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**UNITED STATES BANKRUPTCY COURT
 FOR THE DISTRICT OF SOUTH CAROLINA**

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IN RE:)
)
 Paul E. Magee and)
 Virginia G. Magee,)
)
 _____ Debtors.)

O R D E R

Bankruptcy No. 99-03418-B

This matter comes before the court on the objection of Advanta Mortgage Corporation (creditor) to debtors' plan. Debtors own real property with a mobile home located thereon and creditor holds a mortgage which encumbers the real property.

Debtors seek to modify the terms of their loan by valuing the real property separately from the mobile home at \$19,200.00 and paying such amount through their plan. They claim the mobile home is personal property. They also claim there is no lien on the mobile home because there is no lien on the certificate of title.

Creditor objects, claiming that the mortgage which encumbers the real property also encumbers the mobile home because it is a fixture. Creditor contends that this causes the debt to be non-modifiable pursuant to 11 U.S.C. § 1322(b)(2) since debtors, residing in the mobile home as their principal residence, are living on real property secured only by creditor's mortgage.

FINDINGS OF FACT

1. Debtors purchased this property with the mobile home located thereon and reside in the mobile home as their principal

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residence.

2. Debtors refinanced this property with creditor's assignor for the face amount of \$47,600.00. This amount greatly exceeds the value of the land itself on the date of the loan.

3. The mortgage of debtors to creditor contains the following language:

"This property includes a mobile home which is permanently affixed to the real property and is considered a fixture thereto and a component of the real property by the borrowers."

4. At the time of closing the mortgage, debtors signed a statement of "Borrower Certification" which included the following language:

"I intend to occupy the property as my primary residence . . . "

5. Debtors also signed a letter prepared by the closing attorney to be sent to the Berkeley County tax assessor that states as follows:

"Please accept this letter, together with the attached copy of our Deed to the above referenced TMS# and the attached copy of our title to the above referenced Mobile Home, as our request for the mobile home to be deemed a building attached to the real property."

6. The mobile home and real property are taxed separately by the Berkeley County taxing authority.

7. Debtors also hold a South Carolina Department of Public Safety Certificate of Title to the mobile home but the title does not list any lienholder.

8. The mobile home does not have a permanent foundation, although the wheels have been removed. However, it does have a

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porch attached to it.

9. The mobile home retains a tongue and underpinnings which would allow it to be moved from its current location.

ISSUE

Is creditor's debt "secured only by a security interest in real property that is the debtors' principal residence," and therefore non-modifiable? 11 U.S.C. § 1322(b)(2).

DISCUSSION

The threshold question, the answer to which for all practical purposes resolves the above issue, is whether the mobile home is a fixture. If it is, it is subject to the mortgage which creditor has on the real estate. The question of whether or not a mobile home is sufficiently affixed to real property in order to come within the protection of § 1322(b)(2) is a question of state law. "It has long been the law in South Carolina the fixtures annexed to land which is encumbered with a mortgage inure to the benefit of the real property mortgage." *In re Rebel Mfg. and Mktg Corp.*, 54 B.R. 674, 675 (Bankr. D.S.C. 1985), citing *Planter's Bank v. Lummus Cotton Gin Co.*, 128 S.E. 876 (1925). See also, *In re Evangeline M. Ford*, (JBD 97-05675-D, Oct. 27, 1997).

If the mobile home is personal property, a security interest must be perfected by a lien recorded on the certificate of title as allowed by § 36-9-302(3)(b) of the South Carolina Uniform Commercial Code. S.C. Code Ann. § 36-9-302(3)(b) (Law. Co-op.

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1976). There is no lien on the title.¹

The Court in *Rebel Mfg.* and *Ford* used a four part test as set forth in *In re Avery*, 7 B.R. 28 (Bankr. D.S.C. 1980), for deciding whether a mobile home is sufficiently attached to real property in order to fall within the protection afforded by § 1322(b)(2). The four factors are: (1) the mode of attachment, (2) the character of the structure, (3) the intent of the parties, and (4) the relationship of the parties.

Objectively, factor number one is weak for creditor. A porch, as opposed to a permanent foundation, is not overly significant or meaningful. This structure appears movable with little effort or cost. However, there is some authority that intention is the controlling factor and the other factors as to whether the property is a fixture find importance only as an indication of intention. 35 Am. Jur. 2d *Fixtures* § 14 (1967). The mortgage certainly shows the intention on the part of debtors. The letter to the Berkeley Court Tax Assessor states and reiterates this intention. It goes without saying that it was the intent of creditor that the mobile home be construed as a fixture and encumbered by its real estate mortgage. Accepting and recording its mortgage demonstrate this.

It is not necessary for this court to determine if all four factors are present so as to make it a fixture or for that

¹Even if the lien were perfected on the title this probably would not insulate creditor from having its debt modified as this debt would now not be secured only be a security interest in real property.

matter, to consider any of the factors at all. Under South Carolina law, these factors become necessary "in the absence of a specific agreement or contract." *Carroll v. Britt*, 86 S.E.2d 615 (1955). The parties in essence have "stipulated" in the mortgage that the mobile home is a fixture. This statement is a binding contract or agreement between the parties. "[W]here the landowner [debtors] and the person [creditor] claiming the object have made a special agreement respecting its status, . . . it appears well settled that the parties are competent to agree, as between themselves, either that an object which would normally become a fixture shall remain personalty or that an object [as is the case here] which would normally retain its character as personalty shall become a fixture." 35 Am. Jur. 2d *Fixtures* § 16 (1967) (footnotes omitted). If some question remains whether or not the porch attached to the mobile home is sufficient to otherwise make this mobile home a fixture, the parties have "laid this issue to rest." Debtors assert it is a fixture in the agreement and creditor concurs. This statement or covenant in the mortgage is binding on the parties and their assignees or privies and as between the parties concerned, "[e]stoppel [would] operate to bar a party from either asserting or denying that the particular object is a fixture." *Id.* § 29 (footnotes omitted).

The debtors cannot now in their plan claim the mobile home as personal property in derogation of the mortgage and contend that it is not a fixture or that it is unliened so as to deny creditor the benefit of § 1322(b)(2) of the Code. Creditor's

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objection to confirmation is sustained.

IT IS SO ORDERED.


Wm. Thurmond Bishop
Judge

Columbia, South Carolina

This 2nd day of September, 1999.

CERTIFICATE OF MAILING

The undersigned deputy clerk of the United States
Bankruptcy Court for the District of South Carolina hereby certifies
that a copy of the document on which this stamp appears
was mailed on the date listed below to:

SEP 8 1999

Don Lombino *AGL*

~~DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE~~

LISA BAUGHMAN

Deputy Clerk

Kay
5 to chambers