

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI**

IN RE:

DELEANA M. GARY,

CASE NO. 12-02037-NPO

DEBTOR.

CHAPTER 13

**MEMORANDUM OPINION AND ORDER
ON OBJECTION TO SECURED CLAIM AND OTHER RELIEF**

There came on for hearing (the “November Hearing”) on November 16, 2012, the Objection to Secured Claim and Other Relief (the “Objection”) (Dkt. 13) filed by Deleana M. Gary (the “Debtor”), and the Response to Objection to Secured Claim and Other Relief (the “Response”) (Dkt. 16) filed by Complete Financial, LCC (“Complete”) in the above-referenced bankruptcy case.¹ At the November Hearing, Mark K. Tullos represented the Debtor, and Justin J. Peterson represented Complete. During the November Hearing, the Debtor introduced into evidence seven exhibits and was her only witness. Complete introduced into evidence one exhibit and did not call any witnesses. At issue in this contested matter is whether the Debtor may modify the contractual rights of Complete to pay only the fair market value of her mobile home, which the Debtor alleges is \$18,000.00, as a secured claim, and treat her remaining debt to Complete as an unsecured claim in her chapter 13 plan. The Court, having considered the pleadings, evidence, and arguments of counsel, finds that the Debtor may modify the contractual rights of Complete to pay only the fair market value of her mobile home, \$20,173.32, as a

¹ In the Objection, the Debtor proposed treatment of four secured claims for purposes of plan confirmation, including the secured claim of Complete. A notice and a copy of the Objection were sent to the affected secured creditors on July 3, 2012. (Dkt. 14). The notice advised the affected creditors that in the absence of a written response, the Court would sustain the Objection. Complete was the only affected creditor to file a written response to the Objection. (*See* Dkt. 16).

secured claim and treat her remaining debt to Complete as an unsecured claim through her plan for the reasons set forth below.²

Jurisdiction

This Court has jurisdiction over the parties to and the subject matter of this proceeding pursuant to 28 U.S.C. § 1334. This is a core proceeding as defined in 28 U.S.C. § 157(b)(2)(B). Notice of the Objection was proper under the circumstances.

Facts

1. On February 28, 2011, the Debtor purchased a “Lexington MSFLV25A00294 4 bedroom 28 x 60” mobile home (the “Mobile Home”) from Woods Manufactured Homes in Pearl, Mississippi.³ (Cl. No. 5-1; Debtor Ex. 1).⁴

2. In connection with the purchase of the Mobile Home, the Debtor entered into a “Loan Agreement, Promissory Note and Security Agreement” (the “Agreement”) with Manufactured Home Finance Company, L.L.C. (“Manufactured Home Finance”). (Cl. No. 5-1 at Ex. A; Debtor Ex. 1). According to the terms of the Agreement, the Debtor agreed to pay Manufactured Home Finance the principal amount of \$27,096.00,⁵ plus interest at 15.8721%, in monthly installments of \$395.72 for a total of 180 months. (*Id.* at 1). As part of the Agreement,

² Pursuant to Federal Rule of Civil Procedure 52, made applicable to bankruptcy cases by Federal Rule of Bankruptcy Procedure 7052, the following constitutes the findings of fact and conclusions of law of the Court.

³ Test. of Debtor at 11:09:15-11:09:41. The November Hearing was not transcribed. References to testimony are cited by the timestamp of the audio recording.

⁴ Hereinafter, exhibits introduced into evidence at the November Hearing by the Debtor are cited as “(Debtor Ex. ___)”. The exhibit introduced into evidence at the November Hearing by Complete is cited as “(Complete Ex. 1)”.

⁵ The principal amount does not include a \$10,000.00 down payment made by the Debtor at the time she entered into the Agreement. (Debtor Ex. 1 at 2).

the Debtor granted Manufactured Home Finance a purchase money security interest in the Mobile Home. (*Id.* at 3).

3. The Debtor testified at the November Hearing that she purchased the Mobile Home to be her primary residence.⁶

4. By entering into the Agreement, the Debtor also “AGREE[D] NOT TO REMOVE THE [MOBILE HOME] FROM 225 SCR 103 Louin[, Mississippi] . . . without [Manufactured Home Finance’s] prior written approval.” (Debtor Ex. 1 at 2).

