
SO ORDERED,



Selene D. Maddox

Judge Selene D. Maddox

United States Bankruptcy Judge

The Order of the Court is set forth below. The case docket reflects the date entered.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF MISSISSIPPI

IN RE: BARBARIA A. THOMAS
DEBTOR(S).

CASE NO.: 16-11178-SDM
CHAPTER 13

**MEMORANDUM OPINION AND ORDER GRANTING IN PART AND DENYING
IN PART TRUSTEE'S NOTICE AND MOTION TO MODIFY PLAN**

THIS CAUSE comes before the Court on the Trustee's *Notice and Motion to Modify Plan* (Dkt. #112). On August 27, 2020, the Court heard oral arguments from the Trustee and from Debtor's counsel. The Court also heard testimony from the Debtor and reviewed exhibits submitted by both parties. For the reasons set forth below, the Court hereby GRANTS in part and DENIES in part the Trustee's Motion.

I. JURISDICTION.

This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1334(a), 28 U.S.C. §157(a) and the Standing Order of Reference signed by Chief District Judge L.T. Senter and dated

August 6, 1984. This is a “core proceeding” under 28 U.S.C. § 157(b)(2)(A)¹(matters concerning the administration of the estate).

II. FACTS AND PROCEDURAL HISTORY.

The Debtor is Barbara Thomas (“Thomas”), who filed the underlying Chapter 13 case on April 4, 2016. According to her plan and Schedules, Thomas is a below-median income debtor, and her confirmed plan presently pays nothing to unsecured creditors. On or about June 30, 2018, Thomas was struck by a motor vehicle while walking through a parking lot and suffered injuries. In due course, Thomas hired William A. Graves of the law firm of Morgan & Morgan PLLC to represent her in a lawsuit against the driver who injured her, and Graves filed an Application to Employ (Dkt. #62), an Application to Compromise Controversy (Dkt. #63) and an Application for Compensation (Dkt. #64) contemporaneously on June 17, 2019. By an order dated July 17, 2019, the Court granted the Application to Employ (Dkt. #75). Graves subsequently withdrew the Application to Compromise Controversy and the Application for Compensation.

On October 8, 2019, Graves filed new Applications to Compromise Controversy and for Compensation (Dkt. #91, 92), and after some back and forth between Debtor’s counsel (Michael Boyd) and the Trustee, the Court granted the Application for Compensation, awarding Graves compensation in the amount of \$17,500.00 and reimbursement for expenses in the amount of \$913.07 for a total payment of \$18,413.07 (Dkt. #108). Resolution of the Application to Compromise Controversy was more problematic, as Thomas and the Trustee disagreed as to the disposition of the settlement proceeds.²

¹Except where stated otherwise, all subsequent statutory references will be to Title 11 of the U.S. Code.

²There is no dispute by the parties that the settlement proceeds are property of the bankruptcy estate.

On February 18, 2020, the Court entered an Agreed Order signed by the Trustee, Boyd, and Graves (Dkt. #109). Pursuant to the terms of this Agreed Order, a total settlement of \$50,000 was approved, with the aforementioned \$18,413.07 going to Graves as compensation and expenses and an additional \$12,970.93 reserved for the payment of certain medical expenses incurred in the aftermath of Thomas's accident. The remaining balance of the settlement proceeds in the amount of \$18,616.00 were to be "retained by the Trustee to be disbursed pursuant to further order of this Court."

On June 15, 2020, the Trustee filed the instant *Notice and Motion to Modify Plan* (Dkt. #112) which proposed that the entire \$18,616.00 be distributed pro rata to unsecured creditors who had timely filed proofs of claim. Boyd duly filed a *Response* (Dkt. #113) asserting that Thomas's financial situation had worsened since her accident and requesting that the settlement proceeds be applied to her remaining secured debts and administrative expenses, with the remainder to given over directly to her.

On August 27, 2020, the Court heard arguments from Boyd and the Trustee and testimony from Thomas and reviewed the exhibits submitted by both parties. Thomas testified that her sole income is from Social Security. According to her Schedule I, Thomas received \$1316.00 per month in Social Security benefits at the time of filing, but she testified at the hearing that it had been increased to \$1404.00 per month. Thomas further testified that her ongoing medical expenses resulting from her accident consist of an additional \$18.00 per month in medications; one to three extra doctor visits per year with an out-of-pocket cost of \$35.00 each; and \$240.00 for physical therapy (sixteen visits so far at an out-of-pocket cost of \$15.00 each), plus future costs for same.

