

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 08-11202-JMD
Chapter 13

James A. Rodger and
Jana M. Rodger,
Debtors

ORDER

The Court has before it the Debtors' Motion for Relief from Order or to Alter/Amend Order (Doc. No. 54) (the "Motion"). A motion to alter or amend a judgment or order filed within fourteen days after the entry of the judgement or order is governed by Federal Rule of Civil Procedure ("Rule") 59, made applicable to bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 9023. To be successful on a Rule 59 motion a moving party must establish a manifest error of law or fact or must present newly discovered evidence. Landrau-Romero v. Banco Popular de Puerto Rico, 212 F.3d 607, 612 (1st Cir. 2000). The Motion alleges that section III.C of the Court's February 5, 2010 memorandum opinion contains a manifest error of law when it explained that the below median debtors in this case must pay their disposable income not only during the first three years of their chapter 13 plan but for the duration of the plan. See In re Rodger, 2010 BNH 005. The Court does not believe that the Motion presents any new or additional arguments that were not made at the original hearing and were not addressed in that memorandum opinion. However, the argument in the Motion provides greater emphasis on one line of argument made at the original hearing. Therefore, the Court shall address that line of argument.

The Debtors contend that the Bankruptcy Code¹ does not require that they pay their disposable income for the life of their chapter 13 plan. They point out that the Bankruptcy Code only requires that a chapter 13 plan “provide for the submission of all or such portion of future earnings or other future income of the debtor to the supervision and control of the trustee as is necessary for the execution of the plan.” 11 U.S.C. § 1322(a)(1). The Debtors argue that the requirement in § 1325(b)(1)(B) does not solely act to set the minimum term of a chapter 13 plan, but only determines the amount of income that a below median debtor must commit to plan payments during the first three years of a plan.

The Debtors argue that the Court’s decision in this matter is inconsistent with the decision in In re Jones, 374 B.R. 469 (Bankr. D.N.H. 2007). In Jones, an above median debtor proposed a chapter 13 plan providing for monthly payments which were significantly less than his disposable income over the sixty month applicable commitment period, but which would pay all unsecured claims in full. The trustee objected to confirmation under § 1325(b)(1) because the debtor was not using all of his disposable income to fund the plan. Section 1325(b) was added to the Bankruptcy Code in 1984 and imposes a “disposable income test” to confirm a chapter 13 plan over the objection of a creditor or a trustee. 2 Keith M. Lundin, Chapter 13 Bankruptcy § 163.1 (3d ed. 2000 & Supp. 2004). “Section 1325(b) was substantially amended by BAPCPA in an attempt to create a bright line test to determine whether a debtor is committing all disposable income to fund the debtor’s plan.” Jones, 374 B.R. at 470 (citing 8 Lawrence P. King, Collier on Bankruptcy ¶ 1325.08[1] (Alan N. Resnick & Henry J. Sommer eds., 15th rev.

¹ Unless otherwise indicated, in this order, the terms “Bankruptcy Code,” “section” and “§” refer to title 11 of the United States Code, 11 U.S.C. §§ 101-1532, as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”), Pub. L. No. 109-8.

ed. 2008)). The court in Jones overruled the trustee's objection to confirmation of the plan under § 1325(b)(1), as amended by BAPCPA, because "§ 1325(b)(1) requires compliance with either subsection (A) or (B), but not both." Id. at 471. The chapter 13 plan in Jones satisfied the alternative requirement in § 1325(b)(1)(A) because it was paying all unsecured claims in full, even though the plan payments were less than the debtor's disposable income. In this case, the Debtors' chapter 13 plan does not pay all unsecured claims in full. Therefore, the Jones decision is not applicable in this case.

The Debtors contend that because § 1325(b)(1) is the only provision of the Bankruptcy Code that requires disposable income to be paid into the plan, its sole purpose cannot be to set the minimum plan term. They argue that it also sets the maximum duration of the time period during which they can be required to pay their disposable income. The Debtor's argument is correct in the context of a below median debtor who proposes a three-year plan which does not pay all unsecured claims in full.² Section 1325(b)(1)(B) prohibits confirmation of a plan by a below median debtor, over the objection of the trustee or a creditor, unless the Debtors commit all of their disposable income for three years. Section 1322(d)(2) prohibits a plan term longer than three years for a below median debtor, unless the Court, for cause, approves a longer term, with a maximum of five years. Therefore, the Bankruptcy Code sets the maximum and minimum plan term for a below median debtor not paying all unsecured claims in full at three years, absent cause for a longer term.

Cause to approve a longer term would include the inability of a debtor to comply with the confirmation requirements of the Bankruptcy Code despite compliance with the disposable

² Section 1325(b)(4)(B) permits confirmation of a plan proposed by a below median debtor with a term of less than three years, but only if the plan provides for payment in full of all unsecured claims.

income test by paying their disposable income under the plan for three years. Those requirements include: (1) proposing the plan in good faith;³ (2) satisfying the best interests of creditors test by paying each allowed unsecured claim holder at least as much as they would be paid in a chapter 7 liquidation proceeding;⁴ (3) payment in full of all secured claims, as modified, or, in the case of secured claims against a debtor's principal residence, the full claim without modification;⁵ and (4) complying with the other provisions of the Bankruptcy Code.⁶ Those other provisions include § 1322, which requires payment in full of all priority unsecured claims. 11 U.S.C. § 1322(a)(2).

In this case, the Debtors elected to propose and obtain confirmation of a sixty-month plan. Accordingly, the Debtors believed that cause existed when they proposed a plan in excess of three years and the Court necessarily found cause when it confirmed their chapter 13 plan on July 1, 2008. The Debtors' confirmed chapter 13 plan proposed to pay more than their disposable income over sixty months.⁷ The reason the Debtors proposed paying more than their disposable income for more than the required three years is obvious from reviewing their chapter 13 plan (Doc. No. 2). They needed the increased payments and increased term to cure arrearages on secured mortgage and tax claims on their principal residence and to pay priority administrative unsecured claims for attorneys' fees and trustee fees.

³ 11 U.S.C. § 1325(a)(3).

⁴ 11 U.S.C. § 1325(a)(4).

⁵ 11 U.S.C. §§ 1325(a)(5) and 1322(b)(2).

⁶ 11 U.S.C. § 1325(a)(1).

⁷ The Debtors's schedules I and J show their disposable income as \$766.33. Yet they proposed to pay an average of \$1,300.83 per month for sixty months.

If the Debtors' argument is correct, a below median debtor not paying unsecured claims in full could obtain the protections and automatic stay available under chapter 13 for a longer period of time than permitted under § 1322(d)(2) without utilizing all of their disposable income. The Bankruptcy Code only permits confirmation of a plan longer than three years for a below median debtor if "cause" exists. This Court does not believe that "cause" can exist when debtors are utilizing less than their disposable income during the extended term. Utilizing all of the Debtors' disposable income during the term of the plan is the policy judgment implicit in § 1322(d), as modified by § 1325(b), for all chapter 13 plans where unsecured claims are not paid in full. Below median debtors are no exception. If payment of excess income tax refunds in years four or five of the Debtors' confirmed chapter 13 plan enables them to satisfy the requirements of the Bankruptcy Code in less than sixty months, they are free to seek a further modification of their plan.

For the reasons stated above, the Court does not find any manifest error of law in its original February 5, 2010 decision. Accordingly, the Motion is DENIED.

ENTERED at Manchester, New Hampshire.

Date: February 26, 2010

/s/ J. Michael Deasy
J. Michael Deasy
Bankruptcy Judge