SO ORDERED.

SIGNED this 11 day of February, 2011.

JANICE MILLER KARLIN
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:	)	
THOMAS WEIMER BAUGHMAN	)	**Case No. 10-41545**
	)	**Chapter 13**
Debtor.	)	
	)	

ORDER DENYING DEBTOR'S OBJECTION TO CLAIM NO. 2 AND GRANTING CREDITOR NEBRASKA FURNITURE MART'S OBJECTION TO CONFIRMATION OF DEBTOR'S PLAN WITH CONDITIONS FOR CONFIRMING PLAN

This decision involves the weighty issue of how much a debtor must pay a creditor in his Chapter 13 plan for a two year old dishwasher that, when new, was worth $500. It is before the Court on Debtor's Objection to Claim No. 2, filed by Nebraska Furniture Mart,[1] and Nebraska Furniture Mart's Objection to Confirmation of Debtor's Plan.[2] Both these matters involve questions

[1]Doc. 16.

[2]Doc. 12. The Court notes that Doc. 23 has been docketed as an Objection to Confirmation of Plan, as well, but that this later document is actually a response in support of the objection to confirmation and the objection to NFM's Proof of Claim.

about whether Nebraska Furniture Mart retains a valid security interest in certain items purchased on credit from its store. These matters are both core proceedings over which the Court has jurisdiction.[3]

I. FINDINGS OF FACT

The parties have filed a Stipulation of Facts,[4] which they contend is all the evidence they wish to submit. The Court therefore essentially adopts those stipulated facts, and summarizes them here.

Prior to filing for bankruptcy, Debtor purchased several items from Nebraska Furniture Mart ("NFM") with a Nebraska Furniture Mart credit card. The items purchased on the card included a granite counter top, a variety of "toys," to include an HD LCD television, XBOX Video game, Apple iPod Nano, and Panasonic home theater system, and a rocker/recliner, toaster oven, telephone, and a Frigidaire stainless steel dishwasher.[5] When these items were purchased, NFM obtained a security interest in the personal property to secure the debt charged on Debtor's credit card; Debtor does not contest that NFM properly perfected its security interest to the extent the items have retained their character as personal property.

The granite counter top was purchased in August 2008 for $3,764.00. The video game was purchased in November 2008 for $19.77 and the iPod was purchased approximately three weeks later in December 2008 for $130.00. The dishwasher was purchased in January 2009 for $495.89.

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[3] 28 U.S.C. § 157(b)(2)(B) and (L).

[4] Doc. 28.

[5] The Debtor agrees that the theater system, rocker/recliner, toaster, and telephone were all purchased within one year of filing, and thus "the amount required to be paid through Debtor's Chapter 13 Plan to retain the property is the full purchase price of the property, as mandated by the paragraph following 11 U.S.C. § 1325(a)(9)." Stipulation No. 5, Doc. 28.

The home theater system was purchased in October 2009 for $379.99 and the rocker/recliner, toaster oven and telephone were all purchased in March 2010 for a combined purchase price of $327.97. NFM filed a proof of claim for $3,280.27, claiming it was secured to the extent of $3,073.05.

The counter top and dishwasher were installed in Debtor's kitchen and remained there on the date of the filing of the bankruptcy petition in this case. Similarly, the home theater system, which apparently consists primarily of speakers, was installed at Debtor's home and also remained on the property. The 2008 television stopped working following the expiration of the warranty and was discarded by Debtor prior to the filing of the bankruptcy petition. The remaining items apparently remain in Debtor's possession.

Pursuant to statements made on the record at the hearing on November 22, 2010 and in the Stipulation filed January 14, 2011, the parties had resolved all issues except for those surrounding the granite counter top, the home theater system and the dishwasher. In the objection to NFM's claim, Debtor maintained that those three items had all become permanently affixed to his real property. As such, Debtor contends NFM's security interest is no longer valid as the property is no longer considered personal property, and NFM took no steps to record its interest in the county real property records.

