

Case Dismissed with prejudice for 180 days after it was learned that the Debtors filed a false Direct Payment Certification (after the ruling and after the Debtor and attorney had left, the Judge noted to those present that he had meant to dismiss the case with prejudice for one year but he would keep his initial ruling of 180 days prejudice period as announced on the record while the Debtor and attorney were present)

17-20199. *James and Elizabeth Williams.*

Hearing Date: 8/30/18 Tyler Docket; Motion for Relief from Stay as filed by the Debtors' Mortgage Bank indicating that the Debtors had not made full mortgage payments for both pre- and post-confirmation months; and an Order for Debtors to Show Cause as to Why Case Should Not be Dismissed with Prejudice for One Year based upon an apparent false Direct Payment Certification.

Issue: What was the appropriate consequence of the Debtors' failure to file a truthful Direct Payment Certification in order to obtain confirmation of their Plan when the Debtors were in fact delinquent on their pre-confirmation mortgage payments?

Facts: After an initial denial, the Debtors filed an amended Chapter 13 Plan that proposed to pay monthly plan payments to the Trustee which would cure, among other things, pre-petition mortgage payments while at the same time maintaining their monthly direct mortgage payments. On the eve of confirmation, the Debtors signed and their attorney caused to be filed their Direct Payment Certification thereby indicating under penalty of perjury that the Debtors had made all of their post-petition monthly mortgage payments. Based upon their Direct Payment Certification and after curing all of the Trustee's remaining objections to confirmation, the Trustee recommended their Amended Plan for confirmation and the Court accordingly entered an appropriate Confirmation Order.

Thereafter, the holder of the mortgage claim on their home filed its Motion to Lift Stay wherein it alleged, among other things, that the Debtors had failed to make all of their post-petition monthly mortgage payments including payments that came due prior to the Debtors' last confirmation hearing. As evidence of this, the mortgage creditor attached to its Motion a payment history of the mortgage payments made by the Debtors. If true, the Debtors clearly did not fully pay their monthly pre-confirmation mortgage payments, thereby accumulating pre-confirmation post-petition mortgage arrears including appropriate late charges. The mortgage company and the Debtors entered into an Agreed Order thereby agreeing to give the Debtors an opportunity to cure the post-petition mortgage arrears direct. The Court declined to enter this proposed Agreed Order, opting instead to set a Show Cause Hearing on why the case should not be dismissed with prejudice for one year based upon the Debtors' signing and causing to be filed what appears to be a false Direct Payment Certification.

At the hearing, the Debtors' attorney proffered the testimony of the Debtor that was in the Courtroom:

--The Debtors, based upon conversations of the Bank loan officer (who was present in the Courtroom as the Bank's representative in case testimony was needed in connection with the pending Motion to Lift Stay), were under the impression that their post-petition, pre-confirmation mortgage payments were current.

Note: The Debtors' attorney was careful in the wording of this proffer, declining to state that the bank officer had specifically told the Debtors that they were current on these

mortgage payments. The attorney used the word that they were under the impression that they were current based upon these conversations.

--Based upon this impression, the Debtors signed their Direct Mortgage Certification.

--The Debtors' attorney, after consulting with her client, declined the Court's offer to call the Debtor to the witness stand to give direct testimony.

--The Debtors' attorney did not contest the accuracy of the payment history as attached to the Motion to Lift Stay as further evidenced by the terms of the Agreed Order that the Debtors and the Mortgage Holder had entered into.

The attorney for the mortgage holder stated that the mortgage holder wanted to work with these Debtors in working out a payment plan to allow the Debtors to bring these post-petition mortgage payments current in the context of the bankruptcy instead of foreclosing on the property as set forth in the proposed Agreed Order.

Upon the Court's inquiring of the Trustee's position concerning the false Direct Payment Certification in light of the mortgage company's desire to give the Debtors a chance to bring these post-petition mortgage payments current in lieu of foreclosing on the property, the Trustee made the following points:

--The Trustee relies upon the accuracy of these Direct Payment Certifications in order to determine whether the Trustee ultimately recommends a proposed Plan for confirmation.

--While the mortgage company may be willing to work with the Debtors to bring the post-petition mortgage payments current in order to keep the bankruptcy going, there are also other creditors in this bankruptcy that are affected by the continuation of this bankruptcy.

--Had the Debtors not signed the Direct Payment Certification, the Amended Plan would not have been confirmed and the case would have been dismissed with prejudice for 120 days in accordance with the dismissal deadlines as set in the previous Initial Denial Order entered in this case. As a result, the Debtors enjoyed a number of months (from January through August) under the protection of the Bankruptcy Court that they were not otherwise entitled to had they not filed a false Direct Payment Certification.

--The Trustee supported the dismissal of the case under an enhanced prejudice period.

Ruling: The Judge dismissed the case with prejudice for 180 days (while, later, the Judge indicated to those still present in the Courtroom, that he had intended to dismiss the case with prejudice for one year). The stated reasons for his ruling are as follows:

--The proffer of the Debtor's testimony was that the Debtors were under the impression that they were current based upon conversations with the bank officer....thereby raising the subjective standard of "based upon information and belief"....as the reason for signing the Direct Payment Certification.

Note: The Judge questioned how the Debtors could possibly conclude that they were current on their post-petition pre-confirmation monthly payments based upon the

mortgage payment history that they actually paid as reflected in the attachment to the Motion to Lift Stay unless the Debtors were specifically told by the bank officer that they were in fact current on these payments...a proffer that the Debtors' attorney declined to make.

--The actual standard as set forth in the Direct Payment Certification is "signed under penalty of perjury" which means that the Debtors know that they are current on their post-petition pre-confirmation mortgage payments....nothing subjective about their signing the Direct Payment Certification.

--Without the Motion to Lift Stay being filed, the Court would never have known that the Direct Payment Certification was false. The proposed Plan was confirmed based in part on this Certification; without it, the Plan would have been denied and the case dismissed with prejudice for 120 days.

--This District is the only District in the State of Texas that is not doing conduit mortgage payments. The system that the Court has set up with the Direct Payment Certification (and the Trustee subsequently set up with the post-confirmation post cards) does rely upon the "honor system" that the Debtors will be truthful in completing the Direct Payment Certification (and, now, in completing and returning to the Trustee the monthly post cards). If there is no consequence for signing and causing to be filed an inaccurate Direct Payment Certification, the whole system of monitoring the direct payment of post-confirmation mortgage payments will fail.

--The Judge stated that, under very limited appropriate circumstances, he would not be opposed to giving leniency to a debtor with what turns out to be a false Direct Payment Certification. However, the facts did not support such in this case.

Trustee's Comments: The Direct Payment Certifications must be accurate thereby confirming that the Debtors have made all of their direct post-petition mortgage payments prior to confirmation. The Debtors' proposed Plan calls for them to make these mortgage payments and the signing and filing this Direct Payment Certification is a condition that the Court has imposed upon the Debtors in order to obtain confirmation of their Plan. Without such, the Debtors' case will ultimately be dismissed with prejudice for 120 days in accordance to the dismissal deadlines as imposed upon the Debtors in the previous Initial Denial Order.

Giving false information in these Direct Payment Certifications that results in the proposed Plan being confirmed (when it should not have been) must have consequences including the possible dismissal of the case with prejudice for one year. Absent incredible circumstances, the Trustee will support the dismissal of the case with this prejudice period.