In the United States Bankruptcy Court

for the Northern District of Iowa

ROBERT EDWARD THACKER and LYNNE MARIE THACKER	Case No. 90-01494S
Debtors.	Chapter 13
	Contested No. 6097

ORDER RE: MOTION FOR RELIEF FROM STAY AND CONFIRMATION OF CHAPTER 13 PLAN

The matter before the court is the confirmation of the Debtors' proposed Third Amended and Substituted Plan of Reorganization filed July 2, 1992, as modified. PNC Mortgage Servicing Company, f/k/a Cowger & Miller Mortgage Company, Inc. (COWGER & MILLER), objects to the confirmation and moves for relief from the automatic stay. Hearing was held in Sioux City on July 28, 1992. Debtors' first modification of the Third Plan was filed at the hearing. On July 30, the Debtors filed an "Immaterial Modification" which increased the amount of the monthly payments to the trustee and which made clearer the payments to be made under the Plan. At a telephone hearing held August 20, 1992, counsel for Debtors and for Cowger & Miller agreed that the court could rule on the Third Plan as twice modified without the necessity of further hearing. The court now issues the following findings of fact and conclusions of law as required by Bankr. R. 7052. This is a core proceeding under 28 U.S.C. 157(b)(2)(G) and (L).

FACTS

Robert and Lynne Thacker filed a Chapter 13 petition on August 24, 1990. At the time of filing, the Thackers were between one and three months in arrears with Cowger & Miller, holders of the first mortgage on their home. The Thackers had consulted an attorney prior to filing and were led to believe that they could reorganize their mortgage debt to pay Cowger & Miller without interest. Moreover, they believed that if they paid higher principal payments over a five year plan period, on completion of the plan they would own their home free and clear of the mortgage. Although the Thackers believed no interest would be paid on Cowger & Miller's loan, such treatment was not specified in the plan; and, although the Thackers had a 30-year mortgage with 24 years of payments left, the plan provided for payment of the mortgage in full over five years.

The plan payments were $1,860.54, which included the plan payments to Cowger & Miller. The Thackers were unable to make the plan payments. Their attorney led them to believe they could make up any missed payments at the end of the plan term. In March of 1992, the trustee moved to dismiss or convert the case to a Chapter 7 for failure to comply with the plan. In April of 1992, the Thackers retained new counsel. The Thackers filed a second plan in May, and on July 2, 1992, they filed the Third Amended and Substituted Plan; it has been amended by modifications filed July 28, 1992 and July 30, 1992 (THIRD PLAN). Norwest Bank and Cowger & Miller each filed an objection to the Third Plan. The objection of Norwest Bank was resolved by the Modification filed July 28, 1992. The Thackers have three loans with Norwest Bank. Norwest will offset one note against a certificate of deposit owned by Mrs. Thacker's mother. Norwest has agreed to allow the Thackers to apply all plan payments for six months to curing the arrearage with Cowger & Miller. Norwest will receive plan payments for the Thackers' car loan and second mortgage on the house beginning in the seventh month of the plan. Cowger & Miller is the only remaining creditor objecting to confirmation of the plan.

Mrs. Thacker purchased the home six years ago for $58,000. The fair market value of the Thackers' home today is $72,000. Cowger & Miller filed a claim in this case for $58,810.21. The trustee allowed Cowger & Miller's claim as

fully secured in the amount of $68,548.99 as of October 30, 1991. Norwest Bank's second mortgage on the home is in the amount of $10,547.89. Cowger & Miller has received $7,869.99 through the trustee since the commencement of this case. Since the time the Thackers retained new counsel and proposed a new plan, they have begun making regular monthly payments directly to Cowger & Miller. The trustee reported at the hearing that the Thackers are current with their payments to her. Cowger & Miller and the Thackers have stipulated that the arrearages to Cowger & Miller as of July 17, 1992 are $9,176.71.

