

**UNITED STATES BANKRUPTCY COURT**

**DISTRICT OF SOUTH DAKOTA**

ROOM 211

FEDERAL BUILDING AND U.S. POST OFFICE

225 SOUTH PIERRE STREET

**PIERRE, SOUTH DAKOTA 57501-2463**

**IRVIN N. HOYT**  
BANKRUPTCY JUDGE

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April 4, 2005

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Subject: *In re Gregory A. and Melinda Robinson,*  
Chapter 13; Bankr. No. 04-40674

Dear Counsel:

The matter before the Court is Fairbanks Capital Corporation's objection to Debtors' Amended Plan Dated February 8, 2005. The issue raised by the objection, and presented on briefs, is whether Debtors may modify the terms of the mortgage held by Fairbanks Capital Corporation under 11 U.S.C. § 1322(b)(2). This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and accompanying order shall constitute the Court's findings and conclusions under Fed.Rs.Bankr.P. 7052 and 9014(c). As set forth below, the Court concludes that the mortgage terms may be modified. Accordingly, Fairbanks Capital Corporation's objection will be overruled.

*Summary.* Gregory and Melinda Robinson executed a 180-day mortgage<sup>1</sup> with EquiCredit Corporation of America. The mortgage is now held or serviced by Fairbanks Capital Corporation ("Fairbanks"). The mortgage gave the mortgagee a security interest in the Robinsons' home in Vermillion, South Dakota. The mortgage (bottom of page 1) also provided that the collateral included:

all the improvements now or hereafter erected on the property, and all easements, rights, appurtenances and rents, all of which shall be deemed to be and remain a

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<sup>1</sup> A copy of the mortgage was filed as an exhibit to Fairbank's November 30, 2004, brief in the related Adversary Proceeding No. 04-4045 between Debtors and Fairbanks.

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part of the property covered by this Mortgage[.]

A separate clause in the mortgage (page 4) also referenced rents. This clause provided:

**Assignment of Rents; Appointment of Receiver.** As additional security hereunder, Borrower hereby assigns to Lender the rents of the Property, provided that Borrower shall, prior to acceleration under paragraph 17 hereof or abandonment of the Property, have the right to collect and retain such rents as they become due and payable. This assignment of rents shall be effective until the payment of all sums secured by this Mortgage or, in the event of foreclosure, until the period of redemption expires. Regardless of the extinguishment of the debt by a foreclosure sale, this assignment shall continue for the benefit of the Purchaser at such sale.

[Emphasis in original.] The note attendant to the mortgage carried an interest rate of 13.650%.

The Robinsons ("Debtors") filed a Chapter 13 bankruptcy case. In their Amended Plan Dated February 8, 2005, they proposed to repay Fairbanks' note at only 5.5% interest. Fairbanks has objected to the plan on the grounds that Debtors may not modify a term of the mortgage and must use the contract rate of interest.

*Applicable law.* A Chapter 13 debtor's 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 debtor's principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims[.]*

11 U.S.C. § 1322(b)(2) (emphasis added). The statute reflects Congress'

policy of singling out home lenders for extra protection in bankruptcy proceedings and thus encouraging the accessibility of home mortgages at affordable terms. *First Nat'l Fidelity Corp. v. Perry*, 945 F.2d 61, 63-64 (3d Cir.1991) (quoting Bankruptcy Reform Act of 1978:

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Hearings on S.2266 and H.R.8200 Before the Subcomm. On Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess. 707, 715 (1977) (statement of Robert E. O'Malley)... and [Congress' intent] to limit the ability of Debtors to modify "home mortgages" in order to "encourage the increased production of homes and to encourage individual ownership of homes as a traditional and important value in American life." *Federal Land Bank v. Glenn (In re Glenn)*, 760 F.2d 1428, 1434 (6th Cir.1985), cert. denied sub nom. *Miller v. First Federal of Mich.*, 474 U.S. 849, 106 S.Ct. 144, 88 L.Ed.2d 119 (1985).

