

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF RHODE ISLAND

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In re: :

JESSICA SIMARRA : BK No. 09-14245
Debtor : Chapter 13

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**ORDER OVERRULING CREDITOR'S OBJECTION TO
DEBTOR'S REQUEST FOR LOSS MITIGATION**

APPEARANCES:

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BEFORE ARTHUR N. VOTOLATO, United States Bankruptcy Judge

Heard on the Debtor's Request for entry of a Loss Mitigation Order. America's Servicing Company ("ASC"), as servicer for the first mortgagee, U.S. Bank National Association, objects. The parties filed memoranda in support of their positions, and the Court took the matter under advisement.

BACKGROUND AND DISCUSSION

On December 4, 2009, in accordance with the procedures established in this Court's Loss Mitigation Program (the "LMP", or "the Program") the Debtor requested court supervised negotiations regarding the mortgage on her home in Johnston, Rhode Island. See General Order 09-003 (adopting Loss Mitigation Program and Procedures); General Order 10-001 (adopting the *First Amended* Loss Mitigation Program and Procedures, effective January 15, 2010); and General Order 10-002 (adopting *Second Amended* Loss Mitigation Program and Procedures, effective April 2, 2010). The LMP permits a request for loss mitigation to "be initiated at any time" by the debtor, a creditor, or the Court. See *Second Amended* Loss Mitigation Program and Procedures, 3-4. A debtor is defined as "any individual debtor in a case filed under Chapter 7, 11, 12, or 13 of the Bankruptcy Code...." Id. at 2.

When considering objections to a request for loss mitigation, the Court will not enter a Loss Mitigation Order until it "has either held a hearing to consider the objection, or overrules the

objection without a hearing for failing to include *specific* reasons why loss mitigation would not be successful...." *Id.* at 5 (emphasis added). On October 29, 2009, when the Debtor filed this Chapter 13 case, she was qualified, *prima facie*, to request loss mitigation proceedings.

In its written and oral arguments, ASC declines to participate in any loss mitigation proceedings, on the grounds that: (1) "The Debtor should be obligated to make on-going payments while the loan is being reviewed for a loan modification. If no such payments are made, then Len[d]er should be able to terminate the Loss Mitigation Order;" (2) the Debtor filed a Chapter 13 plan which fails to account for the mortgage arrearage as listed on the proof of claim; and (3) the Debtor's Chapter 13 plan was not feasible and the Debtor "should not be allowed to file Chapter 13 Plans which are not feasible in hopes to obtaining a loan modification." ASC's objection lacks any substantive merit.

Nowhere in its written objection, memorandum, or in its oral argument does ASC address the only relevant issue, i.e., "specific reasons why loss mitigation would not be successful," *Second Amended Loss Mitigation Program and Procedures*, 5, and I view ASC Counsel's arguments merely as subjective statements of its, by now, familiar opposition to loss mitigation procedures in general.

This Court's LMP, and all the other ones that we know of, are intended to bring debtors and secured lenders together, to encourage them to discuss mutually beneficial financial resolution of their home mortgage difficulties, in a climate where both debtors and creditors are at risk of suffering great pecuniary harm even if they were acting prudently. With this in mind, and consistent with federal HAMP eligibility requirements, i.e., that homeowners must be in default or at imminent risk of default, a requirement that debtors must continue to make regular monthly mortgage payments during the loss mitigation process, will not be automatically or presumptively imposed as a condition to creditors' participating in the LMP.¹ See *Second Amended Loss Mitigation Program and Procedures*, 5. Such a requirement would be in contravention, I believe, of every such federal, state, or local program implemented to deal with the present residential real estate crisis.

ASC also objects to the entry of a Loss Mitigation Order because the Chapter 13 plan "fails to account for the mortgage arrearage as listed on the proof of claim." Finally, ASC argues that the Debtor's Chapter 13 plan is not feasible (absent a loan modification) and that as a result, "the only apparent reason for

¹ ASC asserts that 11 U.S.C. § 1322(b)(2) precludes the modification of a creditor's security interest in a debtor's primary residence. This is a correct statement of the law. However, nothing in the proposed loss mitigation order in any way modifies the contractual rights of any party.

filing the petition was to invoke the protections of the automatic stay" in an effort to avoid a pending foreclosure sale. ASC's suggestions, *per se*, do not establish or create a presumption that the Debtor has requested loss mitigation in bad faith. And of course, any party, including this creditor, may request and be heard on the issue of bad faith. See *id.*

In still another judicial nudge to give this Loss Mitigation Program at least a chance of success, all objections to loss mitigation shall be filed by the applicable deadline(s), together with the *specific* reasons why the objector believes that loss mitigation *would not be successful*.

Accordingly, ASC's Objection to the Debtor's Request for Loss Mitigation is **OVERRULED**, the Loss Mitigation Order shall enter forthwith, and ASC is **ORDERED** to participate in this Court's Loss Mitigation Program and Procedures in all respects and in good faith until the parties reach an agreement that is approved, or until an order terminating the Loss Mitigation Procedure is entered. See *Second Amended Loss Mitigation Program and Procedures*, 7.

Dated at Providence, Rhode Island, this 14th day of April, 2010.



Arthur N. Votolato
U.S. Bankruptcy Judge

Entered on docket: 4/14/10