UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re	:	Chapter 13
	:	
DAVID NEVINS and	:	Bankruptcy No. 02-37055DWS
HANNA R. NEVINS,	:	
aka Hanna R. Udell,	:	
	:	
Debtors.	:	

MEMORANDUM OPINION

BY: DIANE WEISS SIGMUND, Chief Bankruptcy Judge

Before the Court is the Debtors' Motion to Release Proceeds of Sale of Real Estate (the "Release Motion") and the Objection of the Chapter 13 trustee thereto.[1] For the reasons that follow, the Motion is denied without prejudice.

[1] After a hearing on January 20, 2005 in which it appeared that the Motion was settled and an amended plan would be filed, see Doc. No. 65, I received a letter dated March 29, 2005 from Debtor's counsel advising me that efforts to settle with the Trustee had not been successful and requesting that I decide the Motion.

BACKGROUND[2]

Debtors filed a petition under Chapter 13 in November 12, 2002. Among their assets was a residence (the "Property") owned by Mrs. Nevins and valued at $68,000 on their Schedules. Their Second Amended Chapter 13 plan was confirmed ("Confirmed Plan") on October 30, 2003 and provided for 60 equal payments of $250 aggregating $15,000. Doc. No. 26. Notably it also provided for current direct payments to their mortgagee which were reflected on their Schedules in the amount of $1,175 month. Schedule J.

While not contemplated by the Confirmed Plan, on January 22, 2004 Debtors filed a post-confirmation Motion for Permission to Sell Real Estate (the "Sale Motion") for $106,000. Doc. No. 33. The Sale Motion averred that any amount in excess of $87,500 representing the average price of comparable properties sold between March 29, 2002 and January 29, 2003, should be considered a post-petition increase in value and not property of the estate. Claiming that the amount of these proceeds were subject to exemptions held by

---

[2] No evidence was presented in connection with this contested matter. However, the facts as recited are not disputed or are apparent from the docket and documents of which I take judicial notice. Fed.R.Evid. 201, incorporated in these proceedings by Fed.R.Bankr.P. 9017. See Maritime Elec. Co., Inc. v. United Jersey Bank, 959 F.2d 1194, 1200 n.3 (3d Cir. 1991); Levine v. Egidi, 1993 WL 69146, at *2 (N.D. Ill. 1993); In re Paolino, 1991 WL 284107, at *12 n. 19 (Bankr. E.D. Pa. 1991); see generally In re Indian Palms Associates, Ltd., 61 F.3d 197 (3d Cir. 1995). While a court may not take judicial notice *sua sponte* of facts contained in the debtor's file that are disputed, In re Augenbaugh, 125 F.2d 887 (3d Cir. 1942), it may take judicial notice of adjudicative facts "not subject to reasonable dispute ... [and] so long as it is not unfair to a party to do so and does not undermine the trial court's factfinding authority." In re Indian Palms Assoc., 61 F.3d 197, 205 (3d Cir. 1995) (*citing* Fed.R.Evid. 201(f) advisory committee note (1972 proposed rules). Moreover, "factual assertions in pleadings, which have not been superceded by amended pleadings, are judicial admissions against the party that made them. Larson v. Gross Bank, 204 B.R. 500, 502 (W.D. Tex. 1996) (statements in schedules). See also In re Musgrove, 187 B.R. 808 (Bankr. N.D. Ga. 1995) (same); In re Leonard, 151 B.R. 639 (Bankr. N.D.N.Y. 1992) (same).

both Debtors, the Sale Motion sought the release of the funds to the Debtors. The Debtors further proposed that the Confirmed Plan be reduced to 36 monthly payments of $250 because the mortgagee would be paid off in the sale.[3]

The Trustee and Mellon Bank ("Bank") objected to the Sale Motion insofar as it sought to dictate what happened to the sale proceeds. Specifically Bank noted that Mr. Nevins was not entitled to an exemption for the Property which was owned solely by his wife. As that issue was related to the plan modification request subsumed in the Sale Motion, this Court approved the post-confirmation sale, contemplating that a formal plan modification motion would be filed dealing with the distribution of the non-exempt proceeds. The Order approving sale dated February 26, 2004 directed that the proceeds be transmitted to the Trustee less an amount equal to Mrs. Nevins' exemption. Doc. No. 37.

