DOCKET NUMBER: 95-12515
ADV. NUMBER:
JUDGE: M. A. Mahoney
PARTIES: Robert Gilder Thomas
CHAPTER: 13
ATTORNEYS:
DATE: 12/4/95
KEY WORDS: confirmation
PUBLISHED: No

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

ROBERT GILDER THOMAS Case No. 95-12515-MAM-13

Debtor.

ORDER DENYING CONFIRMATION

The confirmation hearing on the Debtor's Chapter 13 plan is before this Court. The Court has jurisdiction to hear the matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. The matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). For the reasons indicated below, the Court is denying confirmation.

FACTS

The parties stipulated to the relevant facts. This debtor filed his Chapter 13 case on September 22, 1995. Prior to bankruptcy, he and his wife purchased his current residence at Whitehead Lane, Jackson, Alabama. Mr. and Mrs. Thomas encumbered the property with two construction loans from First Bank & Trust. Both loans were incurred on August 28, 1994 and both came due on August 28, 1995. The loans presently have balances owing of $44, 149.80 and $105,945.20 respectively. The parties agree that the debts are valid and are fully matured. There is no collateral for the loans except the residence. Although the parties disagree about the exact value of the homestead, they do agree that the property is worth more than the indebtedness to First Bank, and therefore First Bank is oversecured.

The Chapter 13 plan of Thomas offers direct payments to First Bank of $500.00 per month at 6% interest with a 30 year amortization. Any prepetition and postpetition arrearage claim will be paid through the plan. All creditors will be paid 100% of their claims through the

plan. First Bank is the only objector to the plan. The basis of its objection is that the plan proposes an impermissible modification of the bank's rights under Sections 1322 and 1325 and fails to give First Bank at least as much as it would receive in a Chapter 7 liquidation case.

LAW

The Debtor alleges that statutory changes in the Bankruptcy Reform Act of 1994 (BRA), which added subsection (c)(2) to 11 U.S.C. § 1322 to allow debtors to modify their obligation by curing a default which matured prior to the date on which the final plan payment is due, enables confirmation of his plan as proposed. The Debtor is only partially correct. 11 U.S.C. § 1322(c)(2) states:

> In a case on which the last payment on the original payment schedule for a claim secured only by a security interest in real property that is the Debtor's principal residence is due before the date on which the final payment under the plan is due, the plan may provide for the payment of the claim as modified pursuant to section 1325(a)(5) of this title.

This new provision has been addressed in three cases to date. *In re James*, 1995 Bankr. Lexis 1573 (Bankr. D. Or. 1995); *In re Chang*, 185 B.R. 50 (Bankr. N.D. Ill. 1995); *In re Escue*, 184 B.R. 287 (Bankr. M.D. Tenn. 1995). All of these cases agree that § 1322(c)(2) permits a debtor to provide for payment of the balance of their mortgage over the term of the Chapter 13 plan, even if the mortgage had matured prepetition.

> The Bankruptcy Reform Act of 1994 amended the Bankruptcy Code to permit modification of claims secured only by a security interest on the debtor's principal residence when the last payment on the original payment schedule is due before the date on which the final payment under the plan is due. Although the debtor cannot extend the mortgage term indefinitely, the debtor can pay the mortgage balance over the life of the Chapter 13 plan, a period which may be as long as five years.

In re Chang, 185 B.R. at 53.

The new § 1322(c)(2), together with § 1322(d), allows limited mortgage payment modifications, but all payments must be completed in 60 months. 11 U.S.C. § 1322(d) states:

> The plan may not provide for payments over a period that is longer than three years, unless the court, for cause, approved a longer period, but the court may not approve a period that is longer than five years.

Therefore, the Debtor's proposal to pay First Bank over a 30-year period is inappropriate.

Also, in Debtor's brief to this Court, his counsel raised the possibility of treating First Bank's claim through a process of negative amortization. He proposes to pay most of the amount due in a balloon payment at the end of the Chapter 13 case. Negative amortization is a procedure by which part or all of the interest on a secured claim is not timely paid, but instead is deferred and allowed to accrue. *In re Club Associates*, 107 B.R. 385, 398 (Bankr. N.D. Ga. 1989). The idea is to lower payments in the front end of a loan and add the accrued interest to the principal which is paid in a balloon fashion when "income is higher or the collateral is sold." *Id*. at 398, *citing*, *In re Conroy Investment Fund VIII Limited Partnership*, 96 B.R. 884 (Bankr. E.D. Wis. 1989). Generally, the net effect of negative amortization is to force a creditor to make a post confirmation loan to the debtor for some extended period of time. *Matter of D&F Construction, Inc.*, 865 F.2d 673, 676 (5th Cir. 1989).

This Court believes that negative amortization might be appropriate if the Chapter 13 plan treatment of the secured creditor meets the requirements placed on debtor's treatment of secured creditors under Chapters 11 and 12 of the Bankruptcy Code. The language of §§ 1129(b)(2)(A), 1229(a)(5)(B) and 1325(a)(5) is almost identical. Therefore, what is appropriate treatment under one chapter should be appropriate under the others as well.

Negative amortization has been approved by courts on a limited basis in Chapter 11 cases when the provision is found to satisfy the fair and equitable requirement of 11 U.S.C. § 1129(b). *See*, *Club Associates*, *supra*; *In re Anderson Oaks Limited Partnership*, 77 B.R. 108 (Bankr. W.D. Tex. 1987); *Century Investment Fund*, *supra*.

In these and other cases, the plan assures that the collateral will appreciate by more than the amount of the deferred interest. *Anderson Oaks*, 141 B.R. 453, 458 (Bankr. N.D. Ga. 1992). Alternatively, for such a plan to be feasible, the court must reasonably believe that the Debtor will be in a financial situation to satisfy this large obligation during the life of the plan. *See*, *In re Immenhausen Corp.*, 172 B.R. 343 (Bankr. M.D. Fla. 1994). Neither scenario is likely in the case at hand. In the immediate proceeding, the Debtor has offered a payment scheme with some unsubstantiated hope that he will be able to satisfy this obligation well into the future. This proof would not meet the tests.

Therefore, it is ORDERED that confirmation of the Debtor's proposed plan is DENIED.

It is further ORDERED that the Debtor submit an amended Chapter 13 plan no later than December 16, 1995 or the Debtor's case is subject to dismissal.

Dated: December 4, 1995

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MARGARET A. MAHONEY
U.S. BANKRUPTCY JUDGE