Dated: July 21, 2023
The following is ORDERED:

Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re JOSE ANTONIO CRUZ, Debtor.	Case No. 22-23864-L Chapter 13
Jose Antonio Cruz, Movant, v. Allied Ventures, LLC, Respondent.	Motion to Assume Lease [ECF No. 30] Confirmation of Chapter 13 Plan [ECF No. 54] and Objections Thereto [ECF Nos. 64, 81]

MEMORANDUM OPINION

THIS CASE CAME BEFORE the Court for evidentiary hearings June 1 and July 13, 2023, on the Debtor's Motion to Assume Lease [ECF No. 30]; Confirmation of the Second Amended Chapter 13 Plan [ECF No. 54]; and objections to confirmation of the Debtor's proposed plan filed

by Sylvia Ford Brown, Chapter 13 Trustee, and creditor Allied Ventures, LLC ("Allied") [ECF Nos. 64 and 81].[1]

The Court issued an *Order Denying Motion for Relief from Stay* on February 23, 2023 [ECF No. 59], which sets forth numerous background facts concerning the relationship between the Debtor, Jose Antonio Cruz, and Allied. In that order, the Court found that the Purchase Contract between the parties is best characterized as an installment land sale contract, a recognized alternative to the deed of trust in Tennessee. The Court also found that the Debtor paid between $225,000 and $238,000 toward the $290,000 purchase price for the Property covered by the Purchase Contract prior to the filing of the bankruptcy petition. The Court found that Allied's interest in the Property is adequately protected by a substantial equity cushion, and thus that cause did not exist for terminating the automatic stay.

The Debtor filed his Second Amended Chapter 13 Plan on February 8, 2023, the eve of the hearing on the Motion for Relief from Stay. The Second Amended Plan proposes that the Debtor pay $3,000 per month into the plan to pay (i) administrative expenses; (ii) the secured claim of Amigos Auto Sales in the amount of $9,100 together with interest at the rate of 6%, in monthly installments of $280.00; and (iii) the balance, if any, owed to Allied after deposited funds held by the circuit court clerk are applied to its claim, in equal monthly installments until paid in full. The plan also proposes to pay all property taxes owed with respect to the Property as they come due and to maintain property insurance at the levels provided in the Purchase Contract. There are no other creditors provided for in the Second Amended Plan. The only creditor that has filed a proof of claim is Allied. The Debtor proposes to file a proof of claim on behalf of Amigos Auto Sales.

[1] The Debtor also filed a motion to convert his case to Chapter 11, Subchapter V, which was orally withdrawn by Debtor's counsel at the close of the hearings.

Allied objects to confirmation of the Second Amended Plan. Allied claims that the Purchase Contract is an executory contract that terminated by its terms after the bankruptcy petition was filed. Thus, Allied claims that it is no longer possible for the Debtor to cure the prepetition default and pay any remaining balance owed under the contract. Allied urges the Court to conclude that it may retain all of the funds paid to it by the Debtor thus far and retain the Property. Allied also filed a proof of claim, however, in the amount of $117,935.82, which includes the remaining installments due under the Purchase Contract and various other costs and attorneys' fees. As the Court understands the arguments, Allied claims the following: (i) The Purchase Contract is an executory contract that the Debtor may not treat as a secured obligation (*Objection to Confirmation of Plan*, February 7, 2023 [ECF No. 52], pp. 5-6); (ii) If the Debtor were to retrieve the $86,000 cash bond and apply it to the obligation owed to Allied, that would require the Debtor to dismiss his appeal rendering the judgment for possession final (*Id.*, pp. 5-6); (iii) If this is not true, the bond is not exempt property and thus should be paid into the plan and distributed to creditors before it is used to cure any post-petition default under the Purchase Agreement. (*Id.* at pp. 5-6); (iv) the plan is not feasible because the Debtor cannot satisfy the requirements for assumption of the Purchase Contract (*Id.* at pp. 6-7); and (v) the Property is no longer property of the estate because it expired by its own terms at some point after the filing of the bankruptcy petition (*Id.* at pp. 7-8). Allied makes reference to no specific provisions of the Bankruptcy Code in support of its position other than sections 365(c)(3) and 365(b)(1)(C).

At the hearing, the Court heard the testimony of Mr. Cruz, the Debtor, and of Mr. Jonathan Vick, sole owner of Allied.

JURISDICTION, AUTHORITY, AND VENUE

Jurisdiction over a contested matter arising under the Bankruptcy Code lies with the district court. 28 U.S.C. § 1334(b). Pursuant to authority granted to the district courts at 28 U.S.C. § 157(a), the district court for the Western District of Tennessee has referred to the bankruptcy judges of this district all cases arising under title 11 and all proceedings arising under title 11 or arising in or related to a case under title 11. *In re Jurisdiction and Proceedings Under the Bankruptcy Amendments Act of 1984*, Misc. No. 81-30 (W.D. Tenn. July 10, 1984). Confirmations of plans are among the core proceedings arising under the Bankruptcy Code. *See* 28 U.S.C. § 157(b)(2)(L). The bankruptcy court has authority to enter a final order on these matters subject only to appellate review. *See* 28 U.S.C. § 157(b)(1). Venue of this contested matter is proper to the Western District of Tennessee because this matter arises in a bankruptcy case pending in this district. *See* 28 U.S.C. §1409(a).

