



The relief described hereinbelow is SO ORDERED.

Signed June 19, 2005.

A handwritten signature in cursive script that reads "Robert D. Berger".

ROBERT D. BERGER
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:

MARGERITE WRIGHT,
Debtor.

Case No. 03-20787-13

MEMORANDUM OPINION AND ORDER¹

This matter comes before the Court on the motion of the debtor, Margerite Wright (“Wright”), to amend plan post-confirmation (Doc. #57) pursuant to section 1329(a) of the Bankruptcy Code and the response and limited objection of Belzer’s Service Team of Professionals (“Belzer’s”) to the post-confirmation modification of the debtor’s plan (Doc. #59). Also before the Court are the debtor’s Objection to Claim of Belzer’s Service Team (Doc. #44)

¹ The debtor, Margerite Wright, appears by her attorney, David A. Reed, Kansas City, Kansas. Belzer’s Service Team of Professionals appears by its attorney, David A. Kraft of Berman, DeLeve, Kuchan & Chapman, L.C., Kansas City, Missouri.

and Belzer's Response in Opposition to the claim objection (Doc. #52).²

Factual Background

Wright filed her Chapter 13 bankruptcy petition before this Court on March 6, 2003. The debtor's Chapter 13 plan was confirmed on May 21, 2003. It is this confirmed plan that the debtor now seeks to modify.

On the petition date, Belzer's had a claim in the amount of \$9,984.63 on account of which a mechanic's lien had been filed that attached to the debtor's homestead. Since Belzer's mechanic's lien was filed after the mortgage was filed by the first mortgagee, Washington Mutual Bank, Belzer's lien was subordinate to the first mortgage. Nevertheless, the debtor's confirmed plan did not seek to avoid or otherwise modify Belzer's lien. In fact, the plan treated Belzer's claim as fully secured and provided that Belzer's "mechanic's lien on homestead, [is] to be paid in full through the plan." The Chapter 13 trustee's records indicate that Belzer's has been paid \$3,340.18 through the plan on account of its claim (\$2,539.81 principal plus \$800.37 interest).

Unfortunately for the debtor and Belzer's, Washington Mutual Bank obtained relief from the automatic stay on May 24, 2004, as a result of the debtor's default in post-petition mortgage note payments to Washington Mutual. Counsel for the parties have stipulated that Washington Mutual exercised its state law rights of foreclosure and that Belzer's subordinate mechanic's lien was foreclosed on the property when the real estate was sold at Sheriff's Sale. Counsel for

² The Court finds that this proceeding is core under 28 U.S.C. § 157 and that the Court has jurisdiction under 28 U.S.C. § 1334.

Belzer's indicated that Belzer's did not bid at the Sheriff's Sale or otherwise assert or protect its rights under the state foreclosure action. Belzer's acknowledges that its collateral has been liquidated by the first mortgagee, that none of the proceeds were paid to Belzer's, and that Belzer's lien was extinguished in the foreclosure action.

After stay relief was granted to the first mortgagee, debtor filed an objection to Belzer's proof of claim and requested that Belzer's claim be disallowed. The debtor subsequently filed a motion to amend her plan pursuant to section 1329(a). The tenor of this amendment is to disallow Belzer's secured claim without prejudice to the right of Belzer's to subsequently file an unsecured proof of claim for the balance due. The plan amendment also provides for the discharge of Belzer's claim as a general unsecured claim. The net effect of the requested amendment to the plan is to disallow Belzer's secured claim and to treat and discharge Belzer's claim as a general unsecured claim.

Legal Analysis

If notice is adequate, confirmation of a debtor's Chapter 13 plan is binding with regard to matters that could have been raised at or prior to confirmation.³ Nevertheless, section 1329(a) provides the debtor, the Chapter 13 trustee, and general unsecured creditors the right to seek modification of the confirmed plan under certain circumstances.⁴

³ See 11 U.S.C. § 1327(a).

