

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF MISSISSIPPI

IN RE: E.C. BROWN AND MARILYN BROWN

CASE NO. 99-45107

OPINION

On consideration before the court are the following pleadings:

(1) A motion for contempt for violations of the automatic stay filed by the debtors, E. C. Brown and Marilyn Brown.

(2) A motion to abandon collateral and lift the automatic stay filed by Conseco Finance Servicing Corp. (Conseco).

(3) A motion to compel arbitration, filed by Conseco, in response to the debtors' motion for contempt.

Appropriate responses were filed by the respective parties; and, following a hearing in open court, the court hereby finds as follows, to-wit:

I.

The court has jurisdiction of the parties to and the subject matter of these proceedings pursuant to 28 U.S.C. §1334 and 28 U.S.C. §157. These are core proceedings as defined in 28 U.S.C. §157(b)(2)(A), (G), and (O).

II.

On November 15, 1999, the debtors, E.C. Brown and Marilyn Brown, filed their joint Chapter 13 bankruptcy petition. Conseco was listed as a creditor in the bankruptcy schedules and, pursuant to actual notice, filed a proof of claim through its attorney of record. (Debtors' Exhibit 6)

Pursuant to a motion for relief and an objection to confirmation, previously filed by Conseco, an order was entered on April 3, 2000, which provided as follows:

1. Joan C. Brown is indebted to Conseco under a Manufactured Home Retail Installment Contract and Security Agreement (“Contract”) in the original sum of \$26,055.06. As of the date of the filing of this bankruptcy, the payoff was \$26,662.05 plus late charges, interest accruing thereafter and attorney’s fees. As collateral for the indebtedness due, Joan C. Brown pledged to Conseco a 1998 Clayton Homes Manufactured Home, including certain furniture, fixtures, appliances and appurtenances thereto (“Manufactured Home”).

2. This Order shall control the treatment of Conseco under Debtors’ (E.C. Brown and Marilyn Brown) plan as confirmed. Debtors’ plan is hereby modified to treat Conseco as follows:

(a) Conseco will be paid through the plan pursuant to 11 U.S.C. §1322(b)(5) with monthly payments of \$268.95 commencing with the January, 2000 payment due under the Contract; and

(b) The arrearage due to Conseco through December, 1999 of \$1,416.66 (which includes \$693.06 for taxes paid by Conseco and insurance premiums due for January and February, 2000) plus 10.5% interest will be paid through the plan.

3. Debtors shall maintain insurance on the Manufactured Home in an amount not less than \$26,662.05 with Conseco listed and named as loss payee. If such insurance lapses or is canceled for any reason and is not reinstated within 20 days after written notice is sent to Debtors and Debtors’ attorney of such default, Conseco’s collateral will be automatically abandoned and the automatic stay of 11 U.S.C. §362 shall immediately terminate as to any and all of Conseco’s collateral without further order of this Court. After the third notice given pursuant to this paragraph, should insurance lapse or cancel for any reason, no further notice shall be required and Conseco’s collateral will be automatically abandoned and the automatic stay of 11 U.S.C. §362 shall immediately terminate as to any and all of Conseco’s collateral without further notice or order of this Court.

4. Should the Debtors become 60 days delinquent on the plan payments to the Trustee and such delinquency is not cured within 20 days after written notice is sent to Debtors and Debtors’ attorney of such default, Conseco’s collateral will be automatically abandoned and the automatic stay of 11 U.S.C. §362 shall immediately terminate as to any and all of Conseco’s collateral without further order of this Court. After the third notice given pursuant to this paragraph, should the Debtors again become 60 days delinquent on the plan payments to the Trustee, no further notice shall be required and

Conseco's collateral will be automatically abandoned and the automatic stay of 11 U.S.C. §362 shall immediately terminate as to any and all of Conseco's collateral without further notice or order of this Court.

5. Debtors shall pay any and all post-petition taxes and assessments due on the Manufactured Home as and when due. If Debtors fail to pay any such post-petition real property taxes and assessments within 20 days after written notice is sent to Debtors and Debtors' attorney of such default, Conseco's collateral will be automatically abandoned and the automatic stay of 11 U.S.C. §362 shall immediately terminate as to any and all of Conseco's collateral without further order of this Court. After the third notice given pursuant to this paragraph, should the Debtors again become delinquent on any post-petition taxes and assessments due on the Manufactured Home, no further notice shall be required and Conseco's collateral will be automatically abandoned and the automatic stay of 11 U.S.C. §362 shall immediately terminate as to any and all of Conseco's collateral without further notice or order of this Court.

