

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

IN RE:)	
)	
KAREN DIANE LEWIS,)	Case No. 03-12393
)	Chapter 13
Debtor.)	
_____)	

MEMORANDUM OPINION

This matter is before the Court for confirmation of debtor Karen Diane Lewis’s amended chapter 13 plan. Creditors Charles and Betty Wood (Woods) object to confirmation of debtor’s amended plan,¹ and have moved for stay relief to foreclose an equitable mortgage in property.²

Factual Background

Based upon the stipulations submitted by the parties,³ the Court finds that the Woods entered into an installment contract for the sale of real estate to the debtor in 1995. The subject property is debtor’s principal residence. Under the contract, the debtor was to pay a down payment, monthly payments for four years at 8.5% interest, and, on August 1, 1999, a balloon payment in the amount of \$34,357.88. When the contract matured, the debtor was unable to make the balloon payment or obtain financing to make the balloon payment. She continued to make monthly payments and they were accepted by the Woods until March of 2003, at which time they declared debtor to be in default. In April of 2003, the Woods commenced an action in state court to foreclose their equitable mortgage.

¹ Dkt. 27. The Trustee has also objected to confirmation based on feasibility. She has not participated in the briefing of the issue before the Court today. Dkt. 25.

² Dkt. 8.

³ Dkt. 30.

Debtor filed her chapter 13 bankruptcy on May 8, 2003.

In her initial plan, debtor offered to pay adequate protection to the Woods while being permitted to hold the property for one year, at which time the property would be sold or refinanced.⁴ After the Woods' and Trustee's initial objections, the debtor filed an amended plan on September 8, 2003 which provided that the debtor would pay the remaining balloon payment over the life of the plan, plus interest at 5 per cent per annum.⁵ Debtor seeks a 60 month plan.

The Woods object, claiming that confirming the debtor's amended plan would result in a modification of a claim secured by her principal residence in violation of 11 U.S.C. § 1322(b)(2).⁶ Moreover, the Woods assert that the only available method of curing debtor's default would be for her to pay the balloon payment in full.

Analysis

Section 1322(b) sets out the permissive provisions that a debtor may include in the plan. Subsection (b)(2) states the general rule governing claim treatment. In general, the debtor may modify the rights of secured and unsecured claimants, except those secured claimants holding a lien on the debtor's principal residence. This section has been interpreted by the United States Supreme Court to mean what it says, that a claim secured only by a debtor's principal residence must be treated exactly as the contract provides.⁷

⁴ Dkt. 2.

⁵ Dkt. 22. The amount due was approximately \$30,508.

⁶ Unless otherwise noted, all subsequent statutory references are to the Bankruptcy Code, 11 U.S.C. § 101, et seq.

⁷ *Nobleman v. American Sav. Bank*, 508 U.S. 324, 113 S.Ct. 2106, 124 L.Ed. 2d 228 (1993) (Stripdown of undersecured home mortgage to value of collateral is not permitted by chapter 13 debtors).

Section 1322(b)(3) allows a debtor to provide for the cure or waiver of a default and subsection (b)(5) provides that, notwithstanding § 1322(b)(2), a debtor may provide for the “curing of a default within a reasonable time and maintenance of payments while the case is pending on any . . . secured claim on which the last payment is due *after* the date on which the final payment under the plan is due.” This latter provision works in tandem with § 1325(a)(5) to provide for the repayment of secured claims having terms beyond the anticipated final payment date of the plan and allows debtors to continue to service their home mortgages post-petition and post-confirmation. Prior to 1994, several courts held that debtors whose home loans matured before their filings or during the pendency of their case were not entitled to cure pre-petition defaults and could not pay the remainder of their secured home loan over the life of the plan under § 1325(a)(5) because these treatments impermissibly modified the secured creditor’s rights under § 1322(b).⁸ These decisions revealed a significant gap in chapter 13 debtors’ ability to protect their homes.

