

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

In re:

BERTHA B. COOPER,

Case No. 6:08-bk-11960-ABB

Chapter 13

Debtor.

_____ /

ORDER

This matter came before the Court on the Motion to Reconsider (Doc. No. 49) filed by BankUnited, FSB seeking reconsideration of confirmation of the Debtor's Plan and denial of its Motion for Relief from Stay (Doc. No. 29). An evidentiary hearing was held on September 23, 2009 at which the Debtor Bertha B. Cooper ("Debtor"), her counsel, counsel for BankUnited, and counsel for the Chapter 13 Trustee appeared.

BankUnited's Motion to Reconsider is due to be denied for the reasons set forth herein. The Court makes the following findings and conclusions after reviewing the pleadings and evidence, hearing live argument, and being otherwise fully advised in the premises.

Allowed Secured Claim of BankUnited

The Debtor filed this case on December 16, 2008. BankUnited holds a first priority mortgage on the Debtor's real property located at 7607 SW 7th Place, Fort Lauderdale, Florida 33068 ("Property") pursuant to an Adjustable Rate Note and Mortgage executed by the Debtor on May 3, 2006. The Note provides for interest on the principal balance of \$256,500.00 at the adjustable annual rate of 7.50% with the rate not to exceed 9.95%. The Note matures on June 1, 2046 and constitutes a long-term debt.

The Property is not the Debtor's principal residence. The Debtor's daughter resides in the Property.

BankUnited filed Claim No. 9-1 asserting a secured claim of \$309,017.41 consisting of a principal balance of \$277,173.70 and an arrearage cure amount of \$31,843.71. The Debtor is authorized to modify BankUnited's secured claim pursuant to 11 U.S.C. Section 1322(b)(2).

BankUnited filed a Motion for Relief from Stay (Doc. No. 29) seeking relief from the automatic stay of 11 U.S.C. Section 362(a) and stating the Property's value is \$120,000.00. The Debtor filed a Motion to Value Claim 9-1 (Doc. No. 40) requesting the BankUnited's secured claim be valued at \$120,000.00. An evidentiary hearing was held on the Motion for Relief from Stay and the Debtor's Motion to Value on May 12, 2009 at which both parties appeared. An Order was entered on May 20, 2009 (Doc. No. 45) finding the Property has a value of \$120,000.00 and bifurcating Claim 9-1 into a secured claim of \$120,000.00 with the balance to be treated as a general unsecured claim.

All other issues, including the interest rate, term and amortization of BankUnited's allowed secured claim were deferred to the confirmation hearing. BankUnited's Motion for Relief from Stay was continued to the confirmation hearing.

BankUnited did not seek appeal or reconsideration of the May 20, 2009 Order. The May 20, 2009 Order constitutes a final, non-appealable Order. BankUnited's claim is undersecured and has been bifurcated into secured and unsecured portions pursuant to 11 U.S.C. Section 506(a). BankUnited has an allowed secured claim of \$120,000.00 and an allowed general unsecured claim for \$189,017.41, which amount is the difference between its claim of \$309,017.41 and \$120,000.00. 11 U.S.C. § 506(a).

Confirmation Hearing

The Debtor, prior to filing her Motion to Value, filed a Second Amended Chapter 13 Plan (Doc. No. 35) (“Plan”) pursuant to which BankUnited shall: (i) retain its lien on the Property; (ii) be paid \$572.90 per month with interest at 4.0% for fifty-nine months; and (iii) be paid a balloon payment of \$108,536.90 in month 60. BankUnited filed an Objection (Doc. No. 38) asserting the Plan violates 11 U.S.C. Section 1325(a)(5)(B)(iii) on the basis the balloon payment does not constitute periodic payments “in equal monthly installments.”

The confirmation hearing was held on August 18, 2009 pursuant to the Notice of Confirmation issued by the Trustee (Doc. No. 44). The Debtor, the Trustee, and counsel for BankUnited appeared. The Court confirmed the Plan in open Court and re-amortized BankUnited’s allowed secured claim of \$120,000.00 over a thirty-year term with interest to be paid at the rate of 8.0% per annum. The balance of its allowed secured claim is to be paid in a balloon payment at the conclusion of the Plan in month sixty. A Confirmation Order and an Order on BankUnited’s Motion for Stay Relief have not been entered due to the parties’ failure to submit proposed orders.

