

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

IN RE: REBECCA CHANDLER,)
)
) CASE NO. 04-03944
 Debtor)
) CHAPTER 7
)
) MEMORANDUM DECISION
)

The matters before the Court are the Debtor's Modified Chapter 13 Plan, to the confirmation of which the Chapter 13 Trustee, Wachovia Bank N.A., the Debtor's mortgagee, and Charles McGuire, another of her secured creditors, have filed objections, the Chapter 13 Trustee's motion to convert the case to Chapter 7, and the Debtor's Motion to Vacate this Court's prior order entered on March 29, 2005 which granted Wachovia relief from the automatic stay to permit it to foreclose its first deed of trust against the Debtor's residence property. For the reasons stated below the Court will sustain in part the objections to plan confirmation, deny the motion to convert the case to Chapter 7, grant the Debtor leave of court upon conditions noted hereafter to continue in Chapter 13 and file a new plan, and grant conditionally the motion to vacate this Court's prior order granting Wachovia relief from the stay. Because this decision might reasonably be criticized as erring too far on the side of giving the Debtor too many opportunities to "save" her home, the Court will endeavor to set forth its rationale in making this decision.

FINDINGS OF FACT

The Debtor, while a very pleasant and charming person, has attempted to deal with her financial problems in a fashion which has been exasperating at times to her creditors,

the Chapter 13 Trustee, the Court and probably her own counsel. The present case is her third attempt at a Chapter 13 case. She has filed petitions which have stopped Wachovia's attempts to exercise its rights under the terms of the contracts evidencing and securing her very much delinquent mortgage debt and has been unsuccessful in prior attempts and so far in this case as well to obtain confirmation of a Chapter 13 plan which would cure her delinquency to Wachovia while making the currently accruing payments as they come due. The original premise supporting the filing of the present petition was that the Debtor owned a collection of art work which she had inherited from her father, its creator, and that an orderly sale of a portion of this collection would provide the necessary funds to permit the Debtor not only to cure the delinquency on her mortgage debt but also to pay all of her creditors. To the disappointment of all concerned this premise was determined to be faulty when a qualified appraiser determined that the collection had no commercial value. Since then the Debtor has taken a new approach by obtaining work from several different families as a caregiver, housekeeper, and general personal helper. Unfortunately, as a result of the varying needs of such families and the Debtor's illness in February of this year, the wages for such work have been irregular and she has not been able to pay on a timely basis both the current monthly obligation on her mortgage debt and the plan payment due to the Chapter 13 Trustee.

On March 14, 2005 at a hearing at which the Debtor failed to appear, the Court granted Wachovia's motion for relief from the stay and on March 29 an order to such effect was entered by the Court. On April 6 the Debtor, by counsel, filed a motion to vacate the order granting relief to Wachovia based on the assertions that she had mailed her February payment to Wachovia's counsel in a letter on March 7, 2005, that she had delivered to her own counsel on March 28 the amount of her March payment, and that she believed she could make future

payments on a timely basis. In such motion to vacate she did not address her failure to appear at the March 14 hearing, but at a hearing held on April 11 on plan confirmation, she testified, without any challenge being made to her account, that she in fact had come to court on the scheduled hearing date but as a result of a mis-communication about the time of the hearing from her counsel's office, she arrived after the motion for relief had already been heard and granted. Although all interested parties were present, at least by counsel, at the April 11 hearing, the Debtor's motion to vacate the order granting relief to Wachovia was noticed for hearing on May 9 and accordingly after hearing testimony from the Debtor about her attempts to obtain and maintain gainful employment, the Court continued the confirmation hearing and objections thereto until that date.

