

**UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF FLORIDA  
JACKSONVILLE DIVISION**

In re:

Case No. 3:08-bk-5683-PMG

Kevin S. Balsan  
Donna L. Balsan,

Debtors.

Chapter 13

**ORDER ON TRUSTEE'S MOTION TO MODIFY  
CONFIRMED CHAPTER 13 PLAN**

**THIS CASE** came before the Court for a final evidentiary hearing to consider the Motion of the Chapter 13 Trustee, Douglas W. Neway, to Modify Confirmed Chapter 13 Plan. (Doc. 33).

For a confirmed Chapter 13 plan to be modified under §1329(a) of the Bankruptcy Code, the proposed modification must satisfy the requirements for confirmation contained in §1325(a), including the requirement of feasibility. In this case, the modification proposed by the Trustee is not feasible, even though Mr. Balsan's income increased after confirmation of the original Plan. Consequently, the Trustee's Motion to Modify the Confirmed Plan should be denied.

**I. Background**

The Debtors, Kevin S. Balsan and Donna L. Balsan, filed a petition under Chapter 13 of the Bankruptcy Code on September 17, 2008. At the time that the petition was filed, Mr. Balsan was employed by Kaman Aerospace Corporation, and Mrs. Balsan operated a horse training and boarding facility.

On the schedule of assets filed with the petition, the Debtors listed their homestead real property located in Middleburg, Florida (the Property) with a scheduled value of \$465,000.00, and scheduled mortgages of \$574,965.00. The Property is currently listed for sale. (Transcript, p. 10).

The Debtors also listed a separate residential property located in Middleburg, Florida as rental property. The rental property was listed with a scheduled value of \$150,000.00, and scheduled mortgages of \$193,596.00, and was surrendered during the course of the Chapter 13 case. (Docs. 21, 24).

On their schedule of personal property, the Debtors listed a 401(k) account valued at \$6,485.00, a 2001 Chevrolet Suburban valued at \$2,800.00, a 2006 Chrysler 300C valued at \$19,500.00, and a 2004 New Holland 40 DA tractor valued at \$14,000.00. The tractor was encumbered by a lien in the scheduled amount of \$20,800.00.

On their schedule of liabilities, the Debtors listed creditors holding general unsecured claims in the total amount of \$107,379.00. According to the Debtor, the unsecured debt was largely incurred to develop the horse training facility located on the Property. (Transcript, pp. 13-14).

On their schedule of current monthly income filed with the petition, the Debtors listed combined average income in the amount of \$9,781.42 per month. The combined income consisted of Mr. Balsan's net take-home pay in the amount of \$7,881.42 per month, income from the rental property in the amount of \$1,200.00 per month, and Mrs. Balsan's earnings from the horse training facility in the amount of \$700.00 per month. On the schedule of current expenditures filed with the petition, the Debtors listed average expenses in the amount of \$9,280.19 per month. After subtracting the average

expenses from the average income, therefore, the Debtor's scheduled net income as of the petition date was \$501.23 per month.

On October 2, 2008, the Debtors filed their Chapter 13 Plan. (Doc. 11).

On December 12, 2008, the Chapter 13 Plan was confirmed as amended at the confirmation hearing. (Doc. 15). The Order Confirming Plan provided for a sixty-month Plan period. Pursuant to the confirmed Plan, the Debtors were required to submit to the Trustee the sum of \$1,091.00 per month for the first ten months of the Plan, and the sum of \$900.00 per month for the remaining fifty months of the Plan.

In 2011, Mr. Balsan left his employment with Kaman Aerospace Corporation because he was uncertain of the company's future stability. (Transcript, pp. 14-15).

In January of 2012, Mr. Balsan obtained new employment with Aurora Flight Services in West Virginia. At that time, Mr. Balsan rented an apartment and relocated to West Virginia for purposes of the new employment. (Transcript, pp. 11, 15). Mrs. Balsan remained in Florida and continues to reside on the Property.

