IT IS ORDERED as set forth below:

Date: August 26, 2016

Paul Baisier

Paul Baisier
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

In re:	CASE NUMBER
CHARLES LEONARDO TOOMER, SR.,	**15-55841-PMB**
Debtor.	CHAPTER 13

MEMORANDUM OPINION AND INTERIM ORDER ON DEBTOR'S MOTION TO RETAIN SETTLEMENT PROCEEDS

This matter comes before the Court on the *Debtor's Motion to Retain Tax Refund*,[1] filed on April 12, 2016 (Docket No. 44)(the "Motion"), and the Chapter 13 Trustee's (the "Trustee") *Trustee's Objection to Debtor's Exemptions*, filed on May 20, 2016 (Docket No. 52)(the "Objection"). The Trustee filed a response objecting to the Motion on May 3, 2016 (Docket No. 48) (the "Response"). The Motion and Response were set for hearing on May 12, 2016, at 10:00

[1] The title of the Motion appears to be an error, as in the Motion the Debtor seeks to retain the Net Proceeds (as defined below) of the settlement of a lawsuit, as described in greater detail below, rather than a tax refund.

a.m. (the "First Hearing"), and the Objection was set for hearing on June 23, 2016 at 10:00 a.m. (collectively, with the First Hearing, the "Hearings"). Counsel for the Debtor appeared at the Hearings in support of the Motion and in opposition to the Objection, and counsel for the Chapter 13 Trustee appeared at the Hearings in opposition to the Motion and in support of the Objection. No other party filed a response to the Motion or the Objection or appeared at either of the Hearings.[2]

BACKGROUND

The Debtor is a truck driver, and a divorced father of seven (7) children, all of whom live with him. (See, Schedules I & J, Docket No. 19). The Debtor filed this case on March 31, 2015 (the "Petition Date"). In his petition, the Debtor did not note the existence of any personal injury claims (See Docket No. 1, *passim*).

On August 26, 2015, the Debtor filed his *Third Amended Chapter 13 Plan* (Docket No. 26)(the "Plan"). The Plan provides for payments of $462 a month to the Trustee, a thirty-six (36) month applicable commitment period, and a zero percent (0%) dividend to unsecured creditors. On October 8, 2015, this Court entered its *Order Confirming Plan* (Docket No. 29), confirming the Plan. That Order was not appealed and is final.

On January 13, 2016, the Debtor sought Court approval to employ counsel to prosecute a personal injury claim (Docket No. 35). In that application, the Debtor disclosed that he had retained counsel to prosecute an unidentified "personal injury claim" (the "Claim") on November 24, 2014 – or four (4) months prior to the Petition Date. On January 21, 2016, the Court approved the engagement, subject to objection by any party within twenty-one (21) days (Docket

[2] On the day of the First Hearing, the Debtor filed an additional exhibit to the Motion (Docket No. 49). After the First Hearing, the Court requested that the parties submit briefs. In response to this request, the Debtor filed *Debtor's Supplemental Brief Supporting the Motion to Retain Settlement Proceeds* (Docket No. 51), and the Trustee filed *Chapter 13 Trustee's Brief in Support of His Response to Debtor's Motion to Retain* (Docket No. 55). All of these pleadings were considered in connection with this Order.

No. 36). No objection was filed, and the engagement of counsel was thus approved. No amendment was made at that time to Schedule B to reflect the existence of the Claim or to Schedule C to exempt any portion of the Claim.

On February 29, 2016, the Debtor filed his "*Debtor's Motion to Allow Settlment (sic) of Claim and Application for Compensation of Special Counsel*" (Docket No. 39)(the "Settlement Motion"). In the Settlement Motion, the Debtor sought Court approval of a settlement of the Claim for $23,500, and for the payment of the fees and expenses for special counsel. The Settlement Motion was approved by Order of this Court on May 27, 2016 (Docket No. 53). Pursuant to that Order, the remaining balance of the settlement, $13,477.91 (the "Net Proceeds"), is being held by the Trustee pending further Order of this Court.

