

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

	)	CHAPTER 13
	)	
	)	
	)	CASE NO. 03-63611
IN RE:	)	
	)	
DORA ESTA RIDOLFI,	)	JUDGE RUSS KENDIG
	)	
Debtor.	)	
	)	<b>MEMORANDUM OPINION</b>

This matter comes before the court upon Debtor's motion to borrow and refinance, filed on September 30, 2005. The Chapter 13 Trustee filed an objection to the motion on October 13, 2005. Debtor filed a brief in support of her motion on November 18, 2005. Trustee filed a brief in support of her objection on November 22, 2005.

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334, 157, and the general order of reference entered in this district on July 16, 1984. This is a core proceeding over which the court has jurisdiction pursuant to 28 U.S.C. § 157(b)(2). Venue in this district and division is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

**FACTS & PARTIES' ARGUMENTS**

Debtor filed her petition under Chapter 13 of the Bankruptcy Code on July 9, 2003. Debtor's plan was confirmed on August 28, 2003. Trustee did not object to the confirmation of this plan. Debtor is current in her monthly payments to Trustee. Debtor's confirmed plan provides a pot of \$4,150 for unsecured claimants. Debtor states that her current monthly income, consisting of social security and pension, is \$1,518, and that she is paying her monthly mortgage payment of \$703 outside the plan provisions. Debtor owns the property at 6744 Ravenna NE, Louisville, Ohio. Debtor contends that, by refinancing this property, she will be able to pay off the mortgage owed to FirstMerit (\$46,692.03 balance) and pay off her Chapter 13 plan (\$2,697.86 balance).

The court held a hearing on this motion on November 16, 2005. Debtor made clear that she will not make regular monthly mortgage payments because she will obtain a "reverse mortgage" that will not be paid unless Debtor is deceased or sells the property at issue. Trustee objected to the motion on the ground that, if Debtor refinances her property and does not have to pay any monthly

mortgage payments, her disposable income will increase. Further, that Debtor is required to devote her disposable income to the Chapter 13 plan for at least 36 months.

Debtor argues that she is entitled to pay off her Chapter 13 plan in less than 36 months from the refinancing of her real estate. Further, Debtor argues that any increase in income as a result of refinancing presents a false dichotomy, because she will not experience an increase in her disposable income if the court does not allow the refinancing. Debtor cites In re Sunahara, 326 B.R. 768 (B.A.P. 9<sup>th</sup> Cir. 2005) for the proposition that Chapter 13 debtors may modify confirmed plans and complete payments in less than 36 months because the disposable income requirement does not apply to modifications of confirmed plans. Debtor also cites In re Burgie, 239 B.R. 406 (B.A.P. 9<sup>th</sup> Cir. 1999) and In re Euler, 251 B.R. 740 (Bankr. M.D. Fla. 2000) for the proposition that the proceeds from the sale of property do not constitute disposable income. Finally, Debtor argues that a confirmed Chapter 13 plan is res judicata to issues that could have been decided at confirmation, citing In re Torres, 193 B.R. 319 (Bankr. N.D. Cal. 1996).

Trustee argues that 11 U.S.C. Section 1325(b) is applicable to post-confirmation modifications. While the Trustee acknowledges that there is a split of authority as to whether Section 1325(b) applies to post-confirmation modifications, she states that the Sixth Circuit accepts her position, citing to Freeman v. Schulman, 86 F.3d 478 (6<sup>th</sup> Cir. 1996) and In re Fields, 269 B.R. 177 (Bankr. S.D. Ohio 2001).

