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WRITTEN DECISION – FOR PUBLICATION

ENTERED <u>2/15/13</u>
FILED
FEB 15 2013
CLERK, U.S. BANKRUPTCY COURT SOUTHERN DISTRICT OF CALIFORNIA
BY <u>[Signature]</u> DEPUTY

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re:) Bankruptcy Case No. 12-03968-CL13
)
) Chapter 13
)
)
RAYMUNDO GAMBOA) MEMORANDUM DECISION AND ORDER
PATRICIA MAHONEY GAMBOA,) ON CHAPTER 13 TRUSTEE'S OBJECTION
) TO CONFIRMATION OF CHAPTER 13
Debtors,) PLAN AND MOTION TO DISMISS
)
)
) Judge: Christopher B. Latham
)
)
_____)

1 **MEMORANDUM DECISION AND ORDER ON CHAPTER 13 TRUSTEE'S OBJECTION TO**
2 **CONFIRMATION OF CHAPTER 13 PLAN AND MOTION TO DISMISS**

3 Chapter 13 Trustee David L. Skelton has objected to confirmation of Debtors Raymundo and
4 Patricia Gamboa's Chapter 13 plan and moved to dismiss their case. The central issue is whether
5 Debtors may retain an income-producing property and cure the mortgage arrears on it through their
6 plan. The court finds that they may not, and so **sustains** the Trustee's objection but **denies** his motion
7 to dismiss.

8 **I**

9 Debtors' plan provides for four initial payments of \$1,342.29 and then \$975.29 per month for
10 the remaining 56 months. [ECF No. 60, p. 1 ¶1]. This yields a 1.01 percent dividend to general
11 unsecured claims or a pro rata share of \$2,075.65. [ECF No. 60, p. 3 ¶13]. Debtors propose to retain
12 an income-producing property located at 9092 Libra Drive, San Diego, California (the "Libra
13 property").¹ The Libra property is a single-family residence built in 1958. Debtors have no equity in
14 the property, which is encumbered by a mortgage with \$49,811.15 in arrears. They propose to pay all
15 of the arrears through their plan.

16 Debtors initially asserted that the monthly mortgage payment was \$2,227.00 and that they
17 received \$2,100.00 rent per month. In their supplemental brief, they state that the mortgage payment
18 on the rental property is actually \$2,197.13, instead of \$2,227.00. Debtors assert that they have
19 negotiated a monthly rent increase from \$2,100.00 to \$2,250.00, creating a monthly positive cash flow
20 of \$52.87 by the property.

21 **II**

22 **A**

23 Debtors argue that the Libra property has a positive cash flow because they raised the rent and
24 their lender reduced the monthly mortgage payment. But Debtors disregard the Trustee's central
25 argument that retaining the rental property results in a net loss because they are paying both arrears on
26

27 ¹ Debtors' schedules are inconsistent with their opposition to the Trustee's objection. The opposition
28 states that the Libra property is the rental property, while their amended Schedules list the Libra
property as their primary residence. Debtors' other property is located at 4830 Doliva Drive, San
Diego. For purposes of this order, the term "Libra property" refers to Debtors' rental property.

1 there is no “amount” to determine.” *Id.* But “[i]f the expense is reasonably necessary for the debtor’s
2 and/or dependents’ maintenance and support, then section 1325(b)(3) requires the court to determine
3 the amount in accordance with section 707(b)(2).” *Id.*

4 Ordinarily, a debtor who is current on a secured obligation may continue to make contractually
5 scheduled payments and deduct them from current monthly income “regardless of whether the
6 collateral is necessary.” *Drummond v. Welsh (In re Welsh)*, 465 B.R. 843, 850 (B.A.P. 9th Cir. 2012);
7 *see also* 11 U.S.C. § 707(b)(2)(A)(iii)(I). That same rule does not apply, however, to curing arrears on
8 secured claims. *See In re Welsh*, 465 B.R. at 849-50; *see also* 11 U.S.C. § 707(b)(2)(A)(iii)(II);
9 6 COLLIER ON BANKRUPTCY ¶ 707.04[3][c], at p. 707-38 (Alan N. Resnick & Henry J. Sommer eds.,
10 16th ed. 2012) (“[T]he provision makes a distinction between amounts scheduled as contractually due
11 on all secured debts and ‘additional payments,’ such as arrears, on necessary property. . .”). Rather,
12 Section 707(b)(2)(A)(iii)(II) limits “allowable cure payments to cure payments on necessary property.”
13 *See In re Welsh*, 465 B.R. at 850. Debtors propose to pay both contractual payments and arrearages on
14 the Libra property mortgage. The court must therefore determine whether maintaining the Libra
15 Property is a reasonably necessary expense.

