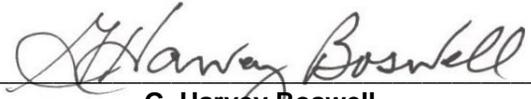




Dated: November 10, 2004
The following is SO ORDERED.


G. Harvey Boswell
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

In re:

PAULA DARLENE WHITE,

Case No. 04-10446

Debtor.

Chapter 13

MEMORANDUM OPINION AND ORDER RE OBJECTION TO CONFIRMATION FILED BY
MITCHELL RAY WHITE

The Court conducted a hearing on Mitchell Ray White's Objection to Confirmation on September 30, 2004. FED. R. BANKR. P. 9014. Resolution of this matters is a core proceeding. 28 U.S.C. § 157(b)(2). The Court has reviewed the testimony from the hearing and the record as a whole. This Memorandum Opinion and Order shall serve as the Court's findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

I. FINDINGS OF FACT

Paula White, ("White" or "debtor"), filed her chapter 13 petition on February 3, 2004. Schedule I and J of her petition show monthly income of \$2,550.00 and monthly expenses of \$1,790.00. White amended schedules I and J on April 26, 2004, to include the monthly income of her live-in boyfriend, Jerry Bolen, and the increase in expenses resulting therefrom. Bolen moved out in July 2004. As a

result, she filed a second set of amended schedules I and J on August 24, 2004, which reduced her monthly income and expenses back down to their original level.

Mitchell Ray White is the debtor's ex-husband. When the parties were divorced, Paula White was ordered to pay a note which the parties had executed jointly in favor of Transouth Financial for a vehicle. Paula White eventually surrendered the vehicle and Transouth disposed of it; however, there is a large deficiency balance remaining. Mitchell White has filed a claim for \$21,890.82.

Mitchell White filed an objection to confirmation to the debtor's plan on March 18, 2004. Mitchell White submitted a request for production of documents to the debtor in connection with his objection on April 22, 2004. The debtor failed to comply with the request and Mitchell White filed a motion to compel production of the documents on July 22, 2004. The debtor eventually turned over some of the financial information to Mitchell White's attorney. The motion to compel was heard by the Court on August 19, 2004, at which time the Court conditionally denied the motion based on the debtor amending her schedules to reflect the decrease in income and expenses following the break-up with her boyfriend. The debtor submitted the amended schedules on August 23, 2004.

According to the Chapter 13 Trustee's records, the debtor is currently making her semi-monthly plan payment of \$36.00 by payroll deduction. The case is current and the bar date for filing claims has passed. The total amount of the unsecured claims filed in White's case is \$22,793.14. Based upon the debtor's present plan payment, the trustee is projecting a 3% dividend to unsecured creditors.

Mitchell White alleged at the hearing on his objection that the financial information provided to him by the debtor does not match the information on her schedules. He also claimed that there is substantial disposable income which the debtor is not disclosing and that the debtor's expenses are inflated. As a result of these two facts, Mitchell White asserted that the debtor could pay a higher percentage to her unsecured creditors.

Throughout the pendency of her case, the debtor has worked as a nurse in Nashville. The debtor suffered a back injury sometime after filing for bankruptcy relief. Because of this injury, she was off work for a month and still suffers from a bulging disc which slips from time to time. The debtor testified that this condition has caused her to be unable to work as much overtime as she did when she filed her case in February 2004, and, as a result, her income has decreased. When the debtor amended her schedules in August 2004, however, she amended her monthly income back down to the amount listed on her original schedule I. The debtor did not present any proof at the hearing in this matter of her decreased income.

Although the debtor works in Nashville, she lives in Big Sandy, Tennessee, and commutes back and forth every day; however, when the debtor’s bulging disc slips and she suffers back pain, she rents a hotel room in Nashville because she is unable to make the commute. The debtor is not able to project the number of times she will have to stay in a hotel so she did not include that expense on her schedule J. She has been staying in Nashville more recently because her back pain is increasing. The debtor did not present any evidence of her hotel stays or expenses.

The debtor testified that she has not moved to Nashville because apartments there cost between \$600.00 and \$700.00 per month. Although both her original and amended schedule J show that the debtor’s monthly rent on her house in Big Sandy is \$350.00, the debtor admitted at the hearing that she only pays \$300.00 a month in rent. When asked about this discrepancy, the debtor stated that she did not know why the schedules show \$350.00. The debtor rents the property from her ex-boyfriend’s brother. The parties never executed a lease for the Big Sandy property.

Although there is no lease and, therefore, no provision requiring her to do so, the debtor pays for some of the home maintenance on the Big Sandy property. According to her testimony, she has paid to have burst pipes repaired a few times and she has paid to have the septic tank fixed. The debtor included a monthly expense of \$25.00 on both her original and amended schedule J for these repairs. She did not present any proof regarding these expenses.