*In re Bookout*, 231 B.R. 306, 309 (Bankr. E.D. Ark. 1999).

The issue presented is whether the assignment of rents provisions in the mortgage give Fairbanks a security interest in something other than Debtors' principal residence so as to allow Debtors to modify, through their Chapter 13 plan, the interest rate set forth in the note. Numerous courts have addressed the issue, including two Circuit Courts. In *Allied Credit Corp. v. Davis (In re Davis)*, 989 F.2d 208, 212 (6th Cir. 1993), the court concluded that the inclusion of "rents, royalties, profits, and fixtures" in boilerplate within the mortgage did not remove the mortgage from the protection of § 1322(b)(2). It reasoned that these items were "merely incidental to an interest in real property" and did "not constitute additional security). In *Wilson v. Commonwealth Mortgage Corp.*, 895 F.2d 123, 128-29 (3rd Cir. 1990), the court concluded the inclusion of some personalty as additional collateral under the residential mortgage made § 1322(b)(2) inapplicable. Lower courts have reached similar conclusions.<sup>2</sup>

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<sup>2</sup> See, e.g., *Lee v. Home Savings of America (In re Lee)*, 215 B.R. 22, 25-26 (B.A.P. 9th Cir. 1997) (washer, dryer, oven, range, and dishwasher that the parties by agreement deemed a component of the real property did not constitute additional collateral so as to remove residential mortgage from the protections of § 1322(b)(2)); *Lievsay v. Western Financial Savings Bank (In re Lievsay)*, 199 B.R. 705, 707-09 (B.A.P. 9th Cir. 1996) (strictly construing similar provision at § 1123(b)(5), court held boilerplate that included easements, rents, water and mineral rights, etc., as part of the collateral did not extend the

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mortgagee's security interest beyond items that are inextricably bound to the real property itself; thus, mortgage on residence and home office could not be modified); *Brown v. Master Financial, Inc.* (*In re Brown*), 311 B.R. 282, 284-85 (Bankr. M.D. Fla. 2004) (mortgagee who takes security interest in an escrow account for taxes and insurance in addition to the debtor's residence forfeits the protection of § 1322(b)(2)); *In re McConnel*, 296 B.R. 197, 199-200 (Bankr. D. Minn. 2003) (creditor given protection of § 1322(b)(2) where residential mortgage also included a small portion of farm land that produced an insignificant portion of the debtors' income but where principal purpose of the property was their residence); *Lewandowski v. H.U.D.* (*In re Lewandowski*), 219 B.R. 99, 101-02 (Bankr. W.D. Pa. 1998) (under Pennsylvania law, an inclusion of rents as security for mortgage did not constitute security in property other than the debtor's principal residence for purposes of applying § 1322(b)(2) but inclusion of security interest in escrow account for taxes and insurance did remove mortgage from § 1322(b)(2) protection because these funds were a separate item of personalty); *In re Cervelli*, 213 B.R. 900, 903-04 (Bankr. D.N.J. 1997) (boilerplate in mortgage granting mortgagee an assignment of rents did not remove mortgage from protections of § 1322(b)(2) since the mortgagee was not given any security interest that did not run with the land); *In re Gleckman*, 212 B.R. 204, 205-06 (Bankr. D.R.I. 1997) (rents and profits clause in residential mortgage does not remove mortgage from protections of § 1322(b)(2) where this additional collateral did not add independent value and was a component of the real property); *In re Pruitte*, 157 B.R. 662, 663-65 (Bankr. E.D. Mo. 1993) (boilerplate language in residential mortgage that gave mortgagee a secured interest in improvements, easements, rights, appurtenances, rents, royalties, mineral, oil and gas rights and profits, water rights and stock, and fixtures associated with the residential real property did not create additional security so as to allow mortgage to be modified under § 1322(b)(2)); *In re Lee*, 137 B.R. 285, 287 (Bankr. E.D. Wisc. 1991) (assignment of rents clause in residential mortgage did not remove mortgage from protections of § 1322(b)(2) since it did not create additional security other than the real property); *In re Jackson*, 136 B.R. 797, 802-03 (Bankr. N.D. Ill. 1992) (mortgage provision which assigned rents, issues, and profits from the debtor's residence created additional security so as to remove the mortgage from the protections of § 1322(b)(2) where

