

**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF COLORADO**  
Bankruptcy Judge Joseph G. Rosania, Jr.

In re:

Leonel Vialpando,  
SSN: xxx-xx-6641

Debtor.

Case No. 20-11403-JGR  
Chapter 13

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**ORDER**

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This case requires the Court to decide whether a Chapter 13 debtor's plan is feasible when the debtor relies solely on contributions from non-debtor third parties. This issue comes before the Court frequently, especially in cases in which debtors are attempting to save their homes.

**THE PROPERTY**

Randy Vialpando ("Randy") and Leonel Vialpando ("Leonel"), a married couple, jointly purchased a condominium in Denver located at 9725 E. Harvard Avenue, Unit 303, Denver, Colorado 80231 (the "Property"), at a foreclosure sale in August 2012, for cash, using Randy's funds.

The condominium is governed by the Woodstream Falls Condominium Association (the "HOA"), which obligates homeowners to comply with the rules and regulations of the HOA, including paying monthly HOA dues. If the payments are late, homeowners are liable for costs of collection upon default, including late fees, default interest, and reasonable attorney's fees and expenses. Randy and Leonel assumed that contractual obligation when they purchased the Property. They have had a difficult time paying the monthly HOA dues, in the present amount of approximately \$334, since 2013 (HOA Ex. 1), and real property taxes on the Property since 2018.

**RANDY VIALPANDO'S CHAPTER 13 CASE**

Randy and Leonel's default in the payment of HOA dues led to the HOA filing an action against them, seeking a judicial foreclosure and monetary damages, in state court in 2017. Randy filed a Chapter 13 bankruptcy case in this District on May 30, 2019, Case No. 19-14627-JGR, before the state court issued an order and decree for judicial foreclosure. He filed bankruptcy to obtain an automatic stay of the foreclosure under 11 U.S.C. § 362(a) and avail himself of the provisions of Chapter 13, which would allow him

to cure the pre-petition default owed to the HOA over time through a Chapter 13 plan and commence making post-petition monthly payments directly to the HOA.

Randy valued the Property at \$135,000. (Case No. 19-14627, Doc. 1, Schedule A, p. 17, May 30, 2019).

The third Chapter 13 plan Randy proposed was a sixty-month plan which provided that Randy would make forty-six monthly payments of \$787 and fourteen monthly payments of \$1,227 to the Chapter 13 trustee. It also proposed to cure the pre-petition default owed to the HOA, in the amount of approximately \$18,000 (at that time), through the Chapter 13 plan over forty-eight months and make the regular monthly post-petition payments, in the amount of \$325 (at that time), directly to the HOA. (Case No. 19-14627, Doc. 38, October 17, 2019).

Randy stated that his income was \$30,000 in 2017 and \$28,000 in 2018, in his Statement of Financial Affairs. (Case No. 19-14627, Doc. 1, p. 9, May 30, 2020). In his Schedule I, he indicated that his monthly income to fund his Chapter 13 plan was \$3,572, which was derived from working as a pizza delivery driver for Dominos, from related tips, and from cutting lawns. This income was much higher than his income in 2017 and 2018.

Randy's spouse, Leonel, listed income of \$200 per month from food stamps, for combined monthly income in the amount of \$3,772. (Case No. 19-14627, Doc. 1, pp. 39-40, May 30, 2019).

On his Schedule J, Randy reported monthly expenses of \$2,955, for net monthly income in the amount of \$817. (Case No. 19-14627, Doc. 1, pp. 41-42, May 30, 2019).

To his credit, Randy filed a proof of claim for a secured claim on behalf of the HOA on August 16, 2019, in the amount of \$18,000. (Case No. 19-14627, Claim No. 7, August 16, 2019).

However, the Internal Revenue Service filed a proof of claim in his case on June 24, 2019, for federal income taxes in the total amount of \$18,407, of which \$9,740 was a priority claim. The proof of claim states that the federal income taxes are owed for the years 2012 and 2015 through 2018, inclusive, and that no tax returns were filed for the years 2015 through 2017, inclusive. (Case No. 19-14627, Claim No. 3, June 24, 2019).

The Colorado Department of Revenue also filed a proof of claim in his case on June 27, 2019, for state income taxes in the total amount of \$1,492, of which \$1,376 was a priority claim. The proof of claim reflects that the state income taxes are owed for the years 2015 through 2018, inclusive, and that no income tax returns were filed for the years 2015 through 2017, inclusive. (Case No. 19-14627, Claim No. 4, June 27, 2019).

