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UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF SOUTH CAROLINA

FILED

98 JAN 12 PM 1:00

U.S. BANKRUPTCY COURT  
DISTRICT OF SOUTH CAROLINA

IN RE:

Reushal Gregory,

Debtor.

C/A No. 97-10052

JUDGMENT

Chapter 13

**ENTERED**

JAN 13 1998

R. J. J.

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, the motion for relief from the automatic stay provisions of 11 U.S.C. §362 filed by Johnsonville State Bank on December 2, 1997 is denied at this time.

*James W. White*  
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,  
*January 12*, 1998.

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CLERK OF DISTRICT COURT  
DIST. OF SOUTH CAROLINA  
C/A No. 97-10052

IN RE:

Reushal Gregory,

Debtor.

ORDER

ENTERED

Chapter 13

JAN 13 1998

R. J. J.

THIS MATTER comes before the Court upon the motion for relief from the automatic stay provisions of 11 U.S.C. §362<sup>1</sup> filed by Johnsonville State Bank ("Johnsonville") on December 2, 1997. The motion seeks relief pursuant to §362(d)(1) for cause including refiling in bad faith and a lack of adequate protection. The Chapter 13 Trustee did not object or appear at the hearing; however, a timely objection was filed by the Debtor, Mr. Reushal Gregory ("Debtor"). Based upon a review of the file including the certifications of facts and upon arguments of counsel, the Court makes the following Findings of Fact and Conclusions of Law.

**FINDINGS OF FACT**

This Chapter 13 case was filed by the Debtor on November 24, 1997. The Debtor had a previous Chapter 13 case in this District, Case No. 96-76030, which was filed on August 26, 1996. In Case No. 96-76030, a plan was confirmed on January 16, 1997; however, the case was subsequently dismissed by Order of August 29, 1997 for failure to make plan payments to the Chapter 13 Trustee. In Case No. 96-76030, Johnsonville State Bank was the Debtor's principal creditor with a claim secured by real estate in an approximate amount of \$22,000 and a claim secured by a mobile home in an approximate amount of \$11,400. The confirmed plan in Case No.

<sup>1</sup> Further references to the Bankruptcy Code, 11 U.S.C. § 101, *et seq.* shall be by section number only.

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96-76030 required 58 monthly payments of \$1,215 to the Trustee. The plan in Case No. 96-76030 provided for payments of \$710 per month plus 12.99% interest to Johnsonville on its real estate claim and \$290 per month plus 12% interest to Johnsonville on its mobile home claim. That plan also provided for 100% payment to unsecured creditors at 8% interest. During the pendency of Case No. 96-76030, on April 10, 1997 the Debtor and Johnsonville entered into a consent order which provided Johnsonville with automatic relief from the stay upon the Debtor's failure to make payments. Based upon a subsequent affidavit of non-compliance filed by Johnsonville, the Court granted relief from the stay by Order of April 30, 1997. As stated previously, Case No. 96-76030 was dismissed by Order of August 29, 1997 for failure to make plan payments to the Chapter 13 Trustee. It appears that the creditor commenced foreclosure proceedings in State Court on October 27, 1997 and on November 24, 1997, the Debtor filed this second Chapter 13 case.

#### CONCLUSIONS OF LAW

Johnsonville's present motion seeks relief from the automatic stay provisions for cause pursuant to § 362(d)(1). Section 362(d)(1) provides as follows:

(d) 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;

11 U.S.C. § 362(d)(1). Johnsonville alleges that the cause present to allow its requested relief is the Debtor's lack of insurance coverage on Johnsonville's collateral, a present lack of payments to Johnsonville, and an undue delay caused by the refiling of bankruptcy after the Debtor's breach of



the adequate protection agreement contained in the previous consent order in Case No. 96-76030. Johnsonville does not argue that §109(g) prohibits the refiling of a second petition and also acknowledges that the Debtor may have equity in the real estate on which Johnsonville has a first lien. The Debtor opposes the relief sought by Johnsonville and asserts that she has effective insurance coverage and that a change of circumstances has occurred since the earlier case which provides justification for the refiling and gives her a reasonable prospect for a successful reorganization in this case.

At the hearing on the within motion, the Debtor was ordered to provide proof of insurance to Johnsonville within ten days or Johnsonville would be allowed to indicate any such failure by affidavit and immediately propose an order for relief from stay. No such affidavit has been filed by the creditor to date and in fact, counsel for the Debtor has stated in correspondence to the Court that adequate insurance is in place on the collateral.

Additionally, the schedules and statements filed in this case by the Debtor indicate, and the Debtor testified to, a \$9,000 reduction in her secured debt due to the collection by a secured creditor against a third party's certification of deposit and a \$3,000 reduction in unsecured debt due to forgiveness of debt by relatives and friends, both occurring since the filing of the previous bankruptcy case. The proposed plan filed on November 24, 1997 provides for payments to the Chapter 13 Trustee of \$870 per month for 58 months with Johnsonville receiving \$544 per month plus 8.25% interest on its real estate claim and \$208 per month plus 8.25% interest on its mobile home claim (such claim to be valued). Johnsonville has filed an objection to the plan but a hearing has not yet been scheduled before this Judge.

At the hearing on the within motion for relief from the automatic stay, the Debtor further

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testified to a recent award of a contract to provide day care through the ABC Governmental Program which would provide an increased and more certain cash flow for her day care business which is the Debtor's sole source of income.

This Court has recognized that it is generally a debtor's burden of proof to show an entitlement to a second opportunity to file for relief by showing a bona fide change in circumstances justifying default in the first case and a second filing. In re Pryor, 54 B.R. 679 (Bkrcty.D.S.C. 1985). In re White, 72 B.R. 169 (Bkrcty.D.S.C. 1986). In re McElveen, 78 B.R. 1005 (Bkrcty.D.S.C. 1987). In re Whitner, No. 88-009948 (Bkrcty. D.S.C. 1988). In re Brumer, No. 92-71010 (Bkrcty.D.S.C. 1992). In re Hartley, 187 B.R. 506 (Bkrcty.D.S.C. 1995).

In addition, pursuant to § 362(g), "[i]n any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section-- (1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and (2) the party opposing such relief has the burden of proof on all other issues." 11 U.S.C. § 362(g). As there is no issue as to equity, it is the finding of the Court that the Debtor has met her burden of proof that Johnsonville's collateral is adequately protected and in addition that cause does not exist for the relief requested by Johnsonville at this time. While the Court is mindful of the need for the reliability of consensual adequate protection orders as the one entered in Case No. 96-76030, the change of circumstances presented by the Debtor including the existence of property casualty insurance, the existence of equity in the property, the substantial reduction of debt (approximately 23% of secured debt and 55% of unsecured debt) from the filing of the first case which allows lower plan payments, and the recent prospect for an increased and more certain income from the Debtor's business all satisfactorily rebut the creditor's arguments that cause

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exists for the lifting of the automatic stay.<sup>2</sup> For all of these reasons, it is therefore,

**ORDERED**, that the motion for relief from the automatic stay provisions of 11 U.S.C. §362 filed by Johnsonville State Bank on December 2, 1997 is denied at this time.

**AND IT IS SO ORDERED.**

  
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,  
January 12, 1998.

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<sup>2</sup> Under circumstances such as in this case, the Court believes that an argument based upon a lack of good faith in refiling is best weighed in the context of a motion to dismiss or a confirmation hearing, however, upon the presentation of the parties and upon a review of the totality of the circumstances, the Court finds that the refiling is justified based upon the change of circumstances.

