

**U.S. BANKRUPTCY COURT  
District of South Carolina**

Case Number: **13-06730-jw**

**ORDER**

The relief set forth on the following pages, for a total of 7 pages including this page, is hereby ORDERED.

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**FILED BY THE COURT  
10/26/2015**



Entered: 10/26/2015

US Bankruptcy Judge  
District of South Carolina

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

IN RE:

Michael Andrew James,

Debtor(s).

C/A No. 13-06730-JW

Chapter 13

**ORDER**

This matter is before the Court on the Motion to Reconsider Supplemental Settlement Order (“Motion”) filed by Michael Andrew James (“Debtor”) on July 28, 2015 and on the Affidavit of Debtor’s Default Pursuant to Settlement Order filed by Carolina Bank on September 9, 2015. Carolina Bank filed an objection to the Motion and Debtor moved to reconsider the affidavit of default. After hearings on the Motion and Affidavit of Default, the Court took the matters under advisement and now addresses both matters by this Order. Pursuant to Federal Rule of Civil Procedure 52, which is made applicable to this contested matter by Federal Rules of Bankruptcy Procedure 7052 and 9014(c), the Court makes the following findings of fact and conclusions of law.<sup>1</sup>

**FINDINGS OF FACT**

1. Debtor filed a voluntary petition for relief under Chapter 13 of the Bankruptcy Code on November 11, 2013.

2. Debtor is the owner of real property located at 156 Swallow Lane, Norway, SC 29113, which he uses as his principal residence (“Property”). Debtor is indebted to Carolina Bank for a loan secured by a mortgage on the Property. The indebtedness owed to Carolina Bank exceeds the value of the Property.

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<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 of the following conclusions of law constitute findings of fact, they are so adopted.

3. Debtor's confirmed plan provides for the catch up payment of prepetition arrearage payments to Carolina Bank through the Trustee and payment of regular post-petition payments directly to Carolina Bank by Debtor. The arrearage payments are current, but Carolina Bank complains that the direct payments have been inconsistent or incomplete.

4. On April 22, 2014, Debtor's mortgage creditor, Carolina Bank, filed a motion for relief from the automatic stay. Debtor objected to the motion for relief from stay. Carolina Bank subsequently withdrew its motion for relief from stay because Debtor became current on the note.

5. On November 4, 2014, Carolina Bank filed a second motion for relief from stay. Debtor again objected to the motion.

6. Debtor and Carolina Bank entered into a settlement agreement which was approved by entry of a Settlement Order on January 23, 2015.

7. On April 15, 2015, Debtor filed a Notice and Motion for Loss Mitigation/Mediation.

8. On April 23, 2015, Carolina Bank filed an objection to the Notice and Motion for Loss Mitigation/Mediation and also an affidavit of default regarding the previously entered Settlement Order.

9. The parties subsequently settled their dispute regarding Debtor's request for loss mitigation/mortgage modification and Carolina Bank's request for relief from stay and agreed to entry of a Consent Supplement Order for Loss Mitigation on May 19, 2015, which provided, among other things, that Debtor would bring payments current on the Settlement Order, Carolina Bank would engage in loss mitigation review, and that

any subsequent dismissal of Debtor's bankruptcy case would be with prejudice for a period of nine months.

10. On May 19, 2015, the Court entered an Order Requiring Loss Mitigation/Mortgage Modification. This order requires all parties to act in good faith during the loss mitigation/mortgage modification process. At the time of the entry of the Order, the parties and the Court were unaware that there was no non-bankruptcy authority compelling Carolina Bank to consider loss mitigation/mortgage modification in light of the unusual circumstances governing Carolina Bank's holding of mortgages.

11. Debtor submitted documents for loss mitigation/mortgage modification review by Carolina Bank via the Portal on June 1, 2015.

12. After reviewing the information provided by Debtor, Carolina Bank declined to offer any loss mitigation/mortgage modification to Debtor based on Debtor's failure to comply with the Settlement Order, Debtor's history of being provided with opportunities to make reduced/deferred payments and defaulting on those payments, Debtor's continued "irresponsible financial behavior" by applying for additional credit over the past year, Debtor's bouncing of checks on a regular basis, and Debtor's low credit score. After rejecting Debtor's request for loss mitigation/mortgage modification, Carolina Bank began refusing to accept direct mortgage payments from Debtor.

13. On July 28, 2015, Debtor filed the Motion to Reconsider Supplemental Settlement Order on the grounds that Carolina Bank did not act in good faith in connection with the loss mitigation/mortgage modification review. Carolina Bank objected to the Motion, and a hearing was held on September 10, 2015.

