

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO**
Bankruptcy Judge Elizabeth E. Brown

In re:

Margaret L. Kinney,

Debtor.

Bankruptcy Case No. 13-27912 EEB

Chapter 13

ORDER DISMISSING CASE PRIOR TO ENTRY OF DISCHARGE

THIS MATTER comes before the Court on the Motion to Dismiss Case Pursuant to 11 U.S.C. § 1307(c), filed by HSBC Bank USA, N.A. (the “Bank”) and the Debtor’s Response. The Debtor’s confirmed chapter 13 plan required her, for a period of sixty months, to make certain payments directly to the chapter 13 trustee (the “Trustee”) and to make her post-petition monthly mortgage payments directly to the Bank. The Debtor completed all the required payments to the Trustee. However, she admits that she failed to make the last three mortgage payments to the Bank during the plan period. The Debtor nevertheless asks the Court to deny the Bank’s motion and to allow her additional time to cure the arrearage and obtain a chapter 13 discharge. For the reasons set forth below and in this Court’s opinion in *In re Humes*, 579 B.R. 557 (Bankr. D. Colo. 2018), expressly incorporated herein, the Court holds that the Bankruptcy Code does not permit the Debtor additional time to cure plan arrearages after the plan has ended. As such, dismissal without entry of discharge is appropriate.

I. BACKGROUND

The Debtor filed her chapter 13 petition and a proposed plan on October 25, 2013. She is an above-median-income debtor and, as such, she was required to and did propose a plan with a five-year applicable commitment period. The proposed plan required her to make her first plan payment to the Trustee by November 25, 2013. This means her final payment was due no later than November 24, 2018. The Debtor’s confirmed plan required her to pay the Trustee a total of \$26,059 over the five-year period in various monthly amounts, as well as her direct mortgage payments to the Bank.

On July 18, 2018, approximately four and one-half months before the end of the Debtor’s plan, the Trustee issued a Notice of Final Cure Payment (“Notice”) to the Bank pursuant to Fed. R. Bankr. P. 3002.1(f). The Notice required the Bank to file a statement indicating whether the Debtor was current on the monthly mortgage payments required by her plan. On July 27, 2018, the Bank filed a response indicating that the Debtor was current on her mortgage through July. At that point, the Debtor had only four months left in her plan. Had the Debtor made the remaining mortgage payments for those months, she likely would have been eligible for discharge.

Unfortunately, the Debtor failed to make the payments due in September, October, and November. She also failed to make her December payment, but that payment falls outside of the plan period and, thus, does not impact her eligibility for discharge. Her arrearage for September, October, and November totals \$2,978.18.¹ These defaults prompted the Bank to file its Motion to Dismiss. The Bank argues this case should be dismissed under 11 U.S.C. § 1307(c)(6), which permits dismissal upon a finding of a material default of a term of the confirmed plan.²

The Debtor objects to dismissal. She acknowledges the arrearage but argues that it is not substantial and that she can cure it over the next few months. At a preliminary hearing on the matter, the Debtor emphasized that, in the past, the Trustee has had a practice of holding chapter 13 cases open past the end of the sixty-month plan term in order to allow debtors to cure arrearages. Debtor also indicated that on February 8, 2019 she paid the Bank three months' worth of past due payments. This means the Debtor has now paid all mortgage payments that were due during the plan, but did so two and one-half months late.

II. *IN RE HUMES* DECISION

This Court previously addressed a chapter 13 debtor's ability to cure a plan arrearage after a sixty-month plan has ended in *In re Humes*, 579 B.R. 557 (Bankr. D. Colo. 2018). In that case, the debtor-husband lost his job during the case. The debtors filed a modified plan that lowered their monthly plan payment but promised to file a modified plan to increase payments once the husband found new employment. When the husband secured new employment, the debtors neglected to modify the plan and instead completed their plan payments at the lower amount. When the chapter 13 trustee realized this fact at the end of the plan, he moved to dismiss the case. The parties then reached a settlement that required the debtors to pay an additional \$17,000, which approximated the amount they would have paid during the plan term if they had timely modified the plan to reflect the husband's new income.

