IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

In re	)	
	)	
RICHARD EUGENE KESSLER, JR.	)	
VIRGINIA MAE KESSLER,	)	Case No. 09-60247-RLJ-13
	)	
Debtors.	)	

* * *

RICHARD EUGENE KESSLER, JR. and	)	
VIRGINIA MAE KESSLER,	)	
	)	
Appellants,	)	
	)	
v.	)	
	)	
ROBERT B. WILSON, Chapter 13 Trustee,	)	
	)	
Appellee.	)	Civil Action No. 6:15-CV-040-C

APPEAL FROM THE
UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
ROBERT L. JONES, BANKRUPTCY JUDGE, PRESIDING

ORDER

Before the Court is an appeal from the United States Bankruptcy Court for the Northern District of Texas. After reviewing the record on appeal and the applicable law, the Court is of the opinion that the bankruptcy court did not commit reversible error. The judgment is **AFFIRMED**.

I. BACKGROUND

A. Facts

The facts of this case are succinctly laid out in the memorandum opinion of the bankruptcy court and are not disputed. After a thorough review of the record, the Court is of the opinion that the bankruptcy court's findings of fact are supported by the evidence and are not clearly erroneous. Therefore, the Court adopts, and hereby incorporates into this opinion, the bankruptcy court's findings of facts.

B. Procedural History

Richard and Virginia Kessler (Kessler) filed their Chapter 13 plan on November 2, 2009, and that plan was confirmed on January 11, 2010. Kessler completed all payments to the trustee (Wilson) as required by the plan on December 1, 2014. But Kessler failed to make $40,922.89 worth of direct payments to Bank of America for his post-petition mortgage debt accruing during the Chapter 13 bankruptcy.

Kessler moved for discharge of the debts provided for in his Chapter 13 plan notwithstanding the undisputed mortgage payments that were still owed to Bank of America. The bankruptcy judge, after a hearing on the motion, denied the request for discharge, finding that Kessler had not satisfied the requirements of § 1328(a) and was not entitled to a discharge.

Kessler timely appealed to this Court, arguing that the bankruptcy judge erred in (1) holding that payment of his post-petition mortgage debt was provided for "under the plan" and was thus a requirement for discharge under § 1328(a) and (2) holding that there was no waiver of any right to object to his failure to make the mortgage payments.

II. STANDARD

"A bankruptcy court's findings of fact are subject to review for clear error, and its conclusions of law are reviewed *de novo*." *In re Morrison*, 555 F.3d 473, 480 (5th Cir. 2009). This Court will only reverse fact findings for clear error if it is left with the definite and firm conviction, in light of the entire record, that a mistake has been made. *Id.*

III. DISCUSSION

A. Kessler Was Not Entitled to Discharge Under the Plain Terms of § 1328

Chapter 13 discharge is governed by § 1328(a). 11 U.S.C.. § 1328(a). That section provides that "as soon as practicable after completion by the debtor of all payments under the plan . . ., the court shall grant the debtor a discharge of all debts provided for by the plan or disallowed under section 502 of this title," with a few enumerated exceptions. *Id.* One of those exceptions to discharge is any debt "provided for under section 1322(b)(5) of this title," which the parties agree covers the post-petition mortgage payments of Kessler in this case. *See* 11 U.S.C.. § 1322(b)(5). Kessler argues that, because the post-petition mortgage payments are explicitly made non-dischargeable under § 1322(b)(5), these payments cannot be a requirement to discharge under § 1328(a). *See* 11 U.S.C.. §§ 1322(b)(5), 1328(a). Kessler alleges that, in failing to discharge his debts provided for by the Chapter 13 plan, the bankruptcy judge created an "equitable requirement" to discharge that exceeded his authority under the Bankruptcy Code. Wilson responds that Kessler has mis-characterized the issue and that the bankruptcy judge's refusal to grant the discharge was not an equitable imposition but was due only to Kessler's failure to keep his mortgage payments current, which was a condition provided for "under the plan." The Court does not believe that the bankruptcy judge's action can be fairly characterized

as creating equitable requirements beyond his authority and is of the opinion that Wilson's framing of the issue is the correct one.

The true issue in this case is whether Kessler's post-petition mortgage payments were required payments *under* the plan. Because § 1328(a) requires that a debtor complete "all payments under the plan" to be entitled to discharge, this is the dispositive question; if Kessler's payments were payments under the plan, then his failure to pay them was a failure to comply with § 1328(a) and Kessler is not entitled to a discharge. 11 U.S.C.. § 1328(a). On this issue, the Court finds the case law relied upon by the bankruptcy judge to be controlling.