11 U.S.C. Sections 1322(b)(5) and 1325(a)(5)

BankUnited seeks reconsideration of the Court’s August 18, 2009 rulings asserting they violate 11 U.S.C. Section 1325(a)(5)(B)(iii). The issue for determination is whether the balloon payment in month sixty of the Plan is prohibited by Section 1325(a)(5)(B)(iii) and BankUnited’s allowed secured claim must be paid in equal monthly payments for sixty months. This issue involves the interplay between Sections 1322(b)(5) and 1325(a)(5) of the Bankruptcy Code.

The Debtor is authorized to cure the BankUnited mortgage arrearage within a reasonable time while her case is pending pursuant to 11 U.S.C. Section 1322(b)(5).

Section 1322(b)(5) provides a plan may:

Notwithstanding paragraph (2) of this subsection, provide for the curing of any default within a reasonable time and maintenance of payments while the case is pending on any unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due.

11 U.S.C. § 1322(b)(5). Section 1322(e) provides:

Notwithstanding subsection (b)(2) of this section and sections 506(b) and 1325(a)(5) of this title, if it is proposed in a plan to cure the default, the amount necessary to cure the default, shall be determined in accordance with the underlying agreement and applicable nonbankruptcy law.

11 U.S.C. § 1322(e). The Note matures after the date on which the Debtor's final Plan payment is due. The Plan proposes to fully cure the mortgage arrearage. It complies with Sections 1322(b)(5) and 1322(e).

The Plan, to be confirmable, must meet the requirements of Section 1325(a). Section 1325(a)(5) provides three alternative requirements for each allowed secured claim: acceptance of the plan by the claimant; compliance with the cramdown provisions; or surrender of the collateral to the claimant. Subsections (A) and (C) of Section 1325(a)(5) are inapplicable because BankUnited has not accepted the Plan and the Debtor intends to retain the Property. Subsection (B), the cramdown provision, is applicable and must be fulfilled by the Debtor.

Section 1325(a)(5)(B) requires the Plan must provide with respect to each allowed secured claim:

(i)(I) the holder of such claim retain the lien securing such claim . . .

(ii) the value, as of the effective date of the plan, of the property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; and

(iii) if—

(I) property to be distributed pursuant to this subsection is in the form of periodic payments, *such payments shall be in equal monthly amounts*.

11 U.S.C. §§ 1325(a)(5)(B)(i)(I), (B)(ii), (B)(iii)(I) (*emphasis added*). The phrase “equal monthly amounts” is not defined in the Bankruptcy Code or the legislative history of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 pursuant to which Section 1325(a)(5)(B)(iii) was enacted. Scant case law exists addressing Section 1325(a)(5)(B)(iii) and no controlling decisions have been issued. One Bankruptcy Court addressed the interplay between Sections 1325(a)(5)(B)(iii) and 1322(e) and found Section 1325(a)(5)(B)(iii) was not applicable where the debtor’s proposed unequal periodic payments to cure his long-term secured debt arrearages complied with 11 U.S.C. Section 1322(b)(5). In re Davis, 343 B.R. 326 (Bankr. M.D. Fla. 2006).¹

The Debtor’s proposed Plan payments will fully cure the mortgage arrearage within sixty months. The Plan complies with Sections 1322(b)(5) and 1322(e). Section 1325(a)(5)(B)(iii) is not applicable. In re Davis, 343 B.R. at 328. The Plan meets the cramdown requirements of Subsections (i) and (ii) of 1325(a)(5)(B). United Bank shall retain its lien securing the allowed amount of its secured claim and receive \$120,000.00 plus interest. The Plan payments will fully satisfy BankUnited’s allowed secured claim.

