IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF ARKANSAS
PINE BLUFF DIVISION

IN RE: CODY AND GLENA HARRISON, Debtors.

CASE NO. 5:02-bk-16665M
(CHAPTER 13)

ORDER

On June 14, 2002, Cody Paul and Glena Ann Harrison ("Debtors") filed a voluntary petition for relief under the provisions of Chapter 13 of the United States Bankruptcy Code. The original Chapter 13 plan was filed on June 14, 2002, and was modified on September 13, 2002, November 22, 2002, April 1, 2003, July 24, 2003, July 29, 2004, October 26, 2005 and on December 22, 2005. The modified plan proposed on December 22, 2005, was confirmed on January 23, 2006.

On May 25, 2006, the Chapter 13 Trustee filed a modified plan pursuant to 11 U.S.C. § 1329 and the Debtors have objected to the Trustee's proposed modified plan. A hearing was conducted in Pine Bluff, Arkansas, on July 5, 2006, and the matter was taken under advisement. Both parties have filed briefs with the Court.

The proceeding before the Court is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(L) and the Court may enter a final judgment in the case.

DISCUSSION

The facts are not in dispute. The Debtors' plan, as finally amended on December 22, 2005, proposed to pay the Trustee $359.99 per month. The plan treated the claim of one

secured creditor and proposed to pay the secured portion of the claim ($13,615.00) in full over the 58-month life of the plan including interest at the rate of 9 percent per annum. Non-priority unsecured creditors were to receive pro rata payments on their claims after payment of the secured claim in full.

After confirmation of the plan, the Debtors received proceeds from a personal injury lawsuit in the net sum of $3691.06.[1] The Trustee filed a proposed modified plan on May 25, 2006, and the Debtors filed a timely objection. The Trustee proposes to distribute the settlement proceeds to the unsecured creditors pro rata and leave the payment to the secured creditor as previously provided. The Debtors do not object to distributing the money to creditors, but argue the money should be paid to the secured creditor as provided in the original plan.

The evidence offered by the Trustee and Debtors consisted of the docket (Exhibit 1); the narrative statement of the plan (Exhibit 2); the Debtors' modified narrative statement dated September 13, 2002 (Exhibit 3); the Order confirming the plan dated October 28, 2002 (Exhibit 4); the Debtors' modified narrative statement dated December 16, 2005, (Exhibit 5); the Order confirming the plan dated January 23, 2006 (Exhibit 6); and the Trustee's proposed modified plan dated May 25, 2006 (Exhibit 7). No other evidence was offered and no witness testified.

11 U.S.C. § 1329 provides in relevant part:

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[1]The accident occurred post-petition on July 8, 2005, according to the motion filed to approve the settlement. According to the docket, the Order approving the settlement was entered March 14, 2006, and the Trustee received the money sometime after that date.

(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;

. . .

(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.
(2) The plan as modified becomes the plan unless, after notice and a hearing, such modification is disapproved.

Ordinarily, an order of confirmation is entitled to the preclusive effect of res judicata. In re Ramey, 301 B.R. 534, 538 (Bankr. E.D. Ark. 2003). However, 11 U.S.C. § 1329 provides a statutory exception to this principle, specifically permitting a debtor, the trustee or an unsecured creditor to propose a modified plan after confirmation. In re Dunlap, 215 B.R. 867, 869 (Bankr. E.D. Ark. 1997).

The rationale for permitting a modification not prohibited by the principles of res judicata is that a modification is justified only upon a showing of unanticipated changed circumstances affecting the debtor's ability to pay. Arnold v. Weast (In re Arnold), 869 F.2d 240, 243 (4th Cir. 1989); In re Furgeson, 263 B.R. 28, 36-37 (Bankr. N.D.N.Y. 2001); Dunlap, 215 B.R. at 869; In re Guernsey, 189 B.R. 477, 483 (Bankr. D. Minn. 1995); 8 Collier's on Bankruptcy ¶ 1329.03 at 1329-7 (Alan N. Resnick & Henry J. Sommer et al. eds., 15th ed. rev. 2002); Harry L. Deffebach, Postconfirmation Modification of Chapter 13 Plans: A Sheep in Wolf's Clothing, 9 Bankr. Dev. J. 153, 164 (1992).

