

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

FILED

11 O'clock & min. M

IN RE:

C/A No. 05-45006-JW DEC 07 2005

Ydell Bigby and Diane Victoria Bigby,

ENTERED

Chapter 13

United States Bankruptcy Court
Columbia, South Carolina (11)

Debtors.

DEC 07 2005

JUDGMENT

Based upon the findings of fact and conclusions of law made in the attached Order, the Motion to Extend Stay filed by Ydell Bigby and Diane Victoria Bigby (collectively referred to as "Debtors") is denied. Therefore, Debtors' automatic stay shall terminate on December 10, 2005.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina
December 7, 2005

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

FILED

O'clock

DEC 07 2005

IN RE:

Ydell Bigby and Diane Victoria Bigby,

Debtors.

ENTERED

DEC 07 2005

K. E. P.

No. 05-45006-JW

Chapter 13

ORDER

United States Bankruptcy Court
Columbia, South Carolina (11)

This matter comes before the Court upon a Motion to Extend Stay ("Motion") that was filed by Ydell Bigby and Diane Victoria Bigby (hereinafter the Bigbys shall be referred to as "Debtors" or "Bigbys") pursuant to 11 U.S.C. § 362(c)(3)(B).¹ The Motion was served on all creditors, but none filed an objection. The Chapter 13 Trustee filed a response to the Motion.

The Bigbys were debtors in a previous bankruptcy case (C/A No. 04-07837-W) that was pending within a one (1) year period preceding the filing of this case. Debtors' previous case was dismissed because they failed to pay their chapter 13 plan obligations in a timely manner. Therefore, pursuant to § 362(c)(3)(A), the automatic stay provided by § 362(a) was scheduled to terminate on December 4, 2005, the thirtieth (30th) day after Debtors' filed their second bankruptcy case. However, the Court extended the stay to December 9, 2005 pursuant to an interim order entered on December 2, 2005.²

Pursuant to § 362(c)(3)(C)(i)(II)(cc), a presumption that Debtors did not file their second bankruptcy case in good faith exists because Debtors' previous case was dismissed for failure to make timely payments under their confirmed plan. Furthermore,

¹ Hereinafter internal references to the Bankruptcy Code (11 U.S.C. § 101 et. seq.), as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, shall be made by section number only.

² In the December 2, 2005 order, the Court preserved the authority to further address the issue of extending the automatic stay, and extended the stay subject to certain conditions and limitations as expressed therein.

the lack of good faith presumption also arises pursuant to § 362(c)(3)(ii) because at the time Debtors' previous case was dismissed, an action seeking relief from the stay had been resolved pursuant to a settlement order with a mortgage creditor. In light of the presumption of a lack of good faith, Debtors are required to demonstrate, by clear and convincing evidence, that their current case was filed in good faith. 11 U.S.C. § 362(c)(3)(C).

In order to demonstrate that they filed this current bankruptcy case in good faith, Debtors assert that their agreement to a wage order and a continuation of financial contributions from their adult son are two factors that demonstrate a substantial change in circumstances and indicate a likelihood that their Chapter 13 plan in this case will be confirmed and fully performed. The Court disagrees.

Debtors contend that their failure to make timely payments in their previous case was caused by the late receipt of Ms. Bigby's social security check. In this case Debtors assert that their plan payments will be made in a timely manner because Mr. Bigby has entered a wage order. Although the wage order may make Debtors less likely to default on their plan payments in this second case, the entry of the wage order is simply an accommodation that allows the Chapter 13 Trustee to instruct Mr. Bigby's employer to send a portion of Mr. Bigby's paycheck to the Chapter 13 Trustee as payment of his Chapter 13 plan obligations. Ultimately, whether by wage order or Debtors' direct payments to the Chapter 13 Trustee, Debtors are fully responsible for making timely plan payments. Therefore, the entry of the wage order in this case, while a change from the previous case, does not indicate a *substantial* change in circumstances arising after the dismissal of Debtors' first case.

Furthermore, Debtors' reliance on voluntary financial contributions from their adult son does not demonstrate a *substantial* change in circumstances from the dismissal of their previous case to the filing of this case. Debtors' testimony indicates that their son began making financial contributions to them in April 2005. On February 4, 2005, Debtors were subject to an order that provided Debtors with the opportunity to cure an arrearage on their plan payments or their case would be dismissed. However, despite being provided extra time to cure their plan payment arrearage and receiving the voluntary financial contributions from their son, Debtors failed to satisfy the terms of the order; and thus, the Court dismissed Debtors' first Chapter 13 case on July 11, 2005. In light of such facts, it is clear that the voluntary financial contributions offered by Debtors' son do not arise "after the dismissal of the next most previous case" as required by § 362(c)(3)(C)(i)(III). See 11 U.S.C. § 362(c)(3)(C)(i)(III) (noting that a lack of a "substantial change in circumstances *since* the dismissal of the next most previous case under chapter 7, 11, or 13" gives rise to a presumption that a subsequent bankruptcy case is not filed in good faith) (emphasis added). Instead, the proposed voluntary contributions appear to be a continuation of Debtors' financial circumstances that existed during the administration of their first case.

The Court also notes that the voluntary contributions cited by Debtors is not convincing evidence that their Chapter 13 plan in this case is likely to be confirmed or fully performed. Generally, "unsubstantiated expectations of financial contributions from family members or other third parties are not sufficient to meet [plan] feasibility requirements." See In re Williams, C/A No. 97-08824-W, slip op. at 4 (Bankr. D.S.C. Jan. 13, 1998) (citing cases). Such contributions may be considered where there is

evidence demonstrating that the contributing third-party is legally obligated to make certain contributions to debtors or there is evidence of regular reliable contributions in the past. See In re Marley, C/A No. 04-00030-B, slip op. at 3 (Bankr. D.S.C. Oct. 8, 2004) (citing In re Porter, 276 B.R. 32, 38 (Bankr. D. Mass. 2002) for the proposition that a debtor must demonstrate that financial contributions from third parties are being made pursuant to some legally binding obligation to do so); In re Williams, C/A No. 97-08824-W, slip op. at 5 (noting that debtor's failure to demonstrate a legal entitlement to certain voluntary contributions that she relied upon to fund her Chapter 13 plan was a contributing factor that led to denying plan feasibility). See also In re Goodwin, 328 B.R. 868, 872 (Bankr. M.D. Fla. 2005) ("It is well established that gratuitous contributions by nondebtors who are (1) neither the spouse of debtor, nor (2) otherwise obligated to pay the claims and (3) where there is no history of such contribution in the past is . . . insufficient to support the finding that the Plan is feasible . . .") (citing cases). In this case, Debtors, who characterized their son's contributions as "voluntary," did not present sufficient evidence to indicate that their adult son is obligated to make or capable of making financial contributions to Debtors to carry their plan to completion. Moreover, there was no detailed evidence that indicated that Debtors' son had an established history of making regular financial contributions to Debtors.

Accordingly, in light of the totality of the circumstances attendant in this case, the Court concludes that Debtors have failed to rebut the presumption of a lack of good faith in the filing of this case by clear and convincing evidence. Therefore, Debtors' Motion to Extend Stay is denied, and the interim stay relief provided by the Court shall terminate

upon the expiration of time period prescribed in the interim order, which is December 10, 2005.

AND IT IS SO ORDERED.

Columbia, South Carolina,
December 7, 2005


UNITED STATES BANKRUPTCY JUDGE