

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT**

In Re:

**CARL G. RICCITELLI,
Debtor.**

**Chapter 13
Case # 95-10030**

APPEARANCES:

*Jess T. Schwidde, Esq.
Glinka & Schwidde, Rutland, VT
for the debtor, Carl Riccitelli*

*Jan Sensenich, Esq.
White River Junction, VT
Chapter 13 Standing Trustee*

**MEMORANDUM OF DECISION
DENYING MOTION TO DISMISS CHAPTER 13 CASE**

The matter before the Court is the Motion to Dismiss Chapter 13 Case [Dkt. #79-1] filed by the Chapter 13 Standing Trustee (“the Motion to Dismiss”). The debtor filed an Objection to Trustee’s Motion to Dismiss Case [Dkt. #81-1] and a Supplemental Memorandum in Opposition to Trustee’s Motion to Dismiss [Dkt. #86-1]. For the reasons set forth below, the Motion to Dismiss is denied.

Background

The Debtor filed for bankruptcy relief under chapter 13 of Title 11 U.S.C. (“the Bankruptcy Code”) on January 13, 1995. The debtor’s proposed amended plan was confirmed on March 10, 1995. The debtor’s amended chapter 13 plan was modified by Order of this Court on September 22, 1998. On November 22, 2000, the Chapter 13 Standing Trustee filed a Motion to Dismiss the case pursuant to 11 U.S.C. §1307(c) on the grounds that “the case was filed on January 13, 1995 and the original Plan was confirmed on March 10, 1995, over 60 months ago.” It is noted that the debtor’s Modified Amended Plan provided for payments to unsecured creditors from any recovery in a contemplated adversary proceeding. This Court had entered summary judgment

adverse to the debtor in the subject adversary proceeding and the debtor appealed timely. The District Court affirmed the decision of the Bankruptcy Court and the debtor has filed a further appeal which remains pending with the Second Circuit Court of Appeals.

The trustee seeks dismissal since “[a]t this point there is no time remaining in the plan to further litigate these claims or to in any way modify the Plan.” The debtor objects to dismissal contending that (i) the five year limitation period may run from the date the first payment under the plan becomes due rather than the petition filing date, (ii) the debtor has completed all direct payments under the plan and the Modified Amended Plan provides for the pending litigation to go forward and allocates all proceeds from the litigation to unsecured creditors and does not set any time limits for completion of the litigation, (iii) the amended plan complied with the statutory duration period when approved, and (iv) the trustee is estopped from seeking dismissal of the case at this time since he continued accepting payments from the debtor beyond the 60-month period.

Discussion

The Bankruptcy Code mandates that a chapter 13 plan may not provide for payments over a period that is longer than three years unless the Court, upon a finding of good cause, approves a longer period not to exceed five years. 11 U.S.C. §1322(d). The chapter 13 standing trustee asserts that §§ 1322(d) and 1307(c) provide for dismissal of a case in which plan payments are to be made for a period in excess of 60 months, where the plan as confirmed or modified requires plan payment to be completed over a period longer than three years but less than five years. [See Modified Amended Plan, pt. III, para. 2]. The Modified Amended Plan also indicates that “unsecured creditors shall be paid their allowed claims from the proceeds of the adversary proceeding.” [See Modified Amended Plan, pt. II, para. 4].

Assuming *arguendo* that the appropriate starting date for determining the plan duration is the date on which the debtor is first obligated to make payments under an unconfirmed plan (i.e., within 45 days after petition is filed), as opposed to the date on which the first payment becomes due under a confirmed plan, see In re

Nicholes, 184 BR 82 (BAP 9th Cir. 1995); In re Duckett, 139 B.R. 6 (Bankr. E.D.Tex. 1992), it appears that the debtor's final plan payments still exceed five years. However, after considering the language of §1322(d), I find that this provision merely sets an outer limit of five years for payments approved for cause under a chapter 13 plan, but does not require dismissal if plan payments extend beyond five years due to subsequent events. *See In re Black*, 78 B.R. 840 (Bankr.S.D.Ohio 1987)(actual plan payments may exceed five years); *see also In re Garcia*, 2000 WL 420665 (Bankr. N.D.Cal. 2000)(subsequent events may properly require payments beyond five years).

There is no argument that the Amended Chapter 13 Plan or Modified Amended Chapter 13 Plan approved a prohibited payment schedule longer than five years. Moreover, there is no contention that the debtor has acted in bad faith or that allowing payments to occur beyond five years because of the ongoing litigation in the adversary proceeding prejudices the unsecured creditors. On the contrary, it appears that the unsecured creditors stand to benefit if the debtor is allowed to continue pursuit of his appeal and, if successful, to use the proceeds to fund the plan. It also appears that the debtor's pursuit of the appeal is motivated in large part by the debtor's desire to pay a dividend to unsecured creditors. It would benefit no party to dismiss this case at this time and would not appear to serve any public policy either.

While §1307(c) provides a non-exhaustive list of grounds for dismissal or conversion for cause, the basis for dismissal raised by the chapter 13 standing trustee does not appear to this Court to support dismissal under §1307(c). Specifically, the trustee has not interposed any allegation of misconduct by the debtor and made clear that the only basis for his motion is that the vicissitudes of protracted litigation extend the case beyond the five-year time period envisioned for chapter 13 plan payments. As with the debtors in In re Black, *supra*, there is no evidence of a material default nor unreasonable delay under the Modified Amended Plan. It also appears undisputed that the debtor has completed all payments he was required to make from his own funds under his plan.

Taking into consideration that the debtor has reportedly made his final plan payment over the course of an extended plan and that there is no contention of undue delay, vexatious litigation or obstructive tactics in the adversary proceedings or related appeals, this Court finds that cause does not exist to warrant dismissal of this case. Nor does it appear that the chapter 13 standing trustee is for any reason estopped from raising the issue of dismissal under these circumstances. *See In re Roberts*, 247 B.R. 592 (Bankr. D.R.I. 2000).

There is no question that the standing chapter 13 trustee's duties include overseeing the administration of chapter 13 cases and ensuring that chapter 13 plans proceed in accordance with the mandates of the Bankruptcy Code; nor is there any question that the statutory five-year limit must be enforced. It is a reflection of his diligence that the trustee brought the instant motion when he determined that the plan would remain open for more than five years. The denial of this motion turns on the unusual circumstances of this case and should not be interpreted as an indication that this Court will confirm plans which exceed five years in length or generally permit chapter 13 cases to continue for more than five years.

Conclusion

Since the confirmed plan does not provide for a period of repayment in excess of the statutory five-year limit, the debtor completed all payments that he was to make according to the terms of the confirmed plan, the cause of the plan payments exceeding five years is beyond the control of the debtor or any other party in the case, it is clearly in the best interest of the estate to keep the case open until final resolution of the adversary proceeding, and there is no evidence of bad faith by the debtor or other grounds which constitute cause for dismissal, the trustee's Motion to Dismiss is denied.

Dated this 2nd day of May, 2001

/s/ Colleen A. Brown
Colleen A. Brown
U.S. Bankruptcy Judge