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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

1997 MAY 20 PM 2:43

U.S. BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

IN RE:

C/A No. 96-75601-W

David C. Wilson,

JUDGMENT

Debtor.

Chapter 13

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, the Debtor's "Motion for Moratorium of Payments Under Chapter 13 Plan" filed February 28, 1997 is granted for a period of one month with payments to the Trustee under the plan to resume in February, 1997.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
May 20, 1997.

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IN RE:

David C. Wilson,

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ORDER

Chapter 13

THIS MATTER comes before the Court upon the Debtor's "Motion for Moratorium of Payments Under Chapter 13 Plan" ("Motion") and the Trustee's objection thereto. On April 1, 1997, a hearing was held on the Trustee's objection to the Motion and at the hearing, the Court, on the Trustee's recommendation, granted the Debtor a one month moratorium with payments to the Trustee under the plan to resume in February, 1997. The Court issues this supplemental order to provide the Chapter 13 Bar with additional guidance as to the requirements for such requests for relief in the future.

Based upon the arguments of counsel and a review of the file in this Chapter 13 case, the Court makes the following Findings of Fact and Conclusions of Law.

Findings of Fact

On August 6, 1996, the Debtor filed his petition for relief under Chapter 13 of the Bankruptcy Code. On October 10, 1996, the Court entered an order confirming the Debtor's Chapter 13 plan filed August 19, 1996.

On February 28, 1997, the Debtor filed the within Motion in which the Debtor requested a moratorium or deferral of payments for a period of three months for the reason that he is unable to make his required payments because inclement weather reduced the income of his landscaping

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The Motion was accompanied by a memorandum and notice, which were served on the Trustee and all creditors. On March 5, 1997, the Trustee filed an objection to the Motion.

Conclusion of Law

Despite the fact that motions for "moratorium" have been routinely filed in this court for years, such relief is not to be found under that name in the Bankruptcy Code or Bankruptcy Rules. With regard to the this type of relief, one commentator has stated as follows:

The most common modification of a confirmed plan is a request by the debtor to temporarily suspend payments to the trustee for a period of time. Sometimes this request to suspend payments under a confirmed plan is known as a moratorium. What ever the name of the motion, it is actually a motion to modify a confirmed plan. See, In re Hansen, 125 B.R. 831 (Bkrtcy. D. Colo. 1991) (In order for a debtor to obtain an order suspending payments, "he must comply with 11 U.S.C. §1329 because such relief is a modification of the confirmed plan."). Since a request to suspend payments under a confirmed plan is actually a motion to modify a confirmed plan, §1329(b)(1) requires that the modified plan comply with §1325(a). Of special significance in proposing a modified plan are the good faith requirement of §1325(a)(3) and the feasibility requirement of §1325(a)(6).

Under §1329(c), the plan as modified may not exceed three years (or if cause exists, five years) from the time of the first payment under the original confirmed plan; therefore, the debtor must be careful that any suspension of payments does not cause the modified plan to violate §1329(c).

Bankruptcy Handbook, ¶ 12.100 at p. 12-119-120 (1996).

Since a motion for moratorium of payments under a confirmed plan is actually a motion to modify a plan after confirmation, F.R. Bankr. P. 3015(g)¹ and S.C. LBR 3015(1)(e) set forth

¹ F.R. Bankr. P. 3015(g) states:

Modification of Plan After Confirmation. A request to modify a plan pursuant to . . . §1329 of the Code shall identify the proponent and shall be filed together with the proposed modification. The clerk, or some other person as the court may direct, shall give the debtor, the trustee, and all creditors not less than 20 days

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the procedural requirements for such a motion.

Any modification of a confirmed plan pursuant to 11 U.S.C.² §1329 must also satisfy the substantive requirements of §1329(a)³ and §1329(b)(1).⁴

With regard to modification of a confirmed Chapter 13 plan, the Fourth Circuit has stated that “[a]lthough §1329(a) does not explicitly state what justifies such a modification, it is well-settled that a substantial change in the debtor's financial condition after confirmation may

notice by mail of the time fixed for filing objections and, if an objection is filed, the hearing to consider the proposed modification, unless the court orders otherwise with respect to creditors who are not affected by the proposed modification. A copy of the notice shall be transmitted to the United States trustee. A copy of the proposed modification, or a summary thereof, shall be included with the notice. If required by the court, the proponent shall furnish a sufficient number of copies of the proposed modification, or a summary thereof, to enable the clerk to include a copy with each notice. Any objection to the proposed modification shall be filed and served on the debtor, the trustee and any other entity designated by the court, and shall be transmitted to the United States trustee. An objection to a proposed modification is governed by Rule 9014.

