



IT IS ORDERED as set forth below:

Date: January 29, 2015

W. Homer Drake
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

IN THE MATTER OF:	:	CASE NUMBER
	:	
ROGER COTTON	:	14-12186-WHD
	:	
WANDA DENISE ECHOLS COTTON,	:	14-10727-WHD
	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
Debtors.	:	BANKRUPTCY CODE

ORDER

Before the Court is the *Motion for In rem Relief from Automatic Stay* filed by Select Portfolio Servicing, Inc. (hereinafter “SPS”), as servicer for Deutsche Bank National Trust Company, as Trustee, in trust for the registered holders of Morgan Stanley ABS Capital I Inc. Trust 2006-HE7, Mortgage Pass-Through Certificates, Series 2006 HE7 (hereinafter “Deutsche Bank”) against Wanda Cotton and the *Motion for In Rem*

Relief from Automatic Stay filed by SPS against Roger Cotton. This matter constitutes a core proceeding, over which this Court has subject matter jurisdiction. *See* 11 U.S.C. § 157(b)(2)(G); § 1334.

FINDINGS OF FACT AND PROCEDURAL HISTORY

Wanda Cotton filed a Chapter 13 case on March 31, 2014. *See* Case No. 14-10727-WHD. SPS acts as the servicer of a loan held by Deutsche Bank, in its capacity as the trustee of a trust. This loan obligation arose from a promissory note (hereinafter the “Note”) executed by Wanda Cotton in 2006. The Note is secured by a security interest in real property known as 214 Parkhill Drive, Lagrange, Georgia (hereinafter the “Property”), which has been owned by Wanda Cotton and Roger Cotton since June 1988. Both Wanda and Roger Cotton acted as grantor in conveying an interest in the Property to secure the Note.

Wanda Cotton proposed a Chapter 13 plan, through which she would retain the Property, cure a pre-petition arrearage of \$17,000 owed on the Note, and maintain payments on Deutsche Bank’s secured claim. Neither SPS nor Deutsche Bank objected to confirmation, and the Court confirmed Wanda Cotton’s plan on August 11, 2014. One day later, on August 12, 2014, SPS filed a motion for relief from the automatic stay provided by section 362(a) and from the co-debtor stay provided by section 1301 (hereinafter the “Wanda Cotton Motion”). As to the automatic stay, SPS sought relief

under section 362(d)(4) on the basis that the filing of Wanda Cotton's petition was part of a scheme to hinder, delay, or defraud creditors. SPS asserted that Wanda Cotton owed Deutsche Bank approximately \$122,334, plus attorney's fees of \$1,026, and that the Property was worth only \$95,000 based upon the valuation in Wanda Cotton's schedules. SPS further asserted that Wanda Cotton had failed to maintain post-petition mortgage payments.

In support of its position that the filing of Wanda Cotton's petition was part of a scheme to hinder, delay, or defraud creditors, SPS also detailed an extensive history of cases filed by Wanda and Roger Cotton. These cases include the following:

- (1) 95-12109-WHD, a Chapter 13 case, filed by Roger and Wanda Cotton, which was dismissed after confirmation in July 1996;
- (2) 96-12242-WHD, a Chapter 13 case, filed by Roger and Wanda Cotton, which was dismissed in August 1997;
- (3) 97-12825-WHD, a Chapter 13 case filed by Wanda and Roger Cotton on September 2, 1997, discharged March 29, 2003 (although this case was later reopened in 2005 for the purpose of attempting to avoid a judicial lien);
- (4) 12-11983-WHD, a Chapter 13 case filed by Wanda Cotton on July 12, 2012, and dismissed on March 14, 2013, prior to confirmation for failure to fund the plan;
- (5) 13-10863-WHD, a Chapter 13 case filed by Wanda Cotton on April 3, 2013, and dismissed on February 21, 2014, after confirmation for failure to fund the plan.

The Wanda Cotton Motion was scheduled for a hearing on August 28, 2014. At that time, although no party opposed the Wanda Cotton Motion, the Courtroom Deputy advised SPS's counsel that the request for relief under section 1301 could not be heard, as the co-debtor had not been given sufficient notice of the hearing. For this reason, the Wanda Cotton Motion was rescheduled for hearing on October 2, 2014. *See* Dkt. No. 37.

