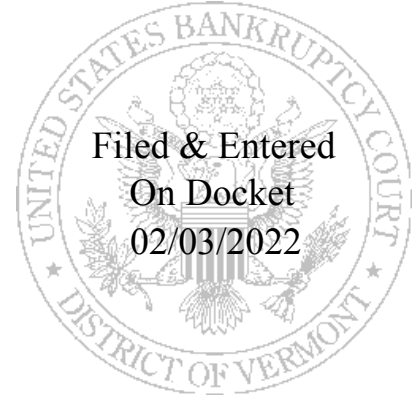


UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT



In re:

**John Pearl Gifford and
Janice Elizabeth Gifford,
Debtors.**

**Chapter 13
Case # 22-10001**

ORDER
GRANTING THE DEBTORS' MOTION TO EXTEND AUTOMATIC STAY

The Debtors filed the instant case on January 5, 2022 (doc. # 1). This is the fifth bankruptcy case the Debtors have filed in this District within the last seventeen years, and the third within the last six years.¹ Their most recent previous case was dismissed on August 17, 2021, due to the Debtors' failure to make plan payments and to fulfill their post-petition tax obligations, as required by their confirmed chapter 13 plan; that case was closed on November 5, 2021 (see case # 18-10278, doc. ## 80, 99, 115, 120). As this chronology indicates, the Debtors filed the instant case just two months after their most recent prior bankruptcy was closed. Since the Debtors' previous case was pending during the year prior to the date the instant case was filed, this case is subject to expiration of the stay on the 30th day after filing. See 11 U.S.C. § 362(c)(3)(A).

Thus, on January 19, 2022, the Debtors filed a motion seeking to extend the automatic stay as to all creditors, pursuant to §362(c)(3)(B) (doc. #12, the "Motion"), which was set for hearing on January 28, 2022. On January 26, 2022, Northfield Savings Bank ("NSB") filed an objection to the Motion (doc. # 17, the "Objection"). The next day, in response to the Objection, the Debtors filed a supplement to their Motion, as well as a chapter 13 plan (doc. ## 18, 21). The Debtors and NSB filed a proposed stipulation approximately one hour before the hearing on January 28, 2022 (doc. # 23), to which the chapter 13 trustee (the "Trustee") filed electronic consent.

¹ See case ## 93-10404, 05-11637, 15-11056, and 18-10278.

At the January 28th evidentiary hearing, Rebecca A. Rice, Esq., appeared on behalf of the Debtors, Robert S. DiPalma, Esq., appeared on behalf of NSB, and Jan. M. Sensenich, Esq., appeared as the Trustee. The Debtors were also present at the hearing and Debtor John Gifford testified in support of the Motion. The Court continued the hearing to February 1, 2022, to give the Debtors additional time to file an amended plan and attempt to resolve a dispute with NSB over the amount of their secured claim and the portion of that claim to be paid through the amended plan. On January 31, 2022, the Debtors filed an amended plan and amended schedule J (doc. ## 29, 30).

On February 1, 2022, the Court held a continued hearing on the Motion, at which Rebecca A. Rice, Esq., appeared on behalf of the Debtors, Robert S. DiPalma, Esq., appeared on behalf of NSB, and Jan. M. Sensenich, Esq., appeared as the Trustee. The Debtors were also present at the hearing, although they did not give further testimony. Debtors' counsel offered a summary of the amended plan and her arguments in support of its feasibility, NSB orally withdrew its Objection, and the Court issued a bench ruling granting the Motion, subject to the Court revisiting the question of feasibility at a hearing set for February 25, 2022. The Court enters the instant Order to memorialize its bench ruling and further explain its rationale.

The Bankruptcy Code addresses the applicability of the automatic stay in a repeat filer case, in pertinent part, as follows:

- [I]f a single or joint case is filed by or against a debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b)—
- (A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case;
 - (B) on the motion of a party in interest for continuation of the automatic stay and upon notice and a hearing, the court may extend the stay in particular cases as to any or all creditors (subject to such conditions or limitations as the court may then impose) after notice and a hearing completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed; and
 - (C) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)—
 - (i) as to all creditors, if—
 - ...
 - (II) a previous case under any of chapters 7, 11, and 13 in which the individual was a debtor was dismissed within such 1-year period, after the debtor failed to—
 - ...
 - (cc) perform the terms of a plan confirmed by the court[.]

11 U.S.C. § 362(c)(3).

It is undisputed that the Debtors' previous case was pending within one year of the instant case and was dismissed because the Debtors failed to make their plan payments (Motion at ¶¶ A.3, A.4). The Court further observes the dismissal order in the previous case was also based on the Debtors' "failure to remain current on their post-petition tax obligations" as required by their confirmed plan (case # 18-10278, doc. # 115, p. 1). Therefore, THE COURT FINDS the § 363(c)(3)(C) presumption arises that the instant case was not filed in good faith. Accordingly, THE COURT FURTHER FINDS the burden is on the Debtors to (i) rebut that presumption and (ii) show, by clear and convincing evidence, that this case was filed in good faith as to all creditors.

