

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

IN RE:

C/A No. 17-01656-JW

Beverly Linda James,

Chapter 13

Debtor(s).

**ORDER**

This matter comes before the Court upon the Motion for Relief from Stay (“Motion”) filed by Wells Fargo Bank, NA (“Wells Fargo”). A response to the Motion was filed by Beverly Linda James (“Debtor”) and a hearing was held on the Motion. The Chapter 13 Trustee did not file a response to the Motion. The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. In accordance with Fed. R. Civ. P. 52, made applicable to these proceedings by Fed. R. Bankr. P. 7052 and 9014(c), the Court makes the following findings of fact and conclusions of law.<sup>1</sup>

**FINDINGS OF FACT**

1. Debtor’s residence is secured by a first mortgage held by Wells Fargo.
2. On April 3, 2017, Debtor filed a petition for relief under chapter 13 of the Bankruptcy Code.
3. On April 26, 2017, Debtor filed a proposed chapter 13 plan indicating Debtor’s intent to treat Wells Fargo’s secured claim through the Court’s Loss Mitigation/Mortgage Modification (“LM/MM”) Portal Program as outlined in the undersigned’s chambers guidelines. This plan was subsequently amended on June 7, 2017 (“Amended Plan”) and provided the following as to the treatment of Wells Fargo:

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<sup>1</sup> To the extent that the following findings of fact constitute conclusions of law, they are adopted as such, and vice versa.

The Debtor(s)' plan relies upon loss mitigation or a consensual mortgage loan modification (LM/MM) of the mortgage loan secured by the following property:

[DEBTOR'S] RESIDENCE-445 INDIGO RIDGE DRIVE, COLUMBIA SC 29229

If the LM/MM is approved, the Debtor(s) shall directly pay WELLS FARGO HOME MORTGAGE's allowed mortgage claim, including any prepetition and post petition amounts. No payment will be made by the Trustee on this secured claim.

In the event that (1) the LM/MM request (and any necessary documentation) is not submitted or is denied or (2) the Debtor(s) fail to timely make any required Trial Period Plan Payments, the Mortgage Creditor may, after 14 days' written notice to the Debtor(s), [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 LM/MM is concluded and reported to the Debtor(s) and Debtor(s)' Counsel.

This language is the same as the non-standard language provided in chambers guidelines to indicate a Debtor's intention to pursue LM/MM in a chapter 13 plan.

4. Wells Fargo did not object to Debtor's Amended Plan, and the plan was confirmed on July 11, 2017.

5. On August 7, 2017, Wells Fargo filed the Motion seeking a lifting of the automatic stay so that it may pursue state court remedies, including foreclosure. Wells Fargo alleged that Debtor has not filed a Notice and Motion for Loss Mitigation/Mortgage Modification or otherwise commence a LM/MM review with Wells Fargo. Wells Fargo also alleges that Debtor has failed to make ongoing post-petition mortgage payments and that Debtor has no equity in her residence.

6. Wells Fargo did not file an affidavit and proposed order seeking relief from the stay pursuant to the terms of the confirmed chapter 13 plan.

7. On August 22, 2017, Debtor filed a response to the Motion, which generally denied the allegations of the Motion.

8. On September 19, 2017, the Court held a hearing on the Motion. At the hearing, Debtor indicated that LM/MM relief is necessary to her reorganization and, as a defense to the Motion, she offered to resume payments to Wells Fargo in the amount of \$800 per month. In addition, counsel for Wells Fargo suggested that the Court should immediately enter an Order Requiring Loss Mitigation/Mortgage Modification and order that upon any subsequent failure by Debtor to meet a deadline under the LM/MM program, Wells Fargo may file an affidavit of default and proposed order granting relief, and the Court may grant relief from the automatic stay without a further hearing. The Court took the matter under advisement.

9. Shortly after the hearing on September 19, 2017, Debtor filed a Notice and Motion for Loss Mitigation/Mortgage Modification.

### **CONCLUSIONS OF LAW**

Wells Fargo seeks relief from the automatic stay under 11 U.S.C. § 362(d)(1) and (d)(2). Section 362(d)(1) provides for the lifting of the automatic stay “for cause, including the lack of adequate protection of an interest in property of such party in interest.” Section 362(d)(2) provides that relief may be granted if the debtor does not have equity in the property, and the property is not necessary to an effective reorganization. A decision to lift the automatic stay “is within the discretion of the bankruptcy judge.” Robbins v. Robbins (In re Robbins), 964 F.2d 342, 345 (4th Cir. 1992).

