

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE  
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 03-34187

LARRY RAY HARVEY

Debtor

**MEMORANDUM ON MOTION FOR RELIEF FROM AUTOMATIC STAY  
AND OBJECTION TO CONFIRMATION OF CHAPTER 13 PLAN**

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Chapter 13 Trustee

**RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE**

This contested matter is before the court on the Motion to Terminate Automatic Stay, for Abandonment and to Authorize Foreclosure (Motion for Relief) and the Objection to Confirmation of Chapter 13 Plan (Objection to Confirmation), both filed by U.S. Bank Home Mortgage (U.S. Bank) on September 5, 2003, requesting that the court grant it relief from the automatic stay in order to proceed with a foreclosure and that the court deny confirmation of the Debtor's Chapter 13 Plan. The Debtor has urged the court to deny the Motion for Relief and confirm his Chapter 13 plan as proposed, stating that he intends to auction U.S. Bank's collateral and use the proceeds to pay it in full. At a hearing held on September 24, 2003, the court took the Objection to Confirmation under advisement.<sup>1</sup>

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(A), (G), (L), and (O) (West 1993).

## I

The Debtor filed the Voluntary Petition commencing his Chapter 13 bankruptcy case on July 29, 2003. U.S. Bank was listed as a secured creditor, holding a security interest in the following real property: (1) 54 acres located on Lawnville Road in Kingston, Tennessee; (2) a house and lot at 1345 Gallaher Road, Kingston, Tennessee; and (3) a house and lot at 1931 Gallaher Road, Kingston, Tennessee (collectively the Real Property). The Debtor scheduled the value of the Real Property at \$850,000.00, subject to U.S. Bank's claim scheduled at \$300,000.00. The Debtor's Chapter 13 Plan (the Plan) proposes monthly payments to the Chapter

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<sup>1</sup> As the issue presented as it relates to the Objection to Confirmation is solely a question of law, an evidentiary hearing was not held. No action will be taken on the Motion for Relief without an evidentiary hearing.

13 Trustee of \$1,200.00 and a 100% dividend to unsecured creditors. Additionally, the Plan proposes the following treatment for U.S. Bank's claim: "Lien held by U.S. Bank to be paid by sale of properties attached to lien." The Plan does not provide for periodic payments to be made on U.S. Bank's secured claim.

U.S. Bank's Motion for Relief is based upon the failure of the Debtor to propose plan payments on his mortgage debt, including an arrearage claim alleged to exceed \$125,000.00. Additionally, U.S. Bank avers that it is not adequately protected because the Real Property is not insured, and the Debtor has failed to pay his property taxes. U.S. Bank argues that this is the Debtor's fifth bankruptcy filing since 1999, and that it was commenced in order to stop a foreclosure that was in process. In its Objection to Confirmation, U.S. Bank reiterates that the Plan does not propose any payments on the mortgage obligation, stating that the Debtor must make his maintenance payment on the mortgage through the Plan. Additionally, U.S. Bank objects because the Plan does not properly propose to cure the arrearage owed on the mortgage and because the Real Property is uninsured.<sup>2</sup>

At the September 24, 2003 hearing on U.S. Bank's Motion for Relief and Objection to Confirmation, the Debtor argued that he did not provide for payments to U.S. Bank in his Plan because he intends to personally hold an auction of the Real Property and to use the proceeds therefrom to pay U.S. Bank. The Debtor speculated that the auction would yield sufficient funds to pay U.S. Bank's claim in full; however, he has not scheduled an auction, nor did he give the

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<sup>2</sup> The Chapter 13 Trustee has also objected to confirmation, arguing that the case "is a property liquidation case dressed up as Chapter 13."

court a specific date upon which he desired to hold an auction of the Real Property. U.S. Bank renewed its objection to this treatment, instead requesting relief from the stay so that it could proceed with a sale of the Real Property.

## II

A court "shall confirm a [Chapter 13] plan if—(1) the plan complies with the provisions of this chapter and with the other applicable provisions of this title[.]" 11 U.S.C.A. § 1325(a)(1) (West 1993). Consistent with this mandate, Chapter 13 of title 11 sets forth various requirements that must be met in order for a plan to be confirmed, including specific contents, payment requirements, duration requirements, and creditor treatments. As it pertains to secured creditors, the Bankruptcy Code provides debtors with three options for dealing with allowed secured claims: (1) obtain approval of the plan from the secured creditor; (2) "cramdown" the creditor's claim; or (3) surrender the collateral securing the creditor's claim. *See* 11 U.S.C.A. § 1325(a)(5) (West 1993); *In re McCommons*, 288 B.R. 594, 596 (Bankr. M.D. Ga. 2002) (citing *Assocs. Commercial Corp. v. Rash*, 117 S. Ct. 1879 (1997)). Additionally, the court may confirm a Chapter 13 plan whereby the debtor will either cure or waive all defaults and complete contract payments during the life of the plan pursuant to 11 U.S.C.A. § 1322(b)(3) (West 1993), or will cure all defaults within a reasonable time and make maintenance payments to continue after the duration of the plan pursuant to 11 U.S.C.A. § 1322(b)(5) (West 1993). If the requirements set forth in these various Bankruptcy Code sections are not met, a proposed plan may not be confirmed.