Randy was unable to meet his commitment under his Chapter 13 plan to make plan payments in the amount of \$787 per month to the Chapter 13 trustee. Because he only made two monthly payments in his case, totaling \$1,574, from May 2019 to

November 2019, his case was dismissed on November 1, 2019, prior to plan confirmation, on motion of the Chapter 13 trustee. (Case No. 19-14672, Doc. 41, November 1, 2019). Randy testified that he told his bankruptcy lawyer the plan payments were too “expensive.”

The Court notes that he only made direct three payments to the HOA in the six months he was under the protection of Chapter 13 (HOA Ex. 1, p. 3).

Randy was unable to obtain a confirmed plan because the Chapter 13 trustee objected to confirmation on the bases that he had not filed all applicable federal and state income tax returns, including tax returns for the years 2015 through 2017, which is one of the statutory requirements for confirmation pursuant to 11 U.S.C. § 1325(a)(9). (Case No. 19-14627, Docs. 20, July 12, 2019, and 33, September 19, 2019).

Randy’s Chapter 13 case was closed on February 25, 2020. (Case No. 19-14627, Doc. 50, February 25, 2020). The reason for the lapse of time between the date of dismissal and the date the case was closed was his bankruptcy attorney filed an application for administrative expenses (Case No. 19-14627, Doc., 42, November 1, 2019), and it takes time for the Chapter 13 trustee to distribute the funds collected.

### **LEONEL VIALPANDO’S CHAPTER 13 CASE**

After the dismissal of Randy’s Chapter 13 case, the HOA filed a second action in state court for judicial foreclosure and monetary damages against Randy and Leonel on January 14, 2020 (HOA Ex. 2), which resulted in Leonel’s filing of the within Chapter 13 case on February 28, 2020, three days after Randy’s Chapter 13 case was closed.

Leonel valued the Property at \$121,257. (Case No. 20-11403, Schedule A, February 28, 2020). At some point, the HOA recorded a *lis pendens* on the Property.

In Leonel’s case, the HOA retained bankruptcy counsel and requested relief from the automatic stay and relief from the co-debtor stay afforded to Randy, to continue with the state court foreclosure action. (Case No. 20-11403, Docs. 40 and 43, June 15, 2020). The HOA also objected to confirmation on the grounds that Leonel’s plan was not feasible, the plan was not proposed in good faith, and the HOA was not adequately protected by a plan which proposes to cure the HOA’s arrearage in four years. (Case No. 20-11403, Doc. 36, June 4, 2020).

In Leonel’s initial Schedule I, filed on February 28, 2020 (Case No. 20-11403, Doc. 1, pp. 35-36, February 28, 2020), Leonel indicated that the monthly income to fund the Chapter 13 plan was “income from husband” in the amount of \$1,615.

In an amended Schedule I, Leonel indicated that the monthly income to fund the Chapter 13 plan was “income from husband” in the increased amount of \$1,776. (Case No. 20-11403, Doc. 54, July 13, 2020). Leonel also testified that her mother was her “backstop” to help her financially if Randy was unable to do so.

In Leonel's Schedule J, filed on February 28, 2020, Leonel indicated monthly expenses of \$1,115, for net monthly income in the amount of \$500. (Case No. 20-11403, Doc. 1, pp. 37-38, February 28, 2020).

The City and County of Denver filed a proof of claim on May 20, 2020, for a secured claim for real property taxes owed in 2019 in the amount of \$1,129. The proof of claim also stated that the 2018 real property taxes in the amount of \$448 (the Court believes this amount is for the second half of 2018) had been sold at a tax sale. (Case No. 20-11403, Claim No. 9, May 20, 2020).

The HOA filed a proof of claim on May 8, 2020, for a secured claim in the amount of \$22,292 for unpaid HOA dues, default interest, and attorney's fees and expenses. (Case No. 20-11403, Claim No. 9, May 20, 2020).

On August 26, 2020, the HOA filed a Notice under Fed.R.Bankr.P. 3002.1(c), claiming that an additional \$10,159.19 was owed in attorney's fees and expenses, \$60 in late fees, and \$2,004 in HOA fees, for a total of \$34,516, allegedly owed to the HOA.

Leonel filed a sixty-month second amended Chapter 13 plan on June 25, 2020, under which Leonel committed to pay \$500 per month for four months, \$631 per month for four months and \$661 per month for fifty-two months. (Case No. 20-11403, Doc. 46, June 25, 2020) (the "Plan"). The Plan also proposed to cure the arrearage owed to the HOA in the amount of \$23,698 within forty-four months. Finally, the Plan provided that Leonel would make the post-petition HOA payments, in the amount of \$334 per month, directly to the HOA outside of the Plan.

