

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

IN RE:

Laura Pearl White,

Debtor(s).

C/A No. 15-05037-JW

Chapter 13

**ORDER**

This matter comes before the Court upon the Motion to Reconsider Relief from Stay (“Motion to Reconsider”) filed by Laura Pearl White (“Debtor”) seeking to vacate the Order Granting Relief from the Automatic Stay as to LNV Corporation (“Mortgage Creditor”). After a hearing on the Motion to Reconsider, the Court makes the following findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52, which is made applicable to this proceeding by Fed. R. Bankr. P. 7052 and 9014(c).

**FINDINGS OF FACT**

1. Isaac Bennett executed a promissory note to Decision One Mortgage Company, LLC in the amount of \$112,527.50 on June 27, 2006 (“Note”).
2. To secure the obligations on the Note, Isaac Bennett also executed a mortgage on June 27, 2006 (“Mortgage”) as to certain real property that is better known as 126 Aberdeen Avenue, Columbia, South Carolina, 29203 (“Subject Property”).
3. At the time the Note and Mortgage were executed, the Subject Property was owned by Isaac Bennett, Derrick White and Debtor.
4. Thereafter, the Note and Mortgage were transferred to the Mortgage Creditor.
5. In February of 2009, MGC Mortgage as Representative of the Mortgage Creditor commenced an action against Isaac Bennett and Debtor in the Court of Common

Pleas for Richland County (“State Court”) seeking to collect on the Note and foreclose on the Mortgage (“First Foreclosure Action”). As part of this action, the Mortgage Creditor requested a declaration from the State Court that Debtor intended, but neglected to sign the Mortgage and that the Mortgage Creditor is entitled to an equitable mortgage over Debtor’s interest in the Subject Property.

6. A Judgment of Foreclosure and Sale was entered in the First Foreclosure Action on June 10, 2009, which included a finding that the Mortgage Creditor was entitled to an equitable mortgage on Debtor’s interest in the Subject Property. The First Foreclosure Action was later dismissed in March of 2013; however, the State Court did not vacate the portion of the judgment pertaining to the Mortgage Creditor’s equitable mortgage on Debtor’s interest.

7. In October of 2010, the Mortgage Creditor commenced a second action against Isaac Bennett and Debtor to foreclose on the Mortgage (“Second Foreclosure Action”). The Second Foreclosure Action also sought a reformation of the Mortgage to include Debtor as a mortgagor and encumber her interest in the Subject Property.

8. On May 5, 2015, the State Court entered a Judgment of Foreclosure and Sale in the Second Foreclosure Action, which included a holding that the Mortgage Creditor was entitled to a reformation of the Mortgage to include Debtor as a mortgagor and to encumber her interest in the Subject Property.

9. On September 22, 2015, Debtor filed a petition for relief under chapter 13 of the Bankruptcy Code.

10. Debtor filed a proposed plan of reorganization on September 22, 2015, which was amended on December 18, 2015 and confirmed on December 23, 2015 (“Chapter 13 Plan”).

11. In addressing the Mortgage Creditor’s secured claim, the Chapter 13 Plan provides that:

The Debtor is unable to resume payments to [Mortgage Creditor] at this time, and therefore the Debtor’s plan relies upon loss mitigation or a consensual mortgage loan modification.

According to an Order Requiring Loss Mitigation/Mortgage Modification and no less than 7 days before the confirmation hearing, the Debtor acting through Debtor’s Counsel will submit a complete application to [Mortgage Creditor], seeking loss mitigation or a consensual modification of the Debtor’s mortgage loan through an applicable program, such as the Home Affordable Modification Program (HAMP). The subject mortgage loan is secured by real property located at

126 Aberdeen Avenue, Columbia, SC 29203

Upon acceptance of the Debtor in a Trial Period Plan, Debtor’s Counsel shall submit a proposed Order Approving Trial Period Plan, and the Debtor will commence payments directly to [Mortgage Creditor] in an amount equal to the payment called for under the Trial Period Plan of the applicable modification program.

