UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

In re:

Case No. 9:11-bk-17863-FMD
Chapter 13

Stephen Carreiro,

Debtor.
_____/

ORDER DENYING DEBTOR'S MOTION TO APPROVE EARLY PAYOFF OF CHAPTER 13 PLAN

THIS CASE came on for hearing on November 15, 2012, upon the Debtor's *Motion to Approve Early Payoff of Chapter 13 Plan and Request for Fees* (Doc. No. 39) (the "Motion"). The Court denied the Motion for the reasons stated in open court. This Order supplements the Court's oral ruling.

FACTUAL AND PROCEDURAL BACKGROUND

On September 26, 2011, the Debtor filed a voluntary petition under Chapter 13 of the Bankruptcy Code. The Debtor's bankruptcy schedules and Statement of Financial Affairs stated that he is single, that he had been self-employed for six years, and that he had previously owned businesses in the construction industry.[1] The Debtor's Form B22C indicates that his average monthly income for the six months prior to the bankruptcy filing was $3,674.56. Because that amount exceeds the median family income for residents of the State of Florida with a household of one person, the Debtor is considered to be an above-median income debtor.[2] Above-median income debtors are required to make plan payments for an "applicable commitment period" of five years.

The Debtor's proposed Chapter 13 Plan (the "Plan") provided that the Debtor would make payments to the Chapter 13 Trustee ("Trustee") of $130 per month over 60 months, to be distributed by the Trustee to pay the Debtor's unpaid bankruptcy attorney's fees of $3,500 and an estimated dividend to unsecured creditors of $3,517.[3] The Trustee objected to the Plan because the Debtor had not dedicated all of his projected disposable income to the Plan. As a result of this objection, the Court was prohibited from confirming the Plan unless "all of the debtor's projected disposable income to be received in the *applicable commitment period* . . . will be applied to make payments to unsecured creditors under the plan."[4] (emphasis supplied).

Thereafter, on August 30, 2012, the Court entered an order confirming the Plan ("Confirmation Order"). The Confirmation Order required, in addition to the payments of $130 for 60 months, that the Debtor commit to the Plan all tax refunds for each year of the plan period, beginning with tax year 2012, and provide complete copies of all tax returns to the Trustee's office no later than April 15th of each year for the preceding year's taxes.[5] As set forth in the Court's Order Allowing and Disallowing Claims and Ordering Disbursements, the Debtor's allowed unsecured claims totaled over $86,000.[6]

Notwithstanding the fact that the Debtor's applicable commitment period was five years, a mere 36 days after the Court entered the Confirmation Order, the Debtor filed the Motion. In the Motion, the Debtor proposes to fund a lump-sum payoff of his Plan payments with a withdrawal from his exempt retirement account—funds that would not otherwise be available to unsecured creditors. The payoff of the Plan payments would result in unsecured creditors—whose claims totaled over $86,000—receiving a *pro rata* distribution of approximately $3,517. The Debtor would then receive his discharge,[7] and would avoid turning over his income tax returns and any income tax refunds to the Trustee for tax years 2012 through 2015.

The Motion included a notice legend in bold type on the first page that stated "Unsecured Creditors are advised that the granting of this Motion will deprive them of a potentially higher dividend in the event that the Debtors [sic] have an increase in disposable income over the original 60-month term of the confirmed plan." No creditors objected to the Motion. The Trustee did not state a position at the hearing.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C §§ 157(a) and 1334(a) and (b) and the Standing Order of General Reference entered in this district. This matter is a core proceeding under 28 U.S.C §

[1] Doc. No. 1.
[2] 11 U.S.C. § 1325(b)(3)(A).
[3] Doc. No. 2.
[4] 11 U.S.C. § 1325(b)(1)(B).
[5] Doc. No. 35.
[6] Doc. No. 37.
[7] *See* 11 U.S.C. § 1328(a) (directing the court to enter a discharge after the completion of all plan payments).

157(b)(2)(A), and the Court may enter a final order under 28 U.S.C § 157(b)(1).

ANALYSIS

Section 1329 authorizes the Court to modify a plan at any time after confirmation to, *inter alia*, extend or reduce the time for payments.[8] The question presented is whether the confirmation requirements of § 1325(b), including the applicable commitment periods set forth in § 1325(b)(4), apply to modifications of a plan under § 1329.

Prior to the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA), if the Chapter 13 trustee or an unsecured creditor objected to confirmation of the plan, the debtor was required to satisfy the "best efforts test." The "best efforts test" required a debtor who did not propose 100% repayment to unsecured creditors to make his best effort toward repayment for three years. The debtor demonstrated his best efforts if his plan provided that "all of the debtor's projected disposable income to be received in the three year period . . . under the plan will be applied to make payments under the plan."[9]

BAPCPA substantially amended the language of § 1325(b)(1) by replacing the reference to a three-year repayment period with the phrase "applicable commitment period." Section 1325(b)(1)(B) now states:

> If the trustee or 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—
>
> > . . .
> > (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.

The "applicable commitment periods" are specified in § 1325(b)(4). For above-median income debtors, the applicable commitment period is five years, unless the plan proposes to pay all allowed unsecured claims *in full* over a shorter period.[10]

Courts have differed in their interpretation of the function of the "applicable commitment period" and whether the term represents a temporal or monetary requirement. Those courts which view the "applicable commitment period" as a temporal requirement believe the term represents a fixed durational period in which the Chapter 13 debtor must pay the Chapter 13 trustee all of his disposable income for repayment to creditors. In contrast, those courts which view the "applicable commitment period" as a monetary requirement believe the term is simply part of a multiplication formula which produces the total dollar amount the debtor must pay in order to receive his discharge. Under that formula, the debtor's projected monthly disposable income is multiplied by the number of months in the applicable commitment period to arrive at a total dollar amount. As long as that total dollar amount is paid, a Chapter 13 debtor may pay off his plan and receive his discharge before the expiration of his applicable commitment period.[11]

The Eleventh Circuit Court of Appeals, whose decisions are binding upon this Court, views the "applicable commitment period" as a temporal requirement. In *In re Tennyson*, the Eleventh Circuit employed the plain meaning approach of statutory construction to interpret the meaning of "applicable commitment period" for purposes of plan confirmation.[12] Finding the term to be a temporal requirement, the Eleventh Circuit held that an above-median income debtor, even one whose projected disposable income was negative, is obligated to remain in Chapter 13 for the specified five years unless his unsecured creditors are paid in full under the plan. As the *Tennyson* court pointed out, the Supreme Court's decision in *Hamilton v. Lanning*[13] supports a temporal interpretation of "applicable commitment period."[14] In *Lanning*, the Supreme Court endorsed the "forward-looking approach" when it held that a bankruptcy court's calculation of a Chapter 13 debtor's projected disposable income can account for changes in the debtor's income or expenses that are known or virtually certain at the time of confirmation.[15]

---

[8] 11 U.S.C. § 1329(a)(2).
[9] *In re Buck*, 443 B.R. 463, 465-66 (Bankr. N.D. Ga. 2010) (citing § 1325(b)(1)(B) (2004)).
[10] 11 U.S.C. § 1325(b)(4)(B).
[11] *See, e.g.*, *Baud v. Carroll*, 634 F.3d 327, 336-38 (6th Cir. 2011) (discussing the split of authority and listing those courts which subscribe to each position). *Carroll* lists eight courts that follow the monetary approach. *Id.* at 337-38.
[12] *In re Tennyson*, 611 F.3d 873 (11th Cir. 2010).
[13] 130 S.Ct. 2464, 177 L.Ed.2d 23 (2010).
[14] *Tennyson*, 611 F.3d at 878-79.
[15] *Lanning*, 130 S.Ct. at 2469.

Because the bankruptcy court enjoys the flexibility under *Lanning's* forward-looking approach to depart from a strict formulaic calculation of a debtor's projected disposable income, the term "applicable commitment period" must have some meaning independent of a pure monetary calculation. As the *Tennyson* court concluded, that meaning must be temporal in nature.[16] Accordingly, the Debtor in this case could not have obtained confirmation of his Plan unless it provided for payments over a five-year period.

Having obtained confirmation of his Plan, may the Debtor now modify the Plan to reduce the required five-year plan period? While § 1329(a)(2) permits a plan modification to reduce the time for payments, it is qualified by § 1329(b)(1). That sub-section makes the requirements of §§ 1322(a), 1322(b), 1323(c), and 1325(a) applicable to any plan modification. Although § 1329(b)(1) does not specifically refer to § 1325(b), it does expressly refer to § 1325(a).[17] And § 1325(a) incorporates the requirements of § 1325(b) as well as all other provisions of Chapter 13. Thus, because the "applicable commitment periods" set forth in § 1325(b)(4) are doubly incorporated by § 1325(a), courts have held that they apply to plan modifications.[18] And in *In re Heideker*, the court dispensed with the argument that applying § 1325(b) to plan modifications would render § 1329(a)(2) completely meaningless because the latter section remains applicable to below-median income debtors: "[t]he fact that one subsection of a statute may be inapplicable to one category of debtors does not render the statute superfluous."[19]

