UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

In re:

JAMES GRAHAM and
BRENDA S. GRAHAM,

Case No. HK 13-02132
Hon. Jeffrey R. Hughes

Debtors.
_____/

ORDER DENYING MOTION FOR RELIEF FROM AUTOMATIC STAY

PRESENT: HONORABLE SCOTT W. DALES
United States Bankruptcy Judge

On October 22, 2013, creditor MICB-PCB RE HOLDINGS IV, LLC (the "Creditor") filed a motion for relief from the automatic stay (the "Motion," DN 47) seeking to enforce its mortgage against the residence of chapter 11 debtors James and Brenda Graham (the "Debtors"). The Debtors filed their response to the Motion, arguing that, in an order dated August 9, 2013, the court previously rejected the arguments the Creditor is reasserting. The court reviewed the Motion and the Debtors' response (the "Response," DN 48) in advance of the oral argument which took place on December 5, 2013 in Kalamazoo, Michigan.

At the oral argument, the Creditor argued that the Debtors cannot confirm a plan over the Creditor's objection because, according to the Creditor, it holds a claim immune from modification under 11 U.S.C. § 1123(b)(5).[1] The Creditor's argument against modification,

[1] At oral argument, the Creditor's counsel stated that the claim is based on a guaranty of the debts of Portage Oil Company (and presumably TTA, LLC), and the Motion states that the Debtors executed the mortgage "[a]s security for their Commercial Guaranties . . ." *See* Motion at ¶ 8. The mortgage that is attached to the Motion as Exhibit 3, however, identifies the "Borrower" as "JAMES G. AND BRENDA S. GRAHAM, HUSBAND AND WIFE," and states that the mortgage secured indebtedness under an "Equity Line" pursuant to which the "Borrower may, from time to time, obtain advances . . ." The guaranty claim described in the Motion and at oral argument does not seem to match the lending arrangement described in the mortgage. Furthermore, this does not appear to be the only discrepancy between the documents described in the Motion and its attached Exhibits. However, the court's disposition of the Motion renders any discrepancy immaterial at this time.

however, appears nowhere in the Motion and admittedly took the court and presumably opposing counsel by surprise.

During oral argument, Creditor's counsel mentioned that his assistant filed the wrong version of the Motion. Indeed, it appears that the Creditor filed a motion nearly identical to the one filed in April of this year, bearing the same date, but omitting at least one exhibit. *Compare* DN 20 *with* DN 47. This repetition, in fact, was the gravamen of the Debtor's written Response. Although the court's surprise at oral argument was the product of law office failure rather than intent, the fact that the Creditor's counsel filed the Motion papers asserting arguments previously rejected deprived the Debtors of a full and fair opportunity to address the anti-modification issue under § 1123(b)(5) and deprived the court of the opportunity to prepare for and conduct a meaningful argument on December 5.[2]

Under the circumstances, Fed. R. Bankr. P. 9005 does not permit the court to disregard the error, and the court is unwilling to rule on the merits of the Creditor's oral argument, as opposed to the arguments set forth in its written Motion, without full briefing from the parties. If the court had been apprised of the Creditor's reliance on § 1123(b)(5) in advance of the hearing, the court's preparation and questions on December 5 would have been more focused and germane. The Creditor's counsel conceded during the hearing that its oral argument against modification of its secured commercial guaranty depends entirely on the court's willingness to accept the Creditor's interpretation of § 1123(b)(5)—an interpretation arguably consistent with the text of the statute, but at odds with legislative history. *See United States v. Smith*, 874 F.2d 371, 372-73 (6th Cir. 1989) ("it is the intention of Congress that controls, and a result contrary to

[2] It is, of course, possible that the Creditor served upon the Debtors a revised stay relief motion at some point before oral argument without correcting the erroneous filing with the court, but as the Debtors' Response suggests, the law of the case doctrine warrants denial of the Motion *as filed*, except that Judge Hughes denied the virtually identical, earlier motion "without prejudice." *See* Order Re: MICB-PCB RE Holdings IV, LLC's April 23, 2013 Motion – Stay (DN 37).

the literal meaning of the words is justified when 'the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters....'") (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)); H.R. Rep. No. 103-835, at 46 (1994), (*reprinted in* 1994 U.S.C.C.A.N. 3340, 3354) ("This amendment conforms the treatment of residential mortgages in chapter 11 to that in chapter 13, preventing the modification of the rights of a holder of a claim secured only by a security interest in the debtor's principal residence. Since it is intended to apply only to home mortgages, it applies only when the debtor is an individual. It does not apply to a commercial property, or to any transaction in which the creditor acquired a lien on property other than real property used as the debtor's residence."). Again, given that the Creditor's counsel raised this issue for the first time at oral argument, the court did not adequately prepare for argument on this pivotal issue.

Before the court would be willing to accept the Creditor's interpretation of § 1123(b)(5), it would require the proponent to offer substantially more analysis and, if possible, support in the case law. If the Creditor intends to make a third motion for relief from the automatic stay, the court would expect the Creditor (in its motion papers) to address the apparent inconsistency between the legislative history and text of Section 1123(b)(5). Because the legislative history so clearly expresses Congressional intent to limit the statute's anti-modification provision to residential mortgages, the court will not lightly read the statute to reach a patently commercial transaction, at least not without full and fair opportunity for briefing and argument. In addition, the Creditor would be well-served to explain the seeming discrepancy regarding the obligations described in the guaranty and in the mortgage, as footnoted above.

NOW, THEREFORE, IT IS HEREBY ORDERED that the Motion is DENIED without prejudice.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Order pursuant to Fed. R. Bankr. P. 9022 and LBR 5005-4 upon Joseph A. Lucas, Esq., Kerry D. Hettinger, Esq., the 20 largest creditors and the Office of the United States Trustee.

END OF ORDER

IT IS SO ORDERED.

Dated December 10, 2013

Scott W. Dales
United States Bankruptcy Judge