FINDINGS OF FACT

Significant background facts are set forth in the previous *Order Denying Motion for Relief from Stay.* The Court incorporates those facts here. Capitalized terms used in that order have the same meaning when used in this opinion. Very briefly, on July 12, 2019, Mr. Cruz and Allied entered into a Purchase Agreement for the Property located in Memphis, Tennessee. Allied had been the high bidder for the Property at $80,500 at a tax sale, but title did not pass to Allied until December 17, 2019. The Purchase Contract was characterized by the Court for purposes of the motion for relief from stay as a land sale contract. The Debtor paid more than 71% of the purchase price of $290,000 before Allied filed suit to obtain possession of the Property for failure to pay taxes and insurance. After possession was awarded, the Debtor posted a cash bond of $86,000, more than enough to pay the remaining balance of the purchase price, before filing a voluntary

petition under Chapter 13 of the Bankruptcy Code on September 9, 2022. The Debtor filed a proposed Chapter 13 plan with his petition, which has been amended twice in an effort to meet the objections of Allied. [ECF No. 2, 31, 54].

The First Amended Plan provided for plan payments of $2,200 per month; payment of trustee commission and attorney’s fees; payment to Allied in the amount of $1,200 per month to cure the default of $56,000 together with interest at the rate of 7%; payment to Amigos Auto Sales in the amount of $200 per month to pay a claim of $9,100 together with interest at the rate of 6%; and provided for the assumption of the “Lease/purchase agreement with Allied Ventures.” The plan proposed to use the $86,000 cash bond to catch up on the post-petition payments owed under the Purchase Contract. [ECF No. 31]. In connection with the First Amended Plan, filed January 11, 2023, the Debtor filed his *Motion to Assume Lease as to Allied Ventures, LLC*. [ECF No. 30].

The Debtor filed his Second Amended Plan on February 7, 2023. Allied filed its objection on March 3, 2023 [ECF No. 64]. This plan proposes that the Debtor pay $3,000 per month to pay the administrative expenses, the claim of Amigos Auto Sales, and the remaining balance, if any, owed to Allied after application of the funds held by the circuit court clerk (or so much of them as is not necessary to secure the costs of the appeal).

On April 12, 2023, the Chapter 13 Trustee objected to confirmation of the Second Amended Plan. The Trustee’s objection stems from the fact that she cannot determine what is to be paid to Allied under the plan. The reasons for the confusion stem from the various contradictory positions taken by Allied in this case.

The original proof of claim filed by Allied was straight forward. It requested payment of a claim in the amount of $56,700 arising from a lease. The original plan, filed with the bankruptcy petition, proposed to pay Allied the amount of $87,000 in monthly installments of $1,450 without

interest. Based on the payments already made by the Debtor at the time the bankruptcy petition was filed, $58,500 remained to be paid under the Purchase Contract, leaving $28,500 for whatever additional claims Allied might make. The Court did not reach the question of confirmation of this plan because the Debtor did not have property insurance and was having trouble securing it. The record is not clear about what the difficulties were, but it is very likely that the condition of the Property when Mr. Cruz took possession of it initially hampered his ability to obtain insurance. Mr. Vick obtained a quote for insurance before he received the deed to the Property and Mr. Cruz took possession of it. Mr. Cruz testified that he believed that Mr. Vick had obtained insurance but that he later learned this was not true. Tr. June 1, 2023, pp. 20-30. Mr. Vick testified that he was not able to afford to insure the Property until February 2022. The allegation that Mr. Cruz failed to obtain property insurance was one of the bases for Allied's suit for possession in the general sessions court. After filing his bankruptcy petition, the Debtor was able to secure an acceptable policy in December 2022, but by then, Allied had raised other objections to the plan, which the Debtor attempted to meet by amending his plan.

After the first day of the hearing on confirmation of the Second Amended Plan, Allied filed its Amended Proof of Claim. It is not straightforward like the first proof of claim but contains numerous seemingly contradictory statements. It states that it amends the claim filed October 13, 2022, which contained a simple statement of the amount needed to cure the prepetition arrearage as of the date of filing, but it includes claims for obligations that arose after the bankruptcy petition was filed. At paragraph 7, in response to the question, "How much is the claim?," the response is $117,935.82. The attached statement required by Bankruptcy Rule 3001(c)(2)(A) states:

Remaining rent owed to complete owner-finance agreement	$58,500.00
Insurance policy paid by owner for general liability and building	$ 9,550.94
Glankler Brown legal fees*	$ 27,365.75
Money owed for previous property taxes	$ 15,112.63

Fee to serve tenant eviction	$ 40.00
Court cost fee to file general sessions court	$ 102.00
Realtor fee owed to help close at end of owner-finance	$ 499.00
Ben Sissman fee for legal counsel in general sessions	$ 150.00
Late fees for non-payment of rent	$ 1,950.00
Days off work, hotel and gas for 4 court appearances out of state	$ 1,785.00
Hours spent managing property and collection efforts 23.04 hrs at $125 hourly	$ 2,880.00
Grand total	$117,935.82

Ex. 11.

At paragraph 8, in response to the question, "What is the basis of the claim?," the response is "Land Sale Contract."

At paragraph 9, in response to the question, "Is all or part of the claim secured?," the response is "Yes. The claim is secured by a lien on property." No property is specified, however, and the value of the property is listed as "$0.00," the "amount of the claim that is unsecured" is stated to be $117,935.82, and the "amount necessary to cure any default as of the date of the petition" is stated to be "$56,700."