The Plan before the Court proposes that the mortgage arrearage due Wachovia through the month of November 2004 in the amount of \$19,065.20 shall be paid by the Trustee and that the Debtor would make post-November 2004 payments directly. Although her payments have been late, she has now made the December 2004 thru March 2005 payments, has tendered to her counsel the funds necessary to pay the April 2005 payment as well as the delinquent payments due the Chapter 13 Trustee under the terms of her Plan, and testified at the May 9 hearing that she is able to pay now the May 2005 payment. A review of the documents filed with Wachovia's Motion for Relief indicates that the regular monthly payment is due on the eighth day of the month and that the note provides for a late charge if the payment is not made within eight days of its due date. The Debtor further testified that she will be able to pay the payment due to the Trustee at the latter part of the current month (May 2005). Debtor's counsel was already holding in his trust account the sum of more than \$400 and the Debtor brought to him in cash on the morning of the hearing the sum of \$1,420, the amount of the deficiency to the

Trustee for Plan payments, but of this amount \$1,000 was a gift from the Debtor's daughter. The inescapable import of that fact is that the Debtor's earnings from her employment have not been sufficient to permit her to pay her living expenses, Plan payments and current mortgage payments. However, at the May 9 hearing the Debtor introduced without objection (Debtor's Exhibit # 1) an account her daughter had helped her to prepare of the sources and amounts of her past and projected earnings from her various employers. This Exhibit reflects that as of May 2, 2005 she had obtained additional employment with Kathy and John Lietz at \$12 per hour for 20 hours a week, thereby representing additional income to the Debtor of \$240 per week. Accordingly, if the Debtor is able to maintain this new employment as well as her prior employment, her ability to fulfill the Plan she has proposed has been significantly improved.

The Debtor testified that she was involved in a serious automobile accident in the early 1980s which continues to impact adversely her thinking and organizational skills. Her manner of answering the questions posed to her by counsel or the Court gives credence to this testimony and no party in interest has challenged this assertion. In short, the Debtor has struggled to overcome adversity in her life. The Court is persuaded by her testimony and by the payments she has made to date that she is trying her very best to produce the income necessary to permit her to keep her home and perform the other obligations of her job. Whether that "very best" is enough to enable her to accomplish her objective is not so clear. The Court also finds that while the Debtor did bring to the May 9th hearing typed information about the sources of income, she has failed to fulfill the Chapter 13 Trustee's requests for detailed documentation about her tax returns, income and expenses. In view of Debtor's prior bankruptcy filing history and her performance so far in the present case, the Trustee not only vigorously opposes confirmation of the Plan now before the Court, but also urges that the case be converted to

Chapter 7, reasoning that such action is in the best interest of the creditors.

The Debtor has two creditors who hold possessory liens on certain art objects securing loans they made to the Debtor prior to bankruptcy. The Modified Plan, proposed after the art collection was determined to be without commercial value, proposes to value the collateral held by such creditors at \$500 each and to pay these secured claims with interest before payment towards any of the other secured debt. Wachovia has objected to this provision. The Modified Plan further provides that after these creditors have been paid the value of their secured claims, they would be required to relinquish to the Debtor the art objects which they are holding. One of these creditors, Charles McGuire, has filed an objection to being obliged to release the art before being paid in full. The Debtor has filed valuation motions with respect to this art, which the Debtor originally valued in her schedules at \$200,000, and each of such creditors' secured claim has been valued at \$500.

In her bankruptcy schedules the Debtor valued her residence property at \$75,300 and reported the amount of the debt to Wachovia as being \$75,300. Perhaps somewhat surprisingly, or at least in some contrast to the more usual situation, the secured creditor reported in connection with its motion for relief from the automatic stay the amount of the debt owing to it (claimed to be \$84,130.21 as of the filing of the Movant's Certification on November 26, 2004) as being less than its valuation of the property (\$89,400), indicated to be the tax assessed value for the property, over \$14,000 greater than the Debtor's valuation of her own property. Wachovia has not suggested that the value of the residential property is depreciating or that it is not insured against casualty loss. As long as the Debtor continues to make the current payments on the mortgage debt, maintains it, insures it against casualty loss, and pays or provides for the real estate taxes, the Court finds that Wachovia's position is improving rather than being

prejudiced because the amount of the outstanding principal is being reduced and current interest is being paid.

