

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT HAMMOND

IN RE:)
ESTELA MAGALLANES)
) BANKRUPTCY NO. 09-23286
)
Debtor)

MEMORANDUM OPINION
AND
ORDER

I

Statement of Proceedings

This Chapter 13 case is before the Court on an Objection filed by Chase Home Finance, L.L.C. (“Chase”) to the Confirmation of the Chapter 13 Plan filed by the Chapter 13 Debtor, Estela Magallanes (“Debtor”), on August 6, 2009 (“Plan”).

The Debtor filed her Chapter 13 Petition on August 6, 2009. The Debtor also filed her Plan on August 6, 2009. Thus, pursuant to §1326(a)(1), her first Plan payment was due not later than 30 days after the Petition date, or September 5, 2009.¹

Paragraph 2 of the Debtor’s Plan provides that the length of the Plan is “60 Months from the date of Confirmation” (emphasis supplied).²

¹ Section 1326(a)(1) provides that unless the Court orders otherwise, the debtor shall commence making payments not later than 30 days after the filing of the plan or the Order for Relief, whichever is earlier. Section 1321, Filing of Plan, is implemented by Fed. R. Bk. P. 3015(b), which provides the debtor may file a Chapter 13 plan within 14 days after the Petition, and this time may only be further extended for cause shown.

In addition, §1325(b)(1)(B) provides that a Court may not approve a plan over the objection of the trustee or the holder of an allowed unsecured claim unless the plan provides that all of the debtor’s projected disposable income to be received in the applicable commitment period beginning on the date that the first payment due under the plan will be applied to make payments under the plan.

² Although the Plan of the Debtor proposes a 60 month term, the Court takes judicial notice that the form B22C filed by the Debtor on August 6, 2009 states that the Applicable Commitment Period is 3 years. See Part II. Calculation of §1325(b)(4) Commitment Period.

Thus, pursuant to §1322(d)(2), the Plan may not provide for payments over a period that is longer than 3

Paragraph 4c.(3) of the Plan, states that the Debtor has no secured debts which extend beyond the length of the Plan, and Paragraph 4(2)(a) of the Plan, Secured Claims Subject To Valuation Under §506, proposes that the amount of Chase's allowed Secured Claim should be \$45,000.00 as to the Debtor's residence located at 1310 W. 148th Street, East Chicago, Indiana ("Residence").³

Chase on December 22, 2009 filed its Secured Claim versus the Debtor's estate asserting an allowed Secured Claim in the sum of \$76,953.79 with interest at the rate of 11%. From August 6, 2009, which is the Petition date (Secured Claim"). The Secured Claim asserts that the above amount is secured only by a First Mortgage Lien on the Debtor's Residence.

Chase's Objection to the Debtor's Plan asserts that the Plan violates §1322(h)(2) in that it proposes to modify the terms of its First Mortgage Lien secured only by the Debtor's principal Residence.

At a hearing held on January 20, 2010 on the Objection by Chase, the Debtor and Chase entered into a Stipulation that the Petition by the Debtor was filed on August 6, 2009, and that the last scheduled payment on the Secured Claim of Chase is due on January 15, 2015.

It was further stipulated that the threshold legal issue to be decided by the Court is whether §1322(c)(2) applies to the Debtor's Plan, whereby the Debtor's may "cram down" the Secured Claim of Chase on the grounds that last scheduled payment to Chase on its Secured Claim is due before the date on which the last payment under the Plan is due (Docket No. 44).

By Docket Entry Order January 20, 2010, each party was ordered to file their initial briefs on or before February 10, 2010, and answer briefs were to be filed on or before February 22, 2010. No

years, unless the Court, for cause, approves a longer period, but the Court may not approve a period that is longer than 5 years.

³ Notwithstanding the fact that the Debtor's Plan valued her Residence at \$45,000.00, her Verified Schedule A, Real Property, and her Schedule D, Creditor's Holding Secured Claims, valued her Residence at \$50,000.00.

reply briefs were permitted. (Docket No. 44).

The Debtor on February 9, 2010 filed her Memorandum In Support of Denying Creditor's Objection to Confirmation and Finding that 11 U.S.C. §1322(c) Applies.

Chase on February 10, 2010 filed its Brief In Support of Objection to Confirmation of Plan.

No answer brief was filed by the Debtor.

Chase filed its Response (Answer) Brief on February 22, 2010.

