

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

In re:

Case No. 3:11-bk-5399-PMG

Theodore Louis Tiliakos  
Katherine Moore Tiliakos,

Debtors.

Chapter 13

**ORDER ON MOTION FOR STAY PENDING APPEAL**

**THIS CASE** came before the Court for hearing to consider the Motion of Douglas W. Neway, Chapter 13 Trustee, for Stay Pending Appeal. (Doc. 82).

The Trustee has appealed an Order on Debtors' Motion to Modify Confirmed Chapter 13 Plan. In the Motion currently under consideration, the Trustee asks the Court to suspend or continue any further proceedings regarding the Debtors' Plan during the pendency of his appeal.

Under Rule 8005 of the Federal Rules of Bankruptcy Procedure, a Court may stay other proceedings in a case while an appeal is pending "on such terms as will protect the rights of all parties in interest." Fed.R.Bankr.P. 8005. In this case, the Trustee has not satisfied the requirements for obtaining a stay pending appeal, because he has not established that he is likely to prevail on the merits of his appeal, and has not satisfied the other criteria for obtaining a stay by the requisite showing. Accordingly, the Trustee's Motion for Stay Pending Appeal should be denied.

## **Background**

On July 22, 2011, the Debtors filed a petition under Chapter 13 of the Bankruptcy Code, and the Court entered an Order confirming their Chapter 13 Plan on October 24, 2011. The confirmed Plan provided for the Debtors to make monthly payments to the Trustee for a period of sixty months.

On August 2, 2012, the Debtors filed a second Motion to Modify Confirmed Plan. The modification proposed by the Debtors provided for a thirty-six month Plan period. The Trustee objected to the proposed modification.

On May 30, 2013, the Court entered an Order on the Debtors' Motion to Modify Confirmed Plan. In the Order, the Court determined:

Under §1327(a) of the Bankruptcy Code, a debtor and each of the debtor's creditors are generally bound by the terms of a confirmed Chapter 13 plan. The binding effect of a confirmed plan, however, is subject to the modifications specifically permitted under §1329 of the Bankruptcy Code.

Section 1329(a) allows a debtor to modify a confirmed plan for the purposes set forth in the section, and §1329(b) provides that any modification must comply with §1322(a), §1322(b), §1323(c), and the requirements of §1325(a) of the Bankruptcy Code.

In this case, the Debtors seek to modify their confirmed Plan to decrease their monthly Plan payments, and to shorten the "applicable commitment period" from 60 months to 36 months. The "applicable commitment period" is determined under §1325(b) of the Bankruptcy Code, which is not applicable to modifications under §1329. Accordingly, a debtor may modify his plan to shorten the commitment period, provided the modification otherwise satisfies the requirements of §1329.

Under §1329(b), a proposed modification must satisfy the good faith requirement of §1325(a) of the Bankruptcy Code. Consequently, the Debtors' Motion to Modify Confirmed Chapter 13 Plan should be rescheduled for hearing to consider whether the modified Plan was proposed by the Debtors in good faith.

(Doc. 78, pp. 1-2, 12-13). The continued hearing on the Debtors' Motion to Modify their Plan is scheduled for August 20, 2013.

On June 12, 2013, the Trustee filed a Notice of Appeal of the Order on Debtors' Motion to Modify Confirmed Chapter 13 Plan. (Doc. 80).

### **Discussion**

In his Motion for Stay Pending Appeal, the Trustee asks for a stay of any further proceedings that might determine the rights of the parties with respect to the terms of the Debtors' Plan. (Doc. 82). The Trustee filed the Motion pursuant to Rule 8005 of the Federal Rules of Bankruptcy Procedure.

Rule 8005 provides that "the bankruptcy judge may suspend or order the continuation of other proceedings in the case under the Code or make any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest." Fed.R.Bankr.P. 8005.

A stay pending an appeal is an extraordinary remedy that should be granted only on a substantial showing by the party requesting the stay. Specifically, the moving party must clearly establish: (1) that he is likely to prevail on the merits of his appeal; (2) that he will suffer irreparable injury if the stay is not granted; (3) that other parties will not suffer any substantial harm if the stay is granted; and (4) that the stay will serve the public interest, where applicable. In re F.G. Metals, Inc., 390 B.R. 467, 471-72 (Bankr. M.D. Fla. 2008)(Citations omitted).

#### **1. Likely to prevail on the merits of the appeal**

The moving party's likelihood of prevailing on the merits of the appeal is "generally the most important of the four criteria" required for a stay, and the Court "must ordinarily find that the appealed decision was clearly erroneous." In re F.G. Metals, Inc., 390 B.R. at 472(quoting Antonio v. Bello,

2004 WL 1895123, at 1 (11<sup>th</sup> Cir.)(and citing Garcia-Mir v. Meese, 781 F.2d 1450, 1453 (11<sup>th</sup> Cir. 1986)).

In this case, the Trustee has not shown that he is likely to prevail on the merits of his appeal. The “applicable commitment period” for Chapter 13 plans is established under §1325(b) of the Bankruptcy Code. The post-confirmation modification of Chapter 13 plans is governed by §1329 of the Bankruptcy Code. In the Order on appeal, the Court determined that §1329(b) of the Bankruptcy Code does not reference or otherwise incorporate §1325(b) or §1325(b)’s provisions concerning the “applicable commitment period,” and that the “applicable commitment period” is therefore not applicable to plan modifications under §1329. (Doc. 78, pp. 7-10).

