



ORDERED in the Southern District of Florida on January 16, 2015.

A handwritten signature in black ink, appearing to read "Laurel M. Isicoff". The signature is written over a horizontal line.

**Laurel M. Isicoff, Judge
United States Bankruptcy Court**

Tagged Opinion

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

In re CASE NO. 14-15585-BKC-LMI
GENE C. LENTZ and MARIA LENTZ, Chapter 13
Debtors.

**ORDER DENYING MODIFICATION OF DEBTORS' SECOND MODIFIED PLAN
AND GRANTING STAY RELIEF**

THIS MATTER came before me on the Debtors' Second Modified Plan (ECF #52) and Memorandum of Law in support (ECF #76). Two objections to the proposed Second Modified Plan were filed—one by the Chapter 13 Trustee, Nancy Neidich ("Trustee") (ECF #55) and one by Community Bank of Florida ("Community Bank" or the "Bank") (ECF #56). An evidentiary hearing was held on November 19, 2014 on the Second Modified Plan, Community Bank's Motion for Relief from the Automatic Stay (ECF #21) and Community Bank's Motion for Allowance of Administrative Expense Claim (ECF #63). Prior to the hearing the parties submitted a Stipulation¹

¹Stipulation Regarding Community Bank of Florida, Inc.'s: (1) Motion for Relief from the Automatic Stay; (2) Objection to Debtor's Motion to Modify Plan; And (3) Motion for the Allowance of Administrative Expense Claim (ECF #66).

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outlining the remaining legal and factual disputes. I have considered the evidence presented, the testimony of the witnesses, the memorandum of law filed by the Debtors, and the arguments of counsel. For the reasons that follow, the modification is denied and Community Bank's Motion for Relief from Stay is granted.

FACTS

On May 18, 2005, the Debtors, Gene C. Lentz and Maria Lentz, executed a credit agreement with Community Bank (the "Credit Agreement"). Along with the Credit Agreement, the Debtors executed a mortgage on their principal residence to secure the indebtedness reflected in the Credit Agreement. The Debtors' real property is located at 125 Marina Avenue, Key Largo, Florida 33070 (the "Property"), more particularly described as:

Lot 25, Port Largo, according to the Plat thereof, as recorded in Plat Book 5, at Page 3 of the Public Records of Monroe County, Florida.

The mortgage was recorded in Official Records Book 2117 at Pages 331-336 of the Public Records of Monroe County, Florida (the "Mortgage").

Between 2005 and 2009, Community Bank extended additional credit to the Debtors and permitted modifications to the Credit Agreement. Eventually, after the Debtors' default in October 2009, Community Bank commenced a foreclosure action in the Circuit Court of Monroe County. On February 11, 2014, the Circuit Court entered judgment in favor of Community Bank for \$527,601.55 and set a judicial sale date of March 18, 2014. On March 11, 2014, the Debtors filed their chapter 13 petition for relief.²

The Debtors filed several chapter 13 plans. The Debtors filed their first plan on March 24,

²The foreclosure judgment was appealed by the Debtors to Florida's Third District Court of Appeal. Part of the dispute that is the subject of the appeal is whether Community Bank breached a pre-foreclosure modification

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2014 (ECF #16), which plan was amended on May 1, 2014 (ECF #25). The Debtors filed their Second Amended Chapter 13 Plan (ECF #39) which plan was confirmed on June 6, 2014. (ECF #41). However, a mortgage mediation was unsuccessful, and so, on August 4, 2014 the Debtors filed their First Modified Chapter 13 Plan, followed a week later by the Second Modified Plan³ (ECF #52), which is the plan that was the subject to the evidentiary hearing and this ruling.

The Second Modified Plan proposes payments to creditors that escalate over time:

Months 1-4: \$3,351.12 per month
 Months 5-9: \$4,484.45 per month
 Months 10-59: \$6,185.00 per month
 Month 60: \$409,591.56

Of those payments, the following amounts are to be paid to the Bank:

Month 1-4: \$2,480 per month
 Month 5-9: \$3,500 per month
 Month 10-59: \$5,000 per month
 Month 60: \$368,632.40

Community Bank and the Trustee raised several objections to the Second Modified Plan, centered primarily around feasibility. The disputed issues of law identified in the Stipulation focus on whether the Debtors may confirm a plan with 59 equal monthly payments and a balloon, and whether the proposed treatment complies with the applicable provisions of the Bankruptcy Code.

