

The court incorporates by reference in this paragraph and adopts as the findings and orders of this court the document set forth below. This document has been entered electronically in the record of the United States Bankruptcy Court for the Northern District of Ohio.



Dated: October 19 2007

Mary Ann Whipple  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
WESTERN DIVISION

In Re:	)	Case No. 06-30046
	)	
Lynn B. McCoy,	)	Chapter 13
	)	
	)	
Debtor.	)	JUDGE MARY ANN WHIPPLE
	)	

**ORDER VACATING ORDER GRANTING RELIEF FROM THE AUTOMATIC STAY  
AND CONDITIONING FURTHER IMPOSITION OF THE AUTOMATIC STAY**

The court held a further hearing on October 16, 2007, on Debtors’ Motion to Reinstate the Automatic Stay [Doc. #81] as to Citibank, N.A., as trustee c/o Chase Home Finance LLC (“Chase”), which holds the mortgage on Debtor’s home. Chase opposes the motion and the relief requested by Debtor.

Debtor seeks to cure her pre-petition unpaid mortgage arrearage, and now a substantial portion of the post-petition mortgage arrearage that has arisen, through her Chapter 13 plan. Chase was granted relief from stay on May 16, 2007, pursuant to an affidavit of default in a prior conditional order for relief intended to address Debtor’s first failure to make post-petition mortgage payments in this case. Debtor filed her motion on August 30, 2007. Debtor does not contest that she was in default of her obligations under the prior conditional order, but insists she will now be able

to make her mortgage payments to Chase because her financial circumstances have changed, improving substantially. In the meantime, however, Chase has rightfully resumed its state court foreclosure proceedings and incurred additional costs and expenses in doing so.

The court held a prior hearing on the motion on October 3, 2007, and directed the parties to supplement the record. As to Debtor, the court directed her to file amended Schedules I and J to substantiate her changed circumstances. As to Chase, the court directed that it file supporting detail of the post-petition arrearage amount, its costs and expenses arising after relief from stay, and information as to the increased mortgage payment amount arising from continued non-payment by Debtor and escalating escrow deficiencies as a result. All of these filings were timely accomplished. The Chapter 13 Trustee has also provided information, both at the hearing, and after the hearing, *see* Doc. #101, as to the necessary amount of Debtor's new Chapter 13 plan payment based on granting the motion and conditioning relief as addressed at the hearing.

The court construes the motion as seeking to vacate under Fed. R. Civ. P. 60(b) the court order entered on May 16, 2007, granting relief from stay to Chase. After the automatic stay has been lifted, bankruptcy courts require a showing of changed or extenuating circumstances to justify vacation of the prior order under Rule 60(b)(6). *E.g., Commonwealth of Pa. v. Durkalec (In re Durkalec)*, 21 B.R. 618, 619 (Bankr. E.D. Pa. 1982)(changed circumstances, consisting of debtor's obtaining employment after termination of stay, justified vacation of prior order). Debtor's amended Schedules I and J demonstrate changed employment and improved financial circumstances. Therefore, for the reasons stated on the record by the court at the hearing, the court will vacate its order granting relief from and terminating the automatic stay.

The court's analysis does not conclude with vacation of the order. While authorizing relief from prior judgments under certain circumstances, Rule 60(b) also provides that such relief be "upon such terms as are just." As the Third Circuit held, "under Fed.R.Civ.P. 60(b) prejudice suffered by a non-defaulting party can be rectified through the trial court's power to impose terms and conditions upon the opening of a judgment." Hritz v. Wroma Corp., 732 F.2d 1178, 1182 n.3 (3d Cir. 1984). Other courts have imposed a variety of conditions to put the party opposing vacation of the prior order in the status quo, including payment of attorney's fees and costs of litigation. *E.g., Weillbacher v. U.S.*, 99 F.Supp. 109, 111 (S.D. N.Y. 1951) (litigant required to return funds as condition for vacating judgment); Morisse v. Defensive Instruments, Inc., 55 F.R.D. 433, 435 (E.D. Wis. 1972) (payment of plaintiff's attorneys fees a condition to vacation of judgment); Bros. Inc. v. W.E. Grace Mfg. Co., 320 F.2d 594, 610-11 (5<sup>th</sup> Cir. 1963) (imposes conditions that will place parties in the status

quo).

In obtaining relief from stay, Chase was asserting its legal rights in response to undisputed defaults by Debtor. Therefore, in order to be fair to Chase, the court finds that vacation of the prior order must be conditional. See Durkalec, 21 B.R. at 620.