At paragraph 10, in response to the question, "Is this claim based on a lease?," the response is "Yes," and the "[a]mount necessary to cure any default as of the date of the petition" is stated to be "$56,700." No itemization is given for this amount, however,

At paragraph 12, in response to the question, "Is all or part of the claim entitled to priority under 11 U.S.C. § 507(a)," the response is "Yes." The box next to "Other" is checked, subsection 507(a)(2) is specified, and the amount stated is "$61,235.82." Allied claims that the numerous amounts added to its cure amount should be treated as administrative expenses.

It is impossible to determine from either the initial proof of claim or the Amended Proof of Claim what is included in the $56,700 alleged to have been owed as of the date of the petition. Mr. Cruz made his last full installment payment in June, which was followed by $5,500 paid in

July. The petition was filed September 9, 2022; at most, therefore, three monthly installments of $6,500, or $19,500, were in default as of the petition date. That leaves $37,200 unaccounted for in the default amount of $56,700. The Amended Proof of Claim indicates that the total claim is $117,935.82, which apparently includes all charges Allied asserts are due under the Purchase Contract, but the itemization duplicates installment payments and includes both pre- and post-petition charges. What is clear is that the Land Sale Contract calls for 40 payments to be made and the Debtor completed 31 payments before the petition was filed. Nine payments of $6,500, or $58,500, of the original installments remain to be paid. Allied may be entitled to be paid other amounts under the contract, but those amounts must be determined when the Debtor's objection to Allied's claim is heard.

At no time did Allied provide any of its accounting records for inspection by the Court. Mr. Cruz asked for an accounting in March 2022, and again when the suit for possession was filed, but this was not provided to him. Tr. June 1, 2023, pp. 32 and 57; Tr. Ex. 13.

CONCLUSIONS OF LAW

The Debtor seeks confirmation of his Second Amended Chapter 13 Plan which proposes to cure the prepetition default in payments owed to Allied and pay the remaining balance owed to Allied, whatever the Court determines that to be, in full together with interest. The plan proposes that the best way to accomplish this is to apply the funds representing the cash bond to the amounts owed to Allied, and to provide a note and deed of trust for the balance. The plan also proposes that the Property will be insured at levels required by the Purchase Contract.

Requirements for Confirmation

Section 1325 sets out the requirements for confirmation of a Chapter 13 plan. Even if no objections are filed, the bankruptcy judge has an independent duty to determine that the

requirements for confirmation have been met. *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 276-277, n. 15; 130 S.Ct. 1367, 1380-1381, n. 15; 176 L. Ed. 2d 158 (2010); *In re Phile*, 490 B.R. 250, 254 (Bankr. S.D. Ohio 2011); *In re Williams*, 253 B.R. 220, 223 (Bankr. W.D. Tenn. 2000).

The Plan Complies with Section 1325(a)(1)

The Court must determine that the plan complies with the provisions of Chapter 13 and with other applicable provisions of title 11. 11 U.S.C. § 1325(a)(1). As a permissive plan provision, section 1322(b)(3) permits a debtor to provide for the curing or waiving of any default, and section 1322(b)(7) permits a debtor to provide for the assumption of an executory contract that has not previously been rejected. The Second Amended Plan provides for the assumption of the Purchase Contract (and the Debtor has filed a separate motion seeking to assume the Purchase Contract). Relying upon section 365(c)(3), Allied argues that the Purchase Contract may not be assumed because the contract terminated or should be deemed to have been terminated prepetition. Section 365(c)(3) provides:

> (c) The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—
> ***
> (3) such lease is of nonresidential real property and has been terminated under applicable nonbankruptcy law prior to the order for relief.

11 U.S.C. § 365(c). Unlike other subsections of section 365(c), subsection (3) only applies to leases of nonresidential real property. The Contract for Purchase is not, however, a lease. Mr. Vick admitted at trial that there are over 60 instances of the use of language related to borrowing and owner financing in the Purchase Contract and related documents. At no time did the parties contemplate that the Property would return to Allied at the completion of its term. Allied is entitled to retake the Property under the contract only as a remedy for default. All of these facts indicate

that the parties intended a sale rather than a lease. As determined by the Court in its *Order Denying Motion for Relief from Stay*, the Purchase Contract is best characterized as an installment land sales contract, which is a recognized alternative for the purchase of real property under Tennessee law. It was an executory contract when the bankruptcy petition was filed because performance was required by both parties to complete the contract -- the Debtor was required to complete the payments and Allied was required to transfer title when payments were complete – but that does not alter the Court's conclusion that the parties intended that the Debtor purchase rather than lease the Property. Section 365(i) and (j) make specific provision for executory contracts of the debtor for the *sale* of land. There is no similar provision in section 365 for executory contracts of the debtor for the *purchase* of land, but the presence of these sections makes clear the distinction between a lease and a contract for the sale (or purchase) of land for purposes of the Bankruptcy Code. Because the Purchase Contract is not a lease, section 365(c)(3) does not apply.

Allied also asserts that the Debtor cannot assume the Purchase Contract because he is unable to show that he can cure the prepetition defaults in the Purchase Contract. Section 365(b)(1) requires a debtor to (A) cure or provide adequate assurance of prompt cure of a default under an unexpired executory contract; (B) compensate, or provide adequate assurance that the debtor will promptly compensate, a party other than the debtor to an unexpired executory contract for any actual pecuniary loss resulting from default; and (C) provide adequate assurance of future performance under the contract or lease. 11 U.S.C. § 365(b).