If the mortgage loan modification is approved, the Debtor shall directly pay [Mortgage Creditor] allowed mortgage claim, including any prepetition and post-petition amounts. No payment will be made by the Trustee on this secured claim. Upon completion of the Trial Period Plan or to seek final approval of the loss mitigation/mortgage modification, Debtor’s Counsel shall submit a proposed Consent Order Allowing Mortgage Modification. If the loss mitigation or loan modification request is denied, Debtor’s Counsel shall timely file a Mortgage Loan Modification/[ ]Loss Mitigation Report indicating that denial with the Court.

In the [event] that (1) the request for mortgage loan modification (and any necessary documentation) is not submitted or is denied or (2) the Debtor fails to timely make the above referenced Trial Period Plan Payments, the Mortgage Creditor may, after 10 days written notice to the Debtor, Debtor’s Counsel, and the Trustee, submit an affidavit and proposed order seeking relief from the stay. However, the Mortgage Creditor may not obtain relief

until its final consideration of loss mitigation or mortgage modification is concluded and reported to the Debtor and Debtor's Counsel.<sup>1</sup>

12. On January 12, 2016, Counsel for the Mortgage Creditor provided written notice to Debtor, Debtor's Counsel and the Trustee that the Mortgage Creditor had not received a request for a loan modification and that it would be filing an affidavit and proposed order seeking relief from the stay in 14 days.

13. On January 29, 2016, counsel for the Mortgage Creditor filed an affidavit of default and proposed order seeking relief from the automatic stay as outlined in the Chapter 13 Plan, and an Order Granting Relief from Automatic Stay as to the Mortgage Creditor was entered on February 1, 2016 ("Relief Order")

14. On March 4, 2016, Debtor filed the Motion to Reconsider seeking to vacate the Relief Order and resume loss mitigation with the Mortgage Creditor.

15. At the hearing, Debtor's Counsel stated that in January of 2016, counsel for the Mortgage Creditor advised him that Debtor needed evidence of her interest in the Subject Property and the Mortgage to proceed with loss mitigation. Debtor's Counsel delayed the filing of a Notice and Motion for Loss Mitigation/Mortgage Modification and the submission of a loss mitigation application while attempting to obtain this documentation from Debtor. After the Relief Order was entered, Debtor obtained a copy of the Judgment of Foreclosure and Sale from the First Foreclosure Action, evidencing Debtor's interest in the Subject Property and the Mortgage.

16. Counsel for the Mortgage Creditor argued at the hearing that the Motion to Reconsider should be denied because it is not timely under Fed. R. Bankr. P. 9023 and

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<sup>1</sup> The Court notes that this is Court-approved form language for participation in the Court's Loss Mitigation/Mortgage Modification Program as provided by Amended Operating Order 15-01.

because Debtor has not complied with the Chapter 13 Plan as a complete loss mitigation application was not submitted within seven days prior to Debtor's confirmation hearing. Counsel for the Mortgage Creditor admitted that his office represented the Mortgage Creditor in the Second Foreclosure Action and that it has possessed a copy of that action's Judgment of Foreclosure and Sale since its entry by the State Court.

### CONCLUSIONS OF LAW

Debtor's Motion to Reconsider is a motion for relief from judgment under Fed. R. Civ. P. 60 which is made applicable in this proceeding by Fed. R. Bankr. P. 9024.<sup>2</sup> Rule 60 provides in pertinent part that:

[T]he court may relieve a party its legal representative from a final judgment, order or proceeding for the following reasons:

- (1) mistake, inadvertence, surprise or excusable neglect;
- (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
- (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or apply it prospectively is no longer equitable; or
- (6) any other reason that justifies relief.

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<sup>2</sup> Counsel for the Mortgage Creditor argues that the Motion to Reconsider is an untimely Motion for Amendment of Judgment under Fed. R. Civ. P. 59 as made applicable in this proceeding by Fed. R. Bankr. P. 9023. Rule 9023 provides that all motions to amend a judgment must be made no later than 14 days after the entry of the judgment.

