UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

IN RE:	)	CHAPTER 13
ROBERT JORDAN,	)	CASE NO. 03-50422-JDW
MILDRED JORDAN,	)	
	)	
DEBTORS	)	

BEFORE

JAMES D. WALKER, JR.

UNITED STATES BANKRUPTCY JUDGE

COUNSEL

For Debtors:	John K. James 1109 Russell Parkway, Suite #2 Warner Robins, Georgia 31088
For Jim Walter/Mid State Homes:	Stephen G. Gunby P. O. Box 1846 Columbus, Georgia 31902

MEMORANDUM OPINION

This matter comes before the Court on the motion for stay relief by Jim Walter/Mid State Homes. This is a core matter within the meaning of 28 U.S.C. § 157(b)(2)(G). After considering the pleadings, the evidence, and the applicable authorities, the Court enters the following findings of fact and conclusions of law in conformance with Federal Rule of Bankruptcy Procedure 7052.

Findings of Fact

Debtors Robert and Mildred Jordan filed a joint Chapter 13 case on January 29, 2003. Both Debtors are retired with a total monthly income of approximately $3,000 and monthly expenses of approximately $2,400. They filed this case to avoid foreclosure on their home by the Creditor, Jim Walter/Mid State Homes. Debtors purchased their home in 1993 for $55,000. On the petition date, it was worth $86,000. They currently owe the Creditor approximately $60,000. Thus, Debtors have an equity interest of about $26,000.

Debtors' Chapter 13 plan provided for monthly payments of $548 to finance the payment of vehicles, mortgage arrearage to the Creditor, and a 70 percent dividend to unsecured creditors. In April 2004, Debtors became delinquent on their mortgage payments. The Creditor sought stay relief, and in August 2004, the issue was resolved with a consent order providing for postpetition arrearages to be paid through the plan and providing for strict compliance as to future payments. Strict compliance means any future default on the mortgage would be grounds for stay relief for the Creditor regardless of any compelling circumstances–hence the use of the term "strict" with "compliance." The order, which was silent as to the duration of the strict compliance, was entered by consent of counsel for both parties.

In March 2006, after abiding by the strict compliance order for 20 months, Debtors again defaulted on the mortgage by about $900. The delinquency was the result of Ms. Jordan falling ill, which temporarily prevented her from contributing to Debtors' income through her work as a babysitter. In addition, Debtors had to pay $500 for surgery related to Ms. Jordan's illness. Ms. Jordan has recovered and is working again, so Debtors' income has returned to its pre-illness level.

Nevertheless, in June 2006, the Creditor filed an affidavit of default showing that Debtors had defaulted on the strict compliance order and seeking relief from the automatic stay. Debtors responded by filing a modified plan proposing to pay additional postpetition arrearages through the plan and to make regular payments to the Chapter 13 Trustee. Both the Trustee and the Creditor objected to the modification. After the Trustee's objection was resolved, Debtors' counsel submitted to the Court a proposed order confirming the plan. The Court entered the order even though the Creditor's objection had not been considered.[1] Upon being notified of the error, the Court vacated the order confirming the modified plan. The issue of confirmation remains open and is not resolved by this opinion.

The Court held hearings on August 14, 2006, and October 17, 2006, to consider Debtors' objection to the affidavit of default. At that time, the Creditor urged the Court to grant stay relief because Debtors' defaulted on the payment provisions in the strict compliance order.

Conclusions of Law

[1] Confirmation of a modified plan would not remedy the default in the provisions of the strict compliance order, and no party has contended otherwise.

Courts regularly utilize "strict compliance" in cases where the creditor has demonstrated a factual and legal basis for stay relief and where the debtor, in turn, offers compelling evidence of unavoidable financial distress with reasonable assurances of future performance. Courts utilizing strict compliance intend to give the debtor a second chance and, at the same time, to ensure that the creditor will not have to incur the additional expense of another motion for stay relief in the event of a debtor default. Fortunately for debtors, most creditors are willing to enter into strict compliance orders, because they usually prefer payment to repossession of collateral. Some creditors will enter into strict compliance orders permitting one or more defaults by the debtor if the defaults are promptly cured after notice.

The role of the court in enforcement is to ensure compliance is enforced strictly. These agreements lose their usefulness as a settlement tool if the courts will not provide the necessary enforcement "strictly" according to the terms of the agreement. Because of this strict enforcement, the debtor's counsel should negotiate the terms of this agreement as a vigorous and diligent advocate for the debtor to ensure that "strict compliance" will be fair in any conceivable future circumstances. Absent agreement for a consent order, the court will conduct a hearing on the stay relief motion and decide what relief, if any, is appropriate to provide to the creditor, including strict compliance.