5. According to the Debtor, she and her estranged husband, Huey P. Gary, co-own the property located at 225 SCR 103, Louin, Mississippi (the “225 Property”) as tenants by the entirety. (Debtor Ex. 2).⁷

6. At the November Hearing, the Debtor testified that she went to the Smith County Tax Assessor’s Office (the “Tax Assessor’s Office”) on March 4, 2011, to register the Mobile Home in order to get her “water meter and . . . lights cut on.”⁸ While at the Tax Assessor’s Office, a “Certification of Mobile Home as Real Estate” (the “Certification”) was completed on the Debtor’s behalf. (Debtor Ex. 3). The Debtor testified that she personally did not fill out the Certification.⁹

⁶ Test. of Debtor at 11:10:04-11:10:13.

⁷ The Debtor’s spouse did not sign the Agreement. Assuming for the sake of argument that the Mobile Home was located on the 225 Property and became permanently affixed to the land, Complete would not have a valid interest in the land. *See* MISS. CODE ANN. § 89-1-29; *Countrywide Home Loans, Inc. v. Parker*, 975 So. 2d 233 (Miss. 2008).

⁸ Test. of Debtor at 11:15:35-11:16:30; *see* MISS. CODE ANN. § 27-53-5(3) (prohibiting a utility company from providing service to a mobile home without first receiving the number of the registration certificate).

⁹ Test. of Debtor at 11:15:35-11:18:00.

7. The Certification was subsequently filed in the land records of the Office of the Chancery Clerk of Smith County, Mississippi, in Book 0504, Page 358. (Debtor Ex. 3). The Debtor testified, however, that she never intended for the Mobile Home to be taxed as real property.¹⁰

8. The Debtor explained at the November Hearing that she originally intended for the Mobile Home to be located on the 225 Property. Prior to the delivery of the Mobile Home, the Debtor and her husband separated. As a result, the Debtor decided to place the home on 322 SCR 103, Louin, Mississippi (the “322 Property”) instead.¹¹

9. According to the Debtor, once she decided to place the Mobile Home on the 322 Property, she contacted Woods Manufactured Homes and spoke with “Paul,” who gave her permission to have the Mobile Home delivered to the 322 Property.¹²

10. The Debtor testified that the Mobile Home was delivered to the 322 Property in late March, 2011.¹³

11. The Debtor further testified that she has not claimed a homestead exemption on the 322 Property.¹⁴

12. The Debtor explained that she has no ownership interest in the 322 Property. The 322 Property is owned by the Debtor’s brother.¹⁵

¹⁰ Test. of Debtor at 11:50:25-11:50:40.

¹¹ *Id.* at 11:10:14-11:12:35.

¹² *Id.* at 11:44:27-11:45:33.

¹³ *Id.* at 11:49:00-11:49:14.

¹⁴ *Id.* at 11:19:42-11:19:52.

¹⁵ *Id.* at 11:42:57-11:43:08.

13. Sometime after the Debtor purchased the Mobile Home, Manufactured Home Finance changed its name to Complete. (Cl. No. 5-1 at Ex. B).

14. To perfect its interest in the Mobile Home, Complete obtained a “Certificate of Title” (the “Title”). (Cl. No. 5-1 at Ex. C). The Title listed Complete as the first lienholder on the Mobile Home. (*Id.*).

Bankruptcy Case

15. On June 23, 2012, the Debtor filed a voluntary petition for relief under chapter 13 of the United States Bankruptcy Code¹⁶ (the “Bankruptcy Case”). (Dkt. 1).

16. Also on June 23, 2012, the Debtor filed her bankruptcy schedules. (Dkt. 3).

17. In Schedule A - Real Property, the Debtor listed a “1.5 acre[] [piece of property] used as homestead” located at the 225 Property. (Dkt. 3 at 3).

18. In Schedule B - Personal Property, the Debtor listed a “32 X 70 MOBILE HOME” valued at \$18,000.00. (Dkt. 3 at 6). The Debtor included Complete in her list of secured creditors and the “32 X 70 MOBILE HOME” as the collateral securing Complete’s claim in Schedule D. (*Id.* at 9). Schedule D listed the amount of Complete’s claim as \$25,000.00, but the value of the Mobile Home as \$18,000.00. (*Id.*).

