

**U.S. BANKRUPTCY COURT
District of South Carolina**

Case Number: **15-01521-jw**

Order on Request for Appointment of Mediator

The relief set forth on the following pages, for a total of 9 pages including this page, is hereby ORDERED.

**FILED BY THE COURT
03/21/2016**



Entered: 03/21/2016

A handwritten signature in cursive script, reading "John E. Waites". The signature is written in black ink and is positioned above a horizontal line.

US Bankruptcy Judge
District of South Carolina

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA**

IN RE:

Dwayne Dingle and Nekeisha Elizabeth
Stukes-Dingle,

Debtors.

C/A No. 15-01521-JW

Chapter 13

ORDER

This matter comes before the Court on the Request for Appointment of Mediator (“Request for Mediator”) to facilitate consideration of loss mitigation filed by Dwayne Dingle and Nekeisha Elizabeth Stukes-Dingle (“Debtors”). Vanderbilt Mortgage and Finance, Inc. (“Vanderbilt”) objected to the Request for Mediator. After a hearing on the matter, the Court makes the following findings of fact and conclusions of law.¹

FINDINGS OF FACT

1. Debtors are the owners of a 2013 Clayton singlewide manufactured home, in which the Debtors reside (“Manufactured Home”). Vanderbilt holds a security interest in the Manufactured Home.
2. On March 18, 2015, Debtors filed a petition for relief under chapter 13 of the Bankruptcy Code (“Present Bankruptcy Case”).
3. Debtors filed a prior chapter 13 case (13-04826-jw). In that case, Debtors’ plan, confirmed on November 17, 2013, proposed to cure a prepetition default to Vanderbilt by catching up arrearage and making future direct payments according to their contract with Vanderbilt. Debtors failed to make the direct payments and a motion for relief from stay was filed by Vanderbilt on January 15, 2014. The motion was resolved by a

¹ To the extent any of the following findings of fact constitute conclusions of law, they are adopted as such, and to the extent any conclusions of law constitute findings of fact, they are so adopted.

settlement order on February 24, 2014, which provided an additional catch up opportunity for the Debtors. Upon Debtors' default on the terms of the settlement, an order granting relief from stay was granted to Vanderbilt on June 30, 2014. Thereafter, the case was dismissed on March 12, 2015 upon the Trustee's motion due to missed payments.

4. Upon the filing of the Present Bankruptcy Case, Debtors did not seek an extension of the automatic stay as allowed by 11 U.S.C. § 362(c)(3), and the automatic stay expired on April 19, 2015. Upon the request of Vanderbilt, an order confirming the termination of the automatic stay pursuant to 11 U.S.C. § 362(j) was entered on May 1, 2015.

5. On March 31, 2015, Debtors filed a proposed chapter 13 plan in which Debtors proposed to "cram down" Vanderbilt's security interest to the value of the Manufactured Home; to which Vanderbilt objected. In resolution of this objection, the parties agreed that Vanderbilt would review Debtors for loss mitigation/mortgage modification. An amended plan reflecting this resolution was filed on May 29, 2015 and confirmed on July 2, 2015. This confirmed plan provided the following as to Vanderbilt:

The Debtor is unable to resume payments to VANDERBILT at this time, and therefore, the Debtor's plan relies upon loss mitigation or a consensual mortgage loan modification.

According to an Order Requiring Loss Mitigation/Mortgage Modification and no less than 7 days before the confirmation hearing, the Debtor, acting through Debtor's Counsel, will submit a complete application to VANDERBILT seeking loss mitigation or a consensual modification of the Debtor's mortgage loan through an applicable program, such as the Home Affordable Modification Program (HAMP). The subject loan is secured by the following property:

2013 CMHK SINGLEWIDE MOBILE HOME

Upon acceptance of the Debtor in a Trial Period Plan, Debtor's Counsel shall submit a proposed Order Approving Trial Period Plan and the

Debtor will commence payments directly to VANDERBILT in an amount equal to the payment called for under the Trial Period Plan of the applicable modification program.

If the mortgage loan modification is approved, the Debtor shall directly pay VANDERBILT's allowed mortgage claim, including any prepetition and post petition amounts. No payment will be made by the Trustee on this secured claim. Upon completion of the Trial Period Plan or [upon final approval of a] loss mitigation/mortgage modification, Debtor's Counsel shall submit a proposed Consent Order Allowing Mortgage Modification. If the loss mitigation or loan modification request is denied, Debtor's Counsel shall timely file a Mortgage Loan Modification/[Loss] Mitigation Report indicating that denial with the Court.

