Dated: February 23, 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
Allied Ventures, LLC, Movant, v. Jose Antonio Cruz, Respondent.	Motion for Relief from Stay [ECF No. 11]

ORDER DENYING MOTION FOR RELIEF FROM STAY

BEFORE THE COURT is the *Motion for Relief from Stay and Expedited Hearing* [sic], filed September 19, 2022, by Allied Ventures, LLC ("Allied") [ECF No. 11]. The Debtor, Jose Antonio Cruz, did not file a response but has appeared in opposition to the motion through his attorney, Mr. Bruce Ralston. Mr. Cruz uses the real property which is the subject of the motion as a church. There have been seven scheduled hearings to consider the motion, with the final one conducted February 9, 2023, almost six months after the bankruptcy petition was filed. The Debtor

has tried during that time to address the concerns raised by Allied including the lack of adequate insurance and insufficient plan payments. In fact, the Debtor filed his *Second Amended Chapter 13 Plan* on the eve of the most recent hearing [ECF No. 54]. Allied filed a written objection to the Debtor's *First Amended Chapter 13 Plan* two days before the hearing [ECF No. 52] and stated through counsel that the *Second Amended Plan* still is not acceptable to Allied. The Court took the motion under submission for decision.

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). Motions to terminate, annul, or modify the automatic stay, and confirmations of plans are among the core proceedings arising under the Bankruptcy Code. *See* 11 U.S.C § 365(a) and 28 U.S.C. § 157(b)(2)(G) and (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).

BACKGROUND FACTS

Mr. Cruz and Allied entered into an agreement titled *Seller-Financed Industrial Purchase Agreement* on July 12, 2019 [*Motion for Relief from Stay,* ECF No. 11, Ex. 1] (the "Purchase Agreement").

Mr. Cruz's primary language is Spanish, and he has used a Spanish Interpreter to assist him in the hearings before this Court. The Court is informed that there is another version of the Purchase Agreement, perhaps the original, written in Spanish. The Court informed the parties that it would rely upon the English-language version in making its decision.

The Purchase Contract designates Allied as "Seller" and Mr. Cruz as "Buyer," but also refers to a "Lessor," not specifically identified.

The Purchase Agreement calls for the Buyer to pay $290,000 for the purchase of property located at 1445 Warford St., Memphis, Tennessee. The Purchase Contract states that, "The value given on the property is the current County appraised value and is subject to decrease or increase every year," but the Purchase Contract also states, "Since this property was purchased at a tax sale, title insurance may or may not be available at closing." In fact, Allied acquired the Warford property on December 17, 2019, from Shelby County for $80,500 [*Motion for Relief from Stay,* ECF No. 11, Ex. 3]. The Purchase Agreement calls for Buyer to pay $30,000 on August 1, 2019, and monthly payments of $6,500 beginning "30 days after the deed is recorded in the name of Allied" for forty months until the full purchase price of $290,000 is paid.[1] At the completion of these payments, a closing and recorded sale is to occur.

The Seller authorizes the Buyer to "open a church or place of worship or activities that are similar," but states that "If the buyer is operating within the law and does not violate codes or zoning, they may use the building and property as they wish."

[1] Allied received title to the property by Quit Claim Deed on December 17, 2019. The first monthly payment thus came due under the Purchase Agreement on January 16, 2020. If all payments had been made as scheduled in the Purchase Agreement, the Debtor would complete payments April 2023. Neither party has provided the Court with a calculation of the payments actually made. As discussed below, Allied filed an unsecured proof of claim in the amount of $56,700 as a claim under a lease. The court cannot determine how Allied calculated the amount of its claim.

Payments more than 15 days late are subject to a late charge of 5% of the monthly billing. There is no penalty for prepayment.

With respect to nonpayment, the Purchase Agreement provides:

> If no payment has been made for more than (60) days, I will cancel any future billing and the property will be available for purchase or finance to any buyer. Buyer will forfeit all deposits, improvements, payments made and otherwise all their investment into the property.

The Purchase Agreement further provides, "Buyer is accepting this property in as-is condition and will be responsible for every aspect of the property for the duration of this agreement and in perpetuity."

