UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEW MEXICO

In re: DANIEL A. JARAMILLO, No. 11-16-10106 JS

Debtor.

ORDER DENYING MOTION TO SET ASIDE DEAULT ORDER GRANTING RELIEF FROM THE AUTOMATIC STAY

THIS MATTER is before the Court on the Debtor's Motion to Set Aside Stay Relief ("Motion"). *See* Docket No. 42. Debtor requests the Court to set aside a Default Order Granting Motion for Relief from Stay and to Abandon Property Located at 416 Trujillo Ln, Taos, NM 87571 ("Default Order"). *See* Docket No. 24. In support of the Motion, Debtor asserts that, because of a change in counsel, he did not have full and fair opportunity to oppose stay relief. Beal Bank, as successor by merger to Charter Bank, its successors and assigns ("Beal Bank"), opposes the Motion.

The Court heard oral argument on the Motion on September 30, 2016.[1] At the conclusion of the hearing, the Court took the matter under advisement.

At the hearing, the Court questioned whether the anti-modification provision found in 11 U.S.C. § 1123(b)(5)[2] would prevent the Debtor from seeking to restructure the loan from Beal Bank to him through a Chapter 11 plan. At the Court's invitation, Debtor filed a brief following the hearing. Debtor concedes that a debtor may not modify the amount due a secured creditor secured solely by the debtor's principal residence, but asserts that he nevertheless may pay Beal

[1] With the parties' permission, the Court took judicial notice of the documents filed of record in this bankruptcy case and in the Debtors' prior bankruptcy cases, and took judicial notice of the docket filed in the state court foreclosure action. The Court also admitted certain matters in evidence by stipulation of the parties.

[2] References to § or Section, unless otherwise indicated, refer to sections of the United States Bankruptcy Code, 11 U.S.C. §§ 101 *et. seq*.

Bank the full amount of its claim over the life of the plan. *See* Points and Authorities on Motion to Set Aside Stay Relief ("Brief") – Docket No. 44. Debtor's Brief also suggests, for the first time, that, even if Debtor cannot re-amortize Beal Bank's mortgage through a Chapter 11 plan, he can propose a plan under which the property would be sold to a third party and pay Beal Bank's claim would be paid in full.

Because the anti-modification provision found in §1123(b)(5) prevents the Debtor from re-writing the loan through a Chapter 11 plan, and because there is no evidence now before the Court of the Debtor's ability to sell the property to a third party, Debtor is not entitled to relief from the Default Order.

FACTS

1. Debtor filed a voluntary petition under Chapter 13 of the Bankruptcy Code on January 22, 2016. *See* Docket No. 1.

2. Debtor filed a Chapter 13 Plan, which estimated the claim of Beal Bank in the amount of $385,000.00, and estimated the amount of pre-petition arrearages in the amount of $120,000. *See* Docket No. 8. In the schedules, Debtor stated that the value of the collateral pledged to Beal Bank is "unknown." In is proposed Chapter 13 Plan, Debtor listed the value of the collateral pledged to Beal Bank at $0.00, which the Court interprets as "unknown."

3. Beal Bank filed a motion for relief from stay on May 3, 2016. *See* Docket No. 21.

4. Beal Bank sought relief from the automatic stay for the purpose of enforcing its rights under the terms of certain notes, mortgages, security agreements and/or other agreements to which the Debtor is a party, and to foreclose its interest in real property located at 415 Trujillo Ln, Taos, New Mexico (the "Property"). *Id.*

5. The Property is the Debtor's principal residence.

6. Beal Bank's claim is secured solely by its security interest in the Debtor's principal residence.

7. Beal Bank's predecessor initiated a foreclosure action against the Debtor in the Eighth Judicial District Court, State of New Mexico, Taos County as Case No. D-820-CV-2011-00104 on February 28, 2011 (the "State Court Action").

8. Beal Bank obtained a judgment for foreclosure in the State Court Action on October 21, 2015.

9. Debtor was unable to confirm a Chapter 13 plan because the amount of the pre-petition mortgage arrears was too high. *See* Motion, ¶ 2.

10. Debtor converted his Chapter 13 case to Chapter 11 on July 12, 2016.

11. On June 2, 2016, Beal Bank obtained relief from the automatic stay by default to permit it to complete foreclosure of its lien against the Property.

12. This bankruptcy case is at least the second bankruptcy case the Debtor has filed in the face of Beal Bank's (or its predecessor's) efforts to foreclose its interest in the Property. *See* Case No. 7-14-11534 TA.[3]

13. A foreclosure sale of the Property is scheduled in the State Court Action on October 3, 2016.

[3] The Debtor has filed seven prior bankruptcy cases in this district:
Case No. 98-17554-m11
Case No. 01-15558-s13
Case No. 02-17384-m13
Case No. 03-13681-m13
Case No. 03-18105-m13
Case No. 11-11588-j13
Case No. 14-11534-t7

DISCUSSION

Section 1123(b)(5) prohibits a Chapter 11 individual debtor from modifying the rights of secured creditors whose claims are "secured only by a security interest in real property that is the debtor's principal residence." 11 U.S.C. § 1123(b)(5). The same provision is found in Chapter 13. *See* 11 U.S.C. § 1322(b)(2). Debtor asserts that he may propose a plan to pay Beal Bank over the life of a Chapter 11 plan of reorganization despite the anti-modification provision contained in § 1123(b)(5). The Court disagrees. In support of his argument, Debtor cites *In re Bovino,* 496 B.R. 492 (Bankr.N.D.Ill. 2013). *Bovino* is inapplicable inasmuch as it involved "investment properties," which are not subject to the anti-modification provision applicable to claims secured solely by a debtor's principal residence.