The Motion to Reconsider does not specify whether it is being brought under Fed. R. Civ. P. 59 or Fed. R. Civ. P. 60; however, it is clear that the motion was brought outside the window allowed under Fed. R. Bankr. P. 9023 as it was filed 32 days after the entry of the Relief Order.

In Re Burnley, the Fourth Circuit addressed a post-judgment relief motion that did not specify whether it was brought under Fed. R. Civ. P. 59 or Fed. R. Civ. P. 60. In re Burnley, 988 F.2d 1, 2 (4th Cir. 1992). In determining the applicable standard of review, the Fourth Circuit relied on the fact that the motion was filed outside of the 10-day window allowed under Fed. R. Civ. P. 59 to determine that it was a Rule 60 motion. Id. See also Cross v. Bragg, 329 Fed. Appx. 443, 452 (4th Cir. 2009) (upholding a district court's determination that an unspecified motion to reconsider filed outside the time window permitted under Fed. R. Civ. P. 59 was a motion under Fed. R. Civ. P. 60). Based on this precedent, the Court finds that the Motion to Reconsider is a motion for relief from judgment under Fed. R. Civ. P. 60.

In the present matter, the Relief Order was entered based on the *ex parte* Affidavit of Default filed by Counsel for the Mortgage Creditor, which stated that Debtor failed to submit a loss mitigation application by the deadlines set in the Chapter 13 Plan. While the allegations asserted in the affidavit appear to be factually correct, it appears the affidavit should not have been filed considering the totality of the circumstances.

The Mortgage Creditor unfairly contributed to Debtor's failure to timely submit a loss mitigation application by making representations that Debtor must provide evidence of her interest in the Mortgage and Subject Property before she would be considered for loss mitigation. As stated by Debtor's counsel at the hearing, without dispute, he delayed submitting the application based on the Mortgage Creditor's representation that documentation of Debtor's interest in the Mortgage and Subject Property was a necessary prerequisite to consideration of Debtor's application. However, at the same time, counsel for the Creditor possessed the necessary documentation; therefore, it appears inequitable for the Mortgage Creditor to contribute to the Debtor's delay and then use that delay as grounds for relief from the automatic stay.

Furthermore, the record is clear that the Mortgage Creditor was, in fact, aware of Debtor's interest as it obtained two prior judgments establishing Debtor's interest in the Mortgage and Subject Property. Considering the Mortgage Creditor's knowledge of the Debtor's interest, there is a serious question as to why the Mortgage Creditor required the production of this evidence as a prerequisite to considering Debtor for loss mitigation.

Therefore, based on the arguments of counsel and evidence presented at hearing, Debtor's Motion to Reconsider is granted, and the Order Granting Relief from Automatic

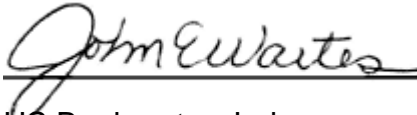
Stay as to LNV Corporation entered on February 1, 2016 is hereby vacated.<sup>3</sup> Further, Debtor shall file a Notice and Motion for Loss Mitigation/Mortgage Modification according to the guidelines stated in Amended Operating Order 15-01 within five days from the entry of this Order.

**AND IT IS SO ORDERED.**

Columbia, South Carolina  
May 11, 2016

**FILED BY THE COURT  
05/11/2016**



  
US Bankruptcy Judge  
District of South Carolina

Entered: 05/12/2016

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<sup>3</sup> After the hearing on the Motion to Reconsider, counsel for the Mortgage Creditor and Debtor's counsel notified Chambers that the parties have additional issues relating to loss mitigation/mortgage modification. These issues were not raised at the hearing and the parties have not filed any pleadings on these issues. As these matters have not been presented to the Court, the Court will not consider them at this time.