In an Addendum entitled "Schedule of all fees associated with owner-financing of your property," the Purchase Agreement calls for the Buyer to obtain property insurance of at least $500,000 replacement value on the building, and $300,000 in liability insurance.

In addition to the Purchase Agreement, Mr. Cruz as "Buyer/Borrower" signed a *Promissory Note* dated July 12, 2019 [*Motion for Relief from Stay,* ECF No. 11, Ex. 2]. The note recites:

> FOR VALUE RECEIVED, the Borrower promises to pay to the Lender at such address as may be provided in writing to the Borrower, the principal sum of $290,000 USD, without interest payable on the unpaid principle [sic], beginning thirty (30) days after the deed is transferred from Shelby County into the name Allied Ventures LLC.

The Note provides that should the Borrower default, "the Lender may declare the principal amount owing under this Note at that time to be immediately due and payable," but also, "If the scheduled amount of payment is not made in sixty (60) days after the invoice date, you will forfeit not only the property, but all deposits, improvements and payments made."

The Debtor filed his Chapter 13 bankruptcy petition on September 9, 2022. The petition states that the Debtor is the proprietor of Baleadas Express Alma's located on Macon Road. The

Debtor also lists real property on Faxon Avenue, Reenie, and the Warford Property, which he valued at $417,400, and added this explanatory comment: "Disputed ownership of land and building, intended to be used as a church. Probably actually worth much more than the county assessment." The Debtor stated that the amount owed to Allied on the date of the petition was $87,000.

The Debtor's initial plan, filed with the petition, called for payments of $1,900 per month, with a monthly payment to Allied of $1,450. The only other creditor specifically provided for in the plan is Amigos Auto Sales to be paid $200 per month. The plan proposed to pay general unsecured creditors 100% of their claims over a five-year period. *See* Chapter 13 Plan [ECF No. 2].

Allied filed its Motion for Relief from Stay on September 19, 2022. The motion alleges that the Debtor has not made a monthly payment since July 1, 2022, and that the property is not properly insured. The motion also alleges that Allied obtained a judgment in the Shelby County General Sessions Court for possession of the property on June 23, 2022, and that the Debtor filed a notice of appeal from that decision on July 27, 2022. The judgment was not made part of the record and the parties have made no mention of a judgment *amount*. The Court assumes that it was merely a judgment for possession.

Allied argues that the Debtor's proposed plan incorrectly treats Allied's claim as a secured claim rather than a lease. Allied also asserts that its claim is actually $114,800 rather than the $87,000 asserted by the Debtor. The exhibits to the Motion for Relief from Stay consist of the Purchase Agreement, Promissory Note, and Quit Claim Deed described above. The motion does not explain how and why Allied accepted a payment from the Debtor *after* it had obtained a judgment for possession, but the Debtor's Statement of Financial Affairs lists a payment of $5,500

made to Allied in July 2022, which is consistent with Allied's statement that it last received a payment on July 1, 2022.

Allied filed its Proof of Claim on October 13, 2022, asserting that it holds an unsecured claim in the amount of $56,700 [Proof of Claim 1-1.] No explanation is given for the calculation of the claim amount or for the difference between this mount and the amount Allied claimed it was owed in the Motion for Relief from Stay. The only document attached to the Proof of Claim is the Purchase Agreement.

The Court scheduled hearings on the Motion for Relief from Stay on October 6, November 3, November 17, December 1, December 15, 2022, and January 12, 2023. At the initial hearing, the Debtor was prohibited from using the property for church services until he could provide proof of insurance acceptable to Allied. At the hearing on December 1, 2023, the Debtor was able to show that he had obtained property and liability insurance acceptable to Allied, and he was permitted to continue his use of the property. At some point the Debtor made the Court aware that he posted a cash bond in the amount of $86,000 in connection with the appeal of the General Sessions Court judgment. This asset does not appear in the Debtor's schedules.

On January 11, 2023, the Debtor filed his *Motion to Assume Lease as to Allied Ventures, LLC* [ECF No. 30] and on January 12, the Debtor filed his *Amended Chapter 13 Plan* [ECF No. 31]. In the Motion to Assume, the Debtor proposes that,

> If the Court finds this to be a secured claim, then Debtor is still willing to pay it in full with interest. If this is determined to be an executory contract, then Debtor wishes to assume that contract, with the prepetition arrearage paid in full through the plan, and any post-petition payments to be paid directly, including whatever it takes to cure any post-petition arrearage. Debtor proposes to use the $86,000.00 presently being held by the Shelby County Circuit Court Clerk to satisfy any such post-petition arrearage, and to otherwise be applied to the plan as may be determined by the Court.

