

**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION**

**In re: Jeffery T. Patterson and
Sora L. Patterson, Debtors**

**No. 5:09-bk-75683
Ch. 13**

ORDER

On May 12, 2010, the Court held a hearing on the debtors' Motion for Refund and the chapter 13 trustee's Response to the Motion for Refund and Objection to Confirmation. On July 14, 2010, this Court entered an Order [July 14 Order] that granted the debtors' motion for refund and overruled the trustee's objection to confirmation. The July 14 Order is incorporated herein in its entirety. On July 28, 2010, the chapter 13 trustee filed her Motion to Make Additional Findings or Alter or Amend Findings Regarding Order Entered July 14, 2010 and a Motion to Stay Order Entered July 14, 2010 Pending Determination of Trustee's Motion To Make Additional Findings or Alter or Amend Findings. On July 29, 2010, the debtors filed a motion to dismiss their chapter 13 case under 11 U.S.C. § 1307(b). On August 2, the Court dismissed the case. After the case was dismissed, the trustee withdrew her motion to stay the July 14 Order; however, the trustee did not withdraw her motion requesting the Court to make additional findings or alter its July 14 Order. The Court held a hearing on the remaining motion on August 25, 2010. At the hearing, Natasha Graf appeared as counsel for the trustee. She presented no additional evidence to the Court but argued that the Court erred in finding that the tax refund should be returned to the debtor.

Because the debtors voluntarily dismissed their case, the trustee's motion for the Court to make additional findings or alter and amend its July 14 Order is denied as moot. However, the Court is cognizant of the effect its July 14 Order will have as precedent in this jurisdiction. For this reason, the Court examined its July 14 Order for errors of law or fact. After a thorough review of the May 12 record and applicable law, the Court finds that no errors of law or fact exist and denies the trustee's motion for the following additional reasons.

Jurisdiction

This Court has jurisdiction over this matter under 28 U.S.C. § 1334 and 28 U.S.C. § 157, and it is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (L). The following order constitutes findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052, made applicable to this proceeding under Federal Rule of Bankruptcy Procedure 9014.

Issues

The trustee brings her motion under two rules—(1) Federal Rule of Bankruptcy Procedure 9023 and (2) Federal Rule of Bankruptcy Procedure 7052. Each rule allows the Court to amend its July 14 Order. Federal Rule of Bankruptcy Procedure 9023 incorporates Federal Rule of Civil Procedure 59, and Rule 59(e) allows the Court to alter or amend the part of the July 14 Order that is considered a judgment. Similarly, Federal Rule of Bankruptcy Procedure 7052 incorporates Federal Rule of Civil Procedure 52 and Rule 52(b) allows the Court to amend the findings in the July 14 Order or to make additional findings. The trustee’s motion under both of these rules was timely. Relief under Rule 59(e) is “‘limited to manifest misapprehension of the law or mistake of fact.’” *In re Oak Brook Apartments of Henrico County, Ltd.*, 126 B.R. 535, 536 (Bankr. S.D. Ohio 1991) (quoting *In re Winer*, 39 B.R. 504, 512 (Bankr. S.D.N.Y. 1984)). Similarly, relief under Rule 52(b) is proper in order to correct findings of fact and legal conclusions and also to clarify the court’s findings. *In re Smith Corona Corp.*, 212 B.R. 59, 60 (Bankr. D. Del. 1997). However, “any additional findings must be supported by the existing record.” *Id.*

In her motion, the trustee asks the Court to make additional findings or alter or amend its findings in “one limited area.” She states that “[b]ased on the Debtors’ plan, the stipulation submitted to the Court regarding the plan terms and the Debtors’ understanding as demonstrated by their actions in paying the Funds to the Trustee, tax refunds exceeding \$2000 are to be committed to the plan as disposable income or projected disposable income.” The trustee continues by stating that “[t]he Debtors’ payment of the Funds to the Trustee demonstrated that they understood the Funds to be a plan payment to be

committed to their plan.” At the hearing, the trustee requested that the Court find that (1) “the funds that [the trustee] received that happen to be tax refund were actually a payment,” and (2) “the funds were properly held by the trustee prior to confirmation and that they should continue to be held by the trustee until confirmation.” The Court will address each request in turn.

