2021 Honorable William H. Gindin Bench Bar Conference

April 23, 2021

Chief Judge Michael B. Kaplan,

United States Bankruptcy Court – District of New Jersey

Recent Caselaw on Mortgage Forbearance Agreements/Loan Modifications

1. *Reed v. Pigora Loan Servicing LLC*, No. 1:20-CV-1035-LY-SH, 2021 WL 84354 (W.D. Tex. Jan. 11, 2021)

FORBEARANCE

The Debtor defaulted on his loan after passing away. Four months later, Creditor scheduled a foreclosure sale. Debtor's daughter sent a letter to Creditor requesting a six-month forbearance. After receiving no response, Debtor's daughter filed suit to stop the foreclosure alleging it violated the foreclosure moratorium provision of the CARES Act.

The Court granted Defendant's motion to dismiss for failure to state a claim because the Debtor's daughter failed to prove she was the legal executor of the Debtor's estate, therefore holding no authority to bring suit or officially request a forbearance on behalf of the Debtor.

2. *Wilmington Sav. Fund Soc'y, FSB as Tr. of Residential Credit Opportunities Tr. V v. Clay*, No. CV 20-217 KG/LF, 2020 WL 6544242 (D.N.M. Nov. 6, 2020)

FORBEARANCE

Plaintiff took action to foreclose on Defendant's property. The Clerk entered a default judgment pursuant to FRCP 55(a) on July 9, 2020. On August 25, 2020, Defendant filed a timely motion to dismiss pursuant to FRCP 56, alleging the CARES Act prohibited lenders and servicers from finalizing a foreclosure judgment or sale through August 31, 2020, and asserted he is exercising his right to economic hardship forbearance under the CARES Act, which includes deferments of payments, interest, fees and penalties for 180 to 360 days.

The Court granted Plaintiff's motion for default judgment and denied the motion to dismiss, holding (1) Defendant did not explain his failure to plead or otherwise defend in a timely manner; (2) that setting aside the Clerk's entry of default will prejudice the Plaintiff; (3) Defendant did not contest defaulting on the loan; (4) HUD terminated the FHA insurance on their mortgage in 2014, so their mortgage is no longer federally backed so the lender is not prevented from finalizing foreclosure; and (5) economic hardship forbearance also requires a federally backed mortgage.

3. *Harlow v. Wells Fargo & Co.*, No. 5:20-CV-00046, 2021 WL 907107 (W.D. Va. Mar. 9, 2021)

FORBEARANCE, RICO

Defendant brought an adversary proceeding in district court to withdraw the case against them from bankruptcy court and consolidate it with another case. Plaintiffs brought suit in bankruptcy court after Defendant placed their mortgages into forbearance without their consent by filing false documents. Plaintiffs allege the forbearance will cause dismissal or denial of their plans in bankruptcy court. Plaintiff's filed an eight-count adversary complaint, including an objection to false forbearance notices, abuse of the bankruptcy process and violation of the Racketeering Influenced and Corrupt Organizations Act (RICO).

The court granted Defendant's motion to withdraw and consolidate the case pursuant to 11 U.S.C. §157(d) because consideration of a RICO violation constitutes a substantial and material consideration necessary of review by the more suitable district court.

4. *In re McCollum*, 624 B.R. 604 (Bankr. D.S.C. 2021)

FORBEARANCE, ARREARS

The Court confirmed Debtor's plan although they missed payments for more than three months because the plan provided treatment for a vast majority of Creditor's secured claims in a forbearance agreement and the dollar amount of missed payments appeared de minimis.

5. *Woodson v. Bd. of Directors of Harbor Hill Condo. Homeowners Ass'n*, No. 20-CV-03135-AGT, 2020 WL 5291916 (N.D. Cal. Sept. 4, 2020)

FORBEARANCE

Defendant filed a motion to dismiss pro se Debtor's/Plaintiff's Complaint. No opposition was filed, so the Court granted Defendant's motion. As best as the Court could tell from Plaintiff's Complaint, Plaintiff owned a condominium in Tiburon, California, and he contended that under section 4022(b) of the CARES Act, the HOA must temporarily forbear from collecting a $47,727 special assessment that he owed and that will be used to pay for repairs and improvements of the condominium complex. The HOA argued that section 4022(b) doesn't require the forbearance Woodson requested, and the Court agreed explaining that the CARES Act forbearance provision only applies to federally backed mortgages, which does not include HOA fees.