6. This Order shall govern Conseco's treatment under any plan and is hereby incorporated therein. This Order shall become immediately effective and enforceable upon its entry and shall not be stayed as set forth in Bankruptcy Rule 4001(a)(3).

The aforementioned order was approved as to form by the attorney for Conseco, the attorney for the debtors, as well as, the Chapter 13 trustee. At the hearing on Conseco's previously filed motion for relief and objection to confirmation, the court learned that Marilyn Brown's name was inserted as a "purchaser," along with Joan C. Brown, on the purchase agreement prepared by the seller of the mobile home, Mr. B's Mobile Homes, when the sales transaction took place. (Debtors' Exhibit 1, offered at the previous hearing on February 3, 2000.) Consequently, at the conclusion of the hearing, the court commented that not only did the debtors have a possessory interest in the mobile home, but that the debtor, Marilyn Brown, appeared to have a legal interest in the mobile home. (See Debtors' Exhibit 3, the Hearing Transcript, page 21.)

Following the entry of the aforementioned order on April 3, 2000, according to representations of the Chapter 13 trustee, the debtors faithfully submitted all payments to the

Chapter 13 trustee for distribution to Conseco. (Debtors' Exhibit 8) This specifically included the regular monthly payment in the sum of \$268.95, as well as, the monthly arrearage payment in the sum of \$36.27. This conformed with the order confirming the debtors' Chapter 13 plan which was entered on April 12, 2000. (Debtors' Exhibit 5)

The debtors also paid the ad valorem taxes which were applicable to the property (Debtors' Collective Exhibit 10), and maintained insurance on the premises. At some point, Conseco complained that the debtors had no insurable interest in the mobile home because Joan C. Brown was not named as an additional insured on the insurance policy. Conseco apparently obtained insurance coverage to protect its interest at its expense, and filed a second motion to abandon collateral and lift the automatic stay on August 7, 2001, which is now before the court. This motion was based exclusively on the uninsurable interest issue despite the fact that insurance coverage was in effect which reflected Conseco as the first lien holder, and despite the fact that the debtor, Marilyn Brown, had a potential legal interest in the mobile home as a result of the purchase agreement, mentioned hereinabove, executed by Mr. B's Mobile Homes. Regardless, before the second motion for relief and to abandon was filed, on July 30, 2001, the homeowner's policy declaration was modified to reflect Joan Brown as an additional insured. The policy period was to run from July 26, 2001, to July 26, 2002. (See Debtors' Exhibit 9) Because of these factors, the court is of the opinion that the second motion to abandon collateral and lift the automatic stay is without merit. It will be overruled through a separate order to be entered contemporaneously with this opinion.

Without doubt, Conseco failed to properly acknowledge in its records the effect of the previous order of this court, entered April 3, 2000. As such, the account, which still bears the

name of Joan C. Brown, was not flagged to indicate that it was subject to a bankruptcy filing by the debtors. As a consequence, the pre-petition arrearage, which was being paid separately through the debtors' Chapter 13 plan from the regular monthly payments, was reflected as a default in the account. Even though the debtors were completely current in their plan payments, Consec's computer system generated a notice of default and a notice of a "legal lockout" on July 30, 2001. (Debtors' Exhibits 11 and 12) These notices were followed with a second notice of default and a notice to vacate dated November 29, 2001. (Debtors' Exhibits 13 and 14) These last two notices were preceded by an Express Mail memo, dated November 26, 2001, from Consec's Account Representative, Jim Wallin, demanding \$300.00 for a payment extension until December 5, 2001. (Debtors' Exhibit 15) All of these items of correspondence were sent to Joan C. Brown, rather than the debtors, but obviously, the debtors became aware of what Consec was demanding. The trial testimony revealed also that Wallin called at least twice requesting to speak to Marilyn Brown, indicating that he either wanted the payments brought current or repossession of the mobile home. This testimony was offered by the debtor, E.C. Brown, and the brother of Marilyn Brown, Lee Warren Flowers.

