

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

In re:

Case No. 3:12-bk-1929-PMG

Jeffrey W. Doherty  
JoAnn L. Doherty,

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 Douglas W. Neway, Chapter 13 Trustee, to Modify Confirmed Chapter 13 Plan. (Doc. 72).

Generally, a party seeking to adjust a debtor's confirmed plan payments under §1329(a) of the Bankruptcy Code must show that the debtor experienced a substantial and unanticipated change in his financial circumstances after confirmation of the plan.

In this case, the Trustee did not show that the Debtors' income increased post-confirmation, because the capital gain reflected on the Debtors' post-confirmation tax return did not constitute actual disposable income received by the Debtors. Further, the Debtors are not required to submit their 2013 tax refund to the Trustee, because the Court cannot find that the refund represents disposable income that is subject to administration under the Chapter 13 Plan.

## **Background**

The Debtors, Jeffrey W. Doherty and JoAnn L. Doherty, filed a petition under Chapter 13 of the Bankruptcy Code on March 26, 2012. Mr. Doherty owns a 50% interest in a corporation known as Backyard Creations, Inc., and Mrs. Doherty is a customer service employee of Blue Cross Blue Shield. The Debtors have one dependent child. (Doc. 22).

According to their Amended Schedule I and Amended Schedule J, the Debtors' combined average monthly income equaled the sum of \$8,719.35, the Debtors' average monthly expenses equaled the sum of \$7,740.83, and the Debtors' monthly net income equaled the sum of \$978.52 as of the petition date. According to their Amended Chapter 13 Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income, the Debtors' current monthly income equaled the sum of \$7,511.19, the Debtors' deductions or adjustments from income equaled the sum of \$9,099.96, and the Debtors' monthly disposable income under §1325(b)(2) was negative \$1,588.77. (Doc. 22).

On September 4, 2012, the Debtors filed an Amended Chapter 13 Plan. (Doc. 30). Generally, the Amended Plan provided for the Debtors to pay the Chapter 13 Trustee the sum of \$930.00 per month for sixty months.

The Chapter 13 Trustee objected to the Amended Plan, and asserted that the Statement of Currently Monthly Income was completed incorrectly, and that the Debtors' monthly net income exceeded the amount that was reflected on their Schedules and Statement. (Doc. 39).

On September 17, 2013, the Court entered an Order Confirming the Debtors' Chapter 13 Plan. (Doc. 70). Under the confirmed Plan, the Debtors were required to pay the Trustee the sum of \$930.00 per month for the first 24 months of the 60-month Plan, and the sum of \$973.00 per month for the remainder of the 60-month Plan. From the payments submitted by the Debtors, distributions were to

be made to the Debtors' attorney, to Infiniti Financial Services on account of its secured claim, to the Internal Revenue Service on account of its priority claim, and to unsecured creditors on a pro rata basis.

On June 30, 2014, the Trustee filed a Motion to Modify the Confirmed Plan. (Doc. 72). Generally, the Trustee contends that (1) the Debtors' monthly disposable income increased after the Plan was confirmed, that (2) the Debtors received a 2013 federal income tax refund in the amount of \$4,673.00, and that (3) the tax refund constitutes disposable income for purposes of the Plan. Consequently, the Trustee asserts that the confirmed Plan should be modified to require the Debtors to submit the tax refund to the Trustee in the 29<sup>th</sup> month of the Plan, and to require the Debtors to increase their payments from \$973.00 to \$1,553.35 in the final thirty months of the Plan.

The Debtors object to the modification proposed by the Trustee. (Doc. 74). According to the Debtors, the modification should not be approved because the confirmed Plan reflects the annual income calculated on their Form 22, the capital gain on their 2013 tax return did not represent actual income, and the tax refund does not represent disposable income under the Bankruptcy Code.

#### **Discussion**

The modification of a confirmed Chapter 13 plan is governed by §1329 of the Bankruptcy Code. Section 1329 provides in part:

#### **§ 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;

11 U.S.C. §1329. “The policy underlying §1329 is to ‘allow upward or downward adjustment of plan payments in response to changes in a debtor’s circumstances which substantially affect the ability to make future payments.’” In re Wetzel, 381 B.R. 247, 251 (Bankr. E.D.Wis. 2008)(quoting In re Nott, 269 B.R. 250, 252 (Bankr. M.D. Fla. 2000)).

Under §1329(a)(1), a Chapter 13 Trustee may ask for an increase in payments under a confirmed Chapter 13 plan if the debtor’s income increased after confirmation. In re Prieto, 2010 WL 3959610, at 2 (Bankr. M.D. Fla.); In re Midgley, 413 B.R. 820 (Bankr. D. Or. 2009).

For payments to increase under §1329, the Trustee generally must show that the debtor’s financial circumstances unexpectedly improved after confirmation. “The party seeking modification must show a substantial, unanticipated change in circumstances.” In re Hernandez, 2015 WL 393410, at 3 (Bankr. M.D. Fla.)(citing In re Savilonis, 2014 WL 3361986, at 2 (Bankr. M.D. Fla.)).

Even though §1329(a) does not specify the elements that must be shown for a modification, it is generally held that a substantial and unanticipated change in a debtor’s financial status may justify a change in the amount of payments. The Court must find that the debtor’s circumstances have substantially and unexpectedly changed, because the doctrine of *res judicata* otherwise prevents the modification of a confirmed plan. In re Evans, 2015 WL 77722, at 3 (Bankr. E.D. N.C.)(citing In re Murphy, 474 F.3d 143, 150 (4<sup>th</sup> Cir. 2007)). See also, In re Hernandez, 2015 WL 393410, at 3; and 11 U.S.C. §1327(a)(The provisions of a confirmed plan bind the debtor and each creditor, whether or not the creditor objected to the plan.).

In this case, the Trustee seeks a modification of the confirmed plan (1) to increase the Debtors’ monthly payments from \$973.00 to \$1,553.35 in the final thirty months of the Plan, and (2) to require the Debtors to submit the tax refund of \$4,673.00 to the Trustee in the 29<sup>th</sup> month of the Plan.

### **A. Monthly payments**

The increased monthly payments proposed by the Trustee are predicated solely on capital gain income as reported in the Debtors' 2013 Individual Income Tax Return. The capital gain income was reported in the amount of \$49,522.00, and relates to the sale of certain real property by the Debtors' Subchapter S corporation.

According to the evidence at trial, the Debtor and his brother own equal interests in a Subchapter S corporation known as Backyard Creations, Inc., which is engaged in the business of constructing patio and screen enclosures. Backyard Creations owned certain real property located at 807 and 811 Park Avenue, Orange Park, Florida, and operates its business from the 811 Park Avenue location.

The corporation defaulted on an existing mortgage that encumbered both property addresses, and the holder of the mortgage began foreclosure proceedings. To resolve the mortgage default, the corporation ultimately sold the portion of the property located at 807 Park Avenue, and refinanced the remaining mortgage on the portion of the property located at 811 Park Avenue.

The sale and refinancing occurred in November of 2013. The Debtors' Individual Income Tax Return for the 2013 tax year was prepared by their accountant, and the accountant determined the capital gain on the sale after calculating the cost of the property. The Debtors' share of the capital gain appears on line 13 of the 2013 Tax Return as \$49,522.00.

Neither the Debtor nor the corporation received any funds as a result of the sale, however, and the closing statement for the transaction does not reflect the disbursement of any cash to the Debtors. (Debtors' Exhibit 3). The Debtor testified that all of the proceeds were applied to the existing mortgage, and that a shortfall in the approximate amount of \$17,000.00 was covered by the corporation.

For purposes of the Modification Motion, the Trustee does not appear to contend that the Debtors actually received any funds from the sale, or that any additional funds are available to make the increased payments that he proposes. Rather, the Trustee asserts that the capital gain reported on the Tax Return should be “deemed” additional income, because depreciation deductions had been claimed for the property before it was sold, and the deductions enabled the Debtors to adjust their individual income in prior financial years.

Based on the evidence, the Court finds that the Debtors did not experience any substantial and unanticipated improvement in their financial circumstances after confirmation of their Plan.

The Debtors did not receive any funds or cash distributions from the sale of the property, and the capital gain reflected on the 2013 Tax Return did not constitute actual disposable income received by the Debtors. Further, the Tax Return does not show that the Debtors obtained additional employment, or that they received increased salaries from their current employment.

