

**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 DEBTORS' MOTION TO MODIFY
CONFIRMED CHAPTER 13 PLAN**

THIS CASE came before the Court for hearing to consider the Motion of the Debtors, Theodore Louis Tiliakos and Katherine Moore Tiliakos, to Modify Confirmed Chapter 13 Plan. (Doc. 64).

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.

Background

Mr. Tiliakos operates a home maintenance business, and Mrs. Tiliakos is a realtor. On July 22, 2011, the Debtors filed a petition under Chapter 13 of the Bankruptcy Code. On their schedule of assets filed with the petition, the Debtors listed their homestead property in Jacksonville, and also listed certain rental real property located on 10th Avenue South in Jacksonville, Florida (the Rental Property).

On July 27, 2011, the Debtors filed their original Schedule of Income and Expenses in the Chapter 13 case, and their original Form B22C (Statement of Current Monthly Income and Calculation of Commitment Period and Disposable Income). (Doc. 8).

On July 27, 2011, the Debtors also filed their Chapter 13 Plan. (Doc. 9). According to the Chapter 13 Plan, the Debtors proposed to make payments to the Chapter 13 Trustee in the amount of \$4,424.00 per month for a period of 60 months.

The Chapter 13 Trustee objected to confirmation of the Plan. (Doc. 26).

On September 30, 2011, the Debtors filed an Amended Schedule I, and an Amended Form B22C. (Doc. 32). The figures on Form B22C are intended to "reflect average monthly income received from

all sources, derived during the six calendar months prior to filing the bankruptcy case, ending on the last day of the month before the filing.”

In Part I of the Amended Form B22C (Report of Income), the Debtors listed the income from the Rental Property as \$1,850.00, and listed their operating expenses for the Rental Property as \$0.00. Based on the income listed in Part I, including the income from the Rental Property, the Debtors’ “annualized current monthly income” was calculated in Part II of the Amended Form B22C as \$69,390.96. Since \$69,390.96 is above the “applicable median family income” for the Debtors’ household in Florida, the Debtors’ “applicable commitment period” was determined to be 5 years in accordance with §1325(b)(4) of the Bankruptcy Code.

In Part IV of the Amended Form B22C (Deductions from Income), the Debtors listed two mortgage payments on the Rental Property in the combined amount of \$1,788.13 per month. The Debtors’ Deductions from Income in Part IV, including the mortgage payments on the Rental Property, totaled the sum of \$6,342.18.

In Part V of the Amended Form B22C, the Debtors’ total Deductions from Income were subtracted from their total Current Monthly Income, and their Monthly Disposable Income was calculated as negative \$559.60.

A hearing was conducted on October 4, 2011, to consider confirmation of the Debtors’ Chapter 13 Plan. On October 24, 2011, the Court entered an Order Confirming Plan, which provided that “[p]ayments shall be made by the Debtors in the amount of \$4,395.00 per month for a period of 60 months.” (Doc. 39).

On December 1, 2011, the Debtors filed their first Motion to Modify Confirmed Chapter 13 Plan. (Doc. 41). The purpose of the first proposed modification, according to the Motion, was to surrender the Rental Property. On February 3, 2012, the Court entered an Order granting the Debtors' first Motion to Modify the Confirmed Plan. (Doc. 46). The modification did not alter the 5-year term of the Plan.

On August 2, 2012, the Debtors filed a second Motion to Modify Confirmed Plan, and a proposed Second Modified Chapter 13 Plan. (Docs. 64, 65). In the second Motion, the Debtors assert that they intend to surrender their home in the event that they are unable to modify the home mortgage. In the Second Modified Plan as filed, the Debtors propose to make payments to the Chapter 13 Trustee in the amount of \$1,196.30 per month in months 1 through 12 of the Plan, and \$228.65 per month in months 13 through 36 of the Plan.

On August 7, 2012, the Debtors filed a second Amended Form B22C. (Doc. 66). In Part I of the second Amended Form, the Debtors listed the income from the Rental Property as \$1,850.00, and listed the operating expenses for the Rental Property as \$1,750.00. The operating expenses apparently consist of the mortgage payments on the Rental Property that were listed as Deductions from Income in Part IV of the first Amended Form B22C. In other words, the Debtors "corrected the original Form 22C and moved that mortgage payment up" from Part IV to Part I of the Form. (Transcript, p. 3).