Experience, as evidenced by the facts of this case, shows that sometimes debtors' counsel are too willing to enter into these agreements. Reasons vary, but the most common incentive is to avoid spending the time in a court hearing in a case where the debtor may not be able to pay counsel additional fees to compensate for such attorney time. Such a compromise is not appropriate. An attorney has an obligation to represent a client diligently until excused from further representation by the court, regardless of prospects for compensation.

At issue in this case is whether the Court should grant stay relief where Debtors have violated a strict compliance order due to unavoidable financial hardship. As a general matter, the Court routinely grants stay relief motions in such circumstances. However, due to the unique facts of this case, the Court finds it necessary to revise its policy on strict compliance provisions of unlimited duration, which will apply to all strict compliance orders: The Court may decline to grant stay relief pursuant to a strict compliance order after 18 months from the date of entry of the order if the order does not provide for the actual duration of the strict compliance. Any such relief will be considered on a case-by-case basis.

This new strict compliance rule is in addition to two other stay relief rules already adopted by this Court. The first relates to the refusal of a creditor to accept payments from the debtor. The second relates to the circumstances under which the Court will allow the imposition of strict compliance and allow the creditor to recover attorney fees. This opinion restates all three rules as a matter of information and to encourage well-reasoned objection when appropriate in future cases.

With regard to payments, I have repeatedly held that I may decline to grant stay relief to a creditor when it refuses to accept payments required to be made directly by the debtor unless the creditor makes a showing of unusual circumstances. A decision by a creditor to pursue foreclosure is a serious one for both the creditor and the debtor. Often, debtors defaulting in payments to creditors can subsequently remedy the default by making a late payment, subject to appropriate contractual late fees. The decision to rely on the strict compliance order and proceed with foreclosure should be a difficult one for a creditor if the debtor has fully or partly remedied any delinquency. On the other hand, when the creditor refuses to accept late payments, the person charged with deciding whether to pursue foreclosure is presented with a more compelling case to go forward with the foreclosure process. This circumstance misrepresents the debtor's payment performance.

An additional complication arises when the late payments are returned to the debtors because many debtors are confused by such a response and fail to properly preserve the fund for tender to the creditor in a subsequent stay relief proceeding. In short, the relationship between the debtor, the secured creditor, the Chapter 13 trustee, and other creditors is unnecessarily complicated by the refusal of the creditor to accept late payments.

The Court is unaware of any decision in which a creditor's entitlement to stay relief is diminished or eliminated if it accepts payment from a debtor already in default. The only effect of accepting such payments would be a reduction in the delinquency. A creditor remains free to request stay relief when the debtor makes late payments, even if previous late payments have been accepted and even if the account is current at the time of the stay relief hearing. Correspondingly, the Court would not receive favorably the argument of a debtor in response to a motion for stay relief that the willingness of the creditor to accept late payments prejudices the right to request stay relief.

Because the request for stay relief must be made before the creditor can act to accelerate the debt, demand payment, or otherwise fix the obligation under state law as a prerequisite to foreclosure, the Court views the refusal to accept payments as a tactic designed to advance the creditor's cause to the detriment of the debtor and other creditors in the case. For that reason, the Court has consistently refused to grant stay relief when the creditor refuses to accept payments from a debtor unless the circumstances of the case are otherwise compelling. As long as the law recognizes the creditor's right to charge a late fee pursuant to the terms of the contract, the creditor appears to be sufficiently compensated for the expense and inconvenience incurred in the processing of the late payment. This same rule applies when the payments are tendered following entry of a strict compliance order.[2]

The second rule relates to eligibility for attorney fees and/or strict compliance. While the Court has long followed the rule that a creditor may file a motion for stay relief at any time in a bankruptcy case, premature and unnecessary motions for stay relief are discouraged. Consequently, if the Court should deny the motion, attorney fees and/or strict compliance may not be awarded unless the payments were <u>more than</u> two months in arrears <u>at the time of the filing of the motion</u>.[3] Experience has shown this Court that a delinquency of such magnitude is necessary to reasonably justify the filing of a motion for stay relief. When a motion for stay relief is made in the case of a delinquency of less than two months, the account is often paid current by the time of the hearing. By requiring a delinquency of more than two months, including grace periods provided in the loan agreement, the Court can be assured that the debtor's default is of a magnitude appropriate for the imposition of the additional expense of attorney fees and the limitation imposed by a strict compliance provision if the request for stay

[2] In this case, Debtors' counsel offered catch up payments in exchange for agreement by the Creditor to withdraw the strict compliance affidavit. Debtors' offer was rejected by the Creditor, and the payments were never remitted to the Creditor. This does not amount to the Creditor refusing payments because the offer of payment was conditioned on the Creditor discontinuing its request for stay relief.

