

IT IS SO ORDERED.

**Dated: May 03, 2007
02:17:36 PM**



**Honorable Kay Woods
United States Bankruptcy Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO**

IN RE:

TRACY L. EVANS,

Debtor.

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CASE NUMBER 06-41254

Chapter 13

HONORABLE KAY WOODS

M E M O R A N D U M O P I N I O N
NOT INTENDED FOR NATIONAL PUBLICATION

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This cause is before the Court on Motion of Michael A. Gallo, Standing Chapter 13 Trustee, for an Order Objecting to Confirmation of Debtor's Plan ("Objection to Confirmation") filed by Michael A. Gallo ("Trustee") on November 21, 2006. Trustee argues that the chapter 13 plan of Debtor Tracy L. Evans' ("Debtor") does not conform with 11 U.S.C. §§ 1325(a)(4) and (b)(1)(B). Debtor filed Debtor's Brief in Opposition to Trustee's Objection to Confirmation on January 3, 2007 ("Debtor's Response").

This Court held a hearing on this matter on January 4, 2007, at which time the Court set a briefing schedule. On March 1, 2007, Trustee filed Standing Chapter 13 Trustee's Brief in Support of Plan Modification ("Trustee's Brief"). On March 15, 2007, Debtor filed Debtor's Reply Brief to Chapter 13 Trustee's Brief in Support of Plan Modification ("Debtor's Brief"). On April 3, 2007, Trustee filed Reply of Standing Chapter 13 Trustee to Debtor's Reply of Plan Modification ("Trustee's Reply"). This Court set an evidentiary hearing for May 7, 2007.

This Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1334. Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(A), (B) and (L). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

I. FACTS

On August 11, 2006 ("Petition Date"), Debtor petitioned for relief under chapter 13 of the Bankruptcy Code. Debtor's Schedule C (Property Claimed as Exempt), filed on the Petition Date, lists "Payment in compensation for loss of future earnings - Delphi buyout" as exempt pursuant to O.R.C. §§ 2329.66(A)(10)(b), (A)(11) and (A)(12)(d). On the same date, Debtor filed her Chapter 13 Plan ("Plan"), which provides for payments of \$574.00 a month for 42 months (\$24,108.00 in total). Pursuant to the Plan, unsecured creditors will receive a 5% dividend.

On the Petition Date, Debtor was employed at Delphi Packard Electric ("Delphi") with an annual salary of \$58,122.48. Prior to the Petition Date, Debtor elected to participate in an attrition program negotiated by and between Delphi's management and Debtor's Union.¹ Debtor claims she "was informed by her employer that should she elect not to sever her ties with the company and take the buyout, there would be no guarantee of future employment, there would be no guarantee of the hourly rate to be paid, and no guarantee of any benefits." (Debtor's Response at 1-2 (unnumbered).) Debtor elected the "Voluntary Quit" program and received a pre-tax lump sum payment of \$140,000.00; after taxes, Debtor projects she will receive a net amount of \$92,000.00

¹ Debtor states that she "recently" elected to participate in the attrition program (Debtor's Response at 1.), but Debtor's petition represents that she elected to participate in this program before the Petition Date. (See Schedule C - Property Claimed as Exempt.)

(the "Buyout"). In return for the Buyout, Debtor agreed to sever all ties with General Motors Corporation ("GM") and Delphi no later than January 1, 2007 and relinquish all potential benefits from Delphi and GM, including, but not limited to, healthcare and life insurance benefits. Debtor alleges that she plans to use the Buyout to support herself, fund the Plan and pay \$509.00 a month in child support payments for the next two years² while she completes a course of training to reenter the workforce. Debtor is currently unemployed.

II. ANALYSIS

Trustee argues that the Plan cannot be confirmed pursuant to 11 U.S.C. §§ 1325(a)(4) and 1325(b)(1)(B).

A. § 1325(a)(4)

The Court first addresses Trustee's arguments under 11 U.S.C. § 1325(a)(4), which states in pertinent part:

Except as provided in subsection (b), the court shall confirm a plan if -

(4)the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date[.]

² Debtor's annual salary as of the Petition Date was \$58,122.48. As a consequence, the pre-tax lump sum payment of \$140,000.00 exceeds two years salary of \$116,244.96 by approximately \$23,755.00. The Buyout is taxable in one year rather than two. Consequently, two years of salary cannot be compared to the Buyout on an "apples to apples" basis.

11 U.S.C. § 1325(a)(4). This section has been referred to as the "Chapter 7 Liquidation Test" and the "Best Interests Test."

To determine if Debtor meets the Chapter 7 Liquidation Test, the Court must calculate the value of Debtor's non-exempt assets. Consequently, the primary question under this analysis is whether the Buyout is exempt.