² Further references to the Bankruptcy Code, 11 U.S.C. §101, et seq., shall be by section number only.

³ Section 1329(a) states:

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 provided for by the plan;
- (2) extend or reduce the time for such payments; or
- (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.

⁴ Section 1329(b)(1) states:

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.

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warrant a change in the level of payments.” Arnold v. Weast (In re Arnold), 869 F. 2d 240, 241 (4th Cir. 1989). The Arnold court goes on to state that “[t]he doctrine of res judicata bars an increase in the amount of monthly payments only where there have been no unanticipated, substantial changes in the debtor's financial situation.” 869 F.2d at 240. Although Arnold dealt with an unsecured creditor's motion to modify a confirmed Chapter 13 plan to increase the debtor's payments, the discussion of the requirements of §1329(a) applies to a debtor's motion to modify a confirmed plan.

Since it is well settled in this District that the proponent of a Chapter 13 plan has the burden of proving that the proposed plan satisfies the confirmation requirements, In re Wallace, 95-70780 (Bkrcty. D. S.C. 6/22/95) (JBD); In re Brunner, 92-71010 (Bkrcty. D. S.C. 6/10/92) (WTB); In re Honeycutt, 90-03656 (Bkrcty. D. S.C. 1/24/92) (WTB); In re Peeler, 92-77271 (Bkrcty. D. S.C. 3/4/93) (WTB); In re Thomas, 118 B.R. 421 (Bkrcty. D. S.C. 1990) (WTB), the party moving to modify a confirmed Chapter 13 plan likewise has the burden of showing an unanticipated, substantial change in circumstances which warrant modification of the plan.

In order to satisfy his burden of proof, a debtor's motion to modify a confirmed Chapter 13 plan to defer payments for a period of time must allege facts showing such an unanticipated, substantial change in circumstances and show that the modified plan satisfies §1322(a), §1322(b), §1322(c), and §1325(a). Of particular relevance to a motion to modify a confirmed plan to defer payments is the good faith requirement of §1325(a)(3), the feasibility requirement of §1325(a)(6), and the plan term requirement of §1329(c). In order to satisfy these requirements, a debtor's motion to modify a confirmed plan to defer payments, at a minimum, must state: the number of months for which the debtor proposes to defer payments to the trustee;

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a good faith reason why modification of the plan is necessary; an explanation as to why the needed deferral of payments does not render the plan unfeasible; an explanation as to how the debtor will be able to resume the payments to the trustee at the end of the period during which payments are deferred; a statement of the number of payments which have come due to the trustee under the plan as of the filing of the motion and how many of those payments have been made; and a statement of the total number of months the confirmed plan is to run and whether the granting of the modification will cause the plan to exceed the plan term limit set forth in §1329(c).

Compliance with the aforementioned requirements would assist the court in satisfying its independent duty to determine whether the modified plan meets the confirmation requirements of §1325.

Likewise any objection by the Trustee or a creditor filed in response to such a motion should also contain adequate and specific information which demonstrate their concerns relative to the motion, even if the concerns are a lack of adequate information from the debtor as to the necessity for the modification. For example, if the Trustee or creditor believes the proposed modification extends the plan beyond the permissible plan term, or is unfeasible, or is not filed in good faith then the response should set forth specific information which gives credence to that position.

Such specificity in pleadings not only promotes communication between debtor's counsel and the objecting party, which may lead to settlement of the motion, but also prepares the Court for the hearing in the event a settlement is not reached. The present frequent practice of one sentence pleadings either requesting or objecting to the request for "moratorium" requires the

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Court to ferret out the basic facts of the matter and causes a needless waste of time at the hearing.

According to the above stated rules, a motion meeting these requirements must be filed and must be accompanied by a memorandum, an appropriate notice giving interested parties twenty (20) days to object to the motion, and a certificate of service that the notice, motion, and memorandum have been served on the debtor, the trustee and all creditors. Any objection should also be accompanied by a memorandum stating the reasons for the objection.

CONCLUSION

For all of the foregoing reasons, it is therefore

ORDERED, that the Court, may sua sponte, deny future requests for modification of a confirmed Chapter 13 plan to defer payments or overrule objections thereto unless the requirements set forth in this order are satisfied. It is further

ORDERED, that the Debtor's Motion for Moratorium of Payments Under Chapter 13 Plan filed February 28, 1997 is granted for a period of one month with payments to the Trustee under the plan to resume in February, 1997.

AND IT IS SO ORDERED.

Columbia, South Carolina,
May 20, 1997.


UNITED STATES BANKRUPTCY JUDGE