In addition to the discrepancies in her income and her monthly rent, Mitchell White alleges that the debtor’s monthly expense for electricity in the amount of \$175.00 is inflated. The debtor provided proof to Mitchell White during the course of discovery which demonstrated that her average monthly electricity bill for the last thirteen months was \$116.35. Although the debtor did not provide Mitchell White with any proof of heating costs, she stated at the hearing in this matter that she has heating bills in the winter. The debtor did not present any evidence of these heating bills at the hearing nor did she state the amount she pays for heat. She did testify that she recently paid \$200.00 to have her propane tank filled; however, she did not state how often she has to fill the tank.

According to the Chapter 13 Trustee, the debtor would have to remit \$268.00 semi-monthly in order to pay 70% to her unsecured creditors. The debtor would have to remit \$370.00 semi-monthly to pay 100% to her unsecured creditors. The debtor is currently paying \$36.00 semi-monthly. The debtor has proposed a thirty-six month plan.

II. CONCLUSIONS OF LAW

Pursuant to 11 U.S.C. § 1325(b)(1), the Bankruptcy Code mandates that if the trustee or an unsecured creditor objects to confirmation of the plan, the Court may not confirm the plan unless the unsecured creditors will receive 100% of their claims or, alternatively, the plan provides that all the debtor's disposable income will be paid into the plan for at least three years. 11 U.S.C. § 1325(b)(1). For purposes of this test, "disposable income" is defined as:

(2) . . . income which is received by the debtor and which is not reasonably necessary to be expended –

(A) for the maintenance or support of the debtor or a dependent of the debtor, including charitable contributions . . . ; and

(B) if the debtor is engaged in business, for the payment of expenditures necessary for the continuation, preservation, and operation of such business.

11 U.S.C. § 1325(b)(2). Determining what is reasonably necessary "will be a fact question determined in the context of individual debtors and their dependents" on a case-by-case basis. 2 Keith M. Lundin, Chapter 13 Bankruptcy, § 5.36 at 5-101 (2d Ed. 1994); *In re Tibbs*, 242 B.R. 511, 516 (Bankr. N.D. Al. 1999). The majority opinion is that "reasonably necessary" "means 'adequate' but not 'first class.'" *In re Lindsey*, 243 B.R. 30, 32 (Bankr. E.D. Tenn. 1999). However, a court "is not expected to, and should not, mandate dramatic changes in the debtor's lifestyle to fit some preconceived norm for chapter 13 debtors." 8 Collier on Bankruptcy § 1325.08[4][b][ii], at 1325-54 (15th ed. rev. 1999). As several courts have recognized, a "fundamental purpose of the disposable income test is to 'prevent large expenditures by debtors for non-essential items which ultimately reduce the sum available to pay holders of unsecured claims.'" *In re Brooks*, 241 B.R. 184, 186 (Bankr. S.D. Ohio 1999) (citing *In re Hedges*, 68 B.R. 18, 20 (Bankr. E.D. Va. 1986)).

In the case at bar, it is clear that there is a problem with the debtor's plan as currently proposed. Based on the proof as presented to the Court, the expenses listed on the debtor's petition appear to be inflated. The debtor testified that her rent is actually \$50.00 per month less than what appears on schedule J. The only evidence of her monthly electricity and heating bills show that the cost is approximately \$60 less per month than what is listed on her schedules. Given these two facts, it appears that the debtor's monthly disposable income is more than what she currently proposes to pay into her plan. Given § 1325(b)'s requirements, the Court cannot confirm the plan at this time.

The debtor did testify that her income has decreased since she filed her case because of her back injury; however, the monthly income on her amended schedule J is the same as the amount listed on her original petition. The debtor did not present any evidence of a decrease. Without this proof, the Court cannot take this factor into account.

The debtor also testified that she is spending extra money every month to stay in a hotel in Nashville when she is unable to make the commute home because of her back pain. The debtor did not present any proof of this expense nor did she state how much these stays cost her. Without this proof, the Court cannot make a determination as to the reasonableness or the necessity of the expense. It may be that the debtor is paying so much in hotel costs that by the time the hotel bills and her Big Sandy rent are added together, she would actually pay less to rent an apartment in Nashville. Absent proof on this matter, the Court cannot decide how this issue may or may not impact her case.

As a result of the Court’s findings regarding the debtor’s disposable income, the Court will grant Mitchell White’s objection to confirmation. The debtor will be given fifteen days from entry of this order to file amended schedules which accurately reflect her monthly income and expenses. The debtor will also have fifteen days to file an amended plan which incorporates these amendments. The amended plan will then be set for confirmation.

III. ORDER

It is therefore **ORDERED** that the Mitchell Ray White’s Objection to Confirmation is **SUSTAINED**. The Debtor shall have fifteen days to file (1) amended schedules J and I to accurately reflect her monthly income and expenses and (2) an amended plan or the case will be dismissed.

It is **FURTHER ORDERED** that confirmation of the debtor’s plan, as currently proposed, is **DENIED**.

Service List

debtor
Sam Watridge, Debtor’s attorney
Stephen Hughes, Attorney for Mitchell Ray White
Tim Ivy, Chapter 13 Trustee
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