

**UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
JACKSONVILLE DIVISION**

In re:

Case No. 3:14-bk-3817-PMG

Jeremiah D. Cady  
a/k/a Jeremy D. Cady,  
and Susanna M. Cady,

Debtors.

Chapter 11

**ORDER ON DEBTORS' MOTION FOR VALUATION OF PROPERTY**

**THIS CASE** came before the Court for hearing to consider the Motion of the Debtors, Jeremiah D. Cady and Susanna M. Cady, for Valuation of Property of the Estate in which Bayview Loan Servicing, LLC, as Servicer for TD Bank, N.A., Holds an Interest. (Doc. 18).

The anti-modification provision of §1123(b)(5) of the Bankruptcy Code prevents a Chapter 11 debtor from modifying a claim secured only by real property that is the debtor's principal residence.

In this case, the Debtors own certain real property in Lake City, Florida, and Bayview Loan Servicing, LLC, as servicer for TD Bank, N.A., is the holder of a mortgage on the property.

Under the circumstances of this case, the Court finds that the property is the Debtors' principal residence, even though Mr. Cady also uses the property as a home office for his work as a real estate agent. The Court reaches this conclusion because (1) the property is single family residential property, (2) the Debtors agreed to occupy the property as their principal residence, and (3) the Debtors actually reside on the property with their children.

Accordingly, the anti-modification provision of §1123(b)(5) prevents the Debtors from modifying Bayview's secured claim in their Chapter 11 case.

### **Background**

The Debtors, Jeremiah D. Cady and Susanna M. Cady, filed a petition under Chapter 11 of the Bankruptcy Code on August 5, 2014. According to their schedules, Mr. Cady is self-employed in real estate sales, and Mrs. Cady is unemployed. The Debtors have four dependent children.

On their schedule of assets, the Debtors listed certain real property located at 411 SW Sweetbriar Drive, Lake City, Florida (the Property), with a scheduled value of \$300,000.00.

On their schedule of liabilities, the Debtors listed Bayview Loan Servicing, LLC (Bayview), as a creditor holding a secured claim on the Property in the amount of \$776,681.42.

On September 1, 2014, the Debtors filed the Motion to Value the Property that is currently under consideration. (Doc. 18). In the Motion, the Debtors ask the Court to value the Property under §506(a) of the Bankruptcy Code as property of the estate in which Bayview holds a mortgage, and assert that the fair market value of the Property is \$300,000.00.

Bayview "objects to the Debtors' Motion on the grounds that it violates 11 U.S.C. §1123(b)(5) prohibition against modifying claims secured by the debtor's principal residence." (Doc. 20, ¶ 5, Doc. 33, ¶4).

The Debtors contend that §1123(b)(5) of the Bankruptcy Code does not prohibit the proposed valuation of the Property, because the Property is used predominantly as an office for Mr. Cady's real estate work, so that he can produce income for the family. According to the Debtors, the residential use of the Property has been subordinated to its current business use because of their changed financial circumstances. (Hearing conducted on November 3, 2014, on the Motion to Value Property).

## Discussion

The threshold issue for purposes of the Motion to Value is whether the Property is the Debtors' principal residence within the meaning of §1123(b)(5), even though the Debtors use a portion of the Property as a home office for Mr. Cady.

Section 1123(b)(5) of the Bankruptcy Code is known as the "anti-modification" provision, and provides as follows:

### 11 U.S.C. §1123. Contents of plan

...

(b) Subject to subsection (a) of this section, a plan may—

...

(5) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence, or holders of unsecured claims, or leave unaffected the rights of holders of any class of claims.

11 U.S.C. §1123(b)(5)(Emphasis supplied). The "anti-modification provision precludes debtors from 'proposing plan provisions which would unilaterally rewrite the terms of a home loan—for example, by reducing the principal balance to the current value of the home, lowering the interest rate, or providing for a new amortization schedule.'" In re Homitz, 2014 WL 3721998, at 2 (Bankr. W.D. Penn.)(quoting In re Haake, 483 B.R. 524, 533 (Bankr. W.D. Wis. 2012), and In re Wofford, 449 B.R. 362, 364 (Bankr. W.D. Wis. 2011)).

Courts have struggled with the application of §1123(b)(5) in cases where Chapter 11 debtors assert that their property has multiple uses. See In re Wages, 479 B.R. 575 (Bankr. D. Idaho 2012), *aff'd*, 508 B.R. 161 (9<sup>th</sup> Cir. BAP 2014).

One issue under §1123(b)(5) centers on the relevant date for the “principal residence” determination, with some Courts finding that the determination should be made as of the date of the loan transaction, and other Courts finding that the determination should be made as of the date of the bankruptcy petition. See In re Wages, 508 B.R. at 164; In re Schayes, 483 B.R. 209, 213-15 (Bankr. D. Ariz. 2012).