First, the defaulted post-petition payments on Chase's mortgage must be cured, and the method for doing so will be a combination of immediate cash payments to Chase and to the Chapter 13 Trustee, including the balance of the post-petition arrearage in the plan and increased future plan payments to account for same. Second, the attorneys fees and costs that Chase has incurred after obtaining relief and in recommencing proceedings in state court to sell the property must be reimbursed by Debtor and will be added to the post-petition arrearage amount to be cured through the plan. But for her default and the court order granting relief, Chase would not have incurred these fees and costs, so they are a necessary and proper condition of vacating the court's order to prevent further prejudice to Chase irrespective of the terms of the underlying note and mortgage or applicable law denying mortgagee's costs and attorney's fees under other circumstances. Thus, pursuant to Chase's Statement of Post-Petition Arrearages filed on October 10, 2007, Doc. #94, the court finds that the proper total post-petition arrearage amount is \$14,541.41, including specifically \$400.00 in bankruptcy fees and costs incurred since relief was granted and \$2,235.82 in additional foreclosure fees and costs. Third, further defaults by Debtor must be subject to final summary relief in favor of Chase, as set forth below.

All of these conditions are necessary to assure that Chase is not penalized for Debtor's defaults and for its own pursuit of its legal rights and remedies in the face of Debtor's repeated defaults. Chase is also entitled to imposition of such conditions as further adequate protection of its lien interest in Debtor's residence due to Debtor's missed post-petition mortgage payments.

This is the last time the court will afford Debtor an opportunity to continue the benefit of the automatic stay as to Chase under the protection of Chapter 13 of the Bankruptcy Code.

Based on the foregoing reasons and authorities,

1. Debtor's motion [Doc. #81] is **GRANTED** and the court's order entered on May 16, 2007, [Doc. #79] is hereby vacated. Chase's objection to the motion is overruled.

2. Debtor must immediately pay the lump sum of \$4,002.50 to Chase. These funds must be RECEIVED by Chase's attorney on or before **October 26, 2007**. Failure by the Debtor to make timely this lump sum payment when due shall be an event of default under this order.

3. Debtor must re-commence making regular monthly payments on the Chase mortgage loan,

starting with the payment due for the month of November, 2007. Debtor must hereafter maintain her regular monthly post-petition payments to Chase outside the Chapter 13 Plan. Payments must be made by the **due date in the note or, at the latest, any grace period provided in the note.** Starting with the November 2007 payment, failure by the Debtor to make any mortgage payment by the due date or at the latest the grace period provided in the note shall be an event of default under this order.

4. The amount of Debtor's regular monthly post-petition mortgage payments under the Chapter 13 plan, including for the November, 2007, payment, shall be **\$1,078.28** until further notice by Chase provided of record in this court or further order of the court.

5. Debtor must immediately pay the total of **\$600** to the Chapter 13 Trustee. These funds must be received in the Chapter 13 Trustee's lock box on or before **October 31, 2007.** Failure by the Debtor to make timely this lump sum payment when due shall be an event of default under this order.

6. Until further order of the court, Debtor's plan and the order of confirmation are hereby amended to require Debtor to make monthly Chapter 13 plan payments of **\$720.**<sup>1</sup> She must start making \$720 monthly plan payments to the Chapter 13 Trustee in **November 2007.** Because post-petition arrearages are being included in the plan, Debtor's failure to make timely a future plan payment to the Chapter 13 Trustee will be an event of default under this order.

7. Chase is granted leave to amend its proof of claim to include the total post-petition arrearage and reinstatement amount of \$14,541.41, less the amount of \$4,002.50 to be paid directly to Chase by Debtor under paragraph one above.

8. Upon the existence of any event of default under this Order, Chase's counsel may send counsel for Debtor and Debtor a ten-day notice of Chase's intent to file with the court another affidavit and proposed order again granting final relief from and termination of the automatic stay.

9. If the specified event of default under this Order is not cured within that ten-day period, then upon the filing of an affidavit by Chase attesting to the event of default by Debtor, an order shall be entered by this court without further notice or opportunity for hearing, again terminating the stay

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At the hearing on October 16, 2007, the parties tentatively determined that the necessary plan payment amount going forward would be \$755. In his supplemental status report filed on October 18, 2007, the Chapter 13 Trustee re-calculated the necessary amount as \$700 per month. However, Debtor's counsel also filed on October 16, 2007, a fee application seeking an additional \$500 in attorney's fees to be paid through the plan. It is not clear that this amount was taken into consideration in the Trustee's status report, so the court has set the monthly plan payment amount at \$720 instead of \$700 to account for the pending fee application amount.

imposed by 11 U.S.C. § 362(a) of the Bankruptcy Code with respect to Chase, its successors and assigns.

**IT IS SO ORDERED.**