



SO ORDERED.

SIGNED this 11 day of July, 2005.

ROBERT E. NUGENT
UNITED STATES CHIEF BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

IN RE:)	
)	
PAUL D. STOGSDILL,)	Case No. 03-14304
KAMA K. STOGSDILL,)	Chapter 13
)	
Debtors.)	
_____)	

ORDER ON CITIFINANCIAL’S MOTION FOR RELIEF FROM STAY

CitiFinancial Mortgage Inc. (“Citi”) seeks relief from the automatic stay to enforce a mortgage covering the debtors’ homestead on South Pinecrest in Wichita.¹ This mortgage was given to secure the debtors’ promissory note to Travelers Bank & Trust, FSB, on March 14, 2002, in the original amount of \$70,452.37. According to Citi’s witness, Travelers Bank is a subsidiary of CitiFinancial and “under the same umbrella” of the Citi group of companies. Citi asserts that the debtors are in default of their payment

¹ Dkt. 29.

obligations, both pre- and post-petition, and that some eleven payments had been missed at the time the motion was filed on August 13, 2004.² Debtors respond that the terms of their confirmed chapter 13 plan require Citi to honor its Payment Waiver Program (PWP) by waiving these missed payments. Ultimately at issue here are the specific provisions of the PWP, how they apply to the Stogsdills, and whether the debtors are entitled to the PWP benefits. Citi's motion was taken under advisement following an evidentiary hearing.

Factual Background

Debtors filed this case on August 11, 2003. According to Mr. Stogsdill, their bankruptcy filing was motivated by Citi's insistent attempts to collect past-due mortgage payments. Stogsdill says that a Citi representative informed him in a phone conversation that Citi would waive three mortgage payments and allow them to be added to and paid at the end of the mortgage contract. The debtors began to miss mortgage payments after Mr. Stogsdill lost his job at Raytheon in February of 2003. An order confirming Debtors' chapter 13 plan was filed on December 10, 2003 following a confirmation hearing on November 13, 2003.³ Citi did not object to debtors' plan.

When the Stogsdills refinanced their home with Citi in 2002, they were offered participation in Citi's "S.M.A.R.T. Completion Plan Payment Waiver Program" or PWP.⁴ In exchange for a substantial fee (here it was \$43.16 per month in addition to the Stogsdills' \$600 monthly loan payment), Citi agreed to

² Initially, CitiCorp Trust Bank, fsb filed a motion for relief from stay on September 22, 2003. *Dkt. 8*. That motion was subsequently withdrawn by Citi on November 19, 2003. *Dkt. 22*. On August 16, 2004, the current motion was filed by CitiFinancial Mortgage Company, Inc. *Dkt. 29*.

³ *Dkt. 24*.

⁴ Plaintiff's Ex. 3. Only Mr. Stogsdill was covered by the PWP.

waive certain payments if Mr. Stogsdill became disabled or involuntarily unemployed.⁵ PWP is not an insurance program; rather, when a payment is waived, interest continues to accrue on the unpaid payments and the principal balance of the loan remains payable. All that Mr. Stogsdill appears to have purchased here is the ability to miss mortgage payments under certain stringently-defined circumstances.

Under the PWP agreement, after the borrower becomes involuntarily unemployed and after the lender has received satisfactory proof thereof, the lender agrees to waive debtors' loan payments coming due after 90 days after the unemployment. There is in effect a 90 day waiting period before the PWP benefits kick in, much like disability insurance.⁶ The waiver benefit is also capped at 12 loan payments per occurrence (*i.e.* a continuous period of involuntary unemployment). This basic right to secure a waiver of loan payments is subject to a number of conditions and exclusions. The conditions and exclusions pertaining to an employment-related waiver are found in Section D of the PWP agreement.

That portion of the agreement first requires that the borrower must be unemployed as a result of layoff, strike, or involuntary termination by the employer other than for cause. The borrower must also qualify for state unemployment law benefits and must be registered for work with the state unemployment office within 30 days after the last day employed. The agreement's exclusions are significant here. First, there is no waiver of loan payments if the borrower was notified of an impending layoff within 90 days prior to the effective date of the PWP agreement (March 14, 2002). Second, there is no waiver of loan payments if the borrower is laid off "within 12 months from the PWP Effective Date" and has not been

⁵ For purposes of the current motion, only the unemployment event will be addressed since, in this case, the PWP was not triggered by a disability.

⁶ The PWP agreement makes clear that debtors remain responsible for loan payments during the waiting period.

employed for a minimum of thirty hours per week for the twelve consecutive months immediately preceding the layoff.⁷ The Court takes this to mean that if the debtor is laid off within 12 months of March 14, 2002 and has been less than a 30 hour per week worker during the 12 months before being laid off, he is not entitled to a waiver.

