

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re

SHONDRA ADDISON,

Case No. 95-24076-L

Debtor.

Chapter 13

MEMORANDUM OPINION AND ORDER

This Court conducted a hearing in this matter on May 19, 1998, as a result of this Court's sua sponte order setting a hearing concerning the proposed "Agreed Order Stating Position of Bolton Sisters, LLC." In the proposed order, Bolton Sisters, LLC ("the Claimant") and the Debtor agreed to treat the Claimant's postpetition claim as a "Class One Priority debt," whereby the Claimant would receive 100% of its claim of \$1,025.00 with no interest. Based on the following, this Court does not approve the proposed settlement and will not enter the proposed order. This opinion contains findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052. This is a core proceeding. 28 U.S.C. § 157(b)(2)(B).

I. FINDINGS OF FACT

The Debtor filed her voluntary petition under Chapter 13 of the Bankruptcy Code on April 21, 1995. A review of the file indicates that the Debtor entered into a residential lease agreement with the Claimant as lessor on January 1, 1996, without the consent of the Chapter 13 trustee.¹ (See Exhibit attached to Document 24 ("Real Estate Lease")). On August 6, 1997, the

¹ At the hearing on this matter, George W. Stevenson, the standing Chapter 13 trustee, stated that he believed the Debtor entered into the residential lease before the petition was filed. As indicated, however, the

Debtor filed a motion to add the Claimant as a postpetition priority creditor, and on September 15, 1997, this Court entered an order adding this postpetition debt to the plan and providing the Claimant the option to file a proof of claim and to receive payments under the plan.² On November 24, 1997, the Claimant filed a “Motion to Lift Stay and to Dismiss.” In that motion, the Claimant stated that it did not consent to its claim being paid through the Debtor’s Chapter 13 plan. On January 26, 1998, this Court entered an order on the Claimant’s motion terminating the automatic stay to permit the Claimant to recover possession of the property. On April 14, 1998, the Debtor and the Claimant submitted the proposed agreed order that is the basis of this opinion. Upon review of the proposed order, the Court set a hearing to determine whether the proposed treatment of the postpetition claim of the Claimant is appropriate. At the hearing, the attorneys stipulated that the Debtor is no longer living in the property owned by the Claimant. Nevertheless, the Debtor and Claimant propose to treat the debt arising from missed lease payments as a “Class One Priority debt” to be paid in full through the plan. Pursuant to the confirmed plan, general unsecured creditors will receive only 70% of their allowed claims.

Debtor entered the lease after the petition was filed.

² This order was submitted for entry after no objection was raised to the Debtor’s “Motion to Modify Plan to Include Bolton Sisters, LLC as a Postpetition Priority Creditor.” It did not result from a hearing before the Court, and it appears now, for the reasons stated in this Memorandum, that the order was entered in error.

II. CONCLUSIONS OF LAW

A. Post-Confirmation Modification of Chapter 13 Plans

The proposed agreed order submitted by the parties in this matter attempts to modify the Debtor's confirmed plan. Modification of a Chapter 13 plan after confirmation is governed by 11 U.S.C. § 1329(a). That section provides:

(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; 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.

11 U.S.C. § 1329(a). Each of the three subsections of Section 1329(a) relates to modification of claims *provided for* under the plan. Although the confirmed plan in this case does not provide for the treatment of postpetition claims, this Court will permit post-confirmation modification of Chapter 13 plans to provide for treatment of postpetition claims under certain conditions. *See, e.g., In re Bagby*, 218 B.R. 878 (Bankr. W.D. Tenn. 1998); *In re Trentham*, 145 B.R. 564 (Bankr. E.D. Tenn. 1992); *In re Goodman*, 136 B.R. 167 (Bankr. W.D. Tenn. 1992); *In re Thornton*, 21 B.R. 462 (Bankr. W.D. Va. 1982).

According to the Bankruptcy Code, the plan as modified becomes the plan unless, after notice and a hearing, such modification is disapproved. 11 U.S.C. § 1329(b)(2). Federal Rule of Bankruptcy Procedure 3015(g) governs modification of a plan after confirmation. It provides:

(g) Modification of Plan After Confirmation. A request to modify a plan pursuant to § 1229 or 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 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.

FED. R. BANKR. P. 3015(g).

The proposed agreed order does not state whether creditors were given notice and an opportunity to object to the proposed treatment of the Claimant. The proposed agreed order does not specify how the payment of 100% of the Claimant's claim will affect the payment of prepetition unsecured claims and what adjustments will be "necessary to comply with the modification prayed for herein." There was no showing that the plan as modified would be feasible. *See* 11 U.S.C. § 1329(b)(1). The Court will not approve the proposed modification to the plan based upon the Debtor's failure to comply with Section 1329(a) and Rule 3015(g).

B. Allowance of Postpetition Claims

Additionally, the Court concludes that the postpetition claim of the Claimant should not be allowed pursuant to 11 U.S.C. § 1305. That section provides:

(a) A proof of claim may be filed by any entity that holds a claim against the debtor -

(1) for taxes that become payable to a governmental unit while the case is pending; or

(2) that is for a consumer debt, that arises after the date of the order for relief under this chapter, and that is for property or services necessary for the debtor's performance under the plan.

