UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re: CASE NO: 3:07-bk-05472-TBA

DAVID L. BATES and CHAPTER 13
JOY MARTIN BATES,

Debtors.
_____/

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came before the Court upon Creditor's Amended Objection to Confirmation of Debtors' Chapter 13 Plan filed by Wells Fargo Bank, N.A. ("Wells Fargo"). Debtors filed a Response to Amended Objection to Confirmation of Chapter 13 Plan and an Amended Chapter 13 Plan. The Court conducted a Confirmation Hearing on February 5, 2008. The Court took the matter under advisement and provided the parties fifteen (15) days to submit Memoranda of Law on the Objection to Confirmation of Wells Fargo. Upon the evidence and the arguments of the parties, the Court makes the following Findings of Fact and Conclusions of Law.

Findings of Fact

On November 30, 2007, Debtors filed a joint petition under Chapter 13 of the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"). On December 26, 2007, Debtors filed a Chapter 13 Plan, which included the following paragraph:

> 7. CONFIRMATION OF THE PLAN shall impose a duty on the holders and/or servicers of claims secured by liens on real property (a) to apply the payments received from the trustee on the pre-petition arrearages, if any, only to such arrearages; (b) to deem the pre-petition arrearages as contractually cured by confirmation; (c) to apply the direct mortgage payments, if any, paid by the trustee or by the debtor(s) to the month in which they were made under the plan or directly by the debtor(s), whether such payments are immediately applied to the loan or placed into some type of suspense account…[1]

[1] Wells Fargo does not object to the remaining provisions of Paragraph 7 of Debtors' plan. Accordingly, those provisions were not included above.

On December 31, 2007, Wells Fargo, the holder of a secured claim on Debtors' principal residence, filed an Amended Objection to Confirmation of Plan, which included two objections to Paragraph 7 of Debtors' Proposed Plan. The first objection pertained to the language in subsections (a) and (c), which require all pre-petition arrearage payments to be applied only to such arrearages, and the direct mortgage payments paid by the trustee or debtor to be applied to the month in which they were made under the plan, whether such payments are immediately applied to the loan or placed in some type of suspense account. The second objection was in regard to the language in subsection (b) that deems pre-petition arrearages as contractually "cured" upon confirmation of the Chapter 13 Plan.

On January 30, 2008, Debtors' filed a Response to Wells Fargo's Amended Objection to Confirmation, in which they reasserted the language in Paragraph 7 of the Chapter 13 Plan. Debtors then filed an Amended Chapter 13 Plan on February 4, 2008, which still included the objected to language. A Confirmation Hearing was held on February 5, 2008, at which time the Court took the matter under advisement and provided the parties fifteen (15) days to submit Memoranda of Law on the Amended Objection to Confirmation of the Chapter 13 Plan.

With the exception of the issue now pending before the Court, the permissibility of certain plan terminology, the Court finds that Debtors' Chapter 13 plan complies with all the requirements of § 1325 of the Bankruptcy Code.

Conclusions of Law

A. Objection to Language in Plan Requiring Pre-Petition Arrearage Payments to be Applied Only to Such Arrearages and Requiring Direct Mortgage Payments to be Applied to the Month in which They were made Under the Plan

Wells Fargo objects to the language in Paragraph 7, subsections (a) and (c), of Debtors' Proposed Chapter 13 Plan upon the basis that it is common industry practice by mortgage lenders to track payments both contractually and pre/post-petition in order to ensure that any contractual delinquency can be determined in the event the Chapter 13 case is dismissed. Wells Fargo argues that the language in the Chapter 13 Plan is attempting to dictate a procedure for how it is to apply the plan payments in violation of §1322(b)(2).

11 U.S.C. §1322(b)(2) of the Bankruptcy Code permits a debtor to modify the rights of a holder of a secured claim, other than a claim secured only by a security interest in real property that is a debtor's principal residence. The provision provides in relevant part: "Subject to subsections (a) and (c) of this section, the 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) (2005).

Notwithstanding §1322(b)(2), the Code allows a debtor to manage long-term secured debt by curing a pre-petition default and maintaining payments throughout the pendency of a Chapter 13 plan pursuant to §1322(b)(5). This provision provides:

> Subject to subsections (a) and (c) of this section, the 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…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) (2005).