Based on the income and operating expenses listed in Part I, the Debtors' "annualized current monthly income" was calculated in Part II of the second Amended Form as \$48,390.96. Since \$48,390.96 is less than the "applicable median family income" for the Debtors' household in Florida, the Debtors' "applicable commitment period" was determined to be three years in accordance with

§1325(b)(4) of the Bankruptcy Code, and the Debtors were not required to complete Parts IV, V, or VI of the second Amended Form B22C.

On August 13, 2012, the Trustee filed an Objection to the Debtors' second Motion to Modify Confirmed Chapter 13 Plan. (Docs. 67, 74). Generally, the Trustee asserts that the Debtors' Plan was confirmed in reliance on the first amended Form B22C that was filed on September 30, 2011, that their income as reflected in the first amended Form B22C was greater than the applicable median income for their household, and that their Plan must therefore extend for a 5-year commitment period.

In response, the Debtors contend that they incorrectly listed their Rental Property mortgage payments as Deductions from Income on their first amended Form B22C, instead of listing the payments as operating expenses in Part I of the Form. Although the error "made it appear that their gross income was above median," the Debtors assert that their income was not actually above median as of the petition date, and that their Plan is therefore not required to extend for a term of five years. (Doc. 76).

Discussion

At the hearing on the Debtors' Motion, the Trustee primarily asserted that the Debtors are above-median individuals, as determined on their Form B22C, and that their status as above-median debtors was an issue that was litigated or should have been litigated at the confirmation hearing. Consequently, the Trustee asserted that the Confirmation Order is res judicata as to the Debtors' status as above-median debtors, and that §1325(b) of the Bankruptcy Code requires the Debtors to commit to a five-year plan. (Transcript, pp. 7-9).

I. The binding effect of a confirmed Chapter 13 plan is subject to the modifications permitted by §1329 of the Bankruptcy Code.

The binding effect of an order confirming a Chapter 13 plan is governed by §1327(a) of the Bankruptcy Code. The section provides:

11 U.S.C. §1327. Effect of confirmation

(a) The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.

11 U.S.C. §1327(a). Under this section, “confirmation of a Chapter 13 plan may satisfy the requirements for claim preclusion and therefore prevent relitigation of matters that either were raised or could have been raised prior to confirmation.” Hope v. Acorn Financial, Inc., 2012 WL 74874, at 2 (M.D. Ga.) (citing In re Seidler, 44 F.3d 945, 948 (11th Cir. 1995)).

Section 1329 of the Bankruptcy Code, however, specifically allows for modification after a Chapter 13 plan has been confirmed. Section 1329(a) provides in part:

11 U.S.C. §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;

(2) extend or reduce the time for such payments;

(3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan.

11 U.S.C. §1329(a). The section was intended to permit the modification of confirmed plans “to address certain problems arising after confirmation.” In re Meeks, 237 B.R. 856, 859 (Bankr. M.D. Fla.

1999)(citing H.R.REP. NO. 95-595 at 265 (1977)). “Modification is based on the premise that, during the life of the plan, circumstances may change, and parties should have the ability to modify the plan accordingly.” In re Meza, 467 F.3d 874, 877 (5th Cir. 2006)(quoted in In re Davis, 404 B.R. 183, 187 (Bankr. S.D. Tex. 2009)).

Because of the respect for finality evidenced by §1327, however, modifications under §1329 should be permitted only for the limited purposes indicated in the statute. In re Meeks, 237 B.R. at 859. Due to the binding effect of confirmation under §1327, a confirmed Chapter 13 plan should be modified only if the modifications “strictly fall within the parameters of §1329.” In re Morrow, 397 B.R. 876, 879 (Bankr. N.D. Ohio 2008)(quoting In re Storey, 392 B.R. 266, 271 (6th Cir. BAP 2008)).

II. The “applicable commitment period” is determined under §1325(b) of the Bankruptcy Code, which is not applicable to modifications under §1329.

In this case, the Debtors’ proposed modification shortens the “applicable commitment period” from 60 months to 36 months. The “applicable commitment period” for Chapter 13 plans is determined by §1325(b)(4) of the Bankruptcy Code. Section 1325(b)(4) provides that the “applicable commitment period” for a Chapter 13 plan is 3 years, or “not less than 5 years” if the debtors’ income is greater than the median family income in the applicable state for a family that is the same size as the debtor’s household. 11 U.S.C. §1325(b)(4). In this case, the Debtors’ income was “above median” as calculated on the Form B22C that they completed before confirmation, and their “applicable commitment period” was therefore determined to be 5 years under §1325(b)(4).