In *Foster v. Heitkamp*, the Fifth Circuit addressed the issue of whether payments paid directly to a creditor by the debtor during a Chapter 13 bankruptcy were payments made "outside the plan" or "under" it. *Foster v. Heitkamp (In re Foster)*, 670 F.2d 478 (5th Cir. 1982). That case involved an appeal of the bankruptcy judge's decision not to confirm a Chapter 13 plan that provided for current payments on the debtor's mortgage to be made outside the plan, directly to the creditors rather than the bankruptcy trustee. *Id.* at 485. The Fifth Circuit first concluded that the Bankruptcy Code allows for such payments to be made directly by the debtor, acting as a disbursing agent, with the bankruptcy court's approval. *Id.* at 486. But just because such payments are made directly by the debtor does not mean that they are made outside of the plan rather than under it; the Court went on to hold, "a plan cannot provide that the current portion of a mortgage claim will be made 'outside the plan' . . . when the arrearages on the mortgage claim are being cured under § 1322(b)(5)." *Id.* at 488 (citing 11 U.S.C.. § 1322(b)(5)).

The Fifth Circuit explained that curing a mortgage debt under § 1322(b)(5) is completely discretionary and such a debt may, but need not be, included in a Chapter 13 plan. *Foster*, 670 F.2d at 484. There are various reasons a debtor may or may not want to include a debt under § 1322(b)(5) in their Chapter 13 plan. But where a debtor does elect to include such a debt, the Fifth Circuit has very clearly held that "for the arrearage on a mortgage claim to be cured under § 1322(b)(5), the current mortgage payments while the case is pending *must be provided for in the plan.*" *Id.* at 489 (emphasis added). "Conversely, where a fully secured mortgage claim is not treated under the provisions of § 1322(b)(5), or any other provision of Chapter 13, payments on that claim need not be made under the plan." *Id.* In other words, the decision to include arrears on a mortgage claim under § 1322(b)(5) in the Chapter 13 plan is entirely up to the debtor, but an election to do so necessitates that post-petition mortgage payments arising during the bankruptcy must be included under the plan. *Id.*

Kessler attempts to argue that *Foster* is not controlling because it discussed only the bankruptcy judge's refusal to confirm a Chapter 13 plan and did not deal with discharge under § 1328(a). But the Court finds this argument unpersuasive. Just because *Foster* did not deal with the issue of discharge specifically does not mean that its holding is inapplicable to the present case. *Foster* definitively established that current mortgage payments made on a § 1322(b)(5) debt fall under the Chapter 13 plan when arrears for such a debt are included in the plan. *Foster*, 670 F.2d at 489. In the context of the issue of discharge, § 1328(a) requires that all payments under the plan must be paid before a debtor is entitled to a discharge order. Because the post-petition mortgage payments are required to be "under the plan," failure to make those

payments precludes discharge under § 1328(a), as correctly held by the bankruptcy judge. *See Foster*, 670 F.2d at 489; 11 U.S.C.. § 1328(a).

Kessler voluntarily included the arrears from his mortgage debt in his Chapter 13 plan. The current payments on that mortgage were necessarily included under the plan as well. Kessler's failure to pay the current mortgage payments for the duration of the bankruptcy proceeding was a failure to complete all payments under the plan as required. Therefore, Kessler is not entitled to a discharge. *In re Heinzle*, 511 B.R. 69, 81–83 (Bankr. W.D. Tex. 2014).

B. This Result Is Neither Absurd Nor Inequitable

Kessler argues that it would be absurd to require satisfaction of all post-petition mortgage payments under the plan in order to receive a discharge, considering that some mortgage payments may last as long as 15 or 20 years after the final Chapter 13 payment. According to Kessler, "[i]t would seem unfair to revoke a Chapter 13 discharge because the Debtor did not 'complete' all payments 'under the plan' 15 years after the hearing." Br. of Appellants 14. But Kessler misunderstands the requirements of § 1328(a). There is no support for Kessler's proposition that a discharge could be revoked years after the Chapter 13 proceeding is completed. To the contrary, *Foster* clearly stated that those payments falling under the plan are the "current mortgage payments *while the case is pending*." *Foster*, 670 F.2d at 489 (emphasis added). By the plain language of *Foster*, any current mortgage payments made *after* the conclusion of the bankruptcy case would not be payments under the plan. *See id.*

Further, it is not inequitable (as Kessler argues) to deny Kessler a discharge for his failure to complete these payments as required by § 1328(a); quite the opposite is true. As Wilson correctly points out, "allowing a discharge of the remaining debt where [Kessler] had the

unfettered use of over $40,000.00 in disposable income would be unfair and inequitable to [Kessler's] creditors." Br. of Appellee 12; *See In re Formaneck*, 534 B.R. 29, 33–34 (Bankr. D. Colo. 2015).

