UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

ELTON I. BOWERSOX, JR.
KATHLEEN J. BOWERSOX

CASE NO. 9l-03637

Chapter 13

Debtors

APPEARANCES:

SALVATORE F. LANZA, ESQ.
Attorney for Debtors
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Fulton, New York l3069

LACHMAN & GORTON, ESQS.
Attorneys for Dale Mortgage Bankers Corp.
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EDWIN LACHMAN, ESQ.
Of Counsel

STEPHEN D. GERLING, U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Elton I. Bowersox, Jr. and Kathleen J. Bowersox ("Debtors") have moved this Court for "an Order continuing automatic stay" pursuant to §362(e) of the Bankruptcy Code (ll U.S.C. §101-1330) ("Code") to prevent Dale Mortgage Bankers Corp. ("Dale") from completing a mortgage foreclosure action that was pending at the time Debtors filed their voluntary petition pursuant to Chapter l3 of the Code.

The motion was argued before this Court at Syracuse, New York on June 23, l992. Dale appeared in opposition to the motion.

JURISDICTIONAL STATEMENT

This Court has core jurisdiction of this contested matter pursuant to 11 U.S.C. §§1334(b) and l57(a), (b)(l) and (2)(G).

FACTS

On December 24, l99l, Debtors filed their voluntary Petition pursuant to Chapter l3 of the Code. In Schedule D filed with the Petition, Debtors listed Dale as a secured creditor holding a mortgage on Debtors' residence, l35l James Road, Hannibal, New York. Debtors' Statement of Financial Affairs filed with the Petition indicated that Dale had commenced an action in the Supreme Court of the State of New York, County of Oswego ("state court") to foreclose the aforementioned mortgage prior to the date of Debtors' filing and, in fact, a foreclosure sale of Debtors' residence had been scheduled for December 30, l99l.

Debtors' Petition also included Schedules I and J which reflected Debtors' total combined monthly income of $l,327.00. Debtors' total monthly expenses were listed at $l,409.00, which included a $489.00 monthly mortgage payment, for a negative monthly income of $82.00.

Together with their Petition, Debtors filed a Chapter l3 Plan ("Plan"). The Plan proposed to pay to the Chapter l3 Trustee ("Trustee") the sum of $200.00 monthly "for a period of 30 years or until mortgage is paid in full." The Plan also listed as secured creditors, A.L. Lee Memorial Hospital to be paid $50.00 per month and Empire Tel-Com Federal Credit Union to be paid $50.00 per month. (See Debtors' Chapter l3 Plan dated December l9, l99l).

On February 26, l992, following the initial meeting of creditors, a confirmation hearing on the Debtors' Plan was held. The hearing was adjourned however to March 25, l992 upon the Trustee's advice that Debtors would be filing an amended Chapter l3 plan. On March 25, l992, the Court was again advised by the Chapter l3 Trustee that Debtors' counsel was in the process of amending Debtors' Plan and an adjournment was requested to April 29, l992. The Court granted the adjournment, but indicated that unless an amended plan had been filed by that date, it would deny confirmation of the Plan then pending before the Court.

On April 8, l992, Debtors filed an Amended Plan ("Amended Plan"), which was executed on April 6, l992. The Amended Plan provided for payments to the Trustee at $200.00 per month for a period of 60 months. No secured creditors were listed as being paid through the Amended Plan. As to unsecured creditors, the Amended Plan provided "Unsecured creditors to receive distribution of 48%."

At the adjourned confirmation hearing held on April 29, l992, the

Trustee recommended confirmation of the Amended Plan, with the proviso that the order of confirmation require Debtors to advise the Trustee when each one returned to work.[1]

On May 6, l992, this Court executed an Order of Confirmation ("Confirmation Order") confirming the Amended Plan. That Confirmation Order Provided for, among other things, the payment to Dale directly by the Debtors. It appears that some time thereafter, the Trustee served Debtors' counsel with a copy of the Confirmation Order.

The Debtors made no mortgage payments to Dale for the months of January through May l992.

On May l4, l992, Dale filed a motion seeking to lift the automatic stay pursuant to Code §362(d), alleging that Debtors had failed to make payments on the mortgage "outside the plan" for the months of January through May l992. (See Affirmation of Edwin Lachman, Esq. dated May ll, l992 in support of motion).

An Affidavit of Service filed with the motion indicated it was served on both Debtors and their attorney on May l2, l992. The motion was made returnable at a motion term of this Court scheduled for Syracuse, New York on May 26, l992.

Upon the return date there was no appearance by Debtors and on May 27, l992, the Court signed an Order Modifying Stay permitting Dale to continue to foreclose its mortgage on Debtors' property. On June l0, l992, Debtors filed this motion.

