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NOV 15 2005

UNITED STATES BANKRUPTCY COURT

DISTRICT OF SOUTH CAROLINA

United States Bankruptcy Court
Columbia, South Carolina (36)

In re:

Jennifer Jones Scott,

Debtor.

C/A No. 03-02627-JW

Chapter 13

JUDGMENT

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, the Motion for Resumption of Payments filed by Jennifer Jones Scott is denied.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina
November 15, 2005

ENTERED

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

IN RE:

Jennifer Jones Scott,

Debtor.

C/A No. 03-02627-JW

Chapter 13

ORDER

This matter comes before the Court upon a Motion for Resumption of Payments (“Motion”) filed by Jennifer Jones Scott (“Debtor”). The Motion seeks an order authorizing the Chapter 13 Trustee to direct certain payments under her Chapter 13 plan to Citifinancial, a creditor holding a second mortgage on Debtor’s home.

Debtor filed for relief under Chapter 13 on February 28, 2003. In her schedules, she listed a first mortgage on her home located at 1220 Cactus Avenue, Richland County, South Carolina to National City Mortgage in the approximate amount of \$44,000 and a second mortgage to Citifinancial in the approximate amount of \$14,000. In her Chapter 13 Plan filed on May 21, 2003, Debtor proposed to directly pay her mortgage payments to National City Mortgage and to pay the net balance of the secured claim filed by Citifinancial with 8.5% interest through plan payments of \$321.00 per month. The Chapter 13 Plan proposed total payments of \$640.00 per month to the Chapter 13 Trustee with an estimated dividend of 5% to unsecured creditors. On May 30, 2003, the Court confirmed Debtor’s Chapter 13 Plan (hereafter the “Confirmed Plan”). Debtor’s Confirmed Plan also states as follows:

Any creditor holding a claim secured by property which is removed from the protection of the automatic stay, whether by judicial action, voluntary surrender, or through operation of the plan, will receive no further distribution from the trustee, unless an itemized proof of claim for any deficiency is filed within a reasonable amount of time after

the removal of the property from the protection of the automatic stay, [sic] This also applies to creditors who may claim an interest in, or lien on, property which is removed from the protection of the automatic stay by another lienholder or released to another lien holder.

The purpose behind discontinuing payments to secured creditors after relief from stay is granted appears to be two-fold. First, once such creditors choose to enforce their interests and collect obligations by foreclosing on collateral outside of the Bankruptcy Court, they elect to forego many of the benefits of the Chapter 13 distribution process. Second, the property is lost for the benefit of debtor and the estate upon foreclosure by the creditor.

After filing a Motion for Relief from Stay alleging that Debtor failed to perform under her Confirmed Plan, Aurora Loan Services, the successor to National City Mortgage, and Debtor agreed to a settlement order to provide Debtor an opportunity to cure its Plan default. On November 16, 2004, Aurora Loan Services, asserting a default under the Settlement Order, obtained relief from the automatic stay so it could commence foreclosure on the subject property. According to the terms of the Confirmed Plan, the Chapter 13 Trustee thereafter ceased all payments to Citifinancial as a lienholder on the same property.

Since the date that Aurora Loan Services received relief from the automatic stay, Debtor has apparently continued making her plan payments according to her Confirmed Plan. However, the Chapter 13 Trustee has distributed payments, including the portion which was originally designated to Citifinancial under the Confirmed Plan, to unsecured creditors. This is the proper result under the terms of Debtor's Confirmed Plan. Under the provisions of Debtor's Confirmed Plan, payments initially directed to secured

creditors subject to the automatic stay would be directed to unsecured creditors once relief from stay is granted to that secured creditor or any other secured creditor with an interest in the property protected by the automatic stay. In this District, according to the Confirmation Order, creditors are entitled to receive the full amount designated to be paid under a confirmed chapter 13 plan not merely the projected percentage. See In re Bouton, C/A No. 98-09296-B, slip op. at 6 (Bankr. D.S.C. Nov. 13, 2000) (finding that provisions of Chapter 13 plan created a pot plan and declining to modify payment period of plan because it would change distribution expressed by the plan).¹ See also In re Dennis, No. 98-04378-JW, 2001 WL 1806000, at * 2 (Bankr. D.S.C. Mar. 21, 2001) (following Bouton). Accordingly, Debtor's unsecured creditors have received and have a reasonable expectation to continue to be paid the funds directed to Citifinancial once relief from stay was granted. Under such circumstances, the Court is not inclined to grant Debtor's Motion because to do so would in effect change the present distribution committed to by Debtor in her Confirmed Plan.

Any change of distribution under the Confirmed Plan as it now provides may be better achieved by modifying the Confirmed Plan pursuant to 11 U.S.C. § 1329. Filing of a Motion to Modify the Confirmed Plan would provide better notice to unsecured creditors of a possible decrease in distributions caused by a resumption of payments to Citifinancial. Furthermore, Debtor would also be required to present evidence of her present income and expenses and justify a departure from the initial terms of the

¹ Under a "pot" or "base" plan, debtors must pay a base amount equal to payment under the confirmed plan, even if certain creditors do not file proofs of claim and the projected percentage distribution amount to unsecured creditors increases as a result. This process appears to avoid an unfair windfall to debtors at the expense of unsecured creditors.

Confirmed Plan. Filing a Motion for Resumption of Payments does not appear to achieve similar results.

Debtor asserts that she continued making payments under the Confirmed Plan with the belief that Citifinancial continued to receive distributions after Aurora Loan Services obtained relief from the automatic stay. However, Debtor's assertion is contrary to the express terms of the Confirmed Plan which should have been better explained to Debtor by her counsel.

Furthermore, in this case, Aurora Loan Services has received relief from the automatic stay, and although Debtor claims that she is presently current with payments to it, Aurora Loan Services retains the ability to presently foreclose on Debtor's home outside of the bankruptcy case. In light of this fact and the underlying policy concerns stated above, any resumption of payments on any mortgage by the Chapter 13 Trustee should also require an agreement with Aurora Loan Services to forbear foreclosure.

The Court also notes that SC LBR 4001-1(a)(14) clearly requires the actual agreement of Citifinancial and the Chapter 13 Trustee before an "Order Allowing Resumption of Payments by Trustee" is entered by the Court. In this case, neither the Chapter 13 Trustee, Citifinancial nor Aurora Loan Services have affirmatively consented to the relief requested. The absence of such affirmative agreement is a procedural defect under this Court's local rules. Accordingly, Citifinancial's failure to object to the Motion is not an acceptable substitute for the express requirements of SC LBR 4001-1(a)(14).

Finally, the Court is troubled by Debtor's long delay in seeking the Motion after relief from stay was granted. The record of this case indicates that Aurora Loan Services obtained relief from stay on November 12, 2004, and the Chapter 13 Trustee has not paid

Citifinancial for approximately one year. Accordingly, Debtor's arrearage to Citifinancial under its allowed secured claim has increased significantly, may require a greater portion of the plan payment to the Trustee, and may itself justify relief from stay were Citifinancial to request it.

In light of all the reasons stated herein, the Court is convinced that Debtor's remedy, if any, is through a modification of the Confirmed Plan which fully details and discloses the relief sought and is subject to further notice and hearing. Therefore, Debtor's Motion is denied. If a modification is pursued, the Chapter 13 Trustee is to set a confirmation hearing on the dispute calendar for consideration by the undersigned.

AND IT IS SO ORDERED.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
November 15, 2005