Additionally, Thomas has incurred certain post-confirmation expenses unrelated to her accident: \$1200.00 in expenses for repairs to her vehicle; real estate taxes for 2016, 2017, 2018,

and 2019 at about \$860.00 per year; and an undetermined amount for necessary repairs for Thomas's home. Thomas borrowed money from family to pay for the vehicle repairs and the unpaid taxes but has not yet paid for any home repairs. Thomas further testified that she has not paid her monthly Chapter 13 plan payment from at least March 2020 forward. She indicated that Graves advised her that she would be able to use the settlement funds to pay any delinquent plan payments, but she did not testify that she actually lacked adequate funds to make plan payments from July 2019 through Jan 2020.

Based on the foregoing testimony, Thomas, through counsel, renewed her request to have the entirety of the remaining settlement proceeds used to pay off her remaining secured creditors and administrative expenses with the balance going directly to her. Alternatively, Thomas requested a hardship discharge. Meanwhile, the Trustee argued that Thomas had failed to demonstrate that she was entitled to any of the proceeds, all of which should be used to provide a pro rata disbursement to unsecured creditors.

III. DISCUSSION.

A. The Hardship Discharge.

As an initial matter, Thomas's ore tenus request for a hardship discharge under § 1328(b) is DENIED. There are three requirements that must be met before a hardship discharge may be granted in a Chapter 13 case:

(1) the debtor's failure to complete such payments is due to circumstances for which the debtor should not justly be held accountable;

(2) the value, as of the effective date of the plan, of property actually distributed under the plan on account of each allowed unsecured claim is not less than the amount that would have been paid on such claim if the estate of the debtor had been liquidated under chapter 7 of this title on such date; and

(3) modification of the plan under section 1329 of this title is not practicable.

11 U.S.C. § 1328. At the hearing, Thomas testified that she believed she would be able to continue making plan payments going forward, and she indicated that she might have been able to make the presently delinquent payments had she not followed Graves's recommendation that she pay any delinquency from the settlement proceeds. Accordingly, the Court finds that Thomas has failed to prove that she meets the statutory requirements for a hardship discharge under § 1328.

B. Modification of the Plan.

Post-confirmation modifications to a Chapter 13 plan are governed by § 1329, which states in relevant part:

(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;
- (2) extend or reduce the time for such payments;
- (3) 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 ...

(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.

11 U.S.C. § 1329.

A confirmed chapter 13 plan is, of course, binding on all parties. 11 U.S.C. § 1327(a). Under 11 U.S.C. § 1329, however, the plan may be modified by either the debtor, trustee, or an unsecured creditor. *See In re Solis*, 172 B.R. 530, 533 (Bankr.S.D.N.Y.1994) (“Although section 1327(a) binds the debtor and the creditors, a confirmed plan may be modified at any time after confirmation before payment is completed.”)

In re Meza, 467 F.3d 874, 877 (5th Cir. 2006).

Although the motion to modify in this case is premised on unforeseen changed circumstances—specifically, a substantial settlement from a tort claim—that is not a requirement

for modification of a chapter 13 plan in the Fifth Circuit. *Meza*, 467 F.3d at 878 (adopting the majority rule that unforeseen changed circumstances are not a prerequisite to modifying a confirmed plan).

As noted *supra*, § 1329(b) limits modification and requires the modified plan comply with § 1322(a), (b) and (c) and with § 1325(a). Section 1322 merely delineates the required contents of a Chapter 13 plan, and there is no question that the Trustee's proposed modification comports with those requirements.

Accordingly, the Court moves on to consideration of § 1325(a), specifically the following relevant portions: § 1325(a)(1), which requires that the amended plan comply with the provisions of this chapter and with the other applicable provisions of this title; § 1325(a)(3), which requires that the amended plan be proposed in good faith and not by any means forbidden by law ("the good faith requirement"); § 1325(a)(4), which requires that the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date ("the liquidation analysis requirement," also known as the "best interests of the creditors" test); and § 1325(a)(6), which requires that the debtor will be able to make all payments under the amended plan and to comply with its terms ("the feasibility requirement"). 11 U.S.C. § 1325.