ARGUMENTS

The Debtors assert that they did not believe that they were required to pay Dale it mortgage payments outside the plan. They argue that it was their belief that they were required to make $200 per month payments to the Trustee and that no further payments were required to be made to any other creditors.

Debtors contend that they were never advised of any default by Dale

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[1] It is noted that Debtors' counsel did not appear at any of the confirmation hearings.

and that if they had been properly advised, they would have made their required monthly payments.

Debtors seek modification of their Amended Plan to "reduce the amount of payments which need to be made by [them] , and to further extend the time for [them] to make such payments so that they will not lose their home to foreclosure." (See Affirmation of Salvatore Lanza, Esq. in support of Debtors' Motion dated June 6, l992, ¶12). As indicated, Debtors seek a continuation of the stay.

Dale contends that the Confirmation Order clearly required Debtors to make payments outside the Amended Plan, that Debtors admit that they have failed to make such payments, that they had due notice of Dale's motion to modify the stay, which they did not oppose, and Debtors' motion should be denied.

DISCUSSION

Initially, the Court observes that Debtors' motion presently before the Court is misguided. Debtors seek primarily to "continue the automatic stay" and statutorily they rely upon Code §362(e).

Such requested relief obviously overlooks the fact that this Court's Order of May 27, l992 modified the stay to permit Dale to foreclose its mortgage in state court and thus, there is no stay currently in effect and capable of being continued that would avoid that which Debtors seek to prevent, namely the foreclosure of Dale's mortgage on their home.

Thus, the Court will treat Debtors' motion as one to reimpose the stay previously modified pursuant to the general grant of equitable power found in Code §105(a).

While there is case law on both sides of the issue, this Court believes that Code §105(a) does in fact provide an equitable basis to reimpose a previously vacated stay. See In re Wedgewood Realty Group Ltd., 878 F.2d. 693 (3rd Cir. l989); In re Codesco, Inc., 24 B.R. 746, 75l (Bankr. S.D.N.Y. l982); In re QPL Components, Inc., 20 B.R. 342, 346 (Bankr. E.D.N.Y. l982); contra In re Wood, 33 B.R. 320 (Bankr. D.Idaho l983).

The Court further believes that the appropriate procedural vehicle

for making such a motion before the Court is Federal Rule of Bankruptcy Procedure ("Fed.R.Bankr.P.") 9024, which incorporates by reference Federal Rule of Civil Procedure ("Fed.R.Civ.P.") 60(b).

The Court notes that the Second Circuit interprets Fed.R.Civ.P. 60(b), as incorporated by Fed.R.Bankr.P. 9024, as a vehicle to be broadly construed to achieve "substantial justice" and grant "extraordinary judicial relief ... upon a showing of exceptional circumstances." See Nemaizer v. Baker, 793 F.2d. 58, 6l (2d Cir. l986) (citations omitted). Accord In re Creed Bros., Inc., 70 B.R. 583, 586 (Bankr. S.D.N.Y. l987); In re Chipwich, Inc., 64 B.R. 670 (Bankr. S.D.N.Y. l986).[2] "In deciding a Rule 60(b) motion, a court must balance the policy in favor of hearing a litigant's claims on the merits against the policy of finality." In re Kotlicky v. U.S. Fidelity & Guar. Co., 8l7 F.2d 6, 9 (2d. Cir. l987) (citing to 11 C. Wright & A. Miller, FEDERAL PRACTICE AND PROCEDURE §2857 (l973)). Thus, final judgments should not be "lightly reopened" since the Rule is not a substitute for a timely appeal. See Nemaizer v. Baker, supra, 793 F.2d at 6l.

Moreover, the standard for granting relief from an order vacating or modifying a stay is also one of exceptional or extraordinary circumstances and encompasses the threat of irreparable harm. See In re Terramar Mining Corp., 70 B.R. 875 (Bankr. M.D.Fla. l987); In re Wood, supra, 33 B.R. 320.

A key factor to be considered by a court is whether the secured creditor has changed its position in reliance on the stay having been lifted. See Matter of Feimster, 3 B.R. ll, l3 (Bankr. N.D.Ga. l979). Also significant is whether, on the merits, the court would have been likely to have lifted the stay. See In re McNeeley, 5l B.R. 8l6, 82l (Bankr. D.Utah l985).

Here, the Debtors contend they were only required to pay $200 per month to the Trustee and that would satisfy any and all obligations listed in their Chapter l3 petition, including the mortgage debt due Dale of approximately

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[2] Since Debtors have not relied upon Fed.R.Civ.P. 60 in bringing this motion, the Court is treating the motion as fully within the purview of subsection (b).