19. On June 23, 2012, the Debtor filed her Chapter 13 Plan (the “Plan”) (Dkt. 6). In the Plan, the Debtor listed her debt to Complete as a “NON-MORTGAGE SECURED

¹⁶ Hereinafter, the “Code” refers to the United States Bankruptcy Code found at Title 11 of the United States Code and all code sections refer to the Code unless otherwise noted.

CLAIM[.]” (*Id.* at 2). As such, the Debtor proposed to pay Complete the value of the Mobile Home, \$18,000.00, plus 7% interest¹⁷ through the Plan. (*Id.*).

20. On July 3, 2012, the Debtor filed the Objection. In the Objection, the Debtor reiterated her intention to “pay the value of [the Mobile Home] \$18,000 plus 7% interest through the plan, [a]nd upon payment of same, eliminate any lien.”

21. On July 31, 2012, Complete filed a proof of claim (the “Proof of Claim”) (Cl. No. 5-1) in the Bankruptcy Case. The Proof of Claim listed the debt owed to Complete as \$28,649.05. In the Proof of Claim, Complete had the choice of describing the nature of its collateral as either “Real Estate,” “Motor Vehicle,” or “Other” by checking the appropriate box. Complete checked the box next to “Other” and inserted the description “Manufactured Home.” Complete attached to the Proof of Claim copies of the Agreement and the Title. (*Id.*).

22. On August 2, 2012, the Response was filed. In the Response, Complete argued that because the Mobile Home is the Debtor’s principal residence and is subject to the homestead exemption, the debt is non-modifiable. Alternatively, Complete contended that the Debtor “misstated the value” of the Mobile Home, and the value is “well in excess of” the \$18,000.00 listed in the Debtor’s Schedules and the Plan.

23. On August 27, 2012, a hearing (the “August Hearing”) was held on the Objection and the Response. During the August Hearing, several issues of fact were raised by counsel for both parties as to, for example, whether the wheels were still attached to the Mobile Home, and whether the Debtor claimed the Mobile Home as her homestead. This Court set the matter for an

¹⁷ According to a memorandum issued by this Court on February 13, 2009, for cases filed on or after March 1, 2009, the presumptive interest rate for secured creditors in chapter 13 plans is 7%. *See* Mem. on Presumptive Interest Rate for Secured Creditors’ Claims Paid in Installments, (Bankr. S.D. Miss. Feb. 13, 2009).

evidentiary hearing in order to resolve these fact questions. Additionally, the Court granted Complete the right to inspect the Mobile Home prior to the November Hearing.

November Hearing

24. Nearly three months after the August Hearing, the November Hearing was held. The focus of the November Hearing was the resolution of two factual issues regarding the Mobile Home: its location and its condition.

Location of the Mobile Home

25. The Debtor testified that the Mobile Home sits on the 322 Property owned by her brother.

26. Complete maintained that the Mobile Home sits on the 225 Property owned by the Debtor and her estranged husband. No one from Complete, however, inspected the Mobile Home prior to the November Hearing. Therefore, Complete was unable to present any live testimony at the November Hearing as to the current whereabouts of the Mobile Home. Instead, Complete entered into evidence at the November Hearing a “property record card setting forth the tax appraisal of the real property located at 225 SCR 103” (the “Property Record Card”). (Complete Ex. 1).

Condition of the Mobile Home

27. The Debtor testified extensively at the November Hearing regarding the condition of the Mobile Home. She testified that the Mobile Home sits on concrete blocks, rather than a permanent concrete foundation,¹⁸ that she was unsure if the axles or wheels were still attached to the Mobile Home, and that she was certain that the hitch had not been removed.¹⁹

¹⁸ Test. of Debtor at 11:23:30-11:23:36.

¹⁹ *Id.* at 11:23:30-11:24:16.

