

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

In the matter of:)
)
RAYMOND D. BUNNELL)
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Debtor)
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)
)
UNION PLANTERS BANK, N.A.)
)
Movant)
)
)
)
v.)
)
RAYMOND D. BUNNELL)
)
Respondent)

Chapter 13 Case

Number 02-43707

FILED
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November 20, 2003
Clerk
United States Bankruptcy Court
Savannah, Georgia

ORDER ON MOTION FOR RELIEF FROM STAY

Raymond D. Bunnell ("Debtor") filed a voluntary Chapter 13 case on November 6, 2002. Union Planters Bank, N.A. ("Union") filed a Motion for Relief from Stay on July 30, 2003, in order to commence foreclosure proceedings on Debtor's principal residence. In response, Debtor moved to modify his confirmed Chapter 13 plan to cure his post-petition arrearage to Union. Accordingly, a hearing was held on September 23, 2003.

This Court has jurisdiction pursuant to 28 U.S.C. § 157(b)(2)(G) over this core proceeding.

Debtor Bunnell
Debtor's Attorney Gastin
Creditor
Creditor Greenberg 11/20/03 ER
Trustee Brown
U. S. Trustee

Pursuant to Federal Rule of Bankruptcy Procedure 7052(a), I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

On July 6, 1999, Debtor first filed for relief under Chapter 13 of the Bankruptcy Code. On May 22, 2002, Debtor converted his Chapter 13 to a Chapter 7 liquidation. Union held, and still holds, a security interest in Debtor's principal residence which is located at 958 Whipoorwill Way, Flemington, GA 31313 ("Property"). The security interest is based on a Deed to Secure Debt that was executed by Debtor as collateral for a note and filed on January 6, 1989. (Movants's ex. A). Debtor failed to make post-petition payments on the underlying note and Union first filed a Motion for Relief from Stay on June 24, 2002. The Chapter 7 Trustee abandoned his interest in the Property and I granted Union's motion in an order filed June 18, 2002. On September 3, 2002, Debtor was granted a discharge under 11 U.S.C. § 727.

Debtor again filed for relief under Chapter 13 on November 6, 2002. Notably, Union had failed to commence foreclosure procedures prior to the filing of Debtor's November 6 petition. Thus, Union filed a claim of \$4,476.41 to recover the pre-petition arrearage that still existed. An order confirming Debtor's plan was entered on April 15, 2003. Pursuant to the confirmed plan, Debtor is required to make payments of \$175.00 a month.

In addition, Debtor is obligated to make direct monthly mortgage payments of \$465.00. (Chapter 13 Voluntary Petition, Schedule J).

Since filing this case, Debtor attempted to make seven of the required ten mortgage payments to Union. However, two of the payments bounced because Debtor's account contained insufficient funds.¹ Accordingly, there is now a post-petition arrearage of \$2,270.86 through September 2003. As a result of the post-petition arrearage, Union filed the instant motion on July 30, 2003. The parties have stipulated that the value of the property is just over \$48,000 based on the previous Chapter 7 valuation. At the September 23 hearing, Union's counsel stated that the current payoff figure for the mortgage is approximately \$42,000.00.

The relevant facts as enumerated are not in dispute. Instead, Debtor and Union disagree on how to cure the post-petition arrearage. Debtor contends that I should deny Union's Motion for Relief from Stay and instead should allow him to modify his plan pursuant to 11 U.S.C. § 1329 in order to cure his defaults. Debtor relies on Green Tree Acceptance, Inc. v. Hogle (In re Hogle), 12 F.3d 1008 (11th Cir. 1994) for the proposition

¹At the September 23 hearing, Debtor testified that the checks to Union bounced because he had given a company permission to draft amounts from his account. Upon such authorization, the company proceeded to remove all amounts from Debtor's account. Debtor did not anticipate nor did he expect that his account would be entirely depleted by the company. While Debtor testified that the company was collecting for amounts that became due after he filed for bankruptcy, he made no notation as to the name of the company and could not recall to whom he gave such authorization. Further, he testified that his bank has been unable to provide him with any relevant information. Debtor has never recovered any of the money that was removed from his account and has had a hard time maintaining his finances since the company drafted his account.

that this Court has the authority to modify his confirmed Chapter 13 plan to allow him to cure the post-petition defaults even though the default relates to a secured claim on his house.