¹ The Bankruptcy Court in the Chapter 11 case In re F.G. Metals, Inc., 390 B.R. 467 (Bankr. M.D. Fla. 2008) analyzed the plain meaning of 11 U.S.C. Section 1129(a)(9)(C) in comparison to Section 1325(a)(5)(B). It found Congress intended different results in using the language “equal monthly amounts” in Section 1325(a)(5)(B) versus “regular installment payments in cash” in Section 1129(a)(9)(c). It determined: “Consequently, when a chapter 13 debtor proposes to pay a secured claim in periodic payments under § 1325(a)(5), those payments must be in equal monthly amounts.” In re F.G. Metals, Inc., 390 B.R. at 474. The decision is not controlling.

Conclusion

A primary purpose of Chapter 13 is to resolve mortgage defaults. “[T]he general legislative intent surrounding Chapter 13 as well as specific legislative history relating to § 1322(b)(5) . . . suggest that defaults, either preconfirmation or postconfirmation, may be cured under appropriate circumstances.” Green Tree Acceptance, Inc. v. Hogle (In re Hogle), 12 F.3d 1008, 1011 (11th Cir. 1994). The promissory notes underlying contemporary mortgages typically have twenty, thirty, or forty-year terms, which exceed the sixty-month terms of most Chapter 13 plans. BankUnited appears to take the position long-term mortgage debts must be paid in full through a debtor’s plan. This position renders the Chapter 13 process unworkable and is contrary to the fundamentals of Chapter 13.

The Bankruptcy Code requires a mortgage arrearage to be cured and the secured creditor’s lien rights to be adequately protected during the life of the plan. The value of the collateral is central to adequate protection and claim allowance determinations. Adequate protection may be provided by periodic cash payments which are calculated based upon the collateral’s value. 11 U.S.C. § 361(1). Compliance with the cramdown provisions of Section 1325(a)(5)(B) turns upon valuation, as Congress explained during Section 1325’s enactment:

Of course, the secured creditors’ lien only secures the value of the collateral and to the extent property is distributed of a present value equal to the allowed amount of the creditor’s secured claim the creditor’s lien will have been satisfied in full. Thus the lien created under section 1325(a)(5)(B)(i) is effective only to secure payments to the extent of the amount of the allowed secured claim.

124 CONG. REC. H11, 107 (daily ed. Sept. 28, 1978) (statement of Rep. Edwards), *as reprinted in* 1978 U.S.C.C.A.N. 5963, 6482.

BankUnited will receive Plan distributions equal to the present value of its allowed secured claim. Its interest in the Property is adequately protected through the Plan payments and the terms established at the August 18, 2009 hearing. It has established no basis for relief from the automatic stay pursuant to 11 U.S.C. Section 362(d). The Plan complies with all of the Chapter 13 provisions including Sections 1322(b) and 1325(a). BankUnited's Motions for Relief from Stay and for Reconsideration are due to be denied. The Debtor's Plan is due to be confirmed pursuant to the terms established by the Court at the August 18, 2009 hearing.

Accordingly, it is

ORDERED, ADJUDGED AND DECREED that BankUnited's Motion for Relief from Stay (Doc. No. 29) is hereby **DENIED**; and it is further

ORDERED, ADJUDGED AND DECREED that BankUnited's Motion to Reconsider (Doc. No. 49) is hereby **DENIED**; and it is further

ORDERED, ADJUDGED AND DECREED that the Debtor's Second Amended Plan is hereby **CONFIRMED** pursuant to the rulings issued in open Court on August 18, 2009, specifically, BankUnited's allowed secured claim of \$120,000.00 is re-amortized over thirty years with interest at the rate of 8.0% per annum with periodic payments to be made over fifty-nine months and the balance of the allowed secured claim to be paid in month sixty through a balloon payment at the conclusion of the Plan; and it is further

ORDERED, ADJUDGED AND DECREED that the Chapter 13 Trustee is directed to submit a detailed confirmation order in conformity with this Order within fourteen (14) days of the entry of this Order.

Dated this 17th day of November, 2009.

/s/ Arthur B. Briskman
ARTHUR B. BRISKMAN
United States Bankruptcy Judge