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UNITED STATES BANKRUPTCY COURT

APR 18 2008

FOR THE DISTRICT OF SOUTH CAROLINA

United States Bankruptcy Court
Columbia, South Carolina USA

IN RE:

C/A No. 06-00524-JW

Wayne Joseph Barton and
Karen Sue Barton,

Chapter 13

JUDGMENT

Debtor(s).

Based on the Findings of Fact and Conclusions of Law as set forth in the attached Order of the Court, Debtor's Motion for a Hardship Discharge pursuant to 11 U.S.C. § 1328(b) is denied. Debtors may submit an amended plan within ten (10) days of the entry of this order to reduce their payments.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina
April 18, 2008

ENTERED
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J.G.S.

FILED

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IN RE:

C/A No. 06-00524-JW

Wayne Joseph Barton and
Karen Sue Barton,

Chapter 13

ORDER

Debtor(s).

This matter comes before the Court on Wayne Joseph Barton and Karen Sue Barton's ("Debtors") Motion for Hardship Discharge ("Motion"). The Chapter 13 Trustee ("Trustee") filed an objection to the Motion. A hearing was held on this matter on April 8, 2008. Debtors testified in support of their Motion. The Court makes the following Findings of Fact and Conclusions of Law pursuant to Fed. R. Civ. P. 52, which is made applicable to this contested matter by Fed. R. Bankr. P. 7052 and Fed. R. Bankr. P. 9014(c).

FINDINGS OF FACT

1. Debtors filed their joint petition for relief under chapter 13 of the Bankruptcy Code on February 9, 2006.

2. Debtors filed their chapter 13 plan ("Plan") on February 23, 2006, which was subsequently amended on September 15, 2006.

3. On September 20, 2006, the Court entered an order confirming the Plan. At the time the Plan was confirmed, Mr. Barton was employed as a company supervisor and operated vending machines part-time with a net income in the amount of \$3,708 per month and Ms. Barton was employed as an independent contractor with a net income of \$2,590 per month.

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J.G.S.

4. Debtors made payments to the Trustee pursuant to the Plan for eighteen (18) months. To date, Debtors have paid \$31,202.89 into the Plan, with approximately \$25,000.00 having been distributed to general unsecured creditors.

5. Prior to filing bankruptcy, Ms. Barton had back surgery. In their original Schedules I and J, Debtors indicated that they anticipated that Ms. Barton may require additional surgery and that their health expenses would increase significantly. Since the filing of her case, Ms. Barton's condition has deteriorated and she is no longer able to work. Debtors filed Amended Schedules on February 12, 2008. The Amended Schedules show that Ms. Barton's monthly net income has decreased by \$2,590 per month, but does not appear to show an increase in medical expenses since the filing of the original schedules; however, Debtors testified that these expenses have increased.

6. According to Mr. Barton's income statement, which was entered into evidence at the hearing, his individual monthly net income has been reduced by approximately \$317 per month because he is no longer operating any vending machines. Mr. Barton testified that he had to stop operating the vending machines because he was relocated to North Carolina for work, which increased his commute time and hours at work, leaving him with no extra time to maintain the vending machine business.

7. Debtors' Amended Schedules indicate that their monthly expenses have decreased by \$722 per month as a result of the termination of the vending machine business and the loss of expenses associated with Ms. Barton's employment.

8. According to Debtors' Amended Schedules, Debtors' have a negative net disposable income of \$-625.00. Debtors seek a hardship discharge pursuant to 11 U.S.C. § 1328(b) because they are unable to make their plan payments.

CONCLUSIONS OF LAW

Under 11 U.S.C. § 1328(b), the Court may grant Debtors a hardship discharge if they satisfy three criteria:

- (1) Debtors' failure to complete their plan payments must be due to circumstances for which the Debtors 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 must be not less than the amount that would have been paid on such claim if the estate of Debtors had been liquidated under chapter 7 of this title on such date; and
- (3) modification of Debtors' plan under section 1329 of this title must be not practicable.

11 U.S.C. § 1328(b). Debtors bear the burden of proof for all three criteria. See Bandilli v. Boyajian (In re Bandilli), 231 B.R. 836, 839 (B.A.P. 1st Cir. 1999); In re Keisler, C/A No. 04-07990-DD, slip op. at 3 (Bankr. D.S.C. Mar. 6, 2008); In re Harrison, No. 96-36511-T, 1999 WL 33114273, slip op. at *1 (Bankr. E. D.Va. Aug. 3, 1999). Debtors and the Trustee agree that the second element has been met, as the general unsecured creditors have received a greater distribution than they would have received if Debtors' estate had been liquidated under chapter 7. Thus, the Court must only determine whether Debtors have satisfied the first and third elements.

Debtors assert that Ms. Barton's medical problems and loss of vending machine income constitute circumstances for which they should not justly be held accountable. The Trustee agrees that Ms. Barton's medical problems have eliminated her ability to work, but asserts that Ms. Barton's medical problems and the loss of the vending machine income were anticipated by Debtors at the time they filed their chapter 13 plan. Judge Duncan of this Court recently examined the following factors to determine whether

debtors were justly accountable for their failure to make payments under their Chapter 13 plan:

- (1) 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) Whether the debtor did materially perform under the plan from the date of confirmation until the date of the intervening event or events;
- (3) Whether the intervening event or events were reasonably foreseeable at the time of confirmation of the Chapter 13 plan;
- (4) Whether the intervening event or events are expected to continue in the reasonably foreseeable future;
- (5) Whether the debtor had control, direct or indirect, of the intervening event or events; and
- (6) Whether the intervening event or events constituted a sufficient and proximate cause for the failure to make the required payments.

