

*In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division*

In the matter of:)	
)	
MARION CRAIG LEWIS, JR.)	Chapter 13 Case
DEANNE J. LEWIS))	Number <u>95-40401</u>
)	
<i>Debtors</i>)	

MEMORANDUM AND ORDER

FINDINGS OF FACT

On March 1, 1995, Debtors filed their Chapter 13 case. Contemporaneous with the filing of their petition, Debtors asserted a damage action in State Court alleging substantial defects in the construction of their personal residence seeking damages for the cost allegedly necessary to correct the structural defects. Apparently, because of their non-bankruptcy counsel's belief that the State Court action would be resolved favorably within a month or two of their Chapter 13 filing, Debtors failed to make post-petition direct payments to Bankers First, the mortgage lender on the residence. Because of non-payment, Bankers First filed a Motion for Relief from Stay which initially was unopposed and an Order Granting the Motion for Relief was signed on August 24, 1995.

Thereafter, Debtors filed a Motion to Reconsider and to seek reimposition of the automatic stay believing that foreclosure of the property could prejudice their ability to successfully prosecute the damage action. This Court ordered that the stay be reimposed

subject to the Debtors maintaining post-petition direct payments commencing November 1. The Court further directed Debtors' counsel to submit a written order commemorating the Court's ruling which contained a strict compliance provision as it relates to those November 1 and subsequent house payments. As of the date of the hearing on confirmation, November 14, that Order had not been submitted by counsel.

Debtors filed a modified Chapter 13 plan on September 28, 1995, which provided that "all pre and post-petition arrearages owed to Bankers First at the time of confirmation shall be paid under the Chapter 13 plan." Bankers First appeared at the confirmation hearing and objected to the terms of the modified plan insofar as it provided for a curing of post-petition payments which were in default in an amount stipulated to be \$6,225.45. Moreover, Debtors' modified plan made no provision for the time within which either the pre or post-petition arrearages would be cured. Bankers First further argued that Debtors were in default of the Court's verbal order that post-petition payments commence November 1 in that Debtors had remitted only \$900.00 of the \$989.00 payment due on November 1.¹

In support of their position, Debtors rely on the case of In re Hogle, 12 F.3d 1008 (11th Cir. 1994), for the proposition that the post-petition default in direct payments may be cured in a modified plan. Bankers First objects on the ground that the Hogle case only dealt with a single payment and allowed for cure within a period of five days; whereas, here

¹ On November 15, 1995, this Court ordered Debtors to pay the remainder of their November payment of \$89.00 to Bankers First by November 20, 1995. Further, Debtors' were ordered to make their future direct payments to Bankers First in strict compliance with the loan agreement.

the Debtors are in arrears post-petition for a six-month period and have not included specific provisions as to the length of time during which the post-petition arrearage would be cured. The question presented, therefore, is whether the Hogge case is controlling and Debtors' modification is proper or whether it is distinguishable and whether Debtors have proposed a plan which cannot be confirmed.

CONCLUSIONS OF LAW

_____ In pertinent part, Section 1322(b) provides:

Subject to subsections (a) and (c) of this section, the plan may--

(5) . . . provide for the curing of *any default within a reasonable time* and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due;

11 U.S.C. §1322 (emphasis supplied).

Debtors correctly cite In re Hogge, 12 F.3rd 1008, for the proposition that post-petition as well as pre-petition arrearage may be cured by a modified plan. Under 11 U.S.C. §1323,² Debtor may modify a Chapter 13 plan at any time prior to confirmation,

² In pertinent part, § 1323 provides:

(a) The debtor may modify the plan at any time before confirmation, but may not modify the plan so that the plan as modified fails to meet the requirements of section 1322 of this

provided that the plan, as modified conforms to the requirements of Section 1322. Section 1322 clearly states that the Debtor may cure "any default." Congress could have inserted the word pre-petition to modify default but failed to do so. Thus, the plain meaning of Section 1322 permits the curing of defaults, both pre and post-petition. Id., at 1010.

However, Section 1322 also requires the curing of default "within a reasonable time." In the present case, Debtors have not provided the Court with their proposed treatment of the default under the plan and, therefore, I am unable to evaluate whether or not Debtors' plan proposes to cure the arrearage "within a reasonable time." Thus, Debtors' confirmation is denied and a continued hearing will be scheduled to consider any modified plan that clearly outlines the treatment of the post-petition arrearage.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THE COURT that Debtor's confirmation hearing be continued until the month of January 1996 and that Debtor supply this Court and Bankers Trust a proposed modified plan within fifteen (15) days of this ORDER.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

title.

This ____ day of December, 1995.