

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 04-32067

KANDY ELAINE KENNEDY

Debtor

**MEMORANDUM ON OBJECTION
TO INCREASED MORTGAGE PAYMENT**

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**RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE**

This contested matter is before the court upon the Objection to Increased Mortgage Payment filed by the Debtor on June 29, 2004, asking the court to require that Countrywide Home Loans (Countrywide), the holder of the mortgage encumbering the Debtor's residence, be bound by the monthly mortgage payment of \$709.26 set forth in the Debtor's confirmed Chapter 13 Plan and that Countrywide not be allowed to raise the Debtor's monthly mortgage payment to \$782.29.

The facts and documents essential to the resolution of this issue are before the court upon the Stipulations filed by the parties on September 27, 2004, the Trial Brief of the Debtor filed on September 21, 2004, and the Brief in Support of Payment Amount filed by Countrywide on September 23, 2004.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(A), (B), and (O) (West 1993).

I

The Debtor filed the Voluntary Petition commencing her Chapter 13 bankruptcy case on April 14, 2004, within which she listed a debt owed to Countrywide in the amount of \$96,697.00, secured by a Deed of Trust on real property located at 7500 Foxtrail Drive, Knoxville, Tennessee (Real Property), which the Debtor valued at \$65,000.00. In her Chapter 13 Plan, the Debtor proposed to pay her mortgage obligation to Countrywide as follows:

MORTGAGE and/or LONG TERM LIEN: Mortgage/lien balance survives the plan and the Trustee upon notification shall pay any future mortgage increases due to escrow and interest rate changes. The Debtor(s) owns a house located

at 7500 Foxtrail Drive, Knoxville, TN which is subject to a first mortgage or long term lien held by Countrywide Home Loans which shall be paid by the Trustee in monthly maintenance installments of \$709.26 commencing the month and year of 06/04 in addition to a mortgage/lien arrearage in the approximate amount of \$27,000.00 which shall be paid in full in monthly installments of \$450.00 at 0% interest.

STIP. EX. 1. The Order Confirming Chapter 13 Plan was entered on June 2, 2004.

On June 10, 2004, Countrywide filed its proof of claim in the amount of \$96,059.19, which included an arrearage claim in the amount of \$29,077.07 consisting of the following charges: (1) \$21,314.00 representing thirty-four payments due from August 2001 through, and including, June 2004; (2) an escrow shortage of \$2,883.06; (3) foreclosure fees and costs of \$3,640.56; (4) bankruptcy fees and costs of \$275.00; (5) property inspections of \$404.50; (6) previous bankruptcy fees and costs of \$960.00; and (7) a credit in the amount of \$400.05 for the suspense account. See STIP. EX. 3. Additionally, on June 10, 2004, Countrywide, through its attorneys, sent a letter to the Chapter 13 Trustee, notifying her that, as of May 1, 2004, the Debtor's post-petition mortgage payment had increased to \$782.29 "due to escrow changes." STIP. EX. 4.

In response to the increased payment, the Debtor requested and received a breakdown of the principal, interest, and escrow for the Debtor's account (Account Breakdown). See STIP. EX. 6. The Account Breakdown, with an analyzation date of June 4, 2004, shows the current monthly payment in the amount of \$709.21, consisting of \$621.00 in principal and interest, plus \$88.21 for escrow. The "Proposed" monthly payment of \$782.24 consists of principal and interest in the amount of \$621.00 and an increased escrow of \$95.88, plus

shortages of \$49.44 and \$15.92 for reserves.¹ The Account Breakdown also shows that, as of June 4, 2004, the Debtor's annual property taxes, due October 1, 2004, are \$684.50, and the property insurance is \$466.00, due on August 30, 2004. Based upon those annual amounts, the Account Breakdown indicates that the monthly escrow amounts for taxes and insurance on the Debtor's mortgage total \$95.88.² The Account Breakdown further evidences a negative escrow balance in the amount of \$2,901.06 and a negative disbursement balance of \$27.87.

