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JUDGE: M. A. Mahoney
PARTIES: Maxcine Westry Jackson
CHAPTER: 13
ATTORNEYS:
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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

ANDREW JOSEPH CURTIS	Case No. 94-11204-MAM-13
MELISSA JERKINS	Case No. 94-12712-MAM-13
MAXCINE WESTRY JACKSON	Case No. 95-10994-MAM-13

Debtors.

ORDER GRANTING MOTIONS OF DEBTORS TO REDUCE PAYMENTS

These cases are before the Court on the motions of the Debtors to reduce their monthly payments toward their Chapter 13 plan obligations. A hearing was held. Appearances were as noted in the record. The Court has jurisdiction to hear the motions pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. These matters are core proceedings pursuant to 28 U.S.C. § 157(b)(2)(A).

FACTS

Andrew Joseph Curtis

Mr. Curtis filed his Chapter 13 case on June 22, 1994. His Chapter 13 plan was confirmed by order of September 28, 1994. The plan did not indicate any particular percentage of unsecured debt to be paid. No creditor objected to the plan. The Chapter 13 Trustee indicated that the plan would pay 100% of all creditor claims listed in Mr. Curtis's schedules. The order confirming the plan stated, inter alia:

> 2. [T]he debtor shall pay to the Standing Trustee the sum of $323.00[1] per month.

[1]This number was actually smaller in the original plan. However, the payments of Mr. Curtis were increased to cover later filed claims.

3. From the amount paid by the debtor, the Standing Trustee shall pay, in order of priority:

(a) The costs, expenses and fees as required by law.
(b) An attorney's fee . . .
(c) Any claims entitled to priority under and in the order prescribed. . .
(d) [P]reference payments to secured creditors . . .
(e) A pro rata dividend to all other creditors whose claism have been proved and allowed . . .

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5. This proceeding is confirmed on a sixty (60) month plan.

Curtis now seeks to reduce his payments from $323 per month to $156 per month. This reduction would be possible due to Curtis's objection to the claim of the Internal Revenue Service which left him with a smaller balance to pay over the remaining life of his plan. His schedules indicate that at the time he filed this case he had $691 of net monthly income over expenses. No change in his financial condition was shown.

Melissa Jerkins

Ms. Jerkins filed her Chapter 13 case on December 27, 1994. Her Chapter 13 plan was confirmed by order of February 14, 1995. It did not state any particular percentage of each unsecured debt to be paid. The Chapter 13 Trustee had calculated that it would pay 100% of all claims listed in Ms. Jerkin's bankruptcy schedules. No creditor objected to the plan. The plan contained the language quoted above from Mr. Curtis's plan except that her payments were $275.00 per month. Ms. Jerkins now seeks to reduce her plan payments to $32 per month. She will repay 100% of the claims filed in her case within the 24 months remaining in her 60 month plan at this rate. Her schedules reflected that she had $316.83 of monthly income net of her monthly expenses when she filed her bankruptcy case in 1994. No change in her financial condition was shown.

Maxcine Jackson

Ms. Jackson filed her Chapter 13 case on April 28, 1995. Her plan was confirmed on June 21, 1995. Her plan, under the form then (and now) utilized by the Chapter 13 Trustee in this district, stated that unsecured creditors would be paid 100% of their allowed claims. The Chapter 13 Trustee indicated that the plan would pay 100% of all debt listed in Ms. Jackson's schedules. The order confirming the plan contained the same provisions as quoted from Mr. Curtis's order except that Ms. Jackson was required to pay $495 per month.

Ms. Jackson seeks to reduce her payments from $495 to $429 per month. This sum would pay 100% to her creditors. The lower monthly payments would be possible because claims filed and allowed by the Court were of a lower total amount than anticipated at confirmation. No change in her financial condition was shown.

LAW

The motions to reduce payments do not specify which provision or provisions of the Bankruptcy Code are the bases of the motions. The Court believes that the motions are either motions for relief from an order under Fed. R. Bankr. P. 9024 or motions for modification of a Chapter 13 plan after confirmation pursuant to 11 U.S.C. § 1329. The Court will discuss (1) the general requirements of Fed. R. Bankr. P. 9024; (2) the general requirements of 11 U.S.C. § 1329; and (3) whether these debtors have fulfilled the requirements.

I.

Fed. R. Bankr. P. 9024 incorporates Fed. R. Civ. P. 60 into the Bankruptcy Rules. It allows a party to make a motion to set aside or modify any order or judgment in a bankruptcy case. The movant bears the burden of proving a reason justifying relief. *In re Republic Fabricators, Inc*., 104 B.R. 933 (Bankr. N.D. Ind. 1989). Rule 9024 has been utilized in the

context of Chapter 13 confirmation orders. *See, e.g., In re Saulter*, 133 B.R. 148 (Bankr. W.D. Mo. 1991) (Court set aside order confirming Chapter 13 plan when creditor had no notice).

