SO ORDERED.

SIGNED this 13th day of February, 2015

LENA MANSORI JAMES
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

In re:	)	
	)	
CLOYCE MICHELLE HUNTER,	)	Case No. 14-80214
	)	Chapter 13
Debtor.	)	
	)	

ORDER

This matter came before the court on December 11, 2014, after due and proper notice, for a hearing on the Motion to Modify Plan and the Objection to Claim Number 6 of Federal National Mortgage Association filed by Cloyce Michelle Hunter (the "Debtor"). At the hearing, Benjamin Busch appeared on behalf of the Debtor, Kimberly Sheek appeared on behalf of Federal National Mortgage Association ("Fannie Mae"), and Benjamin Lovell appeared on behalf of the Chapter 13 trustee.

FACTS

In May 2006, Charles H. Lassiter ("Mr. Lassiter") executed and delivered a Note in the amount of $149,150.00 and a Deed of Trust to Countrywide Home Loans, Inc. The Deed of

Trust secured a lien on real property located at 6800 Highway 751, Durham, North Carolina. In addition to requiring monthly principal and interest payments, Paragraph 3 of the Deed of Trust required the borrower to make payments to the lender for "Escrow Items," including private mortgage insurance ("PMI") premiums. Paragraph 10 expanded on the mortgage insurance obligation. Paragraph 10 provided that "[i]f Lender required Mortgage Insurance as a condition of making the Loan, Borrower shall pay the premiums required to maintain the Mortgage Insurance in effect." The Deed of Trust acknowledged that the borrower may be entitled under the Homeowners Protection Act of 1998 or other applicable law to receive disclosures, "to request and obtain cancellation of the Mortgage Insurance, [or] to have the Mortgage Insurance terminated automatically."

A few years after executing the Note and Deed of Trust, Mr. Lassiter passed away, and his daughter, the Debtor in this case, received title to the property through a General Warranty Deed dated September 25, 2010. During the same month, the Debtor executed a Simple Assumption Agreement (the "Assumption Agreement"), assuming "all obligations of a borrower or mortgager" under the Note and Deed of Trust. Pursuant to the Assumption Agreement, the Debtor began to receive notices regarding fees, expenses, and costs on the mortgage account. The record in this case includes notices mailed to the Debtor in September 2011, October 2011, November 2011, December 2011, February 2012, and March 2012 from Bank of America Home Loans advising the Debtor of escrow disbursements for the payment of PMI. See Aff. of Esther Parrish.

On August 17, 2012, the Debtor entered into a modification agreement (the "Modification Agreement") with Bank of America, N.A. The initial payment under the modified loan was $872.46, including an estimated initial escrow payment of $345.02. The Modification

Agreement reiterated in Paragraph 4(C) the Debtor's obligation to "comply . . . with all covenants, agreements, and requirements of [the original] Loan documents including my agreement to make all payments of taxes, insurance premiums, assessments, [and] Escrow Items, . . . the amount of which may change periodically over the term of my Loan."

The Debtor filed a voluntary petition under Chapter 13 of the Bankruptcy Code on March 2, 2014. By the time of filing, the Debtor had made the real property her principal place of residence. On May 19, 2014, a Plan was confirmed with monthly payments of $1,072.45 and an estimated 27-percent dividend to general unsecured creditors. The Plan provided for cure of pre-petition arrearages and for monthly payments of $876.46 to the Federal National Mortgage Association ("Fannie Mae") on the Debtor's mortgage. On August 1, 2014, Fannie Mae filed a late claim for $160,806.26, including $7,638.56 in arrearages. According to an account statement attached to the Proof of Claim, the Debtor's new monthly mortgage payment (effective August 1, 2014) was $864.35, including projected escrow of $336.91. The attached account statement showed that $119.13 per month would be deducted from the escrow account to pay for PMI.

The Debtor objected to Fannie Mae's claim on August 20, 2014 (the "Objection to Claim"), and filed a simultaneous motion to (among other things) reject the PMI contract and lower her monthly Plan payments by $119.00 (the "Motion to Modify Plan").[1] A hearing was held on December 11, 2014, at which the Debtor testified. At the hearing, counsel for the Debtor raised an issue as to whether PMI was "a condition of . . . the Loan" pursuant to Paragraph 10 of the Deed of Trust. Counsel for the Debtor then argued that even if PMI was a condition of the loan, the Deed of Trust required any PMI premiums to be "reasonable and appropriate" under the

[1] These documents provided virtually no argument as to why the Debtor should not be required to pay for PMI. The motion to reject the PMI contract seemed to suggest a possibility of relief under the Homeowners Protection Act, but the Debtor never pursued that line of argument.

circumstances, and that a factual issue existed as to whether that standard was met in this case. Debtor's counsel called upon the Debtor to testify that the Assumption Agreement did not mention PMI as a precondition to the loan, that she was not advised at the time of entering into the Modification Agreement that her new payments included PMI, that she did not have knowledge of the PMI prior to the filing of Fannie Mae's claim, and that affording her monthly mortgage payment was more difficult because of the PMI premiums. Because the Debtor raised an array of factual and legal issues at the hearing, none of which had been specifically identified in the Motion to Modify Plan or Objection to Claim, the Court asked the Debtor to submit a post-hearing brief. The Court also allowed Fannie Mae the opportunity to file an affidavit and reply brief. In her post-hearing brief, the Debtor abandoned her argument that the PMI was not a precondition of the loan and made no further reference to her allegations that she was not properly advised of the PMI requirement.

