Entered on Docket October 27, 2015

Below is the Order of the Court.

Brian D. Lynch
U.S. Bankruptcy Judge
(Dated as of Entered on Docket date above)

UNITED STATES BANKRUPTCY COURT

WESTERN DISTRICT OF WASHINGTON AT TACOMA

In re: HOLLY MARIE ROBBINS, Debtor.	Case No. 15-42660-BDL **FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO EVIDENTIARY ISSUES**

This matter came before the Court for an evidentiary hearing on October 13, 2015 as to four inter-related requests for relief. First, Debtor Holly Robbins objected [ECF No. 54] to the Proof of Claim (Claim Number 3-1) filed by Secured Creditor Dr. Jack W. Schnoor, on the grounds that the loan between the parties had been modified to a lower ongoing payment amount, so the proof of claim had an incorrect calculation of the amount due. Second, the Chapter 13 Trustee objected to confirmation [ECF No. 43] of Debtor's proposed Chapter 13 Plan of Reorganization on the grounds that the proposed plan is not feasible regardless of whether she prevails on the claim objection or not, as Debtor lacks sufficient income to make all payments under the Plan as required by 11 U.S.C. §1325(a)(6). Third, secured creditor Dr. Schnoor objected to confirmation [ECF No. 45] on the grounds that Debtor's plan is not

feasible based on her lack of income as well as the failure to fully pay Dr. Schnoor's claim. Dr. Schnoor claimed that the loan between the parties had not been modified, and his signature on a purported December 2011 amendment was a forgery. And the fourth matter before the Court was Dr. Schnoor's renewed Motion for Relief from Stay [ECF Nos. 13, 45, 46] on the grounds he is not adequately protected by Debtor's $600 per month adequate protection payment. In addition to those four matters, Dr. Schnoor has moved to assess sanctions against Debtor and her attorney under Federal Rule of Bankruptcy Procedure 9011 and 11 U.S.C. § 105.

Debtor was represented at the hearing by both Gregory Mitchell and John Sterbick. Debtor called three witnesses, herself, Monica Miles and Elaine Teune, and presented no exhibits. Debtor is undergoing chemotherapy treatment for cancer, and testified it has affected her memory and ability to recall. Dr. Schnoor was represented by Thomas Quinlan and called two live witnesses, Dr. Schnoor's daughter Susan Schnoor, who holds his power of attorney, and Hannah MacFarland, a certified document examiner. Dr. Schnoor also presented deposition testimony of Dr. Schnoor and of Debtor. Dr. Schnoor submitted 19 exhibits, all of which were admitted without objection. The Chapter 13 Trustee was represented by Samuel J. Dart. Trustee called no witnesses but submitted six exhibits, all of which were admitted without objection.

This Court has jurisdiction over these matters pursuant to 28 U.S.C. § 1334. They are all core proceedings under 28 U.S.C. § 157(b)(2)(B), (G) and (L). The following are the Court's findings of fact and conclusions of law under Federal Rules of Bankruptcy Procedure 9014 and 7052. Orders as to each request for relief will be entered separately in accordance with these findings and conclusions.

I. Findings of Fact

A. Terms of the Property Purchase

In October 2010, Debtor contracted with Dr. Schnoor to purchase his commercial property located at 11026 Pacific Avenue, Tacoma, Washington ("the Property") for $120,000. To document the sale, the parties executed a Commercial and Investment Real Estate Purchase and Sale Agreement [Ex. R-5], a Promissory Note [Ex. R-3] and a Deed of Trust [Ex. R-4]. The documents were drafted by Debtor's attorney. Debtor was to pay Dr. Schnoor $500 per month on the first of the month for the first three months of the Note, and then payments increased to $1,000 a month on February 1, 2011. A $5,000 balloon payment was due on November 1, 2015. The Note bore 6% simple interest; that would increase to 12% upon default. A late charge of five dollars per day would be applied if a payment was more than 10 days late. Debtor was to pay all real estate taxes for the Property and to maintain insurance. The Note provided that the whole sum of principal and interest would become due and payable at once If Debtor defaulted on the Note and had not cured the default within 90 days after receiving notice to cure [Ex. R-3, R-5]. The Deed of Trust also provided that Debtor would pay all taxes and assessments on the Property [Ex. R- 4]. The Promissory Note, the Deed of Trust and the Purchase and Sale Agreement all provide for the recovery of attorney fees in the event of a default by Debtor for any proceeding to enforce, collect or foreclose [Exs. R-3, R-4, R-5]. The Deed of Trust and a Statutory Warranty Deed were recorded on October 26, 2010, evidencing Dr. Schnoor's security and first position lien on the Property [Ex. R-4].