The Plan proposes to make regular monthly payments of $665 to Cowger & Miller outside the plan and to cure the arrearage through plan payments to the trustee. Thus, the Plan seeks to revert to the pre-confirmation long term payments schedule. The Plan provides for monthly payments of $1,192.46 for 30 months beginning July 1, 1992. For the first six months of the Plan, payments through the trustee will go solely to the arrearage with Cowger & Miller. Interest was calculated to provide up to contract rate for one year. Since the arrearage will be paid off with large payments in the beginning, the interest allowed is sufficient to satisfy the requirements of the contract. The Thackers are relying on Cowger & Miller to figure the exact amount of interest owed on a declining balance. For the first six months, the plan payment less trustee fees will give Cowger & Miller $6,439.32. In the seventh month, Norwest Bank will also receive payments on the Thackers' car loan and second mortgage. The Third Plan provides that Cowger & Miller's arrearage will be paid off in the twelfth month of the plan. Thereafter, payments will be applied to all other creditors.

Robert and Lynne Thacker have been married three years. Mrs. Thacker's first marriage ended when she was widowed. She has three children, ages 12, 10 and 7 from her first marriage. The Thackers also have a two-year-old child and share custody of two children from Mr. Thacker's previous marriage. The Thackers have lived in their home for six years. They have maintained the condition of the home and have made a number of improvements to it. The home is in a good neighborhood and is appreciating in value.

Mrs. Thacker, 31, is a full time homemaker. Mr. Thacker, 36, has been employed as an addiction therapist with a St. Luke's Medical Center clinic for the last three years. He has a masters degree in educational psychology and counseling. The family began to have financial difficulty when his student loans became due.

The Thackers have income from three sources: Social Security benefits for Mrs. Thacker's children from her first marriage (of $1143 per month; a lifetime annuity for Mrs. Thacker of $1351 per month; and Mr. Thacker's wages, which now net the family an average of $1174 per month. Total monthly income is approximately $3,668. The Social Security benefits are subject to cost of living increases; the annuity is fixed. The Thackers' household income has increased since their initial bankruptcy filing because Mr. Thacker has received regular wage increases for cost of living and performance review. In addition, he is seeing clients at home in an effort to earn more income. The family's total living expenses are approximately $2,165 per month. Since their initial bankruptcy filing, the Thackers' transportation expense has decreased by about $200 per month because Mr. Thacker is working much closer to home. The total of expenses and plan payments under the Third Plan are approximately $200 less than they were under the original plan.

Original Plan	
$1,860.54	Plan payment (including house payment)
1,700.00	Personal expenses
$3,560.54	
Third Plan	
$1,192.46	Plan payment
2,165.00	Personal expenses (including monthly house payment)
$3,357.46	

DISCUSSION

Cowger & Miller objects to confirmation of the Third Plan and, in addition, moves for relief from the automatic stay.

Motion for Relief from Stay

For its motion for relief from stay, Cowger & Miller argues that it is entitled to relief from the stay because it does not have adequate protection and, alternatively, because the Thackers lack equity in their home and the home is not necessary to an effective reorganization. 11 U.S.C. 362(d)(1) and (2). Cowger & Miller has the burden of proof to show the Thackers have no equity in their home; the Thackers have the burden on all other issues. 11 U.S.C. 362(g).

Under 11 U.S.C. 362(d)(1), a creditor may obtain relief from the stay upon a showing of "cause," including lack of adequate protection. Cowger & Miller claims it lacks adequate protection because the Thackers have not kept the mortgage obligation current. It argues that failure to make postconfirmation payments is eroding the cushion it has between the total claim and the fair market value of the home.

While substantial default in making post-confirmation payments may be cause for relief from the stay, In re Smith, 104 B.R. 695, 700 (Bankr. E.D. Pa. 1989), default in itself is not cause for relief in every case. In re McCollum, 76 B.R. 797, 799 (Bankr. D. Ore. 1987). Whether cause exists depends on the facts of the case. The absolute rule of In re Hollis, 105 B.R. 1003, 1005, that cause for relief from the stay exists whenever a debtor seeks to cure a post-petition default, is based on the minority view that modification to cure postpetition default in home mortgage payments is a violation of 11 U.S.C. 1322(b)(2). As discussed below, the court declines to accept this view.

It is undisputed that the Thackers are seriously delinquent in their home mortgage payments. However, unlike cases cited to the court by Cowger & Miller, the Thackers have not shown an unwillingness to perform their plan. See, e.g., In re Smith, 104 B.R. 695 (Bankr. E.D. Pa. 1989) (debtor was in complete default, making no payments for eight months); In re Ellis, 60 B.R. 432 (9th Cir. B.A.P. 1985) (no payment several months). The Thackers struggled to make payments under a plan based on incorrect advice. The payments in the initial plan were likely far higher than they should have been. Rather than make it possible for the Thackers to reorganize, the plan made their life much more difficult. When they told their attorney they were having trouble making the payments, their attorney dismissed their worries, incorrectly informing them that they could always make up any missed payments at the end of the five years.