DISCUSSION

Under Section 1322(b) of the Bankruptcy Code, a Chapter 13 Plan may "modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor's principal residence." 11 U.S.C. § 1322(b)(2). The parties in this case do not dispute that the real property in question is the Debtor's principal residence. Thus, by the terms of Section 1322(b)(2), the Debtor is not permitted to modify Fannie Mae's rights under the loan agreements.[2] While the Debtor does not dispute the authenticity or admissibility of any of the documentary evidence provided by Fannie Mae, the Debtor argues that a factual dispute

[2] The Debtor seems to argue that she *can* modify Fannie Mae's rights so long as she "cures and maintains" as to Fannie Mae during the term of the Plan. She cites as her authority this Court's opinion in In re Martin, 444 B.R. 538 (Bankr. M.D.N.C. 2011). However, the Court in Martin made explicit that the anti-modification provision of § 1322(b)(2) did not apply to the creditor in that case because the creditor's claim was secured by both the debtor's principal residence and the debtor's interest in an escrow account. See id. at 543. Fannie Mae's claim, by contrast, is secured by the Debtor's principal residence only and thus fits within the anti-modification provision of 1322(b).

exists as to whether Fannie Mae has the contractual right under the loan agreements to require PMI payments. The Debtor focuses on a provision in Paragraph 9 of the Deed of Trust stating that, upon certain triggering events (including a default by the borrower or the filing of a bankruptcy petition), "then Lender may do and pay for whatever is reasonable or appropriate to protect Lender's interest in the Property and rights under this Security Instrument." The Debtor argues that it is not "reasonable or appropriate" under the present circumstances for Fannie Mae to require the Debtor to pay for PMI. See Debtor's Post-Hearing Br. 1 (January 20, 2015) (asserting in her introduction that, "[b]riefly, it is not reasonable or appropriate under these circumstances to allow Fannie Mae to advance mortgage insurance payments as an additional debt of the Debtor."). The Court rejects this argument.

The Debtor is contractually obligated to pay for PMI premiums under the Deed of Trust and other loan agreements, and Fannie Mae has the right to require such advances from the Debtor. Paragraph 10 of the Deed of Trust, entitled "Mortgage Insurance," states that "[i]f Lender required Mortgage Insurance as a condition of making the Loan, Borrower shall pay the premiums required to maintain the Mortgage Insurance in effect." The Debtor now concedes that PMI was a condition of her loan. See Debtor's Post-Hearing Br. 3 (January 20, 2015) ("After consideration, Debtor waives her argument that as a factual matter, the PMI was not a condition of her loan."). However, the Debtor argues that Fannie Mae only has the contractual right to require PMI payments where such payments are "reasonable [and] appropriate."[3] The Debtor misinterprets Paragraph 9 of the Deed of Trust with this reading. Paragraph 9 provides that where the Debtor has defaulted under the loan agreement; there is a legal proceeding (such as a bankruptcy) that might affect the lender's rights or interests; or the Debtor has abandoned the

[3] The Court finds the Debtor's admission that PMI was a condition of the loan and her argument that Fannie Mae does not have the contractual right to require PMI payments to be contradictory.

property, the lender may take actions and incur expenses that are "reasonable or appropriate" to protect the lender's rights. The paragraph includes examples of permissible actions by the lender: paying sums secured by a lien with priority over the lender's security interest, appearing in court, and paying reasonable attorney's fees, as well as taking certain physical steps to protect the property (for example, changing the locks). Paragraph 9 clearly intends to limit the Debtor's liability for out-of-the-ordinary expenditures by the lender; the paragraph does not operate to scale back any commitments made by the Debtor elsewhere in the Deed of Trust.

Because Fannie Mae has the contractual right to require the Debtor to pay for PMI, now prohibiting Fannie Mae from requiring such payments would amount to a modification of the rights of a holder of a claim "secured only by a security interest in real property that is the debtor's principal residence," in violation of Section 1322(b). See In re Lanois, No. 13-13070, 2014 WL 4449805, at *4 (Bankr. D.R.I. Sept. 10, 2014) (holding that omitting PMI payments from the creditor's mortgage claim did not violate the antimodification provision of Section 1322(b)(2) only "because of the nature of the Property," which was a multi-family dwelling).

The Court also finds the Debtor's alternative argument that she may reject the PMI contract to be without merit. The Debtor cannot circumvent the provisions of Section 1322(b)(2) by separating the PMI requirement from the remaining terms of the Deed of Trust. Furthermore, Sections 365(a) and 1322(b) provide that a trustee or Chapter 13 Plan may assume or reject "any executory contract or unexpired lease *of the debtor*." 11 U.S.C. §§ 365(a), 1322(b)(7) (emphasis added). Even if the Debtor, who has already confirmed a Plan that provides for payment of Fannie Mae's claim as a long-term debt, had attempted to reject the contract in a timely manner, she could not do so: the Deed of Trust makes explicit in Paragraph 10 that the Debtor "is not a party to the Mortgage Insurance" contract. Thus, the PMI contract is not an executory contract

"of the debtor" and could not be rejected under Section 365 or Section 1322 regardless of timing.[4]

CONCLUSION

In sum, Fannie Mae has the contractual right under the Deed of Trust and other loan agreements to require the Debtor to advance PMI premiums, and the antimodification provision of Section 1322(b) bars the Debtor from stripping Fannie Mae of that right. Thus, the continued payment of PMI is necessary in order for the Debtor to cure and maintain Fannie Mae's claim in accordance with Section 1322. The Debtor has no power under the Bankruptcy Code to reject the PMI contract. NOW, THEREFORE, it is hereby ORDERED that:

1. The Debtor's Motion to Modify Plan is DENIED; and

2. The Debtor's Objection to Claim Number 6 of Federal National Mortgage Association is OVERRULED.

END OF DOCUMENT

[4] A borrower may have the right to cancel PMI under the Homeowners Protection Act. The Debtor did not present evidence that she was eligible for PMI cancellation under the Act, and it does not appear that she would be.