

U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: 04-07990

ORDER DENYING MOTION FOR HARDSHIP DISCHARGE

The relief set forth on the following pages, for a total of 5 pages including this page,
is hereby ORDERED.

FILED BY THE COURT
03/06/2008



Entered: 03/07/2008

A handwritten signature in black ink, appearing to read "S. R. O.", written over a horizontal line.

US Bankruptcy Court Judge
District of South Carolina

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA**

IN RE:

Roger Wesley Keisler and
Lisa Kay Sease AKA Lisa K. Keisler,

Debtor(s).

C/A No. 04-07990-DD

Chapter 13

**ORDER DENYING MOTION FOR
HARDSHIP DISCHARGE**

THIS MATTER is before the Court on Roger Wesley Keisler and Lisa Kay Keisler's ("Debtors") Motion for Hardship Discharge ("Motion") and the Chapter 13 Trustee's ("Trustee) Motion to Dismiss for Non-payment. A hearing was held on these matters on January 23, 2008. Debtors and Trustee appeared at the hearing by and through counsel. Mr. Keisler testified in support of Debtors' Motion. The Debtors are not making their plan payments.

Debtors filed the present case on July 7, 2004. Debtors' original schedules I and J indicate that Debtors have projected monthly income of \$1,235.00 and expenses of \$1,460.00 (a net monthly income if -\$225.00). Despite this deficit of funds, Debtors' plan was confirmed with a monthly payment of \$390. The original Schedule I indicates that Debtors were unemployed at the time of the filing of this case and the income on Schedule I was derived from unemployment benefits. An amended schedule I filed on December 16, 2007 indicates that Mr. Keisler is now employed while Mrs. Keisler remains unemployed. Amended schedule I further indicates that Mr. Keisler has been employed as a millwright for 2 years and 4 months, and is now making \$3,127.32 per month.¹ Debtors' Schedule J lists expenses of \$3,099.97. According to Debtors' amended Schedules I and J Debtors now have a positive net disposable income of \$17.35. Thus, Debtors are in a better position than they were at the time of confirmation.

¹ Debtors' Schedule I also lists \$639 of income from social security benefits paid to Mr. Keisler's mother who lives with Debtors. Schedule J lists the mother's expenses at \$629.00. These two amounts are nearly equal and the Court is not considering the mother's income and expenses in this analysis.

Mr. Keisler testified that Debtors were able to make their plan payments until now only with the assistance of family members. He further stated Debtors are seeking a hardship discharge pursuant to 11 U.S.C. § 1328(b)² because the family members are no longer in a position to help. Section 1328(b) states,

At any time after the confirmation of the plan and after notice and a hearing, the court may grant a discharge to a debtor that has not completed payments under the plan only if--

(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.

The debtors bear the burden of proof for all three elements under 11 U.S.C. § 1328(b). *In re Harrison*, 1999 Bankr. LEXIS 1830 (Bankr. E.D. Va. 1999)(citing *Bandilli v. Boyajian (In re Bandilli)*, 231 B.R. 836, 839 (B.A.P. 1st Cir. 1999). The parties agree that Debtors pass the chapter 7 liquidation test of § 1328(b)(2) and that modification of the plan is not feasible. In order to be eligible for a discharge pursuant to § 1328(b) Debtors must show that their inability to complete plan payments is due to circumstances for which the Debtors should not be held accountable. One court has developed a test which is helpful. The court states,

The determination of whether a debtor is justly accountable for his or her failure to make payments under his or her Chapter 13 plan is necessarily fact-driven, with the emphasis properly focused on the nature and quality of the intervening event or events upon which the debtor relies. Considerations by the court in that regard should include:

a) whether the debtor has presented substantial evidence that he or she had the ability and intention to perform under the plan at the time of confirmation;

² Further reference to the Bankruptcy Code shall be by section number only.

- b) whether the debtor did materially perform under the plan from the date of confirmation until the date of the intervening event or events;
- c) whether the intervening event or events were reasonably foreseeable at the time of confirmation of the Chapter 13 plan;
- d) whether the intervening event or events are expected to continue in the reasonably foreseeable future;
- e) whether the debtor had control, direct or indirect, of the intervening event or events; and
- f) whether the intervening event or events constituted a sufficient and proximate cause for the failure to make the required payments.

Bandilli at 840.

There is no evidence that Debtors possessed the ability to perform under the plan. While Debtors did perform under the plan until recently, it was only with the assistance of family members that was not disclosed at the time of confirmation.

Mr. Keisler testified that the reason Debtors could no longer make plan payments was because family members were no longer able to help by contributing funds. This is not an intervening event. Had their family members not given financial assistance Debtors' case would have failed long ago. Nothing in the record indicates any reliance on help from the family at the time of confirmation.

Second, Mr. Keisler testified that Debtors moved in with Mrs. Keisler's mother shortly after filing. This happen in July 2005, about two years before Debtors missed their first plan payment. This is not an intervening event, but rather a change in living situation that occurred well before Debtors failed to make a plan payment. Living expenses may have slightly risen based on the increased household size, however, there is no evidence of this and it appears Debtors were able to cope with the increased expenses for two years without defaulting on the plan payments. Third, Mr. Keisler testified that his wife's adult son, who has been diagnosed as paranoid schizophrenic, moved in with them and has no income. However, as with the mother, this circumstance has existed for at least two years prior to the default on plan payments.

Mr. Keisler testified to two events that occurred during the summer of 2007. First, Mr. Keisler's father was warned he would be fined for junk/trash located at his residence.³ Mr. Keisler stated that he used his funds to rent a "backhoe" and a truck to clean up his father's yard. This is no intervening event; rather, Mr. Keisler made the choice to help his father with an expense rather than use the funds as previously committed. The second event during the summer was the claimed theft of \$390 from Debtors by a relative. This is also not an intervening event which would entitle Debtors to a discharge pursuant to § 1328(b). This was a one time occurrence. A single financial loss in the amount of one plan payment is not, under these circumstances, a basis for a discharge under § 1328(b).

The Court does not believe that the events described by Mr. Keisler were the cause for the failure of Debtors' case. Rather, the plan was not feasible at the time of confirmation. Debtors did not and do not have sufficient disposable income to fund the plan. This is not a case of changed circumstances, but of a reorganization that was doomed to fail from the start.

Conclusion

Debtors' Motion is denied. As requested, Debtors have ten (10) days to convert this case to one under chapter 7 of the Bankruptcy Code and otherwise the case will be dismissed on the Trustee's motion.

AND IT IS SO ORDERED.
Columbia, South Carolina
March 6, 2008

³ Mr. Keisler testified that his father was an auto mechanic and the local government was threatening to fine him for old cars and/or car parts in his yard if they were not removed.