The Second Amended Plan provides for the cure of the prepetition monetary default, whatever that amount may be, and provides adequate assurance of future performance. The Debtor was able to post a cash bond of $86,000 on very short notice through the generosity of the members of his church. This amount can be made available to satisfy a substantial portion of the debt owed

to Allied. The Second Amended Plan proposes that the Debtor will make monthly payments of $3,000 until his debts are paid in full. The Debtor made regular monthly installments of $6,500 for 31 months prior to the filing of the bankruptcy petition. During this bankruptcy case, the Debtor has generated average net monthly income in excess of $6,000. The Debtor has shown that he has the ability to make the proposed plan payments.

As to the nonmonetary default, the failure to provide insurance, the record is clear that Mr. Vick knew that the Debtor had not obtained property insurance prior to taking possession of the Property. *See* Tr. Ex. 7. Mr. Cruz testified that he believed Allied had obtained insurance for the building but that he later found out it was not insured. Mr. Cruz testified that he believed the building was insured because Mr. Vick asked for payments for insurance and because Allied was accepting installment payments from him. Tr. June 1, 2023, pp. 29-30. The record also shows from December 2019 until February 4, 2022, Mr. Vick accepted monthly installments from Mr. Cruz on behalf of Allied knowing that the Property was not insured. It was February 4, 2022 when Mr. Vick texted Mr. Cruz to tell him that his insurance agent and inspector would be visiting the Property on February 8. *See* Tr. Ex. 6. The record contains no evidence of a written demand for payment of insurance premiums after Mr. Cruz took possession of the Property in December 2019 until Mr. Vick sent an email to a representative of the Debtor on February 7, 2022. Tr. Ex. 8. Mr. Vick testified that he obtained insurance for the building then because that was the first time he was able to afford to purchase it. Whatever obstacles there were to the Debtor or Allied obtaining insurance prior to the filing of the bankruptcy petition, the Debtor has obtained insurance in amounts exceeding the requirements of the Purchase Contract. The nonmonetary default arising from failure to obtain insurance has been cured.

In every contract, there is an implied covenant of good faith and fair dealing. Eli Richardson, Judge of the United States District Court for the Middle District of Tennessee, has explained this covenant as follows:

> While the implied covenant does not create new contractual rights or obligations, it protects the parties' reasonable expectations as well as their rights to receive the benefits of their agreement.
>
> Thus, "there is an implied covenant of good faith and fair dealing in every contract, whereby neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." The general idea, at least in pertinent part, seems to be that one party cannot in bad faith get in the way of the counterparty's satisfaction of a contract condition that would result in the counterparty's realization of a benefit under the contract. In the Court's view, the following hypothetical demonstrates the principle. If a landowner agrees to pay a painter a $10,000 commission if she completes a "satisfactory" landscape of the landowner's estate, the landowner breaches the covenant of good faith and fair dealing—and thus the contract—if he stops allowing the painter onto his estate after the painter has completed most of the painting; the covenant protects the painter from the argument that she, not having "completed" a "satisfactory" landscape, is contractually not entitled to a commission.

Evans v. Vanderbilt Univ. Sch. of Med., 589 F. Supp. 3d 870, 900 (M.D. Tenn. 2022) (Richardson, D.J. quoting from his own prior unpublished opinion). Allied and Mr. Vick, who is the sole owner of Allied, have done everything in their power to thwart the ability of Mr. Cruz to receive the benefit of his bargain. Allied breached the covenant of good faith and fair dealing when Mr. Vick allowed Mr. Cruz to take possession of the Property and accepted more than $200,000 in payments from him knowing that he had not obtained property insurance before claiming that the lack of insurance was an event of default. Allied breached the covenant of good faith and fair dealing when Mr. Vick stopped communicating with Mr. Cruz and refused to provide a proper accounting for the payments made by Mr. Cruz and the amount remaining to be paid under the Purchase Contract. Allied's lack of good faith has continued throughout this bankruptcy case as it continues to provide inadequate accounting for its claim so that it is impossible for Mr. Cruz or the Court to

determine what should be paid to complete Mr. Cruz's obligation under the Purchase Contract. Whatever that amount is (and the Court believes that is substantially less than the $117,935.82 set out in the Amended Proof of Claim), Mr. Cruz has shown that he is able to pay it within a reasonable time, which is what is required by section 365(b)(1).

Section 1325(a)(2)

Section 1325(a)(2) requires that any fee, charge, or amount required under chapter 123 of title 28, or by the plan, to be paid before confirmation, has been paid. The Debtor paid his chapter 13 filing fee with his petition on September 9, 2022, and the conversion fee required by filing the motion to convert this case to a chapter 11 on February 22, 2023. There are no required pre-confirmation fees or charges outstanding.

The Plan Is Proposed in Good Faith

Section 1325(a)(3) requires that the plan be proposed in good faith and not by any means forbidden by law. The Debtor has demonstrated his good faith in proposing the Second Amended Plan to the satisfaction of the Court. The plan proposes to pay all creditors in full within a reasonable time and is feasible.

If the Purchase Contract Gives Rise to an Unsecured Claim, the Plan Satisfies the Best Interest of Creditors Test

Section 1325(a)(4) requires that the plan satisfy the so-called best interests of creditors test, that is, that the value, as of the effective date of the plan, of property to be distributed under the plan on account of each unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7. If the result of calling the Purchase Contract an executory contract is to render any claim arising under it unsecured, the Debtor has satisfied the best interest of creditors test.