In December 2010, after the parties discovered that more repairs to the Property were necessary than had been expected, Debtor and Dr. Schnoor executed a "December 2010 Addendum to Contract referred to as the Commercial and Investment Real Estate Purchase

and Sale Agreement of October 7, 2010 and signed October 25, 2010 Between Buyer, Holly Robbins and Seller, Jack W. Schnoor" [Ex. R-8]. This addendum made no payment due until February 1, 2011 and reduced interest on any unpaid principal from 12% to 6%. There is no dispute that the parties both signed this document and that it became part of the terms of their agreement.

There is, however, substantial dispute about a second purported addendum, entitled "November/December 2011, Two Page Addendum to the Commercial and Investment Real Estate Purchase and Sale Agreement of October 7, 2010 and signed October 25, 2010. Between Seller: Dr. Jack W. Schnoor and Buyer: Holly M. Robbins, or Assigns. Concerning the Property at 11026 Pacific Avenue South, Tacoma, WA.98444" [Ex. R-9]. The terms of this 2011 addendum, in addition to discussing many other things such as disposition of Dr. Schnoor's dog, changed the ongoing monthly payment from $1,000 a month to $500 a month[1], with 50% of each payment going to principal and the remaining 50% going to interest. This, mathematically, has the effect of changing the Note from a 15 year amortization schedule, to being a negatively amortizing note [Ex. R-2]. However, the 2011 addendum also gave Seller (Dr. Schnoor) the right to increase monthly payments by $100 per month, once a year, until they reached a maximum of $1,000. The 2011 addendum reiterated that the obligation to pay property taxes remained with Debtor, but increased the time to cure defaults from 90 days to six months, and also provided that if Dr. Schnoor became incapacitated or died, that all remaining debt was to be forgiven – which Dr. Schnoor would add to the terms of

[1] Debtor had never actually made a payment of $1,000 [Ex. R-1]. She made the first month's payment of $500 in November 2010 and then did not make another payment until March 2011, for $500. From March to December 1, 2011, Debtor made seven more payments (missing two months), all of which were for $500 [Ex. R-1].

his will. Lastly, the addendum noted that Debtor would be given access to Dr. Schnoor's bank account to make deposits in the event Dr. Schnoor was out of town on vacation.

What the 2011 addendum does not purport to effect is that the Note bears 6% interest, that taxes and insurance must be maintained and that there is a $5,000 balloon payment due in November 2015. It is uncontested the Note continues to contain these terms.

Debtor testified that the signature on the 2011 addendum is hers, but she could only state that she picked the document up from Dr. Schnoor's house. In both her deposition, taken 15 days before the Evidentiary Hearing, and at the evidentiary hearing, Debtor testified that she did not see Dr. Schnoor actually sign the document or at least could not recall seeing him sign it. Debtor called as a witness her friend Monica Miles who testified that she did see Dr. Schnoor sign the document, and that Ms. Miles's signature and initials are on the document as a witness. She recalled being with Debtor at Dr. Schnoor's house to take Dr. Schnoor some food or dinner, and that Debtor carried a document out of the kitchen to Dr. Schnoor. However, Ms. Miles did not testify as to any other surrounding circumstances or confirm that it was specifically the 2011 addendum that she recalled being signed. Ms. Miles has worked for Debtor's boyfriend Dr. David Herbst for some years, and has worked with Debtor at Dr. Herbst's office and considers Debtor her friend. Debtor also called as a supporting rebuttal witness Elaine Teune, who was friends with Dr. Schnoor and testified that Dr. Schnoor was very fond of Debtor and was estranged from his family, which corroborates some of the other things described in the 2011 addendum.