In this case, the Debtor's Plan may not be confirmed as proposed because the secured creditor, U.S. Bank, has objected to confirmation; *i.e.*, has not accepted its treatment under the Plan pursuant to § 1325(a)(5)(A). *Cf. In re James*, 260 B.R. 498, 503 (Bankr. D. Idaho 2001) (finding that failure to object to confirmation results in approval of the plan); *In re Brown*, 108 B.R. 738, 740 (Bankr. C.D. Cal. 1989) (presuming acceptance by failure to object to confirmation). Because the Debtor has not satisfied § 1325(a)(1) and (5), the Plan cannot be confirmed. *See, e.g., In re McMillan*, 251 B.R. 484, 487 (Bankr. E.D. Mich. 2000).

Moreover, proof that the Debtor has failed to insure the Real Property may be evidence that U.S. Bank is not adequately protected, and thus, relief from the automatic stay may be warranted. *See* 11 U.S.C.A. § 362(d)(1) (West 1993 & Supp. 2003). In order to obtain relief from the stay for lack of adequate protection, U.S. Bank must establish a *prime facie* case, showing that the Debtor owes it an obligation, that U.S. Bank has a valid security interest that it seeks to protect, and that cause exists justifying relief, such as the Debtor's failure to make payments or that the collateral is decreasing in value. *In re Planned Sys., Inc.*, 78 B.R. 852, 860 (Bankr. E.D. Ohio 1987).

The determination of whether a creditor's interest is adequately protected is not an exact science nor does it involve a precise arithmetic computation. Rather, it is pragmatic and synthetic, requiring a court to balance all relevant factors in a particular case, including the value of the collateral, whether the collateral is likely to depreciate over time, the debtor's prospects for a successful reorganization and the debtor's performance under the plan. Other considerations may include the balancing of hardships between the parties and whether the creditor's property interest is being unduly jeopardized.

*In re Rogers*, 239 B.R. 883, 887 (Bankr. E.D. Tex. 1999) (citing *In re Olick*, 221 B.R. 146, 161 (Bankr. E.D. Pa. 1998)). The court has thus far not entertained any proof on U.S. Bank's Motion for Relief.

In this case, the Debtor's Plan does not meet the requirements of 11 U.S.C.A. § 1325(a)(1) and (5) and, therefore, it shall not be confirmed. U.S. Bank's Objection to Confirmation shall be sustained. The court will, however, allow the Debtor ten days to file a modified plan treating U.S. Bank's secured claim in a manner consistent with 11 U.S.C.A. § 1325(a)(5). The Motion for Relief will be set for hearing on a non-contest docket to determine if the Debtor intends to proceed in Chapter 13.

FILED: October 2, 2003

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE  
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 03-34187

LARRY RAY HARVEY

Debtor

**ORDER**

For the reasons stated in the Memorandum on Motion for Relief from Automatic Stay and Objection to Confirmation of Chapter 13 Plan filed this date, the court directs the following:

1. The Objection to Confirmation of Chapter 13 Plan filed by U.S. Bank Home Mortgage on September 5, 2003, is SUSTAINED. Confirmation of the Debtor's Chapter 13 Plan filed July 29, 2003, is DENIED.

2. The Debtor shall, within ten (10) days, convert or dismiss his Chapter 13 case or, alternatively, may file a modified plan treating U.S. Bank Home Mortgage's secured claim in the manner allowed by 11 U.S.C.A. § 1322(b)(3) or (5) (West 1993) or as required by 11 U.S.C.A. § 1325(a)(5) (West 1993). If a modified plan is filed, counsel for the Debtor shall notice the modified plan for a confirmation hearing on October 22, 2003, at 9:00 a.m., in Bankruptcy Courtroom 1-C, First Floor, Howard H. Baker, Jr. United States Courthouse, Knoxville, Tennessee. The Debtor's counsel shall certify service of the notice and amended plan on the Chapter 13 Trustee, U.S. Bank Home Mortgage, and all affected creditors.

3. The Motion to Terminate Automatic Stay, for Abandonment and to Authorize Foreclosure filed by U.S. Bank Home Mortgage on September 5, 2003, is set for further hearing

on October 22, 2003, at 9:00 a.m., in Bankruptcy Courtroom 1-C, First Floor, Howard H. Baker, Jr. United States Courthouse, Knoxville, Tennessee, on a non-contest docket.

4. Upon the Debtor's failure to comply with paragraph 2 herein, his bankruptcy case will be dismissed without further notice or hearing.

SO ORDERED.

ENTER: October 2, 2003

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.  
UNITED STATES BANKRUPTCY JUDGE