

U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: 06-02600

ORDER ON MOTION TO EXTEND THE AUTOMATIC STAY

The relief set forth on the following pages, for a total of 5 pages including this page,
is hereby ORDERED.

FILED BY THE COURT
07/19/2006



Entered: 07/19/2006

A handwritten signature in black ink, appearing to read "S. R. O.", written over a horizontal line.

US Bankruptcy Court Judge
District of South Carolina

UNITED STATES BANKRUPTCY COURT

DISTRICT OF SOUTH CAROLINA

IN RE:

Patricia Dingle Harvin,

Debtor.

C/A No. 06-02600-DD

Chapter 13

ORDER

This matter is before the Court on Patricia Dingle Harvin's ("Debtor") Motion to Extend Stay ("Motion") pursuant to 11 U.S.C. §362(c)(3)(B) as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA").¹ The Motion and Notice of Hearing on the Motion were served on all creditors, but none filed an objection. The Chapter 13 Trustee filed a response to the Motion.

Debtor was previously a debtor in a Chapter 13 bankruptcy case (05 -09522) that was pending within a one (1) year period preceding the filing of this case. Therefore, pursuant to § 362(c)(3)(A), the automatic stay provided by § 362(a) is scheduled to terminate on July 22, 2006, the thirtieth day (30th) day after Debtor filed the present bankruptcy case. Pursuant to § 362(c)(3)(C)(i)(II)(cc), a presumption that Debtor did not file the present bankruptcy case in good faith as to all creditors exists because Debtor's previous case was dismissed for failure to make timely payments under the confirmed plan. In light of the presumption of a lack of good faith, Debtor is required to demonstrate, by clear and convincing evidence, that the current case was filed in good faith. 11 U.S.C. § 362(c)(3)(C).

Debtor during her previous case was employed under contract as a security guard for the SECURITAS security agency. Apparently, while her previous case was pending her contract with SECURITAS terminated. The termination of her contract reduced her hourly pay rate from \$10.50 per

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.

hour to \$7.00 per hour. Debtor asserts that this resulted in her take home pay decreasing to less than \$200 per week, and furthermore asserts that it was this reduction in pay that caused her case to be dismissed for non-payment. Debtor states that after her case was dismissed she decided to train for a new career as a tractor-trailer driver.

Debtor as of the date of the hearing on the Motion, July 18, 2006, has completed about five (5) of the eight (8) week training program. While Debtor is in training she indicates that she earns about \$550 per week, and after the completion of her training she claims she has potential to make over \$1000 per week. The Court notes Debtor's effort to better herself as well as her financial situation. The Court recognizes this to be a change in the Debtor's circumstances, and furthermore, believes this to be a factor to be considered in the good faith analysis. However, a change in circumstances is one factor of many to be considered in the totality of circumstances analysis. In *In re Thomas* I discuss my analysis of the requirements of extension of the automatic stay pursuant to § 362(c)(3)(B) by stating,

The determination of good faith is necessarily fact intensive and must be conducted on a case-by-case basis. The Court should consider the totality of the circumstances including the *Goodwin* factors, evidence of a substantial change in circumstances following previous filed cases, and any other relevant evidence offered by the debtor in making its decision. A change in circumstances, substantial or not, would rarely by itself demonstrate good faith of the current filing.

In re Thomas, C/A No. 06-01961-DD, slip op. (Bankr. D.S.C. June 27, 2006)(*Emphasis in Original*).

While Debtor's change in circumstances does weigh in favor of the Debtor, it is by no means *the* deciding factor in this case. The Court notes two other factors for consideration. First, the Debtor's willingness to execute a pay order to have the plan payments deducted from her paycheck by her employer and paid directly to the trustee. It is my view that in the majority of cases the use of a pay order greatly enhances the chance that a debtor will make the required plan payments. In the present case this factor weighs in favor of extending the automatic stay.

The last factor to consider in the present case is the proposed percentage payout to unsecured creditors. The proposed payout to unsecured creditors is in my view a significant indicator when determining the presence of good faith. In cases where a debtor has had a change in financial circumstances in the form of a substantial increase in disposable income that increase, at least in part, should be passed on to the debtor's unsecured creditors.² It is difficult for this Court to find good faith when the plan in a debtor's previous case proposed a 1% dividend to unsecured creditors, and after the debtor has substantially increased her disposable income she continues to propose 1% to unsecured creditors. This seems to me to be the very definition of bad faith. I do not come to a determination as to the percentage increase that would constitute good faith, because I believe that to be best left to a case-by-case analysis. In the case at issue, Debtor proposed a 1% payment to unsecured creditors in her prior case, and now in the current case is proposing a 16% payout.³ This increase seems to be sufficient at this time for this factor to weigh in favor of extending the stay.

However, due to the unique factual situation in this case I have decided to condition the stay in an unusual way. Debtor is presently in training for her new career, and while in training she represents that she makes \$550 per week. She further states that after she completes her training and begins working full time she could make "over a thousand dollars a week." The plan and proposed percentage to unsecured creditors is adequate at this time, but may become inadequate depending on the actual amount Debtor earns from her new employment. Therefore, it is this Court's intention to extend the stay for a specified amount of time to enable the Debtor to settle into her new job. The Court will then

² This is a general rule; I do not intend to suggest that this rule would be applicable in all cases with increased income. There may be other factors that do not permit a better treatment of unsecured creditors.

³ Debtor's initial plan filed in the present case proposed only a 1% dividend to unsecured creditors, however an amended plan was filed increasing the payout to 16% before the hearing. Given the additional disposable income in this case, Debtor needed to amend her plan to increase the proposed payout to unsecured creditors. Had she not done so, the Court would have considered it a factor weighing against extending the automatic stay.

be able to make a better determination as to Debtor's actual income increase and whether or not the plan is sufficient in regards to the actual increase.

Based on the totality of the circumstances in this case, the Court finds that Debtor has met her burden of proof that this case was filed in good faith,⁴ and that the equities of the case support granting the Motion with the following limitations:

It is therefore,

ORDERED that the automatic stay is extended as to all creditors pursuant to § 362(c)(3)(B) until October 1, 2006; and it is further

ORDERED that a hearing be held in this matter at **9:00 am on September 26, 2006** at the **J. Bratton Davis United States Bankruptcy Courthouse, 1100 Laurel Street, Columbia, South Carolina 29201-2423** to determine whether any amendments to the plan, schedules, or any other documents are necessary based on the actual income of Debtor at that time; and it is further

ORDERED that the Court reserves to itself the discretion to further extend the stay past October 1, 2006 as to any or all creditors for a length of time the Court deems just and appropriate after the aforementioned hearing; and it is further

ORDERED that should this case be dismissed for any reason such dismissal shall be with prejudice for a period of one-hundred and eighty (180) days as to any subsequent filing by Debtor under Chapter 11, 12, or 13 of the Bankruptcy Code.

AND IT IS SO ORDERED.

Columbia, South Carolina
July 19, 2006

⁴ The Court's findings are limited to the context of this Motion and nothing in this Order shall be construed as *res judicata* to prevent Debtor, the trustee, or any party in interest from challenging or establishing that this case or plan was filed or proposed in good faith for purposes of 11 U.S.C. §§ 1307 or 1325. See *In re Charles*, 332 B.R. 538, 542 (Bankr. S.D. Tex. 2005) (holding that Congress, by enacting § 362(c)(3), intended the courts to conduct an early triage of a case and determine whether a case is doomed to fail or whether a case has a reasonable likelihood of success.)