2000 BNH 028 **Note: This is an unreported opinion. Refer to AO 1050-1 regarding citation.**

UNITED STATES BANKRUPTCY COURT
for the
DISTRICT OF NEW HAMPSHIRE

In re: Bk. No. 99-12466-MWV
Chapter 13

David C. Smith,
Debtor

MEMORANDUM OPINION

The Court has before it two pending motions and the confirmation of the Debtor's Chapter 13 plan. The first motion asks the Court to reconsider its order valuing the Debtor's real estate, which this Court made from the bench on April 19, 2000. The second motion asks the Court to approve secured financing and to subordinate the mortgage interest held by Kimberly MacMillan ("MacMillan"), the Debtor's ex-wife, pursuant to 11 U.S.C. § 364(d).[1]

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

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[1] Section 364(d) provides:

> (1) The court, after notice and a hearing, may authorize the obtaining of credit or the incurring of debt secured by a senior or equal lien on property of the estate that is subject to a lien only if –
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> (A) the trustee is unable to obtain such credit otherwise; and
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> (B) there is adequate protection of the interest of the holder of the lien on the property of the estate on which such senior or equal lien is proposed to be graned.
>
> (2) In any hearing under this subsection, the trustee has the burden of proof on the issue of adequate protection.

11 U.S.C. § 364(d).

Motion to Reconsider

In his "Motion for Approval of Secured Credit and For Subordination of Mortgage Held by Kimberly MacMillan,"[2] the Debtor first claimed that MacMillan's lien was unsecured based upon the current value the real estate and other liens having priority over her lien. Ms. MacMillan disputed the Debtor's assertion of the value of the property. At the April 19, 2000 hearing, MacMillan called Ms. Cheryl Brush, a real estate broker, to testify as to the value of the property. Ms. Brush, whom this Court felt was qualified to appraise the Debtor's property, testified that her opinion was that the value of the property was $260,000. Also at that hearing, counsel for Ledyard Bank, the Debtor's primary secured creditor, represented to the Court that the bank normally loans at an eighty percent loan-to-value ratio which, if true, corroborated the opinion of Ms. Brush. Based on the above, the Court found the value to be $270,000.

Subsequent to the hearing, the bank had the property appraised and the Debtor sought reconsideration of the Court's previous order on valuation. At a hearing held on June 1, 2000, the bank's appraiser testified that it was his opinion that the value of the real estate was $228,500. This opinion of value was corroborated by all three methods of valuation, i.e., replacement cost, comparable sales, and the income approach. Also prior to the June 1, 2000 hearing, the bank filed a statement indicating that the assumption of the loan-to-value ratio in this particular case was an error since the bank was willing to loan further amounts to protect its collateral — up to 100% of value. Based on the Court's review of the two appraisals and the testimony of two appraisers, this Court reconsiders its valuation of $270,000 and finds the value to be $228,500, as appraised by the bank's appraiser.

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[2] The Debtor is self employed and owns and operates a moving and storage business. Therefore, he is vested with the powers of the trustee under § 364, subject to any limitations under that section. 11 U.S.C. § 1304(b).

Motion to Approve Secured Lending and to Subordinate

First, the Debtor argues that the secured claim of MacMillan should be valued at zero making it unnecessary to subordinate it. Second, he argues that the borrowing to make repairs on the real property will increase its value and, thus, whatever secured claim MacMillan might have is adequately protected for purposes of § 364(d) of the Bankruptcy Code.[3]

In order to arrive at a secured claim of zero, the Debtor argues that the value of the property, $228,500, should be reduced by a broker's commission of $22,850 and transfer taxes of $1,713.75, leaving a replacement value for the premises of $203,936.26. Since this amount is less than Ledyard Bank's proof of claim of $207,913.10, the Debtor argues that the claim of MacMillan attaches to no value in the collateral and, thus, her secured claim is zero.

In support of this argument, the Debtor cites Associates Commercial Corp. v. Rash, 520 U.S. 953, 117 S.Ct. 1879 (1997), and specifically footnote six. In Rash the Supreme Court was faced with determining the proper valuation standard to apply in valuing property pursuant to § 506(a) of the Bankruptcy Code where a creditor attempts to use the "cram down" provision of § 1325(a)(5)(B). The Supreme Court, holding that the proper standard is replacement value, stated in footnote six:

> "Our recognition that the replacement-value standard, not the foreclosure-value standard, governs in cram down cases leaves to bankruptcy courts, as triers of fact, identification of the best way of ascertaining replacement value on the basis of the evidence presented. . . . Whether replacement value is the equivalent of retail value, wholesale value, or some other value will depend on the type of debtor and the nature of the property. We note, however, that the replacement value in this context, should not include certain items. . . ."