Allied has filed a proof of claim containing contradictory statements concerning the nature of its claim. The Amended Proof of Claim states both that the claim arising from the Purchase Contract is secured and that it is unsecured. Whatever the true nature and amount of the claim is determined to be, it is the only potentially unsecured claim provided for in the plan. The Court has found that the Debtor may cure the prepetition default under the Purchase Contract, whatever it is. The plan proposes to apply the funds held by the state court to the claim and to pay any remaining balance with interest at 7%. Allied has not objected to this interest rate. The Debtor proposes plan payments of $3,000 per month. The only other claim provided for under the plan is the secured claim of Amigos Auto Sales, which is to be paid in monthly installments of $280. Amigos Auto Sales has not filed a proof of claim, but the plan indicates that the Debtor intends to file a proof of claim on its behalf. It is clear that the bulk of the monthly plan payments will be paid to Allied. The Court finds that the plan satisfies the best interest of creditors test.

The Plan Provides for Full Payment of All Secured Claims

Section 1325(a)(5) requires with respect to each secured claim either that the creditor has accepted the plan, or that debtor surrenders the property securing the claim, or,

> (B)(i) the plan provides that--
>
> > (I) the holder of such claim retain the lien securing such claim until the earlier of--
> >
> > > (aa) the payment of the underlying debt determined under nonbankruptcy law; or
> > > (bb) discharge under section 1328; and
> >
> > (II) if the case under this chapter is dismissed or converted without completion of the plan, such lien shall also be retained by such holder to the extent recognized by applicable nonbankruptcy law;
>
> (ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; and

> (iii) if—
>
> > (I) property to be distributed pursuant to this subsection is in the form of periodic payments, such payments shall be in equal monthly amounts; and
> >
> > (II) the holder of the claim is secured by personal property, the amount of such payments shall not be less than an amount sufficient to provide to the holder of such claim adequate protection during the period of the plan.

11 U.S.C. § 1325(a)(5).

Amigos Auto Sales holds a secured claim but has not filed a proof of claim. The plan provides that the Debtor will file a proof of claim on its behalf and will pay the claim, which he believes is in the amount of $9,100, together with interest at 6% in equal monthly installments of $280. The plan's treatment of the claim of Amigos Auto Sales complies with section 1325(a)(5).

There are many reasons to think that Allied's claim should be treated as a secured claim under Tennessee law. The Tennessee Supreme Court has said that it is,

> not able to draw any sensible distinction between the cases of a legal title conveyed to secure the payment of a debt, and a legal title retained to secure the payment of a debt. In both cases, courts of chancery consider the estate only as security for the payment of the debt, upon a discharge of which the debtor is entitled to a conveyance in one instance, and a reconveyance in the other.

Graham v. Campbell, 19 Tenn. 52, 33 Am. Dec. 126 (1838). Bankruptcy Judge Richard Stair concurs:

> Even though not widely used, Tennessee does recognize contracts for deed as valid options for the purchase of real property. See e.g., *McMillan v. Am. Suburban Corp.*, 136 Tenn. 53, 188 S.W. 615 (1916); *Harmon v. Eggers*, 699 S.W.2d 159 (Tenn.Ct.App.1985), overruled on other grounds by *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88 (Tenn.1999). The seller, or vendor, of the contract retains legal title as security, see *Cleveland v. Martin*, 39 Tenn. (2 Head) 128, 130–31 (1858), while the purchaser, or vendee, obtains an equitable ownership interest in the property. *King v. Dunlap*, 945 S.W.2d 736, 740 (Tenn.Ct.App.1996).

In re Carson, 286 B.R. 645, 649 (Bankr. E.D. Tenn. 2002). *See also, In re Buhler*, No. 3:22-AP-90090, 2022 WL 17184617, at *3 (Bankr. M.D. Tenn. Nov. 23, 2022) (Tennessee law identifies

land sale contracts as legitimate instruments for the purchase of real property.). From Judge Stair's description, the close relationship between the installment land sale contract and the deed of trust is clear. The Tennessee Supreme Court has said that "[a]fter a contract of sale of land has been entered into, the vendor is from that time considered in equity to be the trustee of the purchaser, and the vendee, as to the equivalent which he is to give for the thing purchased, a trustee for the seller." *Lunsford v. Jarrett*, 79 Tenn. 192, 195 (1883). Moreover, "the general rule is stated that a contract for the sale of land operates as an equitable conversion and the vendee's interest under the contract becomes realty and the vendor's interest becomes personalty, and in equity the vendee is regarded as the owner, subject to liability for the unpaid price, and the vendor is regarded as holding only the legal title in trust for the vendee from the time a valid contract for the purchase of land is entered into." *Campbell v. Miller*, 562 S.W.2d 827, 831-832 (Tenn. Ct. App. 1977), citing 77 Am. Jur.2d 478-479, "Vendor and Purchaser," Sec. 317. That the transaction between these parties was intended for security is reinforced by the Promissory Note, which contains an absolute rather than a conditional obligation to pay $290,000 described as a "Principle [sic] Amount loaned against property." Ex. 2 to Tr. Ex. 11. The Court is simply repeating statements from its prior *Order Denying Motion for Relief from Stay.* [ECF No. 59].

Although the record contains no copy of any judgment obtained prior to the filing of the bankruptcy petition, the parties agree that Allied obtained a judgment for possession and that the judgment did not become final as the result of the filing of the Debtor's notice of appeal. The Debtor's equitable interest in the Property thus became property of his bankruptcy estate upon filing. *See* 11 U.S.C. § 541(a)(1) (property of the bankruptcy estate consists of all legal or equitable interests of the debtor in property as of the commencement of the case).