6. *In re Ritter*, No. 1:19-BK-11838-MT, 2021 WL 864092 (Bankr. C.D. Cal. Mar. 5, 2021)

DISCHARGE & FORBEARANCE

The Debtor failed to make payments pursuant to a loan modification achieved under 11 U.S.C. §1329(d), then filed for immediate discharge of all debts. The Debtor argued she met all statutory requirements for a COVID discharge because the plan provided for the curing of defaults and maintenance of payments on residential mortgages and they have entered into a forbearance or loan modification agreement. Debtor only provided a stipulation of financial hardship with no evidence of income for that year, arguing she only had to meet the requirements of §1328(i) to qualify for a COVID discharge.

The Court held that though the Debtor qualified under §1328(i), she still had to meet the requirements of §1328(a) through (h).

7. *In re Gilbert*, 622 B.R. 859 (Bankr. E.D. La. 2020)

PLAN MODIFICATION

The Court had several motions to dismiss multiple bankruptcy cases filed by the chapter 13 Trustee and/or Debtors' motion to modify their plans pursuant to the CARES Act. In each case, except for one, Debtors argued they fell behind in payments owed under their confirmed plans due to unforeseen hardships and sought to cure their arrears by extending the terms past 60 months. In the one case, Debtors alleged they could still complete their plan in 60 months if they decreased the recovery to unsecured creditors. In all cases, Debtors confirmed their plans before March 27, 2020 and fell behind on their plan payments *before* the CARES Act was enacted. The Trustee objected to modification unless Debtors fell behind on payments after March 27, 2020, and the *sole* reason for the arrearages can be traced to the pandemic.

The Court held that the CARES Act, by its plain terms, did not require that Debtors had to be current in his or her plan payments prior to the pandemic in order to be entitled to modify plan pursuant to CARES Act provision, and any material financial hardship underlying modification request did not have to be caused *solely* by the pandemic.

8. *In re Bridges*, Bk. No. 19-31012, 2020 WL 6927557, at *1 (Bankr. S.D. Ill. July 30, 2020)

PLAN MODIFICATION

Debtor filed an amended plan on February 25, 2020, and the Trustee objected on February 27, 2020. A hearing was scheduled for April 30, 2020. At the hearing, Debtor's counsel argued that the court could use its equitable powers under 11 U.S.C. §105(a) to retroactively confirm the Debtor's plan to enable the Debtor to take advantage of a provision in the CARES Act that allows a debtor to modify a confirmed plan to extend past five years.

The court rejected Debtor's argument, holding that the plain language of the CARES Act does not leave room for discretion on the issue of timing, and requires the conclusion that since the

plan was not confirmed by March 27, 2020, she does not qualify for modification under §1329(d).

9. *In re Robinson*, No. 19-22498-BEH, 2020 WL 7234031 (Bankr. E.D. Wis. Dec. 8, 2020)

PLAN MODIFICATION

Debtor submitted a request to modify her confirmed chapter 13 plan and requested to extend her plan from 60 months to 84 months under the CARES Act. The problem for the Debtor was the fact that her plan was originally confirmed four days *after* the enactment of the CARES Act as there was an administrative delay in submitting the confirmation order. Debtor's counsel argued that but for the delay, her plan would have been confirmable before the March 27, 2020 date. The trustee looked to the plain meaning of the text, which states the plan must be confirmed *before* March 27, 2020.

The Court held that there is no reason to read beyond the text of the statute, and this is in line with other cases determining eligibility periods under Section 1329(d). Citing *In re Drews*, 617 B.R. 579, 580 (Bankr. E.D. Mich. 2020) (declining to extend the period of the debtor's plan under 11 U.S.C. § 1329(d) where the debtor's plan was not confirmed prior to March 27, 2020); *In re Roebuck*, 618 B.R. 730, 733 (Bankr. W.D. Pa. 2020) (same).