Although the “applicable commitment period” is relevant to the initial confirmation of a plan, if the trustee or a creditor objects, §1325(b) does not apply to modifications of the plan under §1329(b) of the Bankruptcy Code. Section 1329(b) “specifically requires that post-confirmation modifications comply

with certain Code sections.” In re White, 411 B.R. 268, 273 (Bankr. W.D. N.C. 2008)(citing In re Sunahara, 326 B.R. 768, 781 (9th Cir. BAP 2005)). Specifically, §1329(b)(1) provides:

11 U.S.C. §1329. Modification of plan after confirmation

...

(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(b)(1). Section 1325(b) is not among the provisions listed in §1329(b)(1), even though “the requirements of section 1325(a)” are expressly made applicable to Chapter 13 plan modifications.

A number of Courts have considered whether the “applicable commitment period” of §1325(b) applies to modifications under §1329, and a majority of those Courts have found that post-confirmation modifications are not governed by §1325(b). In re Mattson, 468 B.R. 361, 370 n.10 (9th Cir. BAP 2012)(“Although there is a split of authority on this issue, the majority of courts hold that post-confirmation modifications are not governed by §1325(b).”); In re Grutsch, 453 B.R. 420, 424 (Bankr. D. Kan. 2011)(Although “there is a split in authority, the vast majority of courts deciding the issue have held that post-confirmation modifications are not governed by 11 U.S.C. §1325(b).”).

In In re Tibbs, 478 B.R. 458 (Bankr. S.D. Fla. 2012), for example, the debtors’ income exceeded the applicable median income as of the petition date, and the debtors’ confirmed plan therefore provided for payments to the Chapter 13 trustee over a five-year commitment period. The debtors subsequently filed a motion for approval of an “early pay-off” of the plan in a single lump sum amount to be obtained as a gift from a family member. In re Tibbs, 478 B.R. at 459-60. The Court viewed the issue as whether “§1329, which addresses modification of a confirmed chapter 13 plan, require[s] that

the modified plan remain in place for the ‘applicable commitment period’ determined under §1325(b)(4) unless the modified plan provides for payment in full of allowed unsecured claims.” Id. at 461.

The Court concluded that §1329 does not incorporate §1325(b), and that a Chapter 13 plan may therefore be modified to provide for a term that is shorter than the applicable commitment period. Id. at 461. According to the Court, “neither traditional approaches to statutory construction nor the wording of §1329(b)(1) support the conclusion that §1329(b)(1) incorporates §1325(b).” Id. at 463. First, of course, “§1329(b)(1) specifically incorporates four provisions of the Bankruptcy Code,” but the specifically incorporated provisions do not include §1325(b).

Additionally, §1325(b) is not secondarily incorporated into §1329 through §1325(a). In other words, “the requirements of section 1325(a)” are expressly applicable to post-confirmation modifications by §1329(b)(1), and §1325(a) provides that the court shall confirm a plan if the stated conditions are satisfied, “except as provided in subsection (b).” As explained in Tibbs, however, this phrase in §1325(a) should not be interpreted to mean that the provisions of §1325(b) are also applicable to modifications under §1329.

Importantly, §1329(b)(1) does not simply cross-reference §1325(a). Unlike the references to §§1322(a), 1322(b), and 1323(c), the cross-reference to §1325(a) is limited to “the requirements of section 1325(a).” First, this should be read as incorporating only the requirements stated in the text of §1325(a) itself, not the text of another provision referred to in §1325(a). Second, the provisions of §1325(b) are not “requirements” of §1325(a).

Id. at 464. Consequently, §1325(b) should not be read into §1329 by virtue of §1325(a). Id.

Section 1329(b)(1) does not reference or otherwise incorporate §1325(b) or §1325(b)’s provisions concerning the applicable commitment period. In re Mattson, 468 B.R. at 370. Section 1325(b) is not

applicable to Chapter 13 plan modification under §1329. In re Davis, 439 B.R. 863, 866-68 (Bankr. N.D. Ill. 2010)

III. 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).

Even though §1325(b) does not apply to post-confirmation plan modifications, §1329(b)(1) of the Bankruptcy Code provides that the “requirements of section 1325(a)” apply to any modifications of Chapter 13 plans that are proposed under §1329(a). A “requirement of section 1325(a)” is that “the plan has been proposed in good faith and not by any means forbidden by law.” 11 U.S.C. §1325(a)(3). Consequently, for a post-confirmation modification to be approved under §1329, the modification must have been proposed in good faith.