A second issue under §1123(b)(5) centers on whether the anti-modification provision is inapplicable if a debtor uses his property for both residential and business purposes. In at least two recent decisions, Courts have adopted a “bright line” approach, and found that “the anti-modification exception applies to any loan secured only by real property that the debtor uses as a principal residence property, even if that real property also serves additional purposes.” In re Harriman, 2014 WL 1312103, at 3 (Bankr. N.D. Cal.)(quoting In re Wages, 508 B.R. at 168).

Other decisions have applied a more fact-intensive approach to determine whether a debtor’s commercial use of his property has become so significant that the property is no longer his principal residence. See In re Wages, 479 B.R. at 580-83, for a discussion of the cases that evaluated the “intensity” of the debtor’s commercial activity to determine whether the property was the debtor’s principal residence.

Under any approach, the Court finds that the Property in this case is the Debtors’ principal residence, even though Mr. Cady also uses the Property as a home office for his work as a real estate agent. The Court reaches this conclusion because (1) the Property is single family residential property, (2) the Debtors agreed to occupy the Property as their principal residence, and (3) the Debtors actually reside on the Property with their children. Accordingly, the anti-modification provision of §1123(b)(5) prevents the Debtors from modifying Bayview’s secured claim in their Chapter 11 case.

**A. The Property is single family residential property.**

Section 1123(b)(5) prevents a Chapter 11 debtor from modifying a claim secured only by real property that is the debtor's principal residence. 11 U.S.C. §1123(b)(5). The term "debtor's principal residence" is defined in the Bankruptcy Code as "a residential structure if used as the principal residence of the debtor, including incidental property, without regard to whether that structure is attached to real property." 11 U.S.C. §101(13A). The focus of the definition is on a structure that is used as the debtor's principal residence. In re Laycock, 497 B.R. 396, 399 (Bankr. S.D.N.Y. 2013).

In this case, the Debtor's Property is single family residential property. See In re Abrego, 506 B.R. 509, 515 (Bankr. N.D. Ill. 2014).

The Debtors filed a prior bankruptcy case on May 15, 2013, approximately fifteen months before the present case was filed. On the schedule of real property in their prior bankruptcy case, the Debtors described the Property as a "single family home and 2.010 acres." (Case No. 3:13-bk-3016-PMG, Doc. 1).

Additionally, in the Columbia County Property Appraiser's reports for the 2012 and 2013 tax years, the Property is described as "single family residential" property. (Case No. 3:13-bk-3016-PMG, Doc. 1; Case No. 3:14-bk-3817-PMG, Doc. 20, Exhibit A).

The Property is subject to the anti-modification provision of §1123(b)(5), in part because it is single-family residential property.

**B. The Debtors agreed to occupy the Property as their principal residence.**

Second, the Debtors agreed to occupy the single-family Property as their principal residence.

The Debtors acquired the Property on October 1, 2007. (Case No. 3:13-bk-3016-PMG, Doc. 1). At their §341 meeting of creditors in this case, the Debtors testified that they acquired the Property to build a home. (Doc. 32, pp. 13-14).

On November 30, 2007, the Debtors signed a Fixed/Adjustable Rate Note pursuant to which they borrowed the sum of \$795,000.00 from Carolina First Bank. (Doc. 25, Exhibit A). The Note was secured by a Mortgage on the Property. Paragraph 6 of the Mortgage provides:

**6. Occupancy.** Borrower shall occupy, establish, and use the Property as Borrower's principal residence within 60 days after the execution of this Security Instrument and shall continue to occupy the Property as Borrower's principal residence for at least one year after the date of occupancy, unless Lender otherwise agrees in writing, which consent shall not be unreasonably withheld, or unless extenuating circumstances exist which are beyond Borrower's control.

(Doc. 20, Exhibit B)(Emphasis supplied). The Debtors signed the Mortgage on November 30, 2007.

The one-year term of the occupancy clause had expired by the date that the Debtors filed their Chapter 11 petition on August 5, 2014. Nevertheless, a debtor's written agreement to occupy property as his principal residence is generally a key factor in determining whether the property is his principal residence for purposes of §1123(b)(5). See In re Laycock, 497 B.R. at 402 (By signing a mortgage with an occupancy clause, the debtor "bargained for a residential mortgage" on his property.). See also In re Kendle, 2012 WL 5723088, at 1-2 (Bankr. S.D. Fla.)(The Debtor represented to the lender that he was obtaining a mortgage on property that he intended to use as his principal residence.).