Motion to Assume [ECF No. 30], ¶ 3. The amended plan increased the proposed plan payments to $2,200 per month but lowered the proposed payment to Allied to $1,200 per month. It appears that the Debtor's intent was that if the Purchase Agreement were treated as an executory contract, he would cure the arrearage in payments and make the remaining ongoing payments.

On January 17, 2023, the Debtor filed monthly operating reports for his three business ventures for the months of July through December. The reports for the church only show net monthly income in the following amounts:

July	$3,040
August	3,301
September	1,795
October	2,970
November	(860)
December	2,983
Total	14,949
Average	2,492

Even if the month in which the Debtor was not permitted to enter the property because of his lack of insurance is ignored, the average net monthly income from operation of the church was $2,818, less than is required to service the ongoing obligation to Allied, but the Debtor has additional sources of income. In addition to the church property, the Debtor operates a restaurant and has certain residential rental properties that provide income. The monthly operating reports for the restaurant show average net monthly income of $4,974, and for the residential rental properties, average net monthly income of $2,034. The Debtor's amended Schedules I and J show net monthly income from all sources of $6,979.00.

Allied filed an *Objection to Confirmation* of the Amended Plan on February 7, 2023, and the Debtor filed his *Second Amended Chapter 13 Plan* on February 8, 2023 [ECF Nos. 52 and 54]. Allied argues that the proposed plan is not feasible and further that its claim should not be treated

as a secured claim but rather as an executory contract. It argues that the Debtor does not have the means to assume the contract.

The Second Amended Plan proposes to apply the $86,000 on deposit with the Shelby County Circuit Court Clerk to the plan and to convert the Purchase Agreement into a "standard mortgage" secured by a deed of trust upon the property. The plan asserts that no more than $110,000 remains to be paid to Allied and that the value of the property is at least $417,000. No creditor other than Allied filed a timely proof of claim, but the Debtor acknowledges a debt to Amigos Auto Sales in the amount of $9,100 secured by a truck. The plan provides for the Debtor to file a proof of claim on behalf of that creditor and make payments of $280 per month. The Debtor proposes to pay $3,000 per month to fund his plan.

At the hearing on February 9, 2023, counsel for Allied argued that the plan as further amended still is not capable of confirmation because the Purchase Agreement is a land sale contract rather than a lease (contrary to the Proof of Claim filed by Allied). Counsel argued that there is nothing for the Debtor to assume because the property was forfeited when the Debtor failed to make the monthly payments called for in the Purchase Agreement.

The only matter before the Court at this time is the Motion for Relief from Stay. The hearing on confirmation of the Debtor's proposed Second Amended Chapter 13 Plan is set for March 9, 2023.

ANALYSIS

Allied asks the Court to grant it relief from the automatic stay for cause. *See* 11 U.S.C. § 362(d)(1). It asserts that after more than four months under the protection of the Bankruptcy Code, the Debtor has been unable to propose a plan that is capable of confirmation. It also asserts that the Purchase Contract is an executory contract that the Debtor does not have the ability to

assume, and that the insurance coverage for the property is still inadequate pursuant to the terms of the Purchase Agreement. The Debtor counters that the interest of Allied is more than adequately protected by the value of the property, some $417,400, and by the insurance that he was able to obtain. He further proposes a plan that would repay the remaining balance owed to Allied in full together with interest. He proposes to maintain property and liability insurance in the amounts of $500,000 and $1,000,000 (the Purchase Agreement requires only $500,000 and $300,000). He proposes to make adequate protection payments of $1,800 per month until the plan is confirmed. *See* Second Amended Chapter Plan [ECF No. 54].