This is not a case in which the Debtors’ creditors should “share some of the wealth” because the Debtors’ “financial fortunes” improved after confirmation of their Plan. In re Evans, 2015 WL 77722, at 3(citing Carroll v. Logan, 735 F.3d 147, 151 (4<sup>th</sup> Cir. 2013)).

The evidence does not show that the Debtors experienced a substantial and unanticipated change in their financial circumstances after confirmation of the Plan. In re Hernandez, 2015 WL 393410, at 3. Accordingly, the Trustee’s Motion to Modify Confirmed Chapter 13 Plan should be denied.

**B. Tax refund**

The Debtors’ 2013 Tax Return indicates that they were entitled to a refund in the amount of \$4,673.00, and the Trustee contends that the Debtors should be required to submit the refund to the Trustee in the 29<sup>th</sup> month of the Plan.

It is generally held that a post-confirmation tax refund is income that is subject to administration by a Chapter 13 trustee. In re Carrasco, 395 B.R. 154, 156 (Bankr. M.D. Fla. 2008)(citing In re LaPlana, 363 B.R. 259 (Bankr. M.D. Fla. 2007)). See also, In re Schlagel, 3:11-bk-6801-PMG, Doc. 78(The debtors acknowledged that their refund “should be treated as additional income.”).

In Carrasco, however, the Court also found that “whether or not a debtor’s future income tax refunds will be considered ‘disposable income,’ needs to be determined on a case by case basis.” In re Carrasco, 395 B.R. at 156(cited in In re Hernandez, 2015 WL 393410, at 3). The factors that should be considered in the case-by-case determination, for example, include whether the debtor’s living expenses have increased or decreased, and whether the household budget shows that the debtors “would merely be breaking even.” In re Carrasco, 395 B.R. at 156.

In this case, the confirmed Plan required the Debtors to pay the Trustee the sum of \$930.00 per month for the first 24 months of the 60-month Plan, and the sum of \$973.00 per month for the remainder of the 60-month Plan. (Doc. 70).

The Plan payments correspond closely to the monthly net income of \$978.52 shown on their Amended Schedule of Income and Expenses. (Doc. 22). The monthly net income calculated on the Amended Schedules is the difference between the Debtors’ combined average monthly income (\$8,719.35) and their average monthly expenses (\$7,740.83).

On the same date that the Debtors filed the Amended Schedules, they also filed an Amended Chapter 13 Statement of Current Monthly Income, which showed current monthly income in the amount of \$7,511.19, and annualized income in the amount of \$90,134.28. (Doc. 22).

The Debtors’ Chapter 13 Plan was confirmed on the basis of the income and expenses that were in the record and known at the time of confirmation. See In re Hernandez, 2015 WL 393410, at 3.

The Debtors' 2013 Tax Return, however, shows income from wages and salary in the reduced amount of \$73,680.00, or approximately \$6,140.00 per month, for the 2013 tax year. (Debtors' Exhibit 1). Mr. Doherty testified that the figure on the Tax Return represented the combined income of both Debtors in 2013. Consequently, it appears that the Debtors' income from their post-confirmation employment may be less than the amount shown on their Schedules, and that their current income may be less than the amount that formed the basis for confirmation of their Plan.

Under these circumstances, the Debtors are not required to submit their 2013 tax refund to the Trustee, because the Court cannot find that the refund represents disposable income that is subject to administration under their Chapter 13 Plan.

#### **Conclusion**

Douglas W. Neway, Chapter 13 Trustee, filed a Motion to Modify the Debtors' Confirmed Chapter 13 Plan. (Doc. 72).

Generally, a party seeking to adjust a debtor's confirmed plan payments under §1329(a) of the Bankruptcy Code must show that the debtor experienced a substantial and unanticipated change in his financial circumstances after confirmation of the plan.

In this case, the Trustee did not show that the Debtors' income increased post-confirmation, because the capital gain reflected on the Debtors' post-confirmation tax return did not constitute actual disposable income received by the Debtors. Further, the Debtors are not required to submit their 2013 tax refund to the Trustee, because the Court cannot find that the refund represents disposable income that is subject to administration under the Chapter 13 Plan.

Accordingly:

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

**DATED** this 10<sup>th</sup> day of FEBRUARY, 2015.

**BY THE COURT**

Paul M. Glenn  
PAUL M. GLENN  
United States Bankruptcy Judge