⁴ **§ 1329. Modification of plan after confirmation**

(a) At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to--

(1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;

(2) extend or reduce the time for such payments; or

(3) alter the amount of the distribution to a creditor whose claim is provided for by

Wright seeks post-confirmation amendment of her plan after the first mortgagee in her residence obtained relief from the automatic stay in these proceedings and initiated and concluded foreclosure on the debtor's residence in state court. As a result of the foreclosure, Belzer's lien was foreclosed and no longer attaches to the residence because Belzer's elected not to protect its interests in Wright's residence by forgoing participation in the bidding process or exercising its redemption rights as a lienholder.⁵ It is Belzer's position that Wright may not modify the plan post-confirmation to reclassify the debt owed to Belzer's as a general unsecured claim.

Belzer's requested interpretation of the law has found a home with some courts that have denied a Chapter 13 debtor's attempt to recharacterize a secured claim as a general unsecured claim post-confirmation. *See, e.g., Chrysler Fin. Corp. v. Nolan (In re Nolan)*, 232 F.3d 528 (6th Cir. 2000), and *In re Barclay*, 276 B.R. 276 (Bankr. N.D. Ala. 2001). These cases dealt with circumstances in which the debtors sought to amend their plan post-petition to surrender collateral to a secured claimant and to recharacterize the debt as a general unsecured claim after liquidation of the creditor's collateral. However, this Court rejects Belzer's arguments and finds that a debtor may amend a Chapter 13 plan post-confirmation to treat what was previously a secured claim as a general unsecured claim upon surrender or repossession of collateral. Irrespective of whether the debtor proposes to voluntarily surrender the collateral back to a lienholder or whether her interest is involuntarily foreclosed, the Bankruptcy Code allows

the plan to the extent necessary to take account of any payment of such claim other than under the plan.

⁵ Kansas is a judicial foreclosure state and, subject to limited exceptions, redemption rights inure to the owner and lienholders in a residence after the foreclosure sale is conducted. *See* K.S.A. 60-2414.

Wright's proposed post-confirmation amendment to her plan.

Collier on Bankruptcy observes that the decision in *In re Nolan*⁶ was wrongly decided and that a more careful and complete reading of the Code allows the requested post-confirmation modification to a debtor's plan.⁷ Specifically, section 1329(a)(1) allows a post-confirmation plan modification to reduce payments going to a particular class, and section 1329(a)(3) allows modification of the amount of the distribution to a creditor to take into account payments not made through the debtor's plan. Further, section 502(j) permits this Court to reconsider a claim for cause and Federal Rule of Bankruptcy Procedure 3008 allows the Court to alter the treatment and classification of a claim. Read within the context of the Code the foregoing suggests that, in contrast to the *Nolan* court's conclusion, "a claim may be altered after confirmation, a secured claim may be reclassified as unsecured and section 1329 permits modification of the amount of payments on such a claim."⁸

Judge Keith M. Lundin's prominent treatise on Chapter 13 bankruptcy⁹ also supports the interpretation of section 1329 that is urged by *Collier on Bankruptcy*. Judge Lundin comments that if the original Chapter 13 plan provided for payment of a secured claim, then a post-confirmation modification to the plan that surrenders collateral and modifies payment to claim holders is authorized under section 1329(a).¹⁰ Judge Lundin observes that section 1329 can be

⁶ 232 F.3d 528.

⁷ 8 COLLIER ON BANKRUPTCY ¶ 1329.04[1] at 1329-9 (Alan N. Resnick & Henry J. Sommer, eds., 15th ed. 2004).

⁸ *Id.*

⁹ KEITH M. LUNDIN, CHAPTER 13 BANKRUPTCY (3d ed. 2000 & Supp. 2004).

¹⁰ 3 KEITH M. LUNDIN, CHAPTER 13 BANKRUPTCY § 264.1, at 264-2 (3d ed. 2000 & Supp. 2004).

used by a debtor to modify the entitlements to secured claimholders after confirmation of a plan and that the section contemplates such modifications.¹¹ Judge Lundin recognizes that section 1329(a) may be employed whether a debtor voluntarily surrenders collateral or collateral is foreclosed upon post-confirmation and further concludes that: “[t]o preclude a Chapter 13 debtor from modifying the plan to reflect that a creditor repossessed its collateral and is thus no longer the holder of an allowable secured claim turns the Code on its head.”¹²