The Court's analysis begins with the nature of the Purchase Agreement. As the Court noted in its summary of the facts, Allied itself has variously described the contract as a lease and as a land sale contract. The Purchase Agreement has some of the characteristics of an outright sale. It delivers possession to the Buyer and shifts all responsibility for the property to him: "Buyer is accepting this property in as-is condition and will be responsible for every aspect of the property for the duration of this agreement and in perpetuity." Yet, it reserves in the Seller the right to specify how the property will be used (not for any illegal purpose) and the type of insurance that must be provided ("Property insurance must cover at least $500,000 replacement value on the building and no less than $300,000 for any liability"). Although the Seller delivered possession at the time of the Purchase Agreement, the agreement does not call for the delivery of title until all payments are made. These incidents are consistent with an installment land sale contract.

The agreement is accompanied by the Promissory Note, however, which includes an absolute obligation to pay $290,000, an obligation that is consistent with a loan secured by real property. The Promissory Note also contains some of the language from the Purchase Agreement, however, that is inconsistent with an absolute obligation. It calls for the Borrower to forfeit "the

property … all deposits, improvements and payments made" should a scheduled payment not be made within sixty days after the invoice date, and, in addition to the payments required to pay the principal amount of $290,000, the Note makes the Borrower responsible for "[a]ll property taxes, city fees for grass/weed cutting and liability insurance."

Although there is some ambiguity in the arrangement contemplated by the parties, the Court believes and finds for purposes of the pending Motion for Relief from Stay that the agreement between the parties is best characterized as an installment land sales contract. The installment land sales contract is a recognized alternative to a deed of trust in Tennessee. The nature of the installment land sale contract was described by Bankruptcy Judge Richard Stair as follows:

> 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. Although Allied obtained a judgment for possession prior to the filing of the bankruptcy petition, 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 became property of his bankruptcy estate upon filing, and he may attempt to protect that interest through his plan.

The Court did not hear testimony concerning the events that led to default in payment by the Debtor, but the Debtor asserts in the Second Amended Chapter 13 Plan that:

> For the first 30 - 32 months, more or less[,] Debtor tendered all monthly payments, but admittedly failed to secure adequate insurance, as required by the purchase agreement. During that time Debtor also paid the local property taxes through Mr. Vick, the principal of Allied Ventures. At some point in 2022 a disagreement arose between buyer and seller. Debtor attempted to make payments, but Mr. Vick ceased communicating, and left Debtor with no clear, secure method for making those payments.

ECF No. 54, p. 4. It this is true, the Debtor has paid between $225,000 and $238,000 toward the purchase price, 71-77% of the required $290,000.[2] This means that between $52,000 and $65,000 remains to be paid, a range that includes Allied's Proof of Claim amount of $56,700. The Debtor proposes to repay the remaining amount due to Allied by applying the cash currently held by the Circuit Court Clerk to the indebtedness and by making regular monthly payments together with

[2] My calculation is as follows: $30,000 (down payment) + (30 x $6,500) = $225,000; $30,000 + (32 x $6,500) = $238,000.

interest until any remaining balance is paid. The Debtor believes that the value of the property is in excess of $400,000. Allied has not argued otherwise. Instead, Allied asserts that it should be able to sell this valuable property to another buyer while the Debtor forfeits all of the payments made to date, which the Debtor believes exceed $200,000.

Equity abhors a forfeiture. Even in the absence of statutory regulation, numerous states limit the ability of a vendor to exercise a right of sale against a defaulting vendee when forfeiture would be unreasonable or inequitable. *See* G. Nelson, D. Whitman, A. Burkhart, W. Freyermuth, 1 Real Estate Finance Law: Judicial Limitations on Forfeiture § 3:29 (6th ed. 2016). Among the numerous cases discussed there is a decision of the Missouri Court of Appeals, which affirmed the grant of specific performance to a vendee who had paid almost 35% of the purchase price under a land sale contract before he defaulted. The vendee missed one payment by fifteen days and the vendor refused to accept the late payment. The vendee sued for specific performance and tendered the balance owed on the contract. The trial court granted specific performance and the court of appeals affirmed. *Nigh v. Hickman*, 538 S.W.2d 936 (Mo. Ct. App. 1976). Likewise, the Hawaii Supreme Court affirmed the grant of specific performance to a vendee who had paid only 16% of the total purchase price under a land sale contract saying, "[e]quity … abhors forfeitures and where no injustice would thereby result to the injured party, equity will generally favor compensation rather than forfeiture against the offending party." *Jenkins v. Wise*, 58 Haw. 592, 574 P.2d 1337 (1978). According to the Hawaii court, one of the key factors a trial court should consider is whether forfeiture would be harsh and unreasonable under the circumstances. *Id.*, 58 Haw. at 597. As the court explains, "[t]he penalty of forfeiture is designed as a mere security, and if the vendor obtains his money or his damages, he will have received the full benefit of his bargain." *Id.*