There are six grounds which a party may allege justify relief. Fed. R. Civ. P. 60 (b)(1)-(6). The only section of Rule 60(b) applicable in these cases is Rule 60(b)(6) which allows relief from an order or judgment for "any other reason justifying relief from the operation of the judgment." The fact that smaller monthly payments will satisfy creditor claims in full within the five year plan term is the Debtors' stated reason justifying relief. There was no evidence that these Debtors could have known what payments would be necessary to complete their plans until a date after confirmation. The question then for the Court is whether a fortuitous situation of fewer filed or allowed claims is a sufficient ground to justify a reduction in the monthly payment amount under Fed. R. Civ. P. 60(b)(6) and Fed. R. Bankr. P. 9024. That issue will be discussed in Section III below.

II.

Even if such motions are not appropriate under Fed. R. Bankr. P. 9024, there is a mechanism for certain types of modifications to confirmation orders in 11 U.S.C. § 1329. Section 1329 states that modifications are allowed, regardless of the finality of a confirmation order, in three situations:

1) [to] increase or reduce the amount of payments on claims of a particular class provided for by the plan;

2) [to] extend or reduce the time for such payments; or

3) [to] 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.

Upon review of the plans and orders confirming plans used in this district, the Court is unsure how to characterize the plans. They may be what are called "pot plans"[2] or "percentage plans"[3] since they bear elements of both. The Court need not decide the issue because 11 U.S.C. § 1329 applies to both types of plans and the reduction motions at issue.

If the plans of Curtis, Jerkins, and Jackson are "pot plans," the motions seek to reduce the amount of payments on claims of a particular class as allowed in 11 U.S.C. § 1329(a)(1). Without the reduction, the claims would be paid whatever amount the plan payments paid in the 60 month period. If the plans are "percentage plans," the motions seek to extend the time for the payment of the promised percentages as allowed in 11 U.S.C. § 1329(a)(2).

Many cases have stated that a party seeking to modify a Chapter 13 plan must show that there has been an "unanticipated substantial change in circumstances,"[4] or a "change in

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[2]Pot plans pay a certain total amount to creditors over the life of the plan. The key elements of a pot plan are the monthly payment amount and the term of the plan. The total sum to be paid is fixed at the time the plan is proposed. After payments to priority and secured creditors, the remaining "pot" is paid pro rata to unsecured creditors. The amount of allowed unsecured claims whether later found to be more or less than shown on the debtor's schedules is not determinative of the size of the payments.

[3]Percentage plans specify an exact percentage of recovery to all unsecured creditors who file claims. The key element is the percentage. If the plan is a 10% plan, all allowed unsecured creditors receive 10% of the total amount of their claims. The total amount to be paid under such a plan is not known until the claims bar date passes and all claim objections are heard. Once the total allowed claims are known, the Chapter 13 Trustee can determine what amount will pay 10% of the claims to unsecured creditors. In this district the claims bar date and claim objections occur after confirmation of the plan. Thus, the total amount of claims utilized to determine initial plan payments is based upon the debtor's schedules. Creditors may not file claims; they may file claims for higher or lower amounts than listed in a debtor's schedules; claims may be objected to by the debtor. To meet the promised percentage pay back, plan payments frequently must be adjusted upward or downward, particularly within the first year following confirmation of the plan.

[4]*See,Witkowski*, 16 F.3d 739, 742 (7th Cir. 1994).

circumstances"[5] as a threshold requirement for use of Section 1329. The statute itself contains no such test. This Court concludes that the better reasoned view is that Section 1329 requires no change in circumstances at all as a basis for the motion. *In re Witkowski*, 16 F.3d 739 (7th Cir. 1994). However, even if this ruling is incorrect, failure of a number of unsecured creditors to file claims would satisfy the requirement of a "change in circumstances" anyway. *Id*. at 739, 743. The debtor has no control over how many claims are filed.[6]

III.

A review of Section 1329 indicates that the movant must show that the modification(s) fulfill the requirements of 11 U.S.C. §§ 1322(a), 1322(b), 1323(c) and 1325(a). It is appropriate that the requirements of any motion to reduce payments grounded in Fed. R. Bankr. P. 9024 be the same. The only requirement which may not be met by these motions is the requirement that the modification fulfill the criteria of Section 1325(a). Some case law suggests that the modifications like the ones sought by these debtors do not meet the good faith test of Section 1325(a)(3). Section 1325(a)(3) states that the plan "has been proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1325(a)(3).

Two cases hold that the failure of a plan to fulfill the requirements of Section 1325(b) are an issue for a debtor seeking to modify his or her plan under Section 1329. These cases incorporate the requirements of Section 1325(b) into the "good faith" requirement of Section 1325(a)(3). Section 1325(b) provides:

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[5]*See, Witkowski*, 16 F.3d 739, 742, n.5 (7th Cir. 1994).

[6]However, intentional or knowing manipulation of the process to the debtor's advantage so that a modification request was foreseeable at the time of confirmation might not constitute a "change of circumstances."

