UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

RONALD W. JOHNSON	CASE NO. 92-63316
Debtor	Chapter 13

APPEARANCES:

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STEPHEN D. GERLING, U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

The Court considers herein the motion of Ronald W. Johnson ("Debtor") seeking to modify his Chapter 13 Plan. Also before the Court is the motion of Source One Mortgage Services Corporation ("Source One") to modify the automatic stay in order to commence a state court foreclosure action against the Debtor's residence at 372 Bruce Street, Syracuse, New York.

Both motions were finally argued before this Court at Syracuse, New York on November 16, 1993 and the parties were given until December 15, 1993 to submit memoranda of law.

JURISDICTIONAL STATEMENT

This Court has core jurisdiction of these contested matters pursuant to 28 U.S.C. §§1334(b), 157(a), (b)(1) and (2)(G) and (L).

FACTS

On October 26, 1992, Debtor filed a voluntary petition pursuant to Chapter 13 of the Bankruptcy Code (11 U.S.C. §§101-1330)("Code"). Simultaneously with the filing of his petition Debtor also filed his Chapter 13 Plan.

At the time of filing his petition, Debtor owed Source One the approximate sum of $29,000 on an obligation secured by a mortgage on the Debtor's residence. In his proposed Plan, the Debtor provided that he would pay the Source One mortgage through his Plan at the rate of 9% interest per annum, even though the original mortgage bond required interest at 12 1/2% per annum. Source One did not object to the modification of its original mortgage obligation in Debtor's Plan and the Plan was confirmed by Order of the Court dated January 15, 1993.[1]

Following confirmation of the Plan, Debtor made few if any payments to the Chapter 13 Trustee ("Trustee") in accordance with the Plan and in turn the Trustee made no payments to Source

[1] The Order confirming Debtor's Plan provided that Source One was to receive a monthly payment of $755.94 for a total of 48 months or $36,285.12. The amount paid through the Plan represented a balance of Source One's mortgage of $29,876.65 amortized at 9% per annum.

One on its mortgage obligation.

Thus, on September 8, 1993, Source One filed a motion to modify the automatic stay and subsequent thereto on September 30, 1993, the Debtor moved to modify the Plan. The proposed modified plan would actually reduce the Debtor's monthly payment to the Trustee from $1,000 to $911.75 over 49 months, but increase the dividend from 92% to 100% to unsecured creditors. Such a result is due to the failure of numerous unsecured creditors to file proofs of claim. The proposed modified plan also purports to cure the post-petition default in payments on Source One's mortgage.

ARGUMENTS

Source One opposes Debtor's motion on the ground that the modified plan impermissibly modifies its mortgage debt in violation of Code §1322(b)(2) and that to permit such modification would be contrary to the recent decision of the United States Supreme Court in Nobleman v. American Savings Bank, 113 S.Ct. 2106, 124 L.Ed. 2d 228 (1993). Source One also argues that Debtor can't modify his Plan pursuant to Code §1329(a) in the absence of extraordinary and unanticipated change of circumstances occurring post-confirmation.

The Debtor responds that Source One is barred by principles of res judicata from asserting a violation of Code §1322(b)(2) because it did not object to Debtor's original Plan which also provided for the identical amortization of its mortgage

at 9% per annum.[2]

Debtor also asserts that payments were not previously made pursuant to his Plan because he believed a wage order was in effect and that Plan payments were being deducted directly from his paycheck by his employer. A Wage Order now being in effect, Debtor asserts that payments to the Trustee will be timely.

At oral argument, Source One appeared to offer as a reason for not objecting to Debtor's original Plan, the decision of the U.S. Court of Appeals, for the Second Circuit in In re Bellamy, 962 F2d 176 (2d. Cir. 1992), which it contends would have permitted the Debtor's modification of its mortgage in his original Plan. With the decision of the U.S. Supreme Court in Nobleman v. American Savings Bank, supra, 113 S.Ct. 2106, being issued subsequent to the confirmation of Debtor's original Plan, however, Source One asserts that it now has a legal basis to object to the proposed modification that it did not have at the time of the original confirmation hearing.