This Court refused to approve the settlement and denied the debtors' request for entry of discharge. The Court first held that, because they were above-median income, the debtors were required to propose a plan with a five-year applicable commitment period. Although there is a split of authority on the issue, the Court held that this five-year period runs from the date specified in the plan for the first plan payment, as long as that date meets the requirements of § 1326(a)(1)(A). The applicable commitment period then ends five years after that date.

The Court then went on to analyze whether it had discretion to approve a stipulation that allowed the debtors to make their final plan payments more than seven months after the end of the five-year applicable commitment period. The Court

¹ Three payments of \$1,026.44 = \$3,079.32. The Bank indicated in its Motion that it was holding \$101.14 in a suspense account, leaving the outstanding arrearage at \$2,978.18.

² All references to "section" or "§" shall refer to Title 11, United States Code, unless expressly stated otherwise

recognized there are two schools of thought on the issue. The Third Circuit, in the case of *In re Klaas*, 858 F.3d 820 (3d Cir. 2017), concluded that a bankruptcy court has the necessary discretion under § 1307 to allow a debtor to cure a plan arrearage after the end of the plan term. Many courts have followed the Third Circuit. Other courts have adopted a more hardline approach and refused to allow a debtor to make payments past the end of the five-year plan term, deeming the end of the term to be a “drop dead date.”

This Court ultimately adopted the reasoning of the latter line of cases. The Court found the *Klaas* decision’s reliance on § 1307 unpersuasive. Although that section uses permissive language (“may” dismiss or convert as opposed to “shall”) that gives bankruptcy courts flexibility in choosing what remedies to invoke whenever “cause” for dismissal or conversion has been established, a court’s exercise of that discretion cannot exceed other explicit statutory limits.

Other sections of the Code are more stringent on the required term of a chapter 13 plan. The length of time a debtor must make plan payments is set forth in both § 1322 and § 1325. Section 1325(b)(4) sets the floor and § 1322(d) sets the ceiling. Together these two statutes require a below-median income debtor to make payments for no less than three years and no more than five years. The above-median income debtor must make payments for no more than five years and no less than five years or, put more simply, for exactly five years.

The Code allows a debtor to modify the plan during that period. However, it does not allow modification to take place after the completion of payments. 11 U.S.C. § 1329(a). Thus, the trustee or a creditor cannot request an increase in payments or a longer plan term after the debtor makes the last payment due under the existing plan. And it does not allow a modification to extend the length of the plan beyond five years. 11 U.S.C. § 1329(c). Thus, § 1329 reinforces the five-year limitation by forbidding a debtor from doing through modification what it could not do at plan confirmation.

Given these specific instructions in the Code, the Court concluded that a debtor cannot extend plan payments beyond the five-year period. This Court rejected the notion that Fed. R. Bankr. P. Rule 3002.1 required a different result. The main purpose behind that rule is to force mortgage lenders to give timely notice to a debtor of any postpetition changes in their mortgage payment. It allows chapter 13 debtors to obtain what amounts to essentially a “comfort order,” verifying that they are now current on their mortgage obligations at the end of the plan. However, there is nothing in Rule 3002.1 that authorizes a debtor to make a cure payment after the plan term has ended. Nor could it because the Federal Rules of Bankruptcy Procedure cannot override any of the substantive provisions in the Bankruptcy Code.

The Court explained that it is sympathetic to the difficulties chapter 13 debtors face in trying to live on the stringent budget imposed by their plans for sixty months. In addition, there are practical efficiencies that would favor giving chapter 13 debtors greater flexibility in completing their plan payments. Nevertheless, the Court felt

constrained by the clear dictates of the Code to prohibit debtors from extending their plan beyond five years.