Dr. Schnoor, on the other hand, is adamant that the signature on the 2011 addendum is not his. He called as an expert witness Hannah MacFarland, a certified document examiner, who compared the signature on the 2011 addendum to 11 other known exemplars

of Dr. Schnoor's signature and concluded that the 2011 addendum signature of Dr. Schnoor was probably not genuine. Ms. MacFarland testified that each person develops certain characteristics in their handwriting, variations unique to their writing, and each person also develops a fluency in their writing. Once a person learns to write, they no longer focus on the technique of generating the letters or words, but instead focus on the message being communicated. In a genuine signature, the writer doesn't usually have stops or starts as they focus again on forming letters, and there are not usually any tremors or interruptions unless the writer has health issues.

Ms. MacFarland identified 10 different areas where the characteristics of Dr. Schnoor's confirmed signatures vary from the signature on the 2011 addendum. First, in the cursive capital "J" that starts the signature, Dr. Schnoor's genuine signatures show that the two upper and lower loops of the "J" never meet, while in the addendum signature they cross where the two loops end. Dr. Schnoor makes the lower loop of the "J" rounder in his signatures, but the addendum one is more triangular and bigger. In the upper loop of the "J", Dr. Schnoor again writes with a rounder shape that is almost angled, while the addendum signature is narrower. In the "W" of the initial, on the 2011 addendum it appears that the pen was lifted and the writer stopped and started again while writing; Dr. Schnoor's signatures are fluent in writing the "W." In the capital "S" in Schnoor, Dr. Schnoor's signatures makes a longer stroke to start the letter, starting much further to the left than the short initial stroke of the 2011 addendum signature. His lower portion of the "S" in the genuine signatures appears somewhat angled, while the 2011 addendum is rounded there. The "n" within Schnoor is written with two humps next to each other in Dr. Schnoor's genuine signatures, but it has three humps and is rounder in the 2011 addendum signature. Dr. Schoor's genuine signatures always include an "o"

written out in the last name, but the 2011 addendum does not have an identifiable "o." Dr. Schnoor always ends his signature with the "r" ending on a stroke that goes up and to the right; the 2011 addendum signature trails off flatly to the right, not upward. And lastly, when Dr. Schnoor has ended his signature with "DMD," signifying his dental degree, he never uses periods in between the letters. The 2011 addendum signature ends with "D.M.D." with the periods in between somewhat emphasized.

These characteristics as to Dr. Schnoor's genuine signature can also be seen in the other documents in the record with undisputedly genuine signatures, but which were not part of Ms. MacFarland's exemplars – the December 2010 addendum [Ex. R-8], the notarized power of attorney executed by Dr. Schnoor in favor of his daughter Susan in January 2014 [Ex. R-10] and 20 checks from Debtor for payments on the Note that are indorsed by Dr. Schnoor [Ex. R-11]. Specifically the other documents also show that the upper and lower loops of the "J" at the beginning of the signature never cross; they all demonstrate at least one discernible "o" in the last name, the "r" at the ends finishes upward, and there are never periods used when a "DMD" is included at the end of the signature.

The Court was persuaded by the testimony of Ms. MacFarland. The Court finds that the signature of Dr. Schnoor on the 2011 addendum is not genuine and that Dr. Schnoor never signed the document. The Court finds that Ms. Miles's testimony about witnessing Dr. Schnoor's signature is not credible, not only based on Ms. McFarland's testimony, but also based on the lack of detail provided by Ms. Miles as to the circumstances of the signing, and also Ms. Miles's personal relationship with Debtor and her boyfriend.