$40,200.[3]

While a review of the Debtors' original Plan lends some credence to their contention, in light of the provision therein that Debtors' would pay the Trustee $200 per month "for a period of 30 years or until mortgage is paid in full", that Plan was subsequently amended to delete that terminology and the Amended Plan made no reference to the payment of any mortgage "inside" the plan and instead provided for a 48% distribution to unsecured creditors.

Additionally, Debtors' attorney was served with the Confirmation Order which clearly references at ¶3(e)(3) "secured claims to be paid directly by the Debtor(s) as hereinafter set forth:

Creditor	Total Payment
Dale Mortgage Bank Corp.	$40,200.00
Oswego County Dept. of Social Services	$75,000.00

While the Court agrees with the weight of authority that holds that where the terms of a Chapter l3 plan conflicts with the order confirming that plan, the plan controls, the conflicting terminology in the order certainly puts the Chapter l3 debtor on notice that inquiry is warranted. See Exten Assoc. v. Sundowner Joint Venture, 24 B.R. 877, 880 (D.Md. l982); In re Wickersheim, l07 B.R. l77, l8l (Bankr. E.D.Wis. l989).

Here there was apparently no inquiry by Debtors or their counsel upon receipt of the Confirmation Order, despite the fact that they allegedly believed that Debtors would meet all of their pre-petition obligations by making a lump sum payment of $200 per month to the Trustee for 60 months as set forth in the Amended Plan.

Lastly, there is the unexplainable failure of the Debtors and their counsel to appear in opposition to Dale's May l4th motion to modify the stay and raise the very arguments that they now assert in support of this motion. The only explanation offered by Debtors' counsel at oral argument in defense of his failure to oppose Dale's May l4th motion was that he was otherwise engaged in trial in another court.

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[3] A review of Debtors' total expenses as set forth in their petition, reflected a monthly payment of $489.00 on a mortgage, presumably the Dale mortgage.

The Debtors argue that they will suffer "tremendous hardship" if their home is foreclosed upon and that had they realized they had to continue regular mortgage payments to Dale in addition to their Amended Plan payments, they would have done so.

While the Court is somewhat skeptical of Debtors' position, it is of the opinion that the statutory requirements of Chapter l3 were not fully explained to them from the inception of this case. Further, it appears that the failure of Debtors to oppose Dale's motion to modify the stay was due, in part, to their attorney's failure to at least communicate with Dale's attorneys and request an adjournment of the motion to another date.

The Court believes that had the Debtors appeared in opposition to Dale's motion, it may have allowed the Debtors an opportunity to cure their post-petition default on the mortgage pursuant to Code §1322(b)(5).

Lastly, Dale's Affirmation in opposition to this motion makes no assertion that it has changed its position in reliance upon this Court's May 27, l992 Order. While it appears that Dale had commenced a foreclosure action pre-petition, no actual foreclosure sale has apparently occurred, which would implicate the rights of innocent third parties.

The Court therefore concludes that there exists herein exceptional circumstances, as well as the threat of irreparable harm which bode in favor of hearing the merits of the Debtors' claim and giving them an opportunity to modify their Amended Plan. Such opportunity can only be accomplished by the Court exercising its equitable power under Code §105(a) and reimposing the automatic stay of Code §362(b) insofar as it applies to the mortgage foreclosure action heretofore commenced by Dale. The Court does not believe, however, that such reimposition of the stay should be without condition.

Based upon the foregoing, it is

ORDERED, that the automatic stay imposed pursuant to Code §362(a) insofar as it was modified by the May 27, l992 Order of this Court so as to permit Dale to proceed with the foreclosure of its mortgage in state court, is reimposed as of the date of this Order, and it is further

ORDERED, that the Debtors shall, within fifteen (l5) days of the date of this Order, file and serve a motion pursuant to Code §1329 and Fed.R.Bankr.P.

2002(a)(6), which motion shall propose a modification of the Amended Plan to provide for the curing of the post-petition default on the Dale mortgage in accordance with Code §1322(a)(5), and it is further

ORDERED, that effective August l, l992, Debtors shall commence making payments to Dale pursuant to the terms of the Note and Mortgage dated June l3, l988, and it is further

ORDERED, that in any such proposed cure of Dale's mortgage, there shall be included as arrears the sum of $300 which shall compensate Dale for its attorney's fees in connection with the defense of this motion.

Dated at Utica, New York
this day of July, l992

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STEPHEN D. GERLING
U.S. Bankruptcy Judge