Thereafter, the Debtor filed her Objection to Increased Mortgage Payment, arguing that Countrywide should be held to the \$709.26 payment set forth in the Debtor's confirmed Chapter 13 Plan. The Debtor also avers that Countrywide has attempted to include escrow shortages in the monthly maintenance payment, while also claiming escrow shortages in its arrearage claim that is being paid at a rate of \$450.00 per month through the Debtor's Chapter 13 Plan. In response, Countrywide argues that the Account Breakdown properly shows the amount of the Debtor's required monthly payment.

II

Pursuant to 11 U.S.C.A. § 1322(b) (2) (West 1993), the Debtor's Chapter 13 Plan may not modify the rights of her mortgage holder, Countrywide. Nevertheless, the Debtor may

¹ The court notes that the requested increased monthly payment set forth in Countrywide's letter to the Chapter 13 Trustee and in its Proof of Claim arrearage breakdown is \$782.29, while the Account Breakdown shows a "Proposed" monthly payment of \$782.24.

² Although not in the record, the court can presume that the property taxes and/or homeowners' insurance on the Real Property increased, resulting in the escrow increase from \$88.21 to \$95.88.

cure any default or arrearage on her mortgage during the life of her Plan. 11 U.S.C.A. § 1322(b)(5) (West 1993); *see also In re Rathe*, 114 B.R. 253, 257 (Bankr. D. Idaho 1990) (“The purpose of a Chapter 13 plan is to allow a debtor to pay arrearages during the pendency of the plan while continuing to make payments at the contract rate.”). This is accomplished by “essentially split[ting Countrywide’s] secured claims into two separate claims -- the underlying debt and the arrearages.” *Rake v. Wade*, 113 S. Ct. 2187, 2192 (1993). Once the arrearage is cured, the Debtor’s account should be restored to “pre-default status.” *In re Wines*, 239 B.R. 703, 707 (Bankr. D.N.J. 1999).

Cure plans do not “permanently deprive” a claimant of their entitlements under the mortgage instrument. Rather, confirmation of the plan remedies its default status as of the completion of the plan. *In re Brown*, 121 B.R. 768, 771 (Bankr. S.D. Ohio 1990). “When a default on a mortgage or other long term debt is cured under section 1322(b)(5), the full amount of the creditor’s claim is not paid during the chapter 13 cases. Rather, the debtor preserves the benefit of a longer payment schedule which extends beyond the due date of the last payment under the plan, and the creditor is protected by the exception to discharge for long term debts on which defaults are cured.” [COLLIER ON BANKRUPTCY ¶] 1322.09[4] (1998). Cure of the default will not otherwise alter the creditor’s rights under the mortgage document. To further support this conclusion, the parties need only look to 11 U.S.C. § 1328(a)(1) which specifies that the chapter 13 discharge does not reach “those debts which the debtor wishes to continue treating as long-term debts.” *In re Smith*, 8 B.R. 543, 547 (Bankr. D. Utah 1981).

McCalla v. Nationsbanc Mortgage Corp. (In re McCalla), 238 B.R. 94, 95-96 (Bankr. M.D. Pa. 1999).

The Debtor’s Chapter 13 Plan provides for a monthly maintenance payment of \$709.26, subject to increases for escrow and the adjustable interest rate, plus a monthly arrearage payment of \$450.00. The Debtor based the maintenance payment upon figures

provided to her in a letter from Countrywide's Special Loan Servicing Department dated March 29, 2004 (March 29, 2004 Letter). See STIP. EX. 2. The March 29, 2004 Letter states that the adjustable interest rate on the Debtor's mortgage would be increasing to 10.250%, effective June 1, 2004, resulting in a principal and interest payment of \$621.05, plus an escrow payment of \$88.21, for a total payment, effective June 1, 2004, of \$709.26. STIP. EX. 2. The March 29, 2004 Letter expressly states that "[a]t this time, there are no changes to your escrow payment. We will review your escrow account at a later date." STIP. EX. 2.