C. Kessler's Argument Regarding Waiver Is Unpersuasive

Kessler finally argues that even if his failure to make the mortgage payments is construed as a failure to comply with § 1328(a), Bank of America "must object to the Motion for Entry of Chapter 13 Discharge, or the objection is waived." Br. of Appellant 19. Kessler cites no authority for this bold proposition in his brief, other than relying on the Supreme Court case of *United Student Aid Funds v. Espinosa*. 559 U.S. 260 (2010). But, as the bankruptcy court correctly discerned, Kessler's reliance on the case law is misplaced.

In *Espinosa*, the Supreme Court addressed the issue of whether a bankruptcy court's discharge order could be voided under Federal Rule of Civil Procedure 60(b)(4) several years after a creditor failed to object to the discharge. *Espinosa*, 559 U.S. at 261; Fed. R. Civ. P. 60(b)(4). The Court concluded that the bankruptcy court's failure to find undue hardship in discharging a student loan debt was a legal error (because such a finding is required for student loan debts under the Bankruptcy Code) but held that the confirmation order could not be voided under Rule 60 because the creditor received actual notice of the error and failed to timely object. *Espinosa*, 559 U.S. at 262. But the creditor's failure to object to the discharge in that case was specifically relevant to whether the order entered by the bankruptcy judge could be set aside under Rule 60; nowhere in the opinion did the Court say (as Kessler implies) that a creditor's failure to object to a requested discharge order requires the bankruptcy judge to *grant* a discharge

regardless of whether the debtor has fully satisfied all payments under the plan. *See id.* at 263–68.

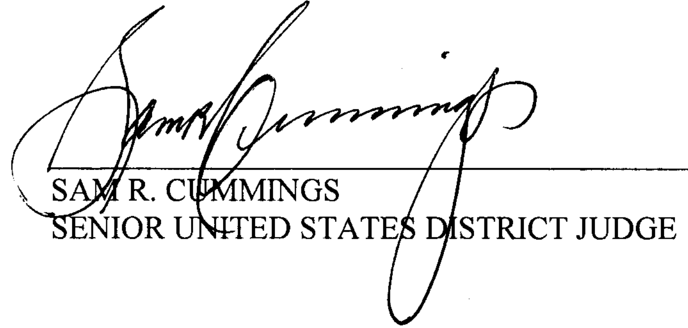
The Court's holding in *Espinosa* was more limited than Kessler would have it read. The Court specifically stated in its opinion that "[w]here, as here, a party is notified of a plan's contents and fails to object to confirmation of the plan before the time for appeal expires . . ., the party's failure to avail itself of that opportunity will not justify Rule 60(b)(4) relief." *Id.* at 276. That is not the situation presented in the current case; no Rule 60 relief is being sought here. Instead, Kessler is appealing the bankruptcy judge's refusal to grant a discharge because Kessler failed to complete all payments under the plan as required by the Code. 11 U.S.C.. § 1328(a).

As the bankruptcy court correctly noted, "there is no requirement that the creditor object to the discharge for the Court to deny discharge." *In re Kessler*, No. 09-60247-RLJ-13, Mem. Op. at *8 (Bankr. N.D. Tex. June 9, 2015) (citing 8 Collier on Bankruptcy ¶ 1328.02 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.)). The Court is of the opinion that neither *Espinosa* nor any other case imposes such a requirement, contrary to Kessler's contention. By the plain language of § 1328(a), a discharge is self-executing and may be granted "as soon as practicable after completion by the debtor of all payments under the plan . . . ." 11 U.S.C.. § 1328(a). Kessler did not complete all payments under the plan and therefore was not entitled to a discharge regardless of any objections that Bank of America may or may not have made. *See supra*, Part A.

IV. CONCLUSION

The Court has reviewed the bankruptcy court's findings of fact for clear error and its conclusions of law *de novo*. For the foregoing reasons, the Court is of the opinion that the bankruptcy court did not commit reversible error with regard to the issues Kessler raises on appeal. Therefore, the judgment of the bankruptcy court is **AFFIRMED**.

Dated November 19, 2015.



SAM R. CUMMINGS
SENIOR UNITED STATES DISTRICT JUDGE