UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re

LUIGIA FERRERA — Case No. 01-10575

Debtor

LUIGIA FERRERA

Plaintiff

-against- — Adv. Pro. No. 01-90142

MORTGAGE ELECTRONIC
REGISTRATION SYSTEMS, INC.

Defendant

APPEARANCES:

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Hon. Robert E. Littlefield, Jr., U.S. Bankruptcy Judge

MEMORANDUM-DECISION AND ORDER

The current matter before the court is Luigia Ferrera's ("Debtor") attempt to modify the secured claim of Mortgage Electronic Registration Systems, Inc. ("Creditor"). The court has jurisdiction via 28 U.S.C. §§ 157(a), 157(b)(1), 157(b)(2)(B), 157(b)(2)(K), 157(b)(2)(L) and 1334.

FACTS

The following facts have been stipulated to by the parties:

1. The Debtor is the fee simple owner of the premises known as 1835-1841 Van Vranken Avenue, Schenectady, New York.

2. On August 11, 1998, the Debtor signed a loan application indicating that the fair market value of the property was $475,000.00.

3. On August 11, 1998, in exchange for the sum of $360,000.00 advanced by Southern Pacific Bank ("Southern Pacific"), Debtor signed a promissory note agreeing to repay to Southern Pacific and its assigns, the sum of $360,00.00 plus interest at the rate of 9.25 % per annum by paying monthly principal and interest payments in the amount of $2,961.63 before September 1, 2028.

4. On August 11, 1998, as security for the loan, Debtor duly executed and delivered to Southern Pacific, a mortgage against the property in the amount of $360,000.00 which had been duly perfected by recording in the Schenectady County Clerk's Office on August 21, 1998 in Book 2627 of Mortgages at Page 101, and Receipt No. 25869, Document No. 3082.

5. The subject mortgage was assigned to the Creditor via assignment dated August 17, 1998 and recorded in the Schenectady County Clerk's Office on January 24, 2000 in Book 2746 of Mortgages at Page 207, Receipt No. 45703 and Document No. 23000-197, Instrument No. 200003002.

6. The property consists of two interconnected mixed-use buildings on a .15 acre lot, totaling 6,059 square feet plus/minus gross usable building area.

7. At the time of filing of the bankruptcy petition, the property was Debtor's principal residence and is currently utilized as follows: a) One apartment unit rented for the sum of $500.00 per month; b) One apartment unit utilized by Debtor as her principal residence; c) Ground Level restaurant and basement cooler are occupied by Mr. Joseph G. DeBase under a written one-year lease agreement, commencing January 1, 2001 with options to renew for an additional four years with monthly rent of $1,800.00 and additional specified rent terms; and d) Debtor operates a separate business out of the area leased as a restaurant known as "Gina's Italian Ice Cream" making and selling gourmet ice cream.

8. The property was valued by the City of Schenectady appraiser in January, 2001 and assessed with a full market value of $230,300.00.

9. At the time of filing of the bankruptcy petition the loan was due for the February 1, 2000 payment with arrears totaling the sum of $70,538.03 and total debt owing of $424,152.96.

ARGUMENTS

The Creditor bases its entire case on the analysis of section 1322(b)(2)[1] as contained in *In re Macaluso*, 254 B.R. 799 (Bankr. W.D.N.Y. 2000). In *Macaluso*, Judge Carl Bucki concluded that the antimodification protection of section 1322(b)(2) extends to real property that is the debtor's principal residence regardless of whether the realty is also utilized for other purposes. *Macaluso*, 254 B.R. at 800.

The Debtor responds by citing the First Circuit Court of Appeals case *Lomas Mortgage v. Louis*, 82 F.3d 1 (1st Cir. 1996). The First Circuit held that "section 1322(b)(2) does not bar modification of a secured claim on a multi-unit property in which one of the units is the debtor's principal residence and the security interests extends to the other income-producing units." *Id.* at 7.

DISCUSSION

The entire spectrum of case law on this issue may be found in bankruptcy court decisions from the Western District of New York. As discussed above, in *Macaluso*, Judge Bucki concluded that the language of section 1322(b)(2) is clear and unambiguous and any reference to legislative history is unnecessary and inappropriate. *Macaluso*, 254 B.R. at 800. He went on to state:

The key factor in interpreting section 1322(b)(2) is placement of the word "only". The

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[1] 11 U.S.C. § 1322 is entitled "Contents of plan." Subsection (b) states, in relevant part:

[t]he plan may -

(2) 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;...

