UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re: Case No. 3:15-bk-3407-PMG

Terri L. Harmon,

Debtor. Chapter 13

ORDER ON MOTION FOR RELIEF
FROM THE AUTOMATIC STAY

THIS CASE came before the Court for hearing to consider the Motion for Relief from the Automatic Stay filed by CIT Bank, N.A. fka One West Bank N.A. (the Bank). (Doc. 14). The Debtor, Terri L. Harmon, filed a written Objection to the Motion. (Doc. 22).

Pursuant to the decision of the United States Supreme Court in Johnson v. Home State Bank, 501 U.S. 78 (1991), a debtor is permitted to treat a lien on his property as a claim in a Chapter 13 plan, even if the debtor has no personal liability for the underlying debt.

Additionally, if the lien is a residential lien and the last payment is due before the final plan payment, the debtor may modify the lien in a Chapter 13 plan pursuant to §1322(c)(2) and §1325(a)(5) of the Bankruptcy Code.

In this case, the Bank is the holder of a reverse mortgage that was signed by the Debtor's mother. The debt became due and the Debtor acquired the residential property upon the death of her mother, prior to the filing of the Debtor's bankruptcy petition. Accordingly, the Debtor may modify the mortgage in her Chapter 13 Plan, even though she did not sign the original Note, as long as the modification complies with the requirements of §1322(c)(2) and §1325(a)(5) of the Bankruptcy Code.

For these reasons, the Bank's Motion for Relief from the Automatic Stay should be denied.

Background

On March 21, 2008, Bennie J. Terry signed a Fixed-Rate Note and a Fixed Rate Home Equity Conversion Mortgage in the amount of $111,000.00. (Doc. 14, Exhibit A). The property encumbered by the Mortgage is located at 813 Rushing Street, Jacksonville, Florida (the Property).

Bennie J. Terry subsequently passed away.

On March 27, 2015, the Bank obtained a Final Judgment of Foreclosure with respect to the Property in the total amount of $85,137.01. (Doc. 14, Exhibit A).

The Debtor, Terri L. Harmon, is the daughter of Bennie J. Terry. On July 29, 2015, the Debtor filed a petition under Chapter 13 of the Bankruptcy Code.

On her schedule of assets, the Debtor listed the Property as her residence with a scheduled value of $25,000.00. On her schedule of liabilities, the Debtor listed the Bank as a secured creditor holding a lien on the Property in the amount of $85,137.01. (Doc. 1).

On August 10, 2015, the Debtor filed a First Amended Chapter 13 Plan in which she proposed to pay the Bank the sum of $395.84 per month for a period of sixty months, for a total distribution of $23,750.40, to satisfy the mortgage. (Doc. 9). According to the Debtor, the payment amount of

$23,750.40 is sufficient to satisfy the mortgage pursuant to HUD reverse mortgage guidelines, because it represents 95% of the appraised value of the Property. (Doc. 22).

Discussion

On October 7, 2015, the Bank filed a Motion for Relief from the Automatic Stay. (Doc. 14). In the Motion, the Bank acknowledges that the Debtor "acquired title to the Subject Property by virtue of death of Bennie J Terry." (Doc. 14, ¶ 16).

The Bank asserts, however, that the Debtor cannot modify the mortgage on the Property in her Chapter 13 Plan because she lacks contractual privity with the Bank. At the hearing on the Motion, the Bank also asserted that the Debtor is prohibited from valuing the Property under the Bankruptcy Code, because the Property is the Debtor's homestead.

The Bank's Motion for Relief from the Automatic Stay should be denied.

A. Privity

Pursuant to the decision of the United States Supreme Court in Johnson v. Home State Bank, 501 U.S. 78 (1991), a debtor is permitted to treat a lien on his property as a claim in a Chapter 13 plan, even if the debtor has no personal liability for the underlying debt.

