

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA

COPY

In Re:

PAMELA ANNE RHYNE HANKS,)

Debtor.)

Case No. B-99-51622 C-13W

ORDER DISMISSING CASE WITH PREJUDICE

This Chapter 13 case came before the Court on July 12, 2000, on the Trustee's motion for dismissal of the case with prejudice. All interested parties having received proper notice, Pamela Anne Rhyne Hanks ("the Debtor") appeared Pro Se, Kathryn L. Bringle appeared as Trustee, and Tonya R. Deem appeared as Counsel for Frances Coan.

A dismissal hearing is a contested matter under Federal Rule of Bankruptcy Procedure 9014. This Court has jurisdiction of this contested matter pursuant to 28 U.S.C. § 1334. This is a "core proceeding" as the term is defined in 28 U.S.C. § 157(b)(2)(A).

Based upon a review of the record and the statements of the Debtor and Trustee, the Court makes the following:

FINDINGS OF FACT

1. The Debtor filed a Chapter 13 Petition on September 14, 1999, and the Plan was confirmed on March 20, 2000.
2. This is the Debtor's second Chapter 13 case. The Debtor previously filed a Chapter 13 Petition in March 1998 and that case was dismissed in May 1998.
3. The Order Confirming Plan in this case requires the Debtor to make plan payments of \$595.00 per month beginning October 1999.
4. The Order Confirming Plan contains a provision for dismissal of this case with prejudice as follows:

Dismissal of this case will be deemed with prejudice pursuant to 11 U.S.C. § 109(g) so the Debtor will not qualify as a Debtor under Chapter 13 of the Bankruptcy Code

for a period of 180 days following dismissal of this case if the case is dismissed because of default in any plan payments due from November 1999 through April 2001 or if the Debtor requests voluntary dismissal of the case during the period from November 1999 through April 2001.

5. The Debtor failed to make the plan payments due in February 2000 and in June 2000. Consequently, the Debtor has missed two of the nine plan payments which came due from October 1999 through June 2000 and is now in default in plan payments in the amount of \$1,190.00.

6. The Debtor has requested a continuance of this dismissal hearing in order to allow her to procure Counsel. The Debtor was represented by A. Carl Penney at the time the Plan was confirmed but he was allowed to withdraw as Counsel of record in the case at a hearing held on March 22, 2000. The Court notes that previous continuances have been granted to the Debtor to allow her to obtain Counsel. A status hearing on an Adversary Proceeding was continued from March 22, 2000, to April 26, 2000. The Debtor then requested an additional continuance and a continuance was granted until May 17, 2000. The Debtor has had a period of almost four months, from March 22, 2000, to the present, in which to obtain replacement Counsel, but has not done so. In a pleading filed with this Court on July 12, 2000, the Debtor states that she has contacted fifteen (15) attorneys about representing her. The Debtor has offered no evidence that she will be able to procure Counsel if given additional time to do so.

7. The Debtor owns rental real property in Georgia with equity in excess of \$10,000.00 and an undisputed interest in real property located at 135 and 137 E. Devonshire Street in Winston-Salem. These properties represent nonexempt assets that could be liquidated by the Debtor's creditors to procure payment of the debts owed to them if the Debtor were not under the protection of the Bankruptcy Court.

8. The Debtor has informed the Court that she spent \$1,500.00 on repairs to her rental house in Augusta, Georgia. These funds were expended during the time the Debtor was in default in plan payments. If the Debtor had paid these funds into the Plan, instead of making repairs to nonresidential property, plan payments would not be in default.

9. The Trustee has a balance on hand of \$1,043.00. The Order Confirming Plan provided that A. Carl Penney, prior Counsel for the Debtor, be allowed an attorney fee of \$1,000.00. However, because

he was subsequently allowed to withdraw, the Trustee has not disbursed any funds to him. The Court is of the opinion that he should be allowed a period of thirty (30) days from date of entry of this Order to file an Application for fees if he deems an Application appropriate. If no Application is filed within this time, any claim for fees will be deemed waived and the Trustee will thereafter disburse the funds being held pursuant to the Order Confirming Plan.

10. On the day of this hearing the Debtor filed a motion for modification of the Chapter 13 Plan proposing that plan payments be reduced to \$392.00 per month. Payments in this amount will not allow the Plan to be completed within a total of sixty (60) months, which is the maximum length allowed by the Bankruptcy Code.

Based upon the foregoing Findings of Fact and the record in this case, the Court makes the following:

CONCLUSIONS OF LAW

1. Confirmation of the Plan is res judicata and is binding on the Debtor pursuant to 11 U.S.C. § 1327. Consequently, the Debtor is required to make plan payments of \$595.00 per month until such time as the Plan is modified by Order of this Court.

2. The Bankruptcy Code provides that a Chapter 13 debtor must make payments to the standing Chapter 13 trustee in accordance with the debtor's Chapter 13 plan in order to receive the benefits and protection afforded a Chapter 13 debtor. The failure to make more than twenty percent (20%) of the payments that have come due under the plan constitutes a material default by the Debtor with respect to the terms of the confirmed plan. This Debtor had funds on hand to pay the required monthly plan payments and elected to expend the monies on property she owns in Georgia. The Debtor has nonexempt assets that creditors could liquidate but for the protection given the Debtor under the Bankruptcy Code. Based on the foregoing, the Court finds that cause exists to dismiss this Debtor and that dismissal is in the best interest of the creditors and the estate.

3. The Order Confirming Plan provides that dismissal of this case during the period from November 1999 through April 2001 will be deemed with prejudice pursuant to 11 U.S.C. § 109(g). That provision of the Plan is res judicata and is binding on the Debtor. Additionally, dismissal of the case is appropriate because the failure of the Debtor to make plan payments was willful. The Debtor has shown that funds were expended on nonresidential real property which could, instead, have been paid into the Plan.

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby

ORDERED, ADJUDGED, and DECREED that:

1. This Chapter 13 case is dismissed for cause including material default in plan payments under 11 U.S.C. § 1307(c)(6); and

2. Pursuant to the terms of the Order Confirming Plan, dismissal of this case is deemed with prejudice pursuant to 11 U.S.C. § 109(g) so the Debtor will not qualify as a Debtor under Chapter 13 of the Bankruptcy Code for a period of 180 days following entry of the final order dismissing this case, after completion of any appeals; and

3. A. Carl Penney, prior Counsel for the Debtor, is allowed thirty (30) days from the date of entry of this Order in which to file an Application for Attorney Fees, which will be considered by this Court; and

4. In the event an Application for Attorney Fees is not filed within this thirty (30) day period, the fee will be deemed waived and the Trustee shall thereafter disburse all funds on hand pursuant to the Order Confirming Plan.

This the 18 day of July 2000.

CATHARINE R. CARRUTHERS

Catharine R. Carruthers
U.S. Bankruptcy Judge