In addition to exclusions, there are certain requirements borrower must comply with in order to obtain the payment waiver. The debtor must file a proof of involuntary unemployment on the lender's benefit request form within 180 days of the layoff. After filing the initial proof form, the debtor is expected to submit a follow up form every 30 days while his unemployment continues. There is no payment waiver while the debtor's application is pending and the program document plainly states in bold type that "[u]ntil the Lender makes a determination, the BORROWER is responsible for making the Scheduled Loan Payments and the PWP Monthly Fee."⁸

Both debtors signed the PWP agreement, initialing each page. Mr. Stogsdill was laid off at Raytheon on February 13, 2003. He testified that he called Citi on February 18, 2003 and was told that the payment waiver would go into effect in 90 days and that any payments missed in that time period would be payable at the end of his contract. Within 30 days, however, debtors began to receive collection calls. According to Citi's phone log, a representative explained to Mr. Stogsdill that he remained responsible for the payments while his waiver claim was pending.

⁷ As the Court noted at the hearing, this exclusion is less than clear. Read literally, the two elements of the exclusion are in the conjunctive and apparently *both* must be satisfied in order to exclude the claims of a borrower. In other words, even if a borrower's layoff occurs within the 12-month waiting period, if he had been fully employed for 12 months prior to the layoff, the second element would not be met and, arguably, the exclusion would not apply.

⁸ Plaintiff's Ex. 3, p. 3.

In evidence were copies of the only forms Citi said it ever received from debtors. It appears that Stogsdill did not submit an initial PWP benefit request claim form until January of 2004, some nine months after being laid off. That form was not signed by him and contained none of the requested unemployment office information. He also submitted several supplemental forms, but these are also incomplete. Stogsdill essentially argues that the program was inadequately explained to him and that Citi failed to send him the appropriate forms in a timely way.

On December 10, 2003, the Court entered its Order Confirming Chapter 13 Plan. The Plan provided in part that “[t]he current mortgage payments commencing with the June 2003 payment, and continuing thereafter until the debtor obtains employment, shall be made by the unemployment insurance or shall be waived by Citicorp Trust Bank.” Any remaining unpaid payments would be treated as an arrearage and cured under the Plan. Citi did not object to this Plan.

Analysis

At the hearing on Citi’s motion for relief from the stay, debtors had the burden of proving that they were adequately protecting Citi’s interest. They needed to demonstrate by a preponderance of the evidence that they were complying with the terms of their agreements. For the following reasons, the Court concludes that they failed to meet this burden of proof.

While the Court is dubious of the value to the debtors of the PWP program, that is no reason to disregard its plain terms. Mr. Stogsdill was ineligible to receive the payment waiver on several bases. First, he was laid off in February of 2003, only eleven months after the PWP Effective Date, March 14, 2002. Second, he applied for the benefit in January of 2004 after being laid off the previous eleven months – well outside the 180 day application period prescribed in the agreement. Third, his application documents were

incomplete at best and he failed to supplement the initial application every 30 days as required by the PWP agreement. Even though Mr. Stogsdill professes to be uneducated in financial affairs, there is nothing in the record before the Court upon which it could base a determination that he should be somehow excused from complying with the terms of this agreement. The agreement clearly states that the debtors remained responsible for making their payments as long as their application for waiver was pending. As the Court pointed out in colloquy with counsel, there are doubtless many provisions in the debtors' mortgage that they could not adequately explain, but that fact does not render those provisions unenforceable.

Even had Mr. Stogsdill been laid off more than 12 months after the effective date, and assuming he had timely filed a completed application for waivers, he would only have been eligible for 12 waived payments, and then only after waiting 90 days after his unemployment date. The debtors have now been in bankruptcy for nearly two years and have not made a house payment since October of 2004. As of the trial date, Mr. Stogsdill remained unemployed. This motion has been pending since August of 2004. Debtors have had from that time until the date of trial in this matter, March 29, 2005, to determine their future course of action in this matter. Owing to the press of this Court's business, an additional three months have passed prior to this Order's entry. By now, they should have some concept of how they wish to proceed in this case.

Accordingly, based upon its finding that the debtors have failed to adequately protect the interest of Citi by virtue of their post-petition payment default and their inability to qualify for the PWP benefit, the Court ORDERS that Citi's motion for stay relief be GRANTED for cause. Debtors shall be granted 10 days from the date of this order to file a motion to modify their plan. If they do so, this Order shall be stayed pending a determination on said motion which shall be heard on the August, 2005 docket or as soon

thereafter as this Court may reach the case.

IT IS SO ORDERED.

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