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 DENYING MOTION TO RECONSIDER

THIS MATTER comes before the Court on the Debtor's Verified Motion to Reconsider Order Dismissing Case. On February 27, 2019, the Court entered an order dismissing the Debtor's bankruptcy case ("Dismissal Order"), but delayed actual dismissal to allow the Debtor time to elect to convert her case to chapter 7. The present motion asks this Court to reconsider its Dismissal Order. Since dismissal has not yet occurred, the Dismissal Order is not final. Thus, the standards of review applicable to Rule 59 and Rule 60(b) motions do not apply. *Trujillo v. Bd. of Educ. of Albuquerque Pub. Sch*., 212 Fed. App'x. 760, 765 (10th Cir. 2007). A court "can use whatever standard it wants to review a motion to reconsider an interlocutory order." *Patterson v. Nine Energy Serv., LLC*, 355 F.Supp.3d 1065, 1110 (D. N.M. 2018) (noting that the "law of the case" doctrine does not limit a court's review of its own prior non-final order).

At issue in this case is whether a debtor can cure plan payment defaults beyond the end of her five-year plan term. In the Dismissal Order, the Court held that post-plan arrangements, such as the one that occurred in this case, violate the Bankruptcy Code's prohibition against plans exceeding five years in length. *See* 11 U.S.C. § § 1322(d), 1325(b)(4), and 1329(c). The present motion does not add new arguments or legal theories to support reconsideration, but it does add factual background for why the Debtor failed to make all the mortgage payments required during her sixty-month plan. And it explains why she has not elected to convert her case to a chapter 7 proceeding to obtain her discharge under that chapter.

The Court surmises that the Debtor is wisely creating a fuller record on this matter for purposes of appeal. This is a matter that should be appealed. It is an issue that affects many chapter 13 cases in this district and the Court's ruling threatens the efficacy of chapter 13 for debtors who make honest attempts to fulfill their plans but who fall short of perfection in doing so. This Court would be pleased to follow a binding precedent that allows greater flexibility, but it does not believe that it has the authority to judicially create an exception to the statutory prohibitions. To obtain a binding precedent, that will control more than this one particular case, it will require a circuit court level ruling. A ruling by the Tenth Circuit Bankruptcy Appellate Panel ("BAP") is not binding because the BAP is not an Article III court. The ruling of one federal district court judge is not binding because one district court judge cannot bind other district court judges in the same district. Thus, this is a matter the Court believes is best suited for a direct appeal to the Tenth Circuit. The BAP has already ruled on this issue in *Christensen v. Black (In re Black)*, 292 B.R. 693 (10th Cir. BAP 2003). If the Debtor elects to appeal this ruling (and the underlying ruling), then this Court will certify this matter for direct appeal *sua sponte* in accordance with Fed. R. Bankr. P. 8006.

Just as the Debtor filed the present motion to create a fuller record for appellate purposes, so does the Court wish to provide more background and context for appellate consideration. Thus, the Court will briefly summarize the legal analysis from its prior rulings on this issue. Then it will add the additional background regarding chapter 13 practice in this district.

There are two schools of thought on this issue. The first is best exemplified by the case of *In re Klaas*, 858 F.3d 820 (3d Cir. 2017). Presently, this decision is also the only decision rendered on this issue by a circuit court. In holding that the bankruptcy court has the discretion to allow a debtor to cure a plan-payment default after the sixty-month-plan term has ended, the court relied on four arguments. First, it said that § 1307 permits, but does not mandate, dismissal due to a material plan default. *Id.* at 829. Second, § 1328(a) mandates the entry of discharge (of all dischargeable debts) "after completion by the debtor of all payments under the plan . . . ." 11 U.S.C. § 1328(a). It noted that § 1328(a) does not say "timely" completion of payments. *Klaas*, 858 F.3d at 829. And when it refers to "payments *under the plan,*" it does not mean "under the time table set forth in the plan," but means only "under the authority conferred by the plan." *Id.* at 830. Third, legislative history demonstrates that Congress intended to limit the length of a chapter 13 plan to five years so that debtors could not be forced into involuntary servitude. Thus, the court concluded term limits were meant to serve as a "shield" for debtors, not as a "sword" for creditors seeking dismissal. *Id.* And finally, the court considered another alternative remedy, the "hardship" discharge offered by § 1328(b), and held that it would only apply to debtors who are unable to make all the required plan payments and, with that remedy, the debtor does not have to make any additional payments to creditors. In contrast, when debtors have the ability to promptly cure a default, the hardship discharge would not apply. Moreover, by allowing debtors to cure post-plan, creditors would receive the additional payment to which they were entitled under the plan. *Id.* Thus, both debtors and creditors would benefit from a more flexible approach.