In an attempt to undo the consequences of these cases, Congress enacted the Bankruptcy Reform Act of 1994,⁹ which significantly modified § 1322 to provide, at subsection (c), a remedy for those debtors whose mortgages would mature before their chapter 13 plans were completed. The prefatory language of § 1322(c) begins with “[n]otwithstanding subsection (b)(2) and applicable nonbankruptcy law – ,” clearly excepting from the general rule of § 1322(b)(2) the provisions which immediately follow. Subsection (c)(1) permits the cure of a default with respect to a lien on the

⁸ See e.g., *First Nat’l Fidelity Corp. v. Perry*, 945 F.2d 61 (3rd Cir. 1991) (payment of foreclosure judgment over life of chapter 13 plan was an impermissible modification under § 1322(b)(2)); *Seidel v. Larson (In re Seidel)*, 752 F.2d 1382 (9th Cir. 1985) (chapter 13 plan modified secured creditor’s rights by proposing to pay debt that had matured prior to bankruptcy filing over five years with a balloon payment at the end of the five years).

⁹ Pub. L. No. 103-394, 108 Stat. 4106, § 301 (October 22, 1994).

debtor's principal residence under (b)(3) or (5) until the property is sold at foreclosure sale.¹⁰ Subsection (c)(2) provides that when the last payment under the "original payment schedule" for a claim secured by the debtor's principal residence is due *before* the due date of the final plan payment, the plan may provide for a modified payment of the claim under § 1325(a)(5).¹¹

Section 1325(a)(5) states that for a plan to be confirmed vis-a-vis a secured creditor, it must provide for the payment of a secured claim by (1) allowing the secured creditor to retain its lien; and (2) paying the value of the collateral to the creditor by a stream of payments not less than the amount of the secured claim; or (3) surrendering the property securing the claim to the secured creditor. Thus, reading the plain language of § 1322(c)(2), when a debtor's mortgage obligation's last scheduled payment is due before her last plan payment, the remaining amount due may be paid out over the life of the plan.

The Woods protest that they were entitled to their balloon payment nearly four (4) years before this case was filed, stating that "[t]his cannot be what was contemplated by Congress when Section 1322(c)(2) was adopted."¹² They note the lack of binding Tenth Circuit authority, but cite neither case law nor legislative history to support their bald statement of Congressional intent. In fact, many Courts and several commentators have confronted this admittedly awkward statutory formulation and have concluded that § 1322(c)(2) means what it says: that when the last scheduled payment is due before the last plan payment, the remaining balance may be paid over the life of the plan.¹³ A variety of

¹⁰ Section 1322(c)(1) effectively overrules *First Nat'l Fidelity Corp. v. Perry, supra* at n. 8.

¹¹ Section 1322(c)(2) effectively overrules *In re Seidel, supra* at n. 8.

¹² See Dkt. 33, p. 3-4.

¹³ See Keith M. Lundin, *Chapter 13 Bankruptcy*, 3rd Ed., §143.1 (2000 & Supp. 2002).

circuit courts and bankruptcy courts have held that this subsection applies whether or not the mortgage matures before or after the case is filed.¹⁴ Certainly there is nothing in the language of the statute to suggest that it applies only to debts maturing post-petition. As stated by the venerable Judge Schmetterer, “[t]his extension enables debtors to retain their homes for a few additional years and may enable them to sell their homes at a more favorable economic time, obtain replacement financing, or hope that their economic circumstances change for the better so that they may pay off the mortgage debt.”¹⁵ The Congressional debate regarding § 1322(c) indicates that these changes were made expressly to overrule *First Nat. Fidelity Corp. v. Perry, supra*, so that debtors could repay the remainder of so-called short-term mortgages in chapter 13 and not be prejudiced by the mortgages maturing per their terms during the case.¹⁶ Reading § 1322(b)(5) and (c)(2) together makes it clear that Congress was sensitive to the timing issues which frequently bear on debtors’ decisions to file chapter 13. Had Congress intended to draw the distinction the Woods seek, it could have done so explicitly. It is beyond the province of the Court to append this interpretation in the absence of Congress doing so.¹⁷

¹⁴ See cases cited, *id.* at n. 13.