Debtors assert that, in theory, if a debtor pays every payment until completion of the

Chapter 13 plan, the debtor should emerge from bankruptcy current on his or her home mortgage. Debtors correctly state that, to help ensure this happens, this Court includes the following language in every Order Confirming Chapter 13 Plan:

> Any post petition costs or expenses incurred by or on behalf of any secured creditor will be discharged upon the Debtor's completion of the plan, unless specifically provided for in this order, or by further order of Court on motion filed prior to completion of the plan. Regardless of objection by the creditor, this provision specifically supercedes all language in any confirmed plan that states differently.

However, Debtors argue that this language does not go far enough, and that debtors often emerge from a successfully completed Chapter 13 plan, only to discover that post-petition charges exist that were improperly assessed during the bankruptcy.

Thus, Debtors argue that inclusion of the language in Paragraph 7, subsections (a) and (c), of the Plan is necessary to address the problems that often arise after completion of a Chapter 13 Plan when a creditor alleges that the amount paid through the plan did not cure the default, that the debtor failed to maintain post-petition payments, or that junk fees imposed post-petition have increased the balance and imposed large arrearages. Debtors assert that they are seeking the protection of §524(i) of the Bankruptcy Code by specifying the manner in which Wells Fargo is to credit the payments received by the Trustee under the proposed Chapter 13 Plan.

BAPCPA amended §524 to include subsection (i), which provides a remedy to debtors against creditors who willfully fail to credit payments received under a confirmed Chapter 13 plan, to the extent such failure injures the debtor. §524(i) provides as follows:

> The willful failure of a creditor to credit payments received under a plan confirmed under this title, unless the order confirming the plan is revoked, the plan is in default, or the creditor has not received payments required to be made under the plan in the manner required by the plan (including crediting the amounts required under the plan), shall constitute a violation of an injunction under subsection (a)(2) if the act of the creditor to collect and failure to credit payments in the manner required by the plan caused material injury to the debtor.

11 U.S.C. §524(i) (2005). This section deems such failure to credit payments as required under the plan as a violation of the discharge injunction under §524(a)(2).[2] Further, Debtors assert that §524(i) is not self-executing and can only be invoked if the debtor proves that the creditor failed to credit payments in the manner required by the plan. Thus, Debtors argue that the inclusion of precise language in the Chapter 13 Plan directing how payments are to be applied is necessary to invoke the protection of §524(i).

Wells Fargo, on the other hand, contends that by tracking the payments both contractually and pre/post-petition, a creditor is in compliance with §524(i). Alternatively, Wells Fargo contends that §524(i) is a post-discharge remedy only, and therefore, cannot be used to justify the inclusion of the language in Paragraph 7, subsections (a) and (c), of the Chapter 13 Plan. Thus, the issue before the Court is whether §524(i) allows a debtor to include plan language that specifies the procedure for applying plan payments received by the creditor to both pre-petition arrearages and post-petition monthly mortgage payments without modifying the creditor's rights in violation of §1322(b)(2).

This same issue was under consideration in the case of In re Collins, 2007 WL 2116416, *4 (Bankr. E.D. Tenn. July 19, 2007). In Collins, the debtors proposed a Chapter 13 plan which contained language specifying that the creditor separately apply pre-petition arrearage payments and post-petition monthly mortgage payments. The language required the creditor to apply pre-petition arrearage payments only to pre-petition arrearages, and to apply direct post-petition monthly mortgage payments to the month in which they were designated to be made under the plan, whether or not such payments were immediately applied to the loan balance or placed into

[2] §524(a)(2) provides that a discharge "operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived." 11 U.S.C. §524(a)(2) (2005).

a suspense, forbearance or similar account. Id. at *2. In regard to the application of pre-petition arrearage payments only to pre-petition arrearages, the plan language further required the creditor to credit such payments against a "corporate advance arrearage account" that was to have a zero balance upon entry of the discharge. Id.

