

UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

In re:

Leilani Taylor
Debtor.



Chapter 13 Case
02-10695

Appearances: *Rebecca Rice, Esq.*
Rutland, VT
Attorney for Debtor

Stacy Chapman, Esq.
Rutland, VT
Attorney for Movant

ORDER
CONDITIONALLY GRANTING MOTION TO AMEND PLAN
AND CONDITIONALLY GRANTING RELIEF FROM STAY

WHEREAS on March 15, 2004, the Vermont Housing Finance Agency (“VHFA” or “the Creditor”) filed a Motion for Relief from Stay seeking relief from stay to foreclose on the residential property of the Debtor, in reliance upon 11 U.S.C. § 362(d)(1),* see doc #58; and

WHEREAS, in response, the Debtor filed an Objection to the Motion for Relief from Stay and a Motion to Modify Plan, see doc. #s 62 & 64.

UPON CONSIDERATION of the entire record in this case, all papers and exhibits filed in connection with the Motion for Relief from Stay and the Motion to Modify Plan, and all the testimony and other evidence presented at the evidentiary hearing held on April 29, 2004;

THE COURT MAKES THE FOLLOWING FINDINGS:

1. VHFA has demonstrated it is entitled to relief from stay, for “cause,” pursuant to § 362(d)(1) by virtue of the Debtor’s utter failure to make the payments due the chapter 13 trustee under her confirmed plan.
2. The Court may, however, grant such relief on a conditional basis if other factors warrant allowing the Debtor an additional opportunity to succeed under chapter 13. Specifically, the Court finds that in a chapter 13 case where a creditor seeks to act against a debtor’s residential real property, it may condition relief on the debtor’s future performance under the confirmed plan, if the debtor persuades the court that the subject property is essential the debtor’s effective reorganization and the debtor is capable of consummating an effective reorganization, as provided under § 362(d)(2).
3. There is no dispute here that there is no equity in the subject property: the Debtor asserts that the value of the subject property is \$55,000 and does not dispute that the debt due to VHFA is approximately \$57,300. Thus, there is no need for the Court to determine if the subject property’s value is actually

* All references to statutes are to Title 11 of the United states Code (“the Bankruptcy Code”), unless otherwise indicated.

\$47,000 as argued by the Creditor or \$55,000 as asserted by the Debtor; either way, the Creditor has met its burden under the first prong of § 362(d)(2), subsection(A).

4. The primary issue for the Court's consideration is whether the Debtor is capable of effecting an effective reorganization and, hence, whether the property is "necessary to an effective reorganization" under § 362(d)(2)(B).
5. Based on the credible testimony of both the Debtor and Mr. Daniels (the Debtor's ex-husband) on the question of whether reorganization is feasible here, the Court finds the Debtor needs the subject property for her reorganization.
6. The amended Schedules I and J submitted in conjunction with the Debtor's Motion to Modify Plan are credible and support the Debtor's contention that under the current arrangements (i.e., with Mr. Daniels making the trustee payments and continuing to make repairs to the subject property), the amended plan being offered appears to be feasible.
7. Although the Debtor's history does not reflect much success in meeting her obligations under the confirmed plan, the Court finds the amended plan and evidence presented at the April 29th hearing to demonstrate new circumstances which warrant giving the Debtor one more opportunity to prove her ability to fulfill a chapter 13 plan. Based upon Debtor's amended plan, which shows her ex-husband, Mr. Daniels, will be making the monthly plan payments to the trustee from sums due the Debtor for monthly child support, and the amended budget, the Court finds that the amended plan is feasible and the Debtor may now be in a position to consummate an effective reorganization which will adequately protect the subject property that is VHFA's collateral. This finding is based upon the credible testimony of both the Debtor and Mr. Daniels, affirming that: (a) Mr. Daniels has never missed or been late with child support payments to the Debtor; (b) Mr. Daniels is committed to making the monthly plan payment directly to the trustee on the first of each month; (c) Mr. Daniels is willing to continue making repairs to the property on an ongoing basis; and (d) the amended plan and budget reflect that the Debtor has \$50 per month to spend on household repairs.
8. There is still an open issue as to the accounting of funds which the Debtor received from her personal injury lawsuit ("the accounting") and which she promised to pay to VHFA, but which she spent on other living expenses. At the April 29th hearing, the Court found VHFA's request for such an accounting to be reasonable and ordered the Debtor to file an itemization of how those funds were spent. To date, the Debtor has not filed the accounting.
9. In light of the Debtor's poor performance under her confirmed plan, and the Creditor's demonstration that it is entitled to relief under § 362(d)(1) for cause, the Court will grant relief from stay. However, because of the Debtor's new circumstances and her apparent ability to consummate the amended plan, said relief from stay is being granted on a conditional basis.
10. In light of the history of this case, the Court further finds it would be unreasonable and unfair for the Court to approve any amended plan without safeguards to protect VHFA's interest. Moreover, the Debtor acknowledged this and consented to an automatic relief provision in the event her amended plan is approved. With the inclusion of the automatic relief provisions, the Court finds that VHFA will be adequately protected and the amended plan will meet the requirements of chapter 13.