Allied has not accepted the Second Amended Plan and the Debtor does not propose to surrender the Property, so if the claim is treated as a secured claim, which the Court believes is the better understanding of Tennessee law, the Court must determine whether the proposed plan provides the treatment required by section 1325(a)(5)(B). The Second Amended Plan proposes to repay the balance owed under the Purchase Contract through a combination of the application of the funds on deposit with the state court and equal monthly installments until any remaining balance is paid in full, with interest. The Debtor does not know the amount to be paid to Allied because its claim has not been allowed. The plan proposes to give Allied a standard note and deed of trust for the balance owed, but the Court does not believe this is necessary. Allied is fully protected by its retention of title to the Property as security for its loan to the Debtor. Should the case be dismissed or converted, its interest in the Property would be retained and protected. The Debtor will be protected during the pendency of the plan by the automatic stay and the confirmation order. The plan proposes to pay Allied's claim in full with interest at the rate of 7%. Allied has not suggested that this rate is inadequate.

The Court rejects the Creditor's reading of the Sixth Circuit's decision *In re Terrell*, 892 F.2d 469 (6th Cir. 1989). *Terrell* was a decision concerning a land sale contract created in Michigan which the court found was not subject to the cram-down provision of Chapter 12. The value of the collateral for the obligation in *Terrell* was less than the amount of the remaining obligation under the Michigan land sale contract. The debtor proposed to modify the vendor's claim by bifurcating it between secured and unsecured claims as permitted by section 506(a) of the Bankruptcy Code. The court of appeals did not permit this treatment.[2]

[2] At least one scholar has suggested that treating as secured any claim arising under a land sale contract in which the debtor is the purchaser is the better reading of the Bankruptcy Code. *See* Juliet M. Moringiello, *A Mortgage by Any Other Name: A Plea for the Uniform Treatment of Installment Land Contract and Mortgages Under the Bankruptcy Code*, 100 Dick L. Rev 733 (1996).

In this case, however, the plan does not contain the provision found objectionable by the court in *Terrell*. The value of the Property far exceeds the remaining obligation under the Purchase Contract, and the Debtor proposes to pay the remaining balance in full, with interest. The *Terrell* court held that federal law determines whether a contract is executory "but that 'the legal consequences of one party's failure to perform its remaining obligations under the contract is an issue of state contract law.'" *Id.* at 471. If in fact there was a failure on the Debtor's part pre-petition, which is seriously in doubt given the fact that the Debtor asked to meet with Mr. Vick in order to determine the amount that was necessary to pay the contract in full, the Court is satisfied that the Tennessee courts would permit a vendee who has paid more than 70% of the purchase price under a land sale contract to tender the remaining amount due and sue for specific performance should the vendor refuse to convey title to the property. To hold otherwise would be to condone a forfeiture, which is strongly disfavored in Tennessee. *See Hooton v. Nacarato GMC Truck, Inc.*, which states:

> Forfeitures are not illegal per se and will be enforced unless contrary to equity and justice. However, the law does not favor forfeitures and they will be strictly construed. *Simmons v. Hitt*, 546 S.W.2d 587, 591 (Tenn.App.1976) (citation omitted).
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> Forfeitures will be enforced only within the letter and spirit of the law. *Sanders v. Sanders*, 40 Tenn.App. 20, 33, 288 S.W.2d 473, 479 (1955). The law favors the enforcement and preservation rather than the forfeiture of rights. *Burchfield v. Hodges*, 29 Tenn.App. 488, 500–501, 197 S.W.2d 815, 820 (1946).
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> Before a court will enforce a forfeiture, there must be clear proof of the right to the forfeiture and the grounds on which the forfeiture is allowed must be well established. Every reasonable presumption is against forfeiture and every intendment or presumption is against the party seeking to enforce the forfeiture. 17A C.J.S. Contracts § 407 (1963).

Hooton v. Nacarato GMC Truck, Inc., 772 S.W.2d 41, 46 (Tenn. Ct. App. 1989). The Tennessee court quotes at length from an earlier decision, *Hasden v. MvGinnis*, which states:

> Forfeitures are not favored in equity and unless the penalty is fairly proportionate to damages suffered by the breach, relief will be granted when the lessor can, by compensation or otherwise, be placed in the same condition as if the breach had not occurred. *Humphrey v. Humphrey*, 254 Ala. 395, 48 So.2d 424, 31 A.L.R.2d 315; *Twyford v. Whitchurch*, 9 Cir., 132 F.2d 819; 3 Thompson on Real Property, Sec. 1467, p. 712; 32 Am.Jur., Landlord and Tenant, Sec. 847, pp. 720–721. The underlying principle is that a court of equity is a court of conscience and nothing will be permitted within its jurisdiction which is unconscionable. So a person, although having a legal right, will not be permitted to avail himself of that right for the purpose of injury or oppression. 16 A.L.R. 437; 31 A.L.R.2d 321.
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> In 3 Story, Equity Jurisprudence, 14th Edition, Sec. 1726, it is said to be a general principle 'that wherever a penalty is inserted merely to secure the performance or enjoyment of a collateral object, the latter is considered as the principal intent of the instrument, and the penalty is deemed only as accessory, and therefore as intended only to secure the due performance thereof or the damage really incurred by the non-performance. In every such case the true test (generally if not universally) by which to ascertain whether relief can or cannot be had in equity is to consider whether compensation can be made or not. If it cannot be made, then Courts of Equity will not interfere. If it can be made, then if the penalty is to secure the mere payment of money, Courts of Equity will relieve the party upon paying the principal and interest.'
>
> The foregoing doctrine 'has been applied by Courts of Equity to cases of leases where a forfeiture of the estate and an entry for the forfeiture is stipulated for in the lease in case of the non-payment of the rent at the regular days of payment; for the right of entry is deemed to be intended to be a mere security for the payment of the rent. * * * And in cases of this sort admitting of compensation there is rarely any distinction allowed in Court of Equity between conditions precedent and conditions subsequent.' 3 Story, Equity Jurisprudence, 14th Edition, Sec. 1727.