> statute excepts from modification any claim "secured only by a security interest in real property that is the debtor's principal residence." As used in this clause "only" is an adverb modifying "secured". In the present instance, Wallingford is the holder of a claim whose only security is a mortgage on a certain parcel of real property. Because that property is also the debtor's residence, Macaluso's plan may not modify the rights of the mortgage holder. Notably, the statute does not limit its application to property that is used *only* as a principal residence, but refers generally to any parcel of real property that the debtor uses for that purpose. So long as the only collateral is a single parcel of real estate, it matters not that that parcel may fulfill many uses or be divided into many units. The statutory requirements are fulfilled whenever the debtor principally resides in that real estate or some part thereof. *Macaluso,* 254 B.R. at 800.

In contrast, Judge Michael Kaplan in *In re Brunson*, 201 B.R. 351 (Bankr. W.D.N.Y. 1996), rejected the bright line majority approach and embraced a case by case inquiry examining the intent of the parties at the time of the inception of the mortgage. Judge Kaplan stated:

> The Court must focus on the predominant character of the transaction, and what the lender bargained to be within the scope of its lien. If the transaction was predominantly viewed by the parties as a loan transaction to provide the borrower with a residence , then the antimodification provision will apply. If, on the other hand, the transaction was viewed by the parties as predominantly a commercial loan transaction, then stripdown will be available. Such ruling serves the Congressional intent of encouraging home mortgage lending, as illuminated by the Supreme Court in *Nobelman*. *Brunson*, 201 B.R. at 354.

Finally, Judge John Ninfo in *In re Kimbell*, 247 B.R. 35 (Bankr. W.D.N.Y. 2000), agreed with the majority view as espoused in the First Circuit's *Lomas* decision and held that if a claim is secured by a multiuse dwelling, it is subject to modification. *Id.* at 38. Judge Ninfo stated that mortgagees of multi-family structures have been told by the majority of bankruptcy courts that their security interest are not protected and "The concerns expressed by a number of Courts that their decisions may impact on the ability of some individuals to become homeowners is one which Congress may or may not wish to address." *Id.*

This court adopts the majority view as expressed by the reasoning of the *Kimbell* and

Lomas decisions. The *Lomas* court stated that the terms of § 1322(b)(2) are inconclusive and ambiguous. *Lomas,* 82 F.3d at 4. As a result, the court did an extensive analysis of the legislative history and concluded it did not provide any clear answer to the problem either. *Id.* However, the First Circuit did find guidance from the amendments to Chapter 11 contained in the Bankruptcy Reform Act of 1994, Pub.L. No. 103-394, 108 Stat. 4106 (1994). *Id.* at 6. One of the amendments added a home mortgage antimodification provision to Chapter 11 via § 1123(b)(5) which mirrors the language of § 1322(b)(2). *Id.* Further, the First Circuit noted that the legislative history to § 1123(b)(5) makes clear the congressional intent of conformity between Chapters 11 and 13 and that the antimodification provision did not apply to commercial property. *Id.* at 6-7. The *Lomas* court concluded by stating:

> The 1994 Act evidences a deliberate choice on the part of Congress under Chapter 11 to exclude security interests in multi-unit properties like that here from the reach of the antimodification provision based on its understanding that Chapter 13's antimodification provision did not reach such security interests. To disregard such evidence would frustrate the uniform treatment under Chapters 11 and 13 of secured interests in debtors' principal residences that was so clearly Congress's aim in amending § 1123(b)(5). *Id.* at 7.

This court agrees with the *Lomas* court's reasoning because section 1322(b)(2) lends itself to multiple interpretations and, as such, references to the legislative history are not only appropriate but necessary. In reviewing that history, the *Lomas* court correctly concluded that a bright line test was intended by Congress. To accept the reasoning of the Creditor in this case, and Judge Bucki in *Macaluso,* would mean that any rental complex, no matter how large, would be blanketed by antimodification protection if the owner happened to live in one of the units.

Having concluded that the Creditor's secured claim is subject to modification,[2] the court will grant the parties an additional opportunity to submit legal memoranda regarding the value of the property.[3] Any such submission would necessarily entail the ordering of, and references to, a transcript of the trial testimony. The parties have until October 25, 2002 to advise the court of their intent to submit valuation arguments. If such a request is made, the court will schedule a conference to discuss appropriate briefing dates. If no request is received, the court will consider the valuation question fully submitted.

It is so ORDERED.

Dated: October 11, 2002

Hon. Robert E. Littlefield, Jr.
U.S. Bankruptcy Judge

[2]Attached to the Creditor's answer is a copy of an assignment of rents it also received from the Debtor. In light of the court's disposition of the matter, it need not review the question of whether such an assignment also entitles the Debtor to seek modification pursuant to 11 U.S.C. §1322(b)(2).

[3]The court conducted a trial on the valuation issue on January 29, 2002.