On June 24, 2004 a formal Motion to Modify Plan (the "Modification Motion") was filed mirroring the request that had been made in the Sale Motion. As presaged in the Sale Motion, the Debtors sought to reduce their plan payments so that only a total of $8,100, i.e., 36 payments of $250, would be directed to the Chapter 13 trustee. Doc. Nos. 41, 43. Objections to the Modification Motion were lodged by the Trustee and Bank. On September 14, 2004, before any hearing was held on the Modification Motion, Debtors filed an Amended Modification Motion and the instant Motion. The proposed amended modified plan did not change but the Debtors now contended that all of the proceeds after liens and costs (the "Proceeds") should be released to the Debtors as they were not property

[3] While nominally a motion to sell, the Sale Motion was also a motion to modify plan. In re Golek, 308 B.R. 332, 336 (Bankr. N.D. Ill. 2004).

of the estate.[4] At the consolidated hearing on the two Motions, I denied the Amended Modification Motion and marked the Release Motion as settled by a further amended plan to be filed by the Debtors.

In a further change of position, the Debtors now indicate that they do not intend to further modify the Confirmed Plan. Rather they state they will pay the Trustee as proposed in the Confirmed Plan and reiterate that they are entitled to the Proceeds. The Trustee objects and argues that the increased value of the Property should be available for creditors as it represents a "substantial and unanticipated" change to the Debtors' finances which requires plan modification and alternatively that the Proceeds are disposable income that must be made available to unsecured creditors if they are not otherwise being paid in full.

DISCUSSION

I begin with the procedural history of this contested matter. In seeking to have this Court approve a sale of the Property, the Debtors expressly sought modification of the Confirmed Plan. If no modification had been sought, there was no basis for a court order approving the sale (without regard to the fact that the title company may have wanted one) unless the Property did not vest in the Debtor at confirmation or the Confirmed Plan otherwise provided for such approval. Debtors' Confirmed Plan did not contemplate court approval of a sale of the Property, and the Confirmed Plan makes no provision for the vesting

[4] As noted, originally Debtors claimed that the equity was all exempt. The amended modification merely claimed that proposed monthly payments for the balance of the plan period were adequate.

of property upon confirmation. As such, the Property vested in the Debtors upon confirmation. 11 U.S.C. §1328(b) (“”Except as otherwise provided in the plan or order of confirming the plan, confirmation of a plan vests all of the property of the estate in the debtor.”) Thus, the Sale Motion was approved as a component of a plan modification which the Debtors had sought, and the parties left for another day the issue of the appropriate allocation of the Proceeds between the Debtors and the estate.

While objecting to the Debtors’ proffered modification which reduced payments to the Trustee under the Confirmed Plan, the Trustee argues that the sale of the Property nonetheless does require a plan modification.[5] Since the Property, valued at $68,000 in Debtors’ Schedules, was sold for $106,000, the Trustee contends that plan payments should be increased to enable creditors to share in the increased value. The Trustee states that it is his practice not to require an appraisal where, as here, the plan does not provide for a sale of the property. The Trustee was amenable to recommending confirmation based on the value sworn to in the Schedules with minimal independent verification, concluding that where no sale is contemplated the financial burden to the Debtors resulting from obtaining one is unwarranted even though he is unable to accurately assess the value of real estate. To allow Debtors to undervalue their property in the absence of an appraisal, as the Trustee contends

[5] Since the Debtors’ abandonment of the Amended Modification Motion in favor of making the payments as contemplated under the Confirmed Plan occurred after the Trustee submitted his brief, the Trustee has not directly expressed his view on this strategy. However, since the end result is the same, i.e., that the Proceeds would go to Debtors, and since the Trustee and Debtors could not settle the contested matter, I conclude the Trustee continues to oppose the Release Motion.

these Debtors have done, and now retain the undisclosed and/or substantially appreciated value would confer a windfall upon them to the detriment of their creditors.[6]

The solution to the Trustee's dilemma resides in § 1329 which provides that:

> (a) At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to–
>
> > (1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;

Courts have generally recognized the appropriateness of granting the request of a trustee or creditor to increase distribution under a confirmed plan when a change in the debtor's financial situation is substantial and the magnitude of the change could not have reasonably been anticipated at the time of confirmation by the party seeking modification. Arnold v. Weast, 869 F.2f 240, 243 (4th Cir. 1989). The Trustee correctly cites to In re Solis, 172 B.R. 530 (S.D.N.Y. 1994) (sale of business) and In re Barbosa, 236 B.R. 540, 547 (Bankr. D. Mass. 1999) (sale of investment property) as illustrative of plan modification requests made by the Chapter 13 trustee which were granted upon finding substantial and unanticipated changes to have occurred since plan confirmation.

