

FILED  
AUG 2 2007  
UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF SOUTH CAROLINA

FILED  
at O'clock & \_\_\_\_\_ AM  
AUG 27 2007  
United States Bankruptcy Court  
Columbia, South Carolina (13)

IN RE:

Mark Steven Cooper and Sharon Ann  
Cooper,

NH

C/A No. 06-01183-JW

Chapter 13

**JUDGMENT**

Debtor(s).

Based upon the Findings of Fact and Conclusions of Law made in the attached Order of the Court, Debtors' Motion to Reconsider an order entered March 1, 2007 disallowing the claim of CTX Mortgage Company is granted.

*John E. Waite*  
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina  
August 27, 2007

**ENTERED**  
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NMH

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF SOUTH CAROLINA

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at Delack & Smith  
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IN RE:

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C/A No. 06-01183-JW United States Bankruptcy Court  
Columbia, South Carolina (13)

Chapter 13

**ORDER**

This matter comes before the Court on Debtors' Motion to Reconsider ("Motion") an order entered March 1, 2007 disallowing the claim of CTX Mortgage Company. The Court has jurisdiction over this matter pursuant to 11 U.S.C. § 1334. The Court makes the following Findings of Fact and Conclusions of Law pursuant to Fed. R. Civ. P. 52, made applicable to this proceeding by Fed. R. Bankr. P. 7052.<sup>1</sup>

**FINDINGS OF FACT**

1. Debtors filed a petition for relief under chapter 13 on March 28, 2006.
2. Debtors' confirmed chapter 13 plan provides that Debtors' mortgage arrearage with CTX Mortgage Company ("CTX"),<sup>2</sup> the holder of the first mortgage on Debtors' residence, would be paid through the plan in the amount of \$67.00 per month.
3. Debtors' confirmed chapter 13 plan provides that Debtors' mortgage arrearage with Select Portfolio Services, the holder of the second mortgage on Debtors' residence, would be paid through the plan, also in the amount of \$67.00 per month.
4. Debtors' confirmed chapter 13 plan further provides:

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

<sup>1</sup> To the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and to the extent any Conclusions of Law constitute Findings of Fact, they are also adopted as such.

<sup>2</sup> CTX is also referred to in the plan and in its proof of claim as Midland Mortgage.

distribution from the chapter 13 trustee, unless an itemized proof of claim for any deficiency is filed within a reasonable time after the removal of the property from the protection of the automatic stay. Any funds that would have been paid to such a creditor will be distributed to other creditors, unless the Court orders otherwise. 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 lienholder, unless the Court orders otherwise.

5. On January 3, 2007, Select Portfolio Servicing obtained an order lifting the automatic stay as to Debtors' residence.

6. To carry out the provisions of the confirmed chapter 13 plan prohibiting further payment to Select Portfolio Serving and CTX, as holders of claims secured by property removed from the protection of the automatic stay, Debtors' chapter 13 trustee filed a limited objection to the claims of these creditors on January 18, 2007.

7. There appears to be no defect in CSX's claim or substantive basis for disallowing its claim. The provisions of the form plan utilized in this District contemplate that such secured creditors will be paid from liquidation of their collateral and provide an administrative convenience for chapter 13 trustees to redirect plan payments for the benefit of other creditors. However, the form plan specifically allows the Court to order continued payments to such a creditor if a party so moves.

8. Without objection from Debtors, Select Portfolio Serving, or CTX, the Court entered orders on March 1, 2007 allowing the claims of these creditors but finding that the remainder of their respective secured claims should be paid outside of Debtors' chapter 13 plan.<sup>3</sup>

9. On May 29, 2007, CTX filed a motion for relief from the automatic stay.

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<sup>3</sup> Debtors indicate that they have reached an out of court agreement with Select Portfolio Servicing, which does not require the reconsideration of the trustee's claim objection or distribution by the trustee under the terms of the plan.

10. Debtors filed the Motion at issue on July 25, 2007 seeking to reconsider the March 1, 2007 order prohibiting CTX from receiving a further distribution from the chapter 13 trustee so that Debtors could settle CTX's stay relief motion and allow CTX to receive further payments on its arrearage claim from the chapter 13 trustee.

11. At the hearing on August 9, 2007, the parties indicated their agreement that the payments from the chapter 13 trustee should resume. The trustee expressed concern at the hearing that the Motion was not timely but did not object to the relief requested. The trustee indicated that, while the time between the order on the objection to claim and the Motion was over four (4) months, no disbursements were made to the pool of unsecured creditors, and if the claim is paid through the plan, the unsecured creditors will receive no less than what was indicated they would receive when the plan was confirmed and thus would not be unduly prejudiced if the Motion is granted.