Hasden v. McGinnis, 54 Tenn. Ct. App. 39, 43–44, 387 S.W.2d 631, 633 (1964).

The Purchase Contract provides for forfeiture as a remedy for nonpayment. It is a "mere security" in the words of Justice Story quoted in *Hasden*. Mr. Cruz has always maintained that he will pay Allied in full. He asked for an accounting of the remaining balance as early as March 2022. See Tr. June 1, 2023, pp. 33-34; Tr. Ex. 13.[3] Allied has wrongfully refused to provide Mr.

[3] Late on the second day of trial, the Debtor attempted to introduce a transcript of text messages sent to Mr. Vick on March 24, 2022. As a result of technical difficulties, it was not possible at that time to print an acceptable copy so the content of the text messages were read into the record. An acceptable copy was prepared after trial and marked as Exhibit 13.

Cruz the information necessary for him to complete payment under the Purchase Contract. To permit Allied to retain the Property and all payments made by Mr. Cruz would be wildly disproportionate to the damages actually suffered by Allied, which has already received almost three times the amount that it invested to purchase the Property. The Court is satisfied that the *Terrell* court never foresaw nor intended such an inequitable result.

Whether the claim of Allied is treated as unsecured or secured, the treatment proposed by the Debtor satisfies sections 1325(a)(4) and (5).

The Plan is Feasible

Section 1325(a)(6) requires that the debtor be able to make all payments called for under the plan. Although Allied has argued to the contrary, the Second Amended Plan is feasible. The plan proposes to pay down the claim of Allied as far as possible from the appeal bond held by the circuit court and pay any remaining balance together with interest in monthly installments. The Debtor's pre- and post-petition conduct indicate that the payments can and will be made.

Remarkably, Allied argues that in order for the funds on deposit with the state court to be paid to Allied to cure the prepetition default in the Purchase Contract, the Debtor must dismiss his appeal, resulting in the judgment for possession becoming final. The result, argues Allied, is that the Purchase Contract should be deemed to have terminated before the bankruptcy petition was filed. The Court was not provided a copy of the judgment or bond, but it appears that Allied's position is contrary to Tennessee law.

Tennessee Code section 27-5-103(a) requires that an appellant from a judgment of a general sessions court "give bond with good security, as hereinafter provided, for the costs of the appeal, or take the oath for poor persons." Section 27-5-103(b) states that the bond will be considered sufficient "if it secures the cost of the cause on appeal." Additionally, Tennessee Code

section 29-18-130, provides that if a defendant appeals a writ of possession issued by a general sessions court, in "any action of forcible entry and detainer, forcible detainer, or unlawful detainer," the defendant must execute bond "with good and sufficient security in the amount of one (1) year's rent of the premises, conditioned to pay all costs and damages accruing from the failure of the appeal, including rent and interest on the judgment as provided for in this section." Tenn. Code Ann. § 29-18-130(b)(2)(A) (2022).

The Tennessee Supreme Court held in *Griffin v. Campbell Clinic, P.A.*, that the appeal bond required by section 27-5-103 may be a cash bond in the amount of the statutory costs (at that time $150) for appeals to the circuit court. 439 S.W.3d 899, 904 (Tenn. 2014). With respect to section 29-18-130(b)(2), however, the Tennessee Supreme Court has said that, unlike the section 27–5–103(a) appeal bond, which is jurisdictional and always required of a party seeking to appeal from general sessions to circuit court, "[t]he language of section 29–18–130(b)(2), . . . contemplates that a tenant[4] may appeal without posting bond, indicat[ing] that the bond is not jurisdictional but rather is non-jurisdictional and designed to stay the landlord's writ of possession." *Johnson v. Hopkins*, 432 S.W.3d 840, 849 (Tenn. 2013). *Johnson* continues, "[o]ur reading of the plain language of section 29–18–130(b)(2) as prescribing a non-jurisdictional bond requirement for staying the writ of possession pending appeal is also harmonious and consistent with the plain language of Tennessee Rule of Civil Procedure 62.05, which relates to the same subject—bonds required to secure a stay pending appeal." *Id.* at 850. Under Tennessee Rule of Civil procedure 62.05, a bond for stay shall have "sufficient surety,'" and if an appeal is from a

[4] Prior to April 2022, the bond requirement was applicable to a tenant appealing a judgment for possession issued in the case on the grounds that the tenant failed to pay rent. Section 29-18-130 was amended in 2022 to apply to all appeals from a judgment for possession, not just those based on failure to pay rent. Tenn. B. Summ. 2022 Reg. Sess. H.B. 2243 (June 20, 2022).