10. *In re Drews*, 617 B.R. 579 (Bankr. E.D. Mich. 2020)

PLAN MODIFICATION

Debtors' confirmed 60-month Chapter 13 plan could not be modified to extend time for payment beyond the plan's five-year term, based on provision of Section 1329(d) of the CARES Act that permitted plan extensions out to seven years after the due date of the first payment under the plan as originally confirmed, where Debtors' original plan was confirmed after the date that the Cares Act was enacted; this provision of the CARES Act applied only to plans confirmed prior to enactment of the CARES Act.

11. *In re Campbell*, 624 B.R. 602 (Bankr. D.S.C. 2021)

DISCHARGE, ARREARS

Debtor and Creditor filed a proposed settlement order under 11 U.S.C. §362. Debtor's plan provided treatment of Creditor's claim pursuant to 11 U.S.C. §1322(b)(5) by curing pre-petition arrearage and maintaining future contractual payments. After the settlement order was granted, Creditor files a response to Trustee's pre-settlement Notice of Final Cure Payment showing that Debtor had outstanding post-petition fees, charges and other premiums incurred from Creditor's force placed insurance stemming from Debtor's mortgage. Creditor's new fees accumulated after the settlement order was filed.

The court granted Debtor's request for a discharge pursuant to 11 U.S.C. §1328(a), accepting the 11 U.S.C. §362 settlement as an indication of the creditor's prior agreement to postpone the amounts being cured in the agreement.

12. *In re Pressley*, No. CV 20-01397-HB, 2021 WL 625174 (Bankr. D.S.C. Feb. 2, 2021)

PLAN MODIFICATION

Debtor failed to make plan payments, even after she and the Trustee agreed to a pre-confirmation moratorium delaying payments in July 2020, and a consent order in September 2020, providing that should the case be dismissed, it would be with prejudice. Two months after the consent order was approved, Debtor defaulted, and Trustee filed a motion to dismiss with prejudice. Debtor filed a motion to modify the confirmed plan to lower her payments significantly for eight months to $150, raise the amount to $200 for the next eight months, then begin paying $7,800 for 44 months, on the belief that her pre-COVID job offer will still remain once the pandemic dissipates.

The Court denied Debtor's motion to modify the plan because it does not show that the plan meets the requirements of 11 U.S.C. §1323(c) and §1325(a)(5) and (6). Debtor did not propose to surrender the property, the plan does not adequately provide for payment of Creditor's claim, Creditor is prejudiced by interest accruing on its debt without remedy, and Debtor's ability to repay is speculative.

13. *Winnegrad*, No. 19-22700, 2021 WL 219519, (Bankr. D.N.J. Jan. 21, 2021)

PLAN MODIFICATION

Debtors' plan was confirmed on March 17, 2020. On October 20, 2020, Trustee filed a motion to dismiss for failure to make plan payments. Debtors filed a modified plan on November 25, 2020 proposing zero-dollar monthly payments for 24 months after Debtor-husband was laid off and Debtor-wife's hours at work were limited due to COVID. Debtors contend the provision of the CARES ACT and 11 U.S.C. §1329(d) requires confirmation of a Chapter 13 modification if the plan is confirmed as of March 27, 2020 and the debtors suffered financial hardship due to COVID.

The Court held that Debtors qualified for modification under §1329(d) because their original plan was confirmed before March 27, 2020, and they are suffering material financial hardship due to COVID. However, Debtors must still propose a modified plan that conforms to the requirements of §1325(a).

14. *In re Fowler*, No. 16-31791-WRS, (Bankr. M.D. Ala. Nov. 13, 2020)

PLAN MODIFICATION
***This is two cases*- Fowler *and* Lewis, *but Lewis is not a numbered case. Both cases are discussed under the Fowler citation.*

Fowler. Debtor-Fowler received plan confirmation on September 19, 2016. Trustee filed a motion to dismiss on September 3, 2019 due to lapse in payments. At the hearing, Fowler argued her default was due to reduced income after retiring, but her family was helping her make payments. The Trustee argued her plan payments must increase from $105 to $126 biweekly to maintain feasibility. After a few months, an order releasing wages on June 15, 2020 led her to amend her schedules to reflect that her only source of income was social security and a small pension. Fowler moved to modify her plan under 11 U.S.C. §1329(d) to reduce payments and extend her plan from 60 to 84 months due to COVID. Trustee objected due to Fowler's pre COVID defaults and the fact that but for those defaults, she would have paid out her case in full prior to enactment of §1329(d).

