

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP NO. MB 08-052

Bankruptcy Case No. 08-11925-WCH

**CHRISTOPHER R. BELL,
Debtor.**

**CHRISTOPHER R. BELL,
Appellant,**

v.

**CAROLYN BANKOWSKI, Chapter 13 Trustee, and
EASTERN BANK,
Appellees.**

**Appeal from the United States Bankruptcy Court
for the District of Massachusetts
(Hon. William C. Hillman, U.S. Bankruptcy Judge)**

**Before
Carlo, Deasy, and Kornreich,
United States Bankruptcy Appellate Panel Judges.**

David G. Baker, Esq., on brief for Appellant.

Jeffrey W. Shub, Esq., on brief for Appellee, Eastern Bank.

March 6, 2009

Deasy, U.S. Bankruptcy Appellate Panel Judge.

Christopher R. Bell (the “Debtor”) appeals from the bankruptcy court orders sustaining the objections of Eastern Bank and the chapter 13 trustee (the “Trustee”) to his chapter 13 plan (the “Orders Sustaining Objections”). For the reasons set forth in Hamilton v. Wells Fargo Bank, N.A. (In re Hamilton), BAP No. MB 08-046, we **AFFIRM** the Orders Sustaining Objections.

BACKGROUND

The Debtor filed a chapter 13 petition in 2008. Thereafter, he filed a plan that proposed, among other things, to bifurcate the mortgage on a multi-family dwelling and pay the entire remaining secured claim through the plan. The plan proposed to bifurcate the Eastern Bank claim on a multi-family dwelling into a secured claim equal to \$323,301.00, the value of the property, and an unsecured claim for \$51,816.00, the balance of the Eastern Bank claim. The plan also provided that the interest rate on the secured claim would be fixed at 6.75% and that the Eastern Bank secured claim would be paid in full over the 36-month term of the plan. The plan provided:

I. SECURED CLAIMS

A. Claims to be paid through the plan (including arrears):

Eastern Bank	\$75,489.48
---------------------	-------------

2. [. . .] The amount [to be paid to Eastern Bank through the plan] . . . above assumes that \$2,096.93 will be paid to this creditor for the 36 months of the plan, commencing April 1, 2008. Said amount is comprised of principal and interest calculated with a 30-year amortization.

4. The timing, amount and sequence of payments to this creditor shall be at the discretion of the chapter 13 trustee. This plan is not intended to provide for any “periodic payments”. The amount of

\$2,096.93 is for calculation purposes only and is not intended to restrict the chapter 13 trustee's discretion regarding distributions.

6. The debtor reserves the right to seek to extend the term of the plan, if necessary.

7. At any time prior to the end of the term plan (including any extensions), the debtor shall refinance the mortgage and pay the balance then remaining unpaid, calculated pursuant to this modification. The amount then due shall be paid directly (i.e., not through the trustee).¹

The plan expressly acknowledges that plan payments to the chapter 13 trustee would only support a payment of \$2,096.93 per month on the secured claim, where the payment is based upon a thirty-year term, not a three-year term, for the modified secured claim. In order to complete payment of the modified secured claim within the term of the plan, the plan provided in section I.A.7 for a balloon payment on or before the 36th month of the plan.² Eastern Bank objected to the plan on several grounds, including that the balloon payment violated § 1325(a)(5)(B)(iii)(I).³ The Trustee objected as well, on the grounds that the plan was not feasible and that the balloon payment violated § 1325(a)(5)(B)(iii)(I). The Debtor filed responses

¹ This balloon payment is slightly different than that presented in In re Hamilton. For this payment, the Debtor is suggesting that she make the payment directly to the mortgagee. In Massachusetts, payments on modified secured claims must be made through the plan. See In re Harris, 200 B.R. 745 (Bankr. D. Mass. 1996). However, that issue is not before us.

² In section I.A.6, the Debtor reserved the right to extend the term of the plan. The Panel shall not address the effect of this provision because the plan, as proposed, with or without any extension, is not confirmable under 11 U.S.C. § 1325.

