UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF PENNSYLVANIA

IN RE:	**AMEER SALEEM**	**:**	**Chapter 13**
	Debtor(s)	**:**	**Bky. No. 05-15898**

MEMORANDUM

I. INTRODUCTION

On March 14, 2006, three contested matters came before me in the above-captioned chapter 13 case: (1) the Trustee's Motion to Dismiss the Debtor's case; (2) the Motion of DreamBuilder Investments, Inc. to Reconsider Order Dated August 26, 2005 ("the Motion for Reconsideration"); and (3) confirmation of the Debtor's Amended Chapter 13 Plan. The Debtor opposed the Trustee's Motion to Dismiss and the Motion for Reconsideration. Also, the Debtor pressed for confirmation of his Amended Chapter 13 Plan over the objection of DreamBuilder Investments, Inc. ("DreamBuilder") and without the benefit of a recommendation by the Trustee that the plan be confirmed. See generally In re Hines, 723 F.2d 333 (3d Cir. 1983).

Based on the undisputed facts presented by counsel for the Debtor, the Trustee and DreamBuilder, I stated, in open court, that I would deny the Trustee's Motion to Dismiss and an order to that effect has already been entered.

In a similar fashion, the parties agreed that there were no disputed facts with respect to the Motion for Reconsideration. As for the contested matter arising from the objection to confirmation of the Debtor's Amended Plan, a formal evidentiary hearing was held. See generally Fed. R. Bankr. P. 3015(f), 9014.

For the reasons set forth below, I will deny both DreamBuilder's Motion for

Reconsideration and confirmation of the Debtor's Amended Plan.

II. DREAMBUILDER'S MOTION TO RECONSIDER

As evident from its title, the Motion to Reconsider related to this court's Order dated August 25, 2005. That Order resolved a motion for relief from the automatic stay, see 11 U.S.C. §362, which had been filed by DreamBuilder on July 6, 2005.[1] The Debtor contested the motion for relief from the automatic stay. After a hearing, the court issued the August 25, 2005 Order which conditioned the automatic stay upon the Debtor's timely payment of post-petition monthly mortgage payments in certified funds to DreamBuilder. The Order provided that in the event that any payment was more than 15 days late, DreamBuilder would provide the Debtor with notice of the default and 10 days to cure the default. If the Debtor failed to cure the default within 10 days after the notice, DreamBuilder could file a Certification of Default, after which the court could enter an order granting relief from the automatic stay without a further hearing.

In the Motion for Reconsideration, DreamBuilder requested that I amend the Order because the Debtor allegedly had been habitually late in making payments, causing DreamBuilder to file Certifications of Default and to "continue to incur attorneys' fees and costs." The suggested order submitted by DreamBuilder with the Motion to Reconsider proposed to modify the August 25, 2005 Order by removing the requirement of notice and a right to cure the default before it would have the right to submit a Certification of Default and request the entry of an order granting relief from the automatic stay without a further hearing. Rather,

[1] DreamBuilder is the holder of a mortgage on the Debtor's residence, the real property located at 229 E. Johnson Street, Philadelphia, PA.

DreamBuilder proposed that its right to submit a Certification of Default be triggered by any payment that is more than 15 days late (without any prior notice to the Debtor or right to cure).

At the hearing, the Debtor acknowledged that payments have been late since August 2005, but argued that they were late by only a few days, that the lateness was *de minimus* and that he had made all of the payments except for one payment which recently fell due. DreamBuilder emphasized that it had previously filed two Certifications of Default, but did not dispute that the court denied both of the previously filed Certifications of Default and that all of the payments, save the most recent one, had been paid by the Debtor.[2] Neither party presented a detailed payment history since the entry of the Order.

