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P.m. Date 2-14-92  
IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA  
Augusta Division

IN RE:	)	Chapter 13 Case
	)	Number <u>91-11173</u>
BETTY A. ANDERSON	)	
	)	
Debtor	)	
_____	)	
C. MURRAY WILLIAMS	)	
	)	
Movant	)	
vs.	)	
	)	
BETTY A. ANDERSON	)	
	)	
Respondent	)	

**ORDER**

By motion, C. Murray Williams ("Mr. Williams"), the holder of an allowed secured claim in this Chapter 13 proceeding, seeks in the alternative dismissal of this case or relief from the stay of 11 U.S.C. 362(a) in order to foreclose his security interest in property of the debtor, Betty A. Anderson. The facts necessary to resolve the motion are not at issue. Mr. Williams is the holder of a promissory note from the debtor dated September 1, 1988 in the principal sum of Eighteen Thousand Nine Hundred and No/100 (\$18,900.00) Dollars, which note is secured by a security deed of even date recorded in the Office of the Clerk of Superior Court of Richmond County, Georgia. The note grants a first in priority

security interest in real estate which is the debtor's principal residence. On October 13, 1989 Ms. Anderson filed a Chapter 13 proceeding in this court, case No. 89-11584. The debtor's plan was confirmed and proceeded until dismissal by order dated May 15, 1991. Dismissal was based on a material default by debtor in the performance of the confirmed plan, specifically, her failure to make timely plan payments. In the first Chapter 13 proceeding Mr. Williams filed his proof of claim and in accordance with the plan, the debtor made payments on the indebtedness directly to Mr. Williams. Although the payments were made, they were late and irregular. Following dismissal of the first Chapter 13 plan, Mr. Williams commenced foreclosure of his security interest with scheduled public sale for July 2, 1991. On July 1, 1991 Ms. Anderson filed this Chapter 13 case. Mr. Williams timely filed his proof of claim asserting a secured claim in the amount of "\$19,754.10 + attorney's fees" with a prepetition arrearage of Two Thousand Eight Hundred Five and No/100 (\$2,805.00) Dollars. The present Chapter 13 plan objected to by Mr. Williams provides for monthly payments from the debtor of Ninety and No/100 (\$90.00) Dollars to the Chapter 13 trustee for disbursement in accordance with the terms of the plan. Relevant to the claim of Mr. Williams, the debtor proposes to cure the prepetition payment arrearage by disbursements from the Chapter 13 trustee and to make regular post petition payments as they come due to Mr. Williams. Mr. Williams seeks dismissal or relief from stay contending that the debtor is not eligible for Chapter 13 relief pursuant to 109(g), that the plan fails to comply with the requirements of 1322(b)(2), (b)(3) and

(b) (5), that the plan may not provide for the curing of prepetition arrearages by disbursements from the Chapter 13 trustee and the maintenance of future payments by direct payment from the debtor, and that the plan is not feasible under 1325(a) (3), nor filed in good faith under 1325(a) (6). The position of Mr. Williams is not well founded.

Regarding Mr. Williams' contention that the debtor is not eligible for bankruptcy relief under 109(g),<sup>1</sup> according to Mr. Williams, pursuant to 109(g) (1), the dismissal of the first Chapter 13 proceeding was based upon the willful failure of the debtor to abide by the confirmation order in that case requiring the debtor to make the payments to the Chapter 13 trustee in accordance with the terms of the confirmed plan; therefore, the debtor was barred from seeking relief under title 11 for 180 days from May 15, 1991, date of dismissal. In the dismissal of the first Chapter 13 case I did not make a finding that the dismissal was based upon the willful failure of the debtor to abide by any order of the court. The debtor's failure to make payments in accordance with the terms of

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<sup>1</sup>11 U.S.C. 109(g) provides:

Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title [11] who has been a debtor in a case pending under this title at any time in the preceding 180 days if-

(1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case; or

(2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title.