Countrywide did not object to its treatment in the Debtor's Chapter 13 Plan, and thus, pursuant to 11 U.S.C.A. § 1327(a) (West 1993), "is deemed to have accepted it." *In re Basham*, 167 B.R. 903, 904 (Bankr. W.D. Mo. 1994). Nevertheless, because its rights may not be modified under the terms of the Debtor's Plan, Countrywide retains all contractual rights under the Deed of Trust securing the Real Property. These rights include requiring the Debtor to pay funds into both an escrow account for payment of taxes and insurance and a reserve account. See, e.g., *In re Guevara*, 258 B.R. 59, 61 (Bankr. S.D. Fla. 2001) ("Charges for impound or reserve accounts arise from a debtor's contract obligation to make regular payments to the lender so the lender can maintain reserve accounts sufficient to pay the debtor's real property taxes and insurance premiums.").

According to the Account Breakdown, the annual taxes on the Real Property are \$684.50, and the annual insurance is \$466.00, which results in a monthly escrow payment of \$95.88. Additionally, the Account Breakdown shows a required reserve of \$190.98 per annum, resulting in a monthly payment of \$15.92. Therefore, in order to fully maintain the

escrow account and ensure that no further shortages are incurred, the \$95.88 and \$15.92 should be added to the principal and interest payment of \$621.00, resulting in a monthly payment of \$732.80. There is no question that the Debtor's maintenance payment should be increased to this amount from the \$709.26 stated in the Debtor's Chapter 13 Plan.

However, based upon the evidence before the court, it is also obvious that Countrywide has included within its requested \$782.24 monthly maintenance payment the same escrow shortage included within its proof of claim. Countrywide cannot double-dip by forcing the Debtor to repay escrow shortages in her ongoing maintenance payment when the escrow shortages are included within her monthly arrearage payment as well. *See, e.g., In re Christensen*, 106 B.R. 689, 691 (Bankr. D. Colo. 1989) (stating that a mortgage company's actions in carrying forward an accumulated escrow deficit and then seeking to recover those payments from the debtor by increasing the monthly mortgage payments "ignores the fact that the escrow deficiency which existed on the date of the filing of the Chapter 13 was being cured under the plan.").³

Countrywide cannot collect the escrow shortage twice. Accordingly, the requested monthly maintenance payment of \$782.29, which includes \$49.44 for curing the escrow shortage that was also included in Countrywide's arrearage claim, is excessive and improper.

³ On the other hand, it should be noted that the terms of the Debtor's Chapter 13 Plan, as confirmed, will not result in payment in full of Countrywide's arrearage claim. The Debtor has provided for payments of \$450.00 per month, with no interest, which would result in payment of \$27,000.00 to Countrywide for its arrearage claim over the life of the plan. However, the amount of Countrywide's arrearage claim is \$29,077.07, which would require a monthly payment of \$484.62 for the entire arrearage claim to be paid in full over the life of the Debtor's Chapter 13 Plan.

Under the Deed of Trust, Countrywide may, however, require the Debtor to fund an escrow account, as well as a reserve account. Therefore, Countrywide may include a total of \$111.80 to fund these accounts, resulting in a regular monthly maintenance payment of \$732.80.⁴

An order consistent with this Memorandum will be entered.

FILED: October 5, 2004

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

⁴ Of course, because the mortgage is subject to an adjustable interest rate, this amount is subject to change. Likewise, if the property taxes and/or insurance increase, the escrow amount will change.

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In re

Case No. 04-32067

KANDY ELAINE KENNEDY

Debtor

ORDER

For the reasons set forth in the Memorandum on Objection to Increased Mortgage Payment filed this date, the court directs the following:

1. The Objection to Increased Mortgage Payment filed by the Debtor on June 29, 2004, objecting to Countrywide Home Loans' increase of its monthly mortgage payment from \$709.26, as provided for in the Debtor's confirmed Chapter 13 Plan, to \$782.29, is SUSTAINED.

2. Due to present escrow and insurance adjustments, the Debtor's monthly mortgage payment to Countrywide Home Loans, which is to be made by the Chapter 13 Trustee pursuant to the Debtor's plan, is increased from \$709.26 to \$732.80.

SO ORDERED.

ENTER: October 5, 2004

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE