

NOT INTENDED FOR PUBLICATION
UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	:	CASE NO. 03-90949
	:	
SARAH ANN WIDEMAN,	:	CHAPTER 13
	:	
Debtor.	:	JUDGE MASSEY
_____	:	
	:	
WASHINGTON MUTUAL BANK, F.A.,	:	
	:	
Movant,	:	
	:	
v.	:	CONTESTED MATTER
	:	
SARAH ANN WIDEMAN and	:	
NANCY J. WHALEY, Trustee,	:	
	:	
Respondents.	:	
_____	:	

ORDER DENYING MOTION TO DISMISS WITH PREJUDICE

Movant Washington Mutual Bank, F.A. filed an objection to confirmation of the Debtor's plan and moved to dismiss this case with prejudice on the ground that she had two prior cases and was behind several months on her mortgage payment. Movant did not press its objection at confirmation, which would not have been granted based on the facts pleaded in that motion. Instead, Movant prevailed on Debtor through counsel to consent to a "supplemental" confirmation order stating that if the Debtor failed to make a payment on the mortgage in the future and failed to cure it after notice, Movant could make a motion to dismiss the case with prejudice, and that the Court "may" dismiss the case with prejudice. Over a year after objecting to the confirmation

of the plan, Movant filed such a motion, alleging that the Debtor had missed 7 post-petition payments. The Court takes judicial notice that in the meantime, Debtor has paid the Trustee over \$5,000 and has been prosecuting the case. The notion that failing to make a mortgage payment is a proxy for willfully failing to prosecuting a case is unfortunately too common. Washington Mutual could have moved for stay relief (and still can) to obtain the same relief – the unrestrained right to foreclose – without destroying the effort the Debtor is apparently making to pay other debts. The Debtor's failure to pay mortgage payments, as alleged, may mean that the Debtor is unable to perform her plan, but it does not show that she filed the case in bad faith or is not attempting to prosecute the case properly. The kind of motion filed by Movant is not a substitute for a motion for relief from stay on the facts appearing on the record and alleged here.

Accordingly, it is

ORDERED that Movants' motion to dismiss with prejudice is DENIED without prejudice to filing a conventional motion to dismiss or a motion for stay relief.

This 10th day of May 2004.

JAMES E. MASSEY
U.S. BANKRUPTCY JUDGE