In the event that (1) the request for mortgage loan modification (and any necessary documentation) is not submitted or is denied or (2) the Debtor fails to timely make the above referenced Trial Period Payments, the Mortgage Creditor may, after 10 days' written notice to the Debtor, Debtor's Counsel, and the Trustee, submit an affidavit and proposed Order seeking relief from the stay. However, the Mortgage Creditor may not obtain relief until its final consideration of loss mitigation or mortgage modification is concluded and reported to the Debtor and Debtor's Counsel.

6. On June 26, 2015, Debtors filed a Notice and Motion for Loss Mitigation/Mediation. After no objection by Vanderbilt, an Order Requiring Loss Mitigation/Mortgage Modification was entered on July 20, 2015 ("Order Requiring LM/MM").

7. Prior to the entry of the Order Requiring LM/MM, on July 17, 2015, Debtors submitted their loss mitigation/mortgage modification application to Vanderbilt via the Default Mitigation Management Portal.

8. On September 2, 2015, Vanderbilt, through counsel, filed a Mortgage Loan Modification/Loss Mitigation Report that stated that Debtors' request for loss mitigation was denied. Attached to the report was a denial letter to the Debtors from Vanderbilt dated July 20, 2015, which stated that "Vanderbilt was unable to grant a loan modification . . .

[because] Vanderbilt reasonably believes [Debtors] have the ability to repay [Debtors'] loan under its current terms from [Debtors'] current income.

9. Vanderbilt filed a Motion for Relief from Stay on September 17, 2015. Debtors objected to Vanderbilt's motion; however, the objection was subsequently withdrawn, and on October 19, 2015, an order granting relief from the automatic stay was entered allowing Vanderbilt to pursue its state law remedies as to the Manufactured Home.

10. On October 19, 2015, Debtors filed a second Notice and Motion for Loss Mitigation/Mediation. Vanderbilt objected to this second motion on November 10, 2015 and Debtors withdrew it on November 11, 2015.

11. Also on November 11, 2015, Debtors filed a third Notice and Motion for Loss Mitigation/Mediation ("Third Motion for LM/MM").

12. Vanderbilt objected to the Third Motion for LM/MM on the grounds that a prior loss mitigation review occurred in July of 2015 and that Debtors' circumstances had not changed since that review to yield a different outcome.

13. A hearing was held on the Third Motion for LM/MM. At that hearing, Debtors' counsel asserted that Vanderbilt did not act in good faith during Debtors' prior loss mitigation/mortgage modification review and that this prior conduct warranted the need for a further loss mitigation review.

14. In an oral ruling on December 3, 2015, the Court denied the Debtors' Third Motion for LM/MM, finding that the commencement of a new loss mitigation/mortgage modification review process did not appear warranted; rather, the more appropriate course of action based upon Debtors' allegations was for the Debtors to file a motion with the

Court alleging Vanderbilt did not act in good faith in its initial review as required by the Order Requiring LM/MM entered on July 20, 2015.²

15. On January 4, 2016, Debtors filed the Request for Mediator. As part of the Request for Mediator, Debtors sought a reinstatement of the automatic stay as to Vanderbilt during any future mediations.

16. Vanderbilt objected to the Request for Mediator on January 11, 2016.

17. A hearing was held on the Request for Mediator on January 12, 2016. In an oral ruling on January 19, 2016, the Court denied Debtors' request to reinstate the automatic stay and held that the parties would have three days to agree upon the appointment of a mediator and that if the parties fail to agree upon the appointment of a mediator during that time period, the Court would hold a further hearing.³

18. The parties were unable to agree upon the appointment of a mediator and a further hearing was held.

19. At that hearing, Kyle Ray, the Bankruptcy Department Manager for Vanderbilt, testified that Vanderbilt reviews loans for loss mitigation on a case-by-case basis and does not have set numerical guidelines or formulas for determining when a loan may be modified. Mr. Ray further testified that he conducts an initial examination by reviewing the ratio of a borrower's current monthly mortgage payment (including escrow) to the borrower's monthly gross income and that, only in some cases, in Vanderbilt's discretion, will an examination of additional factors occur, such as a review of the ratio of a borrower's monthly total debt to monthly gross income and a comparison of the ratio of borrower's monthly gross income and monthly mortgage payment at the time of loan

² The Court entered a text order to this effect on December 3, 2015.

³ A text order to this effect was entered on January 21, 2016.

origination to the borrower's current ratio. Mr. Ray stated that Debtors' monthly mortgage payment to monthly gross income ratio was 29% and on that basis the Debtors' loss mitigation/mortgage modification request was denied. Mr. Ray also testified that Vanderbilt has no policy or program to consider forgiveness or delay of payment of prepetition mortgage arrearage when a borrower is in a bankruptcy case.