28. The Debtor entered into evidence an “NADAguides.com Value Report” (the “NADA Report”) (Debtor Ex. 7) for a 1997 Lexington Homes mobile home located in Mississippi. The NADA Report provided that the “Base Structure Value” of the Mobile Home was \$21,201.29. (*Id.*) This “Base Structure Value” was adjusted downward based upon the home's location and its condition, which the Debtor checked as “fair.” (*Id.*) The “Base Structure Value” of the Mobile Home, however, was adjusted upward based upon additional features which are unique to the Debtor’s particular Mobile Home. (*Id.*) In light of these upward and downward adjustments of value, the NADA Report provided that the “Total Adjusted (Retail) Value of Home and Optional Equipment” was \$20,173.32. (*Id.*) Additionally, Debtor’s counsel adjusted the value of the Mobile Home downward an additional 10% to reach a value of \$18,155.99. (*Id.*)

29. The Debtor provided testimony as to the “fair” condition of her Mobile Home. For instance, the Debtor testified that when it rains, her windows leak.²⁰ The Debtor also mentioned that the Mobile Home “ha[d] a lot of mold in it.”²¹ Based upon the problems she has experienced with the Mobile Home, the Debtor valued the Mobile Home at \$18,000.00.²²

30. Because Complete did not inspect the Mobile Home before the November Hearing, Complete was unable to present any live testimony as to the condition of the Mobile Home. In lieu of such testimony, Complete entered into evidence the Affidavit of Becky L.

²⁰ Test. of Debtor at 11:22:57-11:24:00.

²¹ *Id.* at 11:25:50-11:26:06.

²² *Id.* at 11:27:20-11:28:46.

Martin, the Smith County Tax Assessor, who provided that the “current appraised valued for taxing purposes” of the Mobile Home is \$22,180.00. (Complete Ex. 1).

Discussion

The Federal Rules of Bankruptcy Procedure provide that a properly filed proof of claim serves as *prima facie* evidence of the validity and amount of the creditor’s claim. FED. R. BANKR. P. 3001(f). If no party in interest objects to the proof of claim, the amount of the creditor’s claim as listed in the proof of claim is “deemed allowed.” 11 U.S.C. § 502(a). Once a party in interest objects, the initial burden of proof is on the objector to provide “enough evidence to rebut the *prima facie*” validity of the proof of claim. *Bourdeau Brothers v. Montagne (In re Montagne)*, No. 08-1024, 2010 WL 271347, *15 (Bankr. D. Vt. Jan. 22, 2010) (quotation omitted). If the objector “carries its burden, the creditor [then] has the ultimate burden of proving the amount and validity of [its] claim by a preponderance of the evidence.” *Stancill v. Harford Sands Inc. (In re Harford Sands Inc.)*, 372 F.3d 637, 640 (4th Cir. 2004).

A chapter 13 debtor may modify the contractual rights of a secured creditor in his plan of reorganization so long as the claim is not “secured only by a security interest in real property that is the debtor’s principal residence.” 11 U.S.C. § 1322(b)(2). If the creditor’s claim is not “secured only by a security interest in real property that is the debtor’s principal residence,” the debtor may bifurcate the secured creditor’s claim into a partly secured and partly unsecured claim. *In re Lara*, No. 07-60188, 2008 WL 961892, *2 (Bankr. S.D. Tex. Apr. 8, 2008). The fair market value of the collateral securing the claim is treated as a secured claim, while the remaining debt owed on the claim is treated as an unsecured claim. *Id.* This process of bifurcating claims is commonly referred to as “cram down.” *Id.*

In her Plan, the Debtor proposes to “cram down” the secured portion of Complete’s claim to the fair market value of the Mobile Home, and to treat her remaining debt to Complete as an unsecured claim. In the Response, Complete argued that the Debtor may not “cram down” its claim as it is “secured only by real property that is the Debtor’s principal residence.” (Dkt. 17 at 1).

