IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE	: CHAPTER 13
	:
ESTHER MIXSON,	:
DEBTOR	: BANKRUPTCY NO. 98-18569 SR

OPINION

By: STEPHEN RASLAVICH, UNITED STATES BANKRUPTCY JUDGE.

Introduction.

This matter comes before the court on a Motion to Lift the Automatic Stay filed by WMFC 1997-4 Properties, Inc.[1] This court has jurisdiction over this core proceeding pursuant to 28 U.S.C.

[1] In her brief, Mixson raises the issue of the standing of WMFC to bring this motion considering EMC Mortgage Corp. is the holder of the mortgage. However, Mixson states that "[i]n order to move this matter towards resolution, Debtor will for the purposes of this motion treat WMFC and EMC as if they are a single entity and will not press the issue of WMFC's standing to file the instant motion." *See Debtor's Brief in Opposition to Motion of WMFC 1997-4 for Relief From the Automatic Stay*, n.1.

Though the Settlement Stipulation entered into by the Mixson, WMFC and EMC (the latter two represented by the same attorney) recites that EMC was the holder of the allowed secured claim, Mixson's chapter 13 plan refers to the claim of "WMFC 1997-4, Inc. c/o EMC Mortgage Corporation." *See Exhibit G to Stipulated Record,* ¶ 2b. The debtor also averred in an earlier complaint that EMC is the agent of WMFC. *See Exhibit E to Stipulated Record*, ¶ 5. WMFC filed a proof of claim in connection with the mortgage on debtor's property. *See Exhibit D to Stipulated Record*.

Rule 17(a) of the Federal Rules of Civil Procedure requires that "every action shall be prosecuted in the name of the real party in interest." *Fed. R. Civ. P. 17, incorporated by Fed. R. Bankr. P. 7017*. "Under Pennsylvania law, a real party in interest must be in such command of the action as to be legally entitled to give a complete acquittal or discharge to the other party upon performance." *In re Tainan*, 48 B.R. 250 (Bankr. E.D. Pa. 1985) (citations omitted). This court will assume,, that WMFC has the power to resolve any action in connection with Mixson's mortgage with it and thus has standing to bring this motion.

§ 1334(b) and 28 U.S.C. § 157(b)(G). At a hearing held April 3, 2002 the parties agreed to submit briefs and documents to create a Stipulated Record in lieu of testimony. *N.T. 5-6*.

Discussion.

The key disagreement in this matter is whether Mixson owes monthly payments to WMFC in the amount of $700 as recited in her Chapter 13 Plan, or $543.60, the amount of equal payments to pay $32,800 at 6% simple interest as directed by a Settlement Stipulation entered into just prior to plan confirmation. We will address this matter before analyzing whether lifting the stay is justified.

The Debtor's filed Chapter 13 plan, confirmed January 7, 2000, provided for the Debtor to make monthly payments of $700 until the entire unpaid balance of the Movant's allowed secured claim, plus 6% interest per annum is paid. *See Exhibit G to the Stipulated Record,* ¶ 9. Counsel for the parties, however, settled an adversary proceeding commenced by Mixson to determine the extent and validity of WMFC's lien, Mixson's motion objecting to WMFC's claim, and WMFC's challenges to confirmation of Mixson's chapter 13 plan and its motion to dismiss, by a Stipulation of Settlement filed December 29, 1999. *See Exhibits C and F to the Stipulated Record*. The Stipulation provides for the balance of the allowed secured claim in the amount of $32,800, plus interest at 6% per annum, to be paid by Mixson to WMFC over 72 months beginning upon confirmation of the chapter 13 plan. *Exhibit F to the Stipulated Record,* ¶¶ 4-5. This equates to equal payments of $543.60, as Mixson has asserted. *See Mixson's Brief in Opposition to Motion of WMFC 1997-4 for Relief from the Automatic Stay*, p.8 n.4. Paragraph 11 of the Stipulation provides:

The provisions of this stipulation concerning the total amount of the payment that must be

paid by debtor under the provisions of her confirmed plan and the manner of payment shall supersede the provisions of her confirmed plan.

Stipulation of Settlement, ¶ 11.

Contract interpretation is a matter of state law and, therefore, bankruptcy courts should rely on applicable state law. *In re Spree.com* Corp., 2002 WL 1586274 (Bankr. E.D. Pa. Jun. 20, 2002), *citing In re Karfakis*, 162 B.R. 719 (Bankr. E.D. Pa. 1993). When a written contract is clear and unequivocal, its meaning must be determined by its contents alone. *Capek v. Devito*, 767 A.2d 1047, 564 Pa. 267 (2001); *Willison v. Consolidation Coal Co.*, 637 A.2d 979, 536 Pa. 49 (1994); *Steuart v. McChesney*, 444 A.2d 659, 498 Pa. 45 (1982).