Debtor now concedes that the home theater system, with the exception of any wires running through the walls (which NFM has never claimed), is not a fixture and that he must pay the value of that home theater system if he retains the system. NFM now admits that the granite counter top is a fixture in Debtor's home, and that it no longer holds a valid security interest in that property.[6]

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[6] Although not contained in the Stipulation filed with the Court, which specifically indicates that the Court will need to decide if the granite counter top is a fixture, NFM now contends in its brief that it "has, and still is, willing to stipulate that the granite counter top has been installed and is so affixed to the real estate so as to have

Therefore, the only issue before the Court is whether the dishwasher has become so affixed to the real estate as to constitute a fixture. If this item is a fixture, then NFM has no valid security interest in it. If it is not, the Debtor is required to pay the value of that dishwasher or surrender it to NFM.[7]

II. CONCLUSIONS OF LAW

This issue is governed by applicable state law, and thus the Court turns to Kansas law to resolve this issue.[8] As noted in *In re Farmland Industries, Inc.*, "for tax purposes, the Kansas legislature defines 'real property' as including not only the land itself, but all buildings, fixtures and improvements."[9] Personal property is defined "as every tangible thing which is the subject of ownership, not forming part or parcel of real property."[10] Kansas courts have imposed a three-part test for determining if personal property has become a fixture, and thus part of the real estate.

The three parts of the test are: (1) annexation to the realty (how firmly the items are attached and how easily they can be removed); (2) the intent of the parties (whether they intended the item to be permanently affixed to the real estate); and (3) how operation of the goods is related to the use of the realty (adaptability).[11] All three of these requirements must be met before property will be

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become a fixture under Kansas law. It is foolish to argue otherwise." *See* Doc. 27. The Court is unclear why Debtor argued this issue in his brief, which was filed two weeks after this concession.

[7]The appropriate date for valuing the dishwasher is the date of the valuation hearing. *In re Cook*, 415 B.R. 529, 523 (Bankr. D. Kan. 2009).

[8]*See Butner v. United States*, 440 U.S. 48-54-55 (1979) (holding that in a bankruptcy proceeding, state law governs the rights of the parties with regard to interests in property).

[9]298 B.R. 382, 387 (Bankr. W.D. Mo. 2003) (referring to K.S.A. 79-102).

[10]*Id*. *See also* K.S.A. 84-9-102(40) which defines "fixtures" as "goods that have become so related to particular real property that an interest in them arises under real property law."

[11]*In re Sand & Sage Farm & Ranch, Inc.*, 266 B.R. 507, 511 (Bankr. D. Kan. 2001) (citing *Peoples State Bank v. Clayton*, 2 Kan. App.2d 438, 439 (1978)).

deemed to be a fixture under Kansas law.[12] In other words, "before personal property can become a fixture by actual physical annexation, the intention of the parties and the uses for which the personal property is to be put must all combine to change its nature from that of the chattel to that of the fixture."[13] The burden of proving that an item remains personal property lies with the party claiming the item is in fact personal property.[14] Thus, the Creditor, NFM, has the burden of proving that the dishwasher does not satisfy at least one part of the three part test.

With regard to how firmly the dishwasher is attached to the real estate, and the ease by which it can be moved, the Court finds in favor of NFM. Debtor argues that the dishwasher is firmly attached to the realty because it is "hard-wired" into the electrical system, it is connected to the hot water supply and sewer drains, it has two screws connecting it to the surrounding cabinets and it cannot be easily removed. The Court notes that whether it was "hard-wired" or connected to the hot water supply or sewer drains, or its ease of removal, are not among the facts stipulated to by the parties. In addition, the pictures presented to the Court do not show these "facts."

In addition, there is nothing in the stipulated facts or pictures that reveal that removal of the dishwasher would cause physical damage to the realty. There is also nothing to show that the dishwasher has been "built in," that it was a custom order requiring specialized installation, or that the adjacent cabinetry had been specially sized or adapted for placement of this particular

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[12] *See Atchison, T. & S. F. R. Co. v. Morgan*, 21 P. 809, 812 (Kan. 1889); *In re Farmland Indus. Inc.*, 298 B.R. at 388.

[13] *In re Farmland Industries*, 298 B.R. at 388 (quoting *Atchison, T. & S. F. R. Co.,* 42 Kan. 23 (1889)).

[14] *Stalcup v. Detrich*, 27 Kan. App. 2d 880, 886-87 (2000) (holding that a metal building attached by metal bolts to a concrete slab, with steel girders connected to each bolt, and sheeting attached to the steel girders, was personal property because (a) it could be removed although "it would take some effort" and removal would not cause damage to the real estate, (b) it was not particularly adapted to the farmland on which it sat, and (c) the owners' intention at the time of annexation for it to remain personal property was borne out by their provisions that it be separately taxed and that the taxes be paid by a distinct party).

dishwasher. Neither the pictures nor the stipulated facts reveal that this is anything other than a standard-sized appliance that can be easily interchanged with a replacement. And although the Debtor argues that removal would cause the kitchen to be "functionally incomplete" and aesthetically unappealing, again, this is not a stipulated fact, but even if it was, it is not dispositive.

