United States Bankruptcy Court
Northern District of Illinois
Eastern Division

Transmittal Sheet for Opinions for Publishing and Posting on Website

Will This Opinion be Published? No

Bankruptcy Caption: In re Judith K. Begoun

Bankruptcy No.: 13 B 27604

Date of Issuance: August 6, 2019

Judge: A. Benjamin Goldgar

Appearances of Counsel:

Attorneys for debtor Judith K. Begoun: Robert R. Benjamin, Anthony J. D'Agostino, M. Elysia Baker, Golan Christie Tahlia LLP, Chicago, IL

Attorney for Standing Chapter 13 Trustee Glenn B. Stearns: Glenn B. Stearns

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In re:	)	Chapter 13
	)	
JUDITH K. BEGOUN,	)	No. 13 B 27604
	)	
Debtor.	)	Judge Goldgar

MEMORANDUM OPINION

Before the court for ruling is the motion of discharged chapter 13 debtor Judith K. Begoun for turnover of funds. The funds represent some of the distributions that creditor JP Morgan Chase Bank, N.A., received under Begoun's 13 plan but mysteriously returned to Chapter 13 Trustee Glenn Stearns. Begoun says she is entitled to the funds; the Trustee says she is not, believing they should be paid to Begoun's unsecured creditors.

For the reasons below, Begoun's motion for turnover will be denied.

1. Jurisdiction

The court has subject matter jurisdiction under 28 U.S.C. § 1334(a) and the district court's Internal Operating Procedure 15(a). This is a core proceeding. 28 U.S.C. § 157(b)(2)(A).

2. Background

The facts are taken from the parties' papers, Begoun's schedules in her bankruptcy case, the court's docket, and the claims register. A bankruptcy court can take judicial notice of its own records, *In re Woodmar Realty Co.*, 294 F.2d 785, 788 (7th Cir. 1961), including a debtor's schedules, *Frierdich v. Mottaz*, 294 F.3d 864, 870 (7th Cir. 2002). No facts are in dispute.

In August 2005, Begoun and WMC Mortgage Corp. executed a promissory note secured by a mortgage on her property at 43 Buckingham Lane, Buffalo Grove, Illinois. Under the note, WMC Mortgage lent Begoun $57,600, and she promised to pay back the loan over fifteen years.

In the years that followed, the WMC note changed hands several times. By 2007, the note belonged to Chase Home Finance L.L.C. In May 2007, Chase Home Finance assigned the note to Dyck-O'Neal, Inc.

In July 2013, Begoun filed her chapter 13 bankruptcy case. In her schedules, Begoun disclosed that she had an first mortgage with "Chase" – on a different property than the property in Buffalo Grove. She listed the balance of Chase's mortgage as $261,780.79, with an additional $3,251 in pre-petition arrears. Begoun also disclosed the loan with Dyck-O'Neal, scheduling the debt as unsecured. She described the basis for the loan as "Installment Loan" and listed the balance as "Unknown."

Dyck-O'Neal filed a timely unsecured proof of claim in the case. The proof of claim said the loan balance was $89,020.28. Dyck-O'Neal attached to the proof of claim the assignment of the note from Chase Home Finance as well as a copy of the original note itself.[1/]

Begoun proposed a chapter 13 plan that required her to (a) make total plan payments of $32,700 over 60 months; (b) submit to the Trustee as an additional plan payment any tax refund beyond $1,200;[2/] and (c) pay her general unsecured creditors "to the extent possible from" her

---

[1/] Given that the Dyck-O'Neal debt originated with a note secured by a mortgage, It is unclear (a) why Begoun listed the debt as unsecured and (b) why Dyck-O'Neal filed an unsecured proof of claim. What matters here, though, is that the claim was unsecured. That is a point on which there is no dispute.

[2/] Of the tax refunds Begoun received during the case, only her 2014 tax refund exceeded $1,200. Begoun made a single additional payment of $2,454 under this plan provision to account for the 2014 refund.

plan payments but "not less than 10% of their allowed [claims]." (*See* Dkt. No. 35, §§ D.1, E.8). The plan was confirmed. (Dkt. No. 39).

Several months later, Begoun moved to modify her plan. The modification she proposed sought to lower her monthly payments to $555, reducing to $32,112 the total amount she would pay under the plan. (Dkt. No. 65). The dividend to unsecured creditors, though, would remain the same: a minimum of 10% of their allowed claims. The motion was granted. (Dkt. No. 67).