Paragraph 11 clearly modifies the chapter 13 plan. Though the chapter 13 plan was not confirmed until January 7, 2000, a week after the parties entered into the Stipulation of Settlement, the plan had been filed earlier, on August 12, 1998. The Stipulation of Settlement obviously anticipated the terms of the confirmed chapter 13 plan in its prospective supersession of part of its terms. Therefore, Mixson is correct that she owes $543.60 per month on the claim.

Whether to terminate, modify, condition, or annul the bankruptcy stay under section 362(d) is within the discretion of the bankruptcy court. *See Matter of Holtkamp*, 669 F.2d 505 (7th Cir. 1982); *In re Shariyf*, 68 B.R. 604 (E.D. Pa. 1986); *In re Colonial Ctr.*, 156 B.R. 452, 459 (Bankr. E.D. Pa. 1993). This determination is to be made by examining the totality of the circumstances. *Local 144 Hospital Welfare Fund v. Baptist Medical Center of New York, Inc.,* 52 B.R. 417, 425 (E.D.N.Y. 1985), *aff'd*, 781 F.2d 973 (2d Cir. 1986); *see also In re Wilson*, 85 B.R. 722, 728 (Bankr. E.D. Pa. 1988) (case-by-case basis).

Section 362(a)(1) bars "the commencement or continuation . . . of a judicial . . . proceeding

against the debtor that was . . . commenced before the commencement of the case under this title . . .." *11 U.S.C. § 362(a)(1), (3)*. Section 362(d)(1)-(2) provides for relief from the stay:

> On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay –
>
> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest;
>
> (2) with respect to a stay of an act against property under subsection (a) of this section, if –
>
> (A) the debtor does not have an equity in such property; and
>
> (B) such property is not necessary to an effective reorganization[.]

11 U.S.C. § 362(d)(1)-(2).

The Code also allocates the burden of proof as follows:

> (g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section–
>
> (1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and
>
> (2) the party opposing such relief has the burden of proof on all other issues.

11 U.S.C. § 362(g).

Courts have interpreted subsection (g) as requiring that the movant establish a prima facie case that cause exists to lift the stay. *In re Ward,* 837 F.2d 124, 128 (3d Cir. 1988); *In re Causa*, 93 B.R. 409, 410-411 (Bankr. E.D. Pa. 1988); *In re Morysville Body Works, Inc.*, 86 B.R. 51, 55 (Bankr. E.D. Pa. 1988); *In re Ziets*, 79 B.R. 222, 224 (Bankr. E.D. Pa. 1987); *In re Tashjian*, 72 B.R. 968, 973 (Bankr. E.D. Pa. 1987); *In re Ronald Perlstein Enterprises, Inc.*, 70 B.R. 1005, 1009-10 (Bankr. E.D. Pa. 1987); *In re Stranahan Gear Co.*, 67 B.R. 834, 836-37 (Bankr. E.D. Pa. 1986). "To meet this burden, the moving party must introduce some evidence to establish that the 'balance of hardships' tips in his favor." *Causa*, 93 B.R. at 411, *citing In re Ziets*, 79 B.R. 222 (Bankr. E.D. Pa. 1987); *In re Ronald Perlstein Enterprises, Inc.*, 70 B.R. 1005, 1009-10

(Bankr. E.D. Pa. 1987). The burden then shifts to the debtor opposing the relief to establish the absence of "cause." *11 U.S.C. § 362(g)*; *Stranahan Gear*, 67 B.R. at 836-37; *In re Reice*, 88 B.R. 676, 680 (Bankr. E.D. Pa. 1988).

WMFC argues that Mixson's failure to pay it when due, failure to pay trustee payments when due, and a pattern of paying only when threatened by a motion to dismiss, constitute cause for relief from the stay. *See WMFC's Motion to Dismiss*, ¶¶ 6-7, *and WMFC's Letter Brief in Support*.

The undisputed evidence is that the debtor did not in fact pay either WMFC or the trustee monthly as required under the plan, therefore WMFC satisfied its burden of establishing a prima facie case on those grounds. *See Exhibit I to the Stipulated Record; Morysville*, 86 B.R. at 56 (failure to make mortgage payments can constitute section 362(d)(1) cause).

