

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

In re: Case No. 9:13-bk-09610-FMD
Chapter 13

Amanda Mayer,

Debtor.

**ORDER (1) VACATING ORDER
DENYING MOTION TO EXTEND
AUTOMATIC STAY AND (2) SCHEDULING
FINAL EVIDENTIARY HEARING ON
MOTION TO DISMISS FOR BAD FAITH
FILING AND DEBTOR'S MOTION TO
EXTEND THE AUTOMATIC STAY**

THIS CASE came on for consideration of the Court's own motion for the purpose of considering the entry of an appropriate order. On August 22, 2013, the Court conducted a preliminary hearing on the *Motion to Dismiss Chapter 13 Bankruptcy Petition for Bad Faith Filing* filed by Thomas R. Starck (the "Motion to Dismiss") (Doc. No. 14) and on the *Debtor's Motion to Extend the Automatic Stay Pursuant to §362(c)(3)(B)* (the "Motion to Extend") (Doc. No. 19).

In order to rule in the Debtor's favor on the Motion to Extend, the Court was required to find that there has been a change in the Debtor's personal or financial circumstances since the dismissal of her prior case and that the current case would conclude with a confirmed plan that would be fully performed.¹ At the hearing, the parties stipulated that the debt owing to Mr. Starck, which is secured by a mortgage on the Debtor's principal residence, had matured by its

¹ The Debtor filed the Motion to Extend because she had filed a prior bankruptcy case that was pending within the year prior to the filing of this case; pursuant to 11 U.S.C. 362(c)(3), the automatic stay terminates on the 30th day after the filing of the later case unless the Court finds that the presumption of bad faith set forth in § 362(c)(3) is rebutted by clear and convincing evidence.

own terms prior to the filing of this case.² Because Mr. Starck's loan had fully matured prepetition, the Court concluded that 11 U.S.C. § 1322(b)(2), which prohibits a debtor from modifying the rights of a holder of a claim that it is secured solely by the debtor's principal residence, would preclude the Debtor from obtaining confirmation of a Chapter 13 plan. Therefore, the Court denied the Motion to Extend and granted the Motion to Dismiss. On August 28, 2013, the Court entered its order denying the Motion to Extend (Doc. No. 23).

However, upon further reflection, the Court has determined that § 1322(c)³ provides an exception to the anti-modification provisions of § 1322(b)(2). Section 1322(c) states

Notwithstanding subsection (b)(2) and applicable nonbankruptcy law –

...

(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. (emphasis supplied.)

Section 1325(b)(5) is generally read to permit debtors, *inter alia*, to cure defaults on claims that are secured by the debtor's principal residence.

The Fourth Circuit Court of Appeals held in an unpublished opinion, *In re Henry*, 153 F. App'x (4th Cir. 2005), that a fully matured claim secured by the debtor's principal residence could not be paid through the debtor's Chapter 13 plan because the "proposal constituted an impermissible modification of

² Mr. Starck's proof of claim (Claim No. 2-1) states that the balance owed on account of his claim is \$26,055.54.

³ Unless otherwise stated, all references herein are to the United States Bankruptcy Code, 11 U.S.C. § 101, *et seq.*

the terms of the debt.”⁴ However, numerous courts have expressly held that a Chapter 13 plan may provide for the payment of a claim secured by the debtor’s principal residence that matured prior to the filing of the bankruptcy petition if the plan provides for the payment of the claim in full during the term of the plan.⁵ For example, in *In re Kelly*, 283 B.R. 808 (Bankr. M.D. Fla. 2002) the court held:

This amendment [11 U.S.C. § 1322(c)(2)] leaves no doubt that a debtor in a Chapter 13 may deal with a fully matured mortgage provided the mortgage is fully paid off and satisfied before the last payment on the mortgage under the confirmed Chapter 13 Plan is due.⁶

And, *In re Palacios*, 2013 WL 1615790, the Bankruptcy Appellate Panel for the Ninth Circuit implicitly held that § 1322(b)(5) permits a balloon payment on a mortgage that has matured prepetition to be cured through a Chapter 13 plan that provides for full payment to the mortgagee over the life of the plan.

In light of the case law that supports the Debtor’s ability to obtain confirmation of a Chapter 13 plan that provides for payment in full of Mr. Starck’s claim over the term of the plan, the Court has reconsidered its rulings made orally at the August 22, 2013 hearing and will conduct a final evidentiary hearing on the issues raised in the Motion to Dismiss and the Motion to Extend.

Accordingly, it is

ORDERED:

1. The Order Denying the Motion to Extend the Automatic Stay Pursuant to §362(c)(3)(B) (Doc. No. 23) is hereby **VACATED**.

2. A final evidentiary hearing on the Motion to Extend and the Motion to Dismiss shall be held

⁴ 153 F. App’x at 147.

⁵ See *In re Hinton*, 2005 WL 2483243 (Bankr. M.D. Fla.); *In re Brannon*, 2010 WL 1657642 (Bankr. M.D. Ala.).

⁶ 283 B.R. 808, 810.

on September 17, 2013, beginning at 1:30 p.m. at the United States Courthouse, Room 4-117, Courtroom E, 2110 First Street, Fort Myers, Florida.

3. The automatic stay is imposed until further order of the Court.

4. The Debtor’s Emergency Motion to Reconsider Order Denying Motion to Extend Automatic Stay and Order Dismissing Case (Doc. No. 24) is hereby **DENIED AS MOOT**.

DONE and **ORDERED** in Chambers at Tampa, Florida, on August 29, 2013.

_____/s/_____
Caryl E. Delano
United States Bankruptcy Judge

Attorney David Lampley is directed to serve a copy of this order on interested parties and file a proof of service within 3 days of entry of the order.