

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Western Division

In re:) Bankr. No. 97-50358
)
RAYMOND C. HANDBOY)
Soc. Sec. No. [REDACTED]-0309) Chapter 13
)
and) MEMORANDUM OF DECISION RE:
) SDHDA'S MOTION TO VACATE
) ORDER AMENDING PLAN
MARVEL J. HANDBOY)
Soc. Sec. No. [REDACTED]-4825)
)
Debtors.)

The matter before the Court is the Motion to Vacate Order Amending Chapter 13 Plan filed by the South Dakota Housing Development Authority and the responses thereto. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Memorandum of Decision and accompanying order shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that South Dakota Housing Development Authority's Motion to Vacate Order must be granted in part and denied in part.

I.

Debtors Raymond C. and Marvel J. Handboy filed a Chapter 13 petition on July 30, 1997. In their schedules, they listed the South Dakota Housing Development Authority (SDHDA) as holding a claim of \$749.30 secured by a mortgage on their homestead. SDHDA filed a proof of claim for \$3,026.87, which represented the past due mortgage payments and penalties and fees through July 30, 1997.

In their plan dated August 13, 1997, Debtors proposed to cure the default to SDHDA plus 7% interest by making 24 monthly payments of \$33.53. Debtors also proposed to make their regular monthly mortgage payment to SDHDA. The first payment under the plan was to be October 1, 1997.

Only Trustee Dale A. Wein filed an objection to the proposed plan. A confirmation hearing was held November 4, 1997. Appearances included John H. Mairose for Debtors and Trustee Wein. Trustee Wein reported that Debtors would pay all claims in full. The Trustee's objections were resolved. Attorney Mairose was directed to file a proposed confirmation order and a "Plan as Confirmed." No party requested service of the "Plan as Confirmed" under Local Bankr. R. 9072-1.

Attorney Mairose prepared and submitted the proposed confirmation order and a "Plan as Confirmed." They were entered November 24, 1997. In the "Plan as Confirmed," the default on SDHDA's mortgage was listed at \$3,026.87 and Debtors proposed to pay it with 7% interest over 24 months with payments of \$33,53. The first payment under the plan was to be October 1, 1997.

After catching errors in the amount of the monthly payments to two secured creditors, including SDHDA, Debtors filed and served on all parties a motion to modify their plan on May 29, 1998 to correct the monthly amounts. In the motion, Debtors stated that the monthly payment to SDHDA to cure the \$3,026.87 default should

be \$135.52. Determining that the motion was equitable in nature and was only correcting the amount of the monthly payment to SDHDA, the Court approved the changes by Order entered June 10, 1998. The Order, however, also provided that the first payment date was now January 1, 1998.

SDHDA filed an Objection to the Modification of Chapter 13 Plan on June 15, 1998 and a Motion to Vacate Order Amending Chapter 13 Plan¹ on June 19, 1998. In each, SDHDA asked that Debtors' proposed plan modification as filed May 29, 1998 not be approved because the first payment was being delayed until January 1, 1998 and because the default amount of \$3,026.87 was incorrect since more interest and costs had accrued. SDHDA also complained that it was not given time to object to Debtor's motion to amend. SDHDA's final complaints were that the plan did not properly address real estate taxes, the plan did not contain a provision that SDHDA would automatically receive relief from the automatic stay if Debtors defaulted, and the plan did not include all interest and costs, including attorney's fees, to which SDHDA is entitled as an oversecured creditor.

Debtors filed a response to SDHDA's motion to vacate on June 23, 1998. They argued that the corrections made to the plan as confirmed did not alter the claim treatment given to SDHDA at

¹ The Court considers SDHDA's objection to Debtors' motion to amend to be supplanted by SDHDA's motion to vacate.

the time of confirmation. Trustee Wein filed a response to SDHDA's motion to vacate on June 24, 1998. He stated that he saw the June 10, 1998 Order as only correcting a typographical error and that the rights of SDHDA were not adversely affected. Neither the Trustee nor Debtors addressed the change in the first plan payment date.

II.

Clerical mistakes in an order may be corrected on motion by a party in interest with notice. F.R.Bankr.P. 9024 and F.R.Civ.P. 60(a). A motion to vacate an order or judgment is governed by F.R.Bankr.P. 9024 and F.R.Civ.P. 60(b). Under Rule 60(b), a party may be relieved of an order for several stated reasons or for "any other reason justifying relief from the operation of the judgment." A motion is required. Notice and a hearing are in the discretion of the court.

III.

When the Court entered the June 10, 1998 order, it assumed that the only change was to correct the amount of the monthly payments to the secured creditors. Accordingly, the matter was deemed equitable in nature and was not set for hearing. After considering SDHDA's motion to vacate, however, the Court reviewed the entire record, including the confirmation hearing tape. The Court has reached two conclusions.

First, SDHDA did not object to Debtors' plan dated August 13, 1997. Therefore, SDHDA let pass its opportunity to object to the plan regarding matters such as the payment of real estate taxes, the amount of costs and attorneys fees to be paid, and the lack of a default provision. It is bound by the plan as confirmed. 11 U.S.C. § 1327(a); *Bright v. Ritacco (In re Ritacco)*, 210 B.R. 595, 597 (Bankr. D. Ore. 1997) (confirmation of a plan is *res judicata* as to all justiciable issues that were or could have been decided at confirmation); *In re Battle*, 164 B.R. 394, (Bankr. M.D. Ga. 1994) (oversecured creditor must timely object to plan to insure appropriate interest is paid on arrearage). Had the treatment of SDHDA's claim not reflected SDHDA's proof of claim, the binding nature of the plan might be in question. See, e.g., *Sun Finance Co. v. Howard (In re Howard)*, 972 F.2d 639, 641-42 (5th Cir. 1992); *Vines v. Mid-State Homes (In re Vines)*, 153 B.R. 345, 347-48 (Bankr. M.D. Ala. 1993); *In re Holt*, 153 B.R. 215, 216 (Bankr. N.D. Ill. 1993); see also *F.D.I.C. v. Union Entities (In re Be-Mac Transport Co.)*, 83 F.3d. 1020 (8th Cir. 1996) (discussion of interplay of proof of claim procedures and confirmation in a Chapter 11 case).


Second, under Debtor's plan dated August 13, 1997 and the "Plan as Confirmed," plan payments were to commence October 1, 1997 and end September 1, 2000. Those dates should not have been changed without notice and hearing as they materially alter the plan terms as originally confirmed. See 11 U.S.C. § 1229, F.Rs.Bankr.P. 2002(b)

and 3015, and Local Bankr. R. 3015-4.

SDHDA's motion to vacate will be granted to the extent that the first plan payment date must remain October 1, 1997 and the last plan payment date must remain September 1, 2000. An appropriate order shall be entered.

So ordered this 2nd day of July, 1998.

BY THE COURT:


Irvin N. Hoyt
Chief Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk

By: Charles L. Nail, Jr.
Deputy Clerk

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered

JUL 02 1998

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota



CERTIFICATE OF SERVICE

I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to those creditors and other parties in interest identified on the attached service list.

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

By: CLN
Date: 7-02-98

Case: 97-50358 Form id: 122 Ntc Date: 07/02/98 Off: 3 Page : 1
Total notices mailed: 6

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Aty Gering, Bruce J. Office of the U.S. Trustee, #502, 230 South Phillips Avenue, Sioux Falls, SD 57104-6321
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