Marilyn Brown testified that the demands by Consec, even though primarily directed to Joan C. Brown, caused her anxiety and mental distress. She indicated that she lost a total of twelve hours from her employment at the rate of \$8.40 per hour and was required to be treated by an emergency medical technician for hypertension. Other than this testimony, the evidence failed to quantify any actual damages sustained by the debtors as a result of Consec's collection activities.

III.

Conseco has also filed a motion to compel arbitration in response to the debtors' motion for contempt. Indeed, the manufactured home retail installment contract and security agreement, dated October 30, 1998, contained an arbitration clause in paragraph no. 14. Although, this document was executed by Joan C. Brown, and not the debtors, there are a number of interesting provisions in this clause which are set forth as follows:

(a) The assignee, formerly Greentree Financial Servicing Corporation, but now Conseco, can select one arbitrator with the consent of the buyer, who is identified in the agreement as Joan C. Brown. The court wonders what would happen if the buyer's consent was never obtained.

(b) The assignee is permitted to file suit for monetary sums due under the contract, enforce the security agreement, or foreclose against the collateral. The buyer has no rights to file suit or litigate even if the buyer wanted to assert a counterclaim following a lawsuit initiated by the assignee.

(c) The buyer waives his or her right to a jury trial.

(d) The filing of a lawsuit by the assignee does not waive the arbitration clause insofar as the buyer is concerned.

Fortunately, the court does not have to address the onerous provisions of this arbitration clause. While the debtors, as third party beneficiaries of the contract, could conceivably be bound to arbitrate if the clause were found not to be unconscionable, this court concludes that the implications of §362(a) and §362(h) of the Bankruptcy Code far outweigh any implications of the arbitration clause. See, In re Arentson, 126 B.R. 236 (Bankr N.D. Miss. 1991). As such, the

court is of the opinion that the motion to compel arbitration is without merit. It will be overruled by a separate order to be entered contemporaneously with this opinion.

IV.

The debtors have asserted that Conseco's actions have violated the co-debtor stay found in §1301 of the Bankruptcy Code. However, since Joan C. Brown is the only designated obligor to Conseco, there is no co-debtor, and, therefore, no co-debtor stay. The debtors' argument on this issue is misplaced.

V.

Because of the previous order of this court, entered April 3, 2000, Conseco had actual notice that the debtors were servicing the loan made to Joan C. Brown. The payment of the regular monthly installments, the pre-petition arrearages, ad valorem taxes, and the maintenance of insurance were all addressed in that order. Other than Conseco's uninsurable interest concern, which the court finds to be meritless, the debtors have faithfully honored the provisions of the order. Because of its negligence and inattention, Conseco generated threatening notices, albeit to Joan C. Brown, and phone calls that constitute willful violations of the automatic stay. The remedy for such violations is found in §362(h) which is set forth as follows:

(h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

Marilyn Brown testified that she lost a total of twelve hours from work at the rate of \$8.40 per hour. These absences were directly tied to the notices and telephone calls initiated by Conseco, demanding payment, threatening repossession and eviction. These damages, totaling

\$100.80, are the only quantifiable actual damages that are supported by the proof as to the alleged mental distress suffered by the debtors.

The debtors did introduce billings regarding their legal fees and expenses incurred as a result of Conseco's actions, as follows:

(a)	Cost of the transcript of the hearing conducted on February 3, 2000	\$104.00
(b)	Copies of the transcripts of the depositions of the debtors and Joan Brown	98.00
(c)	Attorney's fees and expenses	<u>2812.26</u>
		\$3014.26

The court has considered the request for damages and sanctions, and is of the opinion that Conseco should be liable to the debtors for the following amounts:

Loss of wages	\$ 100.80
Cost of the transcript of the hearing conducted on February 3, 2000	104.00
Copies of the transcripts of the depositions of the debtors and Joan Brown	98.00
Attorney's fees and expenses	2450.00
Sanction for the willful violations of the automatic stay	<u>3000.00</u>
Total	\$5752.80

A judgment in favor of the debtors against Conseco will be entered in the aforesaid amount.

A separate order shall be entered contemporaneously with this opinion.

This the 23rd day of September, 2002.

_____/s/_____
DAVID W. HOUSTON, III
UNITED STATES BANKRUPTCY JUDGE