DISCUSSION

Source One raises a threshold issue that Debtor may not maintain a motion to modify his confirmed Plan, pursuant to Code §1329(a) unless he can show extraordinary and unanticipated changed circumstances occurring subsequent to the confirmation of Debtor's original Plan. The case law relied upon by Source One does not,

[2] Neither party appears to dispute the contention that Code §1322(b)(2) was violated by the Debtor's reduction in the interest rate provided in the original mortgage bond.

however, support its contention.

This Court previously in In re Walker, 114 B.R. 847, 850 (Bankr. N.D.N.Y. 1990) posited that a debtor, in order to modify its confirmed Chapter 13 plan, need only show a change in financial circumstances. The Court further observed, however, that "Code §1329 should be interpreted broadly to allow the plan to accommodate 'changed circumstances, so long as the modified plan would have been appropriate had the present circumstances existed originally'." Id., quoting In re Taylor, supra 99 B.R. 902, 904 (Bankr. C.D.Ill. 1989).

In Walker supra, this Court relied upon In re Moseley, 74 B.R. 791 (Bankr. C.D.Cal. 1987), Appeal dismissed, order vacated on other grounds, 101 B.R. 608 (9th Cir.BAP 1989), which distinguished between a motion to modify made by a debtor and a similar motion made by a creditor and concluded that a Code §1329 motion could be made by the latter only where circumstances had changed post-confirmation or where a post-confirmation default existed since any other modification "is barred by res judicata." Id. at 799.

In that same vein, Bankruptcy Judge Scholl in In re Gronski, 86 B.R. 428 (Bankr. E.D.Pa. 1988), a case relied upon by Source One, observed that "the power of a debtor to request post-confirmation amendments is much broader than that of a creditor." Id. at 432. So, too, 5 Collier On Bankruptcy ¶1329.01[1][b], at pages 1329-4 and 5, observes that the burden to show a substantial change in circumstances is on the trustee or an unsecured creditor in moving pursuant to Code §1329(a), but that no such requirement is placed upon a debtor.

Thus, this Court cannot agree with Source One that the Debtor here must show an extraordinary and unanticipated change of circumstances in order to seek modification of his Plan pursuant to Code §1329(a). While the Debtor's explanation for having missed substantially all of his post-confirmation payments to the Trustee and consequently his post-petition mortgage payments to Source One may not constitute a change of financial circumstances strictly speaking, it would seem to provide an adequate basis for the Court to entertain Debtor's motion. See In re Bereolos, 126 B.R. 313, 326 (Bankr. N.D.Ind. 1990); In re Davis, 34 B.R. 319 (Bankr. E.D.Va. 1983).

Next, the Court turns to Source One's contention that notwithstanding the concept of res judicata, the Debtor cannot modify his Chapter 13 Plan and then limit the Court's review of the modified plan to the specific change being proposed. Source One argues that a motion to modify brings before the Court the plan in its entirety, as modified, and that by virtue of Code §1329(b)(1), the modified plan must comply with Code §§1322(a), 1322(b), 1323(c) and 1325(a).

Conversely, the Debtor argues that res judicata applies to the original Confirmation Order and that Source One's failure to raise the Code §1322(b)(2) anti-modification provision by way of an objection to the original Plan bars it from asserting that provision in opposition to the modified plan because the latter plan does not propose to change the interest rate of 9% to be paid on the Source One mortgage.

Once again it would appear that Colliers agrees with

Debtor's position indicating that a creditor may object to a modified plan that is out of compliance with confirmation requirements, but "such parties may not raise issues as to aspects of the plan which have not changed, or issues which could have been raised at the confirmation hearing. The confirmed plan is res judicata as to all such issues." 5 Collier On Bankruptcy ¶1329.01 [1][a] at pages 1329-4 and 5. See also In re Stage, 79 B.R. 487, 488 (Bankr. S.D.Cal. 1987).

If it can be shown, however, that the post-confirmation modification of a plan becomes necessary due to unanticipated and substantial changes in the debtor's financial situation, the doctrine of res judicata may be inapplicable, particularly where a creditor seeks to compel a modification of debtor's plan. In the matter sub judice, Debtor's requested modification of his Plan is not due to either an unanticipated or a substantial change in Debtor's financial circumstances. It is driven by Debtor's failure to make post-confirmation payments to the Trustee (to include payments to Source One) due allegedly to Debtor's mistaken belief that Plan payments were being withheld from his wages and paid over to the Trustee by his employer pursuant to Court Order. See In re Bereolos, Supra 126 B.R. at 326.

