Post-petition appreciation
Res judicata
Modification of plan

In re Douglas H. Suratt — Case No. 692-62374-psh13

2/16/95 — PSH — Unpublished

The 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 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.

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

IN RE	)	Case No. 692-62374psh13
	)	
DOUGLAS H. SURATT,	)	OPINION
	)	
Debtor.	)	

The court must determine to whom the post-petition appreciation inures if a Chapter 13 debtor sells property during the life of a confirmed plan and, having paid off all liens, receives additional proceeds which are not required by the terms of the plan to be paid to his prepetition unsecured creditors.

FACTS

This court entered an order confirming the debtor's Chapter 13 plan on November 18, 1992. The debtor's one-half interest in the residential property eventually sold had been valued on his Chapter 13 schedules at $100,000. Based on the value of estate property, including the residence, the debtor had been required by the provisions of 11 U.S.C. § 1325(a)(4) to make a payment of approximately 5% into the plan for the benefit of his unsecured

creditors. The plan did not include any provision for the sale of the residence. In July, 1994, prior to the debtor's completion of payments under the confirmed plan, he and his non-debtor spouse sold the property for $265,000. The debtor's share of the net proceeds from the sale was $44,693.24. Of this amount the debtor validly claimed $15,000 as exempt. He has asked the court to interpret the terms of the confirmed plan as also entitling him to the balance from his one-half interest free of any claims by the trustee on behalf of his unsecured creditors. The trustee has filed a proposed modified plan pursuant to 11 U.S.C. § 1329 which, if confirmed, would require the debtor to pay the nonexempt proceeds into the plan. This would increase the debtor's payments to his unsecured creditors to approximately 27%. The disputed funds are being held by the escrow agent pending a court decision.

ANALYSIS

The debtor insists that with confirmation of his 1992 plan and the effect of 11 U.S.C. § 1327 his prepetition creditors have no claim to the nonexempt proceeds. His argument goes something like this. At confirmation in 1992 the court, taking into consideration all nonexempt estate property, including any nonexempt equity then present in the residence, found, as a precondition to confirmation, that the plan provided for an amount to be distributed to the unsecured creditors which they would have received if the estate were then liquidated under Chapter 7. By the terms of §1325(a)(4) this process of valuation is to be performed as of the effective

date of the plan. After confirmation the provisions of § 1327(b) and (c) vested all estate property, including the residence, in the debtor free and clear of any claims of his prepetition creditors other than as provided for in the confirmed plan. He has cited Mason v. Williams, 45 B.R. 498 (Bankr. D. Or. 1984), aff'd sub nom. In re Mason, 51 B.R. 548 (D. Or. 1985) in support of his position. In Mason in addressing whether certain acts had violated the automatic stay the courts held that, postconfirmation, title joins possession of estate property with the debtor. Property formerly of the estate becomes the debtor's property. Accordingly, after confirmation the estate terminates.[1]

Although he has not used the legal phrase, in fact the debtor is asking the court to find that postconfirmation the doctrine of res judicata always applies to bar modification of the obligations as defined under the plan in place. This argument has been presented and rejected in a number of reported cases which address the interplay between §§ 1327 and 1329.[2]

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[1] The courts disagree on the effect of § 1327(c) on the entity of the bankruptcy estate. See In re Aneiro, 72 B.R. 424 (Bankr. S.D.Cal. 1987) (revested property remains property of estate); In re Walker, 67 B.R. 811 (Bankr. C.D. Cal. 1986); In re Dickey, 64 B.R. 3 (Bankr. E.D. Va.1985) (estate terminates); In re Adams, 12 B.R. 540 (Bankr. D. Utah 1981); In re Stark, 8 B.R 233 (Bankr. N.D. Ohio 1981). Although Mason directly addresses this issue it is not relevant to the analysis this court must perform in reaching a decision on the controversy between these parties. Consequently this court forms no opinion on the effect of § 1327(c) on the bankruptcy estate.