The Thackers have only recently obtained new counsel and proposed a more realistic plan. They have shown both the willingness and ability to perform the new plan. Since retaining new counsel and proposing a new plan, they have begun making regular monthly payments directly to Cowger & Miller. As of the July 28 hearing, they were current with payments to the trustee. With regular payments from the Thackers, Cowger & Miller will be adequately protected. The Third Plan provides that post-petition arrearages will be paid within a year and that the Thackers will maintain regular monthly payments to Cowger & Miller. Cowger & Miller has the first lien on the home. Its present claim is less than the value of the home. The home is in a good neighborhood and is appreciating in value. The Thackers have made improvements and maintained its condition since they purchased the home.

As its second basis for relief from stay, Cowger & Miller argues that the Thackers have no equity in the home and it is not necessary for an effective reorganization. The home has a value of $72,000. Cowger & Miller's allowed claim as of October 30, 1991 was for $68,548.99. Norwest Bank has a second mortgage on the home of $10,547.89. This leaves the Thackers with no equity. Cowger & Miller argues that the home is not necessary for an "effective" reorganization, since it is unlikely that the Thackers will propose a feasible plan that meets the requirements of the Bankruptcy Code. The Thackers have shown a reasonable possibility of *a* successful reorganization. Further, the stability a home provides makes it necessary. In re Thomas, 121 B.R. 94, 108 (Bankr. N.D. Ala. 1990). The Thackers have lived in their home for six years. There are six people in the Thacker household, and eight in the summer months. It would be very difficult for them to find less expensive alternative housing.

Objection to Confirmation of the Third Plan

A plan modified after confirmation must meet a number of requirements, among them compliance with 11 U.S.C. 1322(b) and 1325(a). 11 U.S.C. 1329(b). Cowger & Miller first argues that modification of a plan to cure post-petition default is an impermissible modification of its rights pursuant to 11 U.S.C. 1322(b)(2). In addition, Cowger & Miller argues that, if debtors in some cases may modify to cure postconfirmation arrearages, the Thackers are too far in default to allow it in this case. Finally, Cowger & Miller argues the Third Plan proposes an unreasonably long time to cure in

violation of 1322(b)(5).

Cowger & Miller cites two cases from the Northern District of Alabama for the proposition that it is impermissible to modify a plan to cure post-petition default. Brief at 5, 6. These decisions read the word "pre-petition" into the text of 1322(b)(3), which permits the curing of "any default." The majority view allows post-confirmation modification when the facts of a case make it appropriate. In re Ford, 84 B.R. 40, 44 (Bankr. E.D. Pa. 1988) (citing cases); In re Thomas, 121 B.R. 94, 104 (Bankr. N.D. Ala. 1990); 5 Collier on Bankruptcy 1322.09 at 1322-20, 1329.01 at 1329-3 (15th ed. 1992). The absolute rule of In re Hollis, 105 B.R. 1003, 1005 (N.D. Ala. 1989), that modification to cure post-confirmation default on home mortgage payments is a violation of 1322(b)(2), is not only a minority view, it is not a well-settled view in its own district. See Thomas, 121 B.R. at 106 (questioning the basis for the decision); see also Ford, 84 B.R. at 45; In re McCollum, 76 B.R. 797, 800 (Bankr. D. Ore. 1987). That the words "any default" in 1322(b)(3) also refer to postconfirmation default is supported by 1329(a)(1) and (2), allowing for changes in the amount of and time for payments under the modified plan. Thomas, 121 B.R. at 102.

