



A handwritten signature in blue ink that reads "Neil P. Olack".

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: May 20, 2015

The Order of the Court is set forth below. The docket reflects the date entered.

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF MISSISSIPPI**

IN RE:

**WILLIE E. BRITT,

DEBTOR.**

**CASE NO. 11-14780-NPO

CHAPTER 13**

**ORDER DENYING MOTION TO ADD
POST-PETITION FEES AND COSTS INCURRED BY MIDFIRST BANK**

This matter came before the Court for hearing on April 30, 2015 (the “Hearing”) on the Motion to Add Post-Petition Fees and Costs Incurred by MidFirst Bank (the “MFB Motion to Modify”)¹ (Dkt. 68) filed by MidFirst Bank (“MFB”), the Trustee’s Response to Motion to Add Post-Petition Fees and Costs Incurred by MidFirst Bank (the “Trustee Response”) (Dkt. 71) filed by Locke D. Barkley, the standing chapter 13 trustee (the “Trustee”), and the Response to Motion to Add Post-Petition Fees and Costs Incurred by MidFirst Bank [Dkt. 68] (the “Debtor Response”) (Dkt. 72) filed by Willie E. Britt (the “Debtor”) in the above-styled bankruptcy case.

¹ Although the MFB Motion to Modify is labeled as a “Motion to Add Post-Petition Fees and Costs Incurred by MidFirst Bank,” the Court determines that the true nature of the motion, according to its substance rather than its label, is a motion to modify a confirmed chapter 13 plan under 11 U.S.C. § 1329(a). *See Armstrong v. Capshaw, Goss & Bowers, LLP*, 404 F.3d 933, 936 (5th Cir. 2005) (“[W]e have oft stated that ‘the relief sought, that to be granted, or within the power of the Court to grant, should be determined by substance, not a label.’”) (citing *Edwards v. City of Houston*, 78 F.3d 983, 995 (5th Cir. 1996) (quoting *Bros. Inc. v. W.E. Grace Mfg. Co.*, 320 F.2d 594, 606 (5th Cir. 1963)).

At the Hearing, Evan J. Lundy represented MFB, W. Jeffrey Collier represented the Trustee, and Michael W. Boyd represented the Debtor. The Court, having considered the matter, finds² as follows:

1. On October 17, 2011, the Debtor filed a voluntary petition for relief pursuant to chapter 13 of the United States Bankruptcy Code (Dkt. 1) and a Chapter 13 Plan (Dkt. 5).

2. On October 18, 2011, the Debtor filed an amended Chapter 13 Plan (the “Plan”) (Dkt. 9), which proposed to pay MFB \$31,162.00 at a 7% interest rate over the life of the Plan for a claim secured by property located at “624 West McCorkle Circle, Greenville, MS” (the “Greenville Property”).

3. On January 4, 2012, the Court entered the Order Confirming the Debtor’s Plan, Awarding A Fee to the Debtor’s Attorney and Related Orders (Dkt. 17) confirming the Plan.

4. On February 24, 2012, MFB filed an amended proof of claim (the “MFB POC”) (POC 5-3) reflecting a claim of \$34,368.69 secured by the Greenville Property to be repaid at a 9.5% interest rate.

5. On February 28, 2012, the Debtor filed the Motion to Modify Chapter 13 Plan (the “Debtor Motion to Modify”) (Dkt. 20) requesting the Court to allow the Debtor to modify the Plan to treat MFB consistent with the terms of the MFB POC by paying MFB \$34,368.69 at a 9.5% interest rate over the life of the Plan.

6. On March 27, 2012, the Court entered the Order Granting Motion to Modify Chapter 13 [DKT 20] (Dkt. 25) granting the Debtor Motion to Modify.

7. On April 1, 2015, MFB filed the MFB Motion to Modify and the Notice of Post-petition Mortgage Fees, Expenses, and Charges (the “MFB Notice”) (Dkt. 67). In the MFB

² The following constitutes the findings of fact and conclusions of law of the Court without regard to where in the Order they are found.

Notice, MFB supplements the MFB POC and provides notice that it has incurred \$1,817.34 in post-petition fees, expenses, and charges that are recoverable against the Debtor's principal residence. In the MFB Motion to Modify, MFB requests the Court to allow \$1,817.34 in post-petition charges and \$50.00 in attorney's fees to be added to MFB's claim in the Plan and adjust the Debtor's plan payments accordingly.

8. On April 27, 2015, the Trustee filed the Trustee Response asserting that the Court should deny the MFB Motion to Modify because MFB, as a secured creditor, does not have standing to modify a confirmed chapter 13 plan under 11 U.S.C. § 1329.³

9. Also on April 27, 2015, the Debtor filed the Debtor Response stating that he has no objection to the Trustee paying MFB the post-petition expenses outlined in the MFB Motion to Modify.

