IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SARASOTA, INC.,	:	
Appellant,	:	**CIVIL ACTION**
	:	
v.	:	
	:	
KATHY R. WEAVER,	:	**No. 04-1557**
Appellee.	:	

MEMORANDUM AND ORDER

Schiller, J. **November 5, 2004**

Sarasota, Inc. appeals a final order of the United States Bankruptcy Court for the Eastern District of Pennsylvania confirming the Chapter 13 Plan of Kathy R. Weaver ("Debtor"). This Court has jurisdiction to hear the appeal pursuant to 28 U.S.C. § 158. 28 U.S.C. § 158 (2004). For the reasons that follow, the decision of the Bankruptcy Court is affirmed in part and reversed in part.

I. BACKGROUND

Debtor filed a voluntary bankruptcy petition on February 21, 2003 and a Chapter 13 Plan on April 7, 2003. (Appellant's Br. Ex. A.) In the Plan, Debtor reported a gross monthly income of $2,116.00 and a net monthly income of $1,223.60. (*Id*. Ex. C.) Debtor listed monthly expenditures of $1,105.00, leaving $128.60 in disposable income to apply to Plan payments each month. (*Id*.)

On April 24, 2003, Sarasota filed a proof of claim in the amount of $28,017.24. (*Id*. Ex. D.) Sarasota objected to Debtor's Plan because it did not provide that all of Debtor's disposable income would be paid into the Plan. (*Id*. Ex. E.) Thereafter, on November 19, 2003, Debtor filed an Amended Plan (*id*. Ex. G), and, on December 4, 2003, a five-year Second Amended Plan (*id*. Ex. H). According to the Second Amended Plan, Debtor would pay a total of $9,408.00 into the Plan

over five years, consisting of monthly payments of $128.00 for the first six months and $160.00 for the remaining fifty-four months. (*Id*. Ex. H.) Sarasota filed the same objections as before. (*Id*. Ex. I.)

On February 20, 2004, Debtor amended the Second Amended Plan's current income and current expense schedules. (*Id*. Ex. K.) Debtor explained the reasons for most of these amendments at her March 4, 2004 confirmation hearing. Debtor testified that her net monthly income increased by $497.40 because of a wage increase, overtime, and elimination of payments on a loan and support lein. (*Id*. Ex. M at 5-7 (Confirmation Hearing R.).) Debtor added $25.00 for electricity and home heating fuel due to a change in her home's heating system and the inclusion of air conditioning. (*Id*. at 8.) Debtor's monthly food expense increased from $250.00 to $450.00 because she had previously omitted the cost of cigarettes in the original expense schedule. (*Id*. at 8-9.) Debtor also added clothing expenses of $27.00, medical and dental expenses of $52.00, and recreation expenses of $40.00, all of which had been allocated $0.00 on the original expense schedule. (*Id*. at 10-11, 15; Ex. C.) Due to these various added expenses, Debtor's net monthly income increase of $497.40 only resulted in an $8.00 increase in monthly payments towards the Plan.

On March 5, 2004, the Bankruptcy Court entered an order confirming Debtor's Seond Amended Plan. Sarasota timely filed its notice of appeal on March 15, 2004. (*Id*. Ex. A.)

II. STANDARD OF REVIEW

On appeal, the district court may affirm, modify, or reverse a bankruptcy judge's judgment, order or decree, or remand with instructions for further proceedings. FED. R. BANKR. P. 8013. "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the

opportunity of the bankruptcy court to judge the credibility of the witnesses." *Id*. The district court must make an independent determination as to questions of law. *Frymire v. PaineWebber, Inc.*, 107 B.R. 506, 509 (E.D. Pa. 1989).

III. DISCUSSION

Sarasota argues that Debtor's Second Amended Chapter 13 Plan ("the Plan") should not have been confirmed because it does not commit all of Debtor's disposable income to payments under the Plan as required by 11 U.S.C. § 1325(b). 11 U.S.C. § 1325(b) (2004). Specifically, Sarasota objects to two categories of expenses: (1) expenses related to Debtor's 401k; and (2) expenses for cigarettes.

A. Statutory Framework

According to 11 U.S.C. § 1325(b)(1), all of a debtor's disposable income must be committed to payment under a Chapter 13 Plan. Section 1325(b)(1) provides:

> If the trustee or the holder of an allowed unsecured 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–
> (A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or
> (B) the plan provides that all of the debtor's projected disposable income to be received in the three-year period beginning on the date that the first payment is due under the plan will be applied to make payments under the plan.