In assessing whether the Debtors have satisfied their burden of proof, the Court relies on the criteria it established in In re Goodrich, 591 B.R. 538 (Bankr. D. Vt. 2018). In that case, the Court applied a totality of the circumstances analysis and found six non-exclusive factors to be most probative:

- (i) whether the Debtor's present case has a reasonable probability of success;
- (ii) why the Debtor's prior case was dismissed;
- (iii) what motivated the Debtor to file the instant case;
- (iv) how the Debtor's current filing affected creditors, and the nature and extent of prejudice to any creditor(s) the Debtor seeks to stay;
- (v) whether the trustee or any creditor has objected to continuation of the stay; and
- (vi) whether the Debtor has failed to comply with the obligations imposed by the Bankruptcy Code or is attempting to manipulate the bankruptcy system.

Id. at 550.

As to the first factor, the Debtors' amended plan requires the Debtors to sell their residence to fund a lump sum plan payment of \$99,768.29 due by March 31, 2022 (doc. # 30, §§ 2.4, 8.1). The Debtors filed a fully executed purchase and sale agreement for the property (doc. # 18, the "PSA"). Although the PSA indicates closing shall take place by April 30, 2022 (id. at ¶ 7), the Debtors stipulated they will make every effort – and expect – to close by March 31, 2022 (doc. # 23). Debtors' counsel further stated she would file a motion seeking approval of the sale. Crucially, at the January 28th hearing, Debtor John Gifford testified that the buyer was a friend who had offered to purchase their residence and allow the Debtors to retain a life lease so they could stay at the property. The Trustee also reported at the hearing that he understood the deed from the Debtors would include retention of a life estate and he considered that an essential element of assessing the reasonableness of the proposed sale price.

At the February 1st hearing, counsel for the Debtors clarified that the buyer had agreed to allow the Debtors to reside at the property for the duration of both of their lives, and the Debtors would have to pay, at most, the cost of taxes and insurance or a nominal yearly payment, but the Debtors and buyer

had not yet decided whether to include a life estate in the deed or reached a written agreement on the terms of a life lease.

Based on Mr. Gifford's credible testimony and the Debtors' counsel's representations, THE COURT FINDS the instant case has a reasonable probability of success and the first Goodrich factor thus weighs in favor of continuing the stay, subject to a further hearing on feasibility, as set forth below, to verify the terms of sale with respect to the life estate in relation to the Debtors' ability to afford the plan payment and the reasonableness of the sale price.

Since the Debtors' previous case was dismissed based on their failure to make plan payments and remain current on post-petition tax payments, THE COURT FINDS the second Goodrich factor weighs against continuing the stay.

Turning to the third factor, the Debtors assert in their motion that they filed the instant case on January 5, 2022 to avoid a foreclosure sale of their residence scheduled for January 11th, as they had found a buyer and were in the process of drafting and executing a sale agreement for a price sufficient to pay off their secured claims in full (Motion at ¶ B.1, B.4). The Debtors subsequently filed a copy of the executed PSA (doc. # 18). Therefore, THE COURT FINDS the third Goodrich factor weighs in favor of continuing the stay.

As to the fourth factor, the Debtors' amended plan pays all priority and secured creditors, including NSB, in full (doc. # 30, §§ 3.2, 3.3, 4.4), and thus is in the best interest of those two classes of creditors. With respect to the general unsecured creditors, the amended plan pays a sum of \$2,989, which is approximately 5% of the total amount of general unsecured claims listed in the Debtors' Schedule E/F (\$58,786), and more than the 0% dividend those creditors would receive in a chapter 7 case (doc. # 30, § 5.1; doc. # 1, p. 36). Accordingly, THE COURT FINDS all creditors benefit – and none are prejudiced by – the Debtors' filing of the current case, and thus the fourth Goodrich factor weighs in favor of continuing the stay.

Since NSB orally withdrew its Objection at the February 1st hearing and there have been no other objections to the Motion, the fifth Goodrich factor also weighs in favor of continuing the stay.

Finally, as to the sixth factor, the Debtors timely filed their plan and local form Y-8 (see doc. ## 13, 20, 21) and appear to be complying with their obligations under the Bankruptcy Code. The Court has no evidence before it indicating the Debtors are attempting to manipulate the bankruptcy system with this filing. Hence, THE COURT FINDS the sixth Goodrich factor weighs in favor of continuing the stay.

Based on the above findings, the record in this case, and the Debtors' representations about the terms of sale, THE COURT FINDS the Debtors have met their burden of demonstrating that the totality of circumstances supports a finding this case was filed in good faith as to all creditors.

Accordingly, IT IS HEREBY ORDERED the Debtors' Motion, seeking to extend the stay as to all creditors in this case, is granted, subject to the Debtors presenting further evidence that clarifies the terms of the purchase agreement and post-sale arrangement between the Debtors and the purchaser, particularly with regard to whether the Debtors will retain a life estate in the subject property.

IT IS FURTHER ORDERED the (1) Debtors shall promptly file a motion to approve sale, which includes a clear description of the rights the Debtors will have in their current homestead property, after the sale closes, and (2) the Debtors shall appear at a hearing **at 1:45 p.m. on February 25, 2022**, via Zoomgov, prepared to address the first Goodrich factor in light of any subsequent developments in this case, including whether the Debtors have by then filed a motion seeking to approve sale of the property and/or a copy of an executed agreement regarding their retention of a life estate or terms of the proposed life lease of the sold property. The Court has put the Debtors on notice that it will reassess the extension of the stay at that time, once it considers the additional evidence.

SO ORDERED.

February 3, 2022
Burlington, Vermont



Colleen A. Brown
United States Bankruptcy Judge