Leonel's initial Chapter 13 plan and HOA direct payments were late due to "confusion." Leonel was also late in the payment of court filing fees in installments, causing the Court to issue a notice of default on March 17, 2020 (Case No. 20-11403, Doc. 15).

### **EVIDENTIARY HEARING**

The Court conducted evidentiary hearings, using the Zoom platform, on Leonel's motion to confirm the Plan, the HOA's objection thereto, and the HOA's motion for relief from stay and motion for relief from co-debtor stay on July 30, 2020, and August 6, 2020.

The Court heard the testimony of Leonel; Randy; state court counsel for the HOA, Charlene Hunter; and Rick Daily, a representative of the HOA; and admitted exhibits into evidence.

Leonel testified concerning very serious health issues experienced over several years, which have prohibited her employment. Currently, Leonel is attending beauty school, but due to health issues and COVID, she has decided to "wait it out" before completing her schooling. Leonel testified that she and Randy attempted, but were

unable to obtain, a loan secured by the Property to satisfy the claim of the HOA, due to the *lis pendens*.

Leonel was not aware of the extent of the problems with the HOA, the 2017 state court litigation, or Randy's Chapter 13 case until she was contacted by the HOA in early 2020.

Leonel also testified that Randy is "staying with me," and that he had been staying with her for only one week per month, because in the other weeks he was staying in a work trailer at job sites.

Randy testified that the parties have "been having some issues but they are still married." He also testified that money has been "beyond tight" due to Leonel's health issues and medical bills, which have been accruing for a long time. He also testified that he did not tell Leonel about the litigation with the HOA or his Chapter 13 case, because he did not want to upset Leonel.

Further, Randy also testified that he has been unable to obtain homeowner's insurance for the Property for several years due to his contention that the HOA refused to repair flooding issues within the interior walls.

Randy testified that he owns his own business, and his current income is from landscaping and labor work. He did not specify the amount of his income or provide any documentation of its source or amount. Nor did he provide evidence of his current expenses.

Randy did not provide any documentation to establish that he filed income tax returns for 2015 through 2017 and 2019, or that he paid any of the outstanding federal and state income taxes.

Randy complained throughout his testimony that the HOA was using the payments first to pay for costs of collection, including attorney's fees and expenses, instead of applying the payments to the principal amount owed, and that this was the reason he could never become current.

Randy and Leonel both testified that the Plan payments and direct payments outside the Plan were current as of the dates of the hearings, Leonel has proposed a 100% Plan, they want the chance to "save their home," and they dispute that the amount of attorney's fees and expenses claimed by the HOA for state court counsel and bankruptcy counsel are reasonable. Counsel for Leonel and Randy focused primarily on the disputes with the HOA concerning alleged stay violations and the reasonableness of attorney's fees issue, instead of feasibility.

## APPLICATION OF LAW TO FACTS

The Court has subject matter jurisdiction over these matters under 28 U.S.C. §§ 1334(a) and (b), and 157(a) and (b). This is a core proceeding under 28 U.S.C. §§ 157 (b)(2)(A), (G), and (L), as it involves the administration of the estate, confirmation of Leonel's Plan, and the HOA's motion for relief from stay and motion for relief from co-debtor stay.

The threshold issue for the Court to resolve is whether the Plan proposed in this case is feasible. If the Plan is not feasible, there is no need for the Court to reach the issues of good faith or the reasonableness of the HOA's costs of collection, application of payments, or the reasonableness of the HOA's attorney's fees and expenses.

This decision focuses on the terms of the Plan before the Court for confirmation, even though the HOA's attorney's fees and expenses have increased due to this litigation.

11 U.S.C. § 1325(a)(6) requires a debtor to demonstrate that he or she will "be able to make all payments under the plan and to comply with the plan." This requirement is known as the "feasibility" requirement.

To satisfy the feasibility standard, a debtor's plan must have a reasonable likelihood of success, and the debtor has the burden to prove both the present and future ability to meet the financial requirements of the proposed plan. *In re Khan*, No. 14-13514 MER, 2015 WL 739854, at \*3 (Bankr. D. Colo. Feb. 19, 2015) (citations omitted). Feasibility is assessed on a case-by-case basis by examining the totality of the circumstances.

The United States Bankruptcy Court for the Central District of California issued an opinion surveying the cases on non-debtor third party contributions in assessing feasibility in the case of *In re Deutsch*, 529 B.R. 308 (Bankr. C.D. Cal. 2015).