The Court disagrees that this dishwasher is a fixture under Kansas law.[15] Even assuming the facts not stipulated to are true, removal of the dishwasher seemingly takes three simple steps: removing the two screws, disconnecting it from its electrical source, and disconnecting it from the water supply. For that reason, this particular dishwasher could be easily removed without altering or, in any fashion, damaging any of the realty it is currently attached to or causing any damage to the dishwasher itself. And although the removal of the dishwasher may be somewhat more difficult than a refrigerator or stand-alone range, the Court finds that the dishwasher is similar to those other two appliances—especially with respect to Debtor's argument that its removal would leave the kitchen functionally incomplete and aesthetically unappealing.[16]

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[15] The Court thus simply disagrees with the single case cited by Debtor, *In re Cooperstein*, 7 B.R. 618 (Bankr. D. N.Y. 1980). The Court believes, after reading that case, that it is potentially distinguishable, because of the mortgage document in question, but even if not distinguishable, might be an example of the oft-referred to proposition that "bad facts make bad law." In that case, the Court was clearly distressed at the conduct of those debtors who left capped wires exposed, ripped out paneling and a floor, tore out carpentry from the hallway and living room, removed a built-in gas grill leaving bricks strewn about (as well as the dishwasher in question), and otherwise left the entire house in "deplorable condition."

[16] *Cf. In re Equalization Appeals of Total Petroleum, Inc*,. 28 Kan. App.2d 295, 300 (Kan. App. 2000) (holding that refinery property was firmly attached to the land and not easily removable, because tanks "are so large that the sheet metal to make them had to be transported to the site on semi trucks. It was welded down to create the floor of the tank, and the sides sheets were welded together until they formed a wall three inches thick. In order to remove the tanks, . . . they would have to be cut down a piece at a time. The refinery towers, weighing as much as 175,000 pounds, were built 20 feet into the ground with concrete foundations and designed to withstand 100-mile-an-hour winds. All of the property was originally interconnected, and it had not been severed from the land on the day of valuation. These facts constitute substantial competent evidence that the property was annexed to the realty.").

Notwithstanding that the removal of a refrigerator would also leave a kitchen incomplete and not as appealing, generally, "refrigerators are ordinarily considered personal property . . . given the parties' intent, the item's stock nature, its installation, and its possible removal without material damage."[17] Because the dishwasher in question is similarly not permanently affixed to the realty and can be easily removed, the Court finds it meets the test of personal property under this prong of the test.[18]

Next, the Court must consider how, if at all, the dishwasher was adapted to the use of the specific realty to which it is attached. The Debtor's only contention that the dishwasher is adapted to the realty is that it is connected (by two screws) to the surrounding cabinets, and that it makes the kitchen "aesthetically and functionally complete".[19] While this shows that the dishwasher "matches" the kitchen, it does nothing to prove that the dishwasher was adapted to the use of this particular realty. While the dishwasher is attached to the cabinets with screws, this is how it is affixed, not how it has been adapted. Therefore, while it is possible some dishwashers may be specifically tailored or "adapted" to the use of the realty, there is no evidence of such adaptation here. It appears

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[17] 35A Am. Jur.2d Fixtures § 59, citing *In re Phillips*, 54 B.R. 273 (Bankr. Colo. 1985) (holding that refrigerator and microwave oven that were attached by a plug into an electric socket, were not fixtures) and *Glen Park Assoc. LLC v. State, Dept. of Revenue*, 119 Wash.App. 481, 488, 82 P.3d 664, 669 (Wash.App. Div. 2, 2003) (holding "appliances that are not specially designed for or permanently affixed to the building and need only be plugged in to operate remain personal property and do not become fixtures.").

[18] *Cf. In re Farmland Industries, Inc.*, 298 B.R. at 388 (applying Kansas law) (holding that "[p]roperty required to be assembled on site, built into the ground, and moveable only at considerable expense may be deemed annexed to the realty," for purposes of determining whether it is a fixture under Kansas law); *In re Adam Stern Homes, Inc.*, 2008 WL 4490112 *1-2 (Bankr. M.D. Tenn. 2008) (finding that kitchen appliances —including a dishwasher, were essentially "slide-ins" or otherwise fungible if replacement was needed, and were not fixtures because they were not affixed to the realty in any special way and were removed without damage).