This Court agrees with the *Klaas* court's analysis on these four points. Yet in this Court's opinion in *In re Humes*, 579 B.R. 557 (Bankr. D. Colo. 2018), which is incorporated by reference herein, the Court disagreed with any interpretation that would permit debtors to extend their plan terms beyond five years. While the Code allows bankruptcy judges discretion in terms of the remedies they may employ when a debtor defaults on her plan, they may not exercise that discretion to permit what is explicitly prohibited by the Code. No less than three statutes prohibit a plan term that exceeds five years. The most pertinent one, § 1329(c) provides:

> A plan modified under this section may not provide for payments over a period that expires after the applicable commitment period under section 1325(b)(1)(B) after the time that the first payment under the original plan was due, unless the court, for cause, approves a longer period, but the court may not approve a period that expires after five years after such time.

11 U.S.C. § 1329(c). And the *Klaas* court agrees that a bankruptcy court could not confirm a plan or approve of a plan modification that proposed longer than a five-year repayment arrangement. *Klaas*, 858 F.3d at 828.

But this is where the two schools of thought diverge. The *Klaas* court viewed cure payments after the five-year term has ended as a mere completion of the five-year plan rather than a proposal for a new plan or a modification of an existing one. *Id.* at 831. It rejected the creditor's argument that cure or "catch-up" payments are in essence an "informal modification." *Id.*

Section 1329(a) sets forth the type of changes that constitute permitted plan modifications. Subsection (a)(2) states that a request to "extend or reduce the time for [plan] payments" is a request for a plan modification. Based on this, other courts have steadfastly held that payments made after the five-year mark are prohibited, reasoning that, if a debtor cannot confirm a plan if it exceeds five years, then a debtor cannot be allowed to make plan payments beyond that five-year period. *In re Grant*, 428 B.R. 504, 507-08 (Bankr. N.D. Ill. 2010). In *Christensen v. Black (In re Black)*, 292 B.R. 693 (10th Cir. BAP 2003), the Tenth Circuit BAP held that bankruptcy courts cannot fashion a way to circumvent this statutory prohibition by calling the cure arrangement something other than a modification. Whether it is an informal agreement between the parties, a formal "stipulation for cure," a "settlement," or something else that allows for a modified payment arrangement to fulfill the debtor's plan obligations, it is still a plan modification. In *Humes*, this Court agreed with this second line of interpretation.

When the Court rendered its ruling in *Humes,* it was operating under a false assumption. It assumed that this issue was arising as an isolated instance. It arose in an unusual context. The debtors had promised to modify their plan as soon as the husband obtained a new job. They timely informed their counsel of the new employment but the attorney had forgotten the promise to modify and took no further action. At the end of the plan, the Trustee discovered the husband had been reemployed but the debtors continued to pay only $10 per month. The Trustee then moved to dismiss. Later the Trustee and the debtors entered into a settlement that permitted the debtors to cure the default by paying what they would otherwise have been required to pay if they had timely modified their plan to reflect the husband's new job. Over the course of five months, the debtors paid the arrearage to the Trustee. Then both sides sought the entry of the Debtors' chapter 13 discharge.

The Court acknowledged in its decision that, whatever interpretation it followed, it could potentially apply to many cases in which debtors fall behind in their mortgage payments when those payments are made directly to their lenders. But what it had no way of knowing was that the chapter 13 trustees in this district had a long-established and widely followed practice of allowing debtors to cure plan defaults after the five-year plan term ended -- with such arrangements often extending over many months. In fact, the trustees did not audit their cases before the end of the plan. Debtors often fell behind and caught up over the course of the five years, but no one checked to see where the debtors stood until the plan term had ended. The trustees' main concern was to ensure full payment came in. No doubt they concluded that creditors were better off receiving delayed payments rather than no more payments with a dismissal. So the parties established this flexible, informal arrangement for a post-plan cure and never sought court approval of it. Had the Trustee not filed his motion to dismiss in *Humes* and then later his motion to approve a settlement, the Court would never have known of the informal arrangement in that case.