After accounting for the single tax refund over $1,200, the modified plan required Begoun to pay the trustee a total of $34,566. Of that amount, her unsecured creditors stood to receive $27,556.82. The unsecured claims initially filed in the case totaled $157,391.68, the largest of which was the $89,020 Dyck-O'Neal claim. Another unsecured creditor, Real Time Resolutions, later withdrew its $59,063.69 claim. (Dkt. No. 61). With the Real Time Resolutions claim out of the picture, total unsecured claims in the case came to $98,327.99, all but $9,307.99 of it attributable to the unsecured Dyck-O'Neal claim.

About a year into the case, Dyck-O'Neal transferred its unsecured claim to JP Morgan Chase Bank, N.A. (Dkt. No. 55). Payments the Trustee had been making to Dyck-O'Neal were then made to Chase Bank.

The Trustee disbursed Begoun's monthly payments to creditors according to her plan without incident from confirmation until April 2016. That month, for reasons that remain unclear, Chase Bank stopped accepting payments on its claim, payments it had been accepting for more than a year, and began returning them to the Trustee. Chase Bank never amended or withdrew its claim; it simply sent the payments back. Although the Trustee repeatedly contacted Chase Bank to find out where to send payments, he never received an answer. (Dkt. No. 113, ¶ 10). Chase returned to the Trustee a total of $16,436.49.

Begoun completed her plan payments in September 2018 (Dkt. No. 78) and received her discharge shortly thereafter (Dkt. No. 83). Begoun's unsecured creditors were paid 27.83% of their claims. (Dkt. No. 95, ¶ 2). The Trustee deposited the funds Chase Bank had returned with the clerk of the bankruptcy court and filed a Report of Deposit of Unclaimed Funds. (Dkt. No. 82).

The next month Begoun moved to withdraw those funds under 28 U.S.C. § 2042. (Dkt. No. 86). Because she had made all the payments her plan required and her creditors had received more than the minimum dividend, Begoun contended that the funds Chase Bank had returned belonged to her. (Dkt. No. 91 at 4-5).

The Trustee opposed the motion, arguing that the funds belonged first to Chase Bank, which had refused them, and then to her other unsecured creditors, none of whom had been paid in full. (Dkt. No. 95 ¶¶ 4, 8-9).

After briefing but before the court had ruled, Begoun sought discovery from Chase Bank to determine its position. (Dkt. No. 100). In response to Begoun's subpoena and accompanying set of questions, Chase Bank confirmed only that it was "**not** claiming the $16,436.49 in funds that are currently being held by the Clerk of Court." (Dkt. No. 108, Ex. B, at 1) (emphasis in original). Chase Bank objected to the rest of Begoun's remaining questions, including one about why it had returned the funds in the first place, and refused to answer them.

With Chase Bank's position as clear as it was going to be, the court construed Begoun's motion as a motion for turnover rather than a motion to withdraw unclaimed funds (Dkt. No. 112), and the parties submitted another round of briefs. The turnover motion is ready for ruling.

3. Discussion

Begoun's motion will be denied. The Trustee's position is well taken. The funds Chase Bank rejected belong first to Chase Bank and then to Begoun's unsecured creditors. Whatever is left after those creditors are paid in full will be returned to her. That result follows both from the terms of Begoun's confirmed plan and from the nature of the returned funds.

a. Plan Terms

Chapter 13 bankruptcy is designed for people with regular income who want to recover financially by "ordering, organizing, and modifying their payments to their creditors." *In re Lamont*, 740 F.3d 397, 402 (7th Cir. 2014). The debtor proposes a plan to repay all or a portion of his debts over time, and if the plan complies with the Bankruptcy Code, the bankruptcy court confirms it. *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 264 (2010). If the debtor makes all the payments his confirmed plan requires, the debtor's unsecured debts (including the unsecured portions of any secured debts) are discharged. *Lamont*, 740 F.3d at 402.

