In the United States Bankruptcy Court

for the Northern District of Iowa

RICKI DARLE ENGELBY, MARY ANN ENGELBY	Bankruptcy No. 96-10008KC
Debtors.	Chapter 13
	Contested No. 1084

ORDER RE MOTION FOR RELIEF FROM AUTOMATIC STAY

This matter came on for telephonic hearing before the undersigned on June 26, 1996 on Motion for Relief from Automatic Stay filed by Brenton Mortgages, Inc. Brenton was represented at the hearing by Mark Walz. Thomas McCuskey represented Debtors Rick and Mary Ann Engelby. The parties submitted prehearing briefs. After the hearing, the Court took the matter under advisement. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(G).

STATEMENT OF THE CASE

Brenton Mortgages moves for relief from stay to foreclose on Debtors' residential real estate. It asserts that Debtors have no equity in the property and no prospect for reorganization. Brenton also asserts that Debtors' post-petition delinquency in making payments on the mortgage indebtedness itself constitutes additional cause for relief under § 362(d)(1).

Debtors assert that Brenton is adequately protected by their substantial equity cushion in the property. They argue they are entitled to cure all pre- and post-petition arrearages in their Plan.

Debtors list the value of the real estate in their schedules as $120,000; Brenton does not dispute this valuation. Brenton's secured claim is approximately $50,000. Therefore, approximately $80,000 in equity exists. Debtors have failed to make monthly payments of $896.00 since November 1995 which leaves them eight months in arrears. They filed their Chapter 13 petition on January 2, 1996.

It is evident from the case file that Debtors have not been completely diligent in moving this case toward confirmation. The meeting of creditors was delayed a month on request of the Debtors. Their initial confirmation hearing on February 29, 1996 was continued to allow the IRS to file a proof of claim which was earlier impossible because Debtors had failed to file 1993-95 tax returns. After Debtors failed to file an amended plan within the 60 additional days the Court granted after the February 29 hearing, the Court issued an Order Setting Rule to Show Cause Hearing to required Debtors to show why the case should not be dismissed for failure to file the amended plan. At the show cause hearing on May 28, 1996, the Court granted Debtors until July 15, 1996 to file an amended Chapter 13 Plan. This extension was based in part on Debtors' pending motion for authority to sell certain Hamilton County farm real estate.

Debtors state that they have made regular plan payments to the Trustee and are in the process of selling their "large tract" of farm real estate. They appear to be relying on the proceeds of this sale to help fund their plan. The file does not reflect the value of the real estate or the amount of proceeds Debtors expect to receive from the sale after payment to secured parties. Debtors' schedules reflect excess monthly income of $63.16 but their original, unconfirmed Chapter 13 Plan calls for $325 in monthly plan payments.

CONCLUSIONS OF LAW

It is undisputed that Debtors have substantial equity in the residential real estate securing Brenton's claim. Therefore, it is not appropriate to grant Brenton relief from stay based on § 362(d)(2) which requires that Brenton prove that Debtors have no equity in the property and the property is not necessary for reorganization. The other grounds Brenton asserts for relief from stay is "cause, including the lack of adequate protection" under § 362(d)(1). Brenton relies on Debtors' failure to make monthly payments since November 1995 as "cause" for relief from stay.

The Court must therefore decided whether Debtors' eight months of arrearages in payment of mortgage indebtedness in itself constitues "cause" for relief from stay under § 362(a)(1). Judge Edmonds considered this issue in In re Thacker, No. X90-01494S, slip op. at 7 (Bankr. N.D. Iowa Aug. 24, 1992), where he rejected the absolute view that "cause" for relief from stay exists whenever a Chapter 13 debtor defaults on postpetition payments. He looked at other factors such as the debtors' willingness and ability to perform their plan and whether the creditor is adequately protected by the value of the real estate. Id. at 8.

One court has stated that when no equity cushion exists, a lack of monthly payments may be grounds for granting § 362 relief. In re Morysville Body Works, Inc., 86 B.R. 51, 57 (Bankr. E.D. Pa. 1988). However, failure to make payments must be balanced with other factors when an equity cushion does exist. Id.

> [E]ven if a movant makes a prima facie case for a failure to make payments, that failure, along with the existence of an equity cushion, are merely factors that the court must weigh in its equitable assessment of whether adequate protection exists. This balancing process . . . exhort[s] us to consider "all relevant factors," including ". . . the value of the collateral, the likelihood that it will depreciate or appreciate over time, the prospect for a successful reorganization of the Debtor's affairs by means of the Plan, and the Debtor's performance in accordance with the Plan."

