

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF SOUTH CAROLINA

FILED  
O'clock & min  
AUG 16 2006  
United States Bankruptcy Court  
Columbia, South Carolina (11)

IN RE:

Hilda L. Dinkins,

ENTERED C/A No. 06-02820-JW

AUG 16 2006

Chapter 13

Debtor(s) **K. E. P.** JUDGMENT

Based upon the Findings of Fact and Conclusions of Law made in the attached Order of the Court, Debtor's Motion to Extend the Automatic Stay is denied. The automatic stay shall expire in this case on August 21, 2006 pursuant to 11 U.S.C. § 362(c)(3)(A). The trustee shall closely scrutinize and consider all matters for confirmation to be considered by this Court on an appropriate dispute docket. Any dismissal of this case shall be with prejudice for a period of one-hundred eighty (180) days.

Columbia, South Carolina,  
August 16, 2006

  
UNITED STATES BANKRUPTCY JUDGE

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**ORDER**

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United States Bankruptcy Court  
Columbia, South Carolina (11)

This matter comes before the Court upon a Motion to Extend Stay filed by Hilda L. Dinkins ("Debtor") pursuant to 11 U.S.C. § 362(c)(3)(B).<sup>1</sup> The Motion was served on all creditors. The chapter 13 trustee filed a response to the Motion. A hearing on the Motion was held within thirty days of the petition date. The Court entered an interim order on July 25, 2006 extending the automatic stay until August 21, 2006.

This case is Debtor's second bankruptcy filing. Debtor's previous case was dismissed on February 6, 2006 for failure to make payments pursuant to the terms of a confirmed Chapter 13 plan. Because the previous case was dismissed during the one (1) year period preceding the filing of this case, Debtor must successfully extend the automatic stay pursuant to § 362(c)(3)(B) if she desires the protection of the automatic stay in this bankruptcy case. See In re Jupiter, 344 B.R. 754 (Bankr. D.S.C. 2006) (interpreting § 362(c)(3)(A) as terminating the automatic stay with respect to the debtor and property of the debtor's estate). Under § 362(c)(3)(C)(i)(II)(cc), there is a presumption that Debtor did not file this case in good faith because Debtor's previous case was dismissed for failure to make timely plan payments. The lack of good faith presumption also arises with respect to CitiFinancial Mortgage pursuant to § 362(c)(3)(C)(ii) because it obtained relief from the automatic stay in the previous case. In light of the presumption that Debtor filed this case with a lack of good faith, Debtor must demonstrate, by

<sup>1</sup> 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.

clear and convincing evidence, that she filed this case in good faith in order to extend the stay beyond August 21, 2006.

Debtor was represented by her current counsel in her previous case. Debtor asserts that her previous case failed because her plan payments increased, without her knowledge, and thus she did not have her employer increase her withholdings from her paycheck. This assertion is not supported by the record of the previous case. It appears in Debtor's previous case that her plan payments were originally \$325.00 per month. A wage order was entered requiring Debtor's employer to remit this sum to the chapter 13 trustee. On June 29, 2005, Debtor amended her proposed plan prior to confirmation. The amended plan required payments of \$460.00 per month. This plan was confirmed and a wage order was entered July 18, 2006 requiring Debtor's employer to remit this sum to the chapter 13 trustee. From Debtor's testimony, it is not clear whether her employer failed to remit the increased sum or whether the failure was attributable to some other party, nevertheless Debtor bears the ultimate burden of ensuring that plan payments are timely made. See In re Bigby, C/ A No. 05-45006-W, slip op. at 2 (Bankr. D.S.C. Dec. 7, 2005). Therefore, the Court does not consider any error in the previous case with regard to the wage order and plan payments compelling enough to meet Debtor's burden of proof on the Motion.

Debtor also alleges that she will have additional disposable income in this case due to an increase in an annuity payment and a decrease in household expenses. With regard to the annuity payment, it appears that the annuity is being offset by the annuity issuer due to an overpayment to Debtor.<sup>2</sup> Debtor believes that the annuity issuer will accept her proposal to treat

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<sup>2</sup> Though Debtor discloses an annuity payment on Schedule I, she does not disclose the annuity on Schedule B, which specifically requires Debtor to disclose any annuity on line 10. Debtor's honesty in representing facts to the Court is a factor of good faith considered for purposes of the Motion. See In re Goodwin, C/A/ No. 05-45110-W, slip op. at 2 (Bankr. D.S.C. Dec. 19, 2005).

it as an unsecured creditor in the plan and that the issuer will cease the offset, which would thereby increase Debtor's income. As of the hearing on the Motion, the annuity issuer had not ceased the offset and there is not convincing evidence that the issuer will cease the offset given that the Bankruptcy Code preserves a creditor's pre-petition rights of setoff and recoupment, the latter not being subject to the automatic stay. See 11 U.S.C. § 553. Without this additional income from the annuity, Debtor will not have sufficient income to make the proposed plan payment as it appears that Debtor's income from employment has decreased by more than \$700.00 since the previous case was filed.