³ Unless otherwise indicated, all references to the "Bankruptcy Code" or to specific sections are to Title 11 of the United States Code, 11 U.S.C. § 101, et seq., as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8 ("BAPCPA"). All references to "Bankruptcy Rule" are to the Federal Rules of Bankruptcy Procedure.

to both, accompanied by a memorandum of law,⁴ in which he argued that § 1325(a)(5)(B)(iii)(I) does not prohibit balloon payments. The bankruptcy court sustained both objections, noting: “I hold once again that unequal payments on real estate loans are not permitted at this time.”⁵ The Debtor timely appealed.

JURISDICTION

A bankruptcy appellate panel may hear appeals from “final judgments, orders and decrees [pursuant to 28 U.S.C. § 158(a)(1)] or with leave of the court, from interlocutory orders and decrees [pursuant to 28 U.S.C. § 158(a)(3)].” Fleet Data Processing Corp. v. Branch (In re Bank of New England Corp.), 218 B.R. 643, 645 (B.A.P. 1st Cir. 1998). “A decision is final if it ‘ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.’” Id. at 646 (citations omitted). An order denying confirmation of a chapter 13 plan is interlocutory where the debtor may propose another plan. Watson v. Boyajian (In re Watson), 309 B.R. 652, 659 (B.A.P. 1st Cir. 2004), aff’d, 403 F.3d 1 (1st Cir. 2005). Here, the Orders Sustaining Objections are interlocutory as the Debtor was free to propose another plan. The Panel, however, previously granted leave to appeal.

⁴ The Debtor filed a memorandum of law with his response to Eastern Bank’s objection, and incorporated it by reference to his response to the Trustee’s objection.

⁵ Although the Debtor failed to provide a transcript of the hearing, we find that the appellate record provides a sufficient basis for us to review the Orders Sustaining Objections, as both objections raised the issue of the balloon payment, and because the court explained the basis for its ruling in the Orders Sustaining Objections. See Gagne v. Fessenden (In re Gagne), 394 B.R. 219, 225 (B.A.P. 1st Cir. 2008) (holding that failure to provide hearing transcript is not fatal to appeal where facts are not in dispute and record makes clear that issue on appeal is one of statutory construction).

STANDARD OF REVIEW

There are no disputed facts in this appeal. We review the question of whether a balloon payment provision violates § 1325(a)(5)(B)(iii)(I) *de novo*, as it is a question of statutory construction. See Storneawaye Fin. Corp. v. Hill (In re Hill), 387 B.R. 339, 345 (B.A.P. 1st Cir. 2008).

DISCUSSION

The Debtor’s plan (1) did not provide for the surrender of the property in question; (2) provided for “periodic payments” within the meaning of § 1325(a)(5)(B)(iii)(I) of the Bankruptcy Code; and (3) did not provide for such periodic payments to be made in equal monthly amounts due to the provision in section I.A.7 providing for a balloon payment. By its very terms, the balloon payment is not equal to the preceding payments and, therefore, the plan fails to comply with § 1325(a)(5)(B)(iii)(I) of the Bankruptcy Code. There is no issue in this case as to whether the holder of the secured claim has impliedly accepted the plan, as Eastern Bank did object to confirmation.⁶ For the reasons set forth in Hamilton v. Wells Fargo Bank, N.A. (In re Hamilton), BAP No. MB 08-046, we conclude that the Debtor’s plan did not comply with the requirements of § 1325(a)(5) of the Bankruptcy Code and, therefore, could not be confirmed.

CONCLUSION

Because we conclude that the Debtor’s plan provided for “periodic payments” and that § 1325(a)(5)(B)(iii)(I) prohibits unequal payments on secured claims where the debtor has not

⁶ For the purposes of this opinion, the Panel need not decide whether the chapter 13 trustee has standing to object to a plan for failure to comply with § 1325(a)(5)(B)(iii)(I) of the Bankruptcy Code when a secured creditor fails to object and might be deemed to have impliedly consented to the terms of the plan.

surrendered the property and the creditor has not accepted the plan, we **AFFIRM** the Orders Sustaining Objections.