

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

IN RE:  
JAMES G. OLDHAM and  
LORI A. OLDHAM,

Debtors.

In Proceedings  
under Chapter 13

Bk. No.: 13-30719

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**TRUSTEE'S REPLY TO DEBTORS' BRIEF IN OPPOSITION  
TO TRUSTEE'S MOTION TO COMPEL**

COMES NOW, RUSSELL C. SIMON, Chapter 13 Trustee, by and through his Staff Attorney, Justin Farishon, and files this Reply to Debtors' Brief in Opposition to Trustee's Motion to Compel, which brief was filed on April 12, 2018.

The Debtors first contend that it is an open question as to whether or not they have effected a modification of their plan by their sale of real property. The real property in question is provided for in the most recent approved plan, the Fourth Amended Plan that was approved on May 6, 2014. Said plan provides that the Debtors will be making payments directly to the holders of two mortgages on the real property, as well as curing an arrearage to the first lienholder. Numerous courts have held that the sale of real property for which payments are included in a confirmed plan must necessarily effect a modification. *See, e.g., In re Barbosa*, 236 B.R. 540 (Bankr. D. Mass. 1999); *In re Morgan*, 299 B.R. 118 (Bankr. D. Md. 2003); *In re Stinson*, 302 B.R. 828 (Bankr. D. Md. 2003). The Trustee would note that the Debtors state that caselaw on this issue is split, but they do not cite any authority that supports the position that a sale of real property in which a plan otherwise provides for ongoing monthly payments does not effect a modification.

In any event, the Seventh Circuit has held that modification does not even require a showing of a substantial change in circumstances, although the Trustee is proposing modification only in the context of a change in circumstances. *See In re Witkowski*, 16 F.3d 739, 746 (7th Cir. 1994). The Debtors' motion to sell the real property triggered the events leading to modification, which is

required upon the sale of the real property. The Trustee filed a motion to compel, as opposed to a motion to modify, because without the funds on hand, an increase in the base of the plan as well as a required distribution to general unsecured creditors would cause the case to be dismissed. The Trustee believes this result to be inequitable to said creditors, as Debtors have sufficient funds, through the sale proceeds, to pay a significant percentage of allowed claims. As previously stated, the Trustee stands willing and able to file a formal request for modification should the Court request such.

The Trustee does not agree with the Debtors' characterization of the court's analysis in *In re Barbosa*. The court's discussion of bad faith was in the context of post-confirmation vesting of property in the debtors and not in the context of modification and liquidation. The court devoted the majority of its analysis to whether the sale was a modification and, if so, whether the liquidation analysis was required at modification. This analysis did not contain a discussion of bad faith.

It is interesting, nevertheless, that Debtors bring up the issue of good faith. Under 11 U.S.C. § 1329(b)(1), section 1325(a) applies to any modification. Section 1325(a)(3) requires that any plan be proposed in good faith. This would include the modified plan where the Debtors have sold the real property. The Debtors here do not propose a modified plan in good faith by attempting to retain the sale proceeds. For starters, they filed false schedules understating the value of the real property and overstating the amount of debt securing the property without a reasonable investigation of the facts. These figures were then used as the basis for the motion to sell. Despite their contention that this was a "harmless error," the misrepresentation caused the Trustee to take an action different than he would have had the true facts been disclosed. It also allowed the Debtors to transform the proceeds from cash to alleged equity in real property, which equity may or may not exist.

Moreover, the timing of events here indicates a lack of good faith on someone's part. The Debtors filed an amended Schedule C on November 28, 2017, claiming the full homestead

exemption of \$30,000 rather than the \$9,856.00 homestead exemption they claimed on their original Schedule C. This amended schedule was filed two days before the sale of the real property, thus indicating that the Debtors were aware that they would be receiving funds well in excess of the amount of equity they claimed on their original schedules. The sale of the real property occurred on November 30, 2017. On December 15, 2017, the same day the Trustee received the HUD statement showing that the Debtors made a \$58,667.12 profit, the Trustee advised the Debtors, through their counsel, that they were not to spend the money. Per the Debtors' original Brief in Response to Trustee's Motion to Compel (pg. 2), the money was spent that same day. Nonetheless, on December 22, 2017, Debtors' counsel advised the Trustee that Debtors were instructed not to spend the money.