10. Rule 3002.1 of the Federal Rules of Bankruptcy Procedure ("Rule 3002.1") applies only in cases under chapter 13 of the Bankruptcy Code and only to claims secured by a debtor's principal residence that are provided for under the debtor's plan pursuant to § 1322(b)(5). Rule 3002.1(c) requires creditors holding such claims to give debtors, debtors' counsel, and trustees notices itemizing post-petition fees, expenses, and charges incurred under the original loan documents within 180 days after the costs are incurred. FED. R. BANKR. P. 3002.1(c); *see In re Sheppard*, No. 10-33959-KRH, 2012 WL 1344112, at *2 (Bankr. E.D. Va. Apr. 18, 2012). Rule 3002.1 also provides a mechanism for a debtor or trustee to object to the payment of the requested post-petition costs and for the Court to resolve any such objection. FED. R. BANKR. P. 3002.1(e). The purpose of the rule is to protect a debtor and "prevent unexpected deficiencies in a mortgage when a case is completed and closed." 9 COLLIER ON

³ Hereinafter, all code sections refer to the United States Bankruptcy Code (the "Bankruptcy Code") found at title 11 of the United States Code unless otherwise noted.

BANKRUPTCY ¶ 3002.1.01 (16th ed. 2015). Thus, Rule 3002.1 was adopted to help prevent a situation where a debtor emerges from bankruptcy only to face a previously undisclosed arrearage and be forced to file another petition for relief under the Bankruptcy Code.

11. At the Hearing, MFB, the Trustee, and the Debtor stated that there is no dispute that (1) Rule 3002.1 applies in this instance; (2) MFB has complied with the noticing procedures set forth in the rule, and (3) the Debtor owes MFB the fees, expenses, and charges outlined in the MFB Notice. According to the parties, the only issue is whether MFB has the statutory standing⁴ to bring a motion to modify the Plan to adjust the amount being paid to MFB under the Plan to account for the post-petition fees, expenses, and charges as outlined in the MFB Notice. As previously explained, Rule 3002.1 creates a system in which debtors and trustees receive notice of post-petition costs incurred by a creditor who can recover said costs against the debtor's principal residence. Nothing in Rule 3002.1(c), however, suggests that such notice functions as a motion to modify a debtor's confirmed chapter 13 plan or gives a creditor the authority to move for such modification. *See In re Sheppard*, 2012 WL 1344112, at *4. Instead, the information disclosed through Rule 3002.1 is designed to enable the Debtor or the Trustee to take the appropriate steps to provide for the payment of costs incurred post-petition so that the Debtor is not faced with "unexpected deficiencies in a mortgage when a case is completed and closed." 9 COLLIER ON BANKRUPTCY ¶ 3002.1.01 (16th ed. 2015); *see In re Tollios*, 491 B.R. 886, 891 (Bankr. N.D. Ill. 2013); *In re Holman*, No. 12-50023, 2013 WL 1100705, at *2 (Bankr. E.D. Ky. Mar. 15, 2013); *In re Sheppard*, 2012 WL 1344112, at *4. Further, as the Trustee has stated,

⁴ While the Trustee solely used the term "standing" in the Trustee Response and at the Hearing, it is clear from the Trustee's arguments that she is alleging that MFB does not have statutory standing to move for a modification of the Plan under § 1329, not that MFB does not have constitutional standing under Article III of the United States Constitution. *See City of Farmers Branch v. Farmer (In re Pointer)*, 952 F.2d 82, 85 (5th Cir. 1992).

secured creditors do not have statutory standing to seek modification of a confirmed chapter 13 plan under § 1329.⁵ See *Weber v. Heitkamp (In re Hopson)*, 324 B.R. 284, 288 & n.3 (S.D. Tex. 2005) (explaining that secured creditors do not have statutory standing to seek modification under § 1329(a)); *Day v. Sys. & Servs. Techs., Inc. (In re Day)*, 247 B.R. 898, 902-03 (Bankr. M.D. Ga. 2000) (“A secured creditor cannot seek to modify a confirmed plan in any way.”); 8 COLLIER ON BANKRUPTCY ¶ 1329.03 (16th ed. 2015) (“[A] secured creditor has no right to move for modification of a plan.”). For these reasons, the Court finds that MFB does not have statutory standing to move for a modification of the Debtor’s Plan and, thus, the MFB Motion to Modify should be denied without prejudice to the ability of the Debtor or the Trustee to file a proper modification motion in accordance with § 1329.

IT IS, THEREFORE, ORDERED that the MFB Motion to Modify hereby is denied.

##END OF ORDER##

⁵ Specifically, § 1329(a) provides, in relevant part, that “after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, *upon request of the debtor, the trustee, or the holder of an allowed unsecured claim.*” 11 U.S.C. § 1329(a) (emphasis added). As the United States Supreme Court stated in *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 8 (2000), the theory that “the expression of one thing indicates the inclusion of others unless exclusion is made explicit . . . is contrary to common sense and common usage.”