Comparing the docket to the record of Mixson's payments, as evidenced by the cover letters and check copies submitted as part of the Stipulated Record, reveals a discernable pattern of payments prompted by the filing of motions to dismiss. *Exhibits C and I to the Stipulated Record*. After the chapter 13 trustee filed a motion to dismiss on June 30, 2000, Mixson paid $70 toward her trustee payments on July 10, 2000. The trustee withdrew an April 26, 2002 motion to dismiss on May 24, 2002 when Mixson paid $50 to cure her delinquency with the trustee and put her current through June 2002. Not as closely linked though, when the trustee filed to dismiss the case on August 24, 2001, Mixson did not make any trustee payments until December 14, 2001, after the case had been dismissed and then reinstated on November 2, 2001.

WMFC filed three motions to dismiss, on July 28, 2000, June 22, 2001, and January 24, 2002. Mixson made payments ranging from $1,800 to $2,590 within the same or following

month of the filing of each motion. After the July 28, 2000 motion was granted on October 25, 2000, she paid WMFC $1,950 on December 15, 2000, leading to reinstatement of her case on January 11, 2001. WMFC thus has established a prima facie case on the issue of debtor's payment history.

The burden thus shifts to the debtor to show lack of cause, or that WMFC is adequately protected. *FNMA v. Skipworth (In re Skipworth)*, 69 B.R. 526, 527 (Bankr. E.D. Pa. 1987) (evidence of failure to pay mortgage for nine consecutive months satisfies burden and requires debtor to come forward with evidence establishing that creditor is adequately protected). Determination of whether a secured lender received adequate protection from a debtor requires an analysis of all relevant facts, particularly focusing on the value of the collateral, the likelihood that it will depreciate or appreciate over time, the prospects for successful reorganization by means of the debtor's chapter 13 plan, and the debtor's performance under the plan. *Tashjian*, 72 B.R. at 973; *see Reice*, 88 B.R. at 680 (debtor can defeat section 362 motion by showing that plan adequately protects the secured party). The debtor's performance should not ". . . be isolated from the other elements and utilized alone as a basis to deprive a debtor of [the stay,] one of the most valuable tools with which the bankruptcy filing equips him or her." *Tashjian*, 72 B.R. at 973.

Section 361 lists various means by which adequate protection can be provided. *11 U.S.C. § 361.* Though an equity cushion is not included in the list, it falls within the "catch-all equivalent" of movant's interests. *Morysville*, 86 B.R. at 56 n.9. Existence of an equity cushion is a "powerful factor" in determining whether adequate protection exists. *Morysville*, 86 B.R. at 56, *citing In re 1606 New Hampshire Ave. Associates*, 85 B.R. 298, 310 (E.D. Pa. 1988); *see In re*

Crompton, 73 B.R. 800, 810 (Bankr. E.D. Pa. 1987) (large equity cushion precluded relief from the stay despite debtor's failure to make any postpetition payments to mortgagee), *citing In re Adams*, 27 B.R. 582 (D. Del. 1983).

An equity cushion is determined by subtracting the value of the movant's claim from the value of the property. *In re Rorie*, 98 B.R. 215, 221 (Bankr. E.D. Pa. 1989); *Morysville*, 86 B.R. at 56. An appraisal, submitted as part of the Stipulated Record, values the property at $112,000. *See Exhibit N to the Stipulated Record*. The appraisal's purpose was ". . . to estimate the fair market value of the fee simple estate as of the date of inspection - April 16, 2002." *Id*. The appraiser also included the comment "property values are increasing in a stable area, well maintained property." *Id*. As the appraisal was part of the stipulated record and movant did not dispute its contents in its brief, this court will accept the $112,000 value of the property. Subtracting the $32,800 property value agreed upon in the Stipulated Settlement, leaves $79,200, an ample cushion. In addition, according to the debtor, EMC Mortgage Corp., agent of WMFC, is named as loss payee on a $75,000 homeowner's insurance policy, providing further adequate protection. *Debtor's Affidavit, attached as Exhibit O to the Stipulated Record*; *see Pennsylvania State Employees' Retirement Fund v. Roane*, 14 B.R. 542, 546 (E.D. Pa. 1981) (equity cushion together with FHA mortgage guarantee adequately protect the mortgagee's interest).