However, the evidence is undisputed that Dr. Schnoor accepted $500 monthly payments from Debtor throughout the life of the loan. Debtor produced 21 checks that she

gave to Dr. Schnoor, which he accepted and indorsed and deposited between November 2010 and September 2013, all of which were for only $500 [Ex. R-11].[2] Seventeen of those checks make some reference in the memo section in the lower left corner of the checks that they are payment in full of the monthly obligation based on the parties' modification, including checks both before and after the date of the purported 2011 addendum. Three of the memos indicate that Dr. Schnoor is accepting the lower payment "until further notice in writing" [Ex. R-11, checks for October 2011, November 2011 and December 2011].

There is no evidence Dr. Schnoor ever gave Debtor notice that he considered her in default under the agreement despite making payments at less than the contract amount. Debtor stopped making payments entirely by December 2013. In January 2014, with his health declining, Dr. Schnoor executed a Power of Attorney in favor of his daughter and he was subsequently moved into an assisted living facility. On March 27, 2014, counsel on behalf of the Schnoors provided Debtor notice that she was in default under the terms of the Note, demanded monthly payments of $1,000 per month and demanded that all delinquent amounts be cured [Ex. R-14]. Debtor failed to cure. Moreover, Debtor failed to pay a Pierce County Utility sewer assessment in the original amount of $270.04, that Dr. Schnoor was forced to pay to stop proceedings against the property [Ex. R-7]. The final settlement of the assessment required payment of $566.51 [Ex. R-15]. Debtor is also delinquent on both 2013 and 2014 property taxes [Ex. R-7].

[2] The last check is a cashier's check from September 20, 2013 that is for $995. However, there is a note on the check that it is for two months' payments, which was purportedly credited toward the October and November 2013 payments.

B. Debtor's Finances

The second piece of the confirmation picture, apart from what Debtor owes Dr. Schnoor, is what Debtor's income is, such that Debtor can demonstrate that she will be able to fund her plan to completion. Debtor's income derives almost entirely from rents she receives for renting out the Property. She has another business for doing logo and t-shirt design, and claimed $225 a month in income from that on her Amended Schedule I [Ex. T-5]. But she provided no information or detail about the business in her testimony or other evidence at the evidentiary hearing. She has identified no other past profession or employment that she plans to return to. She currently has one tenant in the Property, Dr. David Herbst, a dentist, who is also her boyfriend. She testified she has a lease with Dr. Herbst, but the lease was not introduced into evidence. Nor was Dr. Herbst called as a witness. Debtor's testimony indicates that the lease is based on receiving a percentage of the income Dr. Herbst's obtains each month, and that Debtor can raise the rent she charges Dr. Herbst at any time, in any amount, and with no limit. Debtor could not recall what amounts she has ever actually received from Dr. Herbst and provided no other evidence as to what amounts she has received as rents or income. Debtor testified she has room for another tenant in the building, and initially said she would consider finding a second one. On cross examination, she claimed that she had begun looking for another tenant, which flatly contradicts her deposition testimony from 15 days earlier which stated she had not explored the possibility of another tenant. [Robbins Dep. 60:7-11].

Debtor's 2013 and 2014 tax returns, prepared and filed after she commenced this bankruptcy, say she earned $31,954 in total income in 2013 and $29,875 in income in 2014 [Exs. T-1, T-2]. Debtor's Amended Schedule J claims total income (from the logo business and the rent) of $4,099.50 a month or $49,194 [Ex. T-5]. Debtor could not explain how that

number was calculated, claimed she hadn't filled out the schedules and stated that she had provided all her documents to her counsel.

Debtor's current proposed Plan [ECF No. 47] proposes to pay $996 a month for 60 months. Aside from Trustee fees and $2800 in attorney fees, Debtor proposes to pay $500 a month to Dr. Schnoor as the ongoing mortgage payment at 0% interest, and to pay Pierce County $193 a month for ongoing property taxes, also at 0% interest. She proposes to pay Dr. Schnoor $100 a month to cure arrears on his Note of $6,000, and proposes to pay Pierce County $124.36 per month to cure property tax arrears of $6,662.39 at 0%.[3] The Plan does not have any provision as to the $5,000 balloon payment that is due under the Schnoor Note in November 2015.