The Court could have discerned this practice earlier than it did. It could have and should have noticed in many cases a lengthy delay had occurred between the end of the plan term and the much later filing of a trustee's certificate indicating that the debtors had fulfilled their plans and were eligible for a chapter 13 discharge. But in this district, court staff have been permitted to enter standard chapter 13 discharge orders when uncontested requests are made. And the court staff had no way to appreciate this legal quagmire. Thus, literally the left hand did not know what the right hand was doing.

Once the *Humes* decision entered, the parties in many cases made the Court aware of the extent of this informal practice. In literally dozens of cases pending before the Court, debtors were in the process of completing these informal post-plan arrangements with the trustees. Faced with this dilemma, the Court held a hearing in those cases to explain that it could not in good conscience deny these debtors a discharge when they were only following what had been a supposedly acceptable arrangement. Acknowledging that doing so was contrary to its *Humes* decision, the Court exercised its discretion to allow cases caught in this predicament to continue their arrangements over the next six months, but indicated that after January 1, 2019 the Court would enforce its *Humes* interpretation.

During this interim, the trustees began conducting their audits for plan compliance six months prior to the scheduled plan completion date. This allowed debtors to become aware of any defaults with six months left to cure them. As a result, this issue has arisen with much less frequency. But it does still arise. Sometimes the debtor makes the final plan payment one or two days after the end of the five-year term. Sometimes, as in the present case, the debtors have missed several mortgage payments and then cured them two to three months post-plan. Sometimes they have sought a longer period to effectuate a cure.

This Court does not want to deny debtors a discharge when they simply make the final payment two days late. Nor would the Court want to deny the *Klaas* debtors a discharge for being unaware of an increase in the trustee's fee that they paid sixteen days post-plan. But is there a principled way to enforce the Code's five-year restriction on plan length and still exercise some amount of discretion for these innocuous offenses?

The *Klaas* court reconciles the two by calling the post-plan cure something other than a modification. As applied to its facts, this Court would agree. In *Klaas,* there was no new payment arrangement. The parties discovered an unpaid, undisclosed fee. It was an insubstantial sum, immediately paid, and the debtors bore no responsibility for its tardiness. The debtors were not trying to extend the time to make the known plan payments. All of the known payments had been made by the end of the five years. And the *Klaas* court adopted a test that, if applied narrowly and cautiously, would not threaten to undercut the statutory prohibition against extending plan arrangements beyond five years.

However, as the present case demonstrates, parties will advocate for application of that test to allow debtors additional months to complete known plan payments. That creates a very slippery slope. Soon the five-year term limit is no more than a guideline.

The temptation is to rescue a debtor who has made an honest effort to comply with a five-year plan but has fallen short of absolute perfection. The present case provides a great example. This Debtor filed for bankruptcy on October 25, 2013. Her first plan payment was due thirty days later or by November 24, 2013. That meant her five-year term would end on November 23, 2018. While her final Trustee payment would be due October 25, 2018, her last mortgage payment under the plan was the November 1, 2018 payment. The Debtor made all of her required Trustee payments by the end of the five years, but she failed to make the September through November mortgage payments until she cured them on February 8, 2019, almost two and one-half months beyond the end of the five years.

The Debtor has asserted that her lapse in paying the mortgage was due to a car accident that caused her to undergo several surgeries and to incur unreimbursed medical expenses. The Court has no reason to doubt the accident, the surgeries, or the medical expenses. But the causal connection between those and her failure to pay the mortgage is suspect. The accident occurred on March 27, 2018. Approximately four months later, the Trustee filed his Notice of Final Cure on July 18, 2018, asking the mortgage lender to confirm that the Debtor was current on her mortgage payments. On July 27, 2018, the lender indicated that she was current. It was not until September of 2018 that the Debtor stopped making the mortgage payments, about six months after the accident.

