IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

IN RE: SONCY A. EDWARDS, **Case No. 4:18-bk-14078J**
(Chapter 13)

Debtor.

ORDER

Before the Court is the *Objection to Confirmation* (the "**Objection**") filed on behalf of Joseph R. Uhiren on October 5, 2018 (Doc. No. 30). Mr. Uhiren objects to confirmation of the Chapter 13 plan proposed by Soncy A. Edwards (the "**Debtor**") on the basis that the Debtor improperly treats Mr. Uhiren's claim in the plan. After several agreed continuances, a hearing was held on the Objection on February 14, 2019. Mr. Uhiren appeared in person and by and through his counsel, the Knollmeyer Law Office, P.A., by Mr. Lonnie Grimes. The Debtor appeared in person and by and through her counsel, the Schmidt Law Firm, PLC, by Mr. Paul A. Schmidt. The plan treats Mr. Uhiren's claim as a note secured by certain real property. Mr. Uhiren argues the real property described in the note and real estate contract is not property of the estate because the documents constitute an executory contract that was terminated prior to the bankruptcy filing. At the conclusion of the hearing the Court took the matter under advisement.

I. JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(L). The following shall constitute the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052, made applicable to this contested matter by Federal Rules of Bankruptcy Procedure 3015(f) and 9014.

II. FINDINGS OF FACT

On September 13, 2012, Randall Uhiren and Tori Uhiren entered into a Real Estate Contract (the "**Contract**") with the Debtor and her husband, Mack Edwards, for the purchase of certain real property located in Lonoke County, Arkansas, as more particularly described in the Contract (the "**Property**"). The Uhirens are denoted in the Contract as the "Sellers" and Mack Edwards and the Debtor are denoted as the "Buyers." (Jt. Ex. 1). Pursuant to the Contract, the Debtor and her husband agreed to pay $225,000.00 for the Property—making a down payment of $5,000.00 and executing a promissory note in favor of the Uhirens for the balance of $220,000.00. The note was to be payable over a twenty-year period at 5.5% interest with monthly payments of $1,513.35. The Contract further provided:

> Delivery of Deed. Upon payment in full of all the amounts (whether principle [sic] or interest under the Promissory Note, Sellers shall cause to have a Warranty Deed delivered to the Buyers, in standard Arkansas form, with Sellers [sic] portion of the documentary stamps affixed thereto, conveying the property to the Buyers or such other person as they may direct, subject to all matters of record (an executed or signed Warranty Deed to be held by Sellers).

(Jt. Ex. 1 ¶ 11a). The Contract was recorded in the real estate records of Lonoke County, Arkansas.

Pursuant to the terms of the Contract, the Debtor and Mack Edwards executed a Promissory Note (the "**Note**") in favor of the Uhirens dated September 13, 2012, in the principal amount of $220,000.00. The Note provided, in relevant part, as follows:

> In the event that any payment of principal and interest due hereunder, or any part thereof, is not paid within thirty (30) days of its due date, a late fee of $75.00 shall be due and payable in addition to the regular monthly payment of principal and interest.
>
> In the event of default in the payment of any installment of principal or interest due hereunder, or any part thereof, for a period of 120 days of its due date, the entire unpaid principal balance, together with all accrued interest, shall, at the option of

> the [Uhirens], become at one [sic] due and payable without notice or demand except such notice or demand, if any, as may be required in the Real Estate Contract.

(Jt. Ex. 2).

The payment history for the Note reflects that the loan became over 120 days late in October 2017, but the payments were caught up by a payment made in December 2017. Mr. Uhiren testified that "there were several times, prior to [December 2017], that [the Debtor] would get four-plus . . . payments late" and he would accept the late payments. (Tr. at 17). The last payment made on the Note was made on March 9, 2018. This payment was applied to the January 2018 payment. On July 18, 2018, Mr. Uhiren's attorney sent a letter to the Debtor's husband stating that the February through July 2018 payments were due on the Note and stating that the Uhirens were accelerating the payments due under the Note. A "Notice to Quit for Nonpayment" was attached to the letter demanding payment of $180,592.44 no later than July 28, 2018. (Jt. Ex. 4).

