

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION**

IN RE

Bobbie McKinnie

CASE NUMBER 98-12528

Chapter 13

**MEMORANDUM OPINION AND ORDER RE
(1) MOTION FOR RELIEF FROM STAY AND FOR PERMISSION TO FORECLOSE
AS TO UNION PLANTERS PMAC, INC., and (2) MOTION FILED BY DEBTOR TO
ADD POST-PETITION ARREARS TO BANKRUPTCY PLAN**

The Court conducted a hearing on Union Planter's "Motion for Relief From Stay and for Permission to Foreclose" and the Debtor's "Motion to Add Post-Petition Arrears to Bankruptcy Plan" on March 22, 2001. FED. R. BANKR. P. 9014. Pursuant to 28 U.S.C. § 157(b)(2), this is a core proceeding. After reviewing the testimony from the hearing and the record as a whole, the Court makes the following findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

On September 20, 1989, the debtor executed a promissory note in favor of Union Planters PMAC, Inc., in the amount of \$48,738.00. This note was secured by a real property Deed of Trust on the debtor's principle residence in Bolivar, TN. The present case was filed on July 6, 1998. The debtor included the on-going monthly mortgage payment to Union Planters, as well as a \$4047.12 arrearage, in her proposed Chapter 13 plan. The debtor's plan was confirmed on September 4, 1998, and set forth a \$609.33 monthly payment to Union Planters for the on-going mortgage as well as a \$90.00 monthly payment to Union Planters on the arrearage.

On November 23, 1998, an Administrative Order Allowing Claims was filed with the Court. In this order, the mortgage arrearage was listed as \$6,578.80. On December 2, 1998, an Order Modifying Plan was entered increasing the monthly on-going mortgage payment to Union Planters to \$619.91.

On February 6, 2001, Union Planters filed a "Motion for Relief From Stay and for Permission to Foreclose." Union Planters alleged in this motion that the debtor had not made the ongoing mortgage payment since October 2000. The balance on the promissory note, as of February 6, was approximately \$41,956.74.

On February 13, 2001, the debtor filed a motion to add her post-petition arrears to Union Planters to her Chapter 13 Plan. On February 27, 2001, an "Order Modifying Confirmed Plan and Limiting Notice" was filed with the Court increasing the monthly payment on the Union Planters arrearage from \$90.00 to \$170.00.

At the hearing on Union Planter's motion for relief and the debtor's motion to add, the debtor testified that when this chapter 13 case was filed, she was not employed. Approximately two months later, she obtained employment at the Whiteville Correctional Facility. In October 2000, the debtor was earning approximately \$8.00/hour. Since that time, the debtor has received a wage increase to \$9.19/hour.

At the time of defaulting on her mortgage payments, the debtor was working some mandatory overtime, but was not receiving overtime pay. Instead, her employer's policy was to compensate employees who worked overtime with additional leave time. In October or November 2000, Whiteville Correctional Facility changed its policy with regard to overtime and

began paying employees who work additional hours overtime pay. According to the debtor's testimony and several pay stubs (Collective Trial Exhibit 1), the debtor has been working between fifty-five and sixty hours of overtime every two weeks since this change in policy. The debtor testified that she expects to continue working this much overtime in the future.

The debtor testified that her house was appraised a few years ago at approximately \$51,000.00. The debtor also testified that the house was in good shape and that she believed it was still worth the appraisal amount. At the time of defaulting on her mortgage, the approximate payoff balance to Union Planters was \$42,000.00. The Chapter 13 Trustee advised the Court that if the mortgage arrearage was added to the debtor's plan, her biweekly plan payment would have to increase to \$445.00.

Section 362(d) of the Bankruptcy Code provides that:

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay –

. . .

(2) with respect to a stay of an act against property under subsection (a) of this section, if –

- (A) the debtor does not have an equity in such property; and
- (B) such property is not necessary to an effective reorganization; . .

11 U.S.C. § 362(d)(2). In the case at bar, it is undisputed that the debtor has equity of approximately \$8,000.00 in her house. It is also undisputed that the debtor and her fifteen-year-old daughter live in the house. Union Planters asserts that remaining in the house is not necessary for the debtor's reorganization and, given the \$445.00 biweekly plan payment, may even be financially unwise for the debtor. While the Court acknowledges that the debtor could

move to either a rental house or an apartment with a lower monthly payment, there are two reasons why the Court finds that remaining in the house is necessary and feasible for the debtor at this time. First and foremost, should the debtor be required to find another place to live, she would incur numerous expenses, including utility and phone deposits. The debtor would also have to miss work in order to look for another home and in order to pack her belongings and move. Secondly, the Court finds that given the increase in income the debtor has recently received at work, the debtor will be able to make the increased payment to Union Planters. After deducting the increased plan payment from the pay stubs presented at the hearing, the debtor will still be netting between \$600 and \$700 every two weeks.

The Court is aware that the debtor's proposal to remain in her house and make an increased payment to Union Planters hinges on the continuing availability of overtime at her job. The debtor testified that she expects the fifty to sixty hours in additional work time to continue in the future. Based on this expectation, the Court finds that the debtor will be able to make the increased plan payment. As a result of this conclusion and the finding that the debtor does have equity in the property and that the property is necessary for an effective reorganization, the Court finds that the automatic stay should not be lifted at this time; however, this denial of Union Planter's motion for relief is conditioned on the debtor making all plan payments in a timely manner and in the full amount. Should the debtor fail to adhere to either of these conditions, the automatic stay will be lifted with a ten-day notice of default.

ORDER

It is therefore **ORDERED** that Motion for Relief from Stay and for Permission to Foreclose as to Union Planters PMAC, Inc., is **CONDITIONALLY DENIED** based on the debtor making all plan payments in a timely manner and in the full amount.

It is **FURTHER ORDERED** that the Debtor's Motion to Add Post-Petition Arrears to Bankruptcy Plan is **GRANTED**.

It is so ordered.

By the Court,

G. Harvey Boswell
United States Bankruptcy Judge

Date: March 29, 2001