ANALYSIS

A modified plan must comply with the requirements of 11 U.S.C. §§1322(a), 1322(b), 1323(c) and 1325(a). Section 1325(a)(5) requires that if the debtor proposes to retain the property,

agreement.

³Under this Court's Administrative Agreed Order of Referral to Loss Mitigation Mediation, a debtor seeking to mediate a mortgage modification may file and confirm a plan that includes payments to the lender of the lesser of 31% of the debtor's income or the regular monthly payment. If the mediation is unsuccessful, then the debtor must modify the plan to surrender the property or conform to the proof of claim filed by the lender.

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and the lender does not accept the proposed treatment, then the plan payments to the lender, if made periodically “shall be in *equal monthly amounts*.” 11 U.S.C. §1325(a)(5)(B)(iii)(I) (emphasis added).

In their closing, the Debtors argued that the requirement for equal monthly payments only applies to loans secured by personal property. I invited the Debtors to submit a memorandum of law in support of that argument,⁴ which the Debtor did submit the memorandum⁵, but the Debtors did not address the argument they raised at closing—that is, that the requirement for equal monthly payments applies only to personal property. Rather, in their memorandum the Debtors argue that they “are proposing to pay *equal* payments through month 59 of the proposed modified plan.” (emphasis in original). There is a split in the courts regarding whether a plan that provides for equal payments to a lender with a balloon as the final payment satisfies the requirements of section 1325(a)(5)(B)(iii)(I). *Compare In re Spark*, 509 B.R. 728, 730 (Bankr. M.D. Fla. 2014) (“Both the plain language of § 1325 and its legislative history support the conclusion that balloon payments are not permitted in a chapter 13 plan.”) with *In re Ramirez*, No. 13-20891-AJC, 2014 WL 1466212, at *3 (Bankr. S.D. Fla. Apr. 7, 2014) (finding that a balloon payment is permissible so long as the plan is feasible). *See also In re Sanchez*, 384 B.R. 574, 576 (Bankr. D. Or. 2008) (discussing split of authority and the effect of changes to Bankruptcy Code as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005).

However, I do not need to decide this issue because, as illustrated above, the Second Modified Plan does not provide for equal monthly payments and a final balloon. Rather, the Second Modified Plan provides two step ups to a fixed payment in months 10-59. Thus, the Debtors’ Plan is

⁴ Community Bank was allowed the opportunity to file a response to any memorandum submitted but Community Bank chose not to file any response.

⁵ The memorandum of law was not filed by the Debtor, but rather, emailed to the Court and opposing counsel. The

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not confirmable. Even if, because of the failed mortgage modification mediation, the two step ups do not violate section 1325(a)(5)(B)(iii)(I), the Debtors' Second Modified Plan is not confirmable because the Debtors have failed to prove the Second Modified Plan is feasible. The Debtors have failed to provide any evidence that would support their ability to make the balloon payment in month 60 of the plan.

Finally, because the Debtor's Second Modified Plan is not confirmable and the Debtors have not been paying the real estate taxes on the Property, Community Bank is entitled to complete stay relief.

ORDERED AND ADJUDGED:

1. Community Bank's objection to the Second Modified Plan is sustained.
2. Community Bank's Motion for Relief from Stay is Granted.
3. Because Community Bank's Motion for Stay Relief is Granted, Community

Bank's Motion for Payment of Administrative Expense is denied without prejudice.

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Copies furnished to:
James Allen Poe, Esq.
Nicholas Bangos, Esq.
Nancy Neidich, Chapter 13 Trustee

Attorney Nicholas Bangos shall serve a conformed copy of this order upon all parties in interest and file a Certificate of Service with the Clerk of Court.