The Trustee argues that such a modification to capture the Proceeds for the benefit of creditors is required under the facts of this case. However, he has never exercised his right to file a request for a modification and as a result has never made a record to support this

[6] By their own admission the Property was worth $87,500 during the relevant period but scheduled at $68,000. Presumably they would contend that the balance of the increase is attributable to a change in the market. Absent an evidentiary hearing which would be required to support a request to modify the plan, I make no findings regarding the nature of or reasons for the substantial increase in the value of the Property.

relief. Debtors note this procedural obstacle and argue that a modification request cannot be made at this juncture. Not contesting the Trustee's characterization of the Debtors' new financial circumstances, the Debtors rather contend that plan modification is untimely under the express language of § 1329 that states that any such request be made prior to completion of payments under the Confirmed Plan.

Courts have construed "completion of payments under the plan" to occur when the debtor makes all the payments required by the plan to the trustee. In re Jacobs, 263 B.R. 39, 43 (Bankr. N.D.N.Y. 2001) (citing cases).[7] Debtors contend that as they have paid all the Proceeds to the Trustee which are more than sufficient to fulfill all plan payment obligations, they have completed payments under the plan. In support, they cite to In re Richardson, 283 B.R. 783 (Bankr. D. Kan. 2002) and Sounakhene, supra for the proposition that "[when] the debtors receive a lump sum payment and pay to the Trustee at least the amount needed to complete the plan payments, the deadline under § 1329(a) expires." Debtors' Memorandum in Support of Motion at 4. In Richardson, the debtors confirmed a 36 month plan and at its conclusion sought their discharge. The trustee objected to the discharge contending that $400,000 representing proceeds of an insurance policy on their son who had died fourteen months after confirmation was disposable income that should be made available to creditors under the plan. The court in one sentence states that the trustee could not seek modification because plan payments were completed. However, it appears that the payments were

[7] Thus, the fact that the Chapter 13 trustee had not yet disbursed the payments does not determine whether payments are completed under the plan. In re Sounakhene, 249 B.R. 801 (Bankr. S.D. Cal. 2000).

completed in the ordinary course and not in advance from the proceeds of the insurance. In Sounakhene, the debtors refinanced their home and prepaid their plan. The Chapter 13 trustee filed a motion to modify the plan, seeking sought to hold them to the plan payments for the balance of the plan term. While the court found the modification untimely because generally a plan is complete when the debtor makes all payments to the trustee, the court distinguished the case in which the debtor receives an inheritance or lottery windfall and delivers a check to the trustee to pay off the plan to prevent an increased distribution to creditors. In that case, the court observed that it might consider a later completion date. However, in Sounakhene, the debtors did not receive a windfall and the court observed, were financially worse off than on the confirmation date. Notably Sounakhene acknowledges that the mere fact that the trustee has been delivered an amount sufficient to pay off the plan may not compel the conclusion that a modification is untimely.

While I am not persuaded by the Debtors' authority for the rule they advance, there is a more compelling reason for not applying it here. In the instant case, the Debtors did not deliver the Proceeds to the Trustee to pay off the Confirmed Plan for at that time they had no intention of doing so but rather were seeking to reduce their commitment thereunder. Rather they delivered the Proceeds as a compromise to allow the Sale Motion to be approved without objection pending litigation or negotiation of the allocation of the Proceeds. Moreover, at the time they had pending a plan modification motion to which the Trustee had responded with a claim that modification should occur but to increase, not decrease the

payments to creditors.[8] The parties and the Court implicitly understood that modification was at issue as a result of the Debtors' realization of substantial unexpected value from the sale of the Property. For the Debtors to now withdraw their modification request and claim that the Trustee by not filing his own has waived this opportunity elevates form over substance. Moreover, unlike the facts presented in Sounakhene, the Trustee argues that the Proceeds are a windfall to Debtors, a position that has yet to be litigated because the Debtors' counsel had agreed that the Proceeds could be held pending first a resolution of the Amended Modification Motion and later a settlement of the Release Motion. In short, under these circumstances, I conclude that the transmittal of the Proceeds to the Trustee did not complete payments under the Confirmed Plan and the Trustee is not barred from pursuing his request for modification. However, I will require him to file a formal motion setting forth his grounds for modification which will be scheduled on notice and evidentiary hearing.[9]

In short, Debtors' Release Motion is denied without prejudice pending the filing of

---

[8] The Trustee's Memorandum in which he argued that a modification was required to capture the significant change in the Debtors' circumstances was filed when the Debtors' Amended Modification Motion was pending. Doc. No.62.