11 U.S.C. § 1325(b)(1). Furthermore, disposable income is statutorily defined as income "not reasonably necessary to be expended for the maintenance or support of the debtor or a dependent of the debtor." 11 U.S.C. § 1325(b)(2)(A).

The statutory language does not provide explicit guidance regarding the appropriate degree of scrutiny a court should apply when determining whether particular expenses are in fact

"reasonably necessary to be expended for . . . maintenance and support." In *In re Devine*, the Bankruptcy Court for the Eastern District of Pennsylvania reviewed the brief legislative history of § 1325(b) in search of congressional guidance. *In re Devine*, No. 96-17346, 1998 WL 386380, at *6, 1998 Bankr. LEXIS 805, at *17-18 (Bankr. E.D. Pa. July 7, 1998). The *Devine* Court arrived at the following three overarching principles:

> One, debtors are supposed to make a substantial effort toward the payment of debts in their plan that may require sacrifices on their part. Two, the role of the courts is to develop norms for support, which implicitly means that courts must evaluate debtors' budgets to determine what is and is not necessary for support and maintenance. Three, a debtor's plan may be confirmed even in the absence of a large return to creditors provided that the debtor's effort is substantial within his capabilities.

In re Devine, 1998 WL 386380, at *6 (Bankr. E.D. Pa. 1998). With these principles in mind, the Court turns to Sarasota's specific objections to Debtor's Plan.

B. Debtor's 401k Expenses

In calculating her gross monthly income, Debtor deducted $24.00 per month for her 401k contribution and $98.00 per month for repayment of a 401k loan. (Appellant's Br. Ex. K.) The bankruptcy court confirmed Debtor's plan without making any specific findings regarding the reasonableness of these expenses. (*Id.* Ex. M at 23-26.) Sarasota contends that these payments are not reasonably necessary for Debtor's support and maintenance during the five-year Plan. This Court reviews the bankruptcy court's determination de novo. *See In re Anes*, 195 F.3d 177, 180-81 (3d Cir. 1999) (evaluating bankruptcy court's conclusion that pension loan repayments are not "reasonably necessary" under § 1325(b)(2)(A) as question of law); *In re Harshbarger*, 66 F. 3d 775, 777 (6th Cir. 1995) (same); *In re McDaniel*, 126 B.R. 782, 784 n.1 (Bankr. D. Minn. 1991) ("[Although s]ome courts have characterized the determination of whether an expense is reasonably necessary as a

question of fact . . . . [s]uch a determination . . . is the product of balancing competing interests, and therefore must constitute a conclusion of law.").

There is clear precedent in the Third Circuit that "[v]oluntary contributions to retirement plans . . . are not reasonably necessary for a debtor's maintenance and support and must be made from disposable income." *In re Anes*, 195 F.3d at 180-81; *In re Devine*, 1998 WL 386380, at *8 ("The case law is fairly uniform in holding that voluntary contributions to pension, savings and investment type plans and accounts are not reasonably necessary for a debtor's support and maintenance during the three to five year term of a Chapter 13 plan."). Furthermore, for purposes of § 1325(b)(2)(A) analysis, there is no meaningful distinction between pension contributions and pension loan repayments. In *In re Anes*, the Third Circuit considered whether a debtor's bankruptcy plan conformed with § 1325(b) where it proposed to repay a loan drawn from a retirement system without first paying unsecured creditors in full. 195 F.3d at 180. Agreeing with the Sixth Circuit, the Third Circuit held that "repayment of amounts withdrawn from retirement accounts is not reasonably necessary for a debtor's maintenance or support" and that such payments are only permissible "after satisfaction of all unsecured debts." *Id*. at 180 (*citing In re Harshbarger*, 66 F.3d at 777). The Third Circuit reasoned as follows:

> If the Debtors do not make the proposed payments, the retirement systems will deduct the balance owed from their retirement accounts. The payments, even if classified as debt payments, therefore, will increase their retirement benefits rather than repay the retirement systems or ensure the viability of either pension system. In effect, the payments are contributions to the Debtors' retirement accounts.