The court in Hollis was concerned that there would be no limit on a debtor's ability to endlessly modify a plan. Cases have found some limits on modification to cure postconfirmation default. A debtor may not cure a debt already matured prior to filing, must maintain regular payments, and may not take an unreasonably long time to cure. Thomas, 121 B.R. at 105, citing In re Ford, 80 B.R. 40, 44-45. On the other hand, the Bankruptcy Court for the Northern District of Iowa has held that a change in circumstances is not a threshold requirement to allowing a modification under 1329. In re Jourdan, 108 B.R. 1020, 1022 (Bankr. N.D. Iowa 1989) (no "cause" requirement in 1329). Of course, 11 U.S.C. 1329 itself provides limits on the ability to modify a plan to cure post-petition default by incorporating the requirements of 11 U.S.C. 1322(a), (b), (c) and 1325 (a). 11 U.S.C. 1329(b)(1). Therefore, the modification may not modify the rights of the home mortgage lienholder in violation of 1322(b)(2). The cure must provide for regular payments and comply with the terms of the original contract. In re McCollum, 76 B.R. 797, 799, 801 (Bankr. D. Ore. 1987). However, post-confirmation modification is not itself a violation of 1322(b)(2). Id. at 800-01; In re Davis, 110 B.R. 834, 835 (Bankr. W.D. Tenn. 1989).

The Thackers have not modified the rights of Cowger & Miller in violation of 1322(b)(2). The Third Plan provides for regular monthly payments directly to Cowger & Miller under the terms of the note and mortgage. Further, it provides that arrearages will be cured through the trustee; the arrearages accrue interest at the contract rate.

Cowger & Miller next argues that modification should be permitted only if post-confirmation default is "modest and justifiable." As discussed above, the size of the default is partly due to the burdensome effects of a plan that probably should not have been proposed to begin with; the Thackers were making their best efforts, not realizing they had been given incorrect advice. Further, when they realized they were having difficulty making payments, their first attorney compounded the problem by dismissing their concern about the effect of missing payments. There is no requirement in the Code that large defaults may not be cured. The court in In re Davis, 110 B.R. 834, 836 (Bankr. W.D. Tenn. 1989), noted that the debtors had proposed to pay all their creditors in full. That court may have considered that factor as one sign of the debtors' good faith in proposing the plan. However, just as there is no requirement in the Code to pay all unsecured claims in full in an initial plan, neither is there such a requirement for a modified plan.

The Third Plan proposes to cure the default with Cowger & Miller by applying all payments for the first six months to the $9,176.71 arrearage with Cowger & Miller. The arrearage will accrue interest according to the terms of the contract until paid. Cowger & Miller will receive approximately $6439.32 in the first six months. Beginning in the seventh month, the Thackers are committed to making payments to other creditors as well. However, $691.48 will be left over to apply to the Cowger & Miller arrearage. The Plan proposes to cure the default by the twelfth month.

Cowger & Miller argues that this is an unreasonably long time to cure in violation of 1322(b)(5). The Thackers could have proposed in their initial plan to cure the prepetition default over the term of the plan. Cases suggest that the term of the plan is the limit on a post-petition default cure as well. In re McCollum, 76 B.R. at 801; In re Davis, 110 B.R. at 836. The Bankruptcy Court for the Northern District of Iowa has used a test for determining whether a cure is "reasonable" within the meaning of 1322(b)(5). In In re Beckman, 9 B.R. 193, 197 (Bankr. N.D. Iowa 1981), the court looked at: (1) the debtor's payment record; (2) the length of the repayment period on the original obligation; (3) the reason for the arrearage; (4) the nature of the security; and (5) whether the proposal to cure represents the debtor's best effort. The

Thackers have lived in their home for six years. The loan was secured by a 30-year mortgage. They maintained payments until shortly before filing their bankruptcy petition two years ago. The arrearages were partly caused by proposing a plan based on bad legal advice. The loan is secured by the Thackers' home, which they have a strong interest in retaining. Their plan proposes to cure the default as quickly as possible. The Thackers are not attempting to stretch out the cure of arrearages over the term of their plan. The main focus of their plan is the curing of the arrearages with Cowger & Miller. They negotiated special terms with Norwest Bank so as to allow cure of the arrearages as quickly as possible. The default will be cured within a reasonable time as required by 1322(b)(5).

Finally, the Third Plan satisfies the requirement of 1329(c) regarding the term of the modified plan. The original plan term was five years. The last payment under the Third

Plan will be made before five years after the first payment was due under the original plan.

Accordingly, IT IS ORDERED that the Debtors' Third Amended and Substituted Plan, filed July 2, 1992 and modified July 28, 1992 and July 30, 1992, will be confirmed by separate order of the court to be submitted by the Trustee.

IT IS FURTHER ORDERED that judgment shall enter denying Cowger & Miller's motion for relief from stay.

SO ORDERED THIS 24th DAY OF AUGUST, 1992.

William L. Edmonds
Bankruptcy Judge