In re Keisler, C/A No. 04-07990-DD, slip op. at 3 (Bankr. D.S.C. Mar. 6, 2008)(citing Bandilli v. Boyajian (In re Bandilli), 231 B.R. 836, 839 (B.A.P. 1st Cir. 1999)).

Mr. Barton testified that, at the time they filed their bankruptcy case, they had every intention of making all payments for the duration of the case. However, the evidence indicates that Ms. Barton's medical condition existed at the time of confirmation and that Debtors anticipated that she would have to have further surgery during the bankruptcy case. The evidence also indicates that Debtors anticipated that

their net income would decrease as a result of the loss of income from the vending machine operation. This factor is neutral.

Debtors did perform under their plan for approximately 18 months. Mr. Barton testified that Ms. Barton stopped working in August of 2007 due to her medical condition, and they ceased making their plan payments shortly thereafter. It is unclear from the record exactly when Mr. Barton stopped operating his vending machines, but it appears that it was sometime in late 2007.¹ This factor weighs in favor of Debtors.

Debtors may not have anticipated that Ms. Barton would lose her ability to work as a result of her deteriorating medical condition, but it does appear that this result was reasonably foreseeable at the time of confirmation, given Ms. Barton's condition at that time. It is clear from the original Schedules filed in this case that Debtors anticipated that they may lose the income from the vending machine operation at the time they proposed the Plan. This factor appears to weigh against Debtors.

The Trustee and Debtors agree that Ms. Barton's medical condition makes her unable to work. Debtors presented testimony indicating that Ms. Barton's medical condition is unlikely to improve in the reasonably foreseeable future. Debtors testified that they sold the vending machines; therefore, the loss of income from this business appears permanent. This factor weighs in favor of Debtors.

It does not appear that Debtors had control, direct or indirect, regarding the progression of Ms. Barton's medical condition. While Debtors did have control over the decision to terminate the vending machine business, it further appears from Mr. Barton's

¹ Debtor testified that he sold the vending machines in early 2008. Debtors did not obtain approval from the Court to sell the vending machines.

testimony that his employment circumstances made the business no longer practicable. This factor weighs in favor of Debtors.

Finally, it appears from Debtors' Amended Schedules that the loss of Ms. Barton's income and the income from the vending machine operation resulted in a negative budget for the Debtors, leaving them with no disposable income with which to fund their Plan. This loss of income appears to be the proximate cause for Debtors' failure to make the required payments. This factor weighs in favor of Debtors.

Based on its analysis of the foregoing factors, the Court finds that Debtors have met their burden of demonstrating that their failure to complete their plan payments was due to circumstances for which the Debtors should not justly be held accountable.

The third factor the Court must examine is whether modification of Debtors' chapter 13 plan is practicable. The Trustee asserts that Debtors' Amended Schedules I & J indicate that a modified plan may be practicable. According to the Statement of Income presented into evidence, Debtors have a consistent monthly income of \$3,391.00 per month.² It appears from their Schedules that Debtors' monthly budget could be tightened to enable Debtors to make some monthly payment towards their plan.³ The Trustee stated that she believes the Debtors could afford a monthly plan payment of \$250 per month if they scaled back their expenses. While the Debtors presented testimony that they have deferred certain expenses due to lack of disposable income, the Court finds that Debtors did not present sufficient evidence to show that they would be unable to make

² Debtors also testified that Ms. Barton anticipates receiving disability income in the near future.

³ For example, Debtors have budgeted \$500 per month for food for a family of two.

any payment through their Plan.⁴ See In re Harrison, 1999 WL 33114273, slip op. at *2 (Bankr. E.D.Va. Aug. 3, 1999)(finding that debtors' unsubstantiated and conclusory statements regarding whether plan modification was possible were insufficient); see also In re White, 126 B.R. 542 (Bankr. N.D. 1991); In re Dark, 87 B.R. 497, 498 (Bankr. N.D. Ohio 1988). Failure to satisfy this single element is sufficient to support denial of a hardship discharge. See Bandilli v. Boyajian (In re Bandilli), 231 B.R. 836, 839 (B.A.P. 1st Cir. 1999); In re Schleppe, 103 B.R. 901, 904 (Bankr. S.D. Ohio 1989).

While the Court is sympathetic to the Debtors' present circumstances, it must apply the standards of the statute when considering the request for a hardship discharge after completing only 18 months of a 58-month plan, especially in light of the objection by the Trustee.

For the foregoing reasons, it is hereby

ORDERED that Debtors' Motion for a Hardship Discharge pursuant to 11 U.S.C. § 1328(b) is denied. Debtors may submit an amended plan within ten (10) days of the entry of this Order to reduce their payments.

AND IT IS SO ORDERED.

Columbia, South Carolina
April 18, 2008


UNITED STATES BANKRUPTCY JUDGE

⁴ Debtors presented an itemization of medical bills into evidence, which shows monthly medical expenses of \$250 per month. Debtors' Amended Schedule J is consistent with the itemization presented into evidence, showing a budget of \$261 per month for medical expenses.