

**United States Bankruptcy Court
Northern District of Illinois
Eastern Division**

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**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

In re:)	Case No. 21 B 1817
)	
ZBIGNIEW BEDNARZ,)	Chapter 13
)	
Debtor.)	Judge David D. Cleary

**ORDER DENYING DEBTOR’S MOTION TO MODIFY PLAN (EOD 54) AND
GRANTING MOTION TO DISMISS (EOD 53)**

This matter comes before the court on the motion of Marilyn O. Marshall, chapter 13 Trustee (“Trustee”) to dismiss this bankruptcy case for failure to make plan payments (“Motion to Dismiss”), and the motion of Zbigniew Bednarz (“Debtor”) to modify his confirmed plan (“Second Motion to Modify”). The Motion to Dismiss and Second Motion to Modify were heard and continued, and then taken under advisement after Debtor filed several exhibits in support of the Second Motion to Modify. The parties did not file briefs in support of their motions, and they did not request an evidentiary hearing. Having reviewed the Motion to Dismiss, the Second Motion to Modify and the exhibits filed by Debtor, and considered the arguments made in open court, the court will deny the Second Motion to Modify and grant the Motion to Dismiss.

BACKGROUND

Debtor filed for relief under chapter 13 on February 11, 2021. According to Form 122C-1, he is a below-median debtor with an applicable commitment period of three years. Debtor filed a proposed plan with his petition. Pingora Loan Servicing LLC, by Flagstar Bank, FSB, Servicing Agent (“Pingora”) filed an objection to confirmation of that plan, claiming that \$18,316.24¹ in prepetition mortgage arrears were not addressed by it.

¹ The proof of claim states that the arrearage is \$18,286.24, which is the amount included in Debtor’s amended plan.

Debtor amended his plan on May 24, 2021, including in section 3.1 the arrearage stated in Pingora's proof of claim. Pingora withdrew its objection, and the court confirmed Debtor's plan on June 7, 2021. The confirmed plan provides for monthly payments of \$370, stepping up to \$668 in the 23rd month when a direct-pay debt is paid in full. The plan term is 60 months.

About seven months later, Pingora filed a motion for relief from stay ("Stay Motion"). Although Debtor had made some post-confirmation payments to Pingora, his post-petition arrears totaled \$6,939.75. The parties asked the court to continue the Stay Motion to allow time to submit an agreed order. A month later, the parties appeared in court again, without a draft order. Debtor's attorney indicated that Debtor and his co-signer could not agree on terms. The court then granted the Stay Motion, terminating both the automatic stay and the co-debtor stay.

On June 27, 2022, Debtor filed a motion to modify plan ("First Motion to Modify"), as well as amended Schedules I/J ("First Amended Schedules"). He alleged that he and his spouse were attempting to work directly with Pingora on loss mitigation. He asserted that once the process was complete, his mortgage payments (budgeted in the plan at \$1,241) would increase to approximately \$1,650. This would result in an inability to make monthly plan payments in excess of \$210. Debtor also asked that his plan term be reduced from 60 months to 36 months, since he is a below-median debtor and had confirmed a 60-month plan only "to accommodate the pre-petition mortgage arrears" which were no longer being paid through the plan due to stay relief. (First Motion to Modify, ¶ 7.)

The Trustee objected to the First Motion to Modify, and the court denied it on August 8, 2022. On December 28, 2022, the Trustee filed the Motion to Dismiss for failure to make plan payments. She alleged a payment default of \$1,110 on Debtor's \$370/month obligation, and that she had not received any payments since November 4, 2022.

Debtor did not file a notice of objection to the Motion to Dismiss, but instead filed the Second Motion to Modify. He alleged that following the stay relief granted to Pingora, he should be able to lower his plan payments because: (1) the plan is feasible with lower payments; and (2) the plan “projects to pay a significantly higher dividend than is needed under the ‘best interests’ test.” (Second Motion to Modify, ¶ 6.).²

Debtor alleged that he provided his attorneys with an updated budget and proof of certain expenses, and that these changes combined with his exempt Social Security income support a decrease in his plan payment to \$230/month. Debtor also requested a reduction in plan term to 36 months, asserting (as in the First Motion to Modify) that cause to extend the term to 60 months no longer exists now that the court granted stay relief to Pingora.