I find that, on the record before me, DreamBuilder presented no compelling reason or change of circumstances which would warrant modification of the court's Order of August 25, 2005 conditioning the maintenance of the automatic stay. Through the requirement of the maintenance of periodic payments coupled with a summary procedure for obtaining stay relief in the event of a future default, as provided in the August 25, 2005 Order, the court determined that DreamBuilder's interest was adequately protected. See generally 11 U.S.C. §362(d) (automatic stay may be modified or terminated for cause, including the lack of adequate protection of an interest in property). As of the date of the March 14, 2006 hearing, nothing material had changed. There was no evidence of depreciation in value of the secured property or other evidence suggesting that DreamBuilder's lien position had eroded since the entry of the court's order. There was no allegation of a non-curable default under the operation of the August 25,

[2] DreamBuilders did point out that it expected to file another Certification of Default soon after the hearing, but, again, acknowledged that no Certification of Default was before the court.

2005 Order[3] and the court had sustained the Debtor's objections to the prior two Certifications of Default filed by DreamBuilder.[4] In these circumstances, given the periodic payments the Debtor has made since August 2005, there is no reason, at this time, to engage again in the balancing of competing interests which led to the court's fashioning of the August 25, 2005 Order.[5]

II. CONFIRMATION OF THE DEBTOR'S AMENDED PLAN

A. Background

The Debtor commenced this chapter 13 bankruptcy case on April 26, 2005. Prior to the commencement of this case, the Debtor had filed four prior chapter 13 bankruptcy cases and one chapter 7 case. The Debtor's filing history is outlined below[6]:

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[3] See n.2, supra.

[4] The August 25, 2005 Order and both Orders sustaining the Debtor's objections to DreamBuilders' two Certifications of Default were entered by my judicial predecessor, the Honorable Kevin J. Carey. Because the Orders sustaining the Debtor's objections to the Certifications of Default were not accompanied by written opinions, I do not know the precise reasons why the objections were sustained by the court. I consider it most likely that the court found either that the Debtor did not default or timely cured any default. Of course, it is possible that the court denied relief based on a cure of the default by the Debtor which was not timely under the terms of the August 25, 2005 Order and, therefore, did not require strict compliance with the Order. However, if that were the case, I believe it is likely that the court would have further conditioned the maintenance of the automatic stay or at least warned the Debtor that, in the future, the order would be strictly enforced, especially after sustaining the objection to the second Certification of Default.

[5] I do not determine whether there may be and in what circumstances repeated late payments may provide grounds for a modification of an order which has conditioned the maintenance of the automatic stay on periodic payments to the creditor. I also note that I have made no determination whether DreamBuilder has incurred any counsel fees or costs for which the Debtor may be charged under the loan documents. See generally 11 U.S.C. §506(b).

[6] The information in the text is derived from the docket entries in the 5 prior cases. The dockets were moved into evidence at trial by DreamBuilders without objection.

Chapter	Case No.	Date of Filing	Outcome	Representation	Reason for Dismissal
13	99-19837	8/2/99	10/6/99 dismissed	*pro se*	failure to propose a plan
13	00-18367	7/6/00	8/10/00 dismissed	*pro se*	failure to file documents
13	00-32043	9/26/00	3/12/02 dismissed	David A. Scholl, Esq.	docket does not state reason for grant of the Trustee's Motion to Dismiss
7	02-30791	8/1/02	8/25/04 discharge granted	David A. Scholl, Esq	n/a
13	04-35354	11/16/04	12/30/04 dismissed	*pro se*	failure to file documents

Before the end of the Debtor's short-lived fourth chapter 13 bankruptcy case, Bky. No. 04-35354 ("the 4th Chapter 13 Case"), the court scheduled a show cause hearing why the case should not be dismissed with a bar to refiling any bankruptcy case in the future without prior leave of court. The order to show cause specifically stated that if the Debtor failed to appear at the hearing, "a bar shall be entered". The Debtor failed to appear and a bar order was entered. The court's Order dated December 30, 2004 stated:

