

Tagged Opinion

ORDERED in the Southern District of Florida on

Aug. 8, 2011



Laurel M. Isicoff
Laurel Myerson Isicoff, Judge
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

In re

Case No. 10-20092-BKC-LMI

JOAN RITA RHYMAUN,

Chapter 13

Debtor.
_____ /

**ORDER SUSTAINING OBJECTION OF CHAPTER 13
TRUSTEE TO PLAN MODIFICATION**

This matter came before the Court on February 4, 2011 on the Motion of Joan Rita Rhymaun (the "Debtor") for an Order Modifying a Chapter 13 Plan for Early Payoff Utilizing Proceeds from the Sale of Exempt Homestead Property (the "Motion") (ECF #58). The Chapter 13 Trustee filed an Objection to the Motion (ECF #65). Both parties have filed memoranda of law in support of their respective positions. The issue presented is whether an above-median Debtor may modify a confirmed Chapter 13 plan to pay off in full the obligations in the plan prior to the conclusion of the 60 month plan term where unsecured creditors will not be paid in

full. For the reasons set forth below, I hold that the Debtor may not do so and I sustain the Trustee's objection.

FACTS

Debtor confirmed her First Amended Chapter 13 Plan (the "Plan") on August 25, 2010. Debtor is an above-median debtor.¹ Debtor's Plan contributed her projected disposable income² for a five-year period to pay creditors as required by 11 U.S.C. §1325(b)(4). However, under the Plan the Debtor's unsecured creditors would not be paid in full. On February 4, 2011, the Debtor filed the Motion. The Motion proposes to pay the Plan's five-year projected payment to unsecured creditors in one lump sum using funds derived from the sale of exempt property. In other words, the Debtor proposes to pay to the unsecured creditors the full amount she committed to pay over the five-year Plan period, but to do so approximately four years early, using the proceeds from the sale of her home.

JURISDICTION

This Court has jurisdiction of this dispute pursuant to 28 U.S.C §1334 and §§157(b)(1) and (b)(2).

ARGUMENTS

The issue in this case is whether the Debtor may modify a plan to accomplish something that, pursuant to 11 U.S.C. §1325(b)(4) as interpreted by the Eleventh Circuit, is not permitted when seeking initial confirmation of the Plan. The Debtor argues that the requirement of section 1325(b)(4) that an above-median debtor must commit to a five-year plan if unsecured creditors are not paid in full does not apply to plan modifications; the Trustee disagrees.

¹ An above-median debtor is defined as a debtor whose annualized current monthly income is above the median family income in the applicable state that corresponds to the size of the debtor's household. *See* 11 U.S.C. § 1325(b)(3).

² For a discussion of what is "projected disposable income" and how it is calculated, see *In re Abaunza*, 2011 WL 2559524 (Bankr. S.D. Fla. June 2, 2011).

ANALYSIS

When Congress amended the Bankruptcy Code in 2005 by the enactment of BAPCPA,³ Congress added to Chapter 13 the concept of the “applicable commitment period.” Pursuant to 11 U.S.C. §1325(b), if a trustee or holder of an allowed unsecured claim objects, where unsecured creditors are being paid less than 100% of their allowed claim, all chapter 13 debtors must propose a plan with payments to be made during the required applicable commitment period. For above-median debtors the applicable commitment period is five years.⁴

³ Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

⁴ 11 U.S.C. § 1325(b) provides:

(b)(1) If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan—

(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the plan provides that all of the debtor’s projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors under the plan.

(2) For purposes of this subsection, the term “disposable income” means current monthly income received by the debtor (other than child support payments, foster care payments, or disability payments for a dependent child made in accordance with applicable nonbankruptcy law to the extent reasonably necessary to be expended for such child) less amounts reasonably necessary to be expended—

(A)(i) for the maintenance or support of the debtor or a dependent of the debtor, or for a domestic support obligation, that first becomes payable after the date the petition is filed; and

(ii) for charitable contributions (that meet the definition of “charitable contribution” under section 548(d)(3) to a qualified religious or charitable entity or organization (as defined in section 548(d)(4)) in an amount not to exceed 15 percent of gross income of the debtor for the year in which the contributions are made; and

(B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

(3) Amounts reasonably necessary to be expended under paragraph (2), other than subparagraph (A)(ii) of paragraph (2), shall be determined in accordance with subparagraphs (A) and (B) of section 707(b)(2), if the debtor has current monthly income, when multiplied by 12, greater than--

(A) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;

(B) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or

(C) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus \$625 per month for each individual in excess of 4.

