

IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
Eastern Division

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U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

In Re:

In Proceedings Under Chapter 13

FABIAN AND TARI MEDVEC

Case No.: 10-14374

Debtors.

JUDGE RANDOLPH BAXTER

MEMORANDUM OF OPINION AND ORDER

The matters before the Court are objections to the confirmation of Debtors' Amended Plan filed by Geauga Savings Bank, Deutsche Bank National and BAC Home Loans Servicing (the "secured creditors.") The Court acquires core matter jurisdiction over this proceeding pursuant to 28 U.S.C. § 157(b)(2), 28 U.S.C. § 1334, and General Order Number 84 of this District. After considering the parties' pleadings, including briefs in support of their respective positions, and conducting an evidentiary hearing, the Court rules as follows:

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The Debtors own several parcels of property, each of which is subject to mortgages held by the secured creditors. With respect to each property, the Debtors are seeking to bifurcate the secured creditors' claims pursuant to 11 U.S.C. § 506(a) into secured (for the fair market value) and unsecured (the remaining balance). The Debtors also seek to reamortize each of the loans to 30 years and lower the interest rate to three-percent. Finally, the Debtors are seeking to waive all arrearages. Prior to the hearing, the parties stipulated to certain facts, including the validity of

the mortgages, the amount of the arrearages, and the value of the various properties. The parties also agreed that no evidence would be presented with respect to the issues raised.

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The secured creditors object to the treatment of their claims as proposed by Debtors' Amended Plan, on the basis that the Amended Plan violates the five year limitation on plan length found in § 1322(d) and § 1325(a)(5). Secured creditors argue that if their claims are to be modified pursuant to § 1322(b)(2), then their claims must be paid in their entirety during the life of the Debtors' plan. The secured creditors allege that Debtors can, alternatively, utilize the 1322(b)(2) "strip and pay" provisions or § 1322(b)(5)'s "cure and maintain provisions," but not both.

In response to the secured creditors' objections, the Debtors allege that § 1322 is in the conjunctive and that they are permitted to utilize multiple provisions under that section. Debtors further allege, without citation to any statutory or other authority, that they are able to modify the secured claims and reamortize the loans because under the plan, they promise a "future stream of payments" for 25 years after the plan has concluded. Debtors claim that this "future stream of payments" satisfies the five year time limitations found in §§ 1325(a)(5)(B)(ii) and 1322(d).

The issue for the Court's determination is whether Debtors' plan satisfies the five year time limitation found in 11 U.S.C. §§ 1325(a)(5)(B)(ii) and 1322(d).

Title 11 U.S.C. § 1322 governs the contents of a plan and states, in pertinent part:

- (b) Subject to subsections (a) and (c) of this section, the plan may—
 - (2) 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, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims;
 - (3) provide for the curing or waiving of any default;
...
 - (5) 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;
- (d) . . . the plan may not provide for payments over a period that is longer than 5 years.

Title 11 U.S.C. § 1325 governs confirmation of a plan, and states, in pertinent part:

- (a) Except as provided in subsection (b), the court shall confirm a plan if—
 - (1) the plan complies with the provisions of this chapter and with the other applicable provisions of this title;
...
 - (5) with respect to each allowed secured claim provided for by the plan—
 - (A) the holder of such claim has accepted the plan;
 - (B)(ii) the plan provides that the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim.

Legislative History to Section 1325

. . . With respect to secured claims provided for by the plan, the holder of the claim must have accepted the plan, or the debtor must either distribute under the plan the value, as of the effective date of the plan, to the holder of the claim, property of a value that is not less than the allowed amount of the secured claim, as determined under proposed 11 U.S.C. § 506(a), or the debtor must surrender the property securing the claim to the holder of the claim.

Title 11 U.S.C. § 1328 addresses discharge of a debtor's debts, and states, in pertinent part:

- (a) Subject to subsection (d), as soon as practicable after completion by the debtor of all payments under the plan, . . . the court shall grant the debtor a discharge of all debts provided for by the plan . . . except any debt—
 - (1) provided for under section 1322(b)(5).

