

UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT



In re:

**Martin & Regina Hunt
Debtors.**

**Chapter 13 Case
04-11280**

Appearances: *Kathleen Walls, Esq.*
 Middlebury, VT
 Attorney for Debtors

Alan Bjerke Esq.
Burlington, VT
Attorney for Creditors/Movant

ORDER AUTHORIZING EVIDENTIARY HEARING,
DIRECTING DEBTORS TO FILE AMENDED PLAN,
RESCHEDULING HEARINGS ON ATTORNEY'S WITHDRAWAL MOTION,
EVIDENTIARY HEARING AND CONFIRMATION HEARING

Creditors, Ford Motor Credit Company and Green Mountain Bureau, LLC (the "Creditors") have filed a notice of Evidentiary Hearing (doc # 23) which the Debtors contest (doc # 24). The thrust of the Debtors' objection is twofold: first, that the Creditors have identified this hearing to be in furtherance of their motion to dismiss and the Debtors dispute that there is any such motion before the Court, and second that in light of the Debtors' attorney's pending motion to withdraw as counsel it would be unfair to proceed with an evidentiary hearing at this time.

Some historical, procedural context is essential to the Court's assessment of the merits of each party's position. The Debtors filed the instant chapter 13 case and their chapter 13 plan on September 20, 2004. They filed amended schedules I and J ("the budget") as well as an amended Statement of Financial Affairs ("SOFA"), on September 30, 2004. The confirmation hearing was set for November 10, 2004. On October 4, 2004 the Debtors filed a motion to avoid the lien of Green Mountain Bureau, LLC and pursuant to the default procedure, an Order was entered avoiding that lien under 11 U.S.C. sec. 522(f) on November 9, 2004. At the November 10th confirmation hearing, the Trustee indicated that he needed a provision in the plan or confirmation order requiring the Debtors to provide him with periodic updates regarding Ms. Hunt's employment since she was not employed as of the filing date or confirmation hearing but had been regularly employed in the past. Additionally, the Creditors interposed an oral objection to confirmation at the hearing asserting that even the amended budget schedules and SOFA were not credible as they were inconsistent with financial statements the Debtors had filed with the Creditors and despite the Creditors' request for financial information from the Debtors that might explain the discrepancy, no information had been received. The Debtors indicated that they had the Creditors' request and would be providing the information very soon. The

Court directed the Creditors to file a written objection, directed the Debtors to provide the requested information promptly and adjourned the hearing until December 9th.

On December 6, 2004, the Creditors filed an Objection to Confirmation which asserted that the Debtors were not dedicating all of their disposable income to the plan, that Mr. Hunt was substantially under-reporting his income in the bankruptcy case, and that the Debtors had not filed the case in good faith. The wherefore clause sought a denial of confirmation based upon failure to comply with sec. 1325 and dismissal of the case on bad faith grounds. The Creditors served the Debtors, the case trustee and the U.S. Trustee with the Objection to Confirmation. On December 7th the Debtors responded to the Objection to Confirmation disputing essentially all of the Creditors' allegations. At the December 9th confirmation hearing the parties argued their positions, the Debtors agreed to amend their plan to more accurately reflect Mr. Hunt's actual income (rather than just the base pay) and the hearing was adjourned to January 6th. The Debtors filed a First Amended Plan on January 5, 2004 (#18) in which the Debtors agreed to submit at least \$172.12 per month to the plan for at least 36 (not to exceed 60) months by direct payment plus pay to the Trustee any additional disposable income (bonus checks), and assuring that there would be a total minimum plan contribution of \$10, 327.20. The Creditors argued that the Debtors were still not being forthright in their disclosure of income in that the Debtors typically received \$3,000 - \$4,000 per year in tax refunds and this income was not included in either the amended schedules or amended plan. There was a discussion on the record regarding the possibility of amending the plan to reflect a payment that took into account the fixed expenses, to provide for the monthly payments based upon recent years' income plus a quarterly payment to reflect that quarter's variance with the figures relied upon in the plan, and a provision to compel Ms. Hunt to notify the Trustee in the event she becomes employed. It appeared that the parties and Trustee had a model upon which to base a consensual plan. The Court adjourned the confirmation hearing to February 10th, directed that either the Debtors file an amended plan or, if the parties could not resolve the disputes regarding the Debtors' income or the Debtors' obligation to dedicate their full disposable income to the plan promptly, that the Creditors set an evidentiary hearing for that date, so that the confirmation of this case could move forward.

On January 24, 2005 the Debtors' attorney filed a motion to withdraw as counsel and scheduled that hearing for March 10, 2005. On February 8th the Creditors filed the subject Notice of Evidentiary Hearing, which appears to be consistent with the Court's direction at the last confirmation hearing and the fact that no consensual amended plan has been filed.

The COURT FINDS that the Debtors have not complied with the Court's direction to file an Amended Plan and that the Creditors' Notice of Evidentiary Hearing is appropriate in light of the hearings in this case, the Debtors' failure to file an Amended Plan and the apparent lack of a resolution of the Creditors' Objection to Confirmation.

THE COURT FURTHER FINDS that although the Creditors requested dismissal of the case in their Objection to Confirmation they have not filed an actual Motion to Dismiss nor provided the requisite notice of their Objection to Confirmation to have it treated as a Motion to Dismiss.

THE COURT FURTHER FINDS that it is in the best interest of all parties to move forward with the confirmation process in this case and that no party would be prejudiced if the hearing on the Debtors' counsel's motion to withdraw is heard sooner than March 10, 2005.

THEREFORE, IT IS HEREBY ORDERED that

1. The hearing on the Debtors' counsel's motion to withdraw shall be changed and set for Thursday, February 24, 2005 at 2:30 PM in Rutland, Vt.; and if the Debtors have retained new counsel prior to that date they may file a substitution of attorney and upon such filing the hearing will be cancelled.
2. The Notice of Evidentiary Hearing shall be treated as being in reference to the Creditors' Objection to Confirmation and will be limited to those issues set forth in that Objection.
3. The Debtors are directed to either file an Amended Plan or a Response to the Notice of Evidentiary Hearing, setting forth the witnesses they will call, by March 3, 2005.
4. The Evidentiary Hearing and the continued Confirmation Hearing in this case shall be set for Thursday, March 10, 2005 at 3:30 PM in Burlington, Vt. on the same terms and with the same witnesses as are disclosed on the Notice of Evidentiary Hearing.

SO ORDERED.

February 9, 2005
Rutland, Vermont



Colleen A. Brown
United States Bankruptcy Judge