Now that Debtor has completed and filed her pre-petition tax returns, the Internal Revenue Service has filed a proof of claim for a priority unsecured debt of $11,213 that Debtor's plan must pay in full. Debtor admits her plan will not currently pay the IRS claim in full, and that she must amend at least as to that claim.

Debtor is current on her plan payments at the proposed amount. By prior Court order [ECF No. 34], $600 per month of Debtor's plan payments is being disbursed pre-confirmation to Dr. Schnoor as an adequate protection payment.

At the evidentiary hearing, the Chapter 13 Trustee and Dr. Schnoor provided calculations as to what Debtor would have to make as a plan payment in order to complete her plan in 60 months under various scenarios of whether she was successful on the claim objection or not. The Trustee calculated that Debtor's current plan is underfunded by about $10,800, even if she prevails on all aspects of the claim objection. Dr. Schnoor calculated

[3] Pierce County has filed a secured proof of claim (Claim No. 1) for $8,015.88 with 12% interest.

that payments to make the plan feasible ranged from $1,777 to $2,441, depending on whether the monthly payment amount was determined to be $500 per month or $1,000. Debtor stated under cross examination that her plan is not currently her best effort at paying creditors, but that she could "probably" pay more.

II. Conclusions of Law

A. Debtor's Objection to Dr. Schnoor's Proof of Claim

A proof of claim provides prima facie evidence of the validity and amount of the claim. Fed. R. Bankr. P. 3001(f). To defeat a claim, the objecting party must come forward with sufficient evidence to negate the claim. *Lundell v. Anchor Const. Specialists, Inc. (In re Lundell)*, 223 F.3d 1035, 1039-40 (9th Cir. 2000). When addressing an objection to claim, the proof of claim provides "some evidence as to its validity and amount" and is "strong enough to carry over a mere formal objection without more." *Id.* To defeat the claim, the objector must come forward with sufficient evidence to "show facts tending to defeat the claim by probative force equal to that of the allegations of the proofs of claim themselves […] If the objector produces sufficient evidence to negate one or more of the sworn facts in the proof of claim, the burden reverts to the claimant to prove the validity of the claim by a preponderance of the evidence." *Id.* While the ultimate burden of persuasion remains at all times upon the claimant, "[i]n practice, the objector must produce evidence which, if believed, would refute at least one of the allegations that is essential to the claim's legal sufficiency." *Id.*

Dr. Schnoor's proof of claim (Claim No. 3-1) is therefore prima facie valid as to the amounts owed by Debtor. The proof of claim was filed with attached copies of the Promissory Note and the Deed of Trust, which were also admitted into evidence at the evidentiary hearing. Dr. Schnoor's claim was also filed with an accounting of the amounts due under the Note, including arrears, late charges, the sewer assessment and past due real estate taxes,

as well as attorney's fees to date. Dr. Schnoor provided updated evidence at the evidentiary hearing that the attorney's fees accrued through that date were $24,191.60 [Exs. R-17, R-18].

Debtor does not dispute that she owes Dr. Schnoor a debt. She has not challenged the amount of attorney's fees, sewer assessment or past due taxes. Debtor disputes only the calculation of arrears, claiming that Dr. Schnoor's calculations are all based on a $1,000 a month monthly payment, and the correct amount should be $500 per month based on the 2011 addendum. However, as the Court finds that the 2011 addendum was never signed by Dr. Schnoor, it concludes there is no written modification of the parties' agreement signed by the parties.