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This Court does not join those courts that have disregarded or minimized the import of some collateral because it was included in boilerplate. *See, e.g., In re Pruitte*, 157 B.R. 662, 663-65 (Bankr. E.D. Mo. 1993). The better approach is set forth in *Lewandowski v. H.U.D. (In re Lewandowski)*, 219 B.R. 99, 101-02 (Bankr. W.D. Pa. 1998). There the court considered the specific mortgage terms and applied state law to determine the nature of the collateral. *Id.* The court concluded that under Pennsylvania law an inclusion of rents in the mortgage did not constitute security in property other than the debtor's principal residence for the purpose of applying § 1322(b)(2). *Id.* at 101. However, the mortgage also gave the mortgagee a security interest in an escrow-type account for taxes and insurance. *Id.* at 101-02. The court concluded this provision did remove the mortgage from the protections of § 1322(b)(2) because these collected funds were a separate item of personalty. *Id.*

Under South Dakota law of long standing, despite some statutory changes, the right to rents and profits from realty is generally tied to possession of the realty. *Alma Group, L.L.C. v. Weiss*, 616 N.W.2d 96, 100 (S.D. 2000); *Hulseman v. Dirks Land Co.*, 259 N.W. 679, 680 (S.D. 1935). Rents and profits are not presumed to be given as part of the realty when the realty is pledged unless there is a specific provision in the mortgage. *Alma Group*, 616 N.W.2d. at 100; *Hulseman*, 259 N.W. at 680; *see also First Federal Savings and Loan Association of Rapid City v. Clark Investment Co.*, 332 N.W.2d 258, 260-61 (S.D. 1982); *Federal Farm Mortgage Corp. v. Holm*, 295 N.W. 662, 663 (S.D. 1940); and *First National Bank of Aberdeen v. Cranmer*, 176 N.W. 881, 882 (S.D. 1920).

Here, the specific assignment of rents clause on page 4 of the mortgage gave Fairbanks Capital something more than just a secured

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under Illinois law a mortgagee is not entitled to rents and profits unless they are expressly pledged); and *In re Wilson*, 91 B.R. 74, 76 (Bankr. W.D. Mo. 1988) (mortgage on residential real property that also took secured interest in certain insurance premium proceeds and return premiums was not protected from modification by § 1322(b)(2) since this additional security was personalty).

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interest in the realty.<sup>3</sup> Under this clause, Fairbanks was entitled to the rents that would accrue if the mortgage payments were accelerated upon breach of the agreement. Thus, it gave Fairbanks the rents that would be collected before Fairbanks would obtain possession of the property through foreclosure. Since this security interest was not tied to possession of the realty itself, it constituted separate collateral. *Hulseman*, 259 N.W. at 680 (rents and profits clause constituted collateral separate from the land itself). Therefore, the specific assignment of rents clause removed the mortgage from the protections of § 1322(b)(2). Consequently, Debtors may modify the interest rate on Fairbanks' note.

An order overruling Fairbanks' objection to Debtor's Amended Plan Dated February 8, 2005, will be entered. The confirmation hearing set for April 5, 2005, at 1:00 p.m. will be held as scheduled to receive Trustee Dale A. Wein's recommendations regarding the plan.

Sincerely,



Irvin N. Hoyt  
Bankruptcy Judge

INH:sh

CC: case file (docket original; serve parties in interest)

I hereby certify that a copy of this document was electronically transmitted, mailed, hand delivered or faxed this date to the parties on the attached service list.

APR 04 2005

Charles L. Nail, Jr., Clerk  
U.S. Bankruptcy Court, District of South Dakota  
By 

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<sup>3</sup> The Court does not reach a conclusion on whether the "improvements" clause at the bottom of page 1 of the mortgage also gave Fairbanks additional collateral.

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