The court in Collins stated that it is not a per se violation of §1322(b)(2)'s anti-modification provision when language in a Chapter 13 plan burdens secured creditors with procedural obligations over the life of the plan, and that such language "is permissible and even desirable." Id. at *11. The Court added that, "[t]he requirement that [the creditor] apply all payments specifically designated as prepetition arrearage payments only to its allowed arrearage claim is not only reasonable, but required." Id. at *13. However, the requirement that the creditor set up and designate plan payments into a specific "corporate advance arrearage account" was found by the court to be "overreaching and unnecessary." Id. Thus, the Court held that as long as a creditor "maintains a separate accounting for application of the separate payments it receives for the Debtors' maintenance and arrearage payments and credits the payments in accordance with the Debtors' plan, it cannot be forced to hold those payments in a manner dictated by the Debtors and/or the Proposed Plan." Id.

Wells Fargo cites to the holding from Collins to support its position that it is in compliance with §524(i) by tracking Debtors' plan payments both contractually and pre/post-petition. Specifically, Wells Fargo argues that, because it maintains a separate accounting for the application of the pre-petition arrearage and post-petition monthly mortgage payments of Debtors, it cannot be required to apply those payments in the manner dictated by Debtors or Debtors' Plan. However, the language objected to in Collins is distinguishable from that in the instant case because in Collins, the language of the proposed Chapter 13 plan not only required

the application of pre-petition arrearage payments only to the allowed arrearage claim (as it does in Paragraph 7, subsection (a), of Debtors' Amended Chapter 13 Plan), but it also required the creditor to set up and designate the arrearage payments into a specific "corporate advance arrearage account." Id. at *2. It was in regard to that additional requirement that the court said the plan language was "overreaching and unnecessary," and it was that requirement to which the court was referring when it held that the debtors or debtors' plan could not dictate the manner in which the arrearage payments were to be applied, as long as the creditor maintained a separate accounting for the separate payments. Id. at *13.

In the instant case, there is no additional plan language that requires Wells Fargo to set up and designate payments into a specific arrearage account, but only the requirement that it apply all payments received from the Trustee that are arrearage payments to the arrearage claim – a task that the court in Collins said was not only reasonable, but required. Id. at *13. Therefore, this Court finds that the language in Paragraph 7, subsections (a) and (c), of Debtors' Amended Chapter 13 Plan does not impermissibly modify Wells Fargo's rights under §1322(b)(2), nor does it prevent Wells Fargo from tracking Debtors' payments contractually, as long as a separate accounting is also maintained for the pre-petition arrearage payments and post-petition monthly mortgage payments. Thus, Wells Fargo's objection to Paragraph 7, subsections (a) and (c), will be overruled.

Even though this Court finds that the language of Paragraph 7, subsections (a) and (c), of Debtors' Chapter 13 Plan does not impermissibly modify the rights of Wells Fargo, Debtors' reliance on §524(i) as the justification for the inclusion of such language in the Plan is mistaken. As held by the Court in Collins, §524(i) provides debtors a potential *post-discharge* remedy if a creditor has willfully failed to honor the terms of a *confirmed* Chapter 13 plan by not properly

crediting payments as required by the plan (emphasis added), but it "does not provide a basis for the incorporation of proposed language in a Chapter 13 plan." Collins, 2007 WL 2116416 at *4; see also In re Anderson, 2008 WL 410077, *3 (Bankr. D. Or. February 12, 2008) (holding that §524(i) provides a remedy to debtors against a creditor who willfully fails to credit plan payments to the debtors' material injury, but "does not dictate what is permissible under a Chapter 13 plan."). This Court agrees with the holdings in Collins and Anderson, and finds that §524(i) is a post-discharge remedy only and cannot serve as the basis for the inclusion of particular language in a Chapter 13 Plan which specifies the manner in which the secured creditor is to apply payments received by the trustee under the plan. Thus, Debtors are erroneously seeking to invoke §524(i) pre-confirmation to justify the inclusion of the language in Paragraph 7, prior to any actual violation of the discharge injunction caused by the failure of Wells Fargo to properly credit payments received under a confirmed plan.