[19] Doc. 29, at 2.

this is a standard sized dishwasher that can easily be removed and used in another location.[20] Therefore, the Court also finds the dishwasher is personal property under the second prong of the test.

The final prong of the test is whether Debtor intended the dishwasher to be permanently attached to the realty. Intent "is deduced largely from the property-owner's acts and the surrounding circumstances."[21] No part of the stipulated facts or pictures allow this Court to infer that Debtor intended for the dishwasher to be permanently affixed, and Debtor elected not to testify on this issue, but to submit the matter by stipulated facts that do not in any fashion address intent. The pictures show it to be a run of the mill $500 dishwasher. Even if the argued facts that it was "hard-wired" into the house's electrical system had been stipulated by the parties, that evidence is insufficient evidence to determine it was Debtor's intent to make this a permanent part of the residence.

Similarly, NFM has presented no evidence of intent, either. But because each element of the three-pronged test must be met before an article may properly be considered a fixture, and NFM has met two of the three tests, the Court finds the dishwasher remains personal property even if NFM has failed to meet its burden on this third element.

III. CONCLUSION

The evidence before the Court establishes that the dishwasher remains personal property, and Debtor is required to provide for the payment of the value of the dishwasher through his Chapter 13 plan if he intends to retain it. NFM's objection to confirmation is sustained to this extent. Rather

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[20] *Board of Educ., Unified School Dist. No. 464 v. Porter*, 234 Kan. 690, 695-96 (1984) (holding that where propane tank was above ground, unattached to soil and easily moved, tank and equipment were not fixtures, notwithstanding landowners' insistence that it was intended to be permanent,).

[21] *In re Sand & Sage Farm & Ranch, Inc.*, 266 B.R. at 511.

than making Debtor go to the time and expense of amending the plan to pay for this dishwasher as a secured claim, however, the Court will deem the plan amended to state that Debtor will pay the value of the dishwasher as a secured claim (and NFM retains its lien and will receive interest on that claim at the trustee's rate) unless Debtor opts to file a different amended plan, within 14 days, calling for the immediate surrender of this asset.[22]

The Court sustains Debtor's objection to NFM's proof of claim. Based upon NFM's concession that the granite counter top has become a fixture in Debtor's home, the amount of NFM's secured claim is clearly incorrect. NFM is required to amend its proof of claim within 14 days, in accordance with this decision, to reflect the proper valuation of its secured claim.

Because the parties reserved the valuation of the dishwasher until after the Court issued this decision, the Court sets the valuation of the dishwasher to an evidentiary hearing to be held on the Court's stacked evidentiary docket, **March 29-30, 2011.**[23]

IT IS, THEREFORE, BY THE COURT ORDERED that Debtor's Objection to Nebraska Furniture Mart's Proof of Claim[24] is sustained. Nebraska Furniture Mart is ordered to amend its proof of claim within 14 days to reflect the accurate amount of its secured claim.

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[22] The Court has reviewed Debtor's Schedules I and J, and notes a $250/month recreation expense and a $884 per month Thrift Savings Plan (401-K type government employee plan) deduction, both of which are likely elective expenses. Accordingly, it appears this plan would be feasible were the Debtor to add even up to $500 to pay for this appliance, as there seems to be ample room in the Debtor's budget for the expense if he wants to retain it.

[23] The Court understands that the parties have agreed to the value of all other items that must be valued. If that is not true, this evidentiary hearing will also be the time to present evidence on the value of any other item that Debtor intends to retain that was purchased greater than a year before filing bankruptcy. Obviously, the Court encourages the parties to resolve this matter without the necessity of trial. This would be a trial over a dishwasher that will be 27 months old when the hearing is held, with an original purchase price just under $500. It is exceedingly difficult to see how trying the issue of value is economically sound for either party.

[24] Doc. 16.

IT IS FURTHER ORDERED that Nebraska Furniture Mart's Objection to Confirmation of Plan[25] is sustained, but for reasons of judicial economy, the Court will sua sponte deem the plan amended to provide for full payment of the value of the dishwasher (to include interest and retention of the lien), as required by 11 U.S.C. § 1325(a)(5), unless Debtor opts to surrender that collateral, in which case he is required to amend the plan within the time noted.

IT IS FURTHER ORDERED that the Court will conduct a valuation hearing on the dishwasher on the Court's **March 29-30, 2011** stacked docket unless the parties can agree on the value prior to that time.

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[25]Doc. 12.