> **"this case is DISMISSED and the Debtor PROHIBITED from filing any new bankruptcy case without prior leave of this Court."**

On April 11, 2005, the Debtor, now represented by counsel in the 4th Chapter 13 Case, filed an expedited motion seeking permission to file another case. In the motion, the Debtor represented that demolition by the City of Philadelphia of the houses on the two lots he owned adjacent to his residence had rendered the properties valuable, that he was prepared to propose a chapter 13 plan in which he would sell the properties and use the proceeds to cure the mortgage delinquency on his residence and that this change of circumstances justified the grant of relief

from the filing bar order entered by the court in December 2004. DreamBuilder filed a limited objection to the Motion stating that it did **not** object to another bankruptcy filing "[p]rovided the Debtor's Chapter 13 Plan provides for post petition payments to Dreambuilder and payment of its pre-petition arrears."

After a hearing held on April 19, 2005, the court issued an Order dated April 25, 2005 providing as follows:

> **[T]he Motion is GRANTED, and the Debtor has permission to file a new bankruptcy case forthwith. The Debtor shall also file the proposed Schedules and Chapter 13 Plan forthwith, with the added provisions that the Debtor's Lots at 231-33 East Johnson Street, Philadelphia, PA 19144, must be the subject of an agreement of sale within nine months from the date of the filing of the case or this case will be dismissed.**

The next day, April 26, 2005, the Debtor commenced this bankruptcy case. On the same day, he filed his bankruptcy schedules, statement of financial affairs and chapter 13 plan ("the Plan").

In his schedules,[7] the Debtor disclosed his ownership of two pieces of real estate: 229 E. Johnson Street ("229 Johnson") and 231-33 E. Johnson Street ("231-33 Johnson"), both located in Philadelphia, PA. The Debtor resides at 229 Johnson. Presumably as a result of the demolition of the structures referred to by the Debtor in his expedited motion for seeking permission to file his fifth chapter 13 bankruptcy case, 231-33 Johnson consists of two undeveloped lots.

The Debtor's schedules indicate that 229 Johnson has a value of $190,000 and it is

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[7] The Schedules were not moved into evidence at trial. However, I may, and I do, take judicial notice of the dockets in this case and the content of the bankruptcy schedules for the purpose of ascertaining the timing and status of events in case and facts not reasonably in dispute. See Fed. R. Evid. 201; In re Scholl, 1998 WL 546607 (Bankr. E.D. Pa. 1998)

subject to liens totaling $165,000 (including the mortgage held by DreamBuilder, with a balance of $145,000). 231-33 Johnson is disclosed as having a value of $150,000, subject to $50,000 in liens held by the City of Philadelphia.[8]

The Plan filed by the Debtor provided for payments of $100/month for 36 months to the Trustee. The Plan further provided that, by January 31, 2006, the Debtor would execute an agreement of sale to sell 231-33 Johnson for no less than $50,000. As required by the court's order of April 25, 2005, the Plan does state that the agreement of sale must be signed by January 31, 2006 or the case will be dismissed with a 180 day bar to refiling unless authorized by the court.[9] The Plan contemplates that between the plan payments to be made by the Debtor to the Trustee and the sale proceeds from 231-33 Johnson, the Plan will be funded sufficiently to cure the prepetition arrears owed to DreamBuilder on the mortgage held against 229 Johnson. The Plan also provides for the Debtor to make all post-petition monthly mortgage payments falling due to DreamBuilder.

On January 23, 2006, the Debtor filed an Amended Chapter 13 Plan ("the Amended Plan"). The Amended Plan provides that the Debtor must enter into an agreement of sale with respect to 231-33 Johnson by September 1, 2006 with the same consequences as in the original plan if the deadline is not met (i.e., dismissal with a 180 day bar unless another bankruptcy filing is authorized by the court).

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[8] Subsequently, DreamBuilder filed a secured proof of claim in the amount of $155,486.06 with prepetition arrearages of $35,279.66 and the City of Philadelphia filed a secured proof of claim in the amount of $2,150.09.

