Post-confirmation appreciation
Res judicata
Modification of plan

In re Douglas H. Suratt

Case No. 692-62374-psh13
Civil No. 95-6186-HO

1/10/96 Dist. Ct. (Hogan, J.) affirming PSH Unpublished

The Bankruptcy Court confirmed the debtor's Chapter 13 plan on 11/18/92. The plan valued the debtor's 1/2 interest in his personal residence at $100,000 and, based on the value of the estate property, it required that the debtor make a payment of approximately 5% to unsecured creditors. The plan did not require the debtor to sell his residence. Prior to completion of payments under the confirmed plan, the debtor and his spouse sold their house for $265,000, with the debtor's share of the proceeds being $44,693.24. The debtor asked the court to rule that he is entitled to the balance of the nonexempt proceeds free of any claims of unsecured creditors. The trustee filed a modified plan requiring the debtor to pay all nonexempt proceeds into the plan.

The Bankruptcy Court characterized the debtor's argument as being that the confirmed plan is res judicata as to all obligations of the confirmed plan. The court, however, rejected this argument and held that a confirmed plan may be modified if the modified plan meets all the preconditions for a confirmed plan. While stating that the 9th Circuit's statement in In re Anderson concerning requirements for plan modification is dicta, the court nonetheless found that those requirements were met in this case. There was a substantial change in the debtor's ability to pay and the confirmed plan did not address the application of the proceeds of a sale. The court confirmed the modifed plan requiring the debtor to pay all nonexempt assets of the sale into the plan.

The District Court affirmed the order of the Bankruptcy Court. Because the sale of the debtor's real estate was not anticipated at the time of plan confirmation, treatment (or nontreatment) of the sale proceeds by the plan is not res judicata. Post-confirmation appreciation is required to be paid into the plan for the benefit of unsecured creditors.

E95-2A(8)

U.S. BANKRUPTCY COURT
DISTRICT OF OREGON
FILED

JAN 10 1996

TERENCE H. DUNN, CLERK
BY _____ DEPUTY

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

In re:	Civil No. 95-6183-HO
DOUGLAS H. SURATT,	ORDER
Debtor.	

This is a bankruptcy appeal arising out of a Chapter 13 bankruptcy. The bankruptcy court confirmed the debtor's Chapter 13 plan on November 18, 1992. At that time, the debtor's one-half interest in a residential property was valued at $100,000. Based on the value of the estate property, including this residence, the debtor was required to make a payment of approximately 5% into the plan for the benefit of unsecured creditors. The plan did not include any provision for sale of the residence.

The debtor and his spouse sold the property for $265,000 in July, 1994, prior to completion of payments under the confirmed

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Dated 1-19-96
Donald M. Cinnamond, Clerk
By Lea Force Deputy

plan. The debtor's share of the net proceeds was $44,693.24. The debtor's homestead exemption of $15,000 was allowed without objection. It is undisputed that the remainder constitutes only the appreciated value of the real property since the plan's confirmation. The debtor filed a motion for interpretation of the plan asking the bankruptcy court to allow him to keep all nonexempt proceeds of the sale. On October 6, 1994, the trustee filed a proposed modified plan pursuant to 11 U.S.C. § 1329 which would require the debtor to pay all of the nonexempt proceeds into the plan, increasing the payments to unsecured creditors to approximately 27%. The bankruptcy court confirmed the modified plan over the debtor's objection and the debtor appeals that ruling.

DISCUSSION

The debtor argues that he is entitled to the entire share of his net proceeds, or $44,693.24, because: (1) the property vested in him, rather than the estate, after the Chapter 13 plan confirmation, and (2) the sale of this property was an issue which could have been decided at the original confirmation hearing and res judicata applies to preclude the trustee from capturing the post-confirmation sale proceeds through plan modification. Debtors receive a "fresh start" after the discharge in a Chapter 13 bankruptcy, which does not occur until all payments under the confirmed plan have been made. Congress provided that Chapter 13 bankruptcy payment plans could last no

longer than five years. After this period, debtors know they are entitled to a "fresh start" in financial life. Congress also intended that the debtor repay creditors, to the extent capable, during the Chapter 13 period.