her confirmed Chapter 13 plan established a basis for dismissal. See 11 U.S.C. 1307(c)(6). However, the mere fact that the debtor did not make the confirmed plan payments does not establish a willful failure of the debtor to abide by the order of confirmation. In a motion to dismiss, the movant bears the burden of proof by a preponderance of the evidence that grounds for dismissal exist. GMAC v. Bullock (In re: Bullock), Ch. 13 case No. 89-11537 (Bankr. S.D. Ga. Dalis, J. April 18, 1990). I made no finding of "willful failure" in the order of dismissal of the first Chapter 13 case and the movant, Mr. Williams, has failed to put forth any evidence other than the mere fact of nonpayment to support his contention of willfulness. This is insufficient to carry the burden. There being no other basis for dismissal as to debtor's eligibility for Chapter 13 relief, the debtor is eligible to bring this Chapter 13 proceeding.

Pursuant to 362(d)(1),<sup>2</sup> Mr. Williams is entitled to relief from the automatic stay if a "for cause" basis can be established. The grounds asserted by Mr. Williams for relief from stay, if established, would constitute a for cause basis for relief.

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<sup>2</sup>11 U.S.C. 362(d)(1) provides:

On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay-

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest.

As Mr. Williams contends he is an oversecured creditor, relief from stay under 362(d)(2) is not applicable. See 362(d)(2)(A).

Pursuant to 362(g),<sup>3</sup> the debtor, the party opposing relief, bears the ultimate burden of proof by a preponderance of the evidence that cause does not exist, once the movant has established prima facie there is cause for relief from stay. In re: Pioneer Commercial Funding Corp., 114 B.R. 45, 47 (Bankr. S.D. N.Y. 1990).

Addressing each basis for relief from stay and dismissal, first, Mr. Williams contends that the debtor's proposed plan fails to comply with the provisions of 1322(b)(2), (b)(3) and (b)(5).<sup>4</sup>

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<sup>3</sup>11 U.S.C. 362(g) provides:

In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section-

- on the issue of the debtor's equity in property; and
- (1) the party requesting such relief has the burden of proof
  - (2) the party opposing such relief has the burden of proof on all other issues.

<sup>4</sup>11 U. S. C. 1322(b) provides in pertinent part:

(b) Subject to subsections (a) and (c) of this section [1322] the plan may-- . . .

(2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's Principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims;

(3) provide for the curing or waiving of any default; . .

(5) notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and the 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; .

. . .

(emphasis added)

The debtor's proposed plan meets the requirements of these subsections of 1322(b). The debtor's plan proposes for the debtor to meet all post petition payments as they come due to Mr. Williams and that the prepetition arrearage will be paid by disbursements from the Chapter 13 trustee. The plan does not propose to modify the rights of Mr. Williams, a creditor secured only by a security interest in real property that is the debtor's principal residence. The plan proposes that the security interest is to remain intact and that post petition payments are to be paid directly by the debtor as they come due. The plan provides for the curing of the prepetition default by payments made through the Chapter 13 trustee and the plan as outlined above is in conformity with the provisions of 1322(b)(5). Fleet Finance, Inc. v. Randolph (In re: Randolph), 102 B.R. 902 (Bankr. S.D. Ga. 1989). At this stage in this proceeding, even a period of cure in excess of 30 months as contended by Mr. Williams, appears reasonable. Although this case is not yet at confirmation, the debtor appears to be devoting all disposable income to the plan for a period of 60 months, the creditor is oversecured and receiving post petition payments as they come due. Although there was evidence introduced that the property was damaged by fire, debtor testified that the damage has been repaired from insurance proceeds. The property is insured and there is no evidence that the property is diminishing in value. Under the facts of this case, at this time it appears that the plan proposes to cure the prepetition default within a reasonable time.