[9] The provision for a refiling bar order was not required by the court's Order of April 25, 2005, but was included in the Plan at the request of the chapter 13 Trustee. See Docket Entry #11.

DreamBuilder filed an objection to confirmation of the Debtor's Amended Plan. In the objection, DreamBuilder asserts that the Amended Plan "flies directly in the face of the April 25, 2005 Order" that granted permission to the Debtor to file his fifth chapter 13 bankruptcy case subject to the requirement that his chapter 13 plan provide for a signed agreement of sale within nine months. At the confirmation hearing, the Trustee supported DreamBuilder's objection.

B. The March 14, 2006 Confirmation Hearing

At the confirmation hearing on March 14, 2006, the Debtor testified that he had entered into an agreement of sale with respect to 231-33 Johnson providing for the sale of the property for $150,000 to his daughter, Malakatu Saleem ("the Agreement of Sale"). The Agreement of Sale is undated, but does bear two signatures. It contains a mortgage contingency clause, conditioning the sale on the buyer obtaining financing within 60 days for 100% of the purchase price at an interest rate of 8.75%. It also provides for a closing date of June 6, 2006 unless extended by the parties. On March 13, 2006, the Debtor filed a motion in this court seeking the entry of an order authorizing the sale of the property to the Debtor's daughter.

Much of the Debtor's testimony focused on the timing of the Agreement of Sale and the *bona fides* of the agreement. The Debtor acknowledged that when he filed the current bankruptcy case, he was aware of the terms of the April 25, 2005 Order, signed the day before this case was filed, requiring that an agreement of sale be signed within nine months. The Debtor stated that he listed the property at a sale price of $400,000 with "Buyowner.com," an internet based service which assists property owners in the sale of property without using a real estate broker. He also stated that he listed the property with a multiple listing service, which was

a separate, more traditional service provided by "Buyowner.com."[10] The Debtor claimed that he took all of these actions within two months of filing the case.[11] He testified that, although six potential purchasers expressed some interest in the property, no one had made a written purchase offer.

As a type of "backup plan" to his efforts to sell the property to an arms-length purchaser, the Debtor testified that starting in September 2005, he began discussing with his daughter the possibility that she purchase the property if he could not locate another buyer. He stated that he was not sure exactly when he and his daughter reached an agreement for the sale of the property, but that it was probably in January 2006.[12] When asked why there was a two month delay before the motion for court approval was filed, the Debtor claimed that he faxed a copy of the Agreement of Sale to his attorney in January 2006, but there was some kind of "fax problem" and his lawyer did not receive it.[13]

Finally, the Debtor testified that his daughter lives in New Jersey and is employed as a master sergeant in U.S. Air Force earning $70,000-80,000 per year. He also stated that she had received some type of preliminary approval on the financing that she would need in order to close on the Agreement of Sale, but produced no documentation verifying this assertion.

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[10] The Debtor produced no documentation verifying these sale efforts.

[11] The Debtor did not explain why he waited two months before doing so.

[12] This time frame places the agreement as being reached just prior to the nine month deadline set by the original Plan.

[13] I give no weight to the Debtor's testimony concerning the alleged "fax problem." The existence of a signed agreement in January 2006 is inconsistent with the Debtor's conduct in filing the Amended Plan, which proposed to extend out to September 2006 the deadline for a signed agreement of sale.

C. Discussion

The issue presented by DreamBuilder's objection to confirmation is whether confirmation should be denied due to the Debtor's failure to satisfy the requirements of 11 U.S.C. §1325(a)(3). Section 1325(a)(3) provides that a court shall confirm a plan if "the plan has been proposed in good faith and not by any means forbidden by law." DreamBuilder argues that the Amended Plan, which proposes a deadline for a signed agreement of sale of September 2006 was not filed in good faith due to its inconsistency with the court's April 25, 2005 Order that authorized the filing of this case and which required the Debtor to enter into an agreement of sale within nine months or suffer dismissal of the bankruptcy case.

