

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA**

In re,

Michael Donnell Terry and
Lola Yvonne Johnson-Terry,

Debtors.

C/A No. 12-04626-dd

Chapter 13

**ORDER REGARDING
MOTION FOR SANCTIONS**

This matter is before the Court on the motion for reduction in attorney fees and for sanctions entered by the Chapter 13 Trustee (“Trustee”) on September 26, 2012. Debtors’ attorney filed a response to the Trustee’s motion. A hearing on the motion was held on November 19, 2012. A confirmation hearing on Debtors’ proposed plan was held on the same date. With respect to confirmation, the Court entered an Order denying confirmation and stating, at Debtors’ request, that the case would be dismissed unless a motion to convert to another chapter was filed within ten days. Debtors did not move to convert, and the case was dismissed. The Court took the motion for sanctions under advisement.

In support of her motion for sanctions, the Trustee asserts she sent an email to Debtors’ attorney on May 16, 2012, stating the following: “Please be on notice that any case or plan filed after today, May 16, 2012, which is based upon an ‘anticipated’ [Home Affordable Modification Program (“HAMP”)] loan modification will result in my seeking sanctions/or a reduction in attorney’s fees based upon bad faith.” Debtors filed their chapter 13 petition on July 30, 2012. The feasibility of Debtors proposed plan was contingent upon being approved for a HAMP loan modification that, according to their amended Schedule J, would lower their monthly mortgage

payment from \$1,232.15 to \$874.14.¹ Debtors also hoped the loan modification would cure their arrearage or postpone its payment. The Trustee asserts Debtors' plan was thus based on a "speculative" future change in income that cannot be relied upon under the current case law. *See Hamilton v. Lanning*, 130 S. Ct. 2464, 2472-73 (2010); *In re Solomon*, 67 F.3d 1128, 1132 (4th Cir. 1995); *In re Forest Grove, LLC*, 448 B.R. 729, 735 (Bankr. D.S.C. 2011). The Trustee argues that the delay in the loan modification approval process, as presently experienced, mandates a bad faith filing finding when the modification request was only recently made. Debtors' attorney responded to the Trustee's motion for sanctions and contended that the use of HAMP as a means to create a confirmable plan is not bad faith but rather a reasonable effort to help Debtors save their home.²

The loan at issue here is secured by a mortgage, a lien on Debtors' home. Chapter 13 plans may modify the rights of holders of secured claims other than liens on a debtor's principal residence. 11 U.S.C. § 1322(b)(2). Despite this restriction, a default on a home loan secured by a principal residence can be cured, most often by payment of the arrearage over time. 11 U.S.C.

¹ In addition, the Trustee asserts Debtors miscalculated what their mortgage payments would be if approved for a HAMP modification.

² Debtors' attorney cites *In re Corley*, 11-07787, 12-02553, as an example of a case where another judge on this Court approved a plan similar to what was proposed here. He asserts the Corleys' first case, 11-07787, was assigned to the judge who is presiding over the present case and dismissed for its use of HAMP. According to Debtors' attorney, the Corleys filed a second case, which was assigned to another judge on this Court under case number 12-02553, and a plan including identical HAMP language was confirmed. However, the Corleys' motion to extend the automatic stay in their second case states that unlike their previous case, the mortgage arrears would be treated and paid through their bankruptcy plan. Moreover, it states that Mrs. Corley was unemployed in the first case and that she had obtained full-time employment with a steady income. In addition, the plan that was confirmed in the second case stated the Corleys were current on their mortgage obligations and would remain current pursuant to a loan modification agreement. Thus, the Corleys' case does not appear analogous to the situation here, as the motion to extend the automatic stay in their second case suggests they could propose a feasible plan that was not contingent on HAMP approval and the plan that was ultimately confirmed suggests to the undersigned there was a loan modification actually in place at the time of confirmation.

§ 1322(b)(5). When considering chapter 13 plans dealing with secured claims, the court may confirm the plan only if all the requirements of 11 U.S.C. § 1325(a) are met. These requirements include, with regard to the claims secured by real property, that the claimant has accepted the plan; the claimant retains its lien, is paid the value of its claim, and the payments are in equal monthly installments if the payment on the claim is periodic; or the property is surrendered. 11 U.S.C. § 1325(a).

These requirements impose a significant restraint on confirmation of a plan that is contingent upon the approval of a modification request concerning the lien on Debtors' principal residence. Absent the creditor's consent, the plan must either surrender the property or provide for periodic monthly payments of either the arrearage or the value of the claim. The creditor's consent will generally be forthcoming only after the loan modification is actually approved. In this instance, the creditor has not consented to the proposed treatment, and Debtors have not proposed surrender of the property or periodic payments. Thus, the plan could not be confirmed.

After careful consideration, the Trustee's motion for sanctions is denied. While debtors' attorneys should give serious consideration to a statement by a trustee that he or she will consider certain conduct bad faith, there is no per se rule against chapter 13 plans based on anticipated HAMP modifications. The Court finds that the better approach is to consider the facts of each case individually and, with respect to this case, finds that the conduct of Debtors' attorney does not warrant sanctions. However, to the extent the Trustee seeks a reduction of the fees of Debtors' attorney, the motion is granted. Debtors' attorney submitted a plan that was not confirmable, the feasibility of which was based on a speculative event that did not come to pass. Additionally, Debtors' attorney has not explained why it was necessary for his clients to file their

case when they did instead of waiting for a decision on their HAMP modification request before filing. Counsel has not shown that the standard or usual fee is reasonable in this case.

The Court recognizes the quandary faced by counsel for clients with the desire to seek a loan modification and the need for immediate bankruptcy relief. Even when the application for loan modification has been made and diligently pursued, the decision-making process often extends beyond the time frame for plan confirmation. While it is not necessarily bad faith to file a chapter 13 case when the only feasible plan for retaining the debtor's home is contingent on a loan modification, counsel must be careful not to waste the limited opportunities a debtor may have for effective relief.

The attorney fees to be paid by Debtors are, pursuant to Operating Order 09-01, limited to the \$218 received by Debtors' counsel pre-petition.

AND IT IS SO ORDERED.

FILED BY THE COURT
01/08/2013



Entered: 01/09/2013

David R. Duncan
US Bankruptcy Judge
District of South Carolina