Thus, the threshold legal issue is when does the Debtor's 60 Month Plan begin, 30 days after the Petition date as asserted by Chase or upon Confirmation of her Plan as asserted by the Debtor.

II

The Positions of the Debtor and Chase

A

The Debtor's Brief

The Debtor asserts that the length of the Plan term should be counted from the date her Plan is confirmed, citing West v. Costen, 826 F.2d 1376, 1378 (4th Cir. 1987); In re Martin, 156 B.R. 47, 50 (BAP 9th Cir. 1993); In re Endicott, 157 B.R. 255, 262-63 (Bankr. W. D. Va 1993); and, In re Serna, 193 B.R. 537, 539 (Bankr. D. Az 1996).

The Debtor asserts that the Court should not follow the recent case of In re Musselman, 341 B.R. 652 (Bankr. N. D. Ind. 2005) that held that the debtor's 60 month payment period was to be calculated from the date of the debtor's payment was first due to the trustee. Id. 341 B.R. at 657.

B

Chase's Brief

Chase asserts that the applicable date in computing when the final payment is due under a plan with a 60 month term is the date the first plan payment is due, or September 6, 2010.

Chase asserts that in deciding this issue, the Court must also look to §1322(d), which provides that the plan may not be longer than five years, §1329 (c) which provides that a modified plan cannot extend longer than 5 years after the time that the first payment under the original confirmed plan was due, and §1326(a)(1), which requires a Chapter 13 debtor to begin making payments not later than 30 days after the filing of the plan or the Order for Relief, whichever is earlier.

Chase cites numerous Courts that have held that the sixty month maximum duration of a plan must be computed from the date that plan payments must commence.⁴

C

Chase's Response Brief

Chase's Response Brief in essence reiterates its arguments set out in its initial Brief, and added that the Court in In re Musselman, 341 B.R. 652, 657 (Bankr. N. D. Ind. 2005) specifically rejected the reasoning of the Court in West v. Costen, 826 F.2d 1376 (4th Cir. 1987), cited by the Debtor in her Memorandum in Support of her position.

Conclusions of Law and Discussion

The Court finds that it has subject-matter jurisdiction of this contested matter pursuant to 28 U.S.C. §1334(b), and that this contested matter is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(L).

The general rule is that a claim secured only by a first mortgage lien on the debtor's principal residence cannot be modified by the debtor's plan. §1322(b)(2). See Nobleman v. American State Bank,

⁴ Chase cited the following cases in support of its position: In re Profit, 283 B.R. 567, 575 (9th Cir. BAP 2002) (collecting cases); In re Nicholes, 184 B.R. 82, 87, (9th Cir. BAP 1995); In re Musselman, 341 B.R. 652, 657 (Bankr. N. D. Ind 2005); In re Walters, 223 B.R. 710, 713 + n. 2 (Bankr. W. D. MO. 1998); In re Collier, 193 B.R. 1, 3-4 (Bankr. D. Ar. 1986); In re Evans, 183 B.R. 331, 332-33 (Bankr. S. D. GA 1995); In re Green, 169 B.R. 480, 483 + n. 5 (Bankr. S. D. Ga 1994); In re Neill, 158 B.R. 93, 97-98 (Bankr. N. D. Oh 1993); In re Duckett, 139 B.R. 6, 8-9 (Bankr. E. D. Tx 1992); In re Cobb, 122 B.R. 22, 26-27 (Bankr. E. D. Pa. 1990); In re Woodall, 81 B.R. 17, 18 (Bankr. E. D. Ak 1987J); compare, In re Whitby, 146 B.R. 19, 20 + n. 1 (Bankr. D. Id 1992) (construing 5 year limit under Chapter 12).

508 U. S. 324, 113 S. Ct. 2106, 2111, 124 L.Ed.2d 228 (1993) (Chapter 13 plan cannot strip down an under-secured mortgage to the value of the collateral or otherwise “modify” the rights of the mortgage company).

However, §1322(c)(2), enacted by the Bankruptcy Reform Act of 1994, carved out an exception to the Rule in §1322(b)(2), which prohibits the modification of the rights of holders of claims secured solely by a security interest in real estate that is the debtor’s principal residence. Collier on Bankruptcy, 15th Ed. Rev. Par. 1322.16 P. 1322-61. Section 1322(c)(2) provides that if the last payment on the original payment schedule is due before the final payment under the plan is due the debtor may pay the claim as modified pursuant to §1325(a)(5). Id. See also Lundin, Chapter 13 Bankruptcy, 3rd Ed. §143.1. P. 143-1. See e.g. In re Paschen, 296 F.3d 1203, 1207-09 (11th Cir. 2002). Cert den. 123 S. Ct. 696.