11 U.S.C. § 1305(a). Subsection (a)(2) is further limited, however, by subsection (c) which provides:

A claim filed under subsection (a)(2) of this section shall be disallowed if the holder of such claim knew or should have known that prior approval of the trustee of the debtor's incurring the debt was practicable and was not obtained.

11 U.S.C. § 1305(c). Only the holder of a postpetition claim may file a proof of claim under Section 1305. A debtor may not file a proof of claim for the holder of a postpetition claim and force its participation in a plan. *See In re Goodman*, 136 B.R. 167, 169 (Bankr. W.D. Tenn. 1992); *In re Trentham*, 145 B.R. 564, 567 (Bankr. E.D. Tenn. 1992); *In re Farquhar*, 112 B.R. 39 (Bankr. D. Colo. 1989). While the record does not reflect that the Claimant has filed a proof of claim for the debt in question, the Court assumes that the Claimant intends to file a proof of claim in light of the Claimant's desire to enter into the proposed agreed order.

Postpetition claims filed under Section 1305 are not deemed allowed as are prepetition claims filed under Section 501. *See* 11 U.S.C. § 502(a).³ Whether the Claimant's claim should be allowed depends initially upon whether the claims are of the types of postpetition claims that may be allowed. Only tax claims or claims for consumer debts for property or services necessary for the

³ Section 502(a) provides:

A claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest, including a creditor of a general partner in a partnership that is a debtor in a case under chapter 7 of this title, objects.

11 U.S.C. § 502(a).

debtor's performance under the plan may be allowed, and even these claims will be disallowed if the holder of such claim knew or should have known that prior approval by the trustee of the debtor's incurring the obligation was practicable but was not obtained. Requiring the approval of the trustee insures, among other things, that a determination is made that incurring additional debt is actually necessary to the debtor's performance under the plan. This protects not only the debtor, but all creditors whose claims are provided for in the confirmed plan.

As the claim is not one for taxes, the Court must determine if a claim for postpetition rent constitutes a claim for a consumer debt for property or services necessary for the debtor's performance under the plan. The Debtor must have shelter in order to perform her obligations under the plan. The Court, therefore, assumes that entering into the lease was necessary for the Debtor's performance under the plan. The Debtor offered no explanation for why she was unable to make her rent payments as they came due, however. Thus the Court cannot determine that incurring the subject debt was necessary for the Debtor's performance under the Plan.

Further, the Debtor did not obtain the approval of the trustee before entering into the lease. Neither the Claimant nor the Debtor asserted that obtaining the prior approval of the trustee was impracticable. The Court cannot conceive of an emergency that would require a debtor to enter into a residential lease without obtaining the prior approval of the trustee. Further, the Claimant could have protected itself by searching the public records to determine that the Debtor's Chapter 13 case was pending and requiring the Debtor to obtain the approval of the trustee. This postpetition claim cannot be allowed under the provisions of Section 1305.

The parties may be attempting to treat the Claimant's postpetition claim as an administrative expense pursuant to Section 503(b) of the Bankruptcy Code.⁴ In his treatise, Bankruptcy Judge Keith Lundin notes that a postpetition claim for a consumer debt may be classified both as a postpetition claim under Section 1305 and as an administrative expense under Section 503 because Sections 1305 and 503 are "not mutually exclusive." 2 K. LUNDIN, CHAPTER 13 BANKRUPTCY § 7.38 (2 ed. 1994). Judge Lundin further notes, however, that where the two sections "overlap, the claim holder or the debtor must satisfy the prior approval of the trustee requirement in § 1305 for the claim to be allowable in the Chapter 13 case." *Id.* (citing *In re Clayburn*, 112 B.R. 434 (Bankr. N.D. Ala. 1990)). The Debtor failed to obtain the approval of the trustee prior to entering into the postpetition lease; therefore, the Court holds that the claim is not allowable under either Section 503(b) or Section 1305.

III. ORDER

It is therefore ORDERED that the settlement set out in the proposed "Agreed Order Stating Position of Bolton Sisters, LLC" is not approved, and the claim of Bolton Sisters, LLC is not allowed.

⁴ This Court found only one case that discussed the appropriateness of treating a claim for postpetition rent, similar to the claim in question in this case, as an administrative expense. *See In re Scott*, 209 B.R. 777 (Bankr. S.D. Ga. 1997). In *Scott*, the debtor occupied the rental property as a tenant at will at the time he filed his bankruptcy petition. Thus, one month after he filed his petition, the debtor "renewed" his lease under Georgia law. *Id.* at 783-84. The court refused to classify the postpetition rent due after the lease "renewal" as an administrative expense because the creditor failed to show that the rental expense qualified as an actual and necessary cost of preserving the bankruptcy estate as required by Section 503(b)(1)(A). *Id.* at 783.

In re Shondra Addison
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BY THE COURT,

Jennie D. Latta
United States Bankruptcy Judge

Date: June 4, 1998

cc: Debtor
Debtor's Attorney
Claimant
Claimant's Attorney
Chapter 13 Trustee
All Creditors and Interested Parties