

IT IS SO ORDERED.

Dated: May 16, 2013  
01:17:35 PM

  
*Kay Woods*  
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Kay Woods  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:

ELLIOTT T. RATLIFF and,  
SANDGENELLA C. RATLIFF,

Debtors.

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CASE NUMBER 10-40652

CHAPTER 7

HONORABLE KAY WOODS

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ORDER SUPPLEMENTING PRIOR ORDER (DOC. # 66)

REGARDING TURNOVER OF VEHICLES BY DEBTORS TO CHAPTER 7 TRUSTEE

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This cause is before the Court on Motion for Turnover (Doc. # 49) filed by Andrew W. Suhar, Chapter 7 Trustee ("Trustee"), on March 19, 2013, in which the Trustee seeks turnover of two vehicles, *i.e.*, a 1998 Mercedes Benz C-230 and a 2006 Hummer A-5 (collectively, "Vehicles"). Debtors Elliott T. Ratliff and Sandgenella C. Ratliff filed Response to Trustee's Motion for Turnover ("Response to Turnover") (Doc. # 58) on March 29, 2013, in which they assert that the Vehicles (valued at \$20,000.00)

would net \$13,700.00 for creditors of the estate after exemptions and costs of sale. The Debtors also contend that they made payments of \$12,941.18 to unsecured creditors pursuant to their confirmed chapter 13 plan, which payments should be an offset to any non-exempt equity in the Vehicles.

The Court held a hearing on the Motion for Turnover on April 25, 2013, at which appeared Andrew W. Suhar, Esq., on behalf of the Trustee, and Richard S. Pluma, Esq., on behalf of the Debtors. At the conclusion of the hearing, the Court granted the Motion for Turnover, subject to a fourteen-day period, *i.e.*, until May 9, 2013, for the parties to brief whether the Debtors are entitled to offset the amount they have paid their unsecured creditors pursuant to the confirmed chapter 13 plan against the non-exempt equity in the Vehicles. The Court entered Order (Doc. # 66) on April 25, 2013, which granted the Motion for Turnover subject to resolution of the issue regarding offset.

For the reasons set forth below, the Court finds that the Debtors are entitled to offset payments of \$10,357.49 against the non-exempt equity in the Vehicles.

#### **I. BACKGROUND**

The Debtors filed a voluntary petition pursuant to chapter 13 of the Bankruptcy Code on March 2, 2010. The Debtors' chapter 13 plan (Doc. # 4), which provided for monthly

payments of \$360.00 for 60 months, was confirmed by Confirmation Order (Doc. # 19) on May 3, 2010. On October 7, 2010, the Debtors and the chapter 13 trustee agreed to and the Court entered Order Providing for Increased Dividend to be Paid to Unsecured Creditors (Doc. # 21), which maintained the monthly payment of \$360.00, but required a 10% dividend to be paid to unsecured creditors. On August 23, 2011, the Debtors and the chapter 13 trustee agreed to and the Court entered Order Providing for Increased Payments into Plan and Increased Dividend to Unsecured Creditors as a Result of Tax Refund (Doc. # 28), which provided for a dividend of not less than 13% to be paid to general unsecured creditors. On November 19, 2012, the Court entered Order Confirming Modified Plan Dated July 19, 2012 ("Final Confirmation Order") (Doc. # 38), which provided for 48 monthly payments in the amount of \$360.00 and a dividend of 16% to general unsecured creditors. Shortly thereafter, on January 14, 2013, the Debtors filed Notice of Conversion Chapter 13 to 7 (Doc. # 40).

The Trustee held the first meeting of creditors pursuant to 11 U.S.C. § 341 on March 12, 2013, which meeting was adjourned to obtain additional information. On March 18, 2013, the Trustee filed Request for Notice to Creditors (Doc. # 46), indicating that there would be assets to distribute. The Trustee filed the Motion for Turnover the next day. Shortly

thereafter, on March 19, 2013, the Debtors filed Motion to Convert from Chapter 7 to 13 ("Motion to Reconvert") (Doc. # 51), which consisted of a single sentence, but provided no reason for reconversion of the case. The Trustee requested a hearing on the Motion to Reconvert (Doc. # 52) and filed Chapter 7 Trustee's Objection to Debtors' Motion to Convert ("Trustee's Objection to Reconversion") (Doc. # 62). The Trustee noted that (i) the Debtors did not appear to have a change in circumstances that would enable them to fund a chapter 13 plan; and (ii) the Motion to Reconvert appeared to be an attempt to obtain dismissal of the Debtors' case to retain assets that belonged to the chapter 7 bankruptcy estate. (Trustee's Obj. to Reconversion ¶¶ 7-8.) The Court held a hearing on the Motion to Reconvert on April 25, 2013, at which time the Motion to Reconvert was denied. On May 15, 2013, the Court entered Order Denying Motion to Reconvert (Doc. # 74) to memorialize that ruling.

