

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

IN RE:

John Wesley Edwards, Jr. and Ella Marie
Law Edwards,

Debtor(s).

C/A No. 13-02660-JW

Chapter 13

ORDER

This matter is before the Court on an Affidavit of Default Regarding Settlement Order filed by Edgewater on Broad Creek Landing Horizontal Property Regime (the “Association”) on September 23, 2013. John Wesley Edwards, Jr. and Ella Marie Law Edwards (“Debtors”) filed a Response to the Affidavit of Default on October 28, 2013, and the matter was set for a hearing. Pursuant to Fed. R. Civ. P. 52, which is made applicable to these proceedings by Fed. R. Bankr. P. 7052 and 9014(c), and based upon the pleadings, testimony, and arguments presented at the hearing, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The Association is the holder of a judgment and horizontal property lien, entered by the state court on September 12, 2012, against the Debtor, John W. Edwards, Jr., individually and as trustee of the John W. Edwards Jr. Revocable Trust dated July 29, 1997, as amended January 13, 2004. The lien in the amount of \$19,988.90 is secured by a condominium unit on Hilton Head Island in Beaufort County, known as 50 Verbena Lane Unit 2403 (the “Property”).

2. On April 5, 2013, the state court entered a judgment of foreclosure and sale in favor of the Association.

3. On May 3, 2013, the Debtors commenced this case by filing a voluntary petition for relief under chapter 13 of the Bankruptcy Code.

4. On Schedule A, the Debtors listed the Property as having a current value of \$463,500.00, with mortgage liens on the Property in the total amount of \$459,771.48. U.S. Bank National Association is listed on Schedule D as holding a first mortgage on the Property in the amount of \$361,700.89, and USAA Federal Savings Bank is listed as holding a second mortgage on the Property in the amount of \$98,062.58. The Debtors' Statement of Financial Affairs indicates that foreclosure action brought by U.S. Bank National Association was pending at the time the Debtors commenced this case.

5. On May 23, 2013, the Debtors filed their chapter 13 plan, which was subsequently amended on June 17, 2013, in order to provide treatment of the Association's claim. The amended plan provided for monthly payments to be made to the Association by the Trustee in the amount of \$375.00 per month, along with 5.25% interest, but did not specifically address future payments to be made directly by the Debtors to the Association.

6. On June 12, 2013, the Association filed a proof of claim in the amount of \$19,988.90, secured by a judgment lien on the Property.

7. On June 26, 2013, the Association filed an objection to confirmation of the plan ("Objection"). The Objection raised questions regarding the feasibility of the plan based upon the Debtors' prepetition failure to make payments.

8. The Debtors filed a second amended plan on July 2, 2013, which did not change the treatment of the Association's claim.

9. The Association and the Debtors reached an agreement resolving the Association's objection to confirmation, and the Association withdrew its objection on July 24, 2013.

10. The confirmation hearing was held on July 25, 2013. No issues regarding the feasibility of the plan were raised by the Trustee or any other party at the hearing, and the Court entered an order providing that the plan as presently filed will be confirmed if the Trustee recommends confirmation.

11. On August 21, 2013, the Court entered a settlement order regarding the Association's objection to confirmation ("Settlement Order"). The Settlement Order required the Debtors to continue to pay all post-petition periodic assessments and special assessments and other regular and special charges imposed by the Association and to make all payments due to the Chapter 13 trustee until the completion of the plan or until their case is dismissed or discharged. In the Settlement Order, the parties agreed to relief from stay should the Debtors fail to pay any post-petition obligation to the Association or to the Trustee within fifteen days of the due date:

[U]pon the ex parte filing of an affidavit of default and proposed order, the Association shall be entitled to relief from stay against the property of the estate, being [the Property], such that it can pursue its state court remedies against said property, subject to any senior liens and encumbrances of records.

12. On September 17, 2013, the Debtor filed a third amended plan ("Third Amended Plan"), which did not change the treatment of the Association's claim. The Third Amended Plan was ultimately confirmed by order entered October 25, 2013. The confirmed plan provides for payment of all obligations, including 100% of general unsecured claims.

13. During the month of October, the Debtors sent two checks in the full amount of the monthly payment obligation to the Association for the October payment, \$541.00. The checks were dated October 9, 2013 and October 11, 2013. When the Debtors realized that they had made double payment, they called the bank and instructed it to stop payment on the October 9, 2013 check. Unbeknownst to the Debtors, the bank stopped payment on both checks as a result of its policy under which a stop payment request stops payment of all checks written to the payee involved until it is rescinded by the account holder.

14. On October 23, 2013, the Association filed an Affidavit of Default and proposed order requesting relief from the automatic stay on the grounds that the Debtors had failed to make their October payment since both checks received by the Association were dishonored as a result of the Debtors' stop payment request.

15. On October 28, 2013, the Debtors filed a response to the Affidavit of Default, asserting that their default was the result of an innocent miscommunication between Debtors and the bank. To avoid future missed or late payments, the Debtors advised that they have authorized the bank to commence monthly automatic payments to the Association beginning the first week of November.

16. At the hearing regarding the Affidavit of Default, the Trustee advised that the Debtors are current with their plan payments.

CONCLUSIONS OF LAW

The Association asserts that it is entitled to relief from the automatic stay pursuant to the terms of the August 21, 2013 Settlement Order, which were agreed to by the Debtors. The Association argues that Settlement Order contemplates the entry of an

order granting relief from the stay upon the filing of an *ex parte* affidavit of default showing that the Debtors have failed to pay any post-petition obligation of the Association within 15 days of its due date. Since both of the Debtors' checks for the October payment were dishonored, the Association contends that the order granting relief from stay should be entered.