However, there remains the question of whether Dr. Schnoor's actions in accepting $500 a month in payment, without objection, both before and after the 2011 addendum, particularly with the memos alluding to an agreement to accept the reduced payment, constitute a modification of the parties' agreements. Per the "Nonwaiver" provision of the Note, the mere acceptance of a smaller payment by Dr. Schnoor than is required by the Note does not constitute a waiver or an agreement to reduce the payment required under the Note [Ex. R-3 at ¶9]. The only other evidence of an "agreement" that was introduced, besides the false 2011 addendum, are the testimony of Ms. Robins and the 21 checks produced by Debtor showing payments on the Note to Dr. Schnoor. All of the checks are for $500, all of them were accepted, indorsed and deposited by Dr. Schnoor. And 17 of those checks have a notation in the memo portion that refers to $500 as being a full month's payment per the parties' agreement.

Under Washington law, the parties to a contract may make an oral modification of a contract, including a contract subject to the statute of frauds, provided there is other evidence

of execution or part performance of the modification. *See Consolidated Elec. Distributors, Inc. v. Gier*, 24 Wash. App. 671, 602 P. 2d 1206, 1208-1210 (Wash. Ct. App. 1979) Mutual modification of a contract by subsequent agreement arises out of the intentions of the parties and requires a meeting of the minds. *See Jones v. Best*, 134 Wash. 2d 232, 950 P. 2d 1, 5 (Wash. 1998). Mutual modifications also require additional consideration. *See Ebling v. Gove's Cove, Inc.*, 34 Wash. App. 495, 663 P. 2d 132, 135 (Wash. Ct. App. 1983). Valid consideration may consist of an act, forbearance, the creation, modification or destruction of a legal relationship, or a return promise. *Huberdeau v. Desmarais*, 79 Wn.2d 432, 439, 486 P.2d 1074 (1971).

The Court concludes that the parties agreed to modify their contract such that Dr. Schnoor would accept $500 payments on the Note from the Debtor until further notice in writing was given. While neither Dr. Schnoor nor Debtor testified about their oral discussions or agreements, the evidence shows a clear meeting of the minds and mutual assent as Debtor only ever submitted $500 per month payments on the Note, the majority of those payments note that it was payment in full for the month per the parties agreement until Dr. Schnoor noted otherwise, and Dr. Schnoor accepted all $500 payments with those statements without objection or notice of default. Dr. Schnoor's counsel argued there was no consideration to support a modification, however the parties December 2010 first addendum noted the building needed more repair than had been expected, there was substantial testimony about Dr. Schnoor's personal relationship with Debtor and how they were good friends. Debtor helped Dr. Schnoor around the house and with his dog. Further, the Note originally provided for the first two months' payment to be at $500, and the 2010 addendum allowed Debtor to miss a few months' payments to do some of the repairs that were

discovered. Allowing her to continue on at $500 per month going forward appears to have enabled her to continue making payments and prevented the Note going into default almost immediately.

However, the Court concludes that modification allowed the amount of payments to increase back to the contract amount of $1,000 upon written notice on behalf of Dr. Schnoor. That notice was given by the letter from Dr. Schnoor's attorney dated March 27, 2014 which demanded monthly payments of $1,000 [Ex. R-14]. Thus, the calculation of what payments have been made or missed when determining the arrears on the Note should be calculated, up to March 27, 2014, at $500 per month. Payments missed since March 27, 2014 (and it is undisputed none have been made) should be calculated at $1,000 per month. Dr. Schnoor's proof of claim has delinquent payments in the amount of $29,000, which appears from the attachments to have been calculated based on $1,000 a month payments over the life of the Note. To the extent that that includes payments missed before March 27, 2014, Dr. Schnoor's calculation of delinquent payments must be recalculated using $500 per month.

The Court also concludes that there is no default interest rate under the 2010 addendum, which refers to decreasing interest from 12% to 6%. The only reference to 12% in the original Note was the provision for default interest. The Court concludes that the 2010 addendum was meant to remove the default interest rate, so to the extent Dr. Schnoor's claim is based on a calculation of 12% default interest, it must also be recalculated on that basis.

