

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

In re

Case No. 6:03-bk-02732-KSJ
Chapter 13

RUSSELL A. KILPATRICK,

Debtor.

MEMORANDUM OPINION DENYING
DEBTOR'S AMENDED MOTION TO REMOVE
THE CHAPTER 13 TRUSTEE AND GRANTING
THE TRUSTEE'S MOTION TO DISMISS

The Chapter 13 debtor, Russell A. Kilpatrick, is a prolific litigator. He has raised numerous contested matters in the almost five years since he filed this Chapter 13 case. Now, in his Amended Motion to Remove the Standing Chapter 13 Trustee (Doc. No. 180), he claims that Laurie K. Weatherford, his Chapter 13 Trustee,¹ made an improper payment of \$3,390.51 and should be removed from her position. The debtor makes this extraordinary request in direct response to a Motion to Dismiss filed by the Chapter 13 Trustee (Doc. No. 174), who asserts that the debtor has failed to make his regular, monthly payments for almost eleven months and is delinquent in the amount of \$2,643. In essence, the debtor blames the Chapter 13 Trustee for his delinquency as an excuse to avoid completing payments required under his confirmed Chapter 13 plan. For the reasons explained below, the Court finds that the debtor's justification for his non-payment is frivolous and that his pejorative allegations against the Chapter 13 Trustee are meritless. He has demonstrated no reason to question Weatherford's performance or to justify his failure to make his Chapter 13 payments. This case will be dismissed.

The debtor filed this case on March 15, 2003 (the "Petition Date"). At the time of the filing, he was involved in litigation or contested disputes with many of his creditors, including Washington Mutual Bank, F.A., who held a mortgage on the debtor's home. Eventually, the debtor and Washington Mutual reached a settlement, as reflected in the Order upon Debtor's Objection to Claim No. 15 of Washington Mutual Bank, F.A., entered on February 6, 2004. (Debtor's Ex. No. 3). The parties agreed that the debtor owed Washington Mutual \$7,311.84

¹ Weatherford filed a written response to the debtor's motion (Doc. No. 181).

on the Petition Date and was entitled to receive credit for prior payments of \$2,587, leaving an arrearages balance due of \$4,724.84 (the "Arrears"). On or around April 20, 2004, the Chapter 13 Trustee made the payment at issue to Washington Mutual on the Arrears of \$3,390.51 (the "Arrears Payment").

The debtor contends Weatherford erred in making the Arrears Payment. He argues that the Court should remove her as a Chapter 13 Trustee, order a full accounting of the financial transactions made by her office, and excuse his failure to make his monthly payments because, if the trustee had kept the Arrears Payment, he would owe no further monies to his remaining creditors. The debtor's argument lacks merit.

First, the Arrears Payment was consistent with the orders confirming the debtor's Chapter 13 plan. The Court entered its initial Confirmation Order, on March 1, 2004, directing the Chapter 13 Trustee to make equal monthly payments on the Arrears to Washington Mutual beginning in January 2004, and continuing for twenty months. (Trustee's Ex. No. 14). However, the Confirmation Order also provided, on the last page, that "unsecured creditors shall be paid pro rata from funds available *after* payment of priority and secured claims." (Emphasis added.) The same language is contained in two later Amended Confirmation Orders. (Trustee's Ex. Nos. 10 and 15). Therefore, if the Chapter 13 Trustee received more funds than those needed to make the minimal, required monthly payments, she specifically was directed to pay secured and priority creditors *prior* to making any distributions to unsecured creditors. Here, Weatherford complied with these directions and made additional payments to Washington Mutual, a secured creditor, rather than hold the monies or distribute funds to unsecured creditors.

Second, the Arrears Payment was consistent with a later order, the Order Authorizing Refinance of Real Property as Post Bankruptcy Debt. (Trustee's Ex. No. 4). Shortly after the Court confirmed the debtor's Chapter 13 plan, Kilpatrick decided to refinance his home and pay Washington Mutual in full, as requested in his motion filed on March 10, 2004 (Doc. No. 125). The Court orally granted the debtor's motion and agreed he could incur post-petition debt in order to pay Washington Mutual in full. The debtor drafted the order, which the Court signed without any change on April 19, 2004.

Consistent with the provisions of the initial Confirmation Order, the terms of the Order Authorizing Refinance of Real Property as Post Bankruptcy Debt, specifically directed the Chapter 13 Trustee first to disburse monies to secured creditors

before making any payments to unsecured creditors, as provided in paragraphs C and D:

C. Debtor's request for return of undistributed funds assigned to the Claim Number ... 0117 [the number assigned to Washington Mutual's Arrears claim] upon proof of a refinance is DENIED. The Chapter 13 Trustee is directed to apply any undistributed funds **first** to any remaining balance of Claim[s] ... 0117, and the remaining amount for the benefit of unsecured creditor[s].

D. That upon proof of refinance, the Chapter 13 Plan is modified to reduce payment to the chapter 13 Trustee by the amount equal to the claim payment for claim numbers...0117.
(Emphasis added.)

Therefore, the Chapter 13 Trustee complied with the terms of this order when she sent the Arrears Payment to Washington Mutual, a secured creditor who was ordered to receive payment prior to any payments going to unsecured creditors.