Debtor is a seventy-five year old former GI whose only sources of income are his military pension and social security benefits.² The primary, if not sole, reason for the filing of his bankruptcy petition was to save his house. While other creditors were scheduled on Debtor's petition, Union was the only creditor to file a proof of claim and is the only pre-petition creditor being paid through the plan. Debtor has admitted that he would be unable to cure the defaults within twelve months. However, he testified that he could increase his payments by forty to fifty dollars a month.

Union contends that Hogge requires that Debtor experience a change of circumstances to merit the kind of plan modification that is being requested here. Further, Union argues that Debtor has suffered no such change in circumstance since he filed his petition. Accordingly, Union believes that it should be granted its motion for relief from stay as modification of Debtor's plan is not appropriate in this situation.

CONCLUSIONS OF LAW

Bankruptcy Court has Jurisdiction Over Debtor's Home

²Debtor receives monthly net income of \$1,112.00 from his military pension and \$785.00 from Social Security benefits for a combined income of \$1,897.00.

This Court retains jurisdiction over the Property even though in the prior Chapter 7 Trustee formally abandoned the Property, Union was granted relief from stay, and Debtor received a discharge releasing him from all personal liability for debts existing on the date of the commencement of the case including the debt to Union. The Eleventh Circuit has held in a case with a factual background similar to this one that:

The lifting of the automatic stay only gave [creditor] the right to foreclose; because no foreclosure sale had taken place by January 26, 1988, [debtor] still had his equitable right of redemption on that date. Although [creditor] was prevented from foreclosing by the filing of the chapter 13 petition on December 30, 1987 [debtor] would have had the statutory right of redemption even if a foreclosure sale had taken place. Either of these property rights is sufficient to give the bankruptcy court jurisdiction over a debtor's home.

Jim Walter Homes, Inc. v. Saylor (In re Saylor), 869 F.2d 1434, 1437 (11th Cir. 1989) (internal citation omitted). Following Saylor, the Supreme Court also held that a debtor can include a mortgage lien in a Chapter 13 plan even after the debtor's personal liability on the debt secured by the property has been discharged in a Chapter 7 liquidation. See Johnson v. Home State Bank, 501 U.S. 78, 111 S.Ct. 2150, 115 L.Ed.2d 66 (1991). The Court reasoned that, "[e]ven after the debtor's personal obligations have been extinguished, the mortgage holder still retains a 'right to payment' in the form of its right to the proceeds from the sale of the debtor's property." Johnson, 501 U.S. at 84, 111 S.Ct. at 2154. Based on the

foregoing, this Court retains jurisdiction over the Property and Union's claim to permit a ruling on Debtor's proposed modification and Union's Motion for Relief from Stay.

Modification of Plan

Debtor contends that he should be allowed to modify his confirmed plan to cure a post-petition default in the monthly payments on his house. The Eleventh Circuit in Hoggle enunciated the principle that a Chapter 13 plan may be modified to allow a debtor to cure a post-petition default on a home mortgage. A close reading of Hoggle, however, indicates that a debtor does not have an absolute right to modification; instead, certain threshold requirements must be met.

In Hoggle, the Court stated that:

The legislative history accompanying §1329 also supports our interpretation. Congress designed §1329 to permit modification of a plan due to *changed circumstances* of the debtor *unforeseen* at the time of confirmation. The House Report suggests that modification is permissible where problems such as a 'natural disaster, a long-term layoff, or family illness or accidents with attendant medical bills' prevent compliance with the original plan.

12 F.3d at 1011(emphasis added). Despite this language in Hoggle, bankruptcy courts within the Eleventh Circuit have differed over whether a change of circumstances must be shown

before a post-petition modification is allowed. Compare In re Flennory, 280 B.R. 896, 898 (Bankr. S.D. Ala. 2001) (“[A] standard of substantial change in circumstances is a necessity. Without some threshold requirement creditors could compel modification every time a debtor obtained a slight increase in income or decrease in an expense.”); American General Finance, Inc. v. Tippins (In re Tippins), 221 B.R. 11, 22 (Bankr. N.D. Ala. 1998) (before the court will grant a modification motion, “the movant must establish that there has been a material change in circumstances since confirmation and that the modification is made in good faith”) with In re Thomas, 291 B.R. 189, 193 (Bankr. M.D. Ala. 2003) (“The Court will not superimpose a ‘substantial change in circumstances’ requirement, because it is not supported by the text of Section 1329”); In re Meeks, 237 B.R. 856, 859 (Bankr. M.D. Fla. 1999) (“Debtors need not demonstrate a substantial, unanticipated change in circumstances in order to modify their confirmed chapter 13 plan”).