But giving the Debtor the benefit of the doubt, the facts of this case present the perfect test case for this issue. If a debtor has "substantially" complied with her plan but, due to unexpected events, she has been unable to complete her plan by the end of the five years, may she extend the time to complete the plan? Although it is difficult to articulate why, to this Court, this situation is different from the undisclosed fee paid sixteen days after the plan ended or the receipt of a final payment two days after the end of the plan. It is an attempt to extend the time for payments. It is a new payment arrangement made to complete known plan payments. That is a plan modification pursuant to § 1329(a). And it is an attempt to extend the plan beyond five years in direct contravention of § 1329(c).

It is a fair question to ask, "what is the harm?" Why can't we be flexible and help debtors make it through what is already a very arduous journey of living on an extremely strict budget for five years. There is never any money built into a chapter 13 budget for a vacation or car repairs. Who can live like that for five years without some flexibility? The answer is that most debtors cannot. And the Bankruptcy Code recognizes this. It allows debtors to come back to the court to modify the plan when life's unexpected events upset the carefully crafted repayment plan that seemed so "do-able" at the time of confirmation. Section 1329 was Congress' answer to this problem.

Why then did Congress draw a hard line in the sand when it comes to the five-year term limit? Why does § 1329(c) say that the one modification a debtor cannot do is to extend the time for payment beyond five years? I cannot say for sure. As applied in individual cases, like the present case, it is harsh and unforgiving.

Perhaps the answer lies in the legislative history, which indicates that Congress was concerned that chapter 13 not become a form of involuntary servitude. In its view, any time frame beyond five years was encroaching on this constitutional prohibition. It had to set some time limit and in its wisdom five years was the outside limit. The problem is that, in 2005, it added § 1325(b)(4) as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). This is the statute that required above-median income debtors to contribute their projected disposable income to repay creditors for *no less than five years*. Prior to this, § 1322(d) provided that all debtors had to propose a three-year plan, unless the court "for cause" approved a longer term, but one that could not exceed five years. 11 U.S.C. § 1322(d) (2000) (amended 2005). Thus, prior to BAPCPA, there was greater flexibility. A debtor could propose a three-year plan and then, if the debtor needed additional time to make plan payments, she could move to modify her plan to extend it up to five years. Now an above-median income debtor must propose a five-year plan and has to complete it within five years. Whether consciously done or not, Congress eliminated any grace period to extend the plan to catch-up on missed payments for above-median income debtors. This situation cries out for a legislative fix. But this Court does not believe it can use its discretion or equitable powers to supersede express statutory limitations.

Until Congress addresses this problem or the Tenth Circuit provides a binding precedent to the contrary, this Court will enforce the five-year term limit. While this may work a hardship in this and other individual cases, the five-year limit benefits debtors as a whole. As the adage goes, every job takes as long as you have to do it. In other words, if you tell debtors that five years means five years, then those who are financially capable of fulfilling their plans will do so within five years. If you tell them they can expect some grace period of six or so months after the end of the five years, then they will take five and one-half years to pay the obligations. This likely explains why so many debtors were entering into informal cure arrangements with the chapter 13 trustees post-plan. Setting a firm limit and enforcing it helps all debtors to get out of bankruptcy and start rebuilding their financial lives as soon as possible.

What then does this mean for chapter 13 debtors appearing before this Court? It means that debtors with five-year plans will need to complete all plan payments, including direct mortgage payments that come due during the plan, before the end of the five years. Debtors in this case have failed to do so and the statutory constraints discussed above prevent this Court from modifying their plan term from sixty months to sixty-two and one-half months.

The Court recognizes, however, that there may be cases with circumstances more akin to the situation described in *Klaas*, where debtors are unable to complete plan payments due to circumstances beyond their control and subsequently cure a small arrearage in one payment, very shortly after the end of the plan. Although such circumstances are not present here, this Court leaves open the possibility that it will allow such a cure without construing it as a plan modification to extend the time for payment.

For the reasons set forth above, the Debtor's Motion to Reconsider is DENIED. An unconditional dismissal order and separate judgment will enter immediately.

DATED this 22nd day of November, 2019.

BY THE COURT:

Elizabeth E. Brown, Bankruptcy Judge