The Debtor filed the Motion on April 12, 2016. In the Motion, the Debtor seeks to retain the Net Proceeds to have his house painted (at a cost of approximately $7,200), to replace the hot water heater, a leaking toilet and a broken pipe (at a cost of approximately $5,100), and to acquire four (4) new tires for his 2004 Chevrolet Suburban (at a cost of approximately $1,200). The Debtor asserts that he has been cited by his homeowners' association multiple times for the exterior condition of his home, thus creating the need for the painting of the home. The Debtor included with his Motion a single third party estimate for each of the expenses.[3]

In the Response, the Trustee objects to the retention of the Net Proceeds by the Debtor, which he asserts should be paid to creditors under the Debtor's confirmed composition Plan. The Trustee's objection is that the Net Proceeds represent "disposable income" under 11 U.S.C. § 1325(b)(2) that the Debtor must contribute to the payment of his creditors unless he can prove that the expenses are reasonably necessary for the maintenance and support of the Debtor or his

[3] The Debtor appears to have attached a second estimate for the house painting; however, on the filed copy of the Motion, that document is illegible.

dependents under 11 U.S.C. § 1325(b)(2)(A), whether or not the Net Proceeds are in any respect exempt property. The Trustee also asserts that the retention of the Net Proceeds by the Debtor would be a violation of 11 U.S.C. § 1325(a)(4). In support of his position, the Trustee in the Response cites In re Springer, 338 B.R. 515 (Bankr. N.D. Ga. 2005)(Drake, J.), from this District.[4]

On May 16, 2016, after the First Hearing, the Debtor filed amendments to Schedules B and C, including the Claim in his Schedules for the first time and claiming virtually all of the Net Proceeds as exempt.[5] In response, the Trustee filed the Objection, stating that it was not clear that the claimed exemptions were factually applicable to the Net Proceeds or that the proposed expenditures were reasonable and necessary, and insisting that the Net Proceeds be applied to the payment of creditors whether or not they are exempt, again citing Springer.

DISCUSSION

Standard for Review

The Response is based on the Trustee's assertion that the Net Proceeds constitute "disposable income" that must be contributed to the Plan pursuant to 11 U.S.C. § 1325(b), and/or that retention of the Net Proceeds would violate 11 U.S.C. § 1325(a)(4). Those issues may have been viable before October 8, 2015 – the date on which the Plan was confirmed. At that point, 11 U.S.C. § 1325 ceased to be directly relevant. The Plan has been confirmed. That simple fact

[4] The Trustee also cites In re Stephens, 265 B.R. 335 (S.D. Fla. 2001); Hagel v. Drummond (In re Hagel), 184 B.R. 793 (9th Cir. BAP 1995); Watters v. McRoberts (In re Watters), 167 B.R. 146 (S.D. Ill. 1994); In re Pendleton, 225 B.R. 425 (Bankr. E.D. Ark. 1997); Gaertner v. Claude (In re Claude), 206 B.R. 374 (Bankr. W.D. Pa. 1997); In re Minor, 177 B.R. 576 (Bankr. E.D. Tenn. 1995) and In re Jackson, 173 B.R. 168 (Bankr. E.D. Mo. 1994).

[5] As noted *infra*, the Debtor's asserted exemptions seek to exempt all but approximately $74 of the Net Proceeds.

distinguishes this case from Springer and from many of the other cases cited by the Trustee in his Response, where 11 U.S.C. § 1325(b) and confirmation are the focus of the inquiry.[6]

After confirmation, whether the Debtor has additional "disposable income", or whether his Plan has turned out to be violative of 11 U.S.C. § 1325(a)(4) due to an undisclosed cause of action, becomes the potential concern of two other sections of the Bankruptcy Code – 11 U.S.C. § 1307(c) and 11 U.S.C. § 1329.[7] Under 11 U.S.C. § 1307(c), the Trustee could ask that the case be dismissed "for cause". "Cause" is a broad concept that can encompass failure to make a new source of disposable income available to creditors in a composition plan like the Plan in this case, and may also be broad enough to encompass dismissal of the case for failure to disclose a known cause of action.[8]

Alternatively, under 11 U.S.C. § 1329, the Trustee can propose a modification to the Plan to require the Debtor to contribute to the Plan any new source of income, or the proceeds of any undisclosed cause of action, and unless the modification is disapproved by the Court, the Plan as