14. On September 9, 2015, Carolina Bank filed the Affidavit of Debtor's Default Pursuant to Settlement Order. In response, Debtor filed a Motion to Reconsider Affidavit of Default, to which Carolina Bank responded as well.

15. On September 21, 2015, Carolina Bank filed a Notice of Payment Change and an affidavit of attorney's fees incurred in responding to the Motion.

16. The Court conducted a hearing on the Affidavit of Default on October 20, 2015. At the hearing, Debtor testified that he had the ability and the funds to catch up his payments and complete his cure pursuant to the Settlement Order.

### **CONCLUSIONS OF LAW**

Debtor requests that the Court reconsider the Consent Supplemental Order for Loss Mitigation pursuant to Federal Rules of Civil Procedure 59 and 60 on the grounds that Carolina Bank acted in bad faith in refusing to enter into a loan modification agreement with Debtor by using non-standard industry criteria for loan modification analysis, unreasonably delaying its review of the loan modification packet Debtor uploaded on the Portal, and refusing to consider Debtor's appeal. Specifically, Debtor seeks an order vacating the dismissal with prejudice provision contained within the Consent Supplemental Order. Carolina Bank objects to such relief.

In support of its objection, Carolina Bank presented the testimony of David Griswold, Senior Vice President of Carolina Bank, who reviewed Debtor's loan for loss mitigation/mortgage modification. The testimony presented showed that Carolina Bank acted within reasonable time frames to review Debtor's loss mitigation/mortgage modification application, but was unfamiliar with the Portal process. Carolina Bank also provided testimony indicating that it had engaged in prior efforts to work with Debtor.

With regard to its loss mitigation/mortgage modification review for Debtor, Carolina Bank primarily considered factors relative to refinancing or extending a new loan, such as credit rating and past payment history—problems which plague most bankruptcy debtors and which are not ordinarily used in a legitimate loss mitigation/mortgage modification review in which a debtor by definition is in default. Mr. Griswold testified that Carolina Bank’s denial of loss mitigation/mortgage modification was due to “debtor fatigue”—the Bank had lost confidence in Debtor’s ability to perform on the loan.

Based on the authorities cited to the Court by the parties, there appears to be no non-bankruptcy authority that would compel Carolina Bank to undertake loss mitigation or mortgage modification to reduce mortgage payments, interest or extend the term of the loan. Debtor’s effort to remove the dismissal with prejudice provision from the Consent Supplemental Order for Loss Mitigation would only help Debtor if, after dismissal, he planned to refile a bankruptcy case before foreclosure, which would allow him to keep his house longer and would delay creditors, raising a question of his own good faith. Moreover, the dismissal with prejudice provision in the Consent Supplemental Order was bargained for and agreed to by Debtor without a guarantee of result. Based on the evidence presented, the Court finds that Debtor has failed to demonstrate that Carolina Bank knowingly acted in bad faith and therefore denies Debtor’s request to reconsider the Consent Supplemental Order and vacate the dismissal with prejudice provision.

Nevertheless, Carolina Bank’s approach taken in connection with the loss mitigation/mortgage modification review, while not proven to have been in knowing bad faith, appears unfair to Debtor who incurred costs, fees, and time in honestly seeking that relief. Debtor’s confirmed plan still provides for the cure of the arrearage and direct

payments to Carolina Bank. As a court of equity, the Court finds that under the circumstances of this case, Debtor should be provided a further opportunity to cure all past deficiencies.

Accordingly, it is hereby

ORDERED that the Motion to Reconsider Consent Supplemental Settlement Order is denied;

IT IS FURTHER ORDERED that Debtor shall cure all outstanding payments due pursuant to the Settlement Order by making a payment of \$3,100.00 by October 28, 2015, and a payment of \$1,604.93 by November 8, 2015, and shall continue to make regular direct payments to Carolina Bank on or before the 20<sup>th</sup> day of each month. Payments received within that 20-day period shall be considered compliant with this Order.<sup>2</sup> Upon Debtor's failure to timely make such payments, relief from stay may be provided without further hearing upon the filing of an affidavit of default by Carolina Bank and the entry of the proposed order by the Court;

IT IS FURTHER ORDERED that the Court reserves the right to consider the appropriateness of any attorney's fees Carolina Bank seeks to charge Debtor, but will allow such issue to be raised pursuant to the Notice of Payment Change; and

IT IS FURTHER ORDERED that in the event this case is subsequently converted to a case under chapters 7 or 11, the undersigned shall retain this case.

**AND IT IS SO ORDERED.**

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<sup>2</sup> Carolina Bank may assert a late fee in accordance with the terms of the loan agreement for payments received after the 15<sup>th</sup> day of the month.