I agree that the Amended Plan should not be confirmed because it does not satisfy the requirements of 11 U.S.C. §1325(a)(3).

Generally, "good faith" in a chapter 13 case is determined by the following three-part inquiry:

> (1) whether the debtor has deliberately misinformed the court of facts material to confirmation of the plan; (2) whether the debtor intends to effectuate the plan as proposed and (3) whether the proposed plan is for a purpose not permitted under the Bankruptcy Code.

In re March, 83 B.R. 270, 275 (Bankr. E.D. Pa. 1988) (per Fox, J.). See also In re Guevara, 2004 WL 2495410 (Bankr. E.D. Pa. October 21, 2004) (per Sigmund, Ch. J.).

A useful further elaboration of the good faith concept, albeit in the chapter 11 context, was set forth in In re Clinton Centrifuge, Inc., 72 B.R. 900 (Bankr. E.D. Pa. 1987), where the court stated that the focus of the good faith inquiry is:

> . . . to determine whether the debtor seeks to abuse the bankruptcy law by employing it for a purpose for which it was not intended. When a debtor is

> motivated by plausible, legitimate reorganization (or liquidation) purposes and not solely or predominantly by the mere desire to prevent foreclosure or hinder creditors, bad faith is not present . . . .

72 B.R. at 905. See also In re Brown, 2005 WL 2589194 (Bankr. E.D. Pa. March 31, 2005) (per Raslavich, J.).

The concept of good faith is supplemented by the requirement in §1325(a)(3) that the plan has been proposed "not by any means forbidden by law." The leading bankruptcy treatise states that this additional confirmation requirement:

> . . . appears to be largely an elaboration of the good faith concept, as well as the section 1325(a)(1) test of whether the plan complies with applicable provisions of title 11. It broadens the latter test in that it is not limited to title 11, and thus contemplates compliance with other applicable law.

8 Collier on Bankruptcy ¶1325.04[2], at 1325-17 (15th rev. ed. 2005).[14]

In the instant case, whether viewed as a requirement under §1325(a)(3) that the Amended Plan be proposed in "good faith" or "not by any means forbidden by other applicable law", I am satisfied that the Amended Plan's inconsistency with this court's Order of April 25, 2005 is a fatal flaw rendering the Amended Plan unconfirmable. In other words, the Debtor's request for confirmation of a plan which is plainly inconsistent with a prior order of this court is either not in good faith or is inconsistent with "other applicable law."

Put in its best light, the Amended Plan could be viewed as a request by the Debtor for a

[14] I note that, as a result of the 2005 amendments to the Bankruptcy Code, the Code now includes certain new statutory presumptions regarding good faith which may affect the duration the automatic stay in certain bankruptcy cases. See 11 U.S.C. §362(c)(3), (4). The case at bench was filed before the effective date of the 2005 amendments.

modification of the April 25, 2005 Order.[15] If treated as such, the request would be governed by Fed. R. Bankr. P. 9024, which incorporates by reference Fed. R. Civ. P. 60. Rule 60(b) provides:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: . . . (6) any other reason justifying relief . . . .

Not surprisingly, given the nature of the bankruptcy process, in which circumstances may change dramatically during the course of a case,

> bankruptcy courts are accorded "a very large measure of discretion" in passing on motions for relief from judgment, and a reviewing court will not set aside an exercise of that discretion "unless it is persuaded that under the circumstances of the particular case the action ... is an abuse of discretion."

In re J & L Structural, Inc., 313 B.R. 382, 385 (W.D. Pa. 2004) (quoting 11 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 2872, at 261 (1973) and citing Wagner v. Pennsylvania Railroad Co., 282 F.2d 392, 397-98 (3d Cir.1960)). See also In re Keul, 76 B.R. 79 (Bankr. E.D. Pa. 1987) (stay relief orders are subject to modification under Rule 9024).