11. Since the subject property is necessary to the Debtor's effective reorganization, the Debtor's amended plan cures the post-petition mortgage arrears, and the amended plan provides for a more reliable source for plan payments, her amended plan is approved. However, to ensure VHFA's rights are protected, the amended plan is confirmed on a conditional basis.
12. This Order requires the Debtor to pay VHFA the costs it incurred in prosecuting the subject Motion for Relief from Stay and provides immediate relief to VHFA if the Debtor defaults on her obligations during the term of her chapter 13 case.
13. It is this Court's conclusion that the risks to the Creditor if the Debtor is permitted to proceed under the amended plan are rather minimal and the potential benefits to the Debtor of a successful reorganization are substantial. Thus, the Court finds it to be a proper exercise of its equitable powers and in furtherance of the purposes of chapter 13 for the Court to grant both the relief from stay and the motion to amend *on a conditional basis*.
14. In this case, the Debtor has had numerous opportunities to cure; therefore, the Creditor shall have immediate relief from stay if the Debtor fails to comply with the terms of this Order. Specifically, VHFA shall have immediate relief from stay upon the filing of an affidavit of default, on 3 business days' notice to the Debtor, unless the Debtor is able to timely respond with proof that the default alleged by the Creditor did not occur.
15. The attorney's fees and inspection costs sought by VHFA in connection with this Motion for Relief from Stay are reasonable and shall be allowed in full. Accordingly,

IT IS THEREFORE ORDERED that:

- A. The Debtor shall pay the attorney's fees (\$1,751.50) and inspection costs incurred by the Creditor (\$500), in this contested motion, totaling \$2,251.50 as follows: the Debtor shall pay one-half of said sum by June 15, 2004 and the balance by July 15, 2004, directly to the Creditor, i.e., outside the plan.
- B. By June 1, 2004, the Debtor shall file the accounting, and serve a copy of it on the Creditor and the Creditor's counsel, by June 1, 2004.
- C. If, from this date forward, the Debtor fails to:
 - (I) make a mortgage payment to VHFA on time;
 - (ii) make the payment to VHFA for the attorney's fees and inspection costs incurred in connection with the instant Motion for Relief from Stay, as set forth above, by July 15, 2004;
 - (iii) file and serve the accounting by June 1, 2004; or
 - (iv) make monthly plan payments by the 5th of each month to the trustee (whether directly or through Mr. Daniels),

then, VHFA shall be entitled to immediate relief from stay upon the filing of an affidavit, specifying the date, nature and extent of the default, on three business days' notice to the Debtor.

- D. The Motion for Relief from Stay is **CONDITIONALLY GRANTED**; and
- E. The Motion to Modify Plan is **CONDITIONALLY GRANTED**; the amended plan is approved subject to the above-described conditions with these conditions being deemed included therein.

SO ORDERED.

May 17, 2004
Rutland, Vermont



Colleen A. Brown
United States Bankruptcy Judge