In In re McNeal, 2011 WL 4381725 (Bankr. M.D. Fla.) and In re Lozada, 446 B.R. 604 (Bankr. M.D. Fla.), for example, this Court previously determined that a debtor is entitled to deal with a lien in his Chapter 13 plan, as long as he had an ownership interest in the property subject to the lien, even though he was not personally obligated for the underlying debt.

> The Supreme Court in *Johnson* has told us that a debtor can include a claim in a Chapter 13 plan, even when the debtor is not personally liable for the underlying debt. Recall that under *Johnson*, a creditor need not hold a personal claim against a debtor for a creditor's claim to be included in the debtor's bankruptcy estate; it is sufficient that a debtor owns property against which a creditor holds a lien for that property to be

> included in the debtor's bankruptcy estate. Also, as *Johnson* acknowledged, the statutory language of §§101(5), 502(b)(1), and 102(2) of the Bankruptcy Code plainly indicates that a claim against property held by a debtor is sufficient to constitute a claim within a Chapter 13 setting.

In re Curinton, 300 B.R. 78, 84-85 (Bankr. M.D. Fla. 2003)(citing Johnson v. Home State Bank, 501 U.S. 78, 111 S.Ct. 2150, 115 L.Ed.2d 66 (1991))(and quoted in In re McNeal, 2011 WL 4381725, at 2, and In re Lozada, 446 B.R. at 606).

The Bankruptcy Court for the Southern District of Florida recently reached the same conclusion in In re Gray, 530 B.R. 501, 503 (Bankr. S.D. Fla. 2015). In Gray, the Court cited Johnson to determine without discussion that a debtor had "standing to treat the bifurcated mortgage in her chapter 13 plan even though she has no personal liability" to the holder of the mortgage.

In this case, therefore, the Debtor may address the Bank's lien on her Property in her Chapter 13 Plan, even though she did not sign the original Note and Mortgage.

B. Modification

Additionally, the Debtor may modify the lien in her Chapter 13 Plan pursuant to §1322(c)(2) and §1325(a)(5) of the Bankruptcy Code, because it is a residential lien and the last payment became due before the final payment under the Plan.

Generally §1322(b)(2) of the Bankruptcy Code is known as the anti-modification clause, and provides that a Chapter 13 plan may "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence." 11 U.S.C. §1322(b)(2)(Emphasis supplied); In re Davis, 2015 WL 5299458, at 1 (Bankr. S.D. Ga.).

Section 1322(c)(2) of the Bankruptcy Code, however, "carves out a rare exception to the anti-modification provision." In re Hubbell, 496 B.R. 784, 788 (Bankr. E.D.N.C. 2013). Section 1322(c)(2) provides:

> **11 USC §1322. Contents of plan**
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> . . .
>
> (c) Notwithstanding subsection (b)(2) and applicable nonbankruptcy law—
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> . . .
>
> (2) in a case in which the last payment on the original payment schedule for a claim secured only by a security interest in real property that is the debtor's principal residence is due before the date on which the final payment under the plan is due, the plan may provide for the payment of the claim as modified pursuant to section 1325(a)(5) of this title.

11 U.S.C. §1322(c)(2). The §1322(c)(2) exception is intended to apply to short-term home mortgages, home mortgages with balloon payments, or long-term home mortgages which have less than five years remaining under their terms. In re Hubbell, 496 B.R. at 789.

By its terms, the section permits a plan to provide for payment of a claim "as modified pursuant to section 1325(a)(5)." Under §1325(a)(5), a chapter 13 plan may provide for the "retention of a creditor's collateral and payment of the value of that collateral as a secured claim, with any balance treated as an unsecured claim (often referred to as 'cramdown')." In re Payne, 347 B.R. 278, 280 (Bankr. S.D. Ohio 2006).