The Property consists of about twenty acres and an underground house located on the Property. The Debtor and her husband have used the Property as their residence since the Contract and Note were signed. They have made improvements to the Property that include improving the driveway, building two buildings, adding new sewer lines, adding a new roof, and putting in new gutters. In addition, the Debtor and her husband have paid the real estate taxes on the Property and maintained insurance on the Property since entering into the Contract with the Uhirens.

The Debtor filed a voluntary petition for relief under Chapter 13 of the United States Bankruptcy Code on July 27, 2018. The Debtor's plan treats Mr. Uhiren's claim[1] as a secured

[1] Mr. Uhiren filed a proof of claim in the Debtor's bankruptcy case and the Debtor filed an objection to that claim. The objection was also set for hearing on February 14, 2019. When the matter was called the parties announced that they had reached a settlement and would submit an agreed order reflecting the agreement of the parties.

claim to be treated as a long-term continuing debt with the Debtor proposing to maintain the current contractual installment payments and cure the pre-petition arrearage on the claim by making additional monthly payments on the arrearage during the life of the plan. Mr. Uhiren objected to the plan arguing that the Debtor purchased the Property on an executory contract that was terminated prior to the bankruptcy filing and the Property is not property of the estate. The Debtor responded arguing that the Contract is a mortgage device and the Property is property of the estate in which the Debtor has an equitable interest.

III. DISCUSSION

The issue before the Court is whether the Debtor has a legal or equitable interest in the Property so that it may be included in her bankruptcy estate and paid through her plan. Section 541(a) defines property of the estate as "all legal or equitable interests of the debtor in property" as of the date the bankruptcy petition is filed. 11 U.S.C. § 541(a) (2012). If the agreement between the parties should be treated as an executory contract with a valid forfeiture clause that has not been waived, then the Debtor has no interest in the Property to include in this bankruptcy case. *See In re Guido*, 345 B.R. 656, 664 (Bankr. E.D. Ark. 2006). If, however, the agreement should be treated as a security device, then the Debtor has an interest in the Property to include in her bankruptcy case because the Debtor's interest was not foreclosed pre-petition. *Id*. at 660.

Property interests in bankruptcy are determined by state law. *Butner v. United States*, 440 U.S. 48, 54–55 (1979). In the case of *In re Jones*, the court discussed the various methods of financing a sale of real property in Arkansas. *Thorpe v. Jones (In re Jones)*, 54 B.R. 697, 698 (Bankr. E.D. Ark. 1985). In discussing alternatives other than the typical note and mortgage financing, the court stated:

> A second alternative is an escrow contract which involves the seller's execution of a deed which is placed with an escrow agent. The purchaser pays the balance of the

> purchase price to the escrow agent and upon payment in full, the escrow agent delivers the deed to the purchaser. A third alternative is a contract for deed which provides that the seller is not obliged to execute or deliver the deed until the purchase price is paid in full. In the latter two examples the contracts typically provide that if the buyer defaults, any monies already paid will be considered liquidated damages or rent and that default in the payment when due constitutes a breach which excuses performance by the seller and renders the contract void. Escrow contracts generally provide for the return of the deed to the seller by the escrow agent upon default by the purchaser.

Id.

The Contract in the case before this Court states that the Sellers will deliver a warranty deed to the Buyers upon payment in full of the Note and contains a parenthetical providing that "an executed or signed Warranty Deed [is] to be held by Sellers." (Jt. Ex. 1 ¶ 11a). Although the Contract contains the parenthetical suggesting the possibility of an escrow contract, no other provision of the Contract supports such a finding. The Court finds, instead, that the Contract is a contract for deed.

