

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In Re:

Case No: 3:06-BK-01569-GLP

JACK A. BLINCO, JR., a/k/a Jack Arden Blinco,
and DEBORAH P. BLINCO, a/k/a Deborah Philips
Blinco,

Debtors.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

This case is before the Court upon hearing on confirmation of Debtors' Amended Chapter 13 Plan (the "Plan"), and the objections filed by Green Tree Servicing, LLC, as agent for Green Tree MH, LLC, as successor by assignment to Conseco Finance Servicing Corp. ("Green Tree"). After a hearing on August 2, 2006, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. On June 2, 2006 (the "Petition Date") Jack and Deborah Blinco ("Debtors") filed for Chapter 13 relief under the Bankruptcy Abuse Prevention and Consumer Protection Act.

2. At the time of filing, Mr. Blinco was employed as a cement truck driver with a consistent, annual gross income of \$41,000.00 per year. Based upon Schedule J of the Debtors' Schedule of Assets and Liabilities and after payment of taxes, social security, and monthly living expenses, the Debtors have disposable income of \$128.00.

3. On November 17, 1999, Debtors executed a mortgage (the "Mortgage") in favor of Green Tree with a promissory note in the original, principle amount of \$49,982.90 (the "Note"). The Mortgage granted Green Tree a lien upon Debtors' real property (the Property) together with the mobile home located upon the property. The Property is the sole collateral for the Note, and constitutes Debtors' principal residence. Paragraph nineteen (19) of the Mortgage specifically provides that no escrow account for taxes or insurance shall be required with respect to the indebtedness owed by the Debtors to Green Tree.

4. Debtors subsequently defaulted under the terms of the applicable Note and Mortgage. As a result, Green Tree instituted litigation seeking to foreclose its lien upon the Property in the Circuit Court of the Eighth Judicial Circuit in and for Baker County, Florida ("Blinco I").

5. In July 2003, the court in Blinco I entered an Amended Final Judgment reforming the monthly payment amount under the Note to \$561.80 per month, with the monthly payments to commence on or before July 25, 2003 (the "Amended Final Judgment"). On November 13, 2003, the Court entered an Order Abating Mortgage Payments (the "Abatement Order"). The order provided that the first four (4) mortgage payments due under the Amended Final Judgment would be abated, and that the first monthly payment in the amount of \$561.80 was to be paid on or before November 25, 2003.

6. Subsequent to the entry of the Amended Final Judgment and the Abatement Order, the Debtors failed to make a full monthly payment under the terms of the reformed Note from November 2003 through the Petition Date. Debtors merely made five (5) partial payments directly to Green Tree, and three (3) partial payments into the registry of the Clerk of Court of the Baker County Circuit Court.

7. Subsequent to the entry of the Amended Final Judgment and the Abatement Order, the Debtors filed two lawsuits against Green Tree in the Circuit Court of Baker County, both of which alleged violations of RESPA (12 U.S.C. §2601, *et. seq.*). Both cases were subsequently removed to federal court by Green Tree (collectively "Blinco II"). After the trial court denied Green Tree's motion to compel arbitration in accordance with the arbitration provision in the Note, the Eleventh Circuit reversed and ordered arbitration. Blinco v. Green Tree, 400 F.3d 1308 (11th Cir. 2005). The Debtors never instituted arbitration.

8. Based upon Debtors' failure to make the monthly payments required under the

Note and Mortgage, Green Tree instituted a second foreclosure action in the Circuit Court of Baker County, Florida ("Blinco III"). Debtors filed an answer to the Complaint notwithstanding the earlier decision of the Eleventh Circuit in Blinco II, that any claims which could or may be asserted by the Debtors must be addressed in arbitration. The Debtors also filed a counterclaim and third-party complaint against Green Tree asserting essentially

the same claims that were previously made in Blinco II.

9. The court in Blinco III entered an Order Granting Green Tree's Motion To Stay Blinco's Counterclaim and Third-Party Claims and Compel Arbitration and Denying the Debtors' Motion to Stay Foreclosure Action (the "Arbitration Order"). The effect of the Arbitration Order was to refer to arbitration any counterclaims that may be asserted by the Debtors against Green Tree, and leave for resolution in Blinco III Green Tree's action to foreclose the Mortgage.

10. Green Tree subsequently filed a Motion for Final Summary Judgment of Foreclosure, which was scheduled for hearing on June 6, 2006. That hearing, however, did not occur, as the Debtors filed this Chapter 13 case on June 3, 2006.

11. On July 26, 2006, Green Tree filed an Amended Proof of Claim asserting a secured claim in the amount of \$197,146.26 (the "Claim"), including an arrearage as of the Petition Date of \$147,004.48 (the "Arrearage").

12. Pursuant to the Plan, the Debtors propose to pay to the Chapter 13 Trustee the amount of \$1,192.52 in months 1-48 and \$14,017.75 in months 49-60. The Chapter 13 Trustee is to make the regular monthly payment on the Note and Mortgage (as reformed in Blinco I) in the amount of \$561.80, and the Arrearage is to be paid in the fifth year from the increased monthly payment amount.