> If the trustee or the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan --
>
> (A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or
> (B) the plan provides that all of the debtor's projected disposable income to be received in the three-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan

Mr. Curtis, Ms. Jerkins and Ms. Jackson, according to their net disposable incomes, could pay more to their creditors than the reductions will require. Should a court refuse to lower their payments due to an ability to pay more?

In *In re Beasley*, 34 B.R. 51 (Bankr. S.D.N.Y. 1983), the Court held that reduction of payments due to the fortuitous failure of creditors to file claims was not a good faith proposal and violated 11 U.S.C. § 1325(a). Thus, under the requirements of Section 1329, the plan modification could not be allowed.

> Proceeding chiefly on the ground of a desire to have additional surplus income attributable to the failure of some unsecured creditors to file proofs of claim, the debtors do not advance evidence that they need or require those additional sums rather than make payment to their creditors. . . . In their original plans, the debtors allocated specific amounts for the payment of creditors, leaving themselves presumably adequate means for self-support. Modification of their plans, absent any meaningful change in their financial condition or some other reasonable excuse, is inconsistent with the prior determination of good faith, and should not be permitted.

Id. at 54.

In *In re Bostwick*, 127 B.R. 419 (Bankr. N.D. Ill. 1991), the Court found that

> [T]here is a change in the debtor's financial condition when several creditors, as here, do not file proofs of claim. The debtor is now able to pay his allowed unsecured claims in full. That rationale would be consistent with *In re Fitak*, 92 B.R. 243 (Bankr. S.D. Ohio 1988), where the court states that unanticipated windfalls should inure to the benefit of the creditors and not the debtor . . . The modification is not of the debtor's payments, which remain unchanged, but rather of the distribution of those payments by the Trustee . . . The disposable income

> requirement would be offended, in letter and in spirit, if such a modification were not permitted.

Bostwick at 420.

However, a third case from Alabama did not incorporate the requirements of Section 1325(b) into the elements necessary to permit a modification. In *In re Woodhouse*, 119 B.R. 819 (Bankr. M.D. Ala. 1990), the Court held that a debtor would not be required to pay the fixed payments established in his percentage plan for the entire stated term of the plan following the failure of some creditors to file claims. The plan indicated unsecured creditors would be paid 7%. If payments continued for three years at the payment level established in the plan as originally confirmed, unsecured creditors would receive 19%. Judge Steele stated:

> The conclusion must be that unless there are substantial, unanticipated changes in the debtor's ability to pay under a plan already confirmed, the rights of the debtor and his creditors are settled at the date of confirmation, and not to be disturbed in modification proceedings relating to disposable income.

Woodhouse at 119 B.R. 820.

Sections 1325(a) and (b) list seven different criteria a plan must fulfill to be confirmed. The requirement of Section 1325(b) must only be met when someone objects to the plan as proposed. Although many courts have incorporated into Section 1325(a)(3) requirements of other Bankruptcy Code sections, this Court concludes that is improper. If no purpose is served by the specific delineations of criteria in separate sections, some with specific triggering devices, Congress would not have enacted the provisions in that manner. *Pac Fung Feather Co., Ltd. v. United States*, 111 F.3d 114 (Fed. Cir. 1997) ("The cardinal principle of statutory construction is to save and not to destroy. [Cites omitted.] We must 'give effect, if possible, to every word and clause of a statute. [Cites omitted.]'"); *Stattin v. Resolution Trust Corp.*, 883 F. Supp. 678, 683 (M.D. Fla. 1995) ("Generally, a statute should not be interpreted in a manner that makes its

works or phrases redundant or meaningless"); *Stewart v. Jones*, 35 B.R. 392, 394 (S.D. Ala. 1983) ("'In determining the legislative intent behind a statute, the statute must be interpreted as a whole, and, if possible, every section should be given effect.' [Cites omitted.] Indeed, wherever possible, every word should be given effect."). Statutory construction principles demand that meaning be given to the separate parts and their separation. Therefore, if the disposable income test of Section 1325(b) is to be triggered only upon the filing of an objection, the Court should not draw the principle into Section 1325(a)(3) where it can be employed without objection of creditors or the trustee. Such loose construction of the Bankruptcy Code gives bankruptcy judges more discretion than Congress intended.

This logic is doubly true when one looks at Section 1329. Section 1325(b) is omitted from the list of Bankruptcy Code sections which a Court should consider in ruling on a plan modification request. Therefore, use of Section 1325(a) to incorporate it into Section 1329 is improper.

This result is not inequitable in these cases. Creditors will be paid 100% of their claims over five years. This was the payment period they expected. By confirmation, there were no objections to the original plans. There were no objections to these motions.

THEREFORE IT IS ORDERED:

1. The Motions of the Debtors to Reduce their plan payments are GRANTED; and

2. The plan payments of Andrew Joseph Curtis are reduced to $156 per month; and

3. The plan payments of Melissa Jerkins are reduced to $32 per month; and

4. The plan payments of Maxcine Westry Jackson are reduced to $429 per month.

Dated: May 16, 1997

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MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE