SO ORDERED,

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: March 30, 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:

SHELIA D. NELSON, **CASE NO. 14-14503-NPO**

DEBTOR. **CHAPTER 13**

ORDER OVERRULING OBJECTION TO SECURED CLAIM

This matter came before the Court for hearing on February 12, 2015 (the "Hearing") on the Objection to Secured Claim (the "Objection") (Dkt. 9) filed by Shelia D. Nelson (the "Debtor") and the letter response (the "Letter Response") (Dkt. 14) filed by the Bank of Benoit in the above-styled bankruptcy case (the "Bankruptcy Case"). At the Hearing, Chris F. Powell represented the Debtor, and G. Adam Sanford represented Locke D. Barkley, the standing chapter 13 trustee (the "Trustee"). No attorney appeared at the Hearing on behalf of the Bank of Benoit.

In the Objection, the Debtor asserts that the Bank of Benoit has a claim of $8,830.03 secured by a "lot and trailer" and proposes to pay that amount at an interest rate of 10.069%, as purportedly set forth in the contract, at $187.93 per month for sixty (60) months. (Debtor's Ex. 1). Consistent with the Objection, the chapter 13 plan (the "Plan") (Dkt. 5) proposes to pay the

Bank of Benoit $8,830.03 at an interest rate of 10.069%. In its Letter Response, the Bank of Benoit did not oppose this treatment of its secured claim.

At the Hearing, the Court questioned whether the contract interest rate of 10%[1] or the *Till* rate of 5% should apply to the Bank of Benoit's secured claim. *See Till v. SCS Credit Corp*., 541 U.S. 465 (2004); Standing Order Designating Presumptive 11 U.S.C. § 1325(a)(5)(B) Interest Rate (July 8, 2014) (the "Standing Order"). The Debtor's counsel explained at the Hearing that he included an interest rate of 10.069% in the Objection and Plan because he believed that reducing the interest rate would violate § 1322(b)(2). Section 1322(b)(2) provides that a "plan may . . . modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence." 11 U.S.C. § 1322(b)(2).

On February 13, 2015, the Court issued the Order Regarding Submission of Brief on Applicable Interest Rate and Extending Deadline to Object to Confirmation (Dkt. 21) instructing the Bank of Benoit, through a Mississippi licensed attorney, to amend the Letter Response and submit a brief addressing the interest rate issue and the interaction between 11 U.S.C. § 1322(b)(2) and § 1325(a)(5)(B). The Court ordered the Bank of Benoit to file the amended response and brief within twenty-one (21) days and also extended the deadline to file a written objection to confirmation of the Plan by that same time period. The Bank of Benoit filed the Response by Creditor, Bank of Benoit, to Applicable Interest Rate (the "Amended Response") (Dkt. 25) through its counsel, Boyd P. Atkinson, on March 27, 2015 but did not file a brief or an objection to confirmation of the Plan. Although the Amended Response was untimely, the Court will nevertheless consider it along with the Objection. In the Amended Response, the Bank of

[1] The contract interest rate is 10%. (Debtor's Ex. 1). Counsel for the Debtor conceded at the Hearing that the Objection and Plan incorrectly used the interest rate of 10.069% set forth under the Truth in Lending Disclosures.

Benoit states that it does not object to application of the *Till* rate of 5%. Having heard the arguments of counsel for the Debtor and the Trustee and being fully advised in the premises, the Court finds that the Objection should be overruled for the reasons that follow.

The interest rate issue requires the Court to answer two questions: (1) Is the interest rate on the Bank of Benoit's claim subject to modification by the Debtor under the exception in § 1322(c)(2)? and (2) If the interest rate is subject to modification under § 1322(c)(2), what is the applicable Plan interest rate? On August 22, 2007, the Debtor signed a promissory note (the "Note") in favor of the Bank of Benoit in the principal amount of $27,116.90 (Debtor's Ex. 1). The Note is secured only by the Debtor's principal residence. By its terms, the Note became due in full on August 22, 2012, and on December 9, 2014 the Debtor filed the voluntary petition seeking relief under chapter 13 of the Bankruptcy Code (the "Petition") (Dkt. 1).

1. Is the Contract Interest Rate Subject to Modification?

Pursuant to 11 U.S.C. § 1325(a)(5), a chapter 13 plan must provide for a secured claim in one of three ways: (1) by obtaining the creditor's acceptance of the plan; (2) by surrendering the property securing the claim; or (3) by providing the creditor both a lien securing the claim and a promise of future property distributions (such as deferred cash payments) whose total "value, as of the effective date of the plan, . . . is not less than the allowed amount of such claim." 11 U.S.C. § 1325(a)(5). The third option is referred to as the "cram down option" because the debtor is permitted to keep the property over the secured creditor's objection. *Assocs. Comm. Corp. v. Rash*, 520 U.S. 953, 957 (1997). A debtor's power under § 1325(a)(5) to use the cram down option is limited by § 1322(b)(2), which expressly forbids the modification of a secured creditor's rights if the "claim [is] secured only by a security interest in real property that is the debtor's principal residence." 11 U.S.C. § 1322(b)(2). Known as the "anti-modification"

provision, § 1322(b)(2) prohibits any fundamental alteration in a debtor's obligations included in this provision, such as a reduction in the interest rate. *See Litton v. Wachovia Bank (In re Litton)*, 330 F.3d 636, 643-44 (4th Cir. 2003).

At first blush, § 1322(b)(2) would appear to preclude modification of the Bank of Benoit's claim because the Note is secured only by the Debtor's principal residence. A question raised by the Court at the Hearing was whether § 1322(c)(2) provides an exception to the anti-modification provision so that the Debtor may cram down the interest rate under § 1325(a)(5). Section 1322(c)(2) provides:

> Notwithstanding [§ 1322(b)(2)] and applicable nonbankruptcy law . . . in a case in 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.

11 U.S.C. § 1322(c)(2). In other words, § 1322(c)(2) allows a debtor to modify a mortgage creditor's rights if the chapter 13 plan proposes to pay the creditor in full during the plan term and if the last payment on the original payment schedule is due before the date on which the final payment under the plan is due. 8 COLLIER ON BANKRUPTCY ¶¶ 1322.01, 1322.06[1][a] (16th ed. 2014). This provision has been interpreted by a majority of courts as applying to mortgages that mature prior to the petition date. *See* KEITH M. LUNDIN & WILLIAM H. BROWN, CHAPTER 13 BANKRUPTCY § 143.1 (4th ed. 2004); *see also In re Sanders*, 521 B.R. 739, 744 (Bankr. S.C. 2014); *In re Young*, 199 B.R. 643, 653 (Bankr. E.D. Tenn. 1996) (recognizing that § 1322(c) applies to "not only short-term home mortgages . . . but also the traditional long-term mortgages . . . which have less than five years remaining under the terms of the loan").

The Fifth Circuit Court of Appeals has not addressed whether varying the contract rate of interest on a mortgage is permissible under § 1322(c)(2) and § 1325(a)(5) but has cited with

approval *First Union Mortgage Corp. v. Eubanks (In re Eubanks)*, 219 B.R. 468, 479 (B.A.P. 6th Cir. 1998), for its discussion of the legislative history of § 1322(b)(2):

> Legislative History of the Bankruptcy Reform Act of 1994 reveals that between 1991 and 1994 both houses of Congress repeatedly studied ways to reduce the protection of subordinate and "short term" mortgages in chapter 13 cases. Specifically, Congress considered the need for [an] exception to § 1322(b)(2) continuously. Thus, § 1322(c)(2) evinces a congressional determination to further define the proper balance between the interests of debtors and home mortgage creditors. By enactment of § 1322(c)(2), Congress sought to withdraw antimodification protection from certain classes of "second mortgages," including "short-term, high-interest rate home equity loans."

In re Bartee, 212 F.3d 277, 294 (5th Cir. 2000) (citing *Eubanks*, 219 B.R. at 479-80). In *Bartee*, the Fifth Circuit held that a one-time annual maintenance assessment imposed by a homeowner's association did not have an "original payment schedule" similar to that of a traditional mortgage and thus did not fall under the § 1322(c)(2) exception to the anti-modification provision. In this matter, it is undisputed that the Note had an "original payment schedule" and thus *Bartee* is inapposite. Nevertheless, the Fifth Circuit's citation of *Eubanks* is instructive because of the holding in *Eubanks* that mortgages that mature prior to final payment in a chapter 13 plan are subject to modification.

Here, the last payment "on the original payment schedule" was certainly due before the final payment under the Plan—indeed, the last payment under the Note was due before the filing of the Petition. Accordingly, the Court finds that because the Note matured before the Petition date and is secured only by the Debtor's principal residence, § 1322(c)(2) applies to allow the Plan to modify the contractual interest rate on the Bank of Benoit's secured claim. Having determined that the interest rate can be modified consistent with § 1325(a)(5) and § 1322(c)(2), the Court next considers what rate of interest rate should apply.

2. What is the Applicable Plan Interest Rate?

When a debtor utilizes the "cram down option," the applicable interest rate is determined using the "prime-plus" method embraced by the plurality in *Till*. *Till*, 541 U.S. at 479-80; *see Drive Fin. Servs., L.P. v. Jordan*, 521 F.3d 343, 348-50 (5th Cir. 2008); *In re Shameka Wells*, No. 14-02982-NPO (Bankr. S.D. Miss. Mar. 18, 2015) (Dkt. 67). The Standing Order sets a presumptive interest rate of 5% applicable to chapter 13 cases filed on or after August 1, 2014. *Till*, 541 U.S. at 478-79. The current prime rate is 3.25% and, therefore, the 5% presumptive interest rate incorporates a 1.75% risk adjustment. Although the plurality in *Till* declined to set the scale for risk adjustment, it observed that "other courts have generally approved risk adjustments of 1% to 5%." *Id*. at 480. *Till* places the burden of proof on secured claimants to increase the risk adjustment figure. *See, e.g., In re Washington*, No. 14-03588-NPO (Bankr. S.D. Miss. Mar. 18, 2015) (Dkt. 50). The Bank of Benoit did not present any evidence that the 1.75% risk adjustment should be further increased and, indeed, stated in the Amended Response that it had no objection to application of the *Till* rate. Accordingly, the Court finds that the presumptive interest rate applies, the Objection should be overruled, and the Bank of Benoit's secured claim of $8,830.03 should be paid at the *Till* rate of 5%. *See Till*, 541 U.S. 465.

IT IS, THEREFORE, ORDERED that the Objection hereby is overruled as set forth herein.

IT IS FURTHER ORDERED that the Debtor shall amend the Plan consistent with this Order within fourteen (14) days of the date of this Order.

##END OF ORDER##