III. APPLICATION TO THIS CASE

The Court sees no reason why the *Humes* decision should not apply in this case. The same sections of the Code apply to prohibit the Debtor from extending her plan payments beyond the five-year period. The Debtor argues her case is different from *Humes* because she only missed three payments and the amount of the arrearage is relatively small. If the Court had adopted the *Klaas* approach, these facts might have relevance. See *In re Klaas*, 858 F.3d 820, 832 (3d Cir. 2017) (adopting non-exclusive factors a court should consider in deciding whether to allow a post-term grace period to cure a plan default, including the length of time needed to cure and amount of arrearage due). However, this Court holds it lacks discretion to consider these factors or to allow the Debtor an additional cure period.

The Debtor also emphasizes that the Trustee has had a long-standing practice of leaving chapter 13 cases open past the five-year period to permit a debtor to cure an arrearage, especially where the amount is small or due to circumstances beyond the debtor's control. Prior to issuance of the *Humes* decision, the Court was unaware of this practice and its pervasiveness. The practice was not sanctioned by this Court, nor is it, as discussed above, authorized by the Code. After *Humes*, both chapter 13 trustees in this district have adopted a new practice of giving chapter 13 debtors notice of potential deficiencies several months prior to the end of their plan period. This permits debtors an opportunity to cure any deficiencies before their plan ends, and thereby to avoid the issues raised in *Humes*.

In this case, the Trustee seems to have followed this new practice by issuing a Notice of Final Cure Payment to the Bank several months *before* the end of the Debtor's plan. Up to the point that the Bank responded to the Notice in July, the Debtor had remained current on her mortgage. Yet for some unknown reason, the Debtor suddenly stopped making payments after almost five years of making them on time. Perhaps she was unaware that her discharge depended on her making all her plan payments, or that she would not have a chance to cure a default after her plan ended. Bankruptcy counsel practicing in in this district would be well advised to emphasize these requirements with their clients and to implement procedures to ensure that clients have cured any payment defaults *before* the end of the plan.

Unfortunately, it is too late for the Debtor in this case. Her failure to timely pay her mortgage payments during the five-year applicable commitment period constitutes a material default of the plan and is cause for dismissal. 11 U.S.C. § 1307(c)(6). The failure to make all her plan payments also prevents the entry of a chapter 13 discharge. 11 U.S.C. § 1328(a) (requiring the court to grant a discharge only after "completion by the debtor of all payments under the plan").³ The Debtor could still obtain a discharge

³ A direct payment to the lender on a mortgage that is provided for in the plan is a plan payment, despite the fact that it is paid directly rather than through the trustee as a conduit. See *In re Hoyt-Kieckhaben*, 546 B.R. 868 (Bankr. D. Colo. 2016); *In re Formanek*, 534 B.R. 29 (Bankr. D. Colo. 2015); *In re*

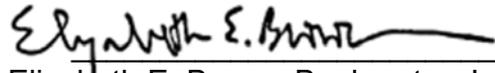
by converting to chapter 7. And if she has caught up on her mortgages payments after the plan ended, then she is not likely to lose her home to foreclosure due to these missed payments. Thus, this Debtor may end up in much the same position as if she had obtained her chapter 13 discharge. The difference is that this Court needs to put a stop to this extrajudicial practice of extending plans beyond sixty months. To allow the Debtor an opportunity to exercise a conversion option, the Court will delay dismissal of this case for two weeks. If Debtor does not convert within that time frame, this case will be dismissed.

IV. CONCLUSION

For these reasons, the Bank's Motion to Dismiss is GRANTED. If Debtor wishes to convert to chapter 7, she shall file a notice of conversion on or before **March 13, 2019**. If no such notice is filed, the Clerk shall DISMISS this case.

DATED this 27th day of February, 2019.

BY THE COURT:



Elizabeth E. Brown, Bankruptcy Judge

Gonzales, 532 B.R. 828 (Bankr. D. Colo. 2015); *In re Furuiye*, Case No. 10-15854 SBB, Docket No. 85 (Bankr. D. Colo. April 7, 2014); *In re Daggs*, Case No. 10-16518 HRT, Docket No. 49 (Bankr. D. Colo. January 6, 2014). Thus, failure to make a direct payment during the life of the plan constitutes a default under the plan.