UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

<u>Transmittal Sheet for Opinions for Publishing and Posting on Website</u>

Will this Opinion be Published?	No
Bankruptcy Caption:	In re: Hector and Donna Lugo.
Bankruptcy No.:	18bk18603
Adversary Caption:	N/A
Adversary No.:	N/A
Date of Issuance:	March 12, 2020
Judge:	Hon. LaShonda A. Hunt
Appearance of Counsel:	
Attorney for Trustee:	Gerald Mylander 801 Warrenville Rd., Suite 650 Lisle, IL 60532
Attorney for Debtors:	Briana Czajka Geraci Law L.L.C. 55 E. Monroe St. Suite 3400 Chicago, IL 60603

Name of Assigned Judge	LaShonda A. Hunt	**CASE NO.**	18bk18603
DATE	March 12, 2020		
CASE TITLE	In re Hector and Donna Lugo		
TITLE OF ORDER	Order Granting Trustee's Motion to Modify Plan (Dkt#38)		

DOCKET ENTRY TEXT

For the reasons set forth in this decision, the Chapter 13 Trustee's Motion to Modify Plan is granted.

STATEMENT

Pending before the court is the motion of standing chapter 13 Trustee Glenn Stearns ("the Trustee") to modify the confirmed Chapter 13 plan of debtors Hector and Donna Lugo ("the Lugos"). The Trustee seeks a plan modification to account for funds that the Lugos may recover from a personal injury claim that has arisen post-petition. The Lugos concede that any non-exempt proceeds of the lawsuit belong to the bankruptcy estate, but nonetheless contend that turnover is required only if payment is received during the 60-month plan term. In response, the Trustee objected to having conditions imposed on his ability to collect property of the estate to be distributed to general unsecured creditors. For the reasons that follow, the court agrees with the Trustee and grants the motion to modify as requested.

Background

The Lugos initiated this chapter 13 bankruptcy proceeding on June 29, 2018, and confirmed their repayment plan on November 16, 2018 (Dkt.#28). In that plan, the Lugos agreed to make monthly payments to the Trustee of $750 for three months and $800 for 33 months, which would provide an estimated 1% dividend to general unsecured creditors. (Dkt.#24).

Nearly a year into the case, in July 2019, the Lugos amended Schedules A/B and C (Dkt.#34). Schedule A/B was updated at question 33 to add a claim in an unknown amount against a third-party for injuries sustained by Mrs. Lugo in a motor vehicle accident in February 2019. Schedule C listed a personal injury exemption in the amount of $15,000 for this new claim.

The Trustee subsequently moved to modify the plan to account for the claim acquired by the Lugos post-petition which, under 11 U.S.C. §1306, constitutes property of the bankruptcy estate. (Dkt.#35). His proposed order provided for the Lugos to pay any non-exempt proceeds of the injury claim to the Trustee within 14 days of receipt of those funds. The Lugos did not oppose the motion, as they agreed that the proceeds should be used by the Trustee to increase the dividend to unsecured creditors. Rather, they maintained that the order must limit their turnover obligation to amounts actually "received during the plan term." (Dkt.#38). Otherwise, the Lugos argued, the modification could potentially run afoul of 11 U.S.C. §1329(c), which prohibits the court from ordering payments to be made beyond the maximum five-year plan term. The Trustee counters that the Lugos are misinterpreting both the Bankruptcy Code and applicable case law. (Dkt.#39).

The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and Internal Operating Procedure 15(a) of the United States District Court for the Northern District of Illinois. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A).

Discussion

Motions to modify chapter 13 plans post-confirmation are governed by 11 U.S.C. § 1329. Both the Trustee and the Lugos agree that modifying their confirmed plan to require an additional plan payment for the non-exempt portion of any personal injury award is appropriate here. At issue is whether the payment must be conditioned upon the Lugos' actual receipt of those funds before the maximum plan term expires. The court holds the answer to that question is no.

Section 1329(c) states that:

> A plan modified under this section may not provide for payments over a period that expires after the applicable commitment period under section 1325(b)(1)(B) after the time that the first payment under the original confirmed plan was due, unless the court, for cause, approves a longer period, but the court may not approve a period that expires after five years after such time.

11 U.S.C. § 1329(c). The Lugos' confirmed plan provides for a 36-month term, meaning that is the amount of time it should take them to complete all of their required plan payments. However, section 1329(c), by its terms, allows the court to approve plan modifications to "provide for payments" to be made for up to five years, or 60 months. The statute is clear that five years is the maximum length of time for debtors to complete required payments under the plan, regardless of whether the court is initially confirming a plan or approving a modification of a confirmed plan. *See* 11 U.S.C. § 1322(d); 11 U.S.C. § 1329(c).