I have previously held that, “the proponent of a post-confirmation modification under section 1329 must demonstrate, as a pre-condition to modification, that the debtor has undergone a substantial, unanticipated change in circumstances following confirmation.” In re Pearson, 1995 WL 17005062, *4 (Bankr. S.D. Ga. 1995). I reaffirm this holding. Courts which permit modification without such a showing ignore the language of the Hogle decision which adopted this standard from the legislative history and render

the provisions of 11 U.S.C. § 1327 meaningless.³

To announce a standard is easier than to apply it. The substantiality of the change that is required to be shown is difficult to articulate and determinations of what is a sufficient change will necessarily be made on a case by case basis. However, there should be, at the very least, a connection between the severity of the change in circumstances and the size of the arrearage. That is, a more extreme change in circumstances will result in this Court allowing the cure of a more sizable arrearage. Conversely, where there is a less extreme change in circumstances, modification should be permitted only as to a minimal post-petition default.

In addition to requiring some showing of unforeseen, changed circumstances, the Hogle court stated that:

[E]ach modification must comply with the requirements outlined in § 1329, including adherence to § 1322(b)(5). Therefore, in each instance where the debtor proposes a post-confirmation modification, a judicial inquiry should be undertaken to determine whether a proposed modification to cure a default will comport with § 1322(b)(5)'s requirements that such a cure be effected within a *reasonable time* and simultaneously *maintain payments on the long term loan*.

³ 11 U.S.C. § 1327(a) states that, “[t]he provisions of a confirmed plan bind the debtor and each creditor.” If a confirmed plan is to have any “binding” effect, it is necessary that a debtor make a showing of changed circumstances before he or she is allowed to modify the plan. Otherwise, the court would be in the position of confirming a new plan with different terms on the same set of facts as the prior “binding” decision.

12 F.3d at 1012 (emphasis added). The question of what is a “reasonable time” to cure a default under 11 U.S.C. § 1322(b)(5) is not addressed by the Bankruptcy Code. Courts have therefore held that the determination of what is a reasonable time is left to the discretion of the Court and will vary from case to case depending on the particular facts and circumstances. *See e.g. Steinacher v. Rojas (In re Steinacher)* 283 B.R. 768, 774 n.13 (9th Cir. B.A.P. 2002); *In re Masterson*, 147 B.R. 295, 296 (Bankr. D. N.H. 1992); *Grundy National Bank v. Stiltner (In re Stiltner)*, 58 B.R. 593, 596 (Bankr. W.D. Va. 1986); *In re Brown*, 34 B.R. 95, 96 (Bankr. E.D. Mich. 1983). As a general rule, I hold that what constitutes a reasonable time should bear some relation to the amount of equity remaining in the underlying property. Where there is little to no equity, the likelihood that a modification will result in injury to the creditor is increased. Thus, it will be necessary that debtors in those situations cure the post-petition arrearage as quickly as possible. Likewise, where there is a substantial amount of equity, a debtor should be allowed a longer cure period as the chance of harm to the creditor is decreased.

In addition to the Hogge requirements, the Bankruptcy Code in § 1329(b) states that § 1325(a) applies to any proposed modification. Namely, § 1325(a) includes the requirement that, “the plan has been proposed in *good faith* and not by any means forbidden by law.” 11 U.S.C. § 1325(a)(3) (emphasis added). The “good faith” requirement of § 1325(a)(3) is not defined in the Bankruptcy Code. Instead, courts often rely on a case-by-

case analysis and the application of a laundry list of factors. Some courts have looked to, “factors which evidence that the petition was filed ‘to delay or frustrate the legitimate efforts of secured creditors to enforce their rights.’” Phoenix Piccadilly v. Life Insurance Company of Va. (In re Phoenix Piccadilly, Ltd.), 849 F.2d 1393, 1394 (11th Cir. 1988) (quoting In re Albany Partnerships, Ltd., 749 F.2d 670, 674 (11th Cir.1984)) (holding that Chapter 11 petition was filed in bad faith). See also Federal National Mortgage Assoc. v. Price (In re Price), 1992 WL 12004521, *3-4 (Bankr. S.D. Ga. 1992) (Dalis, J.) (granting relief from stay in Chapter 13 case where the “timing of the debtors’ filing evidenced an intent to delay or frustrate the legitimate efforts of the debtors’ secured creditors”).