In my view, an order restricting a person's right to file a bankruptcy petition is the type of order that is subject to review and modification in light of changed circumstances. See, e.g, In re Washington, 2004 WL 1607009 (Bankr. E.D. Pa. June 25, 2005) (citing In re Ogelsby, 158 B.R. 602 (E.D. Pa. 1993)). The April 25, 2005 Order was such an order. However, I am not satisfied

[15] It would have been preferable for the Debtor to have addressed the inconsistency more directly by filing a motion seeking modification from the nine month deadline set by the Order rather than simply inserting a provision in the Amended Plan which, if approved, would have effectively modified the court's order. However, in functional terms, the Debtor's request for confirmation, DreamBuilder's objection thereto and the confirmation hearing served the same purpose.

that the Debtor has demonstrated changed circumstances or other equitable grounds to justify relief from the order, particularly since the Debtor proposes doubling the nine month time restriction for him to enter an agreement of sale. The evidence presented by the Debtor did not persuade me that any unforeseeable problems arose in the marketing of the property. Rather, given the amount of time that has passed since some time in the year 2004, when the Debtor believes the property's value was enhanced by the demolition of the structures on it, it appears just as likely, if not more likely, that the Debtor's opinion regarding valuation is simply mistaken and that his decision to list the property for $400,000 was ill-advised. In the absence of some concrete obstacle to a sale of the property, not anticipated when the court entered the Order of April 25, 2005, the Debtor is not entitled to the substantial modification of the Order as proposed in the Amended Plan.

In short, I believe that, given the history of this case, the Debtor has had a reasonable opportunity to market 231-33 Johnson Street and that, given the nine month deadline imposed by the court at the inception of this case, it would be unreasonable to confirm a plan providing him with an additional nine months to do so. See generally In re Gallagher, 332 B.R. 277 (Bankr. E.D. Pa. 2005).

III. Further Proceedings in this Case

Although I have denied confirmation of the Amended Plan, I have not dismissed the Debtor's bankruptcy case. Compare In re Gallagher (case dismissed when confirmation of plan

extending deadline for performance denied and the debtor appeared unable to perform the plan obligations by the deadline established in the confirmed plan).

My narrow holding is that the proposed Amended Plan, extending the deadline for an agreement of sale by nine months, may not be confirmed. I am aware of the Debtor's pending motion for authority to sell the property to his daughter, which is scheduled for a hearing on April 18, 2006. Based on the relatively sparse record created at the confirmation hearing, I have some doubt about the ability of the parties to consummate that transaction. However, I leave open the possibility that the sale of the property to the Debtor's daughter may be carried out and that the sale can provide a basis for the Debtor to propose a confirmable plan. Although such a plan would not be in strict compliance with the April 25, 2005 Order, the likely delay in the payoff of DreamBuilder's secured claim, if closing occurred in June 2006 as provided in the Agreement of Sale, would be approximately two months beyond the deadline that was likely contemplated by the April 25, 2005 Order. As such, a June 2006 closing may well constitute substantial performance of the Debtor's obligation under the Order. Consummation of a sale of the property may provide equitable grounds to give the Debtor relief from the strict terms of the Order, at least if the Debtor can stay current in post-petition monthly payments to DreamBuilder and can actually close on the sale by the June 2006 deadline set forth in the Agreement of Sale.

Appropriate orders denying DreamBuilder's Motion for Reconsideration[16] and confirmation of the Debtor's Amended Plan shall be entered.

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[16] At the hearing, the parties agreed that the due date of the Debtor's monthly payment was in error in the court's Order dated August 25, 2005. In the Order denying the Motion for Reconsideration, I have amended the Order to correct the error.

Date: _____

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ERIC L. FRANK
U.S. BANKRUPTCY JUDGE