If the Mobile Home is indeed residential real property, then Complete’s rights may not be modified by the Plan because of the non-modification provision in § 1322(b)(2). For a debt to fit within this exception, “the collateral [securing the debt] must be both real property *and* the debtor’s principal residence.” *Green Tree Servicing, LLC v. Harrison*, No. 07-2132, 2009 WL 82565, *3 (W.D. La. Jan. 12, 2009) (emphasis added). The Code defines a “debtor’s principal residence” as “a residential structure, including incidental property, without regard to whether that structure is attached to real property . . . includ[ing] . . . a mobile or manufactured home.” 11 U.S.C. § 101(13A).²³ The Debtor’s Mobile Home fits within the definition of a “debtor’s principal residence.” The legal issue here is whether the Mobile Home is real property for “cram down” purposes, a determination controlled by state law. *In re Green*, 436 B.R. 91, 96 (Bankr. S.D. Ill. 2010). Section 1322(b)(2) does not protect Complete’s security interest if the Mobile Home is personal property. In Mississippi, at least at the time of sale, a mobile home was

²³ The definition of a “debtor’s principal residence” in § 101(13A) was modified by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. Soon after its inclusion, some creditors argued that because it included in the definition “without regard to whether that structure is attached to real property,” Congress intended to do away with the requirement that the claim also be secured by real property in order to evade “cram down.” *See, e.g. Fells v. Green Tree Servicing, Inc.*, No. 07-2039, 2012 WL 4276075 (W.D. La. Aug. 12, 2008). The majority of bankruptcy courts in the Fifth Circuit Court of Appeals that have addressed the argument, however, have held that the definition of a “debtor’s principal residence” does not alter the requirement that the collateral securing the claim also be real property. *See, e.g. In re Cox*, No. 07-60073, 2007 WL 188186, *2 (Bankr. S.D. Tex. June 29, 2007).

considered personal property. *See Boyd v. S. Energy Homes, Inc.*, No. 11-CV-118, 2012 WL 1446712 (S.D. Miss. April 26, 2012). Complete maintains that sometime after the Debtor purchased the Mobile Home, it was converted to real property.

A. Location of the Mobile Home

Entangled in the legal issue is the parties' factual dispute regarding the current location of the Mobile Home. During the November Hearing, the Debtor testified that the Mobile Home sits on the 322 Property in which she has no ownership interest. For unknown reasons, Complete did not attempt to rebut the Debtor's testimony with the testimony of any witness who had actually inspected the Mobile Home. Instead, Complete relied exclusively on the Property Record Card and the Certification as evidence that the Mobile Home sits at the 225 Property. Although Complete's argument at the November Hearing was unclear, Complete apparently asserted that the Property Record Card and Certification conclusively showed the location of the Mobile Home as the 225 Property without regard to its actual whereabouts. These documents were issued for tax purposes pursuant to MISS. CODE ANN. § 27-53-15. Under that statute, the owner of a mobile home may convert the mobile home from personalty to realty for ad valorem taxation purposes if certain requirements are met. According to Complete, when the Debtor obtained the Certification declaring the Mobile Home as realty on the 225 Property, Complete's security interest in the Mobile Home became an interest in both the Mobile Home and the 225 Property for purposes of § 1322(b)(2).²⁴ Based upon this documentary evidence, counsel for Complete questioned the Debtor in a manner that implied that she was being less than candid as to the

²⁴ This assertion conflicts with Complete's Proof of Claim which did not describe its collateral as real estate.

location of the Mobile Home, asking “[Do you] have anything in writing that would show that the home is actually located at a different address from [the 225 Property?]”²⁵

The Debtor provided a detailed explanation at the November Hearing as to why the address of the Mobile Home is listed on the Property Record Card and the Certification as the 225 Property when its current location is actually the 322 Property. When the Debtor purchased the Mobile Home, she intended for the Mobile Home to be delivered to the 225 Property. Consistent with her initial intent, the Debtor went to the Tax Assessor’s Office on March 4, 2011, only days after purchasing the Mobile Home, to fill out whatever paperwork was necessary to obtain utility services. Someone at the Tax Assessor’s Office filled out the Certification on her behalf that reflected the Debtor’s intent to reside in the Mobile Home on the 225 Property. Apparently, the Debtor was unaware that the purpose of the Certification was to classify the Mobile Home on the 225 Property as realty for tax purposes. Sometime later, the Debtor and her husband separated. The Debtor then decided to have the Mobile Home placed on her brother’s land, the 322 Property. She contacted Woods Manufactured Homes and received its permission to have the Mobile Home delivered to the 322 Property. In late March, 2011, the Mobile Home was delivered to the Debtor and placed on the 322 Property.