Under Arkansas law, contracts for deed may be treated as equitable mortgages. *In re Jones*, 54 B.R. at 699 ("Under state law, for instance, the effect of a contract for a deed is to create a mortgage in favor of the seller and vest equitable title in the purchaser." (citing *Judd v. Rieff*, 174 Ark. 362, 295 S.W. 370 (1927); *Gunter v. Ludlam*, 155 Ark. 201, 244 S.W. 348 (1922))); *see also In re Guido*, 345 B.R. at 661 ("Under Arkansas law, an installment real estate contract may in certain circumstances be treated as an equitable mortgage (or as a 'bond for title' as such a contract is commonly referred to in the Arkansas cases)." (citing *Robbins v. Fuller*, 148 Ark. 173, 229 S.W. 8, 10 (1921); *Judd v. Rieff*, 174 Ark. 362, 295 S.W. 370, 372 (1927); *In re Jones*, 54 B.R. at 697)). Not all contracts for deed, however, are treated as equitable mortgages. "Where a land sale contract contains a valid forfeiture clause where time is of the essence (either expressly or by implication), the forfeiture clause may be enforced and the contract will not be

considered a mortgage." *In re Guido*, 345 B.R. at 661 (citing *White v. Page*, 216 Ark. 632, 637, 226 S.W.2d 973, 975 (1950)).

The Contract before the Court does not contain a forfeiture clause, nor does it provide (either expressly or impliedly) that time is of the essence.[2] The same is true for the Note. The language relied on by Mr. Uhiren is the provision in the Note providing:

> In the event of default in the payment of any installment of principal or interest due hereunder, or any part thereof, for a period of 120 days of its due date, the entire unpaid principal balance, together with all accrued interest, shall, at the option of the Payee, become at one [sic] due and payable without notice or demand except such notice or demand, if any, as may be required in the Real Estate Contract.

(Jt. Ex. 2). This language is typical of acceleration clauses found in real estate mortgages.[3] It is not a forfeiture clause.

Having found that the agreement between the parties is a contract for deed containing no forfeiture or time is of the essence language, the Court finds that the Contract should be treated as a security device. This Court adopts the reasoning and analysis in *In re Jones* finding that the true substance of the transaction should be given effect over its form. *In re Jones*, 54 B.R. at 699 (holding that "the contract should not be treated as an executory contract but as a security device even though substantial performance remains on both sides" and stating that "[s]uch a construction will give effect to the true substance of the transaction"). This approach, as recognized in *In re Jones*, benefits the estate, furthers the "rehabilitative goal of the Bankruptcy Code," and is consistent with the treatment of similar contracts for deed under state law. *Id*. Because the Contract should be treated as a security device, the Court finds that the Property is

[2] Because there is no forfeiture clause in the Note or Contract, the Court does not need to address whether Mr. Uhiren waived his rights under a forfeiture clause.

[3] Although the evidence reflects that Mr. Uhiren's attorney attached a "Notice to Quit for Nonpayment" to the demand letter, there is no provision in the Contract or Note entitling the Uhirens to immediate possession of the Property for nonpayment. Further, the bankruptcy petition was filed prior to the date for the curing of the default.

property of the Debtor's bankruptcy estate and the claim secured by the Property is properly classified and treated in her Chapter 13 plan.

IV. CONCLUSION

For the reasons stated herein, the Court finds that the Contract is a contract for deed and should be treated as a security device similar to a mortgage. Therefore, Mr. Uhiren's objection to confirmation of the Debtor's plan is overruled as to the plan classification and treatment. The parties represented to the Court that they settled the pending objection to Mr. Uhiren's claim at the time of the hearing on this Objection. The Debtor shall have twenty-one (21) days to modify the plan to provide for Mr. Uhiren's claim consistent with the parties' agreement on the claim objection and the terms of this order.

IT IS SO ORDERED.

Phyllis M. Jones
United States Bankruptcy Judge
Dated: Jul 03, 2019

cc: Mr. Paul Schmidt
Mr. Lonnie Grimes
Mr. Joseph R. Uhiren
Mrs. Soncy A. Edwards
Chapter 13 Trustee