Debtor has also failed to demonstrate that her Schedule J accurately reflects her expenses and thus her ability to fund her proposed chapter 13 plan. In particular, there is an inconsistency of a stable cost- homeowner's insurance- that Debtor has failed to adequately explain. In the previous case, Debtor disclosed that she paid \$150.00 per month in homeowner's insurance. In this case, Debtor asserts that she is only paying \$65.00 per month in housing insurance. Debtor testified that this expense has not changed since the last case was filed and indicated that the expense in the last case may have been higher because she was including home repairs, a separately itemized expense on Schedule J, in her calculation of homeowner's insurance. This explanation, coupled with the other problems in Debtor's schedules, does not convince the Court that Debtor's expenses are accurately reflected in her current Schedule J and that she has the ability to make the proposed plan payments.

It also does not appear, based upon the schedules filed, that Debtor's proposed plan is feasible. Debtor discloses \$325.65 per month in disposable income. The chapter 13 trustee indicates that Debtor will be required to provide \$383.00 per month to her plan. This increase in the required plan payment indicates that the present plan in this case is not feasible, especially

considering that Debtor's expenses and income may not be accurately reflected in her schedules. Debtor failed to offer evidence that she has income sufficient to make the plan payments that the trustee indicates are required in this case and therefore the Motion may also be denied for a lack of feasibility. See In re Love, C/A No. 06-00648-W, slip op. (Bankr. D.S.C. Mar. 23, 2006) (denying a motion to extend the automatic stay for lack of plan feasibility).

This case typifies what appears to be a disturbing trend in this District with respect to the accuracy of debtors' schedules. See In re Elbert, C/A 06-01540-W, slip op. at 3 (Bankr. D.S.C. May 16, 2006) ("The Court is unfortunately finding that many schedules, when put to scrutiny, are seriously flawed especially with respect to the accuracy of a debtor's assets and income."). Often in hearing motions to extend the automatic stay, the Court has noticed that a debtor, who experiences an increase in income, also experiences a substantially similar increase in expenses, without reasonable explanation and notwithstanding the fact that there is small gap in time between the filing of the two cases. Likewise, as in this case, a debtor who experiences a decrease in income attempts to demonstrate an offsetting decrease in her expenses. It certainly raises a concern that schedules are being manipulated, either by padding the budget to pay less to creditors, or by artificially reducing the budget in an effort to meet the requirements of § 362(c)(3)(B). Both of these practices indicate a lack of good faith, raises serious questions regarding counsel's representation, and are not condoned. Schedules are not malleable and subject to artificial or convenient adjustment as debtor or counsel sees fit. They should be an accurate representation of a debtor's current and actual financial circumstances. Debtors must be prepared to offer credible and convincing evidence at the hearing on their motion to extend the automatic stay if there are inconsistencies or significant fluctuations between their schedules in a previous case and their schedules in their current case. Debtor did not offer such evidence at the

hearing on the Motion. Debtor's inconsistent schedules make it difficult for the Court to assess the veracity of the schedules and weigh heavily against granting the Motion. See In re Potts, C/A No. 06-02068-W, slip op. at 2-3 (Bankr. D.S.C. Jun. 15, 2006) (stating "the bar should be advised that debtors carry a heavy burden of proof when they move to extend the automatic stay.... If schedules and testimony are inconclusive on the issue, then the Court may deny the relief sought without allowing further time to correct any errors in the filed documents or to submit additional proof on the matter.").

Accordingly, under the totality of the circumstances attendant in this case, the Court concludes that Debtor has failed to rebut, by clear and convincing evidence, the presumption that she filed this case with a lack of good faith.<sup>3</sup> Therefore, Debtor's Motion is denied, and the automatic stay shall expire on August 21, 2006 pursuant to § 362(c)(3)(A). The trustee is ordered to closely scrutinize and consider all matters for confirmation to be considered by this Court on an appropriate dispute docket. As a condition for allowing this case to continue, it is further ordered that any dismissal of this case shall be with prejudice for a period of one-hundred eighty (180) days.

**AND IT IS SO ORDERED.**

  
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina  
August 16, 2006

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<sup>3</sup> 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).