## DISCUSSION

### **1. Disposable Income Requirement – 11 U.S.C. Section 1325(b)**

The court acknowledges that there are several cases in which the disposable income requirement of 11 U.S.C. § 1325(b) does not apply to post-confirmation modifications.<sup>1</sup> However, the Sixth Circuit has, by implication, asserted that the disposable income requirement does apply to post-confirmation modifications. Freeman, 86 F.3d at 478. This decision is further illuminated by In re Fields, 269 B.R. 177 (Bankr. S.D. Ohio 2001). In this opinion, the court states that “the courts within the Sixth Circuit are to apply § 1325(b) within the context of a debtor’s motion to modify.” Id. at 180. In the instant case, the debtor is attempting to alter the terms of the confirmation agreement. Thus, the disposable income test of § 1325(b) must be met in this case.

### **2. Res Judicata**

The court in In re Torres, 193 B.R. 319, 323 (Bankr. N.D. Cal. 1996) held that “a confirmed plan is res judicata to all justiciable issues that were, or could have been, determined at

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<sup>1</sup> In re Golek, 308 B.R. 332 (Bankr. N.D. Ill. 2004) (holding that disposable income test does not apply to post-confirmation plan modifications) ; Sunahara v. Burchard (In re Sunahara), 326 B.R. 768 (B.A.P. 9<sup>th</sup> Cir. 2005) (holding that good faith requirement applies to post-confirmation modification, but disposable income requirement does not).

confirmation.” Id. The court further details that, in order to avoid the application of res judicata, the movant must show a “substantial change in debtor’s income or expenses that was unanticipated at confirmation.” Id. at n. 6. However, Sixth Circuit law on this subject runs contrary to Torres. Brown v. Ledford, 219 B.R. 191 (B.A.P. 6<sup>th</sup> Cir. 1998) holds that there is no requirement that the moving party show unanticipated or substantial change in debtor’s circumstances. Res judicata is not a bar to Trustee’s objection in the instant case.

### **3. Disposable Income Definition**

11 U.S.C. § 1325(b) defines “disposable income” as:

income which is received by the debtor and which is not reasonably necessary to be expended –

(A) for the maintenance or support of the debtor or a dependent of the debtor

11 U.S.C. § 1325(b)(2). Some courts view do not consider sale or refinance proceeds as disposable income.<sup>2</sup> Other courts hold that sale or refinance proceeds fit the definition of disposable income.<sup>3</sup> In the Sixth Circuit, disposable income “is to be interpreted broadly.” Freeman, 86 F.3d at 481. Given this restriction, the refinancing proceeds in this case qualify as disposable income.

Trustee’s objection to the motion to borrow is sustained. The disposable income test does apply to Debtor’s motion to borrow. Debtor cannot pay off her plan early with refinancing proceeds unless she devotes this increase in disposable income to the chapter 13 plan. Debtor’s motion is **DENIED**.

A separate order is issued herewith.

/s/ Russ Kendig

Judge Russ Kendig  
U.S. Bankruptcy Judge

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<sup>2</sup> McDonald v. Burgie (In re Burgie), 239 B.R. 406, 410 (B.A.P. 9<sup>th</sup> Cir. 1999) (stating that proceeds from debtor’s sale of real estate cannot be disposable income because not in an anticipated stream of payments) ; Golek, 308 B.R. at 338-39 (stating that simply because pre-petition property changes form, it does not convert into disposable income) ; In re Euler, 251 B.R. 740, 748 (Bankr. M.D. Fla. 2000) (holding that proceeds from sale of real estate never become disposable income).

<sup>3</sup> In re Drew, 325 B.R. 765, 772 (Bankr. N.D. Ill. 2005) (holding that refinance or sale proceeds are disposable income because there is added equity in the property due to the refinance or sale) ; In re Keller, 329 B.R. 697, 699 (Bankr. E.D. Ca. 2005) (holding that refinance or sale proceeds are disposable income).

**Service List**

Dora Esta Ridolfi  
6744 Ravenna NE  
Louisville, OH 44641

Toby Rosen  
400 W. Tuscarawas St.  
Charter One Building  
4<sup>th</sup> Floor  
Canton, OH 44702

Donald Miller  
1400 N. Market Ave.  
Canton, OH 44714