

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

IN RE:)
)
MARVIN JOSEPH GREEN,) Case No. 17-01993
)
Debtor.)

ORDER OVERRULING OBJECTION TO CONFIRMATION

This case is before the court on the chapter 13 trustee's objection to confirmation. For the reasons discussed below, the court overrules the trustee's objection.

The trustee's objection is based on the treatment of the debtor's monthly mortgage payment and mortgage arrearage in his proposed plan. The debtor's homestead is secured by a mortgage held by Bank of America. The proposed plan provides for direct monthly payments of \$1,163 to the bank with the trustee to pay the bank's arrearage claim of \$52,704.50 at 100% pro rata through the plan. The combination of the direct mortgage payment and the arrearage claim to be paid through the plan is \$2,070 a month. The proposed plan will pay nothing on unsecured claims.

The trustee contends that the debtor's plan fails to meet the requirement of Bankruptcy Code § 1325(b)(1) that, in summary, the debtor must either pay 100% on unsecured claims or all of his projected disposable income for the applicable commitment period. In calculating "disposable income," § 1325(b)(2) allows the deduction of "amounts reasonably necessary to be expended" for the maintenance or support of the debtor. For above-median debtors like the debtor here, § 1325(b)(3) provides that "amounts reasonably necessary to be expended" shall be determined in accordance with § 707(b)(2)(A) and (B).

The trustee argues that § 707(b) limits the debtor to the applicable IRS Local Standard housing expense of \$743, while the debtor argues that § 707(b) as incorporated in Official Form

122C-1 entitles him to deduct his combined mortgage debt payments of \$2,070 without regard to the IRS Standard amount.

Bankruptcy Code § 707(b)(2)(A)(i) allows for, among other things, the deduction of (1) expenses using the IRS Standards under § 707(b)(2)(A)(ii)(I), (2) average monthly payments on secured debts as set out in § 707(b)(2)(A)(iii), and (3) priority claims under § 707(b)(2)(A)(iv).

“[P]ayments for debts” are specifically carved out of the IRS Standards under § 707(b)(2)(A)(ii)(I). *See, e.g., In re Behague*, 497 B.R. 340, 342 (Bankr. M.D. Fla. 2012) (“ . . . Section 707(b)(2)(A)(iii) governs what, if any, payments on secured debts are permissible deductions from a debtor’s current monthly income, not Section 707(b)(2)(A)(ii)(I).”).

“Although § 707(b)(2) does reflect the IRS Local Standards for monthly housing and transportation expenses, debtors may deduct more based on their actual payments for debts secured by their real estate and vehicles.” *In re Johnson*, 346 B.R. 256, 265 (Bankr. S.D. Ga. 2006). Indeed, “[b]ecause secured debts are addressed in § 707(b)(2)(A)(iii), the Local Standards are not applicable to those payments, and serve as neither a minimum nor a cap on the deduction a debtor may take for secured debt payments.” *In re Fields*, 534 B.R. 126, 132 (Bankr. E.D.N.C. 2015); *see also In re Witcher*, 702 F.3d 619, 621 (11th Cir. 2012) (citing § 707(b)(2)(A)(iii) for the proposition that a ‘debtor’s payment of secured debts’ are “calculated by a statutory formula”).

Under § 707(b)(2)(A)(iii), as amended in 2005,

[t]he debtor’s average monthly payments on account of secured debts shall be calculated as the sum of—

(I) the total of all amounts scheduled as contractually due to secured creditors in each month of the 60 months following the date of the filing of the petition; and

(II) any additional payments to secured creditors necessary for the debtor, in filing a plan under chapter 13 of this title, to maintain possession of the debtor's primary residence, motor vehicle, or other property necessary for the support of the debtor and the debtor's dependents, that serves as collateral for secured debts;

divided by 60.

Accordingly, under § 707(b)(2)(A)(iii)(I), the debtor here may deduct his contractually due secured payment of \$1,163 every month for his home, even though the IRS Standard is limited to \$743 a month. *See generally, e.g., In re Edmondson*, 371 B.R. 482 (Bankr. D.N.M. 2007). At this point, the trustee has not contended that the debtor's mortgage arrearage payments through the plan are not necessary for him to maintain possession of his home for the support of himself; the court thus concludes that such payments are "necessary" under § 707(b)(2)(A)(iii)(II). *See, e.g., In re Roberts*, 493 B.R. 584, 590 (Bankr. D. Kan. 2013); *In re Kain*, No. 07-40922, 2007 WL 2851612, at *3 (Bankr. W.D. Wash. 2007); *see also In re Gibson*, No. 13-39435-BKC-RAM, 2014 WL 6985147, at *2 (Bankr. S.D. Fla. Dec. 10, 2014) ("The Debtor's arrears payment is clearly necessary for the Debtor to maintain possession of the property."). Under § 707(b)(2)(A)(iii), then, the debtor here can deduct both the contractual loan payment and the arrearage payment, for a total of \$2,070, in calculating his projected disposable income under § 1325(b).

Reasonable minds could question the wisdom of § 707(b)(2)(A)(iii) as drafted, which may allow a chapter 13 debtor to retain expensive collateral at the expense of unsecured creditors. *See* Keith M. Lundin & William H. Brown, CHAPTER 13 BANKRUPTCY, 4TH EDITION, § 485.1, Sec Rev. May 8, 2009, www.Ch13online.com. Section 707(b)(2)(A)(iii)(II) does give a court leeway to determine whether payment of the arrearage is "necessary" for the support of the debtor and his dependents; the court is not reaching the issue of whether the necessity provision

also applies to the regular contractual payments under § 707(b)(2)(A)(iii)(I). *See id.*; compare, e.g., *In re Hays*, No. 07-41285, 2008 WL 1924233, at *4-6 (Bankr. D. Kan. Apr. 29, 2008) with *In re Owsley*, 384 B.R. 739, 746-49 (Bankr. N.D. Tex. 2008). The court also recognizes that this order conflicts with its previous ruling in *In re Kidd*, case no. 17-00747, where the court limited an above-median debtor's allowable expense for his motor vehicle to the IRS Standard even though his monthly car payment was substantially higher. Section 707(b)(2)(A)(iii) was not raised as an issue in that case but, going forward, the court will apply that section as discussed herein.

The court thus overrules the trustee's objection to confirmation based on § 1325(b)(1). However, the court is not ruling on any other issue (such as feasibility or good faith) with respect to the debtor's proposed plan and is not conditionally confirming the plan at this point. The court therefore requests that the clerk of court set this case for a continued confirmation hearing with sufficient time for any objections to be filed.

Dated: December 28, 2017


HENRY A. CALLAWAY
CHIEF U.S. BANKRUPTCY JUDGE