Chapter 13 plans typically take two forms: "percentage plans" and "pot plans." A percentage plan defines "what percentage of its claim each general unsecured creditor will receive without stating an exact dollar amount the debtor must pay into the plan until all claims are approved." *In re Golek*, 308 B.R. 332, 335 (Bankr. N.D. Ill. 2004). A pot plan "fixes the amount the debtor must pay into the plan, leaving in question the percentage each general unsecured creditor will receive in payment of its claim until all claims are approved." *Id.*; *see also In re Vastadore*, 516 B.R. 772, 775 (Bankr. W.D. Pa. 2014) (stating that a "pot plan" is "a defined contribution plan where the amount paid by the debtor is fixed"); *In re Dugan*, No. 04-13818-SSM, 2008 WL 3876415, at *1 n.2 (Bankr. E.D. Va. Aug. 18, 2008) (noting that in pot plans "unsecured creditors, rather than being promised a specific percentage payment of their

claims, share pro rata in the 'pot' that remains after payment of secured and priority claims").

In pot plans, consequently, the proposed dividend unsecured creditors will receive can and often does change. *See Vastadore*, 516 B.R. at 775 (noting that "the dividend paid to creditors can vary based upon the universe of claims filed and allowed"); *Dugan*, 2008 WL 3876415, at *1 ("The very nature of a pot plan is that the estimated distribution is only an estimate—neither a floor nor a ceiling—and unsecured creditors have a right to expect that they will share in the upside if fewer claims are filed than expected."); *Golek*, 308 B.R. at 335. If fewer creditors than anticipated file claims, for example, each creditor receives a larger share of the pot. If more creditors file claims, on the other hand, each creditor receives less. *See Dugan*, 2008 WL 3876415, at *1 n.2.

Begoun's plan was a pot plan. The plan required her to pay the Trustee a total of $34,566 in monthly installments over 60 months. From that amount, the Trustee would then distribute $27,556.82 to Begoun's unsecured creditors. But the plan established only the minimum her unsecured creditors would receive: it provided that non-priority unsecured claims would "be paid . . . not less than 10% of their allowed amount." (Dkt. No. 35, § E.8). That language established a floor, not a ceiling. If the "pot" allowed the Trustee to pay them more than 10%, the plan's terms enabled him to do so.[3/]

b. Returned Funds

The funds the Trustee sent to Chase Bank belonged to the pot from which Begoun was paying her creditors. When Chase Bank refused the funds and returned them to the Trustee, they

---

[3/] In fact, the Trustee did pay unsecured creditors more than 10%. Because one unsecured creditor withdrew its sizeable $59,063 claim, the Trustee was able to pay the others 27.83% of their claims.

were still part of the pot. Therefore, they are available for the Trustee to distribute to Begoun's remaining unsecured creditors.

When the trustee pays a creditor under a confirmed chapter 13 plan and the creditor returns the payments, those payments remain available to be distributed according to the plan. *See In re Hoffman*, No. 13-60831, 2019 WL 1271457, at *3 (Bankr. W.D. Va. Mar. 15, 2019); *In re Dubose*, 555 B.R. 41, 43 (Bankr. M.D. Ala. 2016); *Vastadore*, 516 B.R. at 777; *In re Bacon*, 274 B.R. 682, 684-85 (Bankr. D. Md. 2002) ("When the trustee has funds returned from secured creditors, the trustee is obligated to disburse those funds in accordance with the confirmed [p]lan."); *see also In re Pegues*, 266 B.R. 328, 336 (Bankr. D. Md. 2001). If unsecured creditors have not been paid in full, the trustee not only can but must use the returned payments to pay them until they are paid in full; only then is anything available to the debtor. *See, e.g.*, *Hoffman*, 2019 WL 1271457, at *3; *Dubose*, 555 B.R. at 45-47; *Vastadore*, 516 B.R. at 776-77; *Bacon*, 274 B.R. at 684-85; *see also In re Smith*, 334 B.R. 26, 37-39 (Bankr. D. Mass. 2005).

Here, the payments that Chase Bank refused formed part of the pot available to pay Begoun's creditors. When Chase Bank returned those payments, the Trustee had to distribute them according to Begoun's confirmed plan. The plan required her to pay her creditors a total of $34,566, $27,556.82 of it to unsecured creditors. Because she has not paid unsecured creditors that amount, and because those creditors have not been paid in full, the Trustee is obligated under the plan to use the $16,436.39 Chase Bank returned to pay unsecured creditors until they are paid in full (if that is possible, and it is possible here (*see* Dkt. No. 82)). Once those creditors are paid, Begoun will be entitled to the balance, not before. Any other result would change the terms of her confirmed plan by lowering the pot. Those terms became binding on confirmation. 11 U.S.C. § 1327(a); *Bullard v. Blue Hills Bank*, ___ U.S. ___, 135 S. Ct. 1686, 1692 (2015).