Section 522 of the Bankruptcy Code permits Debtor to exempt certain property that would otherwise come within the purview of the bankruptcy estate for the benefit of creditors.

Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (1) or, in the alternative, paragraph (2) of this subsection. . . .

11 U.S.C. § 522(b)(1).

A trustee or other party in interest may object to a debtor's claimed exemptions, but the objection must be made timely.

A party in interest may file an objection to the list of property claimed as exempt only within 30 days after the meeting of creditors held under § 341(a) is concluded or within 30 days after any amendment to the list or supplemental schedules is filed, whichever is later. The court may, for cause, extend the time for filing objections if, before the time to object expires, a party in interest files a request for an extension.

FED. R. BANKR. P. 4003(b). If an objection to exemption is not timely made, the exemption cannot be later challenged. *Taylor v. Freeland and Kronz*, 503 U.S. 638 (1992) (Trustee's failure to object to debtor's claimed exemption within the 30-day time period

prevented trustee from later challenging the validity of the exemption.)

Ohio has opted out of the federal exemptions; as a consequence, exemptions in O.R.C. § 2329.66 (Property that person domiciled in this state may hold exempt) controls with respect to the amount of Debtor's exemptions and the kind of property that is exempt.

On the Petition Date, Debtor listed the Buyout as exempt pursuant to O.R.C. §§ 2329.66(A)(10)(b), (A)(11) and (A)(12)(d). Although Trustee has not filed a formal objection to Debtor's claimed exemptions, the Court deems the Objection to Confirmation to constitute an objection to exemption since it raises and addresses whether the Buyout is exempt. Because Trustee's Objection to Confirmation was filed before the meeting of creditors was concluded, it is timely. As a result, Trustee has timely objected to Debtor's claimed exemptions.

Debtor claims the Buyout is exempt under O.R.C. § 2329.66(A)(11), which provides that a debtor may hold his/her right "to receive spousal support, child support, an allowance, or other maintenance to the extent reasonably necessary for the support of the person and any of the person's dependants" as property exempt from execution, garnishment, attachment, or sale to satisfy a judgment or order. O.R.C. § 2329.66(A)(11). The Buyout is clearly not spousal or child support. Accordingly, the only

question is whether the Buyout constitutes an allowance or other maintenance. The Court finds that it does not.

While the grant of exemption in . . . section [2329.66(A)(11)] extends to assets or claims broader than child or spousal support awarded in connection with a marital or support action, the courts of Ohio have limited the application of the statute to those situations where the purpose of the grant was to provide support for the debtor or his/her dependants. See, e.g., *In re Jackson*, 348 B.R. 771 (Bankr. S.D. Ohio 2006); *In re Hageman*, 260 B.R. 852 (Bankr. S.D. Ohio 2001); *Kandel v. Papai (In re Papai)*, 1197 Bankr. LEXIS 2190 (Bankr. N.D. Ohio 1997). To hold otherwise, opens the door to assertion of exemptions in all manner of income, gifts, and assets coming to debtors.

In re Delmoe, - - B.R. - - -, 2007 WL 926978 *4 (Bankr. S.D. Ohio 2007)(Holding that monthly income of \$600.00 from trust was not exempt under O.R.C. § 2329.66(A)(11).) The purpose of the Buyout was to provide consideration for Debtor's relinquishment of her employment benefits and her employment rights with Delphi and GM. (Debtor's Brief at 1.) Since it is not the purpose of the Buyout to provide support for Debtor or her dependants, the Buyout is not exempt under O.R.C. § 2329.66(A)(11).

Debtor next claims that the Buyout is exempt pursuant to O.R.C. § 2329.66(A)(12)(d).³ This section provides that a debtor's "right to receive, or moneys received during the preceding twelve calendar months from, . . . [a] payment in compensation for loss of future earnings of the [debtor] or an individual of whom the

³ The parties did not cite and the Court could not find any case law that expounded upon this exemption.

[debtor] is or was a dependant, to the extent reasonably necessary for the support of the debtor and any of debtor's dependants" is property exempt from execution, garnishment, attachment, or sale to satisfy a judgment or order. O.R.C. § 2329.66(A)(12)(d). Sometime in the twelve month period preceding the Petition Date, Debtor elected the "Voluntary Quit" option offered by the Special Attrition Plan, and thus acquired the right to receive the Buyout. This program required Debtor to leave her position with Delphi and forfeit benefits offered by her employment. Accordingly, Debtor's right to receive the Buyout was in lieu of future compensation and benefits from Delphi. Consequently, this Court finds that the Buyout is a "payment in compensation for loss of future earnings" and is encompassed within the exemption set forth in O.R.C. § 2329.66(A)(12)(d).