Chapter 13 does not contemplate liquidations of property. 11 U.S.C. § 1327(b) and (c) provide:

> (b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.
>
> (c) Except as otherwise provided in the plan or in the order confirming the plan, the property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for by the plan.

In considering the term "vests", this court has held that property formerly of the estate becomes the debtor's property and the estate ceases to exist. Mason v. Williams, 51 B.R. 548, 550 (D. Or. 1985)(Frye, J.). Once the property is vested, the debtor can "use, sell or lease the property within or outside the ordinary course of business without the necessity of notice and a hearing or order of the bankruptcy court." Mason v. Williams, 45 B.R. 498, 500 (Bankr. D. Or. 1984). The debtor argues, in essence, that because the property vested in him upon confirmation, all post-confirmation sale proceeds must vest in him, to the exclusion of the trustee. However, receiving proceeds has also altered the debtor's financial circumstances. See In re Solis, 172 B.R. 530 (Bankr. S.D.N.Y. 1994)(vesting is not determinative issue in considering modification of Chapter

13 plan).

Under 11 U.S.C. § 1329(a)(1), a debtor, trustee, or holder of an allowed unsecured claim may request modification of the debtor's plan "to increase or reduce the amount of payments on claims of a particular class provided for by the plan." If there is objection to a trustee's request, the trustee "must bear the burden of showing a substantial change in the debtor's ability to pay since the confirmation hearing and that the prospect of the change had not already been taken into account at the time of confirmation." Anderson v. Satterlee, 21 F.3d 355, 358 (9th Cir. 1994). Courts have protected the debtor's right to the full homestead exemption on the date of the sale in both Chapter 7 and Chapter 13 cases, regardless of the vicissitudes of the real estate market or the timing of the sale. In re Walker, 153 B.R. 565 (Bankr. D. Or. 1993)(citing In re Hyman, 967 F.2d 1316 (9th Cir. 1992)). However, the debtor's right to receive all remaining nonexempt proceeds depends on the applicability of res judicata.

An order confirming a Chapter 13 plan is "res judicata as to all justifiable [sic] issues which were or could have been decided at the confirmation hearing." In re Evans, 30 B.R. 530, 531 (Bankr. 9th Cir. 1983)(citation omitted). Issues of adequate protection, lack of equity, and necessity of the property to an effective reorganization of a debtor's affairs can and should be raised at the confirmation hearing. Id. The

doctrine of res judicata limits post-confirmation modifications to cases in which the change in a debtor's ability to pay was unanticipated at the time of confirmation. In re Fitak, 92 B.R. 243, 249-50 (Bankr. S.D. Ohio 1988)(sale of residential property contemplated and covered in confirmation plan). The Ohio court applied an objective test in determining whether the debtor's changed circumstances were unanticipated, i.e., whether a debtor's altered financial circumstances could have been reasonably anticipated at the time of confirmation by the parties seeking modification. Id. It found that because sale of the property was covered in the confirmation plan, the movants could have anticipated an appreciation in value and objected to confirmation on that basis. Id.

On the other hand, where a Chapter 13 plan provides for unsecured creditors to be paid from income earned from a business and the confirmed plan gives no indication of a debtor's intention to sell the business, a post-confirmation sale could be an unanticipated change warranting plan modification. In re Solis, 172 B.R. 530 (Bankr. S.D.N.Y. 1994)(debtor's sale was not anticipated or reasonably foreseeable by creditors or trustee at time of plan confirmation where debtor neglected to inform them); see also In re Arnold, 869 F.2d 240, 243 (4th Cir. 1989)(if it was anticipated, debtor's expectations should have been disclosed to the bankruptcy court before the plan was confirmed).

A debtor's receipt of $40,000 from the post-confirmation sale of a business has been held to be a substantial change in circumstances warranting modification. In re Solis, 172 B.R. at 533. A 20% increase in appraised value is not an unanticipated change in debtor's circumstances as would support modification. In re Fitak, 92 B.R. at 251. Although it may be reasonable to expect a debtor's income to fluctuate from year to year because it was based on sales commissions, an unsecured creditor should not be expected to anticipate a substantial increase, i.e, $120,000, in only two years. In re Arnold, 869 F.2d at 243.

The logical extension of the debtor's argument here is that there must be a provision in all Chapter 13 plans requiring post-confirmation sale proceeds from property originally part of the estate to be paid to creditors, in order to preclude the debtor from receiving those funds. There is no such requirement in the Bankruptcy Code, nor has any court imposed such a requirement. 11 U.S.C. § 1329(a) is intended, in part, to provide the protection the debtor claims is missing. Its purpose is to protect creditors' rights to a debtor's increased income, including from proceeds from the sale of property that has appreciated in value, post-confirmation. As Chief Judge Hess reasoned in addressing post-confirmation appreciation:

> In this case, the property has increased in value since the filing of the petition. What would happen if the debtor were to seek a modification of the plan because the value of the property had decreased? If the creditor's allowed secured claim would increase because of an increase in the value of the property,

> it would seem to follow that the allowed secured claim should decrease if the value of the property were to decrease. For example, in the case of improvements on real property or other depreciable property, if the property has a value of $100,000 at the time of filing, a creditor secured by the real property and improvements has an allowed secured claim of $100,000 if the debt equals or exceeds that sum. It would not make sense that the debtors could have a later modified plan approved which reduced the allowed secured claim because the value in the meantime had declined because of depreciation, physical damage or other cause. In re Walker, 153 B.R. at 571 n. 3.

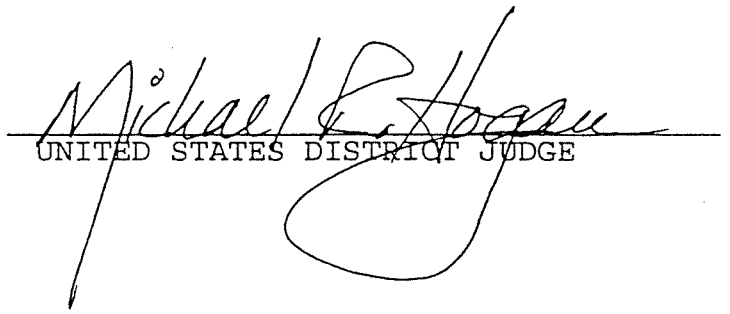
The debtor argues that sales of real property during Chapter 13 periods occur often and are therefore, not unanticipated events. However, simply because there is real property in the estate does not necessarily mean that it is reasonably foreseeable to the trustee and creditors that the debtor will decide to sell that property during the Chapter 13 period. The debtor's receipt of sale proceeds substantially changed his ability to pay unsecured creditors, i.e., from 5% to 27%, and it is undisputed that the original plan did not provide for the sale of debtor's residence. There is no evidence in the record to suggest that the debtor was contemplating the sale of the residence at the time of confirmation. Accordingly, there is no evidence to suggest that the trustee or creditors could have reasonably anticipated the sale. The bankruptcy judge did not err in allowing the trustee's motion to modify the Chapter 13 plan and ordering its confirmation.

CONCLUSION

The bankruptcy judge's decision to allow the trustee's

motion and order modification of the Chapter 13 plan is affirmed. This proceeding is dismissed.

DATED this 9th day of Jan., 1996.



UNITED STATES DISTRICT JUDGE

FILED
& Entered

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

U.S. BANKRUPTCY COURT
DISTRICT OF OREGON
FILED

JAN 19 1996

TERENCE H. DUNN, CLERK
BY _____ DEPUTY

In re: DOUGLAS H. SURATT,

Debtor.

Civil No. 95-6183-HO

JUDGMENT

The bankruptcy judge's decision to allow the trustee's motion and order for modification of the Chapter 13 plan is affirmed. This proceeding is dismissed.

Dated: January 19, 1996.

Donald M. Cinnamond, Clerk

by Lea Force
Lea Force, Deputy

JUDGMENT **DOCUMENT NO:** _____

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