[9] To avoid a repetition of this case, the better practice is for the trustee to file a request for modification when he views the debtor's intention to modify the plan or liquidate an undisclosed or undervalued asset to pay off the plan as an inappropriate windfall that is prejudicial to creditors. See Barbosa, 236 B.R. at 542 (sale proceeds escrowed pending either an agreement between the debtor and trustee or disposition of a motion by the trustee to modify the plan to be filed if no settlement reached). It is common practice in this court given the number of Chapter 13 cases being administered to view the pleading requirements imposed on the Chapter 13 trustee with some liberality. For example, the trustee is not required to file formal objections to plan confirmation but may withhold his recommendation of confirmation nonetheless. The trustee's motions to dismiss tend to be form pleadings that are short on detail. The trustee, however, is cautioned that not all matters are as routine and generally understood by the bar as the foregoing, and he acts at his peril by not filing the appropriate motion in certain circumstances.

a plan modification motion by the Trustee and the Debtors if, in light of this decision, they choose to do so. The party seeking modification must advance a legitimate reason for doing so and strictly confirm to the requirements of § 1329. Barbosa, 236 B.R. at 547. Notably § 1329(b)(1) requires that any modification must comply with the "best interests of creditors test" of § 1325(a)(4) that creditors receive no less under a Chapter 13 plan than they would receive under a Chapter 7 liquidation. The test conducts its inquiry as of "the effective date of the plan." Id. With respect to post-confirmation modifications, most courts have been inclined to interpret this as the effective date of the plan as modified. See In re Morgan, 299 B.R. 118, 124 (Bankr. D. Md. 2003); In re Nott, 269 B.R. 250, 255 (Bankr. M.D. Fl. 2000); Barbosa, 236 B.R. at 554; In re Martin, 232 B.R. 29, 38 (Bankr. D. Mass. 1999).

Finally I am unable to address the Trustee's argument that the Debtors' retention of the Proceeds violates the disposable income requirement of § 1325(b). As the Confirmed Plan required that all of the Debtors' projected disposable income be paid into the plan for three years, I am unclear why the Trustee views this to be a problem now.[10] At least one court has stated that projected disposable income does not mean actual future income but rather income projected at confirmation to be remaining after deducting that which is necessary for the debtor's maintenance and support. Richardson, 283 B.R. at 796. Based on a fixed disposable income requirement, the Debtors' sole obligation is to allocate an

[10] The cases cited by the Trustee following the statement in the brief to this effect, i.e., Barbosa, supra; Solis, supra and In re Suratt, 1996 WL 914095 (D. Ore. Jan. 10, 1996), do not address the disposable income requirement. A fourth case appears from the citation form to be an unpublished New Jersey decision which, in any event, was not provided.

additional $8,100 of their income or property to pay off the plan balance.

Without so stating, the Trustee appears to be assuming that disposable income is to be redetermined as of now. Courts are divided on this issue. Section 1329(b) provides that the requirements of § 1325(a) are applicable to any plan modification and thus the best interests of creditors test must be considered as of the modification date. The disposable income requirement, however, is contained in § 1325(b), and courts taking a plain language approach decline to read that requirement into § 1329(b). E.g., Sounakhene, supra. In any event, the question of whether projected disposable income includes the Proceeds at best only comes into play if there is a plan modification, and there is presently no such motion before me.

An Order consistent with this Memorandum Opinion shall be entered.

Diane W. Sigmund

DIANE WEISS SIGMUND
Chief U.S. Bankruptcy Judge

Dated: April 26, 2005

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re	:	Chapter 13
	:	
DAVID NEVINS and	:	Bankruptcy No. 02-37055DWS
HANNA R. NEVINS,	:	
aka Hanna R. Udell,	:	
	:	
Debtors.	:	

ORDER

AND NOW, this 26th day of April 2005, upon consideration of Debtors' Motion to Release Proceeds of Sale of Real Estate (the "Release Motion") and the Objection of the Chapter 13 trustee thereto;

It is hereby **ORDERED** that:

1. The Release Motion is **DENIED** without prejudice.

2. The Chapter 13 Trustee shall file a motion seeking modification of the Debtors' Confirmed Plan by **May 16, 2005**. Should the Trustee fail to do so, the Court will consider a renewed motion by the Debtors for the release of the Proceeds.

3. If the Debtors choose to file a new modification motion, it shall be lodged by **May 16, 2005** and heard contemporaneously with the Trustee's motion.

Diane W. Sigmund

DIANE WEISS SIGMUND
Chief U.S. Bankruptcy Judge

Copies to:

Lawrence W. Abel, Esquire
ROVNER & ABEL
6545 Roosevelt Boulevard
Philadelphia, PA 19149

William C. Miller, Esquire
Standing Chapter 13 Trustee
P. O. Box 40119
Philadelphia, PA 19106-0119

Dave P. Adams, Esquire
Office of the U.S. Trustee
833 Chestnut Street, Suite 500
Philadelphia, PA 19107