UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

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In re

BRIAN ALBONE and
PATRICIA ALBONE — Case No. 91-13803 K

Debtors

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DECISION AND ORDER

The Court here denies leave to the debtors to modify their Plan to encompass post-petition mortgage arrears.

Brian and Patricia Albone filed their Chapter 13 Petition on November 6, 1991, listing only two debts -- the mortgage on their home and their car loan. The $43,500 mortgage was approximately $8500 in arrears and a foreclosure proceeding was in progress. The balance due on the car was approximately $2000, of which $975 was supported by value and treated as secured; the balance of that loan is the Albone's only unsecured debt.

Their plan proposed 5% to the unsecured debt and, of course, full payment to secured debt, with the prepetition mortgage arrears to be cured over the five-year course of the Plan. There were no objections at hearing on January 28, 1992 and the Plan was confirmed by Order of February 4, 1992. It provided for payments of $183/mo. to the Trustee and was understood to direct the debtors to make current mortgage payments directly to the mortgagee on an ongoing basis.

The payments to the Trustee thus far have been made on a

regular basis through a Wage Order. On May 13, 1992, however, the mortgagee sought lift of stay alleging that three post-petition mortgage payments had not been made. The debtors cross-moved on May 26, 1992 to amend their Plan to include the post-petition arrearages in their Plan; they asserted that only two payments were missed -- December, 1991 and January, 1992, -- and that the reason those payments were not made was that Mr. Albone "thought [their] payments to Sibley [the mortgagee] were not supposed to start again until after the confirmation of the Plan."

He offers no explanation as to what happened to the $540 cash per month that would have been used to pay the mortgage (including taxes and insurance) had he known to make those payments. (Their budget showed combined monthly take-home pay of $2005 and monthly expenses of $1800 including the $540/mo. mortgage payment, which payment was not made in December and January.)

The motion and cross-motion were heard on June 17, 1992. The mortgagee remains willing to give the debtors "some time to bring their post-petition default current." But the debtors, through counsel, assert a right under 11 U.S.C. § 1329 to treat the post-petition arrearages along with pre-petition arrearages in the Plan.

In post-hearing memoranda it became apparent that seven mortgage payments fell due between November 6, 1991 and the end of June, 1992 (December, January, February, March, April, May, June) and five payments were made; these were made with bank checks or

money orders dated 2/14/92, 3/14/92, 5/5/92, 5/18/92 and 6/15/92. As of the May 13, 1992 filing of the motion to lift stay, therefore, it is clear that the December and January payments were not made and that the April payment had not been made until May. As of the date of hearing on June 17, the June payment had likely not yet been received by the mortgagee.

It would appear, however, that as of early July, 1992, only the December 1991 and January 1992 mortgage payments remained unpaid (as among the post-petition mortgage obligations), and it is these which the debtors wish to cure (along with pre-petition arrears) over the 4+ year remaining duration of their Plan.

## Discussion

Although there have been some vigorous, even somewhat caustic, disagreements among the courts regarding the question of whether a debtor may modify a Chapter 13 Plan to cure post-petition arrearages, [1] there appears to be no doubt that if 11 U.S.C. § 1327 (the binding effect of confirmation) is to have any meaning at all, the 11 U.S.C. § 1329 privilege of modifying a plan requires that

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[1] *See Southtrust Mobile Services, Inc. v. Englebert*, 137 B.R. 975 (N.D. Ala. 1992). Also consider *In re Stafford*, 123 B.R. 415 (N.D. Ala. 1991), *In re Stafford*, 121 B.R. 109 (Bkrtcy. N.D. Ala. 1990) and *In re Lynch*, 109 B.R. 792 (Bkrtcy. W.D. Tenn. 1989), as opposed to *In re Hollis*, 105 B.R. 1003 (N.D. Ala. 1989).

there have been some change in circumstances. Thus it was said in *In re Bereolos* (Bkrtcy. N.D. Ind. 1990) 126 B.R. 313 that

> ... the general rule is that a plan can be modified post-confirmation where the movant can show unanticipated and substantial changes in the debtor's condition post-confirmation which directly impacts on the debtor's ability to perform under the terms of the confirmed plan [and] where those issues raised as a basis for a post-confirmation modification were not in existence or could not have been reasonably anticipated at the time the plan was originally confirmed. If there are not any substantial and unanticipated changes post-confirmation, the doctrine of res judicata bars any post-confirmation modification. (Id. p. 326)

This Court generally agrees with that decision and with that Court's careful, thorough and thoughtful analysis of the issues and of the cases in point. Most tellingly, that Court emphasized that "[a] mere default in the plan payments based on a failure to properly apply disposable income as required by the plan is not sufficient, without an additional showing." (Id. at p. 332).

In the case currently at Bar the mortgagee's claim had been filed on November 21, 1991 specifically acknowledging that $8535.75 was the pre-petition arrearage "TO BE PUT IN PLAN." Because of debtors' counsel's unavailability on the original confirmation date of December 17, 1991, confirmation was adjourned to January 28, 1992. Thus, by the time of confirmation the mortgagee's claim had been of record for more than two months.

If that claim was going to be allowed other than as filed

(in other words, if more than $8535.75 was going to be "stretched out" under the Plan) then the mortgagee was entitled to notice and a hearing at which it might question the good faith of such proposal, among other things. This did not occur. Instead, there was a "routine" confirmation. Confirmation is not a one-way street, binding only the creditors; it binds the debtors too under 11 U.S.C. § 1327.

Modification under 11 U.S.C. § 1329 is available only for a change in circumstances. No such change is alleged here, and the realization that the debtors were mistaken as to how they may use their income between the time of filing and the time of confirmation does not constitute a change in circumstances.

The fact that there is not an "at will" prerogative extended by statute to debtors to modify their Plans to cure post-petition arrears does not mean that the Court is without authority to permit time to cure the post-petition arrears in accordance with the equities of the case. With this in mind, the debtors' motion to modify the Plan is denied, but the mortgagee's motion to lift stay is set for final hearing on Tuesday, July 21, 1992, at 11:00 a.m. in Part II of U.S. Bankruptcy Court, 310 U.S. Courthouse, Buffalo, New York.

Dated: Buffalo, New York
July 9, 1992

U.S.B.J.