

§ 1325(a)(5)(B)(iii)(I)
Cramdown
Non-residential real property

Richard L. Nguyen, Case No. 11-35979-rld13

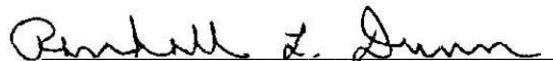
04/02/2012 RLD

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The bankruptcy court applied In re Bollinger, 2011 WL 3882275 (Bankr. D. Or. 2011), to deny confirmation of debtor's cramdown plan with respect to non-residential real property.

P12-4(5)

Below is an Opinion of the Court.



RANDALL L. DUNN
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case
Richard L. Nguyen,) No. 11-35979-rld13
Debtor.) MEMORANDUM DECISION DENYING
CONFIRMATION OF PLAN

The debtor, Richard L. Nguyen, filed a chapter 13 petition on July 12, 2011 ("Petition Date"). On the Petition Date, Mr. Nguyen owned an investment property ("Rental Property") which was subject to a first mortgage ("Mortgage") held by US Bank and serviced by Select Portfolio Servicing, Inc. ("SPS").

Mr. Nguyen does not dispute that on the Petition Date, the amount owed on the Mortgage was \$291,154.16, \$51,412.21 of which represented pre-petition arrears, including payments of principal and interest, late charges, escrow advances and accrued fees and costs. However, supported by a prepetition current market analysis of the Rental Property, Mr. Nguyen's chapter 13 plan ("Plan") proposed to bifurcate SPS's claim into a secured claim in the amount of \$193,035 ("Secured Claim"), with the balance of the claim treated as unsecured.

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1 The Plan, as amended, provides for monthly payments to the chapter
2 13 trustee ("Trustee") in the amount of \$1,094. From this amount, the
3 Trustee is to pay SPS, on account of the Secured Claim, \$850 each month
4 until July 2015, at which time the balance of the Secured Claim is to be
5 paid through a sale or refinance of the Rental Property as a balloon
6 payment.

7 SPS objected to the Plan, asserting that § 1325(a)(5)(B)(iii)(I)'s
8 requirement for equal monthly payments necessarily precludes payment of
9 its Secured Claim through a balloon payment, as provided in the Plan.
10 Instead, SPS contends that Mr. Nguyen must pay the Secured Claim in full
11 through equal monthly payments during the life of the Plan. Under a
12 sixty-month plan, the monthly payment due on the Secured Claim, even
13 excluding the proposed interest to be paid on the Secured Claim, would be
14 \$3,217.25.

15 Under § 1325(a)(5), there are three ways a debtor may treat a
16 secured claim and gain confirmation. The creditor can accept
17 the proposed treatment, § 1325(a)(5)(A); the debtor can
18 surrender the collateral, § 1325(a)(5)(C); or the debtor may
19 retain the collateral provided the creditor retains its lien
20 until the earlier of payment of the entire underlying debt or
21 entry of the debtor's discharge, § 1325(a)(5)(B)(i), and the
22 value as of the plan's effective date, of property to be
23 distributed under the plan is not less than the claim's allowed
24 amount. § 1325(a)(5)(B)(ii). New § 1325(a)(5)(B)(iii) imposes
25 additional requirements when periodic payments of secured
26 claims are proposed.

22 In re Sanchez, 384 B.R. 574, 576 n.4 (Bankr. D. Or. 2008). It is these
23 "additional requirements" in § 1325(a)(5)(B)(iii) that are at issue in
24 this contested matter. Specifically, § 1325(a)(5)(B)(iii) provides (I)
25 that if "property to be distributed pursuant to this subsection is in the
26 form of periodic payments, such payments shall be in equal monthly

1 amounts," and (II) if "the holder of the claim is secured by personal
2 property, the amount of such payments shall not be less than an amount
3 sufficient to provide to the holder of such claim adequate protection
4 during the period of the plan."

5 Mr. Nguyen contends that the requirement for equal monthly payments
6 applies only to claims secured by personal property. He reaches this
7 conclusion based upon the "and" which conjoins subsections (I) and (II)
8 of § 1325(a)(5)(B)(iii). His interpretation of the statute effectively
9 writes out the conditional phrase contained in § 1325(a)(5)(B)(iii)(II):
10 "if . . . the holder of the claim is secured by personal property. . . ."
11 I read § 1325(a)(5)(B)(iii)(II) to impose the additional condition of
12 providing adequate protection when the collateral involved is personal
13 property, not to reach back to eliminate the requirement for equal
14 monthly payments as to real property collateral. Had Congress intended
15 the result suggested by Mr. Nguyen, it could easily have drafted
16 § 1325(a)(5)(B)(iii) to begin not by the single word "if," but by the
17 phrase "if the holder of the claim is secured by personal
18 property. . . ."

19 In support of its assertion that § 1325(a)(5)(B)(iii)(I) not only
20 requires equal monthly payments, but also precludes balloon payments in
21 conjunction with a series of lesser payments, SPS relies on the published
22 decision of another judge of this court. See In re Bollinger, 2011 WL
23 3882275 (Bankr. D. Or. 2011). Bollinger also involved a debtor's attempt
24 to cram down a creditor secured by non-residential real property. In
25 Bollinger, Judge Alley analyzed what he characterized as the
26 "antibackloading policy" behind § 1325(a)(5)(B)(iii)(I) and determined

1 that Congress included language requiring equal periodic payments as a
2 "straightforward prohibition of repayment schemes that allocated the bulk
3 of the payments to some point in the future." In re Bollinger, 2011 WL
4 3882275 *3. As such, he concluded that § 1325(a)(5)(B)(iii)(I)'s
5 requirement of "equal periodic payments" necessarily excludes balloon
6 payments.¹

7 Mr. Nguyen contends that Bollinger's strict reading of the equal
8 monthly payment requirement to exclude a balloon payment in the context
9 of this case would lead to the absurd result that his mortgage payment to
10 SPS would double if he were to exercise his right to bifurcate SPS's
11 claim pursuant to § 506.² He points out, as does Bollinger, that I
12 previously have ruled orally that § 1325(a)(5)(B)(iii)(I) is ambiguous as
13 to whether a balloon payment is precluded based upon the requirement of
14 equal monthly payments. See In re Meredith, Case #11-30227-rld13 (Bankr.
15 D. Or. May 5, 2011) (Dunn, J.). However, as a matter of historical
16 policy, I am bound by the published opinion of another judge of this
17 court. Bollinger is such a decision.

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21 ¹ The challenged chapter 13 plan provisions in Bollinger are very
22 similar to the provisions at issue in this case: the debtor in Bollinger
23 proposed periodic payments of \$1,208 per month at 5% interest, with the
24 balance of the crammed down secured claim to be paid from the proceeds of
a sale or refinance of the subject property.

25 ² The result is not necessarily so absurd when one considers that
26 if Mr. Nguyen were able to effect a cramdown, he would write down
US Bank's secured loan by almost \$100,000 and reduce the interest rate by
3.625%.