Id. (citations omitted). The Morysville court held that when a large equity cushion exists, the sole fact that a debtor has failed to make mortgage payments will be of minimal significance. Id. at 58 (considering relief from stay in Chapter 11 case where debtor had missed 55 payments but equity of $350,000 still remained).

Another court considered granting relief from stay for lack of payments on a Chapter 13 debtor's residence. In re Kaplan, 94 B.R. 620, 621 (Bankr. W.D. Mo. 1989). It stated:

> There was no indication that the property was not being cared for, or was uninsured, or was being misused -- it just wasn't being paid for and that does not constitute "cause" under 11 U.S.C. § 362(d)(1).

Id.; see also In re McCollum, 76 B.R. 797, 799 (Bankr. D. Or. 1987) (stating that postpetition default in payments on residential mortgage is not "cause" for relief from stay where no economic or other harm to the creditor would result; equity of almost double the balance due existed). The moving party has the burden to show "cause" after which the burden shifts to the debtor to show that it is entitled to the continued protection of the automatic stay. In re Abrantes Constr. Corp., 132 B.R. 234, 237 (N.D.N.Y. 1991); Morysville Body Works, 86 B.R. at 55 (stating that movant must make prima facie case with a substantive showing of cause).

Brenton asserts that Debtors' failure to make post-petition mortgage payments may constitute "cause" for relief from stay, whether or not the lender is adequately protected, citing In re Ellis, 60 B.R. 432 (9th Cir. BAP 1985); In re Quinlan, 12 B.R. 516 (Bankr. W.D. Wis. 1981); In re Davis, 64 B.R. 358 (S.D.N.Y. 1986); and In re Elmore, 94 B.R. 670 (Bankr. C.D. Cal. 1988). These cases are distinguishable because they involve postconfirmation defaults in mortgage payments required by confirmed plans, which may subject debtors to conversion or dismissal under § 1307(c)(6).

Debtors' defaults occurred both pre- and post-petition but final confirmation of a Plan has not yet occurred. In Thacker, the debtors had defaulted postconfirmation but were proposing to modify their Chapter 13 plan. Slip op. at 7. In Kaplan, the court considered the issue at the same time as the confirmation hearing and refused to lift the stay because of postpetition defaults. 94 B.R. at 621.

The Court concludes that the approach taken by Judge Edmonds in Thacker is most consistent with the Code. Prior to confirmation of a plan, Debtors' default in mortgage payments does not in itself constitute cause for relief from stay under § 362(a)(1). Other circumstances in this case lead the Court to deny Brenton's motion for relief from stay at this time. Debtors have approximately $80,000 in equity in the property which is more than sufficient to protect Brenton's $50,000 interest. Brenton has not alleged that the property is being misused or depreciating in value. Debtors' deadline for filing a plan is less than a month away. The proposed sale of their farm real estate conceivably could support a confirmable plan. They have been making plan payments to the Trustee as called for in their initial proposed Plan.

The Court is not unmindful of the delays caused by Debtors in this case. This Chapter 13 case was filed more than five months ago. No confirmable plan has yet been proposed. The small amount of disposable income reported in Debtors' schedules undermines any confidence that they can propose a confirmable plan. Therefore, it is understandable that Brenton's patience has been stretched to its limits. The Court concludes, however, that Brenton has failed to substantiate "cause" for relief from the stay at this time. Its motion will be denied without prejudice to renewal of the motion at a later time if warranted by changed circumstances.

At the hearing, Brenton raised the issue of whether Debtors are eligible for Chapter 13 considering the amount of their scheduled debt. 11 U.S.C. § 109(e). The Court will not address this issue at this time. This assertion should be formally made in accordance with Bankruptcy Rules and principles of due process.

The Court also makes no decision regarding how Debtors must cure their postpetition defaults. Under § 1322(b)(2), there is a question of whether Chapter 13 debtors may cure postpetition arrearages on claims secured solely by their principle residence by stretching out payments on such arrearages over the life of their Plan. Compare In re Huerta, 137 B.R. 356, 371 (Bankr. C.D. Cal. 1992) (stating debtors are not permitted to cure post-petition defaults through a plan or plan modification) with In re Thomas, 121 B.R. 94, 107 (Bankr. N.D. Ala. 1990) (stating that when circumstances are appropriate,

bankruptcy courts have power to allow debtors to cure postpetition mortgage defaults under § 1322(b)(5)). This issue is more properly considered in the context of plan confirmation.

WHEREFORE, the Motion for Relief from Stay filed by Brenton Mortgages, Inc. is DENIED, without prejudice to renewal of the motion if warranted by changed circumstances.

SO ORDERED this 28th day of June, 1996.

Paul J. Kilburg
U.S. Bankruptcy Judge