Where Congress intended that debtors repay creditors the maximum amount they could afford to pay, that intent "would be contravened by permitting confirmation of a bankruptcy plan for less than five years when unsecured claims have not been paid in full."[20] As the Eleventh Circuit observed in *Tennyson*, allowing confirmation of a plan for less than five years would deprive unsecured creditors of the opportunity to recover in full by way of post-confirmation plan modifications in the event a debtor's income increased during the life of the plan.[21] This same concern applies equally to post-confirmation plan modifications. "There would be little point in requiring an above-median income debtor to propose a five-year plan for purposes of confirmation if that same debtor could simply turn around and modify his plan to provide for a lesser term."[22] Like the court in *Heideker*, this Court believes that *Tennyson* compels a conclusion that the Eleventh Circuit would, if given the opportunity, find § 1325(b) applicable to plan modifications.[23]

While the Debtor acknowledges *Tennyson*, he relies on the bankruptcy court's recent ruling in *In re Smith*.[24] In *Smith*, the court declined to extend *Tennyson*'s holding beyond the confirmation context to plan modification. But *Smith* was decided on far different facts. First, the debtor's plan had been confirmed for over seventeen months before the debtor's motion seeking an early payoff of her plan came on for hearing. And second, the debtor had been unemployed for over six months when she filed her motion. Referring to the familiar maxim "a bird in hand is worth two in the bush," the judge in *Smith* granted the motion, stating that unsecured creditors should have the right to choose the certainty of receiving the amount of money due under the plan immediately over an uncertain potential increase in their distribution if the debtor's income increased during the life of the plan.[25]

This Court acknowledges that in certain cases creditors and the trustee might support an early payoff of a plan. If it is highly unlikely that the debtor's income will ever increase, it could be in the creditors' best interest for the debtor to complete plan payments and obtain an early discharge, rather than risk the possibility that the debtor might be unable to make future plan payments. But this is not that case. In this case, the Debtor's Plan provides for a nominal distribution to unsecured creditors. The Debtor is self-employed and he has not offered any evidence that his income is unlikely to increase during the plan period. And, he filed the Motion in advance of the deadline for providing the Trustee with his 2012 income tax return. Given these facts, there is no rationale for applying the *Smith* analysis to the Motion.

---

[16] *Tennyson*, 611 F.3d at 879.

[17] The first clause of § 1325(a) states that the court shall confirm a plan "[e]xcept as provided in subsection (b)." Under the plain language of this clause, the requirements of § 1325(b) are necessarily incorporated into § 1325(a).

[18] *See, e.g., In re Baxter*, 374 B.R. 292, 296 (Bankr. M.D. Ala. 2007) (finding that the disposable income provisions of § 1325(b)(1) apply to plan modifications under § 1329); *In re Heideker*, 455 B.R. 263 (Bankr. M.D. Fla. 2011); *In re Buck*, 443 B.R. 463 (Bankr. N.D. Ga. 2010); *In re King*, 439 B.R. 129 (Bankr. S.D. Ill. 2010).

[19] *In re Heideker*, 455 B.R. at 270.

[20] *In re Tennyson*, 611 F.3d at 879.

[21] *Id.*

[22] *In re King*, 439 B.R. at 135.

[23] *See In re Heideker*, 455 B.R. at 272.

[24] 449 B.R. 817 (Bankr. M.D. Fla. 2011).

[25] *Id.* at 817, 821.

CONCLUSION

As an above-median income debtor, the Debtor was required to propose a five-year plan. To allow him to exit bankruptcy early without paying unsecured creditors in full would both contravene the statutory requirements and deprive unsecured creditors of the opportunity to realize a greater recovery in the event the Debtor's income increases during the remainder of his applicable five-year commitment period. Based on this Court's holding that plan modifications are subject to the requirements of § 1325(b), the Court concludes that the Debtor may not modify his Plan to provide for a payment term less than the applicable commitment period unless he pays his unsecured creditors in full.

Accordingly, it is

ORDERED that the Motion is hereby **DENIED.**

DONE and **ORDERED** in Chambers at Tampa, Florida, on May 30, 2013.

__/s/_____
Caryl E. Delano
United States Bankruptcy Judge

Attorney David Lampley is directed to serve a copy of this order on interested parties and file a proof of service within 3 days of entry of the order.