Thus, in order for the Debtor’s Plan to modify Chase’s Mortgage pursuant to §1322(c)(2), the last payment on the original payment schedule in Chase’s Mortgage must be due before the date on which the final payment under the Plan is due.

Lundin’s Treatise, Chapter 13 Bankruptcy, states as follows:

The code does not tell us exactly how to count the length of a Chapter 13 plan. Section 1322(d) speaks of a period that is “not . . . longer than three years” unless the court for cause approves a plan that is “not longer than five years.” The Code does not tell us from what date to count.

* * * *

There are several possible dates to begin counting the three-year or five-year periods in §1322(d). The court might count from the date of the filing of the case, from the date of confirmation, from the date the first payment was due under §1326, from the date of entry of the order to commence payments or from the date that the debtor actually made the first payment under the plan.

For purposes of the more specific disposable income test in §1325(b)(1)(B), the first payment would be due under the debtor’s plan within 30 days after the plan is filed under §1326(a)(1). Section 1329(c) also references “the first payment”, and the time period probably should be counted from the same date used for purposes of §1325(b)(1)(B), but the reported decisions are not in agreement. It would be logical to

count the three- and five-year periods in §1322(d) from the same beginning date as the related time periods in §§1325(b) and 1329(c). Reading §§ 1322(d), 1325(b)(1)(B), 1326(a)(1) and 1329(c) all together, the three- and five-year periods would be counted from the date that the first payment was due from the debtor, which would ordinarily be within 30 days after the plan is filed, absent court order to the contrary.

A majority of courts have determined that the three-year period in §1322(d) should be linked to the commencement of payments under §1326(a)(1), but there is less agreement how to account for the linkage.

* * * *

[g]reater consistency would be realized from a rule that the three-year and five-year periods in §1322(d) are counted from the date that the first payment was due from the debtor under §1326(a)(1) without regard to whether the debtor actually made that payment, and without regard to whether income deduction orders were entered. This approach puts a premium on prompt commencement of payments by the debtor, consistent with §1326(a)(1), and burdens the debtor to stay current in payments, through any delay in reaching confirmation.

Lundin, Chapter 13 Bankruptcy, 3rd Ed. §200.1. pp. 200-1 to 200-7 (footnotes omitted).

Norton Bankruptcy Law and Practice states as follows:

The Code does not specify the date from which the three-year or five-year period should be counted. The constraint of Code §1322(d) is that for below-median income debtors, the “plan may not provide for payments” over a period longer than three years, except for cause, and “the court may not approve a period” longer than five years. It could be argued that the plan does not “provide for payments” until it is confirmed by the court.

Code §1326(a)(1) provides that, unless the court orders otherwise, “the debtor shall commence making the payments proposed by a plan within 30 days after filing”.

* * * *

In the typical Chapter 13 case, however, the plan simply provides for payment of a certain amount by the debtor without specification as to when the payments should commence. In such situations, §1326(a)(1) probably requires that the debtor commence making payments with the first pay period after the filing of the plan.

* * * *

The counting of the three-year and five-year periods in §1322(d) is further complicated by the “disposable income test” requirement in §1325(b)(1). The applicable commitment period that is part of the disposable income test in §1325(b)(1)(B) is

counted “beginning on the date that the first payment is due under the plan”. Again, the first date that “payment is due under the plan” may be the first payment after confirmation or it may be the first payment required to be made by the debtor under §1326(a)(1).

Reading together the plan duration provisions of §§1322(d), 1325(b)(1)(B), and 1326(a)(1), it would make some sense to count all three periods from the same initial point in time. The earliest time at which most Chapter 13 debtors will be required to commence making payments is fixed by §1326(a)(1) —“the debtor shall commence making the payments proposed by a plan within 30 days after the date of the filing of the plan or the order for relief, whichever is earlier.” Bankruptcy Rule 3015 requires a Chapter 13 debtor to file a plan with the petition or within 15 [now 14] days after filing the petition. Except in the rare Chapter 13 case where the plan proposes that payments shall not commence immediately, Chapter 13 debtors will be required to commence making payments no later than 30 days after the filing of the petition (since it is unlikely that the filing of the plan will precede the filing of the petition).