Other cases do not require unanticipated substantial changes as a prerequisite to a confirmation of a modified plan proposed by a creditor or a trustee because 11 U.S.C. § 1129 does not require it. Barbosa v. Soloman, 235 F.3d 31, 41 (1st Cir. 2000); In re

Witkowski, 16 F.3d 739, 746 (7th Cir. 1994); Ledford v. Brown (In re Brown), 219 B.R. 191, 195 (B.A.P. 6th Cir. 1998); Powers v. Savage (In re Powers), 202 B.R. 618, 622 (B.A.P. 9th Cir. 1996); In re Perkins, 111 B.R. 671, 673 (Bankr. M.D. Tenn. 1996).

In this case, it is not necessary to decide whether substantial unanticipated changes are required because the facts are undisputed that there were, in fact, substantial unanticipated changes in the funds available to pay unsecured creditors. The tort claim arose post-confirmation; therefore, it could not have been anticipated by previous plans.

Debtors who receive extra sums of money post-confirmation are subject to having their plans modified on motion of the trustee. Powers, 202 B.R. at 623 (plan was modified because of an unexpected rise in debtor's income); In re Thomas, 291 B.R. 189, 198 (Bankr. M.D. Ala. 2003) (modification was granted for post-confirmation receipt of insurance proceeds from fire loss of real property); In re Florida, 268 B.R. 875, 882 (Bankr. M.D. Fla. 2001) (modification approved because of receipt of insurance proceeds from death of debtor's husband); Furgeson, 263 B.R. at 37 (modification approved because of receipt of money from post-confirmation violation of the stay); In re Studer, 237 B.R. 189, 192 (Bankr. M.D. Fla. 1998) (modification was granted because the debtors received additional funds from proceeds of personal injury action); Collier v. Valley Fed. Sav. Bank (In re Collier), 198 B.R. 816, 817 (Bankr. N.D. Ala. 1996) (modification was granted because of post confirmation receipt of insurance proceeds from fire loss of nonexempt real estate); In re Euerle, 70 B.R. 72, 73 (Bankr. D.N.H. 1987) (plan was modified after receipt of large inheritance); In re Koonce, 54 B.R. 643, 644 (Bankr. D.S.C. 1985) (plan was modified after debtor won the state lottery).

As stated by Judge Lundin, "[t]here is obvious fairness to requiring debtors to share good fortune with creditors. This is the same fairness that permits Chapter 13 debtors to reduce payments to creditors when circumstances disable the debtor from completing the original plan. . . ." Keith M. Lundin, Chapter 13 Bankruptcy § 266.1 at 266-14 (3d ed. 2000 & Supp. 2004).

The party requesting modification of the plan has the burden of proof to demonstrate that a modification is warranted. In re Edwards, 190 B.R. 91, 94 (Bankr. M.D. Tenn. 1995). The proposed modification must satisfy the tests set out in 11 U.S.C. §§ 1322(a), 1322(b), 1322(c) and the requirements of 11 U.S.C. § 1325(a). In re Perkins, 111 B.R. at 673.

The Debtors object to the modification on the basis that the order confirming their seventh modified plan is res judicata. This argument is without merit for the reasons stated above. The Debtors' other argument is difficult to follow except that the Debtors point out that if the Trustee's proposed plan is confirmed they might convert to Chapter 7. This, however, is no basis to deny confirmation.

The Debtors do not argue that the modification is not authorized by the Code or that it does not comply with all the applicable provisions of the Code. Since the only secured creditor is being paid in full under the terms of the 58-month plan, there is no reason articulated why the additional income should not be paid to the unsecured creditors. The Debtors simply argue that they prefer that the money be distributed pursuant to their plan and not the Trustee's. This also is not a sufficient reason to deny confirmation. The Trustee's proposed modified plan is fair to all creditors and the Debtors, and the

modification meets all of the requirements for confirmation contained in 11 U.S.C. § 1322 and 11 U.S.C. § 1325 and the other applicable provisions of Chapter 13.

Therefore, for these reasons, the objection to confirmation is overruled and the plan is confirmed.

IT IS SO ORDERED.

James G. Mixon

HON. JAMES G. MIXON
UNITED STATES BANKRUPTCY JUDGE

DATE: 10/24/06

cc: Jo-Ann Goldman, Chapter 13 Trustee
Jeremy Bueker, Esq.
Debtor(s)