Although there is a split of authority on the issue, it appears that the Court’s decision is consistent with the majority view. See In re Mattson, 468 B.R. 361, 370 n.10 (9<sup>th</sup> Cir. BAP 2012); and In re Grutsch, 453 B.R. 420, 424 (Bankr. D. Kan. 2011). The majority view is supported by the language of §1329, which does not expressly incorporate §1325(b), even though it does specifically incorporate four other provisions of the Bankruptcy Code. Additionally, §1329 does not secondarily incorporate §1325(b) through §1325(a), because only the “requirements of section 1325(a)” are applicable to post-confirmation modifications by virtue of §1329, and §1325(b) is not a “requirement” of §1325(a). In re Tibbs, 478 B.R. 458, 464 (Bankr. S.D. Fla. 2012).

In his Motion for Stay Pending Appeal, the Trustee cites Whaley v. Tennyson, 611 F.3d 873 (11<sup>th</sup> Cir. 2010) to support his claim that he is likely to prevail on the merits of his appeal. (Doc. 82, p. 2). That decision does not involve post-confirmation modifications under §1329, however, or the issue of whether §1325(b) applies to post-confirmation modifications under §1329.

For these reasons, the Trustee has not shown that the Court's determination in the Order on Debtors' Motion to Modify Confirmed Chapter 13 Plan was clearly erroneous, or that he is likely to prevail on the merits of his appeal.

## **2. Irreparable injury to the Trustee**

Second, the Trustee has not shown that he will suffer irreparable injury if the stay pending appeal is not granted.

In the Order, the Court found that a post-confirmation plan modification that shortens the "applicable commitment period" must otherwise satisfy the requirements of §1329, including the good faith requirement of §1325(a). (Doc. 78, pp. 10-12). Accordingly, the continued hearing was scheduled in this case for the purpose of considering whether the Debtors' modified Plan was proposed in good faith.

At that hearing, the Trustee may assert that the proposed modification was not filed in good faith for all of the reasons that he asserted in his original Objection to Modification of Debtors' Confirmed Chapter 13 Plan. (Doc. 67). The Trustee may assert, for example, that the Debtors are "over median debtors" with disposable income, and that this factor evidences the Debtors' bad faith in proposing a modification that reduces their Plan payments and shortens the Plan period.

## **3. Substantial harm to other parties**

Third, the Trustee has not shown that other parties will not suffer any substantial harm if the stay is granted.

The Debtors' Chapter 13 case has been pending for approximately two years. During that period, the Debtors surrendered certain rental property that they owned at the time of the filing, and they assert

that they also intend to surrender their home in the event that they are unable to modify the home mortgage. Consequently, it appears that the Debtors' financial circumstances might have changed since their Chapter 13 case was filed. A post-confirmation change in circumstances may constitute a valid reason to consider the modification of a plan under §1329. In re Hogle, 12 F.3d 1008, 1011 (11<sup>th</sup> Cir. 1994).

The Trustee has not shown that the Debtors will not be harmed if further proceedings in their case are stayed during the appeal. The case is in an advanced stage, and the record indicates that a timely decision on the Debtors' proposed modification is necessary so that they can evaluate their financial options.

#### **4. Public interest**

Finally, the Trustee has not shown that granting a stay of further proceedings in this case will serve the public interest.

“Chapter 13 cases are intended to be expeditiously administered.” In re Michaelesco, 312 B.R. 466, 469 (Bankr. D. Conn. 2004). To achieve that policy, Chapter 13 debtors are required to file their initial plan within fourteen days after the petition date, and to commence payments within thirty days after the filing of the petition or plan. 11 U.S.C. §1326(a); Fed.R.Bankr.P. 3015(b). The original confirmation hearing must be held “not later than 45 days after the date of the meeting of creditors.” 11 U.S.C. §1324(b).

The policy of expeditious administration accommodates the interest of creditors, since it attempts to facilitate the prompt commencement of payments to the holders of allowed claims. Consequently,

Courts have generally disfavored any proceedings that halt the confirmation process. In re Wile, 310 B.R. 514, 517 (Bankr. E.D. Pa. 2004).

The Bankruptcy Code embraces a policy of promoting the prompt administration of Chapter 13 cases. The Trustee has not shown that the policy will be served if the modification proceedings are stayed in this case.

### **Conclusion**

The Trustee has asked the Court to suspend or continue any further proceedings regarding the Debtors' Plan during the pendency of his appeal of the Order on the Debtors' Motion to Modify their Confirmed Plan.

Under Rule 8005 of the Federal Rules of Bankruptcy Procedure, a Court may stay other proceedings in a case while an appeal is pending "on such terms as will protect the rights of all parties in interest." Fed.R.Bankr.P. 8005. In this case, the Trustee has not satisfied the requirements for obtaining a stay pending appeal, because he has not established that he is likely to prevail on the merits of his appeal, and has not satisfied the other criteria for obtaining a stay by the requisite showing.

Accordingly, the Trustee's Motion for Stay Pending Appeals should be denied.

Accordingly:

**IT IS ORDERED** that the Motion of Douglas W. Neway, Chapter 13 Trustee, for Stay Pending Appeal is denied.

**DATED** this 25 day of July, 2013.

**BY THE COURT**

Paul M. Glenn

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PAUL M. GLENN  
United States Bankruptcy Judge