The presence of an occupancy clause is significant for a determination under §1123(b)(5), because it is evidence that the transaction is a residential mortgage. Section 1123(b)(5)'s "stated public policy" is "to promote the continued availability of capital for home loans by reassuring lenders that such loans could not be modified." In re Harriman, 2014 WL 1312103, at 2. A transaction that involves a home

loan or residential mortgage, therefore, falls within the protection that the statute is intended to provide.

In this case, the anti-modification provision of §1123(b)(5) prevents the Debtors from modifying Bayview's secured claim in their Chapter 11 case, in part because the Debtors agreed in the mortgage documents to occupy the Property as their principal residence.

**C. The Debtors actually reside on the Property with their children.**

Finally, in determining whether a property is the debtor's principal residence for purposes of §1123(b)(5), a number of Courts consider the debtor's actual history of residing on the property. See In re Kendle, 2012 WL 5723088, at 1-2(The debtor in fact used the property as his primary residence long after the bankruptcy case was filed); In re Schayes, 483 B.R. at 213(A debtor's principal residence depends on where he actually lives, sleeps, and keeps his personal belongings.).

In this case, the Debtors acknowledge that they have resided on the Property continuously since October of 2007, with the exception of approximately ten months in 2013 or 2014. (Case No. 3:13-bk-3016-PMG, Doc. 1; Case No. 3:14-bk-3817-PMG, Doc. 23; Doc. 32, Transcript of §341 meeting, pp. 7-8, 10). They resided on the Property for more than five years after acquiring it in 2007, and they resided on the Property on the date that they filed the bankruptcy petition commencing this case.

The Debtors contend, however, that the Property is not their "principal residence," because Mr. Cady uses the property as a home office for his work as a real estate agent. Based on the record, the Court finds that the Property is the Debtors' principal residence, even though it also serves as a home office for Mr. Cady.

Mr. Cady is a real estate agent for Coldwell Banker, which he refers to as his employer. He is not a broker. (Doc. 32, pp. 15-16). At the §341 meeting of creditors, Mr. Cady described the business that he performs from his home office as follows:

Real estate paperwork, real estate meetings, developer meetings, business meetings,  
Monday morning meetings.

(Doc. 32, p. 15). He works as an independent contractor, and does not conduct his real estate operations through any corporate form. (Doc. 32, p. 32).

Mr. Cady did not indicate that the Property has been renovated or developed in any way to accommodate his business, or that his business has impaired or terminated his family's residential use of the Property. The Debtors have lived on the Property almost continuously since 2007, and have four dependent children who reside with them in the home. (Doc. 2, Schedule J). Mrs. Cady has not been employed outside the home for approximately fourteen years. (Doc. 2, Schedule I; Doc. 32, p. 15).

Additionally, the Columbia County Property Appraiser's reports for the 2012 and 2013 tax years reflect that the Debtors received homestead tax exemptions in the amount of \$50,000.00 for each of those years. (Case No. 3:13-bk-3016-PMG, Doc. 1; Case No. 3:14-bk-3817-PMG, Doc. 20, Exhibit A).

The Property is residential property, not business or commercial property, and the Debtors actually reside on the Property with their children. The Property is the Debtors' principal residence, even though Mr. Cady also uses the Property as a home office. See In re Wages, 508 B.R. 161 (9<sup>th</sup> Cir. BAP 2014)(The property at issue was the debtors' principal residence, even though they used "a portion of the property to operate their business, including a small office in the house and enough



adjoining space to park two truck tractors and up to three trailers.”). Accordingly, the anti-modification provision of §1123(b)(5) prevents the Debtors from modifying Bayview’s secured claim in their Chapter 11 case.

### **Conclusion**

The anti-modification provision of §1123(b)(5) prevents a Chapter 11 debtor from modifying a claim secured only by real property that is the debtor’s principal residence.

In this case, the Debtors own certain real property in Lake City, Florida, and Bayview is the holder of a mortgage on the Property. Under the circumstances of this case, the Court finds that the Property is the Debtors’ principal residence, even though Mr. Cady also uses the Property as a home office for his work as a real estate agent. The Court reaches this conclusion because (1) the Property is single family residential property, (2) the Debtors agreed to occupy the Property as their principal residence, and (3) the Debtors actually reside on the Property with their children. Consequently, the anti-modification provision of §1123(b)(5) prevents the Debtors from modifying Bayview’s secured claim in their Chapter 11 case.

Accordingly:

**IT IS ORDERED** that the Motion for Valuation of Property of the Estate in which Bayview Loan Servicing, LLC, as Servicer for TD Bank, N.A., Holds an Interest, filed by the Debtors, Jeremiah D. Cady and Susanna M. Cady, is denied.

**DATED** this 27<sup>th</sup> day of January, 2015.

**BY THE COURT**

Paul M. Glenn  
PAUL M. GLENN  
United States Bankruptcy Judge