[6] Stephens, (pre-confirmation); Hagel (pre-confirmation); Watters (pre-confirmation); Pendleton (post-confirmation, but interpreting plan provision requiring payment of all disposable income to plan); Claude (case status not discussed); Jackson, (post-confirmation, but considers 1325 without explanation). The only case cited by the Trustee that addresses this question in precisely the same post-confirmation context faced here is In re Minor, 177 B.R. 576 (Bankr. E.D. Tenn. 1995). In Minor, the trustee filed a motion for a post-confirmation modification (and an objection to an exemption) regarding a prepetition workers' compensation settlement that was disclosed by an amendment to the schedules made two (2) weeks prior to confirmation. By stipulation, the parties addressed to the Court the questions of whether workers' compensation payments, which were exempt under state law, were either property of the estate or disposable income. The court in Minor found that they were property of the estate and disposable income to the extent that they were not necessary for the support of the debtor, but that they were exempt. It is not clear from the decision what the court considered the import of those determinations to be, but it made clear that it left the decision as to whether or not to approve the modification proposed by the trustee under 11 U.S.C. §1329 for another day. Unfortunately, that decision is not reported – but the determination to split those decisions makes clear that the court in Minor would agree that whether the property is property of the estate or disposable income is not relevant to whether the property must be used as a basis to increase plan payments.

[7] In a case like this one, where the Debtor hired a lawyer to pursue the Claim prior to the Petition Date, asserts in his pleadings that the accident was a cause of his bankruptcy case (Docket No. 51, p. 1), and did not disclose the Claim prior to confirmation, there is also the possibility of revoking confirmation or vacating the confirmation order, if a full review of the facts would support such relief and a complaint or request is filed timely. 11 U.S.C. §1330(a); Fed. R. Bankr. Pro. 9024.

[8] See Drake, et. al., 2 CHAPTER 13 PRACTICE AND PROCEDURE § 20:6 (Thomson Reuters 2d. ed. Dec. 2014).

modified becomes the Plan.[9] In considering any proposed modification, 11 U.S.C. § 1329 provides that the plan "may" be modified, and by using "may" instead of "shall," Congress provided courts with discretion. 11 U.S.C. § 1329(a); see, e.g., In re McAllister, 510 B.R. 409, 430 (Bankr. N.D.Ga. 2014)(Bonapfel, J.). Consequently, in addressing a proposed modification, the Court may consider the Debtor's proposed use of the funds,[10] the Debtor's "ability to pay" more generally,[11] whether the funds are exempt,[12] and any other factors the Court may deem relevant.

Claimed Exemptions

Georgia law provides an exemption of ten thousand dollars ($10,000.00) for amounts paid "on account of bodily injury, not including pain and suffering or compensation for actual

[9] Since either of these circumstances would constitute a sufficient change in circumstances to support an amendment if a change in circumstances is required, this Court need not decide whether a change is circumstances is always required for a modification. See Drake et al., 2 CHAPTER 13 PRACTICE AND PROCEDURE §11:3 (describing the split of authority as to whether a "change in circumstances" is required to approve a modification).

[10] It seems clear that, in determining whether to approve a modification, the Court is not required to consider whether the funds are "disposable income", as that term is defined in 11 U.S.C. § 1325(b), since § 1329(b)(1) requires compliance with § 1325(a) and other specific portions of Chapter 13, but not with § 1325(b). In that content, the Court cannot read § 1325(a)(1) (which requires compliance with all of Chapter 13) to incorporate § 1325(b), since that would render superfluous the other specific statutory references in § 1329(b)(1). In that respect, this Court disagrees with the position taken on this issue in In re Stretcher, 466 B.R. 891 (Bankr. W.D. Tex. 2011), cited by the Trustee.