There is no dispute here that Source One did not object to the confirmation of Debtor's initial Chapter 13 Plan. Debtor's proposed modified plan does not seek to modify the confirmed Plan other than to decrease the amount of the monthly payment, extend the term of the Plan by one month and actually increase the dividend to unsecured creditors from 92% to 100%.

This Court must reach the conclusion, as did the Court in Stage, that "a careful examination of §1329(b)(2) supports the debtor's position that only those portions of the Plan proposed to be changed are tested by §1329(b)(1)." Stage, supra, 79 B.R. at 488. Thus, Source One's challenge to the Debtor's modified plan to the extent that it seeks to invoke the anti-modification provisions of Code §1322(b)(2), must fail.

The Court also notes that while it does not appear to be a contested issue, it is of the opinion that modification of the Debtor's Chapter 13 Plan to cure post-petition defaults is permissible. See In re Hoggle, 12 F.3d 1008 (11th Cir. 1994); In re Gadlen, 110 B.R. 341, 343-45 (Bankr W.D.Tenn. 1990); In re Davis, 110 B.R. 834, 835-37 (Bankr. W.D.Tenn. 1989); In re McCollum, 76 B.R. 797, 800-01 (Bankr. D.Or. 1987).

In proposing to cure the post-petition and/or post-confirmation defaults, however, Debtor is required to do so with interest since to do otherwise would constitute an impermissible modification of Source One's mortgage. Additionally, interest would now appear to be mandated where as here the secured creditor appears to be fully secured by virtue of the recent decision of the United States Supreme Court in Rake v. Wade, 113 S.Ct. 2187 (1993). Therefore, while the Court concludes that modification of Debtor's Plan to cure the post-petition defaults is permissible, such cure must include interest at the "crammed down" rate of 9%.[3] See Davis, supra, 110 B.R. at 836.

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[3] It cannot be determined if the Debtor's proposed modified monthly payment of $911.75 includes interest on the arrears.

At oral argument, Source One fired its final salvo at the Debtor's res judicata assertion contending that at the time of confirmation of the Debtor's initial Plan, the law in the Second Circuit regarding Code §1322(b)(2) was controlled by the Court of Appeals decision in In re Bellamy, supra, 962 F.2d 176 (2d Cir. 1992) which had held generally that the bifurcation of a residential mortgage into secured and unsecured components did not result in an improper modification of the mortgagee's claim within the meaning of Code §1322(b)(2). Source One apparently contends that to have initially objected to the modification of its interest rate from 12.5% to 9% would have been successfully overcome by the Debtor citing to In re Bellamy and thus it was an issue that admittedly was not litigated at that time. Therefore, the principle of res judicata cannot apply.

The Court does not agree that the principle of res judicata can be so lightly breached that a litigant can fail to raise a meritorious issue regardless of the current state of case law at any intermediate appellate level only to later argue in litigation involving the same parties that his or her right to raise the issue has been preserved by a reversal of the appellate court. Additionally, there was no factual similarity between the contentions of the parties in Bellamy supra and the contentions of the parties before this Court, albeit the same section of the Bankruptcy Code, was in dispute.

Turning finally to Source One's motion to lift the automatic stay, it is apparent that the motion will be rendered moot by Debtor's modified plan and thus the Court will deny it

without prejudice.

Based, therefore, on the foregoing findings and conclusions it is

ORDERED that Debtor's motion to modify his Chapter 13 Plan previously confirmed by Order of this Court dated January 12, 1993, is granted; and it is further

ORDERED that Debtor shall file said modified plan with Clerk of the Court and serve same upon Source One and the Trustee, within fifteen (15) days of the entry of the order; and it is further

ORDERED that payment under said modified plan shall include interest on the post-petition arrears due and owing to Source One at the rate of 9%; and it is finally

ORDERED that Source One's motion to lift the automatic stay is denied without prejudice.

Dated at Utica, New York
this day of 1994

STEPHEN D. GERLING
U.S. Bankruptcy Judge