Id. at 180-81. Accordingly, the Third Circuit found that 401k loan repayments are equivalent to investments, which may not be made with disposable income. *Id.* at 181 (*citing In re Lindsey*, 122 B.R. 157, 158 (Bankr. M.D. Fla. 1991); *see also In re Devine*, 1998 WL 386380, at *9 (describing

such 401k loan repayment obligations as "in substance debts to oneself").

In conclusion, guided by Third Circuit precedent, this Court finds that Debtor's 401k contribution and 401k loan repayment are unnecessary for her support and maintenance under § 1325(b)(2)(A). Thus, an additional amount of $122.00 per month is available for payment to creditors.

C. Debtor's Cigarette Expenses

Debtor's Plan includes $450.00 per month in food expenses, $200.00 of which is designated as cigarette expenses. In confirming the plan, the Bankruptcy Court described Debtor's testimony regarding her cigarette expenses as "credible" and explained that "[i]t's not the Court's judgment certainly to put some judgment on smoking." (Appellant's Br. Ex. M at 25.) Sarasota objects to Debtor's $200.00 monthly cigarette expense on three grounds: (1) cigarettes are not properly categorized as food; (2) any expenditure on cigarettes is per se unreasonable and unnecessary; and (3) $200.00 is an unreasonable and unnecessary amount for monthly cigarette expenses.

Sarasota's objections highlight the difficulties accompanying judicial scrutiny into the reasonableness of a debtor's living expenses. Bankruptcy law does not impose an ascetic existence upon a Chapter 13 debtor. "A court determining the debtor's disposable income is not expected to, and should not, mandate drastic changes in the debtor's lifestyle to fit some preconceived norm for [C]hapter 13 debtors. The debtor's expenses should be scrutinized only for luxuries which are not enjoyed by an average American family." *In re Navarro*, 83 B.R. 348, 355 (Bankr. E.D. Pa. 1988) (*quoting* 5 COLLIER ON BANKRUPTCY ¶ 1325.08[4][b] at 1325-48 to 1325-49 (15 ed. 1987)). Determining whether expenses are "reasonably necessary," however, is an inherently subjective task. While spending on essentials such as food, clothing and shelter is clearly permissible, the

"reasonably necessary" inquiry becomes considerably more difficult when a court must evaluate more discretionary spending, such as entertainment and recreation expenses. In fact, courts are often quite candid about their discomfort in attempting to craft a standard for what discretionary expenses are "reasonably necessary." *In re Devine*, 1998 WL 386380, at *7; *Navarro*, 83 B.R. at 355 ("In general, 11 U.S.C. § 1325(b) should not be considered a mandate for a court to superimpose its values and substitute its judgment for those of the debtor on basic choices about appropriate maintenance and support."); *In re Woodman*, 287 B.R. 589, 592 (Bankr. D. Me. 2003) (noting that practice of branding certain kinds of expenditures as never reasonably necessary "can clothe subjective moral judgments with the force of law"). Evaluating the reasonableness of a given expense while avoiding a critique of a debtor's lifestyle choices is not a simple task. Thus, the *Navarro* Court stated that it was appropriate to amend a debtor's budget when one of four factors was present:

> (a) the debtor proposes to use income for luxury goods or services; (b) the debtor proposes to commit a clearly excessive amount to non-luxury goods or services; (c) the debtor proposes to retain a clearly excessive amount of income for discretionary purposes; (d) the debtor proposes expenditures which would not be made but for a desire to avoid payments to unsecured creditors.

Navarro, 83 B.R. at 355-56.

Turning to Sarasota's specific objections, this Court rejects Sarasota's first objection regarding Debtor's classification of cigarettes as a "food expense" as a purely semantic distinction. Under bankruptcy law, the "reasonable and necessary" standard applies to all categories of a debtor's expenses, including food, clothing, and more discretionary expenditures, such as recreation. At Debtor's confirmation hearing, the Bankruptcy Court was made aware that cigarette expenses accounted for the $200.00 increase in Debtor's food line-item. Therefore, in approving Debtor's

Plan, the Bankruptcy Court concluded that the $200.00 cigarette expense was reasonably necessary for Debtor's support and maintenance under § 1325(b)(2)(A). Debtor's precise classification of the cigarette expense was irrelevant to that determination.