Because of the fact issues raised at the August Hearing as to whether the Mobile Home was realty or personalty, the Court reset the Objection and the Response for an evidentiary hearing. At the November Hearing, the ultimate burden rested with Complete to prove that its claim falls within the anti-modification protections under § 1322(b)(2), and, as a result, is not subject to “cram down” in the Plan. Stated another way, it was up to Complete at the November Hearing to persuade the Court that its claim was secured only by real property.

²⁵ Test. of Debtor at 11:46:30-11:46:45.

In light of the Debtor's testimony and other evidence presented at the November Hearing, the Court finds that Complete failed to meet its evidentiary burden. The Debtor's credible testimony established that the Mobile Home is located on the 322 Property. This finding is important because it renders irrelevant Complete's argument that the Mobile Home became attached to the 225 Property by virtue of the Certification process set forth in MISS. CODE ANN. § 27-53-15. Given the location of the Mobile Home on the 322 Property, which is land the Debtor does not own, the Court finds that the Mobile Home remained personal property. Because Complete's claim is secured by personal property and is not secured "only by an interest in real property that is the debtor's principal residence," the anti-modification provision in § 1322(b)(2) does not apply. Accordingly, the Court finds that the Debtor may "cram down" Complete's claim to its fair market value.

B. Condition of the Mobile Home

Turning to valuation of the Mobile Home, the Debtor asserted in the Objection that the value of the Mobile Home is \$18,000.00. At the November Hearing, the Debtor offered into evidence the NADA Report that provided the value of the Mobile Home was \$20,173.32 based upon its year, model, features, and condition, which the Debtor checked as "fair." (Debtor Ex. 7). From this amount, Debtor took an additional 10% off the "Total Adjusted (Retail) Value of Home" to reach a value of \$18,155.99. (*Id.*). In support of her contention that the Mobile Home is in "fair condition," the Debtor testified that the windows leak when it rains and that the Mobile Home "ha[s] a lot of mold" in it. Although Complete objected to the Debtor's testimony regarding the value of her Mobile Home, the law is clear that the owner of a mobile home may give her opinion as to the value of her property. *See, e.g., South Central Livestock Dealers, Inc. v. Security State Bank of Hedley, Tex.*, 614 F.2d 1056, 1061 (5th Cir. 1980). At the November

Hearing, Complete entered into evidence a Property Record Card which listed the appraised value of the Mobile Home as \$22,180.00 for tax purposes. (Complete Ex. 1).

The value of “personal property securing an allowed claim shall be determined based on the replacement value of such property as of the date of the filing of the petition without deduction for costs of sale or marketing.” 11 U.S.C. § 506(a)(2). The Code defines “replacement value” as “the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined.” *Id.* Courts may consider the NADA retail value as an appropriate “starting point” in determining replacement value. *In re Coleman*, 373 B.R. 907, 913 (Bankr. W.D. Mo. 2007). With mobile homes, NADA provides a value report based upon general specifications. *Id.* “Unlike cars, the NADA value as to mobile homes tells what the [mobile home] will actually sell for.” *Id.* (citation omitted).

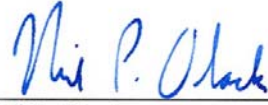
The NADA Report set the value of the Mobile Home as \$20,173.32. The Court finds that it is inappropriate to include an additional percentage reduction to this amount, as urged by the Debtor. *Id.* Based upon the Debtor’s testimony as to the condition of the Mobile Home and the NADA Report, this Court finds that the replacement value of the Mobile Home for purposes of § 506(a)(2) is \$20,173.32.

Conclusion

For the foregoing reasons, the Court finds that the Objection as to the claim of Complete should be, and is hereby, sustained except as to value. The Court concludes that the value of the Mobile Home is \$20,173.32 for purposes of confirmation of the Plan. Also, the Court sustains the Objection as to the Debtor’s proposed treatment of the secured claims of 35 Auto Sales, Oak

Hills Rentals, LLC, and Springleaf Financial, none of whom filed a written response to the Objection.

SO ORDERED.



Neil P. Olack
United States Bankruptcy Judge

Dated: December 20, 2012