Addressing each of these requirements in turn, the Court sees no basis for concluding that the Trustee's proposed amended plan fails to comply with the requirements of the Bankruptcy Code or that it was not proposed in good faith, nor has Thomas presented any arguments to the contrary.

Turning to the liquidation analysis, the Court first notes that the plain language of §1325(a)(4) refers to the value of property available for distribution to unsecured creditors “as of the effective date of the plan.” 11 U.S.C. § 1325(a)(4). This raises the question of whether “the effective date of the plan” refers to the original confirmation date or to the date upon which the plan is later modified, and the courts have been split on this issue. *Compare Forbes v. Forbes*, 215 B.R. 183 (8th Cir. BAP 1997)(holding that “the effective date of the plan” did not change at time of post-confirmation modification and thus settlement proceeds obtained post-confirmation did not impact liquidation analysis under § 1325(a)(4)) *with In re Wilson*, 555 B.R. 547, 555 (Bankr. W.D. La. 2016)(identifying and adopting majority rule that “the best interests of the creditors test must be redetermined as of the date of confirmation of the modified plan”). This Court adopts the majority rule outlined in *Wilson* and holds that the best interests of the creditors test must be applied to the disposition of Thomas’s settlement as of the date of the proposed modification.

Having concluded that a new liquidation analysis must be made, the facts before the Court would seem to dictate that the net settlement proceeds, as a non-exempt asset acquired post-petition, must be used to pay unsecured creditors. Indeed, if the Court only looked to the liquidation analysis in determining whether to grant the motion to modify plan filed by the Trustee in this case, the answer would be easy. The motion would be granted and the net settlement proceeds would be applied and paid towards timely filed allowed unsecured claims on a pro-rata basis. The Debtor would not be entitled to any portion of the proceeds since the timely filed and allowed unsecured claims in this case exceed the net proceeds.

However, the analysis does not end there, as the Court must also consider the impact of the proposed modification on the plan’s feasibility. While Thomas’s settlement in one sense represents a windfall from which she should not be allowed to profit at the expense of unsecured creditors,

the settlement also represents an effort to make her whole after injuries that both caused her to incur medical bills and other expenses. Likewise, if the Court must consider the potential gain for the bankruptcy estate and the unsecured creditors as of the time of the proposed amendment, it must also consider whether Thomas has had other unexpected postpetition expenses which might threaten the feasibility of the plan if she is not permitted to use the settlement proceeds to offset them. If it appears that the plan may no longer be feasible once the Trustee's motion to modify is granted, the Court has the discretion to nevertheless award all or some of the proceeds to Thomas regardless of the liquidation analysis. *See Wilson*, 555 B.R. at 556-57 (noting that court had discretion to award settlement proceeds at issue to debtor despite outcome of liquidation analysis but declined to do so after debtor failed to put forth evidence of need).

Unlike the debtor in *Wilson*, who presented no evidence to support his claim that his plan would be rendered unfeasible if he could not use the settlement proceeds for medical expenses and living expenses, Thomas has provided testimony and exhibits in support of her purported need for the net settlement proceeds, as discussed *supra*. While the Court was not persuaded based on the evidence adduced that Thomas is entitled to the entire \$18,616.00, the Court will nevertheless exercise its discretion to award her part of the net proceeds. And since it may not be possible to determine with absolute certainty what Thomas's future needs will be in terms of medical and living expenses, the Court chooses the traditional Solomonic solution of slicing the metaphorical baby in twain.

Accordingly, it is hereby ORDERED, ADJUDGED, AND DECREED as follows:

1. That the Trustee shall retain \$9,308.00 (representing one-half of the net settlement proceeds) and pay that amount to timely filed and approved unsecured creditors on a pro rata basis, with the Trustee to determine distribution after payment of any statutory Chapter 13 Trustee fees;

2. That from the remaining \$9,308.00 (representing the other half of the proceeds), the Trustee shall deduct an amount sufficient to bring Thomas current on her delinquent Chapter 13 plan payments through the end of August, 2020, with Thomas responsible for all future plan payments beginning in September, 2020; and

3. That the Trustee shall pay over to Thomas whatever remains of her half of the proceeds after the deduction for delinquent payments.

##END OF ORDER##