

**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

**TRUSTEE'S REPLY TO DEBTOR'S BRIEF IN RESPONSE
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 Debtor's Brief in Response to Trustee's Motion to Compel. The Trustee first notes that the Court has not requested briefs, entered a briefing schedule, or taken the matter under advisement. Nonetheless, Debtors have filed a brief supporting their position and providing case law on the issue as they frame it. The Trustee files this reply to ensure the Court is apprised of all relevant case law supporting the Trustee's position.

The Debtors contend that the Trustee's motion to compel should be treated as a motion to modify the plan under 11 U.S.C. § 1329(a)(1). While the Trustee agrees that the issue should be viewed in the lens of a modification of the plan, the Trustee would argue that it is the Debtors' motion to sell the real property that effectively modifies the plan, which otherwise provides for the Debtors to make regular ongoing monthly mortgage payments themselves while the lienholders retain their liens throughout the life of the plan. The Debtors must necessarily seek to modify this treatment of the mortgage lienholders in order to sell the real property, pay the liens, and seek to retain the proceeds. The Trustee will file a motion for turnover and modification of the plan to increase the pool to general unsecured creditors should the Court request such.

The issue of plan modification is secondary, however, to the issue of whether the Debtors' effort at modification, in effect seeking to retain the proceeds from the sale of the property that are in excess of the mortgage balances as of the date of the sale, comports with the requirements of §

1329(a)(1). The Trustee contends that it does not. Section 1329(b)(1) provides that § 1325(a) applies to any modification under § 1329(a). Section 1325(a)(4), often referred to as the “liquidation analysis” or the “best interest test,” requires that “the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date[.]” The question, then, is what “the effective date of the plan” is for purposes of a modification under § 1329(a)(1).

The statutory language itself is silent on this question. The legislative history instructs that:

In applying the standards of proposed 11 U.S.C. § 1325(a)(4) to the confirmation of a modified plan, “the plan” as used in the section will be the plan as modified under this section, by virtue of the incorporation by reference into this section of proposed 11 U.S.C. 1323(b). Thus, the application of the liquidation value test must be redetermined at the time of the confirmation of the modified plan.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 431 (1977), U.S. Code Cong. & Admin. News pp. 5787, 6386, 6387. The leading case on this question is *In re Barbosa*, 236, B.R. 540 (Bankr. D. Mass. 1999). In *Barbosa*, the debtors proposed to sell a piece of real property that had appreciated from \$64,000 at the time of filing to \$137,500 when they proposed the sale two and a half years later. *Id.* at 542-3. The Trustee moved to modify the debtors’ plan to increase the dividend to unsecured creditors from 10% to 100% and to require such payment within a shortened timeframe. *Id.* at 543. Effectively, the Trustee was seeking to require the debtors to use the proceeds from the sale to pay their unsecured creditors in full immediately. The court considered whether a hypothetical chapter 7 trustee would be able to capture the excess proceeds; if so, the debtors would be required to turn the proceeds over to the chapter 13 trustee in order to satisfy the liquidation analysis. *Id.* at 554. The court concluded that a chapter 7 trustee would be entitled to the proceeds from the appreciation and required the debtors to turn them over. *Id.* Other courts in this district have followed *Barbosa*. *See, e.g., In re Drew*, 325 B.R. 765, 771 (Bankr. N.D. Ill. 2005); *In re Golek*, 308 B.R. 332, 336 (Bankr.

N.D. Ill. 2004).

Similarly, in *In re Morgan*, the debtor proposed to sell a piece of real property and use the proceeds after satisfying the lienholders' claims to pay off the plan balance. 299 B.R. 118, 120 (Bankr. D. Md. 2003). The Trustee asked the court to reconsider its order requiring the Trustee to refund to the debtor the amount of the proceeds that exceeded the plan's balance. *Id.* The court granted the Trustee's motion to reconsider and denied the debtor's motion to modify her plan to use the proceeds to pay the plan balance. *Id.* at 124-5. "Debtor continues to receive significant relief and an opportunity for a fresh start. ... Upon plan completion, Debtor receives a discharge of all dischargeable debts including the unpaid portion of allowed claims. As this appears to have been congressional intent in requiring that Section 1325(a) apply to any modification after confirmation, Debtor's assertion of inequity appears misplaced." *Id.* at 125. *See also In re Wetzel*, 381 B.R. 247 (Bankr. E.D. Wis. 2008); *In re Stinson*, 302 B.R. 828 (Bankr. D. Md. 2003).

In the instant case, Debtors concede that the real property, and hence the proceeds from the sale of said property, is property of the estate. Debtors' Br. in Resp. to Trustee's Mot. to Compel 3-4. The Debtors implicitly have requested, and the Court has approved, a modification of their plan under § 1329(a)(1) to sell said real property. Since the proceeds are estate property, a hypothetical chapter 7 trustee would be able to capture and distribute them to unsecured creditors in a liquidation. In order to satisfy the liquidation analysis of § 1325(a)(4), as required by § 1329(b)(1), the Debtors must turn over the proceeds from the sale such that creditors will receive at least as much as they would receive in the hypothetical chapter 7 case. The liquidation analysis must be done *as of the date of the modification* in order to effect the congressional intent of requiring a liquidation analysis upon a modification.