16 C

17 The Trustee draws an analogy between Debtors’ effort to retain this property and a debtor
18 proposing to fund a retirement account during a Chapter 13 plan. Courts generally hold that voluntary
19 contributions to a pension fund or 401(k) account are not reasonably necessary expenses. *In re*
20 *Merrill*, 255 B.R. 320, 324 (Bankr. D. Or. 2000); *see also In re Estes*, 254 B.R. 261, 264 (Bankr. D.
21 Idaho 2000) (holding that repayment of a loan from a 401(k) retirement fund constitutes a per se
22 unreasonable expense); *but see In re Mills*, 246 B.R. 395, 402 (Bankr. S.D. Cal. 2000) (adopting a
23 case-by-case approach and concluding that a modest contribution to a 401(k) plan was not per se
24 unreasonable). The problem with such an investment is that while it may “enhance an individual’s
25 financial security,” it does so impermissibly at the “expense of unpaid creditors.” *In re Merrill*, 255
26 B.R. at 324 (quoting *In re Festner*, 54 B.R. 532, 533 (Bankr. E.D.N.C. 1985)).

27 The reasoning in these cases likewise applies to Debtors’ proposal to retain this property and
28 pay the arrears through their plan. They assert that the property is necessary to “permit them to live in

1 modest comfort” after their case is over. [ECF No. 94, p. 7 ln. 16-17]. And, they suggest, “holding
2 onto this property . . . in an improving market, could be . . . a way of helping them make a fresh start.”
3 [ECF No. 94, p. 7 ln. 5-6]. Prudent as this course may be, the Code does not allow debtors “to acquire
4 financial security for the future at the expense of [their] unsecured creditors.” *In re Merrill*, 255 B.R.
5 at 324. Debtors’ attempt to retain their investment would consume virtually all of their projected
6 disposable income and excluded funds that they would otherwise contribute to their plan.

7 This results in a de minimis return to their creditors. It would be inequitable to allow Debtors
8 to saddle their creditors with the burden of Debtors’ financial investment while they obtain the benefits
9 of a bankruptcy discharge. Retaining the Libra property is not a reasonably necessary expense since
10 Debtors operate it at a loss and it is not their primary residence. As such, Debtors may not deduct the
11 property’s costs from their disposable income. The court **sustains** the Trustee’s objection because
12 Debtors have not applied all of their projected disposable income toward the plan.

13 **III**

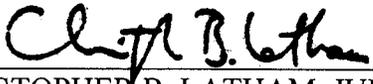
14 Debtors’ supplemental brief also argues that their Official Form B22 is not the correct measure
15 of projected disposable income based on the Supreme Court’s decision in *Hamilton v. Lanning*, 130 S.
16 Ct. 2464 (2010). They claim that Debtor Raymundo Gamboa suffered an industrial accident that
17 significantly reduces his income for the foreseeable future, and consequently, the current measure of
18 projected disposable income is inaccurate. Debtors will have to supplement the record with a
19 declaration detailing Mr. Gamboa’s future income prospects to adequately address this aspect of the
20 Trustee’s objections.

21 **IV**

22 The court **sustains** the Trustee’s objections to confirmation of Debtors’ Chapter 13 plan and
23 **denies** his motion to dismiss. Debtors may file a motion for authorization to sell real property to
24 facilitate plan confirmation.

25 IT IS SO ORDERED.

26
27 Dated: February 15, 2013

28 
CHRISTOPHER B. LATHAM, JUDGE
United States Bankruptcy Court

In re Raymundo Gamboa and Patricia Mahoney Gamboa, Bk. No. 12-03968-CL13

CERTIFICATE OF MAILING

The undersigned, a regularly appointed and qualified clerk in the office of the United States Bankruptcy Court for the Southern District of California, at San Diego, hereby certifies that a true copy of the attached document, to wit:

**MEMORANDUM DECISION AND ORDER ON CHAPTER 13 TRUSTEE'S OBJECTION TO
CONFIRMATION OF CHAPTER 13 PLAN AND MOTION TO DISMISS**

was enclosed in a sealed envelope bearing the lawful frank of the bankruptcy judges and mailed via first class mail to the party at their respective address listed below:

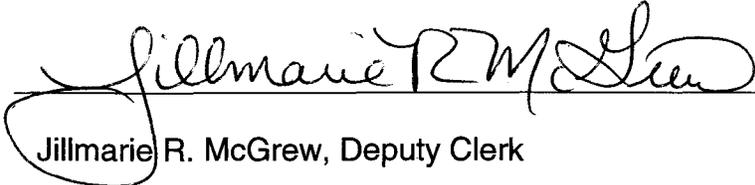
Raymundo Gamboa
9092 Libra Drive
San Diego, CA 92126-4708

David L. Skelton
525 B St., Suite 1430
San Diego, CA 92101-4507

Patricia Mahoney Gamboa
9092 Libra Drive
San Diego, CA 92126-4708

Matthew H. Powell, Esq.
Law Offices of Matthew H. Powell
402 West Broadway, Suite 400
San Diego, CA 92101

Said envelope(s) containing such document was deposited by me in the City of San Diego, in said District on February 15, 2013.


Jillmarie R. McGrew, Deputy Clerk