Nature of the Tax Refund

The trustee’s position at the August 25 hearing was that the tax refund at issue in this case was a “plan payment,” and that the Court erred by not finding it as such in its July 14 Order.¹ The phrase “plan payment” is used frequently to refer to different types of payments required under the code. “Plan payment” is often used when referring to the pre-confirmation payments required under § 1326(a)(1)(A).² These payments are to be paid in the amount proposed by the plan to the trustee and retained by the trustee and distributed to creditors “[i]f a plan is confirmed” and “in accordance with the plan.” 11 U.S.C. § 1326(a)(2). The amount proposed by the plan to be paid to the trustee is typically delineated in the first paragraph of a debtor’s plan, as it is in this case.

The phrase “plan payment” is also used to describe a payment that is made under or pursuant to a confirmed plan. *See* 11 U.S.C. § 1326(b) and (c). These latter payments do not begin until the plan is confirmed, and they are made in accordance with the confirmed plan. While § 1326(a)(1)(A) uses the proposed plan as a reference point for the amount of money that a debtor must begin paying to the trustee, payments made pursuant to § 1326(a)(1)(A) are not necessarily the same as payments made under a confirmed plan. The payment required by § 1326(a)(1)(A) and the amount required by a confirmed plan

¹ When the trustee initially framed the first issue, she stated that she was requesting that the Court find that the tax refund was a “payment.” Based on her argument and the trustee’s motion and brief, the Court presumes she meant to say “plan payment.”

² The debtor is required to make other types of payments under § 1326(a), unless otherwise ordered by the court. 11 U.S.C. § 1326(a). However, it is the payment required under subsection (a)(1)(A) that typically is referred to as a “plan payment.”

can be different as objections to confirmation are made and resolved and amended plans are filed. Because the distinction between a payment made pursuant to § 1326(a)(1)(A) and a payment required under a confirmed plan is important in this Order, the Court will refer to the payment required under § 1326(a)(1)(A) as a “§ 1326(a)(1)(A) Payment”; a payment required by a confirmed plan will be referred to as a “Plan Payment.” Further, in addition to providing for payments to the trustee, a plan can propose to submit other property to the trustee. Frequently in this jurisdiction, chapter 13 plans have language at the end of the plan as an “Other provision” that states that the debtor will submit tax refunds that are in excess of \$2000.00 to the trustee. The plan in this case does not have this additional provision, although, as discussed below, the debtors stipulated that they “intend to propose” such a provision in their plan.

At the time of the May 12 hearing, the debtors had filed a proposed plan but did not have a confirmed plan. Therefore, the debtors were required to make the payments required by § 1326, including a § 1326(a)(1)(A) Payment. The trustee’s argument at the August 25 hearing, and the additional finding she now urges the Court to make, is that the debtors paid their tax refund to the trustee as a § 1326(a)(1)(A) Payment. The Court has reviewed the May 12 record in full. There was no evidence presented at the hearing that the tax refund was a § 1326(a)(1)(A) Payment.

At the May 12 hearing, a stipulation and a small part of Mr. Patterson’s testimony related to the debtors’ agreement with the trustee regarding the tax refund.³ Regarding the former, the trustee read the following stipulation into the record:

“The plan proposed or the debtors intend to propose that if they receive an income tax refund of over \$2000, any amount over that, over the \$2000.00

³ While the Court refers to the arrangement the debtors had with the trustee concerning the tax refund as an “agreement” throughout this Order, the evidence did not show that the debtors’ and trustee’s arrangement regarding the tax refund was bargained for or contractually enforceable, and the trustee did not argue the enforceability of this “agreement” as a reason to keep the tax refund.

amount, would be sent to the trustee.”

The unconfirmed proposed plan did not state that the debtors would commit tax refunds in excess of \$2000.00 to the plan. According to the stipulation then, the parties agreed that the debtors *intended* to propose a plan that provided that an income tax refund in excess of \$2000.00 would be sent to the trustee. However, this stipulation does not say that the debtors sent their tax refund to the trustee to be applied against their balance owed, if any, under § 1326(a)(1)(A). Rather, the tax refund was submitted to the trustee’s office by agreement, and the debtors intended to propose a plan that encompassed this agreement. The “agreement” correlates with a longstanding policy of the trustee’s office—if debtors provide in their plans to pay to the trustee the amount of income tax refund received in excess of \$2000.00, the trustee typically will not object to the confirmation of debtors’ plans based on the refund, or otherwise demand the entire amount of the refund. This policy is related to the trustee’s position that tax refunds are disposable income that must be committed to the debtors’ plan under § 1325(b). This position will be addressed more fully below.

Regarding the testimony that related to the agreement, Mr. Patterson testified during the trustee’s cross-examination about his and Ms. Patterson’s previous bankruptcy case. During the following testimony, the trustee asked Mr. Patterson about the plan and agreement in the debtors’ previous bankruptcy:

Trustee: Didn’t you in your previous case agree to submit any tax refunds that you might have to the bankruptcy trustee for your case?

Mr. Patterson: Yes.

Trustee: So you would have had the same issue in that case . . .

Mr. Patterson: That’s correct.

Trustee: . . . as this one because those monies you’d agreed to commit to your plan?

Mr. Patterson: That is correct.

The above-stated testimony also is not evidence that the tax refund was submitted to the trustee's office as a § 1326(a)(1)(A) Payment in the current case. At most, it shows that the debtors complied with the trustee's position concerning tax refunds. Further, the fact that the tax refund was the subject of negotiation belies the assertion that it was submitted as an amount due under § 1326(a)(1)(A). No agreements or refunds can be made with regard to § 1326(a)(1)(A) Payments—the amount proposed by the plan must be paid when due pursuant to the terms of § 1326. The trustee cannot “refund” § 1326(a)(1)(A) Payments, and the debtor does not have the option to “agree” to make § 1326(a)(1)(A) Payments. The debtor *has* to make the payment, or the debtor's bankruptcy case is subject to dismissal. Neither the testimony or the stipulation support a finding that the debtors used their tax refund money to satisfy a § 1326(a)(1)(A) Payment.

Additionally, the trustee did not introduce any evidence to prove that the tax refund was a § 1326(a)(1)(A) Payment. She did not introduce her ledger, which reflects the debtors' payment history; ask the debtors about their payment history; or argue that the debtors would not be current in their § 1326(a)(1)(A) Payments if the tax refund was returned. The absence of this evidence at the May 12 hearing does not make sense if the trustee was making the argument that the tax refund met a required payment under § 1326(a)(1)(A). However, such absence supports the Court's opinion that the trustee did not argue that the tax refund was submitted as a payment under § 1326(a)(1)(A) at the May 12 hearing, but raised it for the first time at the August 25 hearing. This argument, and the evidence to support it, should have been raised at the May 12 hearing.⁴ “Initial arguments are not to be treated as a dress rehearsal for a second attempt to prevail on the same matter.” *In re Harlan*, 2006 WL 6591974, *3 (Bankr. S.D. Cal. 2006) (quoting *Wall Street Plaza LLC v. JSJF Corp. (In re JSJF Corp.)*, 344 B.R. 94, 103 (B.A.P. 9th Cir. 2006)). In sum, because

⁴ The Court notes that without the trustee's ledger or the debtors' payment history in evidence, the Court could not have deduced whether the tax refund was intended as a § 1326(a)(1)(A) Payment.

there was no evidence or argument presented at the May 12 hearing that the tax refund was submitted to the trustee's office as a § 1326(a)(1)(A) Payment, the Court denies the trustee's request to find otherwise.

Trustee's Retention of the Tax Refund Pre-Confirmation

The second finding that the trustee requests is that “the funds were properly held by the trustee prior to confirmation and that they should continue to be held by the trustee until confirmation.” Whether the funds should continue to be held by the trustee is now moot—the order withdrawing the trustee's motion to stay, entered on August 6, 2010, states that “the Trustee has returned all funds paid pursuant to 11 U.S.C. § 1326.” Additionally, the Court cannot find that the trustee *properly* held the tax refund pre-confirmation because, based on the evidence before the Court at the May 12 hearing, the debtors were entitled to possession of the tax refund under the bankruptcy code pending confirmation. In chapter 13 cases, property of the estate remains in the possession of the debtor. 11 U.S.C. § 1306(b). As stated earlier, the record does not support a finding that the tax refund was intended to be a § 1326(a)(1)(A) Payment. Whether tax refunds must be “committed” to the plan as disposable income under § 1325(b) is not relevant to whether the debtors are entitled to possession of their tax refund pre-confirmation. They are so entitled.