The Debtors make a public policy argument that they should not be "punished" for paying down their mortgage debt and acquiring equity. They note that "any debtor that has paid down

his/her mortgage over the course of a chapter 13 case could be required to increase the pool to unsecured creditors.” This is a pitfall noted by the court in *Barbosa*. 236 B.R. at 554. If either equity or “an under-evaluation at the time of the original confirmation, or appreciation of the value during the pendency of [the] case,” *Morgan*, 299 B.R. at 122, can be captured for the benefit of unsecured creditors using the liquidation analysis on a trustee’s or creditor’s motion to modify a plan, what is to stop a trustee or creditor from filing serial motions to modify to increase the dividend to unsecured creditors? Most courts take the position that there must be a change in circumstance to permit a trustee or creditor to modify a plan to capture any appreciation or equity. *See, e.g., In re Trumbas*, 245 B.R. 764 (Bankr. D. Mass. 2000) (“nothing in the Bankruptcy Code requires the Debtor...to incur new debt or to sell her home as a condition precedent to obtaining a discharge”).

Thus, the court in *Barbosa* stated eloquently:

[R]esolution of these multifaceted issues cannot readily be resolved by attempting to harmonize the various provisions of Chapter 13 of the Bankruptcy Code. The binding effects of confirmed plans, the purposes of the proposed modifications and the unique circumstances of each case must be weighed to reach an equitable result in each case. The backdrop for the Court’s decision is the recognition that a confirmed plan is a contract binding on creditors and that the discharge of debts is a privilege, not a right. Overriding all other concerns is the issue of good faith. In view of congress’s intent in enacting chapter 13 to encourage debtors to repay their debts to the best of their ability, it would be anomalous for this Court to determine that the Debtors can retain the excess proceeds from the sale of the Property without satisfying their unsecured claims.

Barbosa, 236 B.R. at 555-6.

Here, the Debtors willingly sold their real property. They were under no order to do so. They could have elected to retain the property through the conclusion of their case. Once their case concluded and they received a discharge, they would be free to sell the property without approval from the Court, and they could retain the entirety of the net proceeds for themselves. They chose instead to sell the property. They then misappropriated property of the estate and bought a different piece of real property. By willingly creating a change in their circumstances, the Debtors initiated a modification of their plan that requires a liquidation analysis performed at the time of modification.

They cannot now cry foul and seek to gloss over the requirements of the Code.

Debtors have many other incentives to make their plan payments and, if paid outside of the plan, mortgage payments. Their plan payments allow them to charge ahead toward discharge and potentially receive a fresh start. Their mortgage payments allow them to stay in property that they value, for whatever reason it is they value it, be it sentimental, economic, geographic, etc. Those same payments are building equity in the property—equity that the debtors may keep for themselves upon the conclusion of their case. They may not, however, build equity, liquidate the property, and keep the profits to the detriment of their creditors during the life of their plan. The purpose of a chapter 13 bankruptcy is for debtors to pay all that they can, as the Code requires, to their creditors; should they do that, they receive a discharge of all dischargeable debts. The tradeoff noted here is not new, yet the Debtors seek to circumvent it by (presumably, at the conclusion of the case) seeking a discharge and not paying all that they must to their creditors.

The Trustee would also note to the Court that the Debtors were less than forthright with the Trustee throughout the process of seeking approval for the sale and retaining the proceeds. The Debtors stated in their motion to sell that the debt on the property was the debt listed on Schedule D. This statement is false not only because the actual debt, as shown in the proofs of claim filed by the two lienholders, was only \$98,736.70 on the date of filing and not the \$116,857.00 on Schedule D, but also because the actual debt at the time of sale was only \$57,049.02. Thus, the Trustee objected to the sale only so as to receive the closing statements to verify the Debtors' statements. The Trustee would have sought turnover of the net proceeds immediately at the time of sale had the Debtors been honest about the debt securing the property.

Thereafter, immediately upon receiving the closing documents on December 15, 2017, the Trustee advised Debtors, through their counsel, that they were not to spend any of the proceeds from the sale. According to the closing documents, Debtors received the proceeds on November 30, 2017.

According to their brief, Debtor James Oldham then purchased new real property with the sale proceeds “[f]ifteen days later,” or approximately December 15, 2017. Debtors’ Br. in Resp. to Trustee’s Mot. to Compel 2. The Trustee was informed on December 22, 2017, via Debtors’ counsel, that he [counsel] “instructed Debtors to leave the money alone.” However, according to the closing documents and Debtors’ own brief, this is not possible, as the money was already spent on a different piece of real property.

Furthermore, Debtors’ counsel requested the Trustee’s consent to continue the hearing on the Trustee’s motion to compel. The Trustee was willing to give his consent only on the condition that the Debtors still had the money on hand. Debtors’ counsel did not respond to the Trustee’s conditional assent but instead filed a motion to continue which indicated to the Court that the Trustee had no objection to the continuance. As noted above, Debtors’ counsel must necessarily have been aware, at the time he requested a continuance, that the Debtors had already spent the proceeds on a different piece of real property. Nevertheless, he maintained to the Court that the Trustee agreed to the continuance, despite knowing that the condition requested by the Trustee was not true.

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, 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 14th day of February, 2018, with the correct postage prepaid and deposited in the U.S. Mail.

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