The Court granted Fowler's motion to modify her plan under §1329. The reason that her fixed income and small pension do not financially insulate her from the effects of the pandemic, her claim that she expounded financial resources to care for family members constitutes indirect financial hardship caused by COVID, and she otherwise satisfied the requirements of §1329(d).

Lewis. Debtor-Lewis received plan confirmation on December 19, 2020. Trustee filed a motion to dismiss her case on June 23, 2020 after Lewis stopped making payments beginning in March 2020 and had an overall pay record of 43.56%. Lewis filed a motion two days before the first hearing on Trustee's motion dismiss to modify her plan under §1329(d) to reduce her payments and extend her plan from 60 to 84 months alleging a decrease in work hours due to COVID. Trustee objected due to Lewis' pre COVID default on plan payments and continued failure to make plan payments, asserting that Lewis had not provided proof relating to a loss of hours due to COVID.

The Court granted Lewis' motion to modify her plan under §1329(d). They found that her reduction in hours is a direct financial hardship resulting from COVID, and pre-COVID defaults do not just denying modification under §1329(d).

15. *In re Roebuck*, 618 B.R. 730 (Bankr. W.D. Pa. 2020)

PLAN MODIFICATION

Debtor received confirmation of her plan shortly after the CARES Act passed the March 27, 2020 confirmation deadline to be considered for plan modification. Debtor requested the court to honor her interim confirmation given before March 27, 2020 as an equivalent to confirmation under 11 U.S.C. §1329 in order to invoke the modification and extension clause.

The Court denied Debtor's request, because an interim confirmation order does not yet satisfy §1325 and allowing an interim confirmation order goes against the bright line Congress drew establishing debtor eligibility.

16. *In re Harbin*, No. 15-40234, 2021 WL 1112446 (Bankr. E.D. Mich. Mar. 22, 2021)

PLAN MODIFICATION

Debtors brought a motion seeking to authorize the chapter 13 Trustee to disburse funds received post-expiration, but the Court construed the motion to be, in effect, a proposed modification of the Debtors' 60 month confirmed plan, to continue to provide for the 60 months of periodic payments to the Trustee, *plus* provide for the additional payment that the Debtors made to the Chapter 13 Trustee in September 2020, which was after the 60-month Plan expired. The approval of such a proposed plan modification would normally be impermissible, because the plan as modified would exceed the five-year limit in 11 U.S.C. § 1329(c). However, the proposed plan modification was permissible under Section 1329(d)(1) of the CARES Act.

The Court found that Debtors met the requirements of Section 1329(d)(1) as: (1) modification of the plan was not feasible because the plan expired and it would be inequitable to dismiss the case when Debtors paid into their plan for 60 months, and (2) Debtors suffered a hardship due to COVID when one Debtor had a heart attack and needed 24-hour care, leaving the Co-Debtor unable to find part-time employment at a time when companies were not hiring due to the pandemic.

17. *In re Alley*, No. 19-50716, 2020 WL 6891925 (Bankr. M.D.N.C. June 29, 2020)

PLAN MODIFICATION

Debtor filed a motion to modify their chapter 13 plan to extend the plan length from 60 to 84 months and reduce plan payments to "an amount as low as possible" to COVID-related hardships.

While the Debtor's loss of income, due to a temporary quarantine and the loss of overtime hours, may meet the definition of "material financial hardship," under Section 1329(d)(1)(B) allowing for plan modification, notice and hearing is still necessary. Here, Debtor failed to provide any estimate of the modified plan payment amount, nor any estimates for the amounts by which payments to individual secured creditors would decrease. This was not fair notice to affected creditors, as required by Section 1329(d).