[11] The ability-to-pay doctrine provides that a plan is not proposed in good faith if the debtor can pay more than the proposed plan payments. See Waldron v. Brown (In re Waldron), 536 F.3d 1239, 1246 (11th Cir. 2008)(quoting Arnold v. Weast (In re Arnold), 869 F.2d 240, 242 (4th Cir. 1989) ("Congress . . . intended . . . that the debtor repay his creditors to the extent of his capabilities during the Chapter 13 period."). This includes assets and property acquired postpetition. Id. ("Certainly Congress did not intend for debtors who experience substantially improved financial conditions after confirmation to avoid paying more to their creditors."); see also Germeraad v. Powers, 2016 WL 3443342, 2016 U.S. App. LEXIS 11433, No. 15-3237 (7th Cir. June 23, 2016)(permitting a plan amendment proposed by a Chapter 13 trustee based on an increase in the debtor's income without a requirement that the amendment be required by good faith); McAllister, 510 B.R. at 421-424.

[12] Whether the Court can consider amendments that require the dedication to a plan of property that is otherwise validly exempt (without consideration of the proposed uses of the property by the debtor) is a question that the Court may be required to address once it determines whether and to what extent the balance of the Net Proceeds are exempt property. There is certainly case law that might suggest that it cannot. See Law v. Siegel 134 S.Ct. 1188, 1197-98, 188 L.Ed.2d 146 (2014); McAllister, 510 B.R. at 427-430 (citing relevant 11th Circuit cases). Whether the proceeds of the Claim are entirely or nearly entirely exempt is also relevant to the question of whether a modification to the Plan might be appropriate to cure a "best interest of creditors" issue that was not known at confirmation due to the failure by the Debtor to disclose the Claim.

pecuniary loss . . . ." O.C.G.A. § 44-13-100(a)(11)(D). It also provides an exemption of up to five thousand six hundred dollars ($5,600.00), a so-called "wild card exemption," if the debtor does not claim the full ten thousand dollars ($10,000.00) of the homestead exemption provided in O.C.G.A. § 44-13-100(a)(1).[13]

In this case, the Debtor previously claimed two thousand one hundred ninety-six dollars ($2,196.00) of the wild card exemption for unrelated assets, leaving three thousand four hundred four dollars ($3,404.00) available to the Debtor under the wild card exemption. The Debtor had not previously claimed any of the ten thousand dollars ($10,000.00) allowed for a personal injury claim under O.C.G.A. § 44-13-100(a)(11)(D). The Debtor has now claimed $3,404 of the Net Proceeds using the balance of his wild-card exemption and $10,000 of the Net Proceeds using the personal injury exemption, leaving only seventy-three dollars and ninety-one cents ($73.91) of the Net Proceeds not covered by a claim of exemption.

The Trustee objects to all of the exemptions claimed by the Debtor, asserting that the funds must be paid to the Trustee for distribution under the Plan whether or not they are exempt. This "objection" is not really an objection to the validity of the claimed exemptions *qua* exemptions,[14] and is apparently asserted to preserve the Trustee's position with regard to the required use of the exempted funds in light of certain prior case law that foreclosed his position in the absence of such an objection.[15]

As to the specific exemptions claimed by the Debtor, the Trustee does not appear to assert that the Debtor is not entitled to use his remaining "wild-card" exemption on the Net

[13] The amount of the wild-card exemption was increased effective July 1, 2015, but since this case was filed before the effective date of the changes, these older exemption amounts apply.

[14] See McAllister, 510 B.R. at 429-430.

[15] Gamble v. Brown (In re Gamble), 168 F.3d. 442 (11th Cir. 1999); In re Hunton, 253 B.R. 580, 581 (Bankr. N.D.Ga. 2000) (Drake, J.).

Proceeds. As to the exemption under O.C.G.A. § 44-13-100(a)(11)(D), the Debtor states that there is no documentation that sets forth the nature or origin of the settlement amount (i.e. what amount was paid for what damage or injury); that instead the settlement was agreed to and paid in lump sum before the filing of a complaint and without the execution of any settlement agreement. In his Objection, the Trustee demands proof that the claimed exemption is valid; in other words, proof that the monies were paid "on account of bodily injury." In that regard, the Trustee misapprehends the burden of proof, which is on him to prove by a preponderance of the evidence that the exemption is improper. Silliman v. Cassell (In re Cassell), 713 F.3d 81, 81-82 (11th Cir. 2013), adopting Silliman v. Cassell, 292 Ga. 464, 738 S.E.2d 606, 612 (2013); In re Taylor, 523 B.R. 915, 920-21 (Bankr. S.D. Ga. 2014) (citing Fed. R. Bankr. P. 4003(c)). However, because neither of the Hearings was noticed as evidentiary hearing, the Court will permit the Trustee, if he desires to continue to pursue his objection in light of this Order, to obtain any necessary documents from the Debtor, conduct any necessary discovery, and present all such evidence at the hearing to be scheduled pursuant to this Order.