## **II. ARGUMENTS OF THE PARTIES**

The Debtors filed Brief in Opposition to Trustee's Motion for Turnover ("Debtors' Brief") (Doc. # 70) on May 1, 2013. The Trustee filed Trustee's Reply Brief in Support of Turnover ("Trustee's Brief") (Doc. # 72) on May 9, 2013.

First, there is no dispute that the Vehicles constitute property of the chapter 7 bankruptcy estate. The Debtors listed

the Vehicles on Schedule B - Personal Property with their original chapter 13 petition and did not amend that Schedule after conversion of the case to chapter 7.<sup>1</sup> Pursuant to 11 U.S.C. § 348(f)(1)(A), the Vehicles constitute property of the chapter 7 estate. Courts have generally held that any appreciation to an asset that occurs post-petition, but prior to conversion of a case to chapter 7, belongs to the debtor rather than to unsecured creditors. See *In re Sparks*, 379 B.R. 178, 181 (Bankr. M.D. Fla. 2006). In the instant case, the Debtors' Vehicles were not encumbered by liens that were paid pursuant to the chapter 13 plan; thus, there is no post-petition, pre-conversion appreciation in the value of the Vehicles.<sup>2</sup>

The only dispute between the parties is whether the Debtors are entitled to offset the value of their chapter 13 plan payments against the non-exempt equity in the Vehicles.

#### **A. The Debtors' Position**

In the Response to Turnover, the Debtors represent: (i) the Vehicles have a collective value of \$20,000.00, subject to a 10% reduction for costs of sale and administration; (ii) the Debtors are entitled to claim \$4,300.00 of this value as exempt, pursuant to O.R.C. 2329.66(A)(2) and 2329.66(A)(18); (iii) the

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<sup>1</sup> In addition to these two Vehicles, the Debtors scheduled two other vehicles, a 2000 Pontiac Grand Am and a 1991 Buick Regal. (See Doc. # 1, Sch. B at 3.) The Debtors amended Schedules F, I and J on January 14, 2013 (Doc. # 41), but did not amend Schedule B.

<sup>2</sup> The Chapter 13 Standing Trustee's Final Report and Account (Doc. # 44) shows payment of only one secured claim, which is not relevant to the Vehicles.

Debtors' unsecured creditors have already received \$12,941.18 through distributions pursuant to the chapter 13 plan; (iv) funds received by the unsecured creditors should be credited as an offset to any non-exempt equity in the Vehicles upon conversion to chapter 7; and (v) the Debtors have offered the Trustee \$1,000.00 to redeem the remaining equity in the Vehicles.

Attached to the Debtors' Brief is a copy of the Chapter 13 Standing Trustee's Final Report and Account (Doc. # 44) filed on January 30, 2013, which shows allowed general unsecured claims in the amount of \$91,196.01 with payments of \$10,357.49 having been made to holders of those claims. The Final Report and Account also shows allowed priority unsecured claims in the amount of \$2,583.69, which were paid in full. The Debtors identify \$12,941.18, *i.e.*, the sum of \$10,357.49 and \$2,583.69, as the amount they are entitled to offset.

In their Brief, the Debtors further argue that allowing the offset is in accordance with Congressional intent and provides an equitable result. The Debtors contend that ""Congress intended to avoid penalizing debtors for their chapter 13 efforts by placing them in the same economic position they would have occupied if they had filed chapter 7 originally."" (Debtors' Br. at 4 (quoting *Bogdanov v. Laflamme (In re Laflamme)*, 397 B.R. 194, 203 (Bankr. D.N.H. 2008) (quoting *Wyss*

*v. Fobber (In re Fobber)*, 256 B.R. 268, 277-78 (Bankr. E.D. Tenn. 2000)).) This quote from *In re Fobber*, however, is incomplete. The court said:

By adopting [*Bobroff v. Cont'l Bank, (In re) Bobroff*()], 766 F