U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: 06-02828

ORDER SUSTAINING OBJECTION TO CONFIRMATION OF PLAN

The relief set forth on the following pages, for a total of 6 pages including this page, is hereby ORDERED.

FILED BY THE COURT
10/04/2006

US Bankruptcy Court Judge
District of South Carolina

Entered: 10/06/2006

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

IN RE: Trenton Clyde Finklea and Jennifer Weekley Finklea, Debtor(s).	C/A No. 06-02828-DD Chapter 13 **ORDER SUSTAINING OBJECTION TO CONFIRMATION OF PLAN**

THIS MATTER is before the Court on Floyd E. and Joan L. Jones' Objection to Confirmation of Plan ("Objection"). A hearing was held on the Objection on September 19, 2006. Ms. Jones and Debtors along with their respective attorneys appeared. The Court must determine (1) whether the "SALES CONTRACT" between the parties has been effectively cancelled, (2) and if not, the effect of the contract in Debtors' bankruptcy proceeding.

Findings of Fact

Trenton Clyde Finklea and Jennifer Weekley Finklea ("Debtors") entered into a contract with, Floyd E. Jones and Joan L. Jones ("Mr. and Mrs. Jones" or "Sellers"), and agreed to purchase lot 16, phase 1 of Chauncey Hills Subdivision in Lexington County, South Carolina. This contract is in the form of a "land sales contract." The agreement requires the buyer to make monthly payments over a certain period of time, much like mortgage payments. However, unlike seller financing with a mortgage where legal title is held by the buyer and the mortgage is the security instrument perfecting the lien of the seller, under a land sales contract a deed is not executed and delivered to the buyer until the contract price for the land is paid.

On May 5, 1997 Debtors entered into a land sales contract with Mr. and Mrs. Jones. Debtors contemporaneously signed a "termination agreement" purporting to

terminate the contract upon a future default and entitling Mr. and Mrs. Jones to immediate possession of the property without further action. Debtors made monthly payments from May 5, 1997 until April 2006, nearly nine years, before a further notice of default of the contract provisions was given on May 5, 2006.[1] At this time, the testimony indicates, the land value was $14,000 and a balance of $7,000 remained on the contract.

Debtors filed a chapter 13 bankruptcy petition on July 3, 2006. Debtors' plan of reorganization proposes to pay Mr. and Mrs. Jones' claim over the life of the plan. Mrs. Jones objected and maintains that the contract was cancelled as of May 5, 2006, before the petition date, and therefore neither the Debtors nor the estate have any rights under the contract nor to the property because it did not become property of the estate under 11 U.S.C. § 541. In the alternative Mr. and Mrs. Jones argue that if the contract was not cancelled before the petition date, then the contract is an executory contract subject to the requirements of 11 U.S.C. § 365.

Conclusions of Law

Mr. and Mrs. Jones' first argue that the act of sending the termination letter while the Debtors were in default effectively cancelled the land sales contract on May 5, 2006 entitling them to immediate possession. The Court disagrees. South Carolina law recognizes an equitable right of redemption of defaulted installment land sales contracts when equity requires it. *See Lewis v. Premium Inv. Corp.*, 351 S.C. 167 (S.C. 2002). *See also In re Kingsmore*, 295 B.R. 812 (Bankr. D.S.C. 2002). The Court finds that based on the Debtors' substantial equity that a right of redemption should be afforded to the Debtors.

[1] It is undisputed that Debtors' payment history was less than stellar, but Debtors did make the payments and applicable late fees required by the contract.

Additionally, the termination letter signed contemporaneously with the contract is ineffective in equity as a cancellation of the land sales contract between the Debtors and Mr. and Mrs. Jones. It attempts to give affect to the forfeiture provision of the contract, which under South Carolina law is considered an unenforceable penalty. In *Lewis v. Premium Inv. Corp*, the South Carolina Supreme Court stated,

> Parties to a contract may stipulate as to the amount of liquidated damages owed in the event of nonperformance. Where, however, the sum stipulated is plainly disproportionate to any probable damage resulting from breach of contract, the stipulation is an unenforceable penalty. Equity will not enforce a penalty for breach of contract. "Equity does not favor forfeitures or penalties and will relieve against them when practicable in the interest of justice." *Lane v. New York Life Ins. Co.*, 147 S.C. 333, 374, 145 S.E. 196, 209 (1928) *citing Bangert v. John L. Roper Lumber Co.*, 169 N.C. 628, 86 S.E. 516, 517 (1915).
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> The above-stated principles of contract law are consistent with the conclusion that a provision in an installment land contract declaring forfeiture in the event of purchaser default can, in particular circumstances, constitute a penalty. In those circumstances, as in other contractual instances where a stipulated sum amounts to a penalty, we conclude it would be inequitable to enforce the forfeiture provision without first allowing the purchaser an opportunity to redeem the installment contract by paying the entire purchase price.