Mixson only owes $5 per month to the trustee under the plan. *See Exhibit G (Chapter 13 Plan) and Exhibit J (Record of Trustee Payments) to the Stipulated Record*. Though this amount of course resulted from a comparison of the debtor's income to expenses, the low amount yet causes wonder that a debtor could fall behind on payments. Mixson has made only five trustee payments, however she paid more than $5 on each occasion. *See Exhibit J to the Stipulated*

Record. We are handicapped by debtor's failure to explain why her trustee payments were not made monthly and on time, making it impossible to predict whether the conduct will continue in the future. *See Tashjian*, 72 B.R. at 974 ("We believe that the spirit of a bankruptcy court is to be permissive to isolated debtor lapses which are *reasonably explained* . . .") (emphasis added). An unexcused failure to make all regularly-scheduled monthly trustee payments may be cause for relief. *In re Raymond*, 99 B.R. 819, 822 (Bankr. S.D. Ohio 1989). An analysis of the facts surrounding the debtor's failure to make timely payments is necessary, including a determination of the materiality of the default. *Id*. In Mixson's favor is the fact that when she paid the delinquency, she also paid some months in advance. *See Exhibit J to the Stipulated Record*. Most importantly, as of August 2002, she is ahead in her trustee payments by $35. *See In re Pizzullo*, 33 B.R. 740 (Bankr. E.D. Pa. 1983) (debtor not in material default where offered to cure delinquency). We also note that WMFC is not paid through the trustee, thus while debtor's trustee payment performance may be illustrative of her ability to reorganize, her failure to pay plan payments does not affect WMFC's payments, thus we give little weight to that evidence.

Based on the finding above that Mixson owed $543.60 per month, not $700, analysis of her WMFC payment behavior shows a similar pattern of falling behind on payments for a few months, then paying a lump sum that not only cured the arrearage but put the debtor ahead on payments. *See Exhibit I to the Stipulated Record*. Over the 30 months since the plan was confirmed (January 2000-July 2002), Mixson fell behind approximately four times. *Id*. The longest period during which she made no payments was 5 months, March 2000 to July 2000, though the $1,400 she paid in February 2000 covered the March 2000 installment and a portion of the April 2000 installment, therefore she really was only behind in payments from April to

July 2000. *Id*. When Mixson did make regular monthly payments, she paid $600 rather than the required $543.60. *Id*. Again, Mixson offered no excuses for what WMFC termed "erratic" payment behavior, but, significantly, is not in arrears as of August 2002.

We fear that the pattern shows the debtor bringing balances current when faced with a motion to dismiss or to lift the stay, as WMFC suggested. We note that this practice hurts all involved, including the debtor, in spending time bringing, hearing and defending such motions, and thus we will require in the terms of the accompanying Order that the debtor to be more diligent in the future.

Weighing all of the above, this court finds that WMFC is adequately protected. WMFC enjoys a significant equity cushion that will increase both as the debtor pays down her claim with WMFC and the property appreciates in value. *See Morysville*, 86 B.R. at 57 (". . . [W]hen a large equity cushion exists, the sole fact that debtor has failed to make mortgage payments will be of minimal significance."). In addition, though the debtor's payment performance is not commendable, she has shown an ability to bring balances current and is current presently. *See Owens v. Owens (In re Owens)*, 132 B.R. 293 (Bankr. E.D. Pa. 1991) (secured creditor can obtain relief only by showing the debtor substantially defaulted in performances due under the plan); *In re Crompton*, 73 B.R. 800, 809-810 (Bankr. E.D. Pa. 1987) (no per se rule that failure to make payments constitutes cause for relief); *In re Pizzullo*, 33 B.R. 740, 742 (Bankr. E.D. Pa. 1983) (dispositive that debtor made proffer that would cure delinquency; debtors thus not in material default).

WMFC did not argue in terms of hardship, but we assume that its hardship would be in not receiving its full payment under the plan. But WMFC is guilty of exactly what debtor

suggests: that it fails to see that the Stipulation modified the Chapter 13 Plan, and thus it is owed $543.60 per month, not the $700 per month recited in the Plan. Further, as already stated, even if WMFC were not receiving its full amount due, it is adequately protected by the enormous equity cushion as well as the insurance on the property.