CONCLUSIONS OF LAW

This Court has jurisdiction of this proceeding by virtue of the provisions of 28 U.S.C. §§ 1334(a) and 157(a) and the delegation made to this Court by Order from the District Court on July 24, 1984. The confirmation of Chapter 13 plans and the granting or denial of motions for relief from the automatic stay are “core” bankruptcy matters pursuant to 28 U.S.C. § 157(b)(2)(L) and (G), respectively.

Pursuant to 11 U.S.C. § 1322(a)(3) a Chapter 13 plan which “classifies claims” must “provide the same treatment for each claim within a particular class.” Section 1325(a)(6) provides that a court “shall” confirm a proposed plan if the other requirements contained in subsection (a) are met and the court determines that “the debtor will be able to make full payments under the plan and to comply with the plan.” The burden of proof on this requirement, often described as a finding that a plan is “feasible”, is upon the debtor. *In re Wagner*, 259 B.R. 694 (8th Cir. BAP 2001); *In re Brown*, 244 B.R. 603 (Bkrcty. W.D. Va. 2000)(value of collateral for Ch. 13 “cramdown” as element of plan confirmation); B. Russell, **Bankruptcy Evidence Manual, 2005 edition** § 301.80 at pp. 818 - 820 . The Court concludes that at this point that the Debtor’s recent employment and earnings history is not strong enough for the Court to determine that it is probable that the Debtor can meet the requirements of her proposed plan. A few more months of history with increased earnings might make such a finding possible because the Debtor strikes the Court as extremely highly motivated to do what is necessary to prevent the loss of her home to foreclosure. The Court believes that it may be possible if the Debtor’s

obligations are simply to make her mortgage payment by a certain date and make her plan payment to the Trustee by a certain date and if she is acutely aware that her failure to do so will result in the speedy termination of her case and the lifting of the automatic stay, she might be successful.

While the Court believes that there may well be appropriate cases where it would be appropriate to approve Chapter 13 plan provisions providing for a certain class or category of secured creditors to be paid first by the Trustee over the secured claims of other creditors and for such creditors to be obliged once having been paid the value of their secured claims to relinquish their lien rights even though the confirmed plan provisions have not been satisfied and the debtor granted a discharge¹, the Court concludes that Ms. Chandler's case is not such a case. The reasons for the Court's determination to such effect are that (I) the Debtor's own valuation of the property in question has ranged from \$200,000 to \$500, (ii) the chances of her successfully completing are at best barely likely, (iii) dismissal of the case, while in theory restoring the Debtor and the creditors to their pre-confirmation rights pursuant to 11 U.S.C. § 349(b), would not in actuality restore the creditors to their possessory lien rights, at least without some likely involvement by the Court, and (iv) under such circumstances it is not just to require such creditors to give up such rights until the Debtor has successfully fulfilled her "end of the bargain" with her creditors by making all of her payments and receiving a discharge. If she does so, the secured creditors who have been paid the present value of their secured claims will be obliged to surrender the art work even though their total claims have not been paid in full. Accordingly, to the extent just stated, the Court will sustain Wachovia's and McGuire's

¹See *In re Castro*, 285 B.R. 703 (Bankr. D. Ariz. 2002); and Keith M. Lundin, Chapter 13 Bankruptcy 3d Ed. § 149.1, 149-15 (2000 & Supp. 2004).

objections to confirmation.

The Court concludes that the following decision is appropriate under the facts and circumstances of this difficult case:

1. Confirmation of the Debtor's Modified Plan will be denied, but the Debtor will be granted leave of court to file a new plan within thirty days of the Court's order accompanying this decision. Within such time the Debtor shall provide to the Trustee the detailed documentation of her income, expense, and tax return status as has been previously requested by the Trustee.