[2] In re Arnold, 869 F.2d 240 (4th Cir. 1989); In re Solis, 172 B.R. 530 (Bankr. S.D.N.Y. 1994); In re Perkins 111 B.R. 671 (Bankr. M.D.Tenn. 1990); In re Jock, 95 B.R. 75 (Bankr. M.D. Tenn. 1989); (continued...)

As stated by the author of a Section 1327(a) is not a limit on permitted modification of a confirmed Chapter 13 plan; rather, it is a statutory description of the effect of a confirmed plan or of a confirmed modified plan. A confirmed Chapter 13 plan binds the debtor (and all creditors), 11 U.S.C. § 1327(a), but a confirmed plan "may be modified . . . at any time after confirmation of the plan but before the completion of payments under the plan. . . ." 11 U.S.C. § 1329(a). The confirmed plan binds the debtor unless and until it is modified, and then the modified plan "becomes the plan," 11 U.S.C. § 1329(b)(2), and the modified plan has the effects described in § 1327.

In re Jock, 95 B.R. 75, 77 (Bankr. M.D. Tenn. 1989). The modified plan, as with the original plan, must meet the preconditions of §§ 1322(a), 1322(b), 1323(c) and 1325(a) for confirmation. In re Louquet, 125 B.R. 267 (Bankr. 9th Cir. 1991).

In 1984 Congress amended § 1329(a)[3] to allow not only the debtor but also the trustee or a creditor holding an allowed unsecured claim to request modification of a confirmed but uncompleted plan to, among other things, increase "the amount of payments on claims of a particular class provided for by the plan". This amendment has been recognized by the Ninth Circuit Court of Appeals.[4] Courts disagree as to whether, as a precondition to confirmation under 11 U.S.C. § 1329, the moving party also must

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(...continued)
In re Fitak, 92 B.R.243 (Bankr. S.D. Ohio 1988), aff'd, 121 B.R 224 (S.D. Ohio 1990). But see Kitchen v. Malmstrom Federal Credit Union (In re Kitchen), 64 B.R. 452 (Bankr. D. Mont. 1986); In re Abercrombie, 39 B.R. 178 (Bankr. N.D. Ga.1984).

[3] Pub.L. No. 98-353, Title III, Subtitle A, § 319, 98 Stat. 357 (1984).

[4] In re Anderson, 21 F.3d 355 (9th Cir. 1994). See also In re McCollum 76 B.R. 797 (Bankr. D. Or. 1987) wherein the author of Mason applies the provisions of § 1329 to confirm a modified plan proposed by the debtor.

show that there has been a change in the debtor's circumstances.[5] Anderson quotes Collier on Bankruptcy that to obtain confirmation of a modified plan "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.'" 21 F.2d at 358. In Anderson it was unnecessary for the court to address this issue to resolve the controversy before it. Therefore the quoted passage is dicta and is not binding on this court. It will apply Anderson, however, for purposes of this opinion, because it believes that the trustee has met the preconditions for confirmation of the modified plan which are set forth by dicta.

The debtor asserts that Anderson requires the trustee to show that there was an unanticipated change of circumstances. He argues that appreciation and sale of real estate is not an unanticipated circumstance. The debtor has badly misstated the quotation from Colliers which appears in Anderson. Applying the accurate quoted passage, the relevant facts before us are: 1. With the sale there has been a substantial change in the debtor's ability to pay, and 2. At the time of confirmation in 1992 there was no discussion about the sale of the residence; therefore the plan did not address application of any proceeds from sale.

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[5] For a detailed discussion on this point see In re Perkins, 111 B.R. 671, 672 (Bankr. M.D. Tenn. 1990). See also In re Solis, 172 B.R. 530 (Bankr. S.D.N.Y. 1994).

The debtor has raised no other objections to confirmation of the modified plan filed by the trustee. Therefore the court will enter an order of confirmation for this plan.

This Memorandum Opinion contains the court's findings of fact and conclusions of law and pursuant to Bankruptcy Rule 9014, which incorporates Rule 7052, they will not be separately stated.

An order consistent herewith will be entered.

POLLY S. HIGDON
Bankruptcy Judge