Third, even assuming the Chapter 13 Trustee made the Arrears Payment due to some error, the debtor has shown no prejudice caused to him. Washington Mutual apparently received and credited the Arrears Payment to his mortgage account on April 22, 2004. (Trustee's Ex. No. 8, page 5). He completed the refinancing of his home on July 21, 2004. (Trustee's Ex. No. 6). At the closing, he paid Washington Mutual their balance then due of \$150,301.43.² If the Chapter 13 Trustee had not previously made the Arrears Payment, the debtor would have owed Washington Mutual an additional \$3,390.51 at closing. He received full credit for the Arrears Payment.³ If anything, the debtor benefitted

² Washington Mutual sent the debtor a payoff letter dated July 8, 2004. (Debtor's Ex. No. 1). As of that date, the balance due was \$149,674.79. Interest continued to accrue at the rate of \$26.11 per day, which when multiplied by the 24 days between the date of the payoff letter and the actual closing of the refinancing added an additional \$626.64 to the amount due to Washington Mutual ($\$26.11 \times 24 = \626.64). The total amount required to pay Washington Mutual in full on the closing date was \$150,301.43.

³ The debtor argued that Washington Mutual did not properly credit receipt of the Arrears Payment; however, he could not articulate any support for this argument other than to provide a copy of an earlier payoff letter, dated March 30, 2004, reflecting a balance owing of \$155,543.67. (Debtor's Ex. No. 1). Of course, the balance due changed between March 30 and July 21, when the refinancing closed, due to interest accruals and the payments made by the Chapter 13 Trustee. The fact that Washington Mutual decreased the payoff amount by over \$5,000 and that the debtor made no direct payments himself

from the Arrears Payment insofar as it reduced interest accruing on his mortgage loan.

Fourth, even if the Arrears Payment was made prematurely by the Chapter 13 Trustee, the error does not excuse the debtor's failure to make his regular monthly payments to his unsecured creditors. He is still delinquent on payments due under his Chapter 13 plan. Pursuant to the most current Confirmation Order (Trustee's Ex. No. 10), the debtor agreed to make payments over five years, ending in April 2008. During months 17 through 60, he was required to make payments of \$230 per month. All of these payments were to pay his unsecured creditors, who hold claims totaling \$9,925.28, in full.⁴

The debtor has failed to make the required payments. As of November 1, 2007, the debtor was delinquent in the amount of \$2,643. In order to complete his Chapter 13 plan, the debtor would need to make five additional payments totaling another \$1,150. Therefore, the debtor must pay an additional \$3,793 to receive a Chapter 13 discharge.

If the Trustee made equal monthly payments on the Arrears to Washington Mutual through the date of the closing on the refinancing, she would have paid only \$1,653.68 (plus retained a percentage for her fee) as opposed to the \$3,390.51 she actually paid. If so, the debtor would have had to pay an additional \$1,655.83 to Washington Mutual at closing, and the Chapter 13 Trustee would have had an extra \$1,655.83 to disburse to unsecured creditors. Under this scenario, the debtor would currently only be delinquent \$987.17, instead of \$2,643 ($\$2,643 - \$1,655.83 = \$987.17$). (He still would owe the remaining \$1,150 for future payments.) The fact remains, however, *the debtor is still delinquent*, even accepting the debtor's own argument.

The debtor is not current in his Chapter 13 payments. He has offered no valid explanation for

indicates with certainty that Washington Mutual did credit payments received by the Chapter 13 Trustee. The debtor did not object to the payoff due when the refinancing closed in 2004 and now makes no credible argument that Washington Mutual misapplied funds paid to his account.

⁴ The debtor was required to pay his unsecured creditors in full because he was allowed to retain extraordinary income he received during the case of approximately \$7,000. Typically, a debtor must devote all net disposal income to payment of allowed claims, unless the plan provides for a 100% distribution to all creditors. 11 U.S.C. Section 1325(b)(1)(B)(citing the statute in effect on the Petition Date.) Therefore, here, the debtor kept at least \$7,000, which he should have paid to his creditors, in exchange for his agreement to pay the pre-existing unsecured creditors in full through the plan. The debtor now apparently believes he need not honor that agreement.

his deficient and irregular payments. He has failed to demonstrate any impropriety by the Chapter 13 Trustee or to offer any legitimate excuse to allow him to skip his final payments due to his unsecured creditors. He certainly has failed to offer any basis to remove the Chapter 13 Trustee, who performed her job appropriately, or to justify the slanderous allegations he had made against her.

The debtor is trying to avoid paying his legitimate debts but still receive a discharge of them. Whether he is acting out of some misperception or intentional bad faith, the Court does not opine. The debtor, however, has offered no excuse for his conduct and has given no justification that would allow him to remain in this Chapter 13 case.

The Motion to Dismiss filed by the Chapter 13 Trustee to dismiss this case due to the debtor's continuing failure to make regular payments is granted (Doc. No. 174). The case is dismissed. The debtor's Amended Motion to Remove the Standing Chapter 13 Trustee is denied as frivolous. A separate order consistent with this Memorandum Opinion shall be entered.

DONE AND ORDERED in Orlando,
Florida, on November 15, 2007.

/s/ Karen S. Jennemann
KAREN S. JENNEMANN
United States Bankruptcy Judge

Copies provided to:

Debtor: Russell A. Kilpatrick, 2602 Royal Fern
Place, Kissimmee, FL 34758

Chapter 13 Trustee, Laurie K. Weatherford, P.O. Box
3450, Winter Park, FL 32790

United States Trustee's Office, 135 W. Central Blvd.,
Suite 620, Orlando, FL 32801

All Creditors and Interested Parties