On August 7, 2012, the Trustee filed the Motion to Modify Confirmed Plan that is currently under consideration. (Doc. 33). In the Motion, the Trustee asserts that the Debtors' income has increased, and that the payments under the confirmed Plan should therefore also increase to reflect the additional income.

The Debtors filed a written response to the Trustee's Motion, and contend that the proposed increase in Plan payments is not justified, because they are incurring additional living expenses as a result of Mr. Balsan's out-of-state employment.

## **II. Modification under §1329**

The modification of a confirmed Chapter 13 plan is governed by §1329 of the Bankruptcy Code.

Section 1329 provides in part:

### **11 U.S.C. Section 1329. Modification of plan after confirmation**

(a) At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to—

(1) increase or reduce the amount of payments on claims of a particular class provided for by the plan.

...

(b)(1) Sections 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.

11 U.S.C. §1329.

Subsection (a)(1) of §1329 provides that proposed modifications may be made for the purpose of increasing payments under the plan. In re Coay, 2012 WL 2319100, at 5 (Bankr. C.D. Ill.).

Subsection (b)(1) of §1329 sets forth the criteria for modification of a confirmed plan, and §1329(b)(1) “specifically incorporates four provisions of the Bankruptcy Code.” In re Tibbs, 478 B.R. 458, 463 (Bankr. S.D. Fla. 2012). See In re Crim, 445 B.R. 868, 870 (Bankr. M.D. Tenn. 2011).

One of the provisions incorporated by §1329(b)(1) is §1325(a), which contains the general requirements for confirmation of a Chapter 13 plan. In re Prieto, 2010 WL 3959610, at 2 (Bankr. M.D. Fla.). “A proposed modified plan should satisfy the general requirements for confirmation such as the good faith requirement, the ‘best interest of creditors’ test, and the feasibility test.” In re Crim, 445 B.R. at 871.

“Section 1329(b), by its incorporation of §1325(a)(6), requires that any modified plan be feasible.” Ferrell v. Countryman, 398 B.R. 857, 864 (E.D. Tex. 2009)(quoting In re Zavala, 366 B.R. 643, 654 (Bankr. W.D. Tex. 2007)). For a plan to be feasible under §1325(a)(6), the debtor must be able to “make all payments under the plan and to comply with the plan.” 11 U.S.C. §1325(a)(6). “Section 1325(a)(6) permits confirmation of the plan only if the debtor will be able to effectuate it, to make the payments it requires.” In re Gillis 333 B.R. 1. 8 (Bankr. D. Mass. 2005).

### **III. Feasibility of the proposed modification**

In this case, Mr. Balsan acknowledged at trial that his wages have increased since the filing of the Bankruptcy petition. Specifically, his wages were approximately \$128,000.00 per year as of the petition date, and his wages were approximately \$175,000.00 as of the trial date. (Transcript, pp. 7-8, 31).

Based on the increase in Mr. Balsan’s income, the Trustee contends that the Debtors’ Plan payments should increase from \$900.00 per month to at least \$2,136.87 per month, and that the increased payments should be retroactive to 2011. (Transcript, p. 35).

The Court finds that the increased payments proposed by the Trustee are not feasible.

It is the court’s role to make a factual determination as to the plan’s “reasonable likelihood of success.” *In re Ellis*, 2006 WL 1555692, at 5 (Bankr. E.D. Pa. May 16, 2006); *In re Asken*, No. 05-20092REF, 2007 WL 1056724, at 3 (Bankr. E.D. Pa. April 3, 2007). The Bankruptcy Court should be satisfied that the debtor has the present as well as the future financial capacity to comply with the terms of the plan. *In re Buccolo*, 397 B.R. 527, 530 (Bankr. D. N.J. 2008).

In re Eckert, 485 B.R. 77, 85 (Bankr. M.D. Pa. 2013). Feasibility is a factual determination that should be made based on the circumstances of the particular case. In re Gillis, 333 B.R. at 9.

In this case, the Court finds that the Debtors do not have the present and future financial ability to make the increased payments proposed by the Trustee, for at least the following reasons:

1. The Debtors' current payments under the Plan are \$900.00 per month. The Debtors became delinquent under the existing Plan in 2010, and the Trustee filed a Motion to Dismiss the Case for Failure to Make Confirmed Plan Payments. The Motion was denied, and the Debtors were provided an opportunity to cure the delinquency. (Docs. 30, 31).

2. Although Mr. Balsan's wages have increased, the Debtors' income from other sources has decreased or been eliminated since the petition date. On their original Schedule I, for example, the Debtors listed \$1,200.00 in monthly income from the rental property in Middleburg, and \$700.00 in monthly income from Mrs. Balsan's horse training facility. This income is no longer available, however, because the rental property was surrendered during the bankruptcy case, and Mrs. Balsan's training facility is no longer operational. (Transcript, pp. 9-10, 20).

3. The Debtors are maintaining two households as a result of Mr. Balsan's employment in West Virginia. Mr. Balsan leases an apartment in West Virginia, and Mrs. Balsan continues to reside on the Property in Florida. Mr. Balsan's living expenses in West Virginia include the rent for his apartment in the amount of \$665.00 per month, as well as monthly expenses for water, electricity, and cable and internet service. (Debtors' Exhibit 2; Transcript, pp. 28-29). The Trustee has not asserted that the additional living expenses for the second household are unreasonable.

4. The Debtors have incurred significant medical expenses since the confirmation of their Chapter 13 Plan. Mr. Balsan testified, for example, that he has undergone at least two surgeries since 2010, and

that the Debtors jointly incurred approximately \$8,000.00 in out-of-pocket medical costs in 2012. (Transcript, p. 23).

5. The Debtors prepared an Amended Schedule of Income and an Amended Schedule of Expenses dated March 25, 2013. (Doc. 44; Trustee's Exhibit 4). According to the Amended Schedules, the Debtors' combined average income currently equals the sum of \$9,923.00 per month, and their average expenses currently equal the sum of \$10,378.00 per month, so that the Debtors' current net income is reflected as negative \$455.64 per month. Based on the negative monthly income, Mr. Balsan testified that the Debtors are barely able to make the monthly Plan payment in its current amount of \$900.00 per month. (Transcript, p. 32).

6. Mr. Balsan credibly testified that the Debtors might not have remained current on the existing Plan payments if they had not received the one-time departure payment from his former employer in 2011. (Transcript, pp. 31-32). Additionally, the Debtors' attorney represented that they used approximately half of their 2011 tax refund, with the Trustee's permission, to pay their property taxes. (Transcript, p. 41).

Based on these circumstances, it appears to the Court that the Debtors do not have the financial ability to make the increased payments proposed by the Trustee. The Debtors' current Plan payments of \$900.00 per month are substantial. Although Mr. Balsan has obtained new employment at a greater salary, the new employment has also resulted in increased living expenses due to Mr. Balsan's relocation to West Virginia. There is no indication in the record that Mr. Balsan's acceptance of the out-of-state employment was improper, and the Debtors are attempting to sell their Property in Florida. (Transcript, p. 10). Although the Trustee asserts that the Debtors "spend too much," the record does not

show that the Debtors use their earnings to support an extravagant lifestyle. Mr. Balsan testified that he cannot afford the increased payments proposed by the Trustee (Transcript, p. 31), and the Court finds his testimony credible and corroborated by the evidence.

#### **IV. Conclusion**

For a confirmed Chapter 13 Plan to be modified under §1329(a) of the Bankruptcy Code, the proposed modification must satisfy the requirements for confirmation contained in §1325(a), including the requirement of feasibility. In this case, the increased payments proposed by the Trustee are not feasible, even though Mr. Balsan's income increased after confirmation of the Debtors' original Plan. Consequently, the Trustee's Motion to Modify the Confirmed Plan should be denied.

Accordingly:

**IT IS ORDERED** that the Motion of the Chapter 13 Trustee, Douglas W. Neway, to Modify Confirmed Chapter 13 Plan is denied.

**DATED** this 29 day of April, 2013.

**BY THE COURT**

Paul M. Glenn

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PAUL M. GLENN  
United States Bankruptcy Judge