

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO**

In re: ANTHONY RAY LUCERO,
dba ERO Snacks, fdba Pure Vending,
fdbba ERO Vending,

No. 13-15-11782 JR

Debtor.

ORDER GRANTING MOTION FOR RELIEF FROM STAY

THIS MATTER is before the Court on the Motion for Relief from Stay/Codebtor Stay and Abandonment of Property Located at 2720 Wade Blvd., Clovis, NM 88101 (the “Motion”), filed by The Bank of New York Mellon, as Trustee Series CWALT 2004-J2, its assignees and/or successors, by and through its servicing agent PNC Mortgage, a division of PNC Bank, N.A. (“Creditor”). *See* Docket No.99. The Court held a final, evidentiary hearing on the Motion by video to Roswell, New Mexico, on June 30, 2017. Karen Weaver appeared for Creditor, and Wesley Pool appeared for Debtor.

FACTS

Based on the evidence admitted at the final hearing on the Motion, and on the parties’ stipulations, the Court FINDS:

1. Creditor holds a promissory note dated January 22, 2004 in the original principal amount of \$317,000, signed by the Debtor, Anthony Ray Lucero, and the co-debtor, Rudonda B. Lucero (“Note”).
2. The Note is secured by a mortgage on certain real property located at 2720 Wade Blvd, Clovis, New Mexico 88101 (the “Property”).
3. The Property is the Debtor’s principal residence.
4. A second mortgage encumbers the Property.

5. The Debtor filed a voluntary petition under Chapter 13 of the Bankruptcy Code on July 1, 2015.
6. The Debtor filed a Chapter 13 plan on the same date.
7. On November 9, 2017, the Debtor filed an amended Chapter 13 plan.
8. The Court confirmed the Debtor's amended Chapter 13 plan on December 17, 2015.
9. Debtor's confirmed Chapter 13 plan required payments of \$1,060 for 4 months beginning July 30, 2015, then \$876 for 2 months beginning November 30, 2015, and then \$906 for the remaining 52 months, for a total plan term of 58 months.
10. The parties stipulated, for purposes of the hearing on the Motion only, that the current value of the Property is \$460,000.
11. As of May 31, 2017, the balance due Creditor under the Note was \$298,185.71.
12. The Debtor has not made a full mortgage payment to the Creditor since August 2016. A full monthly mortgage payments appears to be \$2,320.41. Debtor's post-petition arrearage on the mortgage exceeds \$15,000. *See* Exhibit C.
13. Creditor requested relief from the automatic stay for cause under 11 U.S.C. § 362(d)(1).
14. Debtor previously obtained a loan modification, but unsuccessfully sought other loan modifications with the Creditor.
15. Cause exists to modify the automatic stay.

DISCUSSION

The Court previously ruled that Creditor is adequately protected by the equity in the Property. *See* Order Denying Motion for Relief from Stay, Docket No. 98. Creditor argues that Debtor's failure to make post-petition payments on the Note is sufficient cause for the Court to grant Creditor relief from the automatic stay. Debtor argues that he had difficulty meeting his financial obligations for reasons beyond his control but has recently caught up his plan payments that, among other things, cure pre-petition arrearages over time, and is prepared to begin making direct payments to Creditor on the Note to be applied to post-petition amounts due of \$625.00 per week. At that rate, it would take more than three years for Debtor to bring current the post-petition amounts due under the mortgage.

Section 362(d)(1) provides that the Court shall grant relief from the automatic stay "such as by terminating, annulling, modifying, or conditioning such stay [] for cause, including the lack of adequate protection of an interest in property of such party in interest . . ." 11 U.S.C. § 362(d)(1). Whether cause exists to grant relief from the automatic stay falls within the Court's sound discretion. *Franklin Sav. Ass'n v. Office of Thrift Supervision*, 31 F.3d 1020, 1023 (10th Cir. 1994) ("We review the district court's decision whether to lift the stay under an abuse of discretion standard") (citation omitted); *In re JE Livestock, Inc.*, 375 B.R. 892, 893-94 (10th Cir. BAP 2007) ("We review a bankruptcy court's determination of 'cause' under Section 362(d)(1) for an abuse of discretion.") (citation omitted). As this Court has previously held, "[a]n ongoing post-petition default in a debtor's payment of the regular mortgage payments can constitute sufficient cause for relief from the automatic stay." *In re Bollinger*, No. 13-10-13688 JR, 2011 WL 1380218, at *3 (Bankr. D.N.M. Apr. 12, 2011) (citations omitted). Debtor does not deny that he has not made a complete mortgage payment to Creditor since August 2016. Debtor's

ongoing post-petition default on the Note constitutes sufficient cause to grant Creditor relief from the automatic stay.

“Once a creditor makes an initial showing that cause exists to grant relief from the stay, the burden shifts to the debtors to establish that they are entitled to continuation of the automatic stay.” *Bollinger*, 2011 WL 1380218, at *3 (citations omitted). Debtor seeks to meet that burden by proposing to make payments on the Note on a schedule that would bring the past due post-petition payments current over a period of time.

Under Bankruptcy Code § 1322(b)(2), a plan may not modify the rights of a creditor whose claim is “secured only by a security interest in real property that is the debtor’s principal residence.” 11 U.S.C. § 1322(b)(2).¹ *See also, Griffey v. U.S. Bank (In re Griffey)*, 335 B.R. 166, 167-68 (10th Cir. BAP 2005) (observing that § 1322(b)(2) “bars a debtor from modifying the rights of a creditor who has a claim secured only by the debtor’s principal residence.”) (quoting *McDonald v. Master Fin., Inc. (In re McDonald)*, 205 F.3d 606, 609 (3rd Cir.2000)). This Code provision, sometimes known as the anti-modification clause, likewise prevents court approval of a post-confirmation plan modification that modifies the debtor’s payment obligations to a creditor whose claim is secured solely by the debtor’s principal residence. *See In re Kurtz*, 502 B.R. 238, 243 (Bankr. D. Colo. 2013) (post-confirmation plan modification under § 1329 “requires the court to find that sections 1322(b)(2) and (5) have been complied with.”).

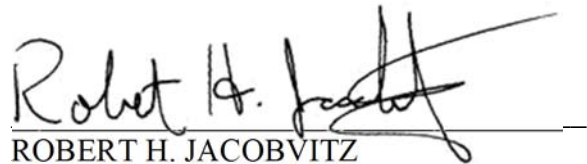
Debtor’s proposal to resist stay relief by making payments to Creditor to cure the post-petition arrears over time is the functional equivalent of a post-confirmation plan modification in contravention of § 1322(b)(2). Denial of Creditor’s motion for relief from stay to prevent

¹ A plan can, however, provide for the curing of pre-petition mortgage arrears over the life of the plan. *See* 11 U.S.C. § 1322(b)(5).

Creditor from exercising default remedies based on Debtor's post-petition payment defaults so long as Debtor makes those payments on a new schedule constitutes an impermissible post-confirmation plan modification. Where, as here, Debtor is proposing to materially alter his post-petition payment obligations under the mortgage, the anti-modification clause bars Debtor from successfully resisting stay relief.

For these reasons, the Court finds and concludes that cause exists to grant Creditor relief from the automatic stay. Debtor has not shown that he is entitled to a continuation of the stay.

WHEREFORE IT IS ORDERED, that the Motion is GRANTED.


ROBERT H. JACOBVITZ
United States Bankruptcy Judge

Date entered on docket: August 17, 2017

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