Based on the foregoing discussion, I hold that the following factors are relevant in determining whether Debtor should be allowed to modify a plan to cure a post-petition default on a principle residence:

1. Whether there has been an unanticipated change in circumstances beyond the control of debtor.
2. Whether that change in circumstances is sufficient to explain the magnitude of the arrearage that has accumulated post-petition.
3. Whether there is equity in the property sufficient to protect the creditor’s interest during a reasonable period of time that is necessary to cure the post-petition arrearage.
4. Whether the debtor has the ability to meet the obligations of the modified plan while continuing current payments on the mortgage.

5. Whether a motion for relief on the property in question was granted in the current or a prior case, or other circumstances exist to suggest that the modification is a bad faith effort intended to frustrate the creditor's remedies.

Having examined the above factors, I hold that Debtor's proposed modification should be denied.

1. Unanticipated Change in Circumstances

Debtor's only explanation for the arrearage is that his account had been depleted by an unknown company. Debtor's inability to provide this Court with any information regarding the nature of the charges to his account make the evidence very shaky. Furthermore, I have previously held that "unanticipated" connotes a change in circumstance that is beyond the debtor's control. *See Pearson*, 1995 WL 17005062, *5. While Debtor insists that his account was debited for more than he intended, he concedes that the amounts were due because of a post-petition debt that he had incurred and that he gave the company in question the permission to debit his account. Thus, the fact that his account was depleted cannot be properly characterized as beyond his control. I therefore hold that Debtor has not exhibited an unanticipated change in circumstances.

2. Extent of Change in Circumstances

As discussed, Debtor has failed to show an unanticipated change in

circumstances. Thus, there is no explanation to justify the relatively substantial arrearage of \$2,270.86 in order that Debtor should be allowed to modify his plan.

3. Equity in the Property/Time Necessary to Cure Arrearage

There is currently \$4,400.00 to \$6,000.00 of equity in the Property.⁴ However, in Debtor's recent Chapter 7 the Trustee abandoned the Property in his Report of Inventory of Debtor that was filed on June 20, 2002. This was likely because, after considering real estate commissions if the Trustee sold the Property, the accrual of future interest, real estate taxes and the like, there is, in reality, insufficient equity remaining to protect Union during what would amount to a third extension⁵ of his repayment obligation.

As discussed, Debtor has stated that, at best, he could increase his payments by forty to fifty dollars a month while maintaining his current plan payments. Paying fifty dollars a month, it will take Debtor over 45 months to pay off the current post-petition arrearage of \$2,270.86. I hold that a 45 month repayment period is an unreasonably long payment period given Debtor's past payment history and lack of equity in the property.

⁴It has been stipulated that the value of the Property is \$48,000.00. Based on one set of figures provided, Debtor currently owes Union approximately \$43,594.62 (\$4,476.41 pre-petition arrearage + 2,270.86 post-petition arrearage + 36,847.35 pre-petition principle balance) and, thus, has \$4,405.38 in equity in the property. In contrast, Union's attorney stated that the payoff figure is currently \$42,000.00 which would leave a total of \$6,000.00 equity in the Property.

⁵Debtor received his first extension when he filed for Chapter 13 relief on July 6, 1999. He was again provided with an extension when filed his second Chapter 13 on November 6, 2002. Thus, the proposed modification is his third attempt to extend his repayment obligation to Union.

4. Feasibility

Debtor has stated that he could, at best, increase his plan payments by forty to fifty dollars per month to cure the post-petition arrearage. However, he has not submitted an amended petition detailing his adjusted income and expenses to account for the increased plan payments. Further, he has pointed to no reason why he will be able to meet the increased payments on the same basic income that has proven insufficient to keep him current thus far. Without further evidence that his modified plan is feasible, I cannot allow Debtor to modify his plan.