Rash, 520 U.S. at 965 n.6, 117 S.Ct at 1886 n.6. The footnote went on to list several adjustments that should be made where a bankruptcy court determines retail value is the proper measure of replacement value, including the value of the warranty, inventory storage, reconditioning and added accessories. Id.

To the extent that it is proper to rely on a footnote in any case, the Court believes that the Supreme

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[3] Ms. MacMillan filed a proof of claim for $119,272.87. However, counsel represented that the claim would be reduced to $97,000.

Court was making reference to items that a buyer of a replacement vehicle would obtain from a new seller as part of the purchase price that benefitted the buyer in a manner that would not be possible if he simply retained the vehicle. For example, a warranty would be such a benefit. In the instant case, though there may be costs incidental to any sale of the real estate, such as a broker's fee, these costs cannot benefit the buyer and, thus, do not influence the replacement value. Other Courts, too, have found that Rash does not dictate that sales costs should be deducted when valuing a secured claim. For example, the Bankruptcy Appellate Panel for the Ninth Circuit has held that Rash does not alter the rule in the Ninth Circuit that replacement costs should not take into consideration sales costs. Mulvania v. United States (In re Mulvania), 214 B.R. 1, 9 (B.A.P. 9th Cir. 1997). Also, in Corona v. Internal Revenue Service (In re Corona), 230 B.R. 204 (Bankr.N.D.Ga. 1997), the bankruptcy court found that where debtors intended to retain their residence, they could not deduct hypothetical selling costs in determining the amount of a creditor's secured claim. Id. at 205. Thus, the Court holds that the replacement cost of the Debtor's real estate should not be reduced by hypothetical sales costs and finds that the value of the real estate for purposes of bifurcation of MacMillan's claim is $228,500.

The Court next turns to the issue of subordination of MacMillan's lien. Section 364(d) requires that in order to prime an existing lien, the debtor must show that the holder of the existing lien is adequately protected. In the instant case, there is a secured claim held by MacMillan equal to the difference between the $228,500 valuation and the bank's claim of $207,913, or $20,587. The appraiser called by the Debtor testified that with respect to the improvements, the improvements to the roof would probably result in a fifty percent increase in value relative to the cost of repairs and, with respect to the drainage repairs, more likely 100%. Based on these percentages alone, any loan for both roof repairs and drainage would reduce the security held by MacMillan and, thus, there is no adequate protection. Therefore, the motion is denied.

Confirmation of Chapter 13 Plan

The creditor, MacMillan, has objected to confirmation on the grounds of disposable income and bad faith. Specifically, with respect to disposable income, the creditor objects to the retention by the Debtor of a boat for which monthly payments are due in the amount of $318.64. The Debtor argues that the plan proposed is for five years, and the amount that would go into the plan if the boat was returned would be offset by a reduction in the term of the plan to three years and any deficiency claim from the entity financing the boat. The Court finds these to be valid arguments and denies the objection on those grounds.

The creditor also objects on the grounds that the plan was filed in bad faith. In a recent First Circuit Bankruptcy Appellate Panel decision, the Panel held that there is no such thing as a "bad faith" objection, but the true standard is honesty of purpose in filing the Chapter 13 plan. Keach v. Boyajian (In re Keach), 243 B.R. 851, 868 (B.A.P. 1st Cir. 2000). This Court has required of this Debtor more than most Chapter 13 debtors in proving confirmation of his plan and has, in fact, held three hearings in the period April 19, 2000 to June 1, 2000. In the opinion of the Court, the objecting creditor has not shown that the Debtor lacked honesty of purpose in preparing and filing his Chapter 13 plan. The fact that this Debtor is attempting to modify an order of a divorce court is not by itself a reason for denial of confirmation.

However, since the Court has found that the creditor, MacMillan, has a secured claim, the Chapter 13 plan, as filed, cannot be confirmed. The Debtor shall have thirty days to file an amended plan in conformance with this opinion and order. If an amended plan is so filed, a confirmation hearing will be held on **August 25, 2000, at 11:00 a.m.**, at the United States Bankruptcy Court, 275 Chestnut Street, 7th Floor Courtroom, Manchester, New Hampshire.

This opinion constitutes the Court's findings and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate order consistent with this opinion.

DATED this 6th day of July, 2000, at Manchester, New Hampshire.

Mark W. Vaughn
Chief Judge