Debtor attached amended Schedules I/J (“Second Amended Schedules”) to the Second Motion to Modify, although he did not file them separately on the docket. Debtor made the following changes to his schedules:

	First Amended Schedules	Second Amended Schedules
Spouse’s take-home pay	\$2,653.34	\$2,639.22
Debtor’s Social Security	\$988	\$1,034
Combined monthly income	\$3,641.34	\$3,673.22
Mortgage	\$1,650	\$1,296.77
Electricity/heat/gas	\$360	\$300
Water/sewer/garbage	\$98.10	\$78.55
Telephone/cell/internet/cable	\$229.08	\$250.12
Food	\$220	\$225
Medical/dental	\$52.38	\$125
Transportation	\$182	\$302
Vehicle insurance	\$95.68	\$106.34
Car payment	\$298	
Pet care		\$55
Spouse credit		\$174
Life insurance loans		\$50
Monthly expense total	\$3,427.01	\$3,204.55

² Under the best interests test of § 1325(a)(4), Debtor must pay his unsecured creditors \$9,564.79.

Monthly net income	\$214.33	\$468.67
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About a week before the initial presentation of the Second Motion to Modify, Debtor filed seven exhibits:

- A home loan statement dated November 16, 2022, issued by Flagstar Bank. It shows a regular monthly payment due in the amount of \$1,296.77 and an overdue payment of \$31,603.22. The recent account history shows no payments made in the prior six months. The statement indicates that “[t]he mortgage is currently on an active Homeowner Assistance Fund option,” although it provides no information about what that means.
- One page of a bill from AT&T issued August 2, 2021, with an amount due of \$193.60
- Three pages containing payment coupons for eight different bills issued to Debtor’s spouse in December 2022 and January 2023, with minimum payments varying between \$29 and \$99
- Four pages containing three additional bills for Debtor’s spouse, due in November and December 2022, two with minimum payments of \$25 and \$49, and one from a medical provider with a total amount due of \$3,649.91
- Three pages of utility bills, showing monthly charges in December 2022 for ComEd (\$69.18) and Nicor Gas (\$80.22 due under payment arrangement), as well as \$53.10 due to Groot (waste management) in October 2022 for an unknown period of time
- An invoice from a veterinary clinic with a charge of \$174 on 4/30/22, a previous balance of \$673.25 and a list of future appointments
- Two receipts, one for each of two loans from the Polish National Alliance, each reflecting a payment of \$25 on November 7, 2022

In court on February 13, 2023, the Trustee objected to the Second Motion to Modify. She argued that: (1) the utility bills showed a monthly obligation of \$149, not \$300; and (2) the plan must run 40 additional months to satisfy the best interests test. The Trustee also stated that although Debtor included a mortgage statement in his exhibits, the court already granted this creditor relief from the stay. Debtor's counsel asked for time to obtain proofs of payment for the mortgage as well as to discuss other issues with the Trustee. The court continued the Second Motion to Modify to February 27, 2023.

On February 27, 2023, Debtor's counsel indicated that the parties were at an impasse. He represented that Debtor had resumed making mortgage payments. He also admitted that the "best interests" test would not be satisfied at monthly payments of \$230 and suggested that there are sufficient funds in Debtor's budget to support a plan payment of \$240.

The Trustee stood on her Motion to Dismiss, arguing that Debtor's utilities expense is overstated and that dismissal is appropriate instead of a reduction in distribution to unsecured creditors. The stay has been modified as to the residence, and she asserted that Debtor is not paying his mortgage. According to the Trustee's comments, the parties exchanged some documentation regarding evidence of an electronic payment that is purported to be a mortgage payment. That documentation was not furnished to the court.

DISCUSSION

Debtor asks the court to modify his plan by reducing the monthly payment as well as the plan term. He contends that the decrease in payments is necessary as a result of his increased expenses. He filed several exhibits that purport to support his contention. Debtor also points out that part of his monthly net income is attributable to benefits received under the Social Security

Act, and therefore should not be counted toward his current monthly income. *See* [11 U.S.C. § 101\(10A\)\(B\)\(ii\)\(I\)](#).