Mixson by contrast showed great hardship if she were to lose her home. Mixson is confined to a wheelchair due to amputation of her legs above her knees. *See Exhibit O to the Stipulated Record*. She has had the house modified to accommodate her handicaps, most notably an elevator, changes to the kitchen and bathroom to make them wheelchair accessible, and the widening of doors and installation of ramps. *See Exhibit O to the Stipulated Record*. It would be very difficult for Mixson to find another compatible home, much less one that she could afford. *See In re Crompton*, 73 B.R. 800, 812 (Bankr. E.D. Pa. 1987) (inability to obtain comparable housing for the $96.57 per month paying to retain current home factor considered in denying relief from the stay); *In re Roselli*, 10 B.R. 665, 667 (Bankr. E.D. Pa. 1981) (lifting stay in part to present testimony as to whether no comparable housing available). It is obvious from Mixson's efforts, not only to cure delinquencies in payments but to overpay her monthly amount due when possible, that she is greatly interested in keeping her home. She filed bankruptcy for this purpose. *See Exhibit O to the Stipulated Record*. Therefore, and in consideration that all of her payments to WMFC and the trustee are up to date, the balance of hardships tips decidedly in her favor.

WMFC requests that the court order waiver of Rule 4001(a)(3). *WMFC's Motion to Dismiss*, ¶ 9. Federal Rule of Bankruptcy Procedure 4001(a)(3) provides for staying a motion for relief from the stay for 10 days after entry of the order. *Fed. R. Bankr. P. 4001(a)(3)*. Since the motion to lift the stay will be denied, this request is moot.

In its letter brief, WMFC asks that if the court does not grant the motion to lift the stay, that it nevertheless enter an order providing WMFC ". . . with the ability to file a Certification of Default if future payments are missed or fail to be made pursuant to the plan." *See Letter Brief*, final paragraph.

Section 105 grants bankruptcy judges the power to grant prospective relief from the automatic stay. *11 U.S.C. § 105*; *In the Matter of Hamer*, 2000 WL 1230496 (E.D. Pa. Aug. 18, 2000), *modifying In re Fallon*, 244 B.R. 589 (Bankr. E.D. Pa. 2000). However, the same reasoning used to deny the lift stay motion applies here to deny WMFC's appended request for automatic relief from the automatic stay upon the occurrence of an uncured event of default. If Mixson becomes delinquent on her payments again, WMFC certainly is entitled to file another motion to lift the stay. *See Glendenning v. Third Fed. Sav. Bank (In re Glendenning*), 243 B.R. 629, 638 (Bankr. E.D. Pa. 2000) (award of stay relief in one case not res judicata of that issue in a later case) and *In re Norris*, 39 B.R. 85, 87 (Bankr. E.D. Pa. 1984) (where creditor sought order that automatic stay would not be available against it in any future bankruptcy filing, court stated ". . . such problems can readily be dealt with if and when they arise, by means which are within the authority of the Bankruptcy Court.") WMFC's request is too broad, asking for automatic default upon missing "future payments." Considering all the factors discussed above, missing the next two payments, for example, would not necessarily constitute material default meriting automatic default. Nevertheless, the Court is not unmindful that the efforts which WMFC must take to prompt payment when the Debtor becomes delinquent are not without cost.

Considering movant's failure to persuade this court that the stay should be terminated, costs and attorney fees in this instance are not merited. The Court's accompanying Order will

provide however, that if it shall become necessary for WMFC to file future motions based on the Debtor's default in the tender of timely monthly mortgage payments, then irrespective of whether the outcome of that Motion should produce the same result as that reached today, the costs and attorneys fees incident to the prosecution of such a motion will be assessed against the Debtor, and the retirement of such expenses on reasonable terms to be set by the Court will be a condition to the continuation of the automatic stay as to WMFC.

An Order consistent with these findings follows.

By the Court:

_____
Stephen Raslavich
United States Bankruptcy Judge

Dated: September 27, 2002

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN RE	: CHAPTER 13
	:
ESTHER MIXSON,	:
DEBTOR	: BANKRUPTCY NO. 98-18569 SR

ORDER

AND NOW, upon consideration of the Motion to Lift the Automatic Stay filed by WMFC 1997-4 Properties, Inc., debtor's response thereto, and the briefs and Stipulated Record submitted, it is hereby:

ORDERED, that the Motion to Lift the Automatic Stay is DENIED, but is further:

ORDERED, that should a future Motion for Relief from the Automatic Stay be filed by Movant based on alleged post-petition delinquencies in the remittance of monthly mortgage payments, then, if such allegations are proven at the time of trial, but the Court nevertheless fails to terminate the automatic stay, the Court may impose the costs and attorneys fees incident to the prosecution of such Motion upon the Debtor, together with such other conditions as it may find appropriate with respect to the continuation of the automatic stay as to the Movant.

BY THE COURT:

STEPHEN RASLAVICH
UNITED STATES BANKRUPTCY JUDGE

DATED: September 27, 2002

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