13. Debtors were current in their plan payments at the time of the confirmation hearing. As of the filing date of their petition, Debtors had approximately \$6,100.00 in a bank account and Mr. Blinco testified that the initial Plan payments had been made from this bank account.

14. Other than Debtors' monthly earnings, and the limited funds in the bank account, no evidence was proffered to indicate any additional source of payment for the required Plan payments in months 1-48. Mr. Blinco testified that the source of funding for the large increase in plan payments for months 49-60 would be the recovery in the arbitration proceeding against Green Tree. Mr. Blinco acknowledged that absent such a recovery, there was no source to fund the increase of plan payments.

15. Contrary to the arbitration provision of the Note, requiring arbitration of any and all alleged

claims by the Debtors against Green Tree, Debtors' Plan attempts to establish a set off of any recovery by the Debtors in the arbitration against the indebtedness owing Green Tree.

CONCLUSIONS OF LAW

Section 1325 of the Bankruptcy Code sets forth the requirements for confirmation of a Chapter 13 Plan.

11 U.S.C. §§ 1325(a)(6)

11 U.S.C. § 1325(a)(6) states:

(a) Except as provided in subsection (b), the court shall confirm a plan if the plan if

(6) the debtor[s] will be able to make all payments under the plan and to comply with the plan.

11 U.S.C. § 1325(a)(6).

Green Tree argues that the Debtors will not be able to fulfill their obligations under the Plan. In support of this argument, Green Tree points out that Debtors' Schedule J lists only \$128.00 in disposable monthly income. However, the proposed plan payments in the first forty-eight (48) months are approximately \$1,192.00 per month, or in excess of \$1,000.00 more than Debtors' schedules indicate is available. Green Tree asserts that because Debtors' yearly income has consistently remained at approximately \$41,000.00 for at least the three (3) years immediately preceding the filing of the petition, that there is no reasonable basis to conclude any significant increase in available income will occur. In support of this argument, Green Tree points to Mr. Blinco's testimony in which he acknowledged that the ability to pay the increased payments in months 49-60 is premised upon being able to obtain a sufficient recovery in the litigation against Green Tree. The Court agrees with the arguments set forth by Green Tree. Based upon Debtors current monthly income, as well as the large uncertainty that Debtors will prevail in the litigation against Green Tree, the Court finds that Debtors have failed to demonstrate that they can feasibly pay the large increase in monthly payments for months 49-60. Based upon the above, the Court finds that the Plan is not feasible, and therefore, Debtors have failed to satisfy the requirements of Section 1325(a)(6) of the Bankruptcy Code.

11 U.S.C. §§ 1322(b)(2) and (b)(5)

§§ 1322(b)(2) and (b)(5) of the Bankruptcy Code provide:

(b)(2) Subject to subsections (a) and (c) of this section, the plan may modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtors' principal residence...

(b)(5) Subject to subsections (a) and (c) of this section, the plan may, notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due;

11 U.S.C. § 1322(b)(2) and (b)(5).

§ 1322(b)(2) of the Bankruptcy Code permits a debtor to modify the rights of a holder of a secured claim, other than a claim secured only by a security interest in real property that is Debtors' principal residence. The collateral for the Note constitutes the Debtors' principal residence within the meaning of Section 1322(b)(2). In re Speights, 131 B.R. 205 (Bankr. N.D. Fla. 1991). Green Tree asserts that contrary to the arbitration provision of the Note, requiring arbitration of any and all alleged claims by the Debtors against Green Tree, that Debtors' Plan attempts to establish a set off of any recovery by the Debtors in the arbitration against the indebtedness owing Green Tree. Green Tree argues that by attempting to structure such a setoff, contrary to the language of the applicable debt instruments and the earlier findings of two separate courts, the Debtors seek to modify the lien rights of Green Tree in contravention of Section 1322(b)(2). The Court agrees with the arguments set forth by Green Tree and finds Debtors' Plan is in violation of § 1322(b)(2).

11 U.S.C. § 1322(b)(5)

Finally, Green Tree argues that Debtors have failed to demonstrate compliance with 11 U.S.C. § 1322(b)(5) regarding their proposed payment of the Arrearage. A Chapter 13 plan may provide "for the curing of any default within a reasonable time". 11 U.S.C. § 1322(b)(5). Green Tree argues that because Debtors' Plan does not propose to pay the Arrearage until year five (5), beginning in month 49 (forty-nine) and terminating in

month 60 (sixty), with no payments made to cure Debtors' Arrearage in months 1-48, that Debtors have not provided for payment of the Arrearage in a reasonable time. The Court agrees with Green Tree and finds that Debtors' proposed Plan fails to comply with § 1322 (b)(5)'s requirement that a default be cured within a reasonable time.

CONCLUSION

Based upon the above, the Court will deny confirmation of the Plan. The Court will enter a separate order dismissing the case and direct the Chapter 13 Trustee to refund to the Debtors the amount held by the Chapter 13 Trustee of \$1,460.24.

ORDERED in Jacksonville, Florida this 28 day of August, 2006.

/s/ George L. Proctor
GEORGE L. PROCTOR
UNITED STATES BANKRUPTCY JUDGE

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