### **CONCLUSIONS OF LAW**

Although Debtor's Motion is captioned as a motion to reconsider, Debtors appear to be moving to vacate the March 1, 2007 order as to CSX under Fed. R. Civ. P. 60(b) and therefore the Court will consider the Motion under the framework of that rule.<sup>4</sup> See Singleton v. Countrywide Home Loans, Inc. (In re Singleton), C/A No. 2:06-cv-1666-PMD, slip op. (D.S.C. Oct. 27, 2006) (considering a "Motion to Reconsider Dismissal" under Fed. R. Civ. P. 60(b)). A motion under Fed. R. Civ. P. 60(b) is a considered in two parts. First, the moving party must satisfy the following three threshold requirements: (1) the motion must be timely filed; (2) the moving party must have a meritorious defense to the action; and (3) the setting aside of the

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<sup>4</sup> Debtors did not specify a rule or statute in their Motion; however, the motion implicated Rule 60(b) and the proposed orders submitted in this matter addressed Rule 60(b) and therefore it appears that Debtors are seeking relief under this rule. Although not referenced by the parties, it appears that 11 U.S.C. § 502(j) would also allow the Court to reconsider the March 1, 2007 order for cause, which appears to be a less restrictive standard than Rule 60(b).

judgment must not unfairly prejudice the nonmoving party. See Nat'l Credit Union v. Gray, 1 F.3d 262, 264 (4th Cir. 1993). Once the threshold requirements of the first prong have been met, the moving party must next satisfy one of the six grounds for relief set forth in Rule 60(b). See Park Corp. v. Lexington Ins. Co., 812 F.2d 894, 896 (4th Cir. 1987).

Motions under Rule 60(b) must be brought within a reasonable time, which is not more than one year after an order is entered if a party is proceeding under Fed. R. Civ. P. (b)(1), (2), or (3). In this case, the Motion was brought nearly four months after the entry of the order at issue. In this case, the Court questions whether the Motion is timely but will deem the Motion to be timely since no party in interest objects to the relief and this is an issue of first impression for this District. In an effort to guide the bar in future matters where a creditor is no longer paid through a plan because of stay relief, the undersigned believes that motions, similar to the one brought in this case, should be made, absent a showing of extraordinary circumstances, not more than the earlier of sixty (60) days after the order is entered disallowing payment of the claim or an order granting stay relief to a party secured by the subject property.<sup>5</sup>

Debtors appear to have a meritorious defense to trustee's motion objecting to CSX's claim. It appears that Debtors desire to remain in the property securing CSX's debt and continue making payments to CSX and that the property, which is Debtors' residence, is necessary to further performance under the plan. Debtors' confirmed chapter 13 plan also provides that the Court may allow a creditor to continued to be paid through a chapter 13 plan notwithstanding stay relief by the creditor or by another party secured by the property. Therefore, the second prong of the threshold requirements is met.

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<sup>5</sup> The Court does not hold that all motions by a debtor under Fed. R. Civ. P. 60(b) or 11 U.S.C. § 502(j) must be brought within sixty days, only that sixty days should be used as a general point of reference when filing motions that essentially seek the resumption of payments in a chapter 13 case due to stay relief.

The third prong is also met in this case. The chapter 13 trustee indicated that there would be no undue prejudice to unsecured creditors since granting the Motion would not alter the distribution to this class of creditors.<sup>6</sup> It also does not appear that other parties would be prejudiced by granting the Motion.

Finally, the Court finds grounds under Fed. R. Civ. P. 60(b) to grant the Motion. Under the facts of this case, it appears that clauses (1), (2), (3), and (4) are not applicable but clauses (5) and (6) provide a sufficient basis to afford Debtors the relief they seek. Therefore the Motion is granted and Trustee shall pay the claim of CSX pursuant to the terms of the confirmed plan.<sup>7</sup>

**AND IT IS SO ORDERED.**

  
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina  
August 27, 2007

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<sup>6</sup> Regardless of the timeliness of a motion to allow the resumption of payments, the Court would likely deny such a motion if a trustee made distributions to unsecured creditors in reliance on the terms of a confirmed plan providing that a secured creditor would receive no further distributions following stay relief for the subject property.

<sup>7</sup> The Court would also find cause to grant the relief requested pursuant to 11 U.S.C. § 502(j).