¹⁵ *In re Chang*, 185 B.R. 50, 53 (Bankr. N.D. Ill. 1995). Nearly every other reported bankruptcy court decision on point agrees. See *e.g.*, *In re Jones*, 188 B.R. 281 (Bankr. D. Or. 1995); *In re Escue*, 184 B.R. 287 (Bankr. M.D. Tenn. 1995). The only significant difference of opinion seems to arise over whether an undersecured short-term mortgage claim may be bifurcated, an issue not present in this case.

¹⁶ 104 CONG. REC. H10,769 (October 4, 1994) (statement of Rep. Brooks and section-by-section analysis of Bankruptcy Reform Act of 1994).

¹⁷ *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 13-14, 120 S.Ct. 1942, 147 L.Ed. 2d 1 (2000) (Achieving a better policy outcome is a task for Congress, not the courts.); *In re Crivello*, 134 F.3d 831, 837 (7th Cir. 1998) (bankruptcy court cannot insert additional language into Bankruptcy Code to conform it with the court’s view); *In re Prairie Mining, Inc.*, 194 B.R. 248, 256 (Bankr. D. Kan. 1995) (The court has no authority to substitute its

Because § 1322(c)(2) is an exception to § 1322(b)(2), the Woods' impermissible modification argument must fail. Their assertion that the only cure available to the debtor is a full payment of the balloon is similarly doomed. Courts are obligated to construe statutes in a manner which makes them workable and meaningful.¹⁸ To hold that debtor may, on the one hand modify the remaining balance of her contract by paying it over the life of the plan, while requiring her to "cure" by paying the balloon payment in full immediately would both defy logic and deny equity.¹⁹ Subsection (b)(5), as it applies to short-term debts through subsection (c)(1) contemplates default cures "within a reasonable time" and "maintenance of payments while the case is pending." Debtor's amended plan appears to provide for both.

Conclusion

Based on the foregoing, the Woods' motion for stay relief, which is grounded on a lack of adequate protection, is DENIED, without prejudice. The amended plan appropriately provides for payment of the balloon payment over the life of the plan, with interest. The Court cannot, however, confirm the amended plan because issues remain with respect to the interest rate offered to the Woods and the trustee's feasibility objection. There is nothing in the parties' stipulations upon which the Court could base factual findings incident to these issues. Therefore, the Clerk will set this matter for

view of fairness and equity for the clearly expressed view of Congress.); *In re Allard*, 196 B.R. 402, 408 n.3 (Bankr. N.D. Ill. 1996) *aff'd* 202 B.R. 938 (N.D. Ill. 1996) (It is the court's function to construe and apply the bankruptcy statute, not to legislate).

¹⁸ *In re Eggleston Works Loudspeaker Co.*, 253 B.R. 519, 523-24 (6th Cir. BAP 2000) (Logic and equity, as well as policy considerations, are factors that may be considered when interpreting the Bankruptcy Code.); *In re Welzel*, 275 F.3d 1308, 1319 (11th Cir. 2001) (Bankruptcy statute should not be construed to create an absurd result.).

¹⁹ The Court notes here that the Woods accepted monthly payments for four years after the balloon payment was due.

a one-hour evidentiary hearing on the Court's next-available docket on the issues of discount rate and feasibility.

IT IS SO ORDERED.

Dated this 24th day of March, 2004

ROBERT E. NUGENT
CHIEF BANKRUPTCY JUDGE
UNITED STATES BANKRUPTCY COURT
DISTRICT OF KANSAS

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the **Memorandum Opinion** was deposited in the United States mail, postage prepaid on this 24th day of March, 2004, to the following:

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