If the last payment on a residential mortgage is due before the final plan payment, therefore, §1322(c)(2) and §1325(a)(5) allow the debtor to modify the mortgage by proposing to pay the creditor the full value of its collateral over the course of the bankruptcy. In re Sanders, 521 B.R. 739, 744 (Bankr. D.S.C. 2014). The section "has been interpreted to apply to both mortgages that mature post-

petition and mortgages that matured or ballooned prior to the petition date." In re Sanders, 521 B.R. at 744(citing In re Brown, 428 B.R. 672, 675 (Bankr. D.S.C. 2010), which applied §1322(c)(2) to a reverse mortgage that had accelerated pre-petition due to the death of the obligor.).

On the basis of facts remarkably similar to the facts of this case, for example, the Bankruptcy Court in In re Gray, 530 B.R. 501 (Bankr. S.D. Fla. 2015)(Mark, J.), found that the debtor was permitted to modify a reverse mortgage in accordance with §1322(c)(2) and §1325(a)(5). In In re Gray, 530 B.R. at 502, as in this case, the debtor had inherited a home previously owned and occupied by her mother, and was living in the home at the time that she filed her bankruptcy petition. The home was encumbered by a reverse mortgage that became due prepetition when the debtor's mother died.

> Because the reverse mortgage became due by its terms prior to the petition date, 11 U.S.C. §1322(c)(2) applies and the Debtor may modify the reverse mortgage consistent with the requirements of 11 U.S.C. §1325(a)(5). *See In re Brown*, 428 B.R. 672 (Bankr. D.S.C. 2010)(finding that a reverse mortgage on the debtor's home could be modified based on the §1322(c)(2) exception to the anti-modification restrictions in §1322(b)(2)). Other courts have reached the same conclusion. (Citations omitted).
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> In addition to paying the mortgage over the life of the plan, the Debtor may strip down the secured claim to the value of the property as of the filing date. *American General Finance, Inc. v. Paschen (In re Paschen)*, 296 F.3d 1203 (11th Cir. 2002)(When a mortgage on a debtor's principal residence is governed by §1322(c)(2), that mortgage debt may be bifurcated, with the secured claim portion reduced to the value of the property. That secured portion may then be treated under §1325(a)(5). . . .

In re Gray, 530 B.R. at 502. In Gray, therefore, the Court determined that the debtor was permitted to "strip down the secured claim to the value of the property as of the filing date," and pay the mortgage over the life of the plan. Id.

In this case, the debt owed to the Bank became due in full prior to the filing of the bankruptcy petition, upon the death of Bennie J. Terry. (Doc. 14, Exhibit A, Fixed-Rate Note, ¶ 6). The Property securing the Bank's lien is the Debtor's principal residence. Consequently, the Debtor is permitted to

modify the Bank's mortgage in her Chapter 13 Plan, as long as the proposed modification complies with the requirements of §1322(c)(2) and §1325(a)(5) of the Bankruptcy Code.

For these reasons, the Bank's Motion for Relief from the Automatic Stay should be denied. See In re Evans, 2011 WL 1420887 (Bankr. M.D.N.C.)(The Court denied a creditor's motion for relief from stay, where the property securing a reverse mortgage was the debtors' principal residence, the originally-scheduled mortgage payments had become due prepetition upon the original borrower's death, and the debtors had proposed to pay the reverse mortgage in their Chapter 13 plan as permitted by §1322(c)(2) of the Bankruptcy Code.).

The hearing to consider confirmation of the Debtor's Chapter 13 Plan is scheduled for December 15, 2015, at 9:30 a.m., and the Court makes no determination at this time as to whether the Plan proposed by the Debtor satisfies the requirements of the Bankruptcy Code. See In re Gray, 530 B.R. at 503(The Court allowed the debtor to value her property for purposes of her Chapter 13 plan, but rejected the debtor's assertion that she could reduce the claim to 95% of the property's assessed value based on certain alleged HUD regulations.).

Accordingly:

IT IS ORDERED that the Motion for Relief from the Automatic Stay filed by CIT Bank, N.A. fka One West Bank N.A. is denied.

DATED this 2 day of December, 2015.

BY THE COURT

Paul M. Glenn

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PAUL M. GLENN
United States Bankruptcy Judge