2001 BNH 044 **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:

Michael Louis Smith and
Rebecca Ann Smith,
Debtors

Bk. No. 01-10677-MWV
Chapter 13

Beckston Investments Ltd.,
Movant

v.

Michael Louis Smith and
Rebecca Ann Smith,
Respondents

CM No. 01-591
CM No. 01-592

MEMORANDUM OPINION

The Court has before it two motions for relief from the automatic stay brought by Beckston Investments Ltd. ("Beckston"), the Movant herein. The first motion concerns certain business assets owned by Beckston and subject to an equipment lease dated December 2, 1996 to Greenview Landscaping, Inc., an entity in which the Debtors, Mr. and Mrs. Smith (the "Smiths"), had an equity interest along with Mr. John Dunlop ("Dunlop"), who is also the agent of Beckston. The second motion concerns the principal residence of the Smiths.

A hearing was held on both motions on November 1, 2001, at which time the Movant, through its agent, Dunlop, and the Smiths appeared. Both parties testified and presented evidence to the Court. At the outset, the Court reminded counsel that motions for relief are summary proceedings, but nevertheless

proceeded to hear a full day of testimony. See Grella v. Salem Five Cent Sav. Bank, 42 F.3d 26 (1st Cir. 1994).

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).

FACTS

The following facts are not in dispute. In 1994, Beckston bought certain real property in Kensington, New Hampshire, which consisted of two parcels with buildings thereon. At the time of the purchase, the Smiths lived in one of the parcels as caretakers. The Smiths continued to live in the premises through 1996 as tenants. In March 1996, Beckston sold the property in which the Smiths were residing to them and took back a note for $145,000 secured by a mortgage on the premises. In June 1999, the Smiths executed an additional $36,000 note secured by a second mortgage on the premises to Beckston.

The transaction related to the business assets is not so straightforward. In November 1996, the Smiths decided to purchase the landscape business owned by Mrs. Smith's parents. To accomplish this, a corporation was formed, Greenview Landscaping, Inc., in which the Smiths jointly held fifty percent of the stock and Dunlop owned fifty percent of the stock. The purchase price of $150,000 was financed by Beckston. The property was sold to Greenview and then transferred to Beckston who then leased the equipment back to Greenview pursuant to an equipment lease dated December 2, 1996. The total amount due under the lease was $180,000.

In September 1999, the Smiths were not able to stay current on both the mortgage and lease payments, which totaled over $6,200 per month. Although there was some disagreement as to the total

amounts then owing, a new note for $236,200 was executed by the Smiths and secured by a mortgage on their principal residence. The $236,200 figure includes the amounts owing on both the lease obligation and the mortgage obligations. Apparently, no releases of the prior mortgages or documents terminating the lease and transferring the landscaping equipment were executed.

In November 2000, the Smiths were again behind in their payments, which had been reduced to $2,279.38 per month under the $236,200 note, and a default notice and demand was sent to them. Thereafter, the Movant commenced foreclosure proceedings, and the Smiths filed their bankruptcy petition on March 12, 2001, the day before the scheduled foreclosure.

DISCUSSION

Much of the testimony of the Smiths at trial concerned the amounts owing when the $236,200 note was executed. The Court finds this inquiry to be irrelevant. The evidence is that the Smiths freely executed the note and mortgage in September 1999. Whatever the disputes over amount were, if any at that time, they merged into the new obligation freely executed by the Smiths. There is insufficient evidence of coercion by Beckston or its agent, Dunlop. On the contrary, the evidence leads this Court to conclude that Beckston went out of its way, through its agent, to try to reasonably accommodate the Smiths' inability to make their prior payments by extending the term of the obligations and substantially reducing the monthly payment amount.

The Court finds that the effect of the September 1999 transaction was to pay off all obligations under the equipment lease, including the purchase price of $1,500, terminating the lease and ownership by Beckston. There is no evidence that the lease was anything other than a lease, with UCC-1 financing statements being filed to put parties on notice of the lease obligation. Even if the equipment lease could have been considered a security agreement, there is no language in the lease that would have allowed the

business assets to be security for the new $236,200 note. Since the Court finds that the lease terminated upon the execution of the $236,200 note, Movant's motion for relief on the business assets is denied.

As to the amount due on the September 1999 note as of the filing date, the Movant presented evidence that as of March 12, 2001, the balance due including interest and fees was $252,570. There being insufficient evidence to the contrary, the Court finds that $252,570 was due and owing on March 12, 2001.

A considerable amount of the time spent at trial concerned the value of the real property owned by the Smiths, which is encumbered by the mortgage in question. Ms. George, the Movant's appraiser, testified that the value of the property is $280,000, while Mr. Gardner, the Smiths' appraiser, testified that the value of the property is $180,000. Each appraiser testified as to why the other appraiser was in error. The Court finds that in this stage of the Debtors' Chapter 13 case, it does not have to reach the issue of valuation. Under section 1322(b)(2) of the United States Bankruptcy Code, the debtor may not modify the rights of a holder of a secured claim secured only by a security interest in real property that is the debtor's principal residence. 11 U.S.C. § 1322(b)(2). This provision is applicable to the instant case.

The Court has previously found that the Movant has no interest in the equipment, leaving it secured only by the Debtors' interest in the principal residence. Should the Debtors desire to remain in Chapter 13, they must provide the Court with a confirmable plan to deal with the secured obligation of the Movant. Should the Debtors decide to convert to Chapter 7, relief from the automatic stay would be appropriate since the real property is no longer the subject of a reorganization, and under either appraisal, there will be no equity left in the property when exemptions are claimed.

The Smiths have also raised the issue of a possible violation of New Hampshire RSA § 397-A. That statute, if applicable, gives certain rights to the banking department of the State of New Hampshire,

but does not provide any other rights or remedies to private parties. NH RSA § 397-A. The Court finds that this statute has no bearing on the validity of the Movant's note and mortgage.

Based on the above findings, the Court grants the Smiths until January 15, 2002 to amend their Chapter 13 plan to conform to this opinion. Consequently, the confirmation hearing currently scheduled for November 30, 2001 is continued. If the Smiths amend their plan, a hearing on confirmation of the amended plan and the motion for relief will be heard on **February 15, 2002 at 9:00 a.m.** Should the Smiths fail to amend their plan by January 15, 2002, the motion for relief will be granted and the hearing scheduled for February 15, 2002 will be canceled.

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 28th day of November, 2001, at Manchester, New Hampshire.

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Mark W. Vaughn
Chief Judge