5. Good Faith/Prior Relief from Stay

The holdings of the Supreme Court in Johnson and the Eleventh Circuit in Saylor make it clear that a debtor can include a mortgage debt in his Chapter 13 plan after a motion for relief on the same property had been granted in a recent Chapter 7. However, there is a clear distinction in what the Eleventh Circuit and Supreme Court have found to be permissible and what Debtor is attempting to do here. The fact that Debtor has defaulted post-confirmation and is attempting to cure a post-petition arrearage exhibits a pattern of noncompliance not present in Johnson or Saylor.⁶ Thus, it is significant that Union was previously granted a motion for relief in Debtor's prior Chapter 7 and this fact weighs

⁶As discussed, allowing Debtor to modify his plan here would amount to a third extension of his repayment obligation. In contrast, both Jim Walters Homes, Inc. v. Saylor (In re Saylor), 869 F.2d 1434 (11th Cir. 1989) and Johnson v. Home State Bank, 501 U.S. 78, 11 S.Ct. 2150, 115 L.Ed.2d 66 (1991) only involved a second extension of the repayment obligation.

heavily in this Court denying Debtor's proposed modification.

Considering the fact that Debtor has not provided this Court with a satisfactory explanation for his default, there is little or no equity remaining in the Property, Debtor can, at best, cure his default over a 45 month period, and Union was previously granted relief from stay, there is a high risk that Debtor's request to modify his plan will result in injury to Union's interest. While I am mindful of the fact that it was "Congressional intent to permit homeowners to utilize its flexible provisions for debt relief without sacrificing their homes," Hogle, 12 F.3d at 1010, Debtor has presented no evidence to make this court believe that the current, proposed modification will succeed where all other attempts to keep his mortgage debt current have failed. Accordingly, it is not appropriate to allow Debtor to modify his plan given this set of facts.

Motion for Relief from Stay

Having determined that Debtor is not entitled to modify his confirmed plan, it is necessary that I rule on Union's Motion for Relief from Stay. 11 U.S.C. § 362(d) sets forth the grounds for such relief and provides in relevant part that:

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.

The party seeking relief from the automatic stay is required to establish a prima facie case of cause for relief. *See e.g. In re Cambridge Woodbridge Apartments, L.L.C.*, 292 B.R. 832, 841 (Bankr. N.D. Ohio 2003); *In re Robinson*, 2002 WL 31685731, *3 (Bankr. E.D. Pa. 2002). If the creditor establishes a prima facie case, the burden shifts to the debtor to prove adequate protection. 11 U.S.C. § 362(g).

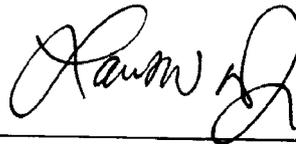
Here, Union has satisfied its initial burden by showing that Debtor has missed five of his last ten payments. It is well-established that a failure by the debtor to make mortgage payments can, under some circumstances, constitute § 362(d)(1) cause. *See Ellis v. Parr (In re Ellis)*, 60 B.R. 432, 435 (9th Cir. BAP 1985) (holding that bankruptcy judge's determination that failure to make post-confirmation payments constituted cause for terminating automatic stay was not clearly erroneous); *Equitable Life Assurance Society v. James River Assoc. (In re James River Assoc.)*, 148 B.R. 790, 797 (E.D. Va. 1992) (holding that bankruptcy court did not err in granting relief from automatic stay for failure to make monthly payments); *In re Morysville Body Works, Inc.*, 86 B.R. 51, 57 (Bankr. E.D. Pa. 1988) (motion for relief denied without prejudice where there still existed substantial equity cushion in property). In this situation, I hold that the failure by Debtor to make five post-

petition mortgage payments is sufficient to constitute cause under § 362(d)(1).

While Union has satisfied its burden, Debtor has not made a showing of adequate protection. As discussed, there exists little to no equity in the property and the modified plan cannot be confirmed. The lack of equity coupled with the fact that Union was previously granted relief from stay give this Court no other option than to grant Union's motion.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THE COURT that Debtor's Proposed Modified Chapter 13 Plan is DENIED and the Motion for Relief from Stay filed by Union Planters Bank, N.A., is GRANTED.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 20th day of November, 2003.