The intended purpose of the Bankruptcy Code's anti-modification provisions applicable to claims secured only by a debtor's principal residence is "to prevent debtors from altering the size and timing of installment payments or modifying other provisions of the contract." *In re Haake,* 483 B.R. 524, 533 (Bankr.W.D.Wis. 2012) (referring to § 1322(b)(2)) (citing *In re Clark,* 738 F.2d 869, 873 (8th Cir. 1984)). Chapter 11's anti-modification provision contained in § 1123(b)(5) prevents a debtor from "unilaterally rewrite[ing] the terms of a home loan . . . by reducing the principal balance to the current value of the home, lowering the interest rate, or providing for a new amortization schedule." *In re Wofford,* 449 B.R. 362, 364 (Bankr. W.D.Wis. 2011). *Accord, Haake,* 483 B.R. at 533 (quoting *Wofford,* 449 B.R. at 364). *See also, In re Homitz,* 2014 WL 3721998, *2 (Bankr.W.D.Pa. July 24, 2014) (citing *Haake,* 483 B.R. at 533).[4]

[4] *Cf. Anderson v. Hancock,* 820 F.3d 670, 673-674 (4th Cir. 2016) (observing that "[c]ourts have . . . 'interpreted §1322(b) to prohibit any fundamental alteration in a debtor's obligations, *e.g.*, lowering monthly payments, converting a variable interest rate to a fixed interest rate, or extending the repayment term of a note.'") (quoting *In re Litton,* 330 F.3d 636, 643 (4th Cir. 2003)).

Debtor also suggests that "de-acceleration of a homestead mortgage is not a prohibited 'modification' of a claim secured by the debtor's principal residence, but is a 'permissible and necessary concomitant of the power to cure defaults.'" *Haake,* 483 B.R. at 531 (quoting *Clark,* 738 F.2d at 872). But, to de-accelerate a mortgage secured only by the debtor's principal residence by curing defaults under a Chapter 11 plan, the Debtor would be required to effectuate the cure "'in full, prior to or on the effective date of the plan" so as to "restore the parties to their pre-default state.'" *In re Cottonwood Corners Phase V, LLC* 2012 WL 566426, *13 (Bankr.D.N.M. Feb. 17, 2012) (quoting *In re Schatz,* 426 B.R. 24, 27 (Bankr.D.N.H. 2009)); 11 U.S.C. § 1124(2) (providing that a creditor is unimpaired if the debtor cures any pre-petition default).[5] There is no evidence now before the Court that the Debtor would be able to cure the pre-petition arrearage of at least $120,000.00 by a plan effective date. To the contrary, the Debtor conceded that he was unable to cure the pre-petition arrears under his proposed five-year Chapter 13 plan.

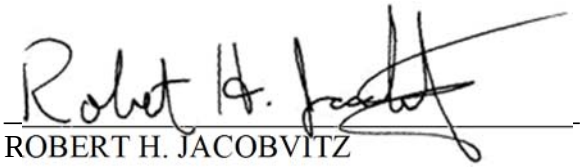
As for Debtor's stated intention to sell the Property to a third party to pay Beal Bank in full, there is simply no evidence in the record to support a finding that there is any realistic prospect that Debtor would be able to sell the Property for the amount needed to pay Beal Bank in full. If the Debtor is able to obtain a purchaser for the Property as he indicates in his Brief, he will be able to pursue his redemption rights under state law as part of the State Court Action. *See* N.M.S.A. 1978 § 39-5-18 (Repl. Pamp. 2006) (redemption of real property).

In sum, the Debtor has raised insufficient grounds to set aside the Default Order. Re-amortization of the mortgage through a Chapter 11 plan is not permitted under the anti-

[5] There is no counterpart in Chapter 11 to §1322(c)(2), which allows a debtor to cure prepetition arrearages on a loan secured solely by the debtor's principal residence before the last payment is due under the plan.

modification provision found in § 1123(b)(5). Debtor has presented no evidence in support of an ability to cure the pre-petition arrears by a plan effective date, or to sell the Property for enough to pay Beal Bank in full. The Court need not, therefore, consider whether the Debtor otherwise may have satisfied the requirements to set aside the Default Order under Fed.R.Civ.P. 60(b).

WHEREFORE, IT IS HEREBY ORDRED that the Motion is DENIED.



ROBERT H. JACOBVITZ
United States Bankruptcy Judge

Date entered on docket: September 30, 2016

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