The Lugos point to this language as support for their argument that the Trustee is limited to requiring additional plan payments to be made within five years, regardless of the source of those funds. However, that is not an accurate assessment of the situation before the court. As debtors in a chapter 13 case, the Lugos are allowed to administer an asset on behalf of the estate and collect funds to be distributed to their creditors. But it is, in fact, the trustee who generally serves as the representative of the estate, with the capacity to sue and be sued, and to prosecute an action by or against the debtor for the benefit of creditors. *See* 11 U.S.C. § 323 (capacity to sue and be sued); Fed. R. Bankr. P. 6009 (capacity to prosecute). So, the Lugos are essentially standing in the shoes of the Trustee when they are pursuing their personal injury claim. *See* 11 U.S.C. § 1303. The parties have labelled the non-exempt proceeds an "additional plan payment," which is why the five-year prohibition in section 1329(c) appears to be applicable. But in reality, the Lugos are doing nothing more than what the Code requires of any debtor, which is to turnover funds that rightfully belong to the estate in accordance with 11 U.S.C. § 542. And because this is a chapter 13 case, those funds are paid to the chapter 13 trustee, who, in turn, "shall make payments to creditors under the plan." 11 U.S.C. § 1326(c). *See also Harris v. Viegelahn*, 135 S.Ct. 1829, 1835 (2015) (explaining that under section 1306(a), "the Chapter 13 estate from which creditors may be paid includes both the debtor's property at the time of his bankruptcy petition, and any wages and property acquired after filing"). The Trustee is therefore correct that under these circumstances, the Code does not impose a time limit for recouping the additional payment due under the modified plan as a result of the Lugos' liquidation of estate property.

The Lugos cite *Germeraad v. Powers* for the proposition that the only payments allowed after five years are plan payments to cure a default. 826 F.3d 962 (7th Cir. 2016). But that argument too narrowly construes the Seventh Circuit's holding. There, the chapter 13 trustee sought to modify the confirmed plan to increase the debtors' plan payments going forward after their disposable income rose significantly. *Id.* at 964. By the time the case wound its way up to the appellate court, though, the five-year maximum plan term had elapsed. *Id.* at 967. As such, the debtors contended that the motion to modify was moot, a position the court rejected as resting on an inaccurate assumption of the effect of granting the modification request. *Id.* at 968. The court explained that "payments made outside of the five-year period specified in § 1329(c)" are prohibited only if "provided for by the modified plan." *Id.* Because the debtors never made the plan payments under the modified plan to begin with, at that point, all they could do was cure the default. *Id.* The court concluded that scheduling payments outside the five-year restriction might be problematic, but actually making them in that timeframe was not. *Id.* *See also In re Henry*, 343 B.R. 190 (Bankr. N.D. Ill. 2006), *aff'd*, 368 B.R. 696 (N.D. Ill. 2007) (finding the bankruptcy court did not abuse its discretion in denying the chapter 13 trustee's motion to dismiss for a plan payment default and allowing the debtor time beyond 60 months to complete plan payments).

What *Germeraad* ultimately affirms is that section 1329(c) cannot be read in the constrained fashion that the Lugos propose here, i.e., the Trustee can never receive a payment after five years. Instead, the court should closely examine the facts underlying the basis for a modified plan to determine if the definition of statutorily prohibited conduct is met. As this court has already explained, *supra*, the modified plan here is not "providing for" further plan payments by the Lugos. All the order does is establish a mechanism for the Lugos to turn over estate property for the Trustee to distribute to creditors according to the confirmed plan. After all, if this personal injury claim existed pre-confirmation, the Lugos would have accounted for the required additional plan payment consisting of the non-exempt proceeds, in their chapter 13 plan using the exact language that is currently proposed by the Trustee. The court can find no reason to impose a qualification on their turnover obligation just because this matter is now raised in a motion to modify their confirmed plan.

Indeed, to read the statute as the Lugos suggest, would violate section 1329(b)(1), which requires a post-confirmation modification to satisfy the confirmation requirements in section 1325(a). Specifically, the Lugos must meet the "best interests of creditors" test in section 1325(a)(4) by paying their general unsecured creditors at least as much as they would receive in a liquidation. The confirmed plan provided for a 1% dividend that was based on the liquidation analysis around the time of confirmation. But the Lugos now have an additional asset to account for in calculating what their creditors are entitled to receive in a chapter 13 case. That the claim is continent and/or unliquidated right now does not change the fact that the non-exempt proceeds are still a post-petition acquisition that is property of the estate. Adopting the Lugos' position here would ignore that critical requirement in section 1329(b)(1) and potentially afford them an unintended windfall. In other words, the Lugos could pay their unsecured creditors less than the liquidation analysis requires and still obtain a discharge of their debts plus retain all of the lawsuit proceeds. The court cannot adopt an interpretation of the Code that would lead to a result that is contrary to not only the plain statutory language but also established bankruptcy principles. *See Grogan v. Garner*, 111 S.Ct. 654, 659 (1991).

Moreover, it is not even clear that the Lugos will be unable to tender the additional plan payment before the maximum five-year plan term expires. Their bankruptcy case has been pending for 21 months and they have already retained counsel to litigate the personal injury claim. That leaves three years to resolve the lawsuit and tender funds to the Trustee; it is not a stretch to assume that can happen within this timeframe.

Conclusion

The court recognizes that debtors may be placed in a difficult position when post-petition acquisitions occur late in a pending chapter 13 case. If they are contingent and/or unliquidated like the personal injury claim here or involve protracted and complex litigation, that can unwittingly lead to an extended plan term, which is contrary to what the Code proscribes for chapter 13 debtors. On the other hand, nothing in the Code gives chapter 13 debtors a pass from turning over estate property that is to be used by the trustee to repay their creditors a meaningful dividend, whenever that property is finally liquidated. Neither policy trumps the other. But in this case, the latter scenario is more applicable to these facts than the former. Consequently, the Lugos' objection will be overruled and the Trustee's motion to modify granted.

IT IS SO ORDERED.

Dated: March 12, 2020

LaShonda A. Hunt
United States Bankruptcy Judge