[3] More than two months does not always mean three months. Partial payments are a frequent problem for secured creditors. Arrears of more than two, but less than three months, are common.

relief is denied. Exceptions, of course, will be considered in appropriate circumstances.

Having stated the reasons for the Court's requirement that creditors accept late payments from debtors and having stated a policy for when the Court will consider imposing attorney fees and strict compliance, the Court now turns to the matter of the new third rule, the duration of a strict compliance provision.

In this case, Debtors paid the Creditor faithfully for 20 months after the entry of the strict compliance order before defaulting. Because the strict compliance provision of the consent order had no limit as to its duration, the Creditor has a valid basis for seeking stay relief. However, the requirement for strict compliance for the duration of the case is too severe when applied to the facts of this case.

While Debtors' counsel agreed to the strict compliance order without any provision for the duration of the strict compliance, that willingness is a disappointing and frustrating circumstance for the Court. Counsel may have difficulty being compensated by Debtors to resist a motion for stay relief and would probably prefer to conclude that representation as soon as possible with an agreement as favorable to Debtors as possible without incurring the additional expense of attorney fees in court hearing. But, the Court finds it unacceptable to surrender a valuable right of Debtors as an accommodation to expedience without Debtors' informed consent. Debtors' counsel conceded at the hearing that he did not give the matter of strict compliance sufficient attention and did not diligently negotiate for a stated duration of the strict compliance provision at the time of the hearing on the original stay relief motion.

Two problems arise when a strict compliance order omits a provision for its duration.

First, such an order is ambiguous. It may mean that the duration is unlimited or it may mean that the parties never agreed to the duration. Second, a debtor cannot purposefully provide an informed consent to such an order when the term of duration is absent. While bankruptcy attorneys may understand as a matter of local practice the order is intended to last for the duration of the Chapter 13 plan, the Court cannot be assured the debtor has a similar understanding unless it is expressly stated in the strict compliance order.

The question of the proper duration of a strict compliance provision involves matters of judgment and discretion on the part of creditor and debtor's counsel. To encourage actual discussion of this important provision, the Court may decline to enforce strict compliance provisions beyond 18 months if the duration is not expressly stated in the order, unless such an extension is justified to the Court by a demonstration of appropriate circumstances. Such circumstances were not present in this case.

I believe that strict compliance orders should be strictly enforced and have never before made an exception to that rule. I make an exception now solely for the purpose of establishing a standard for strict compliance in future cases. Accordingly, in the event of a debtor objection to stay relief following a strict compliance default, I may decline to enforce a strict compliance provision after a period of 18 months unless the creditor demonstrates at a hearing how such a strict compliance provision is appropriate to the circumstances of the case. This rule will be applied on a case-by-case basis as to strict compliance orders currently in force.

The unlimited strict compliance provisions in this case are inappropriate for two reasons. First, the Creditor is protected from the hazards of default by a substantial equity cushion. The lack of such a cushion would be an appropriate consideration for the Court in future strict compliance decisions. Second is a factor not always present in Chapter 13 cases–a substantial dividend to unsecured creditors of 70%. Foreclosure would likely doom the prospects for success of this case. Not only would Debtors likely lose the equity in their home, but the other creditors in the case might lose a significant monetary benefit from payments to the plan. The rights of the secured creditor should not be neglected or diminished in favor of other creditors who do not have the same favorable secured status. On the other hand, when the Court is required to examine "cause" under 11 U.S.C. § 362(d)(1) in approving stay relief for a secured creditor, the impact on the case and its other creditors must be a factor in any decision.

CONCLUSION

This decision reiterates two of the Court's long standing rules for considering motions for stay relief and announces a third rule regarding strict compliance. Under the first rule, a creditor who refuses to accept payments tendered by a debtor and credit the payments to the debtor's account, except in unusual circumstances, may find this Court unwilling to grant stay relief. Under the second rule, a creditor who files a motion for stay relief when payments are not more than two months in arrears may find this Court unwilling to award attorney fees or strict compliance if the motion is denied. Under the new third rule announced by this case, a creditor seeking to impose strict compliance pursuant to an order denying a motion for stay relief containing no provision for the duration of strict compliance may find the Court unwilling to impose strict compliance for a period of longer than 18 months.

In accordance with this memorandum opinion, the Creditor's motion for stay relief in this case will be denied.

An Order in accordance with this Opinion will be entered on this date.

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