When counsel requested a continuance of the original hearing date on the Trustee's motion, the Trustee conditioned consent on the fact that the money had not been spent. Counsel did not respond to the Trustee's condition and instead filed a motion to continue, indicating that the Trustee consented. Again, assuming the statement in their original Brief in Response to Trustee's Motion to Compel is true, the money had already been spent, and thus the Trustee's condition was not met. Given the timing of the events, it is impossible for all parties on the Debtors' side to have acted in good faith.

The Debtors make a second argument that, assuming a modification has occurred, the liquidation analysis is done as if a hypothetical Chapter 7 Trustee were approaching a converted case.

The Debtors then make the argument that equity resulting from mortgage payments should not be captured by said hypothetical Trustee. The problem with the issue as framed by the Debtors is that, in the cases they cite, the debtors have not converted the secured collateral in which they built equity into cash via sale. Instead, the trustees in those cases sought to sell the collateral to capture the equity. Here, the Debtors already made an election to transform secured collateral into cold, hard cash. The courts in the cases cited by the Debtors were not willing to allow the trustees to strongarm

the debtors into selling property they wanted to keep just because the debtors had earned equity. The cases cited by the Debtors are thus inapposite to the facts of this case.

The Trustee would again point the Court to his original Brief and the proposition that a change in circumstances must occur in order for a modification to be permitted. The change in circumstances, by the Debtors transforming equity into cash, is what distinguishes the issue as the Debtors present it from the true facts of this case. The Trustee also reiterates those decisions in circumstances that are precisely on point to the facts presented here and provides yet more cites to cases that reach the same result. *See In re Barbosa*, 236 B.R. 540 (Bankr. D. Mass. 1999); *In re Morgan*, 299 B.R. 118 (Bankr. D. Md. 2003); *In re Stinson*, 302 B.R. 828 (Bankr. D. Md. 2003); *In re Merritt*, 344 B.R. 785, 787-88 (Bankr. N.D. W.Va. 2006); *In re Wimpee*, 343 B.R. 845 (Bankr. W.D. Ky. 2006). Other cases have held that the liquidation analysis is computed as of the modified plan in contexts other than the sale of real property. *See, e.g., In re Walker*, 2010 Bankr. LEXIS 3618, at \*16-21 (Bankr. C.D. Ill. October 21, 2010) (undisclosed workers' compensation settlement required plan modification, and amount of settlement must be turned over under liquidation analysis as of date of modification). The Debtors do not counter the Trustee's argument, nor do they cite contrary caselaw, that the liquidation analysis is done as of the date of the modified plan.

Even if the Court should choose to treat the converted property the same as the unconverted equity in the cases cited by the Debtors, the Trustee would note that it is not a settled issue, as several courts have held that equity produced by debtors in the course of a Chapter 13 case may be captured by the Chapter 7 trustee upon conversion. *See, e.g., In re Peter*, 309 B.R. 792 (Bankr. D. Ore. 2004) (nonexempt equity resulting from debtor's pay down of secured claim while in chapter 13 included in chapter 7 estate); *In re Wegner*, 243 B.R. 731 (Bankr. D. Neb. 2000) (\$2,100 equity resulting from debtor's payments during chapter 13 included in the chapter 7 estate).

For these reasons, the Trustee requests that the Debtors be compelled to turn over the

proceeds from the sale of the real property in the amount of \$28,667.12,<sup>1</sup> representing the non-exempt equity in the property.

Respectfully submitted,

/s/Justin Farishon

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document was mailed to the following interested parties who have not been electronically notified this 19<sup>th</sup> day of April, 2018, with the correct postage prepaid and deposited in the U.S. Mail.

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/s/ Jeff

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<sup>1</sup> The Debtors state in their Brief (pg. 2) that the Trustee seeks \$28,337.12. This figure is incorrect.