In addition to the terms of 1322(b)(2), (b)(3) and (b)(5), Mr. Williams relies upon the decision of the Court of Appeals for the Fifth Circuit in Matter of Foster, 670 F.2d 478 (1982) for the proposition that the debtor may not propose a plan to meet the post petition payments as they come due directly in compliance with the provisions of 1322(b)(5) and propose for the curing of default by disbursements made through the Chapter 13 trustee. This is not the holding of the court in Foster. In Foster, the Fifth Circuit held that a Chapter 13 plan cannot provide for the current portion of a mortgage claim to be paid "outside the plan," meaning that a mortgage payment would not be dealt with by the terms of the plan when arrearages on the mortgage claim are to be cured under the plan. Foster also stands for the proposition that Chapter 13 permits a debtor to act as disbursing agent to make payments directly to creditors rather than through a standing Chapter 13

trustee, subject only to the bankruptcy court's determination as to feasibility of the plan. In this case, the debtor does not propose to make payments "outside the plan." Under the plan the debtor proposes to make direct post petition payments to Mr. Williams as they come due and to cure the prepetition default from disbursements made by the Chapter 13 trustee. There is no provision for payments "outside the plan" under a Foster meaning that the post petition payments are not being dealt with under the terms of the plan. To the contrary, the plan deals specifically with the post petition

payments. The debtor has met her burden of proof under 362(g) by a preponderance of the evidence to defeat a for cause basis for relief from stay under 362(d)(1) and Mr. Williams has failed to carry his burden of proof for dismissal on a basis that the debtor has failed to set forth a plan that complies with 1322(b).

Mr. Williams also contends that relief from stay or dismissal is appropriate based upon debtor's failure to set forth a feasible plan and her failure to bring this Chapter 13 proceeding in good faith. See, 11 U.S.C. 1322(a)(3) and (a)(6).<sup>5</sup> Dismissal of

a Chapter 13 petition for lack of good faith or other §1325(a) confirmation criteria "should be ordered only under extraordinary circumstances such as where the filing represents a blatant abuse of the judicial process." *Allen et al v. Hodges (In re: Hodes)*, Ch. 13 case No. 90-60482 slip op. at 5 (Bankr. S.D. Ga. Dalis J. Jan. 11, 1991) [citing *In re: Robinson*, 18 B.R. 891 (Bankr. D. Conn. 1982)]. At hearing on the motion the debtor testified that she is making the Chapter 13 plan payments and has made payments to Mr.

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<sup>5</sup>11 U.S.C. §1325(a) in pertinent part:

(a) Except as provided in subsection (b), the court shall confirm a plan if-- . . .

(3) the plan has been proposed in good faith and not by any means forbidden by law; .

(6) the debtor will be able to make all payments under the plan and comply with the plan.

Williams for the months of August, September and October, post petition. At this stage of this proceeding, it appears that the plan is feasible. The property in question is the debtor's homeplace which she seeks to retain and to pay for under the terms of her Chapter 13 case. There is no evidence before me of a bad faith filing. See, In re: Kitchens, 702 F.2d 885 (11th Cir. 1983).

Bankruptcy Code §362(d)(1), sets forth "for cause," including the lack of adequate protection, as a basis for relief from stay in order to foreclose a security interest in property of the debtor. A finding that the debtor's proposed plan adequately protects the interests of this creditor requires that the debtor meet the plan payment requirement obligations. The debtor's proposed plan is to make the post petition payments due Mr. Williams. A failure of the debtor to meet that post petition payment obligation would constitute a material default by the debtor under the terms of the plan and a "for cause" basis for relief from stay; however, the parties concede that this creditor is oversecured. The granting of relief from stay to allow Mr. Williams to foreclose his security interest while all other creditors remain stayed under 362(a) could deprive the bankruptcy estate of the available equity in the property in question to the detriment of unsecured creditors.

It is therefore ORDERED that the motion to dismiss or in

the alternative relief from the automatic stay of 362(a) is denied without prejudice.

Further ORDERED that the debtor shall have paid to Mr. Williams post petition payments for the months of August, September and October, 1991 not later than the last day of October. In the event that the debtor has failed to meet the August, September and October payments by the last day of October, 1991 or defaults in any subsequent payment due post petition, Mr. Williams may submit an affidavit to me setting forth the default with affidavit served upon debtor and debtor's counsel prior to filing, and upon the expiration of ten (10) days without the filing of a counteraffidavit by the debtor disputing the fact of default, this case will be converted to a case under Chapter 7 without further hearing.

JOHN S. DALIS  
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia  
this 14th day of February, 1992.