

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

RALPH J. H. GOINS, JR.

CASE NO. 95-11357

Debtor

Chapter 13

APPEARANCES:

MARTIN J. GOODMAN, ESQ.

Attorney for Debtor
350 Northern Boulevard
Albany, New York 12204

ANDREA E. CELI, ESQ.

Chapter 13 Trustee
350 Northern Boulevard
Albany, New York 12204

Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Currently before the Court is a motion filed by Ralph J. H. Goins, Jr. ("Debtor") on November 12, 1999, seeking to modify his chapter 13 Plan ("Plan") to reduce the number of payments from 60 to 54 months and to exclude from redistribution the funds received by him in settlement of an adversary proceeding he commenced against Capital Communications Federal Credit Union ("CCFCU"). Opposition to the motion was filed by the chapter 13 trustee, Andrea E. Celi, Esq. ("Trustee"), on November 18, 1999. Oral argument on the motion was originally scheduled for November 30, 1999, in Albany, New York, and after two consensual adjournments, it was held on March 3, 2000.

After hearing oral argument, the Court provided the parties with an opportunity to file additional memoranda of law. The matter was submitted for decision on April 3, 2000.

JURISDICTION

The Court has core jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. §§1334(b), 157(a), 157(b)(1), and (b)(2)(A) and (O).

FACTS

On April 12, 1995, the Debtor filed a petition pursuant to chapter 13 of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 (“Code”), in the United States Bankruptcy Court for the Northern District of New York, Albany Division, along with his chapter 13 Plan. The Court confirmed the Debtor’s Plan by Order dated January 8, 1996. Pursuant to the Confirmation Order, the Debtor was required to make weekly payments of \$125.48 by payroll deduction for 60 months, with a dividend of no less than 10% going to unsecured creditors. *See* ¶ V of the Confirmation Order.

The Debtor listed a priority debt owed to the Internal Revenue Service (“IRS”) in the amount of \$17,000. However, according to the Debtor, the IRS filed a priority claim of only \$1,494.69, and an unsecured claim of \$14,958.19. In addition, the Debtor listed CCFCU as holding a secured claim of \$7,698.12, which Debtor proposed in his Plan to pay in full at 9% interest.

According to the Confirmation Order, the Debtor filed a proof of claim on behalf of

CCFCU in the amount of \$7,698.12. The Trustee served her “Notice of Claims Filed” on the Debtor on July 1, 1998. The Notice of Claims Filed listed CCFCU as having filed a proof of claim for \$11,324.54. Under the terms of the Confirmation Order, “[o]bjections, if any, to creditor claims by the debtor or debtor(s)’ attorney in the instant case must be filed by appropriate pleading within 30 days of the service, by the trustee, of the “Notice of Claims Filed.” *See* ¶ X of the Confirmation Order. According to the Trustee, she initially disbursed \$8,452.61 to CCFCU. Upon receiving no objection from the Debtor with respect to CCFCU’s proof of claim within 90 days of service of the Notice of Claims Filed, the Trustee disbursed an additional \$3,735.22.

On December 6, 1999, the Debtor commenced an adversary proceeding against CCFCU to recover the overpaid funds. CCFCU settled and agreed to pay the Debtor \$3,025.39. An Order was signed approving the settlement on April 17, 2000. *See* Adversary Proceeding No. 99-91268. The Debtor seeks to modify the Plan to allow him to retain the CCFCU settlement and to reduce the length of the Plan from 60 to 54 months.

ARGUMENTS

The Debtor seeks to modify the Plan based on his contention that he no longer requires 60 months to carry out his Plan and that the settlement from CCFCU should be given to him directly. The Debtor argues that under Code §1325(b)(1)(B), the disposable income test is met if a debtor provides all his disposable income for 36 months. It is the Debtor’s position that as the overpayment to CCFCU was recovered after the 36-month period, the Debtor is entitled to

retain the monies. The Debtor directs the Court to *In re Barroncini*, Case No. 94-13543 (Bankr. N.D.N.Y.), as supporting his argument. There, during their 60-month plan, the debtors had paid Greene County \$1,051.50, which was returned to the trustee because Greene County was paid in full upon the sale of the debtors' residence. By Order signed August 25, 1999, the bankruptcy court determined that the monies were the property of the debtors based on their assertion of a homestead exemption and required the chapter 13 trustee to turn the monies over to them.

The Trustee opposes the Debtor's proposed modification, contending that the amount overpaid to CCFCU during the Plan was part of the Debtor's disposable income, and should, therefore, be redisbursed to his creditors. The Trustee argues that under Code §1325(b)(1)(B), a debtor is required to provide all disposable income to a plan for at least 36 months. The Trustee maintains that if a plan exceeds the minimum 36 months, the disposable income requirement then also extends for the length of the plan. The Trustee cites to *In re Norris*, 165 B.R. 515 (Bankr. M.D. Fla. 1994) in support of her argument that disposable income must be paid over the life of the Plan, and that if the Debtor receives the benefit of a 60-month Plan, he should also accept the burden of committing his disposable income for that same period, which includes the settlement given to the Debtor by CCFCU.