Lastly, the Court is also unclear whether Dr. Schnoor has correctly calculated the accumulated late charges on the Note. The Note provides that there will be late charges of $5.00 for every day after 10 days from the due date, *ad infinitum*. The Court concludes that the intent of that provision in the Note is that the late charge shall accrue for every day of the

month for which the payment is due after the 10th day of the month, but not beyond the last day of the month for which the payment is due. To the extent Dr. Schnoor has calculated late charges in any other fashion, the proof of claim must be revised.

Therefore, the Court denies Debtor's objection to Dr. Schnoor's proof of claim to the extent it is based on the 2011 addendum bearing Dr. Schnoor's forged signature. However, the Court grants the objection in part in concluding that there is no default interest to be applied per the 2010 addendum, that there was an oral modification of the agreement for payments to be $500 per month through March 27, 2014, that payments were to be $1,000 per month from that date, and that late charges may only be calculated through the end of the month of the missed payment. A separate order will be entered, and Dr. Schnoor shall amend his proof of claim as necessary within 14 days from the issuance of this ruling to reflect the Court's findings and conclusions.

B. Objections to Confirmation of Debtor's Plan of Reorganization

The Debtor bears the burden of proving that each element of Section 1325(a)'s requirements for confirmation of a plan is met. *In re Barnes*, 32 F. 3d 405, 407 (9th Cir. 1994); *Meyer v. Hill (In re Hill)*, 268 B.R. 548, 552 (B.A.P. 9th Cir. 2001). Under 11 U.S.C. §1325(a)(6), a debtor must show at the time of confirmation that they will be able to make all payments under the plan and can comply with the plan. *See also Till v. SCS Credit Corp.*, 541 U.S. 465, 480 (2004)(holding a bankruptcy court shall not confirm a plan unless it is persuaded that a debtor will be able to make all payments under the plan). This feasibility standard doesn't require an absolute certainty, but a debtor must show a proposed plan has "a reasonable probability of success." *In re Acequia, Inc.*, 787 F. 2d 1352, 1364-65 (9th Cir. 1986); *see also In re Bassett*, 413 B.R. 778, 788 (Bankr. D. Mont. 2009)(chapter 13 debtor bears the burden of proving their plan has "reasonable chance of success").

Here, while Debtor has made each of her $996 per month plan payments to date[4], it is clear that her payment will need to be much higher in order to pay the ongoing $1,000 per month payment to Dr. Schnoor on the property, to cover higher arrears (including over $24,000 in claimed attorney's fees) and to pay the secured property taxes and the IRS priority claim in full over the life of the plan. Debtor bore the burden of establishing that she has the income to make all payments under the plan over the life of the plan. She utterly failed to do so. Debtor admitted her only income is from rental of the Property, but provided no evidence as to what amounts she has ever received as rents or what she anticipates receiving in the future. There was no evidence of the terms of her lease with Dr. Herbst, and there was no specific evidence that she can increase her income from the Property to meet a higher plan payment of any amount. As the Chapter 13 Trustee argued, the evidentiary hearing was the time for Debtor to come forward and show that she can confirm a plan of reorganization that will cure arrears on the Property and maintain it going forward. She failed to do so, and the Court will sustain the Trustee and Dr. Schnoor's objections to confirmation.

C. Dr. Schnoor's Motion for Relief from Stay

Dr. Schnoor previously moved for relief from stay under 11 U.S.C. §362(d)(1), arguing there is cause to lift the automatic stay and allow him to complete his non-judicial foreclosure in the property because Dr. Schnoor's interest in the property is not adequately protected. Dr. Schnoor renewed his motion for relief from stay in connection with his objection to confirmation. Whether a creditor is adequately protected is a determination of whether the creditor's interests in the property are being protected during a debtor's bankruptcy, while the

[4] Debtor did not provide any testimony or evidence as to the status of her plan payments to date. This was elicited by a question from the Court to the Chapter 13 Trustee.

creditor is prohibited from exercising its state law and contract remedies due to the automatic stay. *See In re Big3D, Inc.*, 438 B.R. 214, 220-221 (B.AP. 9th Cir. 2010).