judgment ordering possession of real property, "shall be conditioned to secure obedience of the judgment and payment for the use, occupancy, detention and damage or waste of the property from the time of the appeal until delivery of possession of the property and costs on appeal." Tenn. R. Civ. P. 62.05(2). Upon motion and for good cause shown, however, the bond may be set in an amount less than that called for in the rule. *Id.* Consistent with *Johnson*, the Tennessee Court of Appeals has ruled that the failure of an appellant "to post a bond under Tennessee Code Annotated 29-18-130(b)(2) does not deprive the circuit court of subject matter jurisdiction to consider an appeal of a detainer action." *Belgravia Square, LLC v. White*, No. W2018-02196-COAR3-Cv, 2019 WL 5837589, at *4 (Tenn. Ct. App. Nov. 7, 2019). This is now the prevailing view among Tennessee courts. *Thomas v. Millen*, No. W2019-00086-COA-R3-CV, 2019 WL 6954178, at *3, n. 3 (Tenn. Ct. App. Dec. 19, 2019).

There is nothing to suggest that the appeal would be lost if the clerk of the circuit court is directed to pay over all but the required statutory appeal bond amount to the Chapter 13 trustee as property of the estate. *See* 11 U.S.C. §§ 541(a)(1) and 542(a). The Debtor's proposed retrieval of all but this amount is consistent with Tennessee law.

Allied also argues that the funds from the bond must be paid into the plan before it can be used to cure any post-petition default under the Purchase Agreement. Allied states "[t]hat would mean there would be sufficient funds to pay every pre-petition claim in full as there appears to be only $65,000 (plus interest) in claims," which would leave the Debtor without sufficient funds to pay post-petition rent owed to Allied. [ECF No. 52, p. 6]. The $65,000 amount referred to by Allied apparently includes its original $56,700 claim (the same cure amount) and the claim of Amigos Auto Sales (proof of which has not been filed). Amigo's Auto Sales' claim is a secured claim provided for by the plan. Since the Debtor does not propose to surrender Amigo's collateral,

it is appropriate for the Debtor to propose to repay that claim in monthly installments. *See* 11 U.S.C. §1325(a)(5). It need not be paid from the funds brought over from the circuit court. That leaves only the claim of Allied to be paid. The Purchase Contract and Note call for monthly rent in the amount of $1,300 after a 30-day grace period after the last installment is paid. Allied's objection was filed before the Second Amended Plan, which increases the proposed monthly plan payment to $3,000. Until Allied's claim is liquidated, it is impossible to determine whether any amount will remain to be paid for post-petition rent, but if there is, the proposed plan payments are sufficient to pay it.

The Action of the Debtor in Filing the Petition was in Good Faith

Section 1325(a)(7) requires that the good faith of the debtor in filing the petition be evaluated in addition to the section 1325(a)(3) requirement that the plan be proposed in good faith. This requirement was added by the Bankruptcy Abuse Prevention and Credit Protection Act of 2005 to prevent the abuse of debtors filing bankruptcy petitions in order to enjoy the protection of the automatic stay with no intention of filing a plan or making payments to the trustee. The Debtor demonstrated his good faith in filing the bankruptcy petition by filing with his petition a plan providing for full payment of the claims of Allied and Amigos Auto Sale. He demonstrated his good faith by tendering to the circuit court an amount that was more than sufficient to cure the arrearage in payments according to the proof of claim eventually filed by Allied. He showed his good faith by amending his plan in an attempt to negotiate a workable solution with Allied. The Debtor has adequately demonstrated his good faith in filing his bankruptcy petition.

There are no Domestic Support Obligations Owed by the Debtor

Section 1325(b)(8) requires the debtor to pay all domestic support obligations that come due after the filing of the petition before a plan is confirmed. The Debtor in this case owed no domestic support obligations.

The Debtor has Filed All Applicable Tax Returns

Section 1325(a)(9) requires that the Debtor file all prepetition tax returns before the plan is confirmed. There is no indication that the Debtor has failed to file required tax returns.

The Amount to Be Distributed Under the Plan Equals the Amount of the Claim of Allied

Section 1325(b)(1) requires that if the holder of an allowed unsecured claim objects to confirmation of the plan, the plan must either provide for the payment of that claim in full or provide that all of the debtor's projected disposable income be paid into the plan over the applicable commitment period. Allied is not the holder of an allowed unsecured claim as a result of the objection filed by the Debtor. *See* 11 U.S.C. § 502(a). Even if it were, the Second Amended Plan proposes payment in full of its claim.

CONCLUSION

The Second Amended Plan satisfies all of the conditions for confirmation set out in section 1325(a) and (b). The objections of Allied and the Chapter 13 Trustee are overruled. The Chapter 13 trustee shall prepare an order of confirmation consistent with this opinion, and counsel for the Debtor shall prepare an order directing the circuit court clerk to turn over to the Chapter 13 Trustee of the amount of the fund held by the circuit court that is not necessary to satisfy the statutory requirement for an appeal bond and an order granting the motion to assume the Purchase Contract. The Debtor shall commence making plan payments in the amount of $3,000 per month within thirty days after the order confirming the plan becomes final. The trustee shall accumulate plan

payments not necessary to pay administrative expenses, attorneys' fees, and the monthly installments due to Amigos Auto Sales until the claim of Allied is finally determined and allowed.

cc: Debtor
Attorney for Debtor
Allied Ventures, LLC
Attorney for Allied Ventures, LLC
Chapter 13 Trustee
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