The court found that the cases indicated that while reliance on contributions from family members is disfavored, it is not prohibited (*In re Schwalb*, 347 B.R. 726, 759 (Bankr. D. Nev. 2006)); that undocumented "occasional contributions" are insufficient to establish feasibility (*Kahn*, 2015 WL 739854, at \*4); that the non-debtor must "affirm" a specific amount that will continue for the duration of the plan (*In re Crowder*, 179 B.R. 571, 574 (Bankr. E.D. Ark. 1995)); and, finally, that there must be evidence of the non-debtor's income and liabilities (*In re Norwood*, 178 B.R. 683, 691 (Bankr. E.D. Pa. 1995)). *Deutsch*, 529 B.R. at 312.

The court in *Deutsch* established a persuasive four-factor test to be applied by bankruptcy courts in determining feasibility in the case of non-debtor contributions:

- (1) the nondebtor's relationship to the debtor and motivation in making the contributions;

- (2) the nondebtor's long and undisputed history of making the contributions or otherwise providing support for the debtor;
- (3) the unqualified commitment of the nondebtor to make the contributions in a specific amount for the duration of the chapter 13 plan; and
- (4) the financial ability of the nondebtor to make the proposed contributions, including expenses and liabilities of the nondebtor that might take precedence over the contributions.

*Id.* at 312–13.

With respect to factors one, two, and three, Randy testified that there are “issues” in his marriage to Leonel, largely due to the potential of losing the Property, and the parties live apart for substantial periods of time, casting doubt about the future of the relationship and the continued funding of the Plan.

With respect to factor four, Leonel has no income or prospect of future income other than “income from husband” or, potentially, from her mother. Thus, the Court must look to Randy’s income and financial situation to evaluate feasibility.

Randy was unable to fund his own Chapter 13 plan, making only two payments to the Chapter 13 trustee in five months. There was no documentary evidence of his current income or that his income has improved since his Chapter 13 case, and he admitted, “money is more than tight”.

There was no testimony from Leonel’s mother or documentary evidence of her income and expenses or her unqualified intent and/or ability to assist in funding the Plan.

The prior history of payments to the HOA have been sporadic, at best (HOA Ex. 1). Randy did not understand and disputed why the HOA was applying his payments first to the costs of collection. The acrimony between the parties and their respective counsel was palpable, and they vehemently disagreed as to the correct overall amount due to the HOA, with their dispute centered on the reasonableness of the HOA’s attorney’s fees and expenses.

There was no documentary evidence that Randy paid his significant, outstanding federal and state income tax obligations or filed his federal and state income tax returns for 2015 through 2017, or that Randy filed income tax returns and paid income taxes for 2019. What if the Internal Revenue Service garnishes Randy’s wages or bank account?

There was no documentary evidence that the real property taxes have been paid for 2019 or the first half of 2020, especially where, as here, there was a sale of the taxes for the second half of 2018 which, if not redeemed, could result in loss of the Property to the tax buyer.

Finally, there is no homeowner’s insurance protecting the Property.

## CONCLUSION

For these reasons, the Court finds that Leonel has failed to demonstrate the Plan is feasible, and confirmation must be denied. Based upon these findings of fact and conclusions of law, there is no need for the Court to reach the issues of whether the Plan was proposed in good faith or the reasonableness of the HOA's attorney's fees and expenses. Therefore,

IT IS ORDERED that Confirmation of Debtor's Amended Chapter 13 Plan (Doc. 46) is denied.

IT IS FURTHER ORDERED that Woodstream Falls Condominium Association's Motion for Relief from Automatic Stay (Doc. 40) and Motion for Relief from Co-Debtor Stay (Doc. 43) are granted, subject to a 30-day stay of such relief from the date of this Order pursuant to Fed.R.Bankr.P. 4001(a)(3), through and including **October 22, 2020**.

IT IS FURTHER ORDERED that, based upon denial of confirmation of the Plan under 11 U.S.C. § 1325, this case is dismissed pursuant to 11 U.S.C. § 1307(c)(5), subject to a 30-day stay of such relief from the date of this Order pursuant to 11 U.S.C. § 105, through and including **October 22, 2020**, to afford Leonel an opportunity to file a motion to sell the Property free and clear of the *lis pendens* and allow Leonel and Randy a fair opportunity to realize upon any homestead exemption which might be yielded by a sale of the Property.

IT IS FURTHER ORDERED that, if a motion to sell the Property is filed on or before **October 22, 2020**, the Court will retain jurisdiction over the Chapter 13 case to rule on such motion and any objections, including the amount owed to the HOA for costs of collection, late fees, default interest, and attorney's fees and expenses, and stay relief and dismissal as set forth herein will be further stayed pending resolution of the motion to sell.

Dated this 22nd day of September, 2020.

BY THE COURT:



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Joseph G. Rosania, Jr.  
United States Bankruptcy Judge