

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

IN RE:)
)
MONICA ELAINE TURNER,) Case No. 19-11330
)
Debtor.)

ORDER SUSTAINING TRUSTEE'S OBJECTION TO CONFIRMATION AND
ORDERING DEBTOR TO FILE AN AMENDED PLAN WITHIN 14 DAYS

This case came before the court on the chapter 13 trustee's objection to confirmation (doc. 29). The court conducted an evidentiary hearing and heard testimony from the debtor. For the reasons discussed herein, the court sustains the objection and orders the debtor to file an amended plan within 14 days.

In the debtor's original and amended chapter 13 plans (docs. 2, 26, and 41), she proposes to retain and pay for two vehicles: a 2012 Jeep Wrangler and a 2013 BMW 535. The chapter 13 trustee objects to the debtor's retention of the BMW under the plan and contends that the expense associated with the BMW should not be an allowable expense in determining the debtor's projected disposable income under Bankruptcy Code § 1325(b).

The debtor is a registered nurse who provides home health care. She serves homebound patients, many of them in rural areas. She provides wound care, checkups, IVs, and draws blood. She must travel down dirt roads and even in some areas with no roads, and she needs a vehicle which can travel in these areas. The debtor's practice is to use the Jeep Wrangler for work and then park it and use her BMW for personal use. She testified that some nurses with her job have one vehicle which they use for both work and personal use, and some like her have separate vehicles.

This court has already discussed in *In re Green*, Case No. 17-1993 (Bankr. S.D. Ala. December 28, 2017) that the IRS housing and vehicle standards do not limit the payments for secured debt owed by an above-median income debtor as here. Bankruptcy Code § 707(b)(2)(A)(iii) allows regular contractual payments on secured debts and “any additional payments to secured creditors necessary for the debtor . . . 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 debt” While § 707(b)(2)(A)(iii)(II) does give a court leeway to determine whether payment of arrearage is “necessary” for the support of the debtor, courts are split as to whether the necessity provision also applies to the regular contractual payments under § 707(b)(2)(A)(iii)(I). *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 does not need to reach that issue here, because it cannot confirm a plan if it has not been proposed in “good faith.” *See, e.g., In re Jackson*, No. 11-42528-JJR-13, 2012 WL 909782, at *2 (Bankr. N.D. Ala. Mar. 16, 2012) (“[E]ven if the absence of objections by creditors or a trustee, a bankruptcy court has an independent duty to determine that all prerequisites for plan confirmation have been satisfied.”). The Eleventh Circuit “has set forth a non-exhaustive list of factors relevant to whether a plan was proposed in good faith[,]” commonly referred to as the *Kitchens* factors. *See In re Brown*, 742 F.3d 1309, 1316-17 (11th Cir. 2014). The court determines good faith on a case by case basis using a “totality of the circumstances” approach. *See, e.g., id.* The debtor bears the burden to show that her “plan was proposed in good faith.” *See, e.g., In re Jackson*, 2012 WL 909782, at *2.

Having reviewed the *Kitchens* factors and the totality of the circumstances here, the court notes that this case is a close call. The debtor has proven the practical necessity for the Jeep Wrangler, which can handle the dirt- and off-road travel required for her job. But the court is not persuaded by the debtor's testimony about why she needs a separate vehicle, in this case a relatively late-model luxury vehicle, for non-work use. For example, while the debtor testified that she was concerned about potential spillage when transporting samples from patients, she also testified that she transports the samples in a safe manner, that she has only had one spill and was not infected as a result, and that she regularly sanitizes the Jeep Wrangler when she returns home from work.

Although the percentage to unsecured creditors has not yet been determined, the debtor has sizeable tax debt and it does not appear that much, if anything, will be paid on unsecured claims. The debtor's plan provides for the debtor to retain and keep driving a late-model luxury vehicle for her own convenience on the weekends when she is paying for another vehicle in the plan which would adequately meet her needs, although perhaps not quite as comfortably. The court understands why the debtor would prefer to drive a BMW on the weekends rather than a rougher-riding Jeep Wrangler, but that preference is not enough under the circumstances of this case to override the interest of unsecured creditors who are not getting paid or getting paid a minimum amount at best. *See, e.g., In re Hicks*, No. 10-41855-JJR-13, 2011 WL 2414419 (Bankr. N.D. Ala. 2011) (finding lack of good faith in chapter 13 plan that, among other things, paid for unnecessary vehicles); *In re Mazarella*, No. 10-81189, 2010 WL 4452352 (Bankr. M.D.N.C. Nov. 1, 2010) (denying confirmation, including on the ground that the debtor's retention of a truck for the purpose of taking his household trash to the dump was an unnecessary luxury); *In re Allawas*, No. 07-06058-HB, 2008 WL 6069662 (Bankr. D.S.C. Mar. 3, 2008)

(denying confirmation for lack of good faith where debtor proposed to retain an expensive motorcycle as a second vehicle). The court thus finds that the debtor has not met the burden of proving that her plan as currently amended is proposed in good faith.

The court sustains the trustee's objection to confirmation and orders that the debtor file an amended plan within 14 days of the date of this order. The case is reset for confirmation on October 3, 2019 at 2:30 p.m. The court is not reaching any of the other issues raised in the trustee's objection.

Dated: August 1, 2019


HENRY A. CALLAWAY
CHIEF U.S. BANKRUPTCY JUDGE