Subsequent to the enactment of BAPCPA, courts have split on the issue of whether the “applicable commitment period” refers to the anticipated dollar amount to be paid over the three to five-year period, that is, a multiplier, thereby allowing a debtor to pay unsecured creditors the full proposed plan amount earlier than the three to five years, or whether “applicable commitment period” is an actual temporal measurement of commitment. The Eleventh Circuit resolved this issue for our circuit in *Whaley v. Tennyson (In re Tennyson)*, 611 F.3d 873 (11th Cir. 2010). In *Tennyson*, the Eleventh Circuit held that a debtor is obligated to remain in Chapter 13 for the specified three or five years unless unsecured creditors are paid in full; in other words, “applicable commitment period” is measured temporally. Consequently, in the Eleventh Circuit, in order to confirm a chapter 13 plan, a debtor must commit to a minimum plan duration of three years, except in the case of an above-median debtor, whose plan must commit to a five-year plan duration.

The Debtor in this case confirmed a plan that complied with the applicable commitment period’s temporal requirement of 60 months for an above-median debtor. However, the Debtor now proposes to modify her Plan using proceeds from the sale of her property to pay the balance

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- (4) For purposes of this subsection, the ‘applicable commitment period’ –
- (A) subject to subparagraph (B), shall be—
 - (i) 3 years; or
 - (ii) not less than 5 years, if the current monthly income of the debtor and the debtor’s spouse combined, when multiplied by 12, is not less than—
 - (I) in the case of a debtor in a household of 1 person, the median family income of the applicable State for 1 earner;
 - (II) in the case of a debtor in a household of 2, 3, or 4 individuals, the highest median family income of the applicable State for a family of the same number or fewer individuals; or
 - (III) in the case of a debtor in a household exceeding 4 individuals, the highest median family income of the applicable State for a family of 4 or fewer individuals, plus \$625 per month for each individual in excess of 4; and
 - (B) may be less than 3 or 5 years, whichever is applicable under subparagraph (A), but only if the plan provides for payment in full of all allowed unsecured claims over a shorter period.

of anticipated payments due under the plan in one lump sum, and obtain her discharge without paying unsecured creditors in full. The Debtor argues that she may do this because the applicable commitment period requirements of section 1325(b)(4) do not apply to plan modifications.

Plan modifications are governed by 11 U.S.C. §1329; not surprisingly, there is also a split among the courts as to whether section 1329 incorporates the applicable commitment period provisions of section 1325(b)(4). The source of this debate is section 1329(b)(1) which provides that “[s]ections 1322(a), 1322(b), and 1323(c) of this title and the requirements of section 1325(a) of this title apply to any modification under subsection (a) of this section.” Those courts holding that the applicable commitment period requirements of section 1325(b) apply to modifications note that section 1325(a) incorporates by reference the restrictions of section 1325(b). *See, e.g., In re King*, 439 B.R. 129 (Bankr. S.D. Ill. 2010).

Here, the qualifying phrase in question is integrally related to the requirements of § 1325(a) itself and, therefore, the Court must give it meaning. Section 1325(a) unequivocally states that its provisions are subject to the restrictions of § 1325(b). Therefore, by incorporation, the provisions of § 1325(b) also apply to § 1329.

439 B.R. at 135; *see also In re Buck*, 443 B.R. 463 (Bankr. N.D. Ga. 2010) (noting that “there is a compelling textual basis to incorporate § 1325(b) into plan modifications when the provisions are examined in total”).

Those courts that have held the requirements of section 1325(b)(4) do not to apply to chapter 13 plan modifications have focused on the fact that, because section 1329(b) specifically references section 1325(a), it would be contrary to the rules of statutory construction to do indirectly what Congress did not do directly—incorporate the requirements of sections 1325(b). In *Sunahara v. Burchard (In re Sunahara)*, 326 B.R. 768 (B.A.P. 9th Cir. 2005), the court noted:

Section 1329(b) expressly applies certain specific Code sections to plan modifications but does *not* apply § 1325(b). Period. The incorporation of § 1325(a) is not, as has been posed by some courts, the functional equivalent of an indirect incorporation of § 1325(b). Under § 1329(b), only the ‘requirements of Section 1325(a)’ apply to modifications under § 1329(a). § 1329(b). As previously noted, § 1325(a) requires that ‘*except as provided in [1325]b*, the court shall confirm a plan if...’ Thus, the 1325(a) confirmation requirements incorporated into § 1329(b) *exclude* the provisions of § 1325(b).

326 B.R. at 781 (emphasis in original); *see also In Re Davis*, 439 B.R. 863 (Bankr. N.D. Ill. 2010). Moreover, those courts observe, section 1325(a) only applies to confirmation of a plan, not modification of a plan.⁵ *Id.*

There are three decisions in the Eleventh Circuit of which I am aware that have addressed this issue post-*Tennyson*. In *In re Heideker*, 2011 WL 2432913 (Bankr. M.D. Fla. June 2, 2011), Judge Adams held that

Section 1325(b) is applicable to plan modifications. To hold otherwise, would contravene the plain meaning of sections 1325(b) and 1329, as well as Congress’ intent in enacting BAPCPA. Worse, it would effectively eviscerate the Eleventh Circuit’s decision in *Tennyson*.

2011 WL 2432913, at *7.

In *In re Buck*, Judge Diehl also rejected the debtor’s argument that the applicable commitment period does not apply to a modification.

Tennyson’s underlying rationale in ruling that [the applicable commitment period] is a temporal concept was that above-median income debtors must remain in their Chapter 13 plans for a sixty month time period to allow creditors to have the benefit of upward changes in income . . . This reasoning would be completely undermined if Debtors were allowed to modify their plans to shorten that period.

⁵ For a thorough discussion of the two lines of cases, *see In re Heideker*, 2011 WL 2432913 (Bankr. M.D. Fla. June 2, 2011) and *In re Buck*, 443 B.R. 463.

443 B.R. at 470 (internal citation omitted).

In *In re Smith*, 449 B.R. 817 (Bankr. M.D. Fla. 2011), Judge McEwen ruled that creditors could consent to an early payoff of a bankruptcy plan, and overruled the objections of the trustee that the early payoff would violate the durational requirements of section 1325(b)(4). Judge McEwen held that *Tennyson* was a confirmation case and not applicable where the relief proposed was through a Motion for Early Payoff, and that the debtor's motion gave the debtor's creditors the right to choose "the bird in the hand." *Id.* at 820. The court also noted that no creditors objected to the motion, and consequently, they therefore were deemed to have consented to the motion.^{6, 7}

I agree with Judge Adams and Judge Diehl. While the immediate issue before the Eleventh Circuit in *Tennyson* was plan confirmation, the entire premise of the Eleventh Circuit's holding was the ability of creditors to seek modification during the three to five-year applicable commitment period if the debtor's circumstances changed—"allowing [the debtor] to confirm a plan for less than five years would deprive the unsecured creditors of their full opportunity to recover on their claims from [the debtor] by way of post confirmation plan modifications." 611 F.3d at 879. There is no question that the Eleventh Circuit views the entire chapter 13 commitment, no matter how many times the plan is modified, as a time commitment, the shortening of which can only be accomplished two ways—payment in full of all unsecured debt or

⁶ In the Middle District of Florida a motion for early payoff may be filed with a negative notice provision; that is, in the absence of affirmative objection is viewed as no objection.

⁷ As Debtor's counsel observed when I delivered my oral ruling, the requirements of 11 USC §1325(b) are only triggered if the trustee or the holder of an allowed secured claim objects, and therefore the Bankruptcy Code requires an affirmative objection before the requirements of section 1325(b) are triggered. Of course, in this case, as well as in *Smith*, the trustee objected.

pursuit of a hardship discharge by the debtor. To hold otherwise would undermine congressional intent and, as Judges Adams and Diehl observed, undermine *Tennyson's* holding.⁸

CONCLUSION

For the reasons set forth above, the Debtor's Motion is denied without prejudice to the Debtor seeking a modification consistent with this opinion.

Copies furnished to:
James Schwitalla, Esq.
Nancy Herkert, Trustee

⁸ I also note that the Debtor's attempt to circumvent section 1325 shows an absence of good faith. Section 1325(a) requires that any plan modification be proposed in good faith. I have previously ruled that a debtor may not do indirectly what the Code does not allow a debtor to do directly, *see In re Santiago*, 2009 WL 3515705, *2 (Bankr. S.D. Fla. Oct. 29, 2009), and that a debtor's attempt to do so constitutes bad faith. *Id.* Section 1329 does not provide the debtor with the ability to achieve through a modification-a shortening of the "applicable commitment period" - that which was specifically prohibited during confirmation. It would be anomalous to presume Congress adopted a statutory scheme whereby conceptually a debtor could confirm a plan meeting the required temporal conditions and even days later seek to modify that plan, thereby circumventing the temporal requirements of confirmation. Indeed, as the Eleventh Circuit noted in *Tennyson* - "We find that a plain reading of 11 U.S.C. § 1325, a recent United States Supreme Court ruling, and the Congressional intent behind BAPCPA mandate that an above median income debtor remain in bankruptcy for a minimum of five years, unless all unsecured creditor's claims are paid in full." *Tennyson*, 611 F.3d at 874. I recognize Judge Adams held in *Heideker* that lack of good faith is not the standard by which a modification seeking to shorten the applicable commitment period should be measured; I respectfully disagree.