20. Nekeisha Elizabeth Stukes-Dingle, one of the Debtors, also testified about her financial hardship which occurred during her bankruptcy cases, including the death of two children and the burial costs associated therewith.

21. Thereafter, Vanderbilt and Debtors submitted memoranda in support of their positions. Additionally, Vanderbilt submitted its loss mitigation/mortgage modification policies and guidelines for an in camera review.

CONCLUSIONS OF LAW

Upon the entry of the Order Requiring LM/MM, Vanderbilt was obligated to conduct a good faith loss mitigation/mortgage modification review of Debtors' loan within the deadlines and guidelines provided in that order and Chamber Guidelines as adopted by Operating Order 15-01. These guidelines provide that the Court "may direct the appointment of a mediator to facilitate [loss mitigation/mortgage modification] discussions and resolve disputes between the parties." When requesting such an appointment, parties should allege specific grounds that demonstrate the need for the appointment of the mediator, including a lack of good faith, a change in circumstance, a demonstrable error,

or other cause.⁴ Upon an adequate showing of cause, the Court will appoint a mediator in the case.

In the present case, Debtors allege that Vanderbilt's loss mitigation/mortgage modification review was not conducted in good faith because Vanderbilt did not complete a full review and did not consider multiple factors relevant to Debtors' financial situation including their prepetition arrearage and their financial hardships. Based on these allegations, Debtors seek the appointment of a mediator to encourage a complete loss mitigation review. Vanderbilt alleges that the appointment of a mediator is not necessary and would not lead to a different result because it acted in good faith and conducted a proper review of Debtors' loan.

According to Mr. Ray, Vanderbilt found that Debtors' monthly mortgage payment to gross income ratio was 29%, which was used to determine that the Debtors' current mortgage payment is affordable and that no modification should be offered. This conclusion does not appear unreasonable or indicative of a lack of good faith in light of the ratio requirements commonly used by other modification programs in considering whether a borrower qualifies for loss mitigation.⁵

Mr. Ray admitted that Vanderbilt only conducts prospective reviews, without consideration of a borrower's previous circumstances. Vanderbilt does not consider the

⁴ Further, the guidelines mandates that a party allege specific grounds when a request has been made more than 60 days after an order granting relief from stay on the subject property or made after denial of a loss mitigation/mortgage modification appeal.

⁵ See Making Home Affordable Program, Making Home Affordable Program: Handbook for Servicers of Non-GSE Mortgages 64 (ver. 5.0, 2016), https://www.hmpadmin.com/portal/programs/docs/hamp_servicer/mhahandbook_5.pdf (requiring borrowers to have a greater than 31% debt to income ratio to qualify for a Tier 1 Home Affordable Modification Program (HAMP) modification); Federal National Mortgage Association, Servicing Guide, Fannie Mae Single Family § D2-3.2-07 (Mar. 9, 2016), <https://www.fanniemae.com/content/guide/svc030916.pdf> (requiring borrowers to have a greater than 31% debt to income ratio to qualify for a Fannie Mae HAMP modification).

amount of arrearage owed by a borrower or the borrower's prior financial hardship when determining whether to offer a loan modification. Further Mr. Ray noted that Vanderbilt does not have a present process to defer or restructure a borrower's arrearage to the end of the debt's term if the borrower is in a bankruptcy case.⁶

While Vanderbilt conducted a quick review of Debtors' modification request,⁷ the determination of Vanderbilt's denial appears to be based on acceptable criteria, at least criteria which does not indicate a lack of good faith, or demonstrable error on its face.

Therefore, considering the circumstances of this case and Debtors' prior case, it appears uncertain that the appointment of a mediator would serve an effective purpose or is justified under the circumstances presently existing in the case. As such, Debtors' Request for Appointment of Mediator is denied.

AND IT IS SO ORDERED.

Columbia, South Carolina
March 21, 2016

⁶ While the Court questions the reasonableness of a loss mitigation process which does not provide a means to address prior arrearages or to consider a financial hardship that may cause a failure to perform under a confirmed plan, considering the opportunities provided to Debtors in this case and their prior case, these factors do not indicate a lack of good faith here. However, these factors may be more suspect in other cases. If Vanderbilt's loss mitigation policies are correctly stated here, in future cases the Court may consider longer and more flexible cure provisions in chapter 13 bankruptcy plans and 11 U.S.C. § 362 settlement orders for debtors affected by these policies.

⁷ Debtors submitted their application on July 17, 2015 and Vanderbilt reported a decision on July 20, 2015.