The Debtors argue that relief from stay should not be granted because their failure to pay was caused by the actions or mistake of a third party, the Debtors' bank, as the result of an innocent miscommunication between the Debtors and the bank. Specifically, the Debtors complied with the Settlement Order by tendering two separate payments of the full amount due to the Association, by checks dated October 9, 2013 and October 11, 2013. Both of these checks were apparently timely received by the Association. When the Debtors discovered they had mistakenly made two payments, they asked the bank to stop payment on their first payment but the bank instead stopped payment on both checks. The Debtors also immediately made arrangements for direct payments to be made to the Association to avoid future defaults. The Debtors further retained an accountant to assist them in organizing their finances. Under these circumstances, the Debtors argue that it would be inequitable and contrary to the intent of the Settlement Order for the Court to enter the order granting relief from stay.

While settlement orders are typically construed for enforcement purposes by this Court as ordinary contracts and thus are construed as they are written,¹ the Court finds the

¹ The Court has previously relied on the district court's opinion in Blanton v. Federal Land Bank (In re Blanton), for the principle that a settlement order should be construed basically as a contract and should be enforced according to its terms. In re The Fripp Group, C/A No. 08-01499, slip op. (Bankr. D.S.C. Dec. 29, 2008). In Blanton, the district court strictly construed the terms of a consent order, finding that the debtor did not substantially comply with a consent order when he made his payment two days late, and enforced the provision in the consent order providing for automatic lifting of the stay upon default in payment by the debtor. 78 B.R. 442 (D.S.C. 1987). The Blanton case is distinguishable from this case

circumstances of this case are highly exceptional and agrees with the Debtors that the circumstances of this case dictate a different outcome than that requested by the Association. The Debtors substantially complied with the terms of the Settlement Order by timely tendering their October payment. It was only through the intervening act of a third party in mistakenly cancelling both of the Debtors' checks that payment was not negotiable and received by the Association. Upon discovery of the bank's actions in dishonoring both of their checks, the Debtors quickly took steps to prevent future missed payments to the Association by setting up direct payments to the Association from the bank.

The Court further observes that the Settlement Order was entered to resolve the Association's objection regarding the feasibility of the plan; however, this issue was quickly resolved during the confirmation process because it was readily apparent that the Debtors had sufficient income to make their monthly payments to the Association and their monthly plan payments, including a 100% dividend to unsecured creditors. The Association's objection was thus based solely on the Debtors' pre-petition failure to make payments, which is not usually recognized by the Court as a valid basis to deny confirmation, and therefore is questionable grounds upon which to allow *ex parte* relief from stay regarding such a necessary asset. It causes the Court further concern that the confirmed plan does not specifically provide for direct payments to be made by the Debtors to the Association outside of the plan and does not reference or incorporate the requirements set forth in the Settlement Order.

because the consent order in Blanton provided for automatic lifting of the stay, without further act, notice, or order of the court and thus the stay was relieved before receipt of the late payment. The Settlement Order in this case did not provide for immediate lifting of the stay since it contemplated the entry of an order by the Court following the filing of the affidavit of default.

The Court further observes that an order granting relief from the automatic stay would appear to provide little benefit to the Association, as there are substantial mortgages on the Debtors' real property, which have priority over the Association's lien, and there is likely little or no equity in the Property to pay the Association. Due to the pending foreclosure action by the mortgage creditor, the Association would be required to outbid the prior mortgage creditors (whose filed claims are in excess of \$460,000) to protect its interest in a state court foreclosure sale. On the other hand, an order granting relief from the automatic stay would have severe consequences to the Debtors and all other creditors, as it would cause the loss of their home, which appears necessary to their successful payments and reorganization. Since the Debtors' confirmed plan provides for payment in full to the Association and the other general unsecured creditors, the Court finds that the interests of the Debtors and all of the creditors in this case outweigh the Association's need for immediate relief from the stay.² In entering settlement orders which allow for the entry of further orders by the Court, the Court does not discard its responsibility to ensure fairness and justice, nor does it waive its discretion to determine whether a material default has in fact occurred or whether the entry of the order lifting the stay is warranted.³

² In the parties Joint Statement of Dispute and Stipulation, the Association requested, at a minimum, the reimbursement of attorneys' fees and costs incurred as a result of the default. However, a final liquidated amount was not documented or submitted. Nevertheless, the Court is prepared to consider the request to minimize any prejudice to the Association if raised by a further supplemental motion within 10 days of this Order.

³ Even if the parties are bound to their agreement regarding lifting the stay pursuant to the Settlement Order, the circumstances of this case may warrant the issuance of an injunction pursuant to 11 U.S.C. § 105 requested by the Debtors to bar the Association from pursuing its state court remedies or an order granting relief pursuant to Fed. R. Civ. P. 60(b)(2) or (b)(6) on the grounds that the Debtors' failure to comply with the Settlement Order is excusable neglect or that there is good cause justifying relief from the Settlement Order.

For the foregoing reasons, the Court declines to issue an order granting relief from the automatic stay at this time. If they have not done so already, the Debtors shall immediately set up automatic, direct payments to the Association to ensure future compliance with the Settlement Order.

AND IT IS SO ORDERED.

FILED BY THE COURT

12/23/2013



US Bankruptcy Judge
District of South Carolina

Entered: 12/23/2013