At the time of the March 2000 hearing, the Trustee averred that unsecured creditors had received approximately 58% on allowed claims and that secured and priority creditors had been paid in full.

DISCUSSION

Disposable Income

The relevant portion of Code §1325 provides that “if the trustee or the holder of an allowed 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 . . . 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.” *See* 11 U.S.C. § 1325(b)(1)(B). For the purposes of Code §1325(b)(1)(B), disposable income is “income which is received by the debtor and which is not reasonably necessary . . . for the maintenance or support of the debtor” *See* 11 U.S.C. § 1325(b)(2)(A).

Although Code §1325(b)(1)(B) expressly provides that the debtor’s disposable income received during “the three-year period,” be utilized for plan payments, courts have interpreted the section to mean that disposable income should be made available to pay a debtor’s creditors *over the life of the plan*, and not just for the initial 36 months. *See Norris*, 165 B.R. at 517; *see also In re Nottingham*, 228 B.R. 316, 321 (Bankr. M.D. Fla. 1998) (indicating that under Code §1325(b)(1), the debtor must show that he is consigning all his projected disposable income to the entire 60-month plan for it to be confirmed).

In *Norris*, the Chapter 13 debtors proposed to pay \$835.79 for 36 months and then to reduce their monthly payments to \$740.05 over the last 24 months because the debtors had insufficient disposable income to pay the secured and priority claims in full without extending their plan payments over 60 months. The Debtors argued that under Code §1325(b)(1)(B), a debtor is only required to commit his disposable income for the initial three-year period. *Norris*, 165 B.R. at 517. Although the debtor further pointed out that the section specifically referred to

committing disposable income for three years, the court ruled that in allowing a chapter 13 plan to extend beyond thirty-six months, Congress did not intend to absolve debtors of the requirement of committing their disposable income for the remainder of their plan beyond the three-year period. *Id.* The court held:

Because §1322(c) creates a 36-month standard time period for a chapter 13 plan and allows for a longer period only in unusual circumstances . . . the use of the 36-month time period in §1325(b)(1)(B) is not exclusive of a 60-month plan. Section 1325 requires use of all disposable income to fund a plan regardless of the duration of the plan. Because debtors do not propose to pay 100 percent on their unsecured claims, they must commit all of their disposable income into the plan.

Id. The debtors, therefore, were required to commit all of their disposable income for the full 60 months of their plan, thereby increasing the dividend they proposed to pay to the unsecured creditors. *See Norris* at 518.

Requiring a debtor to pay all disposable income over the term of the plan, even if it extends beyond 36 months, has support in equity, as well. The court in *In re Wood* stated that the usual plan length is 36 months, and that if the plan is longer, “the debtors cannot elect to retain disposable income and simply ‘string out’ their payments.” *In re Wood*, 92 B.R. 264, 266 (Bankr. S.D. Ohio 1988). Similarly, in *Norris*, the court pointed out that “principles of equity and fair play” require that a debtor commit his disposable income for the life of his plan. *Norris*, 165 B.R. at 518. “Debtors are receiving the benefit of extending their plan payments. They cannot receive this grant . . . without also accepting the burden of committing all of their disposable income to fund their plan.” *Id.*

In the case *sub judice*, the Debtor makes arguments very similar to those made in *Norris*, seeking to retain a portion of disposable income received during the life of his 60-month chapter 13 Plan. The Court questions the Debtor’s reliance on *Barroncini* for support of his argument.

In *Barroncini* the debtors' case was converted from a chapter 13 to a chapter 7 . The bankruptcy court apparently concluded that the monies refunded to the trustee in the case constituted part of the debtors' homestead exemption. The question of disposable income was not an issue and, therefore, the Court finds *Barroncini* unpersuasive with regard to the matter at hand.

The court in *Norris*, as well as in *Nottingham*, makes it clear that a chapter 13 debtor with a plan extending beyond the 36-month period mandated in the statute must commit disposable income for the entire period. See *Norris*, 165 B.R. at 517; *Nottingham*, 228 B.R. at 321. Like *Norris*, the Debtor herein felt it necessary to propose a 60 month plan in order to pay the IRS in full on its priority claim, which the Debtor believed to be \$17,000. Debtor's counsel argues that the Debtor actually could have completed his plan payments within 36 months had he known that the IRS' priority claim only amounted to \$1,494.69. Be that as it may, the fact is that Debtor's counsel made no motion to modify the Plan until November 12, 1999, almost four years after the Confirmation Order was signed and over a year after the Trustee served the Debtor with her Notice of Claims Filed.

A chapter 13 plan represents a contract between the debtor and his/her creditors. See *In re Richardson*, 192 B.R. 224, 228 (Bankr. S.D.Calif. 1996). Once confirmed, it is binding on both the debtor and the creditors. In this case, the Debtor promised to pay all of his disposable income over 60 months and to pay the unsecured creditors **no less than** 10% on their claims. Until he filed his motion to modify his Plan, the monies paid to the Trustee were to be distributed to his creditors. The monies distributed to CCFCU by the Trustee represented disposable income of the Debtor which could have been paid to general unsecured creditors as long as the Debtor had not filed a motion to modify his Plan. Accordingly, the Debtor is not entitled to retain the monies

obtained from CCFCU in settlement of the adversary proceeding.