B. Objection to Language in Plan Deeming Pre-Petition Arrearages as Contractually "Cured" Upon Confirmation

Wells Fargo also objects to the language in Paragraph 7, subsection (b), of Debtors' Amended Chapter 13 Plan that deems pre-petition arrearages as contractually "cured" upon confirmation. Wells Fargo contends that the pre-petition arrearage should not be considered "cured" until the arrearage has been paid in full by the Chapter 13 Trustee in accordance with its Proof of Claim, and that no legal basis exists for deeming the arrearage cured upon confirmation. Wells Fargo argues that substituting language deeming the pre-petition arrearage "current" at confirmation can accomplish the same objective sought by Debtors – that of precluding the assessment of default related charges during the pendency of the Chapter 13 case. Debtors cite to Collins for the proposition that a provision requiring a creditor to deem a pre-petition arrearage amount as contractually "current" upon confirmation "is merely procedural and

requires only that [the creditor] update its accounting procedures to ensure that the Debtors' account is not subject to any additional charges associated with any prepetition default." Collins, 2007 WL 2116416 at *14.

Debtors argue that the "deemed cured" language in the Amended Chapter 13 Plan further implements §524(i), and the failure to treat the loans as such upon confirmation is an open invitation for lender abuse and the imposition of junk fees. Debtors also argue that the cure language operates to put the debtor in the same position as if the default had never occurred, which is the intent behind a Chapter 13 Plan.

§1322(b)(5) authorizes debtors to cure pre-petition defaults by paying the amount of an arrearage claim in full. However, this Court agrees with the court in Collins, and the argument of Wells Fargo, and holds that Debtors' pre-petition arrearage cannot technically be considered "cured" until the arrearage has been paid in full, and that the same result can be accomplished by deeming the arrearage "current" at confirmation. Id. at *13. Further, Debtors' once again mistakenly rely on §524(i) as the justification for inclusion of the "deemed cured" language in the Plan. As previously stated above, §524(i) is a post-discharge remedy only, and cannot provide a basis for the incorporation of proposed language in a Chapter 13 Plan. Id. Thus, Wells Fargo's objection to the language in Paragraph 7, subsection (b), of Debtors' Amended Chapter 13 Plan will be sustained.

C. Permissible Standardized Language in Chapter 13 Plans

The court in In re Collins proposed standardized language which it found would be permissible for debtors to use in Chapter 13 Plans and would not be inconsistent with the anti-modification provisions of §1322(b)(2). Id. at *17. The portion of the proposed language that is applicable to the instant case states:

> Confirmation of the plan shall impose an affirmative duty on the holders and/or the servicers of any claims secured by liens, mortgages and/or deeds of trust on the principal residence of the Debtors to do all of the following:
>
> (1) To apply the payments received from the trustee on the prepetition arrearages, if any, only to such arrearages. For purposes of this plan, the "prepetition" arrears shall include all sums included in the "allowed" proof of claim and shall have a "0" balance upon entry of the Discharge Order in this case.
>
> (2) To deem the prepetition arrearages as contractually current upon confirmation of the plan, thereby precluding the imposition of late payment charges or other default-related fees and services based solely on the prepetition default or defaults.
>
> (3) To apply the direct post-petition monthly mortgage payments paid by the trustee or by the Debtors to the month in which each payment was designated to be made under the plan or directly by the Debtors, whether or not such payments are immediately applied by the creditor to the outstanding loan balance or are placed into some type of suspense, forbearance or similar account.
>
> …

Id. This Court finds that it is permissible for Debtors in the instant case, and cases of a similar nature, to use this standardized language from Collins in proposed Chapter 13 Plans.

This Court further suggests that Debtors may want to also include the standard language used by this Court in every Order Confirming Chapter 13 Plan in their Chapter 13 Plan. As previously mentioned, that standard language provides:

> Any post petition costs or expenses incurred by or on behalf of any secured creditor will be discharged upon the Debtor's completion of the plan, unless specifically provided for in this order, or by further order of Court on motion filed prior to completion of the plan…

The inclusion of this language in Debtors' Chapter 13 Plan, in addition to its inclusion in the Confirmation Order, would further protect Debtors in seeking to preclude the potential assessment of late payment charges or other default-related fees based on pre-petition defaults, which result in improper post-discharge obligations.

Conclusion

Based upon the above, Wells Fargo's Objection to Confirmation of Debtors' Amended Chapter 13 Plan will be overruled in part and sustained in part. The Court will enter a separate

order that is consistent with these Findings of Fact and Conclusions of Law.

DATED this 15 day of April, 2008 in Jacksonville, Florida.

/s/ Jerry A. Funk

JERRY A. FUNK
United States Bankruptcy Judge

Copies furnished to:

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