One day before the re-scheduled hearing on the Wanda Cotton Motion, Roger Cotton filed his own Chapter 13 case. *See* Case No. 14-12186-WHD. Consequently, the Wanda Cotton Motion was rescheduled for December 4, 2014, at which time, counsel for Roger Cotton appeared in opposition. The Court expressed concerns about granting relief under section 362(d)(4) in Wanda Cotton's case that would affect property that was, by that time, property of Roger Cotton's separate bankruptcy estate, without the filing of a motion with notice on all parties in interest in Roger Cotton's case. Additionally, Roger Cotton objected to the Court's making a finding that the filing of Wanda Cotton's case had been part of a scheme to hinder, delay, or defraud creditors solely on the basis of the past filings of Wanda and Roger Cotton and without his having an opportunity to present evidence. The Court agreed and requested that the parties schedule an evidentiary hearing to address the Wanda Cotton Motion, any motion for relief from the automatic stay that might be filed in Roger Cotton's case, and the matter of confirmation of Roger Cotton's Chapter 13 plan.

Following the December 4th hearing, SPS filed an almost identical motion in Roger Cotton's case, again seeking relief from the automatic stay pursuant to section 362(d)(4) (hereinafter the "Roger Cotton Motion"). SPS also objected to confirmation of Roger Cotton's proposed Chapter 13 plan (hereinafter the "Plan") on the basis that: "Debtor is not an obligor on the Promissory Note relative to the Property and therefore has no personal obligation to Movant, leaving Movant with only the recourse as against the Property."

The Plan proposes to commit Roger Cotton's projected disposable income to the payment of unsecured claims; to pay unsecured claims in full; to retain the Property and pay the pre-petition arrearage owed to Deutsche Bank; and to retain two vehicles and pay the claims secured by those vehicles. During the hearing on the Roger Cotton Motion, the Chapter 13 Trustee advised the Court that: (1) although Wanda Cotton failed to maintain direct payments to SPS in her case, the Chapter 13 Trustee has made disbursements to SPS on the pre-petition arrearage claim; (2) the Plan appears to be feasible; and (3) the employment deduction order is working, such that payments under the Plan are substantially current.

CONCLUSIONS OF LAW

Section 362(d)(4) provides that the "court shall grant relief from the stay. . . with respect to a stay of an act against real property . . . by a creditor whose claim is secured by

an interest in such real property, if the court finds that the filing of the petition was part of a scheme to delay, hinder, or defraud creditors that involved either—(A) transfer of all or part ownership of, or other interest in, such real property without the consent of the secured creditor or court approval; or (B) multiple bankruptcy filings affecting such real property. 11 U.S.C. § 362(d)(4). If “recorded in compliance with applicable State laws governing notices of interests or liens in real property, an order entered under [section 362(d)(4)] shall be binding in any other case under this title purporting to affect such real property filed not later than 2 years after the date of the entry of such order by the court, except that a debtor in a subsequent case under this title may move for relief from such order based upon changed circumstances or for good cause shown, after notice and a hearing.” *Id.*

Accordingly, the Court must grant relief from the stay under section 362(d)(4) if it finds that: (1) Deutsche Bank has a claim secured by the Property; (2) the filing of either Wanda Cotton or Roger Cotton’s petition was part of a scheme to delay, hinder, or defraud creditors; and (3) this scheme involved either: (a) transfer of all or part ownership of, or other interest in, the Property without Deutsche Bank’s consent or court approval; or (b) multiple bankruptcy filings affecting the Property. Although multiple bankruptcy filings filed by different co-owners of one piece of real estate can provide evidence of a scheme, “[m]ultiple bankruptcy filings do not alone justify relief under” section

362(d)(4)(B). *In re Gray*, 558 F. App'x 163, 166-68 (3d Cir. 2014). “Under the statute, [prior] filings, as well as the petition in this case, must be ‘part of a scheme to delay, hinder, or defraud creditors’ of the [Property].” *Id.* at 166. Further, additional facts about the cases and the debtor’s financial circumstances may support the conclusion that multiple bankruptcy filings were not part of a scheme to hinder or delay, but rather a failed, but legitimate, attempt to reorganize and pay the claim secured by the property and other debts.