Reduction of Number of Plan Payments

The Debtor also requests that the Court allow him to reduce the length of his Plan payments from 60 to 54 months. “The modification of a plan of reorganization is tantamount to a new confirmation and must be consistent with the statutory requirements for confirmation.” *Richardson*, 192 B.R. at 226, citing *In re Louquet*, 125 B.R. 267 (9th Cir. BAP 1991). Code §1329 addresses the issue of modifying a plan post-confirmation. Code §1329 provides, in relevant part, that *prior to the completion* of payments under a confirmed plan, a debtor may modify the plan to reduce its length. *See* 11 U.S.C. § 1329(a)(2). Section 1329 of the Code further states that the modification must also comply with sections 1322(a), 1322(b), 1323(c), and 1325(a). *See* 11 U.S.C. § 1329(b)(1). Because the Debtor can seek to reduce the length of his plan payments under Code §1329(a)(2), the Court must now determine whether his modification complies with the remainder of Code §1329.

“The ‘completion of payments’ under 11 U.S.C. §1329(a) occurs when the debtor pays to the Trustee the full amount the plan requires the debtor to pay which satisfies the percentage the debtor proposed to pay to a class of creditors.” *In re Casper*, 154 B.R. 243, 247 (N.D. Ill. 1993). If a modification is requested when the debtor has, in fact, completed the plan payments as required under the confirmed plan, a discharge may actually be appropriate instead. *In re Myracle*, 1993 WL 261470 at *2 (Bankr. W.D. Tenn. 1993). Payments do not have to continue in the amount and for the period of time provided in a plan if the debtor completes payments early and these payments satisfy the percentage provided for each class of creditors.” *Casper*, 154 B.R.

at 246.

In *Myracle*, the Chapter 13 debtor was to pay unsecured creditors a dividend of 4% under the confirmed plan. *Myracle* 1993 WL 261470 at *1. The trustee made a motion to modify the plan after 50 months to increase the percentage of payments to unsecured creditors when changes arose in the debtor's financial situation. *See id.* At the time of the trustee's motion for modification, the secured claim in the plan had been fully paid and all that remained were the unsecured claims. *Id.* "At the hearing on the Trustee's motion . . . it was stated by counsel for the debtor and by the trustee that sufficient funds have been paid into the plan to pay the four percent to unsecured creditors, although plan payments have been made for approximately fifty months, less than the originally anticipated sixty months." *Id.* The court in *Myracle* held that as the percentage to be paid to unsecured creditors had been satisfied and the secured creditor had been paid in full, the plan could not be modified under Code §1329 because the plan had in fact been completed. *Id.* at *2. The court, therefore, ordered the trustee to complete any distributions as needed, and to prepare the case for discharge, while also instructing the debtor to stop making further payments into the plan. *Id.* at *6.

In *Casper*, the court similarly held that the trustee's motion for modification of the chapter 13 plan was untimely, though the plan period had not yet elapsed, as the plan was completed for purposes of Code §1329(a). *See Casper*, 154 B.R. at 246. "Part of the goal in bankruptcy is to provide finality and an incentive for a debtor to complete payments promptly to secure a discharge. Therefore, when a debtor completes his or her obligation to a class of creditors as provided in the plan, his or her payments are complete." *Id.* (citations omitted). The court also stated that the duration of the plan, or the number of months of payments under the plan, is not,

therefore, what controls the determination of plan completion. *Id.*

As in *Casper* and *Myracle*, arguably the Debtor has completed his plan for the purposes of Code §1329. The Debtor has paid secured and priority creditors in full. Unsecured creditors have received a dividend in excess of 50%. Code §1329 allows for a modification only before the plan payments have been completed. Having paid the unsecured creditors “no less than 10%” as set forth in the Confirmation Order, the Court concludes that the Debtor has completed his Plan. As the Plan has been completed under its terms, the Debtor may cease making payments to the Trustee. The Trustee should prepare the Debtor’s case for discharge. This should include the distribution of the monies received over the 54 months of the Plan, including those received in connection with the CCFCU settlement.

The Court authorizes attorney’s fees of \$150 fees requested by Debtor’s counsel to be paid through the Plan by the Trustee in connection with the motion herein.

Based on the foregoing, it is hereby

ORDERED that the Debtor’s motion seeking to retain the monies paid him by CCFCU in settlement of Adversary Proceeding No. 99-91268 is denied; it is further

ORDERED that the Debtor turn over to the Trustee \$3,025.39; it is further

ORDERED that the Debtor’s motion to amend is Plan from 60 months to 54 months is denied as moot; and it is further

ORDERED that the Trustee prepare the Debtor’s case for discharge, and it is finally

ORDERED that Debtor’s attorney shall be paid \$150 as requested in the motion, said fees to be retained by Debtor’s attorney from the sum to be turned over to the Trustee pursuant to this Order.

Dated at Utica, New York

this 25th day of August 2000

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge