



IT IS ORDERED as set forth below:

Date: February 20, 2009

James E. Massey

James E. Massey
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

_____|
IN RE:

CASE NO. 09-61362

Thomas Eugene McElroy and Kimberly Jaye
McElroy,

CHAPTER 13

Debtors.

JUDGE MASSEY
_____|

ORDER

This case was filed on the heels of dismissal of a prior case that lasted two years in which Debtors made plan payments exceeding \$20,000. The plan in the prior case provided for payment of attorneys's fees of \$3,500. The motion to dismiss the prior case was filed on July 25, 2008. The ground for dismissal was that the plan "will exceed sixty months by twenty-seven (27) months in violation of 11 U.S.C. § 1322(d)(2)(C)." Section 1322 is entitled "Contents of plan" and is concerned with precisely that. Subsection (d)(2)(C) of section 1322 provides that under the circumstances described in that subsection a plan "may not provide for payments over a period

that is longer than 3 years, unless the court, for cause, approves a longer period, but the court may not approve a period that is longer than 5 years.”

The plan, as amended, in the prior case was confirmed on February 7, 2007, a year and a half before the motion to dismiss was filed. The amended plan provides in relevant part:

Debtor will pay the sum of \$870.00 per month to Trustee by Payroll Deduction(s) or by Direct Payment(s) for the applicable commitment period of 60 months, unless all allowed claims in every class, other than long-term claims, are paid in full in a shorter period of time. The term of this Plan shall not exceed sixty (60) months.

Consequently, the content of the amended plan complied with section 1322(d)(2)(C). Moreover, even it had not, confirmation of the plan foreclosed any later objection to the term of the plan. So the motion failed to state a claim.¹

A hearing on the motion to dismiss was postponed a few times until January 7, 2009. Debtors did not oppose the motion, and the case was dismissed.

Eleven days later, Debtors filed the present case. The plan proposed in this case would have the Debtors paying legal fees of \$3,800. At a hearing on a motion to continue the stay held on February 3, 2009, counsel for Debtors stated that Debtors were “surrendering” their residence. Counsel stated that the problem in the prior case was that a third mortgagee on Debtors’ residence filed a claim higher than anticipated. The Court thinks that explanation is much too facile. Failure to figure out what was due on a third mortgage with a 22% interest rate raises a serious question whether counsel acted competently in the prior case in filing a plan that was infeasible. It is easy to get payoff numbers. Counsel was aware of the claim of the third mortgagee because

¹Whether a case should be dismissed merely because it will take longer than 60 months to perform it due to unanticipated events after confirmation is not before the Court. The issue on such a motion would be whether there is "cause" for dismissal within the meaning of section 1307(c), not whether the plan complies with section 1322(d).

they scheduled it. The plan provided that only allowed claims would be paid. Hence, counsel knew there was a problem the day the plan was confirmed because the third mortgagee had not filed a claim. Until a proof of claim with respect to the third mortgage was filed, that claim could not be paid under the plan, which was certainly not in the interests of the Debtors. Counsel had a responsibility to examine claims, and if they did so, they failed to compare the amount of the claim to the assumption on which the plan was based. Getting this right was for the most part the whole purpose of filing the last case.

If a reasonable fee in the prior case was \$3,500.00, where Debtors had a house with three mortgages, it is difficult to see how a fee of \$3,800.00 could be reasonable in the present case. In the prior case, Debtors had a little over \$10,000 in unsecured debt. Unsecured debt in the present case is a scheduled a bit more than \$13,600. Because Debtors are surrendering their residence, the only secured debt to be paid under the plan is a vehicle, which they owned during the prior case. In other words, little has changed since the last case.

Under these circumstances, Debtors' law firm must file a fee application in this case if it seeks approval of a fee in excess of \$750. The Court will not dictate the time for filing such an application. Counsel can file it at any time before or after confirmation, but if the application is not heard by the time of the confirmation hearing, the plan must be amended to reflect that a fee in excess of \$750 will require approval by an order separate from the confirmation order.

IT IS SO ORDERED.

END OF ORDER