INTERIM CONCLUSION

In light of the foregoing, the Court will construe the Response as a motion by the Trustee to modify the Plan to require commitment of the Net Proceeds to the Plan or in the alternative to dismiss the case (the "Motion to Modify"), and will construe the Motion as an objection in response to the Motion to Modify. For the purposes of its initial consideration of that Motion to Modify, the Court will assume that only $3,404 of the Net Proceeds qualifies for an exemption, leaving open the question as to whether the Debtor is entitled to claim the other $10,000 as exempt.

In considering the Motion to Modify on that basis, the Court notes the apparent need by the Debtor to have his home painted, to have certain plumbing repairs made, and to equip his family vehicle with new tires. These needs appear to be undisputed. However, as to each of them, the Debtor has only submitted a single estimate regarding the cost. With expenses as large as those for the painting and plumbing, and as simple as the Court believes it would be to obtain a second estimate as to the needed tires, the Court would expect more than one estimate for these expenses. In addition, the Court notes that all of these expenses are of the type that are included on Schedule J – the tires on Line 12 (Transportation) and the painting and plumbing on Line 20d (Maintenance, Repair and Upkeep). The Debtor budgeted $300 a month for transportation expense on his Schedule J (Docket No. 19), which is intended to cover gas and car maintenance (which would include new tires), and may be sufficient for those purposes, depending on the number of miles he drives per month. The $0 a month that he budgeted for home maintenance, however, was clearly insufficient, especially in light of the $10,000 of expenses that appear to have been required this year alone.

In sum, for the purposes of this Order, it appears undisputed that the Debtor has an available wild-card exemption for $3,404, and has at least $3,404 in documented needs. In light of those two facts, $3,404 should be distributed to the Debtor immediately for those purposes. As to the balance of the Net Proceeds, the Court will need to determine the applicability of the bodily injury exemption before determining whether those funds should, or can, be ordered distributed to creditors. [16]

Accordingly, in light of the above, it is hereby **ORDERED** as follows:

[16] In its further consideration of these matters, the Court will take into account the failure by the Debtor to schedule the Claim prior to the confirmation of his Plan, to the extent it is within the Court's discretion to do so. Had the Claim been scheduled, the issue as to the disposition of any nonexempt proceeds of the Claim, and any effect that might have had on the compliance of the Plan with 11 U.S.C. §1325(a)(4), could have been considered in connection with confirmation of the Plan.

1. The Trustee shall distribute $3,404 to the Debtor from the Net Proceeds within ten (10) days of the date of this Order;

2. The Debtor shall provide to the Trustee within forty-five (45) days of the date of this Order (i) receipts from third party vendors showing the expenditure of funds by the Debtor for the replacement of his hot water heater, for reasonable costs to address his other plumbing needs, and for four (4) new tires for his 2004 Chevrolet Suburban, and (ii) a refund of any amount by which those two documented expenditures do not exceed $3,404, which refund (if any) will be held by the Trustee with the remainder of the Net Proceeds;

3. An evidentiary hearing will be held on the Motion, the Response, the Objection and the Motion to Modify. The Debtor shall be obligated to appear at such evidentiary hearing to testify, among other things, as to the nature of the Claim and the settlement thereof and the reasonableness of his expenses.

4. The hearing will be held in September, 2016, and will be scheduled on a date that is mutually convenient for the Debtor, the Trustee and the Court. Not later than one (1) week prior to such hearing, the Debtor shall provide to the Trustee any and all documents in his possession that relate to the Claim, including police reports, medical bills, demands made to the party liable on the Claim and/or their insurance company, and any other non-privileged communication regarding the Claim.

The Clerk is directed to serve a copy of this Order upon the Debtor, counsel for the Debtor, the Chapter 13 Trustee, and all parties requesting notices in this case.

[END OF DOCUMENT]