The decision on a motion to modify plan is left to the discretion of the bankruptcy judge. *See Matter of Witkowski*, [16 F.3d 739, 746](#) (7th Cir. 1994). There is no explicit standard in the Bankruptcy Code for determining whether a modification that falls within section 1329 should be approved. *See Germeraad v. Powers*, [826 F.3d 962, 971](#) (7th Cir. 2016). “However, courts routinely deem modification appropriate when there has been a postconfirmation change in the debtor’s financial circumstances that affects his or her ability to make plan payments.” *Id.*

As movant, Debtor bears the burden of proving that he satisfies the statutory requirements for modification in [11 U.S.C. § 1329\(b\)](#).

Expenses on the attached Schedule J are not supported by the exhibits

The Trustee objected to several of the expenses claimed on the unfiled Schedule J. Therefore, the court will not assume that all of those expenses are accurate. Debtor submitted exhibits that purport to support the disputed items, as well as other expenses. For the reasons stated below, the court finds that they do not provide the claimed support.

There is no foundation provided for the documents, and no explanation of what the various receipts relate to and how they should be applied to Schedule J. For example, the second exhibit is one page of a bill from AT&T issued August 2, 2021, with an amount due of \$193.60. This bill is dated more than a year before Debtor filed the Second Motion to Modify. Moreover, there is no explanation of whether this bill is supposed to represent the entire line item for telephone/cell phone/internet/cable, for which the monthly expense is budgeted at \$250.12.

As an additional example, the third exhibit consists of three pages containing payment coupons for eight different bills issued to Debtor’s spouse in December 2022 and January 2023,

with minimum payments varying between \$29 and \$99 and totaling \$478. The fourth exhibit contains three additional bills for Debtor's spouse, due in November and December 2022. Two of these bills have minimum payments of \$25 and \$49, raising the spouse's minimum payment obligation to \$552. Yet Debtor budgeted only \$174 for this line item in the Second Amended Schedules, which appears to be \$378 less than the spouse's minimum monthly payment obligation.³

Finally, the fifth exhibit that Debtor submitted consists of three pages of utility bills, showing monthly charges in December 2022 for ComEd (\$69.18) and Nicor Gas (\$80.22 due under payment arrangement), as well as \$53.10 due to Groot (waste management) in October 2022 for an unknown period of time. These bills do not support the expenses claimed on the unfiled Schedule J attached to the Second Motion to Modify. Debtor claimed \$300 for electricity/heat/gas, but the bills from ComEd and Nicor show no more than \$150 in electricity and gas charges.

Debtor stated that his water/sewer/garbage cost is \$78.55. The bill from Groot in the amount of \$53.10 does not specify the length of the billing cycle. According to the brochure at <https://cdn.wasteconnections.com/cms/groot-west/Arlington%20Heights%20-%202023.pdf> (last retrieved May 11, 2023), the rate schedule effective April 1, 2023, for residents of the Village of Arlington Heights is \$18.11/month for curbside service. Although this figure can vary if the resident is a senior citizen, or requested backdoor service, it is unlikely that this bill from Groot represents one month of waste management services. And in any event, without knowing the cost of water/sewer, it is impossible to determine whether \$78.55/month for water/sewer/garbage is accurate.

³ This discussion does not account for the spouse's obligations to one medical provider, billed at \$3,649.91.

The court will not continue to highlight the deficiencies in the documents submitted in support of the unfiled Schedules I/J attached to the Second Motion to Modify. These examples are sufficient to demonstrate that the court cannot determine with any sense of confidence that the claimed expenses are accurate. Debtor may have more income available, because the utility bills do not support the amounts claimed, or he may have less income available, because his spouse's minimum monthly credit card obligations consume nearly all available income. Without knowing if the expenses are accurate, the court cannot determine whether Debtor has proposed his plan in good faith, as required by § 1325(a)(3), or whether the proposed plan is feasible, as required by § 1325(a)(6).

If Social Security income is subtracted from net income, Debtor's proposed modification is not feasible

Debtor contends in the Second Motion to Modify that his "household income is in part attributable to funds from the Social Security Administration (which is not disposable income under the definition provided in 11 U.S.C. 101(10A))," therefore a lower plan payment is appropriate. (Second Motion to Modify, ¶ 9.)

The Trustee does not dispute that according to the Second Amended Schedules, \$1,034 of Debtor's gross income is attributable to benefits received under the Social Security Act. This income is not counted toward Debtor's current monthly income. If it were subtracted from his income on Schedule J, as is sometimes done, Debtor's monthly net income would be negative.

Debtors can and sometimes do make a voluntary contribution of their Social Security benefits in order to propose a feasible plan. *See* [11 U.S.C. § 1322\(b\)\(8\)](#) (a plan may "provide for the payment of all or part of a claim against the debtor from property of the estate or property of the debtor"). Debtor has suggested that his Social Security income should not be counted toward his disposable income, but if none of it is available then his proposed plan is not feasible. The

Second Motion to Modify and the Second Amended Schedules do not present a coherent picture of the Debtor's intentions, and the court cannot determine whether Debtor will be able to make all payments under the plan and to comply with the plan, as required by § 1325(a)(6).

Mortgage

The parties also dispute whether Debtor properly included \$1,296.77 on his unfiled Schedule J as his mortgage expense.

The court granted Pingora relief from the stay, which meant that all payments under section 3.1 as to Pingora's collateral would cease, and Pingora's claim would no longer be treated by the plan. Relief from the stay did not mean that Debtor no longer had a housing expense. Pingora and the Debtor could continue their mortgagee-mortgagor relationship, or the parties could modify the terms of that relationship, or Pingora could seek to enforce its state court remedies while the Debtor sought housing elsewhere.

The mortgage statement Debtor filed provides that "[t]he mortgage is currently on an active Homeowner Assistance Fund option." The court has no information as to what that means. Although the statement shows a regular monthly payment due in the amount of \$1,296.77, there is no evidence before the court that Debtor is making those payments. In fact, the recent account history on this statement appears to show six months of unpaid installments. Debtor has not demonstrated that his monthly housing expense is \$1,296.77. As with the uncertainty regarding the utility expenses and the spouse's credit card payments, the court cannot determine whether Debtor's housing expense is accurate, and therefore cannot conclude that the plan was proposed in good faith as required by § 1325(a)(3).

Evaluating the evidence submitted to support a motion to modify

It is Debtor's burden to prove that he satisfies the statutory requirements for modification in [11 U.S.C. § 1329\(b\)](#). When there is no objection from the Trustee or a creditor, the court may accept the schedules signed under penalty of perjury on their face.

But when, as in this case, an objection is raised to the relief sought, the plan proponent must do more than upload some recent bills to the court docket.

If the Debtor submits exhibits that suggest the actual expense is lower than itemized on Schedule J, as with the utility bills in this case, then the court must consider if Debtor can actually afford a higher plan payment, and therefore whether Debtor proposed the plan in good faith. If the submitted exhibits suggest that the expense is higher than the amount budgeted on Schedule J, then the court must consider whether the proposed payment and plan are feasible.

The court is not determining whether the expenses Debtor claims here are reasonable and necessary. Additionally, the court is aware that real life does not always correspond to a form, and that expenses may rise and fall over time. But when a party in interest raises an objection to a motion to modify a confirmed plan, the court must hear that objection and be satisfied that the evidence submitted overcomes that objection. In this case, the invoices, statements and bills uploaded to the docket do not satisfy Debtor's burden of proving that his plan is proposed in good faith and that it is feasible. Debtor has not satisfied the requirements of § 1329(b).


CONCLUSION

For all of the reasons stated above, **IT IS ORDERED THAT:**

1. Debtor's Second Motion to Modify is **DENIED**; and
2. Trustee's Motion to Dismiss is **GRANTED**.

ENTERED:

Date: May 11, 2023



DAVID D. CLEARY
United States Bankruptcy Judge