#### *Relief under 11 U.S.C. § 362(d)(1)*

“Cause” to lift the automatic stay is not defined under the Bankruptcy Code and is determined on a case-by-case basis. Id. The initial burden of proof is on the party seeking relief to prove that cause exists for relief. In re Davis, C/A No. 10-02249-JW, slip op. at 4 (Bankr. D.S.C. Oct. 12, 2010). Upon a showing of cause, the burden shifts to the debtor to demonstrate a lack of

cause and the existence of adequate protection. Id. In determining if cause exists to lift the stay, courts “should first weigh the equities by conducting a fact-specific analysis of the circumstances surrounding the default.” AmeriCredit Fin. Servs., Inc. v. Nichols (In re Nichols), 440 F.3d 850, 856 (6th Cir. 2006).

In the present matter, Wells Fargo argues that cause exists to lift the stay because Debtor has delayed the commencement of her LM/MM review for over four months, which Wells Fargo bases on Debtor’s initial expression to pursue LM/MM in the proposed plan filed on April 26, 2017. The Court first notes that while it is best practice for a debtor to commence the LM/MM review near the time that the debtor proposes a chapter 13 plan providing for LM/MM, neither the plan nor the guidelines presently specify when a debtor must commence the review prior to confirmation. Wells Fargo did not object to the proposed chapter 13 plan. Therefore, because of the possibility of objections to confirmation filed by creditors and other interested parties, the Court finds that Debtor was not under the obligation to commence an LM/MM review until the confirmation of the plan providing for LM/MM. Nonetheless, in this matter, the plan was confirmed on July 11, 2017 and more than two months passed before Debtor filed a Notice and Motion for Loss Mitigation/Mortgage Modification. Debtor’s counsel indicated that this delay was due to preparing the complex forms required by Wells Fargo to review for LM/MM and ensuring Debtor’s total involvement in the LM/MM process. The Court recognizes that reasonable delay may occur in commencing the LM/MM process, especially when the mortgage creditor requires more complex forms as compared to other creditors, but significant delay may still create circumstances that could prejudice the mortgage creditor.

In this matter, Debtor has indicated that an LM/MM review is critical to the success of her chapter 13 case. While there has been delay, it appears that Debtor is now ready to proceed with

LM/MM and is taking the necessary steps to ensure an expedited review. Considering Wells Fargo's willingness to review Debtor for LM/MM (as indicated by their acceptance of Debtor's confirmed plan) and the importance of the LM/MM review to Debtor's case, the Court finds that a conditioning of the automatic stay is most appropriate in these circumstances to ensure Debtor's future compliance with the LM/MM procedures and an expedited LM/MM review for the parties. Based on the suggestion of Wells Fargo's counsel, the Court will immediately enter a separate Order Requiring Loss Mitigation/Mortgage Modification as to Debtor's mortgage loan with Wells Fargo.<sup>2</sup> Upon Debtor's failure to timely comply with any deadlines provided for in the Order Requiring Loss Mitigation/Mortgage Modification or the LM/MM procedures outlined in the undersigned's chamber guidelines, Wells Fargo may submit an affidavit of default and proposed order, and the Court may grant relief from the automatic stay without a further hearing.<sup>3</sup>

*Relief under 11 U.S.C. § 362(d)(2)*

When there is no equity in the subject property, the party opposing relief must show that the property is essential to the reorganization effort and that there is a reasonable possibility of an effective reorganization within a reasonable amount of time. See 11 U.S.C. § 362(g) (2017) (placing the initial burden on the movant to show that there is no equity, and shifting the burden to the debtor on all other issues). In reviewing Debtor's schedules, it is clear that Debtor filed bankruptcy in part due to Wells Fargo's foreclosure action and is seeking to retain her residence through her reorganization. As the LM/MM review is a critical element of her reorganization and

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<sup>2</sup> Both Wells Fargo's acceptance of Debtor's confirmed chapter 13 (and therefore, acceptance to conduct an LM/MM review of Debtor's loan) as well as the suggestions by Wells Fargo's counsel at the hearing eliminate the need for the normal 14-day objection period provided to a mortgage creditor when a Notice and Motion for Loss Mitigation/Mortgage Modification is filed; therefore, permitting the Court to immediately enter the Order Requiring Loss Mitigation/Mortgage Modification in this matter.

<sup>3</sup> As the parties have not expressed an agreement for ongoing payments during the LM/MM review, the Court will not require them at this time, unless a further agreement is considered.

as it appears Debtor is ready to proceed with the review, the Court finds that Debtor has shown that there is a reasonable possibility of an effective reorganization within a reasonable amount of time. Therefore, Wells Fargo's request for relief under 11 U.S.C. § 362(d)(2) is hereby denied.

**CONCLUSION**

Based on the foregoing, the Court hereby conditions the automatic stay under 11 U.S.C. § 362 upon the terms stated in this Order.

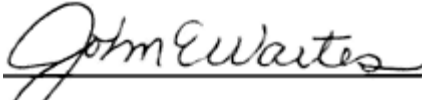
**AND IT IS SO ORDERED.**

Columbia, South Carolina  
September 26, 2017

**FILED BY THE COURT  
09/26/2017**



Entered: 09/26/2017

  
US Bankruptcy Judge  
District of South Carolina