A debtor seeking reorganization under Chapter 13 bears the burden of establishing that the plan complies with the statutory requirements for confirmation. *In re Petrella*, 230 B.R. 829, 832 (Bankr.N.D. Ohio 1999). Therefore, the Debtors must demonstrate by a preponderance of the evidence that their plan satisfies the requirements of 11 U.S.C. § 1325. *See Grogan v. Garner*, 498 U.S. 279 (1991)(preponderance of the evidence standard presumed to be applicable in civil actions between private parties.) The requirements found in § 1325 are “requirements that the debtor must satisfy in order to qualify a Chapter 13 plan for confirmation.” *Shaw v. Aurgroup Financial Credit Union*, 552 F.3d 447, 457 (6th Cir. 2009).

The Debtors have failed to meet their burden to show that their proposed amended plan complies with 11 U.S.C. § 1325 and § 1322(d). Specifically, the Debtors have failed to show that their plan complies with § 1325(a)(5)(B)(ii), which requires that secured claims provided for in the plan be paid in full during the plan period and § 1322(d) which limits the term of a plan to five years. The only provision that contemplates payments beyond five years is § 1322(b)(5). That provision, however, requires a debtor to cure arrearages “within a reasonable time” and maintain payments on “any secured claim on which the last payment is due after the date on which the final payment under the plan is due.”

Notably, herein, Debtors do not seek to cure arrearages. Instead, Debtors seek to modify the secured claims pursuant to § 1322(b)(2), while waiving all arrearages pursuant to §1322(b)(3). Debtors’ proposed amended plan does not invoke cure and maintain provisions of § 1322(b)(5) and, accordingly, there is no provision which would relieve Debtors from paying the entire secured claim during the life of the plan. Because neither §§ 1322(b)(2) nor (b)(3) contemplate payments beyond the plan period, the Debtors need to pay the modified secured claims within five years. *See In re Barnes*, 32 F.3d 405, 408 (9th Cir. 1994)(“the court may not approve a [plan] period that is longer than five years. . . . The plan in this case provides for payments over a period of nineteen years. The Debtors did not cure defaults under the Creditors’ mortgage and thus § 1322(b)(5) is inapplicable.”) This result is consistent with the legislative history to § 1325, which states that secured claims provided for by the plan must either be accepted by the creditor, paid in full under the plan, or the property must be surrendered by the debtor. H.R.Rep. No. 595, 95th Cong., 1st Sess. 430 (1977).

The cases cited by Debtors in support of their position are inapposite. In those cases, the debtor was attempting to modify the secured claim pursuant to § 1322(b)(2) and cure and maintain payments pursuant to § 1322(b)(5). See *In re Jerrils*, 2010 WL 297941 (Bankr.S.D.Fla. 2010)(“Under § 1322(b)(2) and (5), the Debtors may both reduce the Creditor’s secured claim to the value of the collateral and maintain payments on the secured claim, over the length of the original note and beyond the length of the Debtors’ chapter 13 plan.”); *In re Ferriera*, 223 B.R. 258, 262 (D.R.I. 1998)(“although bifurcation may modify the creditor’s ‘rights’ within the meaning of (b)(2), it does not preclude the application of subsection (b)(5) when payments are ‘maintained’ in accordance with the terms of the original indebtedness.”).

The case of *In re Murphy*, 175 B.R. 134 (Bankr.D.Mass 1994), cited by the Debtor, is actually supportive of the secured creditors’ opposition. Therein, the debtor sought to bifurcate the secured claim and amortize the secured portion of the claim over the remaining term of the original mortgage, thereby changing the monthly payment amount. In ruling against the debtor, the court stated that “the flexibility that the Debtor seeks with respect to his Chapter 13 plan is simply unavailable.” *Id.* at 137.

Finally, the Debtors’ argument that the “stream of payments” they promise to pay for 25 years after conclusion of the plan satisfies § 1325 is not supported by any statutory or other persuasive authority. Such argument is especially without merit given that the promised 25 years of future payments would be discharged upon completion of the plan pursuant to 11 U.S.C. § 1328. Notably, § 1328 excepts from discharge any debt “provided for under section 1322(b)(5).”

Accordingly, having cited no statutory or other authority in support of their proposed Amended Plan, said Amended Plan is denied confirmation. The secured creditors' objections are sustained on the basis that the Debtors' Amended Plan fails to comply with the five year time limitation found in §§ 1325 and 1322(d).¹

IT IS SO ORDERED.

Dated, this 15th day of
November, 2010.


JUDGE RANDOLPH BAXTER
UNITED STATES BANKRUPTCY COURT

¹An additional issue regarding the Debtors' principal residence was raised by BAC Home Loans. Because confirmation is denied on the basis of failure to comply with § 1325 and § 1322, the Court need not decide this issue.