Sarasota's second objection asserts that cigarette expenses are per se unreasonable, effectively seeking a prohibition on smoking for Chapter 13 debtors. This objection raises a question of law, which is entitled to de novo review. *Frymire*, 107 B.R. at 509. While this Court is not a proponent of Debtor's habit, cigarette smoking is currently a lawful activity. This Court is reluctant to brand any particular kind of lawful expense as never reasonably necessary because "such an approach can clothe subjective moral judgments with the force of law." *In re Woodman*, 287 B.R. at 592-93 (Bankr. D. Me. 2003) (refusing to hold that cigarette expenditures are per se unreasonable); *In re Regan*, 269 B.R. 693, 698 (Bankr. W.D. Mo. 2001) (allowing cigarette expense); *see generally In re Navarro*, 83 B.R. at 356 (refusing to find charitable contributions or tithing per se unreasonable). Furthermore, Sarasota has not cited to one court decision holding that cigarette expenditures are per se unreasonable. Accordingly, this Court will not hold that it is unreasonable per se for Debtor to allocate some discretionary funds to smoking. If such a determination is appropriate, it should be accomplished by Congress and not this Court. *Id*.

Sarasota's third objection concerns the bankruptcy court's factual finding that $200.00 is a reasonable amount for monthly cigarette expenses, which will be reviewed for clear error. *See* FED. R. BANKR. P. 8013. In the instant case, Debtor testified that she buys one carton of cigarettes per week for approximately $45.80. (Appellant's Br. Ex. M. at 9.) The Bankruptcy Court found Debtor's assessment of her monthly cigarette expenditures to be credible, and noted that Sarasota had not challenged the amount on cross examination. (*Id*. at 25.) This Court finds no clear error in

the Bankruptcy Court's determination that $200.00 is a reasonably necessary amount, especially in light of Debtor's generally modest levels of spending.[1] *In re Gonzales*, 157 B.R. 604, 608 (Bankr. E.D. Pa. 1993) (suggesting methodology of aggregating all discretionary expenses and considering whether total amount exceeds basic needs, rather than "micromanag[ing] the details of a debtor's life" by "pass[ing] judgment on specific expenditures"); *see also Woodman*, 287 B.R. at 596-97 (evaluating cigarette expenditures in light of total discretionary spending). All of Debtor's proposed expenditures are relatively modest, and Sarasota does not object to any except for the cigarette expenditure. (Appellant's Br. Ex. L (noting, e.g., electricity and home heating expenses of $85.00, home maintenance of $8.00, clothing expenses of $27.00, medical and dental of $52.00).) In terms of more discretionary spending items, Debtor's proposal includes only $40.00 in recreational expenses and $45.00 for cable. Given Debtor's modest levels of discretionary spending and the Bankruptcy Court's acceptance of Debtor's testimony regarding the cost of her cigarette habit, this Court concludes that the bankruptcy court's finding that $200.00 was reasonable and necessary is not clearly erroneous. *See Woodman*, 287 B.R. at 597-98 (concluding that Debtors' cigarette expenses were not unreasonable given modest discretionary spending levels).

III. CONCLUSION

In conclusion, Debtor's 401k contribution and loan repayment expenses are not reasonably

[1] This Court refuses Sarasota's invitation to micromanage Debtor's budget by mandating that she purchase a less expensive brand of cigarettes. (Appellant's Br. at 11 (suggesting Debtor should purchase cheaper, generic cigarettes).) Sarasota's suggestion of such close supervision of Debtor's expenses, if accepted, would be unduly burdensome and wasteful of this Court's time. *See Navarro*, 83 B.R. at 355. Regardless, there is no evidence before this Court regarding the relative costs of different cigarette brands.

necessary for her maintenance and support. Accordingly, Debtor must commit the additional $122.00 to monthly Plan payments. The Bankruptcy Court's allowance of $200.00 per month in cigarette expenses, however, is affirmed. An appropriate Order follows.

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ORDER

AND NOW, this **8th** day of **November, 2004**, after a review of this appeal of a final decision of the United States Bankruptcy Court for the Eastern District of Pennsylvania, it is hereby **ORDERED** that:

1. The decision of the Bankruptcy Court is **AFFIRMED in part** and **REVERSED in part** as follows:
   a. The Bankruptcy Court's decision that Debtor's 401k contribution and loan repayment expenses are not disposable income is **REVERSED**. Accordingly, Debtor must pay an additional $122.00 under her Chapter 13 Plan.
   b. The decision of the Bankruptcy Court is **AFFIRMED** in all other respects.
2. This case is closed for statistical purposes.

BY THE COURT:

_____
Berle M. Schiller, J.