The trustee's position at the May 12 hearing was that tax refunds are disposable income that must be committed to the plan; ergo, the trustee is entitled to possession of the tax refund, pre-confirmation, and the debtors are only entitled to a “refund” if they can prove the funds are reasonably necessary to be expended for the maintenance and support of the debtor, or dependents of the debtor, under § 1325(b)(2)(A)(i). This argument is a non-sequitur. Pre-confirmation, chapter 13 debtors remain in possession of property of the estate. 11 U.S.C. § 1302(b). Also pre-confirmation, chapter 13 debtors must make required payments under § 1326(a). A chapter 13 debtor does not have to make a § 1326(a)(1)(A) Payment with any particular source of funds, and the code does not require that debtors turn over certain sources of money pre-confirmation to the trustee,

even if all or a part of those funds must be accounted for in the disposable income calculation in proposing a confirmable plan. *See* 11 U.S.C. § 1325(b). The debtors did have to make payments under § 1326(a)(1)(A) in the amount proposed by their plan as filed, and they could have used their tax refund monies or some other source of funds to make that payment.

Even if the debtors “agreed” that the trustee could hold the tax refund, the parties cannot by agreement expand the chapter 13 trustee’s role under the code. *In re Benny*, 29 B.R. 754, 760 (D.C. Cal. 1983) (stating, in the context of a chapter 7 trustee following a long-standing practice in the district but exercising powers not granted by the code, that “[t]he trustee is a creature of statute and has only those powers conferred thereby”); *see also Anderson v. Patel, (In re Kataria)*, 2006 WL 6589906, *9 (Bankr. N.D. Ga.) (stating that the code “defines a chapter 7 trustee’s duties and other sections of the Bankruptcy Code describe powers of a trustee, but none of these sections empowers a trustee to require a debtor to do an act or refrain from doing an act solely because of the trustee’s instructions.”). A chapter 13 trustee does have the duty to “ensure that the debtor commences making timely payments under section 1326.” 11 U.S.C. § 1302(b)(5). A chapter 13 trustee does not have the § 704(a)(1) duty to “collect and reduce to money the property of the estate for which the trustee serves,” because § 1302(b)(1) excepts this duty from the chapter 13 trustee’s duties. Instead, chapter 13 debtors “shall remain in possession of all property of the estate” except as provided in a “confirmed plan or order confirming a plan.” 11 U.S.C. § 1306(b). Based on the May 12 record, the tax refund paid to the trustee was neither (1) a payment made under § 1326(a) nor (2) a payment made under a confirmed plan. Instead, it seems to be some type of pre-payment on a to-be-filed and to-be-confirmed plan that is not required by the bankruptcy code.

The Court is sympathetic to the trustee’s argument that if debtors are not required to turn over their tax refund income received pre-confirmation, they will spend the refund. However, the Court is not willing to rest its decision on this supposition. The code explicitly grants debtors the right to maintain possession of property of the estate subject

to confirmation. The code also requires that debtors begin making payments under § 1326(a) and later according to their confirmed plan. But, it is an *amount* of money that § 1326(a) requires to be paid, not a particular source of money. If the debtors spend all of their money and cannot make their § 1326(a)(1)(A) Payments, then a motion to dismiss is appropriate. The code also requires that debtors calculate their “disposable income” in determining the appropriate Plan Payment amount, which may include all or a portion of tax refund income. If the debtors spend all of their money and the trustee or a creditor believes, looking forward, that the debtors cannot possibly make their proposed Plan Payments, then an objection to confirmation is appropriate. For these reasons, the Court declines to make a finding that the trustee properly retained the tax refund prior to confirmation.

Conclusion

Based on a review of the record of the May 12 hearing, the Court finds that the July 14 Order contains no error of law or fact. Accordingly, the Court declines to make the additional findings requested by the trustee, declines to amend its judgment, and denies the trustee’s motion as moot and for the additional reasons stated above.

IT IS SO ORDERED.

September 21, 2010

DATE



BEN T. BARRY

UNITED STATES BANKRUPTCY JUDGE

cc: Joseph Cornell, attorney for the debtors
Joyce Bradley Babin, chapter 13 trustee