Counting the three-year and five-year time periods in §§1322(d) and 1325(b)(1) from the point at which payments are required to commence by §1326(a)(1) minimizes the potential for manipulation of the counting of time periods by delay in reaching confirmation, and provides an easy point from which to calculate the duration of the plan in all Chapter 13 cases.

Norton Bankruptcy Law and Practice, Third Edition, Par. 149-18. pp. 149-139-142 (footnotes omitted).

Neither the Bankruptcy Code nor the Bankruptcy Rule set out when a plan term begins and when a plan term ends. The Court concurs with the result reached by those Courts as set out in Chase’s initial Brief, See Footnote No. 4, Supra, and rejects the analysis of the Court in West v. Costen, 826 F.2d at 1378, cited by the Debtor. Thus, the Debtor’s Plan term commenced 30 days after her August 6, 2009 Petition and Plan was filed, or on September 5, 2009. The Court in In re Musselman, correctly decided that the five-year maximum term of a Chapter 13 plan is to be calculated from the due date of the debtor’s first payment unless the plan pursuant to §1326(a)(1) and not from the date of the debtor’s first payment after the plan is confirmed..

In concurring with the analysis of Norton Bankruptcy Law and Practice and Lundin, Chapter 13 Bankruptcy, as set out above, this Court, as was the Court in In re Musselman, is also persuaded by

the conclusions reached by the Court in the case of In re Evans, 183 B.R. 331 (Bankr. S. D. Ga 1995). The Evans Court rejected the decision of the Fourth Circuit in West v. Costen, 826 F. 2d 1376, 1378 (4th Cir. 1987) cited by the Debtor, and stated as follows:

The appropriate time from which to calculate the length of the Chapter 13 plan is the date at which the debtor is first obligated to begin making payments. In re Duckett, 139 B.R. 6, 8 (Bankr. E. D. TX 1992). See also In re Woodall, 81 B.R. 17, 18 (Bankr. E. D. AK 1987); In re Neill, 158 B.R. 93, 97 (Bankr. N. D. Oh 1993); In re Howell, 76 B.R. 793 (Bankr. D. Or 1986). To allow the payment limitation period to begin at confirmation would allow for intentional delays in achieving confirmation to manipulate the mandatory time periods set forth in §1322(c) [now §1322(d)]. In re Cobb, 122 B.R. 2, 27 (Bankr. E. D. Pa 1990). Additionally, commencing the time length of the payment period from confirmation would impose an additional burden on the debtors, not authorized by the Code, requiring the making of perpetuation payments due pursuant §1326(a)(1), but not counting those payments under the term set forth in the plan. The five-year maximum repayment period imposed by §1322(c) and §1329(c) would be impermissibly extended by the amount of time passing between filing and confirmation.

* * * *

[t]he most logical point from which to begin counting the repayment period is the time the debtor is first required to make payments under §1326(a)(1).

* * * *

In this case the plan was filed May 28, 1991, thus the first payment thereunder was due June 28, 1991. Cause having been demonstrated and a five-year plan of repayment having been confirmed November 11, 1991, the plan payments must be concluded by June 28, 1996, five years after the date the first payment was due under the confirmed plan.

Id. 183 B.R. at 332-34.

The Debtor filed her Petition and Plan on August 6, 2009. Thus, pursuant to §1326(a)(1) her first Plan payment was due on September 5, 2009. Based on the Conclusions of Law by the Court as set out above, the duration of the Debtor's five-year Plan is calculated to commence on September 5, 2009 and will end on September 5, 2014. By Stipulation of the parties it was agreed that the last originally scheduled payment on Chase's Secured Claim is January 1, 2015. Accordingly, the last payment on the Debtor's Plan is prior to the last originally scheduled payment on Chase's Secured

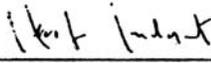
Claim. As a result, the Debtor may not apply §1322(c)(2) to “cram down” Chase’s Secured Claim. It is therefore,

ORDERED, ADJUDGED, AND DECREED, that the Objection to Confirmation should be and is hereby **SUSTAINED**. And it is further,

ORDERED, ADJUDGED, AND DECREED, that the Debtor file an Amended Plan within 30 days of the date of the entry of this Order, or the Court may dismiss or convert this case without further notice and hearing.

The Clerk shall enter this Order on a separate document.

Dated: May 13, 2010



JUDGE, U. S. BANKRUPTCY COURT

Debtor
Attorney Kopko
Attorney Dearing
Trustee