The trend, according to these and numerous other examples cited in the article is to provide relief to the vendee under an installment land sale contract who has paid a substantial portion of the purchase price, allowing the vendee to tender the remaining purchase price or the defaulted payments, a remedy analogous to the equity of redemption. The Supreme Court of Indiana, for example, has held

> [A] land contract, once consummated constitutes a present sale and purchase. The vendor "has, in effect, exchanged his property for the unconditional obligation of the vendee, the performance of which is secured by the retention of the legal title." *Stark v. Kreyling* . . ., 207 Ind. at 135, 188 N.E. at 682. The Court, in effect, views a conditional land contract as a sale with a security interest in the form of legal title reserved by the vendor. Conceptually, therefore, the retention of the title by the vendor is the same as reserving a lien or mortgage. Realistically, vendor-vendee should be viewed as mortgagee-mortgagor.

Skendzel v. Marshall, 261 Ind. 226, 234, 301 N.E.2d 641, 646 (1973). Significantly, among the many decisions discussed by the Indiana Court is the early decision of the Tennessee Supreme Court, *Graham v. McCampbell*, 19 Tenn. 52, 33 Am.Dec. 126 (1838), which states:

> We are 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.'

Quoted in *Skendzel*, 261 Ind. at 236, 301 N.E.2d at 235.

If the Tennessee Supreme Court is not able to draw a material distinction between the two, it is unlikely that this bankruptcy court should do so, especially where the result could be a shocking forfeiture by the Debtor. It is not, however, necessary for the Court to determine at this juncture what protection might be provided to the Debtor by the Tennessee courts, even though it seems clear that they would protect the interests of a vendee who has paid more than 70% of the purchase price and has not in any way repudiated his obligation. Mr. Cruz has sought the protection of the bankruptcy court precisely in order to avoid the cost and uncertainty of further litigation in

the state courts, and Mr. Cruz has proposed a plan that treats the remaining obligation to Allied as a secured debt consistent with the instructions of the Tennessee courts that the vendor under an installment land sale contract holds legal title in trust for the vendee. In the alternative, Mr. Cruz has proposed to treat the Purchase Contract as an executory contract. He proposes to assume the contract, repaying the arrearage and any remaining payments through his plan. Unlike the debtor in *Terrell*, the case relied upon by Allied to assert that the Debtor must treat the Purchase Agreement as an executory contract for purposes of his plan, the Debtor does not propose to reduce the amount of the secured claim of Allied, the circumstance that caused the court of appeals to distinguish the Michigan land sale contract from a secured mortgage. *See Terrell v. Arbaugh (In re Terrell)*, 892 F.2d 469 (6th Cir. 1989). The possibility of the vendee's forfeiture was not a circumstance considered by the court of appeals, so the *Terrell* opinion is not helpful here where the Debtor is asking to be permitted to retain his property by paying the full purchase price. Allied has made conflicting claims about what amount is owed, but whatever that amount is, the Debtor proposes to pay it. The Court is not certain whether the distinction between the two possible treatments of Allied's claim will result in a material difference. With a proposed plan set for hearing on confirmation less than a month away, and Allied enjoying a substantial equity cushion and adequate casualty insurance, the Court finds and concludes that no cause exists at this time for granting relief from the automatic stay. The Debtor either will or will not be able to attain confirmation of his plan. The Court finds no reason at this time to short-circuit that process.

CONCLUSION

For the foregoing reasons the Court concludes that cause does not exist to grant relief from the automatic stay to Allied at this time. The Debtor has an equitable interest in the property under an installment land contract. The Debtor has made substantial payments toward completion of his

payments under that contract and has proposed a Chapter 13 plan to repay the remaining balance either as a secured obligation or as an assumption and cure. The Court finds that Allied's interest is adequately protected by a substantial equity cushion and insurance. The Motion for Relief from Stay is, accordingly, **DENIED**.

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