Lewis v. Premium Inv. Corp., 351 S.C. 167 (S.C. 2002)(citations omitted).

If given affect the forfeiture provision would effectively nullify $7,000 in equity the Debtors have accumulated over the life of their contract. Under these facts, the enforcement of the forfeiture provision would amount to an inequitable penalty. Based on this the Court finds that the termination letter did not cancel the contract.

In order for Mr. and Mrs. Jones to cancel the contract they would have needed to somehow terminate the Finkleas' right of redemption in order to extinguish that interest. The case law suggests that foreclosure is the proper course of action. *See id*. *See also In re Kingsmore*, 295 B.R. 812 (Bankr. D.S.C. 2002); *Dempsey v. Huskey*, 224 S.C. 536

(S.C. 1954); *Wilder Corp. v. Wilke*, 324 S.C. 570, 577 (S.C. Ct. App. 1996)(citing *Milbrandt v. Huber*, 149 Wis. 2d 275, 440 N.W.2d 807, 811 (Wis. Ct. App.), review denied by 443 N.W.2d 311 (Wis. 1989) (noting that "the relationship between [a] vendor [who retains legal title to secure purchase price] and [a] vendee in a land contract is analogous to that of equitable mortgagor and mortgagee; the mortgagor has an equity of redemption, the mortgagee the correlative right of foreclosure")). Since no foreclosure action was filed, under South Carolina law the right to redeem was still in effect as of the petition date.[2]

Mr. and Mrs. Jones next argue that the contract is an executory contract subject to the requirements of § 365. The Debtors argue that the land sales contract should be treated as an equitable mortgage, and they should be allowed to pay the entire balance remaining due under the contract over the life of the plan.

In *Lewis, supra,* the South Carolina Supreme Court recognized an equitable right of redemption in land sales contracts. However, the Court did not hold that these contracts were equitable mortgages. *See In re Kingsmore*, 295 B.R. 812 (Bankr. D.S.C. 2002) ("[The Court's opinion in *Lewis*] maintains a distinction between equitable mortgages and installment land contracts and does not equate the two legally"). "If a contract for deed is an executory contract under applicable state laws, most bankruptcy courts have treated it as an executory contract rather than a mortgage in Bankruptcy proceedings." *In re Jones*, 118 B.R. 395 (Bankr. D.S.C. 1989). "In this state, the South

[2] The Court notes the language in *Lewis, supra,* that "it would be inequitable to enforce the forfeiture provision *without first allowing the purchaser an opportunity to redeem the installment contract by paying the entire purchase price*"(*emphasis added*). Creditors' Exhibit 3 shows evidence that Mr. and Mrs. Jones did grant Debtors thirty (30) days to pay the entire amount due under the contract in order to keep the property. While the Debtors were given an "opportunity" to redeem and failed to do so, *Lewis* in conjunction with the other above cited cases indicates that the right of redemption can only be extinguished through foreclosure, not by the mere giving of an opportunity to redeem the property.

Carolina Supreme Court has often referred to a land sales contract or [a] contract for sale of land as an executory contract." *Id* (citations omitted). Chief Judge Waites stated in *Kingsmore*,

> [I]f state law treats an installment land contract as executory, then the Bankruptcy Code mandates that the purchaser-debtor must either assume or reject the contract. If the purchaser-debtor decides to assume the contract, he or she must cure any default or provide adequate assurance that any default will be promptly cured, compensate the party to the contract for any actual pecuniary loss resulting from the default under the contract, and provide adequate assurance of future performance. In other words, if the contract is executory, the purchaser-debtor will have to cure its default promptly rather than stretching it over the span of a Chapter 13 plan.

In re Kingsmore, 295 B.R. 812 (Bankr. D.S.C. 2002)(citations omitted).

The Court finds that under applicable South Carolina law the land sales contract in question is an executory contract, should be treated as one under the Bankruptcy Code, and that therefore the Debtors must comply with 11 U.S.C. § 365 as outlined in *Kingsmore.* The plan cannot be confirmed as filed. It is therefore

ORDERED that the land sales contract between Mr. and Mrs. Jones and Debtors was not cancelled pre-petition and is property of the estate subject to 11 U.S.C. § 365; and it is further

ORDERED that the Objection to the confirmation of the plan is sustained. The Debtors shall have ten (10) days from the entry date of this order to make the necessary amendments to the plan consistent with this opinion.

AND IT IS SO ORDERED.
Columbia, South Carolina
October 4, 2006