This Court agrees with the approach and analysis undertaken by the two learned treatises cited in the foregoing. Whether a debtor voluntarily or involuntarily surrenders collateral is immaterial. Post-confirmation modification of a plan under section 1329(a) allows Chapter 13 debtors to surrender collateral in satisfaction of a creditor’s secured claim and to treat the balance as a general unsecured claim.¹³

As addressed by the court in *In re Leuellen*, in order for the debtor to modify her plan post-confirmation under section 1329, she must still comply with the requirements for confirmation under sections 1322(b) and 1325(a).¹⁴ Here, there is no doubt that Wright’s plan satisfies section 1322(b)(2) because Belzer’s claim, which was secured by a lien in the debtor’s residence on the petition date, was subject to modification under section 1322(c)(2) since full payment was due on the petition date.¹⁵ Wright proposes a plan that can be confirmed since section 1325(a)(5)(C) permits surrender of collateral to a secured creditor.

¹¹ *Id.* at 264-2, 264-3.

¹² *Id.* at 264-4 & 264-5 n.22.

¹³ *See Bank One, N.A., v. Leuellen (In re Leuellen)*, 322 B.R. 648 (S.D. Ind. 2005).

¹⁴ *Id.* at 654.

¹⁵ *See Am. Gen. Fin., Inc., v. Paschen (In re Paschen)*, 296 F.3d 1203 (11th Cir. 2002), *cert. denied*, 537 U.S. 1097 (2002).

This Court further notes that the good faith aspect of section 1325(a)(3) in particular, with regard to the post-confirmation amendment of a Chapter 13 plan, stands prominent. For instance, if a debtor purposefully failed to maintain insurance on damaged collateral as required under a contract or court order, or engaged in other purposeful or inappropriately neglectful conduct with regard to the collateral, the good faith requirement may very well stand as a resilient barrier to the debtor's post-confirmation modification. There have not been any allegations that Wright engaged in such conduct with regard to the collateral, which was her prior residence. It was Belzer's decision not to protect its interests in its collateral and Wright's plan properly seeks to reduce the amount of Belzer's allowed secured claim to zero dollars and to treat the balance of the claim as general unsecured.

Perhaps if Wright had been more aggressive pre-confirmation, Belzer's secured claim could have been valued under section 506(a) as zero dollars. Attendant to confirmation of a Chapter 13 plan, the replacement value standard is required to value a creditor's collateral and, hence, the amount of that creditor's secured claim. *See Assocs. Commercial Corp. v. Rash (In re Rash)*, 520 U.S. 953, 117 S. Ct. 1879 (1997). In contrast, if property is repossessed by or surrendered to a creditor, that creditor ordinarily recovers from the disposition of the collateral liquidation value. Judge Lundin postulates that perhaps there is a "hidden valuation problem distorting" the debate regarding the post-confirmation surrender of collateral.¹⁶ Built into the confirmation process is the discrepancy between the replacement value of collateral in the debtor's confirmed plan and the liquidation value that a secured claimant could later obtain upon

¹⁶ 3 KEITH M. LUNDIN, CHAPTER 13 BANKRUPTCY § 264.1, at 264-32.

sale of the collateral. Judge Lundin properly questions whether it makes sense to tax the difference in these valuation standards to unsecured creditors and whether it is proper to reward a secured claimant with this artificial difference in value. “[E]ven if the debtor has made every single payment required by the Chapter 13 plan, the valuation standard by itself is likely to cause a deficiency between the balance of the allowed secured claim and the liquidation value at surrender or repossession.”¹⁷

This Court agrees with both Judge Lundin and *Collier on Bankruptcy* that to allow Wright’s proposed post-confirmation modification of her Chapter 13 plan to alter the treatment of a secured claim is the more harmonious reading of the applicable Code sections and for the reasons above stated grants Wright’s motion to amend plan post-confirmation. Additionally, Wright’s objection to Belzer’s proof of claim is granted, and the balance on Belzer’s claim, after credit for previously received payments, is allowed as general unsecured.

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ROBERT D. BERGER
U.S. BANKRUPTCY JUDGE
DISTRICT OF KANSAS

¹⁷ *Id.* at 264-33.