Dr. Schnoor had commenced a non-judicial foreclosure prior to Debtor commencing her bankruptcy case; if he had been allowed to proceed with that, the property would be sold or in his possession now, such that the debt owed by Debtor, and its accumulating interest and attorney's fees, would be terminated and Dr. Schnoor could protect the property by possessing it or being paid in full. Instead, Debtor's bankruptcy filing has left her in possession of the property while the debt continues to mount. While the Debtor has been making pre-confirmation adequate protection payments, that amount was set based on her erroneous calculation of the ongoing payment and the accumulated arrears ($500 a month, and $6,000 in arrears). The Court has concluded that neither of these figures is correct. The ongoing payment has been $1,000 a month since the demand letter was issued to Debtor in March 2014, and the arrears are well north of $6,000. With accumulating interest and attorney fees, arrears are probably closer to $60,000. Debtor scheduled the Property as worth $135,100 and may have begun this case with a small equity margin in the property but that has been eroded as the total debt owed mounts – based on the insufficient monthly payments, the accumulation of 6% interest, and all the attorney fees Dr. Schnoor has had to incur. The parties agree, as seen in Dr. Schnoor's proof of claim and Debtor's Schedule D, that the principal balance remaining on the Schnoor note is at least $110,000. Dr. Schnoor claims over $24,000 in attorney's fees alone, bringing any equity cushion down to less than $1,100 before even considering arrears (which Debtor admits are at least $6,000), any other costs of the foreclosure process to date, plus property taxes and the utilities assessment.

Further, Debtor has not maintained the property taxes on the property, as required in the Deed of Trust. While her Chapter 13 plan provided for cure of the taxes and a reserve going forward; it is clear, as discussed above, that Debtor may never be able to actually confirm a plan in order to start those cure payments. Moreover, Debtor testified in her deposition, which was admitted into evidence, that she has not been doing all maintenance on the building (Robbins Dep. 51:20-25).

The Court concludes that Dr. Schnoor's interest in the Property is not adequately protected as the debt owed on the Property continues to mount and erode what little equity cushion might be left, and Debtor has not shown she can make pre-confirmation disbursements to Dr. Schnoor in an amount that will maintain the ongoing $1,000 payments and the ongoing property taxes. Nor has she shown that she'll be able to confirm a plan that will either maintain the ongoing payment and cure the delinquency, or make payments which can amortize the debt over the life of the plan. Dr. Schnoor is granted relief from the automatic stay as to the Property under Section 362(d)(1).

III. Dr. Schnoor's Request for Sanctions

At trial, Dr. Schnoor also moved for sanctions against Debtor and her counsel under Fed. R. Bankr. P. 9011 on the grounds Debtor's filing was in bad faith, as this case was filed without sufficient income to reorganize and Debtor and counsel advanced a document they knew was a forgery. Dr. Schnoor also moved for sanctions under 11 U.S.C. §105 for an abuse of the judicial process. The Court declines to impose sanctions under either theory.

First, filing a bankruptcy to stop a foreclosure, as Debtor did to stop Dr. Schnoor's foreclosure here, is not an abuse of the judicial process or the Bankruptcy Code. Most of the cases the Court receives are filed to stop foreclosures, some on the eve of the trustee's sale.

The bankruptcy process was designed to give a debtor breathing room and some time to try to reorganize their finances, even if – like Debtor – they may ultimately be unable to do so.

Second, as to Rule 9011 sanctions, while the Court finds that the signature on the 2011 addendum is not Dr. Schnoor's genuine signature, there has been no proof as to who committed the forgery or that Debtor or her counsel were knowingly advancing a forged document. Moreover, the Court has ultimately found that the parties did, in fact, modify their agreement (albeit by oral agreement and conduct) in terms that mirror much of the terms in the purported 2011 addendum. Therefore, the Court declines to impose sanctions under Rule 9011 over the presentation and attempted enforcement of the 2011 addendum.

/// End of Order ///