2. Within five business days following the entry of such order, the Debtor or her counsel on her behalf shall pay to counsel for Wachovia the April 2005 payment and to the Chapter 13 Trustee the full amount of the \$1,420 delinquency in her plan payments and within ten calendar days following such order she shall also pay the May 2005 payment due Wachovia.. Within thirty days following the entry of such order the Debtor or her counsel on her behalf shall send to Wachovia's counsel payment of the contractual late charge due Wachovia for the late April 2005 payment and any late charge due Wachovia if the May 2005 regular payment is not paid within the contractually allowed grace period.

3. The March 29, 2005 order of this Court granting Wachovia relief from the stay shall be vacated, but a new order, to be prepared by Wachovia's counsel, will be entered in its place providing that relief from the automatic stay will be automatically granted if its counsel serves upon the Debtor and her counsel and files with the Court a certification that the payments required of the Debtor in paragraph #2 above were not paid within the time allowed, or that any subsequent regular monthly payment due on the mortgage debt was not received by Wachovia by the 16th day of each month, or if such date is not a regular banking day, the next following

business day, allowing for the grace period provided in Wachovia's note, and the Debtor or her counsel has not filed a response within ten days after the filing of such certification asserting that the payment or payments alleged not to have been made were in fact timely made and setting a prompt evidentiary hearing thereon. Further, the order shall provide that if the Debtor's current mortgage payment does not include a provision for insurance and real estate tax escrow, Wachovia may require the Debtor upon thirty days notice to increase his regular monthly payment to the amount necessary to cover one-twelfth (1/12th) of the annual real estate tax and casualty insurance expense for the Debtor's residential property as well as the amortization of the principal and interest of the mortgage debt.

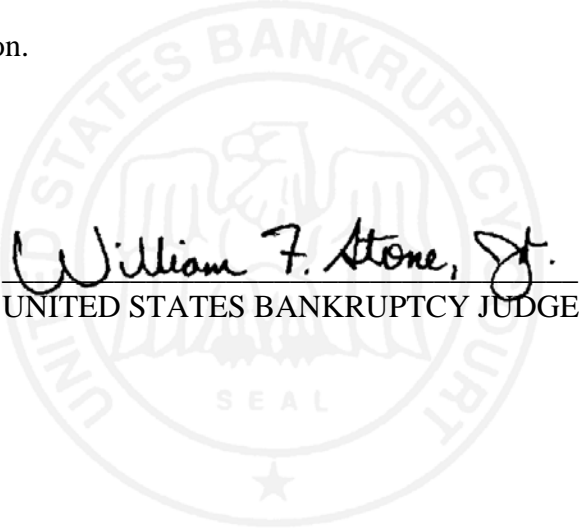
4. The case shall be converted to Chapter 7 if the Chapter 13 Trustee certifies to the Court with contemporaneous notice to the Debtor and her counsel that any payment due the Trustee under paragraph # 2 above has not been paid within the allowed time or that any subsequent plan payment, either before or following confirmation of a Chapter 13 plan in this case, has not been paid within ten calendar days of its due date, unless the Debtor or counsel on her behalf files a response within ten days after the filing of such notice certifying that the payment or payments alleged not to have been paid were in fact paid within the allowed time and setting a prompt hearing date thereon.

5. The Debtor shall retain her right of voluntary dismissal of her Chapter 13 case at any time before a conversion order is entered by the Court, but such dismissal shall be subject to the condition, permissible under 11 U.S.C. § 349(a), that the Debtor shall be precluded for a period of 180 days following the entry of such dismissal order from filing any new bankruptcy petition under any chapter of the Bankruptcy Code in any United States bankruptcy court, and further that no automatic stay shall arise from the filing of any new bankruptcy petition at any time prior

to the dismissal or conversion of the present case or within such 180 day period following the date of such dismissal order.

An order containing the above provisions shall be entered contemporaneously with the signing of this memorandum decision.

This 13th day of May, 2005.

The seal of the United States Bankruptcy Court is visible in the background, featuring an eagle with wings spread, perched on a shield, surrounded by the words "UNITED STATES BANKRUPTCY COURT" and "SEAL" at the bottom. A star is positioned below the seal.
William F. Stone, Jr.
UNITED STATES BANKRUPTCY JUDGE