Here, there is no suggestion that the Cotton’s transferred ownership of the Property between themselves or to others in an attempt to hinder, delay, or defraud creditors. Rather, it would appear that the Cottons already owned the Property jointly at the time Deutsche Bank originated the loan secured by the Property. There have certainly been multiple bankruptcy filings by the Cottons that affected the Property. Three of these cases, however, occurred during the time period of 1995 through 2003 and were all filed before Deutsche Bank’s interest in the Property arose. In the last of these cases, the Cotton’s successfully paid creditors under a confirmed plan. These earliest cases are so far removed in time and content from the more recent cases, that the Court cannot find that they are related sufficiently to the current cases to have been part of one “scheme” to hinder, delay, or defraud creditors that began as early as 1995.

As to the two more-recent prior cases (12-11983-WHD and 13-10863-WHD), the

Court finds, based upon Roger Cotton's testimony, that: (1) Wanda Cotton filed these cases in good faith with a sincere intent to confirm a Chapter 13 plan that would provide for the secured claim against the Property and pay her other debts; (2) these two cases failed due to a combination of issues related to the illness and death of Wanda Cotton's mother, Roger Cotton's suffering a broken ankle (which resulted in uninsured medical bills and a loss of income, as he was self-employed at the time), and the marital strife and separation that resulted from these unfortunate and unexpected events; and (3) Wanda Cotton and Roger Cotton each filed his or her current case in an honest attempt to deal with the arrearage on the Property and to save their home. These findings render relief under section 362(d)(4) inappropriate.

The Court also notes that, although section 362(d)(1) and section 362(d)(2) could also apply to this case, the Court declines to grant relief under either of these subsections at this time, without prejudice to SPS's filing a renewed motion. During the hearing, Roger Cotton's counsel represented that Roger Cotton has attempted to make the post-petition monthly payments owed on the Note to SPS, but SPS has refused to cash any of Roger Cotton's checks. Counsel further related that, upon her advice, Roger Cotton had stopped payment on the checks and was prepared to present a cashier's check representing three post-petition payments in the total amount of \$2,415. The Court has since been informed that these funds have now been received by SPS's counsel. In

addition, the Chapter 13 Trustee opined that Roger Cotton's proposed plan appeared to be feasible and that the employer deduction order has been working. Once confirmed, therefore, the Chapter 13 Trustee would have sufficient funds on hand to begin paying SPS's pre-petition arrearage claim.

From these facts, the Court concludes that Deutsche Bank's interest in the Property is adequately protected for the time being and that the Property is necessary to Roger Cotton's effective reorganization, which appears to be viable. Under the current circumstances, leaving the stay in place until the confirmation hearing on February 12, 2015, will not prejudice Deutsche Bank and will give Roger Cotton an opportunity to litigate whatever objections Deutsche Bank or the Chapter 13 Trustee may raise to the Plan's confirmation.

Finally, at the confirmation hearing, SPS requested that, if the Court chose not to grant the relief requested, Roger Cotton be required to comply strictly with his obligations and that SPS be permitted to add its attorney's fees. The Court finds that this request is reasonable and provides further protection to Deutsche Bank's interest in the Property, and, in any event, Roger Cotton's attorney, subject to having the right to review the attorney's fees, agreed to SPS's request. Accordingly, counsel for Roger Cotton and SPS may submit a supplemental order providing for the terms of the strict compliance and remedies for SPS should Roger Cotton fail to comply, as well as the addition of SPS's

attorney's fees to its claim. Alternatively, counsel may agree that such terms should be included in the Plan or a supplemental confirmation order.

CONCLUSION

For the reasons stated above, the *Motion for In rem Relief from Automatic Stay* filed by SPS, as servicer for Deutsche Bank, against Wanda Cotton and the *Motion for In Rem Relief from Automatic Stay* filed by SPS, as servicer for Deutsche Bank, against Roger Cotton must be and, hereby are, **DENIED**, subject to the terms provided in this Order.

The Clerk shall serve a copy of this Order on Wanda Cotton and her counsel, Roger Cotton and his counsel, the Chapter 13 Trustee, the United States Trustee, and counsel for SPS.

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