Accordingly, a proposed modification to reduce the applicable commitment period of a plan must comply with the good faith requirement of §1325(a)(3). In re Mattson, 468 B.R. at 369. Although the provisions regarding the applicable commitment period do not apply to plan modifications under §1329, “a proposed modification must still satisfy the requirements of §1325(a), including the requirement that the modification be proposed in good faith.” In re Grutsch, 453 B.R. at 429.

“The good faith requirement of §1325(a)(3) fills the gap that would otherwise exist, allowing all parties to object to inappropriate payment terms – whether excessive or inadequate – in a proposed modification.” In re Davis, 439 B.R. at 869(citing In re Prieto, 2010 WL 3959610, at 3 (Bankr. M.D. Fla.)). The principle of good faith that governs plan modifications is in place “to protect creditors from erosion of the commitment period by post-confirmation modification.” In re White, 411 B.R. at 275-76. In In re Savage, 426 B.R. 320, 325 (Bankr. D. Minn. 2010), for example, the Court determined that

a proposed modification to reduce the commitment period failed the good faith requirement of §1325(a)(3), because the debtors had not shown either a factual or a legal basis to shorten the 60-month term of the plan.

In the Eleventh Circuit, it is generally held that the basic good faith inquiry under §1325(a)(3) is “whether or not under the circumstances of the case there has been an abuse of the provisions, purpose or spirit of [the chapter] in the proposal.” In re Kitchens, 702 F.2d 885, 888 (11th Cir. 1983)(quoted in White v. Waage, 440 B.R. 563, 567 (M.D. Fla. 2010)). Primary factors to be considered in the good faith analysis include the debtors’ motivations, sincerity in seeking relief, and *bona fides* in dealing with their creditors. In re Blackmon, 459 B.R. 144, 146 (Bankr. S.D. Fla. 2011)(citing In re Weiser, 391 B.R. 901 (Bankr. S.D. Fla. 2008)).

In this case, the Debtors’ good faith was not addressed at the hearing on the Debtors’ Motion to Modify Plan, and the Court cannot determine whether the modification was proposed in good faith. The Debtors assert that their original Plan included amounts to cure mortgage arrearages. The Debtors also assert that they have surrendered their Rental Property, and that they may surrender their homestead. (Docs. 64, 76). Consequently, it appears that the Debtors’ financial circumstances might have changed since their Chapter 13 Plan was confirmed. A post-confirmation change in circumstances may constitute a valid reason to permit the modification of a plan under §1329. See In re Hoggle, 12 F.3d 1008, 1011 (11th Cir. 1994).

Additionally, the Debtors acknowledge that they incorrectly completed Form B22C prior to confirmation of their original Plan. (Doc. 76). The incorrect Form resulted in the 5-year “applicable commitment period” that the Debtors now seek to shorten. Although the Debtors contend that the

inaccuracies on the Form are excusable because they did not affect the terms of their original Plan (Transcript, pp. 11, 13-14, 19), the Court cannot determine whether the Debtors' post-confirmation attempt to amend the Form in this case is a good faith reason to modify the Plan. See In re Mattson, 468 B.R. at 370. The Plan modification proposed by the Debtors provides for a 0% distribution to unsecured creditors (Doc. 65, p. 3), and the Court cannot determine whether a zero percent plan satisfies the good faith requirement based on the Debtors' post-confirmation financial circumstances.

For these reasons, the Debtors' Motion to Modify Confirmed Plan should be rescheduled for hearing for the purpose of considering whether the proposed modification satisfies the requirements of §1325(a) of the Bankruptcy Code.

Conclusion

The Debtors filed a Motion to Modify Confirmed Chapter 13 Plan. 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 section 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.

Accordingly:

IT IS ORDERED that the hearing to consider the Motion of the Debtors, Theodore Louis Tiliakos and Katherine Moore Tiliakos, to Modify Confirmed Chapter 13 Plan is rescheduled to August 20, 2013, at 1:30 o'clock p.m. in 300 North Hogan Street, 4th Floor – Courtroom 4A, Jacksonville, Florida 32202.

DATED this 30 day of May, 2013.

BY THE COURT

Paul M. Glenn

PAUL M. GLENN
United States Bankruptcy Judge