Although the Buyout comes within the exemption in O.R.C. § 2329.66(A)(12)(d), the exemption is restricted to the portion of the Buyout, if any, that is "reasonably necessary for the support of the debtor and any of debtor's dependants." The difference, if any, between the Buyout and what is reasonably necessary for the support of Debtor and Debtor's dependants is not exempt. The Court does not have sufficient information before it to calculate what amount of the Buyout, if any, is "reasonably necessary for the support of [D]ebtor" and her dependants. As a result, an evidentiary hearing is necessary to determine what amount, if any, of the Buyout is exempt. This inquiry will be impacted by the

length of time Debtor may reasonably require the Buyout for support.

The Court will not address Debtor's claimed exemption pursuant to O.R.C. § 2329.66(A)(10)(b) because the Court holds that the Buyout is exempt under O.R.C. § 2329.66(A)(12)(d).

B. § 1325(b)(1)(B)

Trustee also argues that the Plan may not be confirmed pursuant to 11 U.S.C. § 1325(b)(1)(B), which provides in pertinent part:

If the trustee or the holder of an allowed secured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan -

. . . .
the plan provides that all of the debtor's projected disposable income to be received in the applicable commitment period beginning on the date that the first payment is due under the plan will be applied to make payments to unsecured creditors of the plan.

11 U.S.C. § 1325(b)(1)(B). This section has been referred to as the "Disposable Income Test" and as the "Best Efforts Test."

The Disposable Income Test requires the Court to determine what amount of the Buyout, if any, constitutes disposable income; in other words, the Court is required to determine what portion of the Buyout, if any, is reasonably necessary for the support of Debtor and Debtor's dependants. If all or part of the Buyout is not reasonably necessary for the support of Debtor and her dependants, that amount constitutes disposable income. As stated above, the Court does not have sufficient information to determine

(i) what portion of the Buyout, if any, is reasonably necessary for the support of Debtor and Debtor's dependants, and (ii) the length of time the Buyout is or may be needed to support Debtor and her dependants. This, in essence, is the same issue that needs to be addressed at an evidentiary hearing to determine if the Buyout in whole, or in part, is exempt.

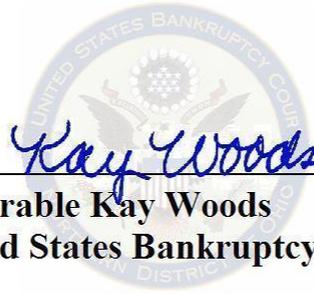
III. CONCLUSION

The Buyout is exempt property pursuant to O.R.C. § 2329.66(A)(12)(d), but only to the extent it is "reasonably necessary for the support of the [D]ebtor and any of [D]ebtor's dependants." Likewise, the test for disposable income in 11 U.S.C. § 1325(b)(1)(B) is based on what is reasonably necessary to support Debtor and Debtor's dependants. The facts before this Court are insufficient to permit the Court to determine whether all, a portion, or none of the Buyout is reasonably necessary for the support of Debtor and Debtor's dependants. Consequently, the evidentiary scheduled for May 7, 2007 is needed to ascertain those facts relevant to (i) the reasonableness and necessity of the Buyout (or portion thereof) as support for Debtor and her dependants; and (ii) the length of time the Buyout is needed for such support.

An appropriate order will follow.

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IT IS SO ORDERED.



**Dated: May 03, 2007
02:17:36 PM**

**Honorable Kay Woods
United States Bankruptcy Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO**

IN RE:

TRACY L. EVANS,

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CASE NUMBER 06-41254

Chapter 13

HONORABLE KAY WOODS

O R D E R

For the reasons set forth in this Court's Memorandum Opinion entered on this date, the right to receive and/or moneys received by Debtor Tracy L. Evans ("Debtor") in consideration for her participation in Delphi Packard Electric's special attrition program is exempt pursuant to O.R.C. § 2329.66(A)(12)(d), but only to the extent "reasonably necessary for the support of the [D]ebtor and any of [D]ebtor's dependants." Likewise, the test for disposable income in 11 U.S.C.1325(b)(1)(B) is also based on what is reasonably necessary for the support of Debtor and Debtor's

dependants. The facts presently before this Court are insufficient to permit the Court to determine whether all, a portion, or none of the Buyout is reasonably necessary for the support of Debtor and Debtor's dependants. Consequently, the Court will conduct an evidentiary hearing on May 7, 2007 at 9:30 a.m. to ascertain those facts relevant to (i) the reasonableness and necessity of the Buyout (or portion thereof) as support; and (ii) the length of time the Buyout is needed for such support.

IT IS SO ORDERED.

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