They cannot be changed now – not without a motion under section 1329, and it is too late for that. *See* 11 U.S.C. § 1329(a) (allowing a plan to be modified "before the completion of payments").

Begoun's motion for turnover of the funds Chase Bank returned will be denied.

c. *In re Jafary*

At the status hearing when the court construed the motion as a motion for turnover, the court suggested that *In re Jafary*, 333 B.R. 680 (Bankr. S.D.N.Y. 2005), might govern the outcome here. Begoun thinks it does. Citing *Jafary*, she argues that the Trustee is unilaterally trying to increase the size of the pot, an impermissible modification of her plan. She characterizes the funds Chase Bank returned as "surplus funds" and insists they belong to her. (Dkt. No. 114, at 3-4).

Begoun is mistaken. *Jafary* is not the same as this case. In *Jafary*, the debtor's confirmed plan required him to pay a total of $19,865. All mortgage arrears would be paid through the trustee, and unsecured creditors would receive less than 100% of their claims. As it happened, the debtor was able to pay off his case early by refinancing his mortgage. But when the new lender disbursed the proceeds of the refinanced loan, the mortgagee ended up receiving a double payment of its arrears – once through the payoff of the mortgage and once from the trustee through the payoff of the case. *Jafary*, 333 B.R. at 682-83. The mortgagee returned the trustee's payment, and the trustee proposed to use those funds to pay unsecured creditors. *Id.* at 683.

The debtor then moved to bar the trustee from making further distributions to unsecured creditors. He maintained that he had complied with the terms of his plan, paying exactly what he was required to pay, and the payment the mortgagee had returned to the trustee belonged to him.

The trustee disagreed, contending the money should be paid to unsecured creditors. Because the debtor's plan was a "pot plan," the trustee said, he did not need to modify the plan to increase the percentage paid to unsecured creditors. *Id.* at 686-87.

In rejecting the trustee's argument, the court in *Jafary* distinguished between increasing the pot and increasing the dividend to unsecured creditors. Variations in amounts paid to unsecured creditors, the court said, are "determined by the number and amount of claims filed," "not by any increase in the pot itself." *Id.* at 687. Because the debtor had already paid everything the plan required him to pay, the trustee's proposal to distribute the returned payment to unsecured creditors was an attempt to "unilaterally . . . increase the amount of the pot," something he could not do without moving to modify the plan. *Id.* Otherwise, the terms of the plan were binding. *Id.* The returned payment belonged to the debtor.

Unlike the trustee in *Jafary*, the Trustee here is not proposing to increase the pot. The funds Chase Bank returned were not a double payment Chase Bank had received but were funds Begoun's confirmed plan required her to pay. In fact, the pot here has never changed. What changed was the willingness of Chase Bank, an unsecured creditor, to accept payments on its claim. But Chase Bank's decision not to accept payments and to return them to the trustee did not alter Begoun's obligations under her confirmed plan. Begoun was still required to pay $27,556.82 to her unsecured creditors, and she has not done so. The funds are not "surplus funds" because unsecured creditors have not been paid in full. Once they are paid in full, the balance will be a "surplus" to which Begoun will be entitled. *See In re Reynolds*, 470 B.R. 138, 148 n.4 (Bankr. D. Colo. 2012).[4/]

[4/] *Jafary* in fact supports this result. The court in *Jafary* held that the trustee's effort to distribute the returned funds would increase the pot under the plan, a modification of the plan that required a motion. Begoun's effort to keep the funds Chase Bank returned would reduce the

4. Conclusion

For these reasons, the motion of debtor Judith K. Begoun for turnover of funds is denied.

Dated: August 6, 2019

A. Benjamin Goldgar
United States Bankruptcy Judge

pot under her plan, a modification that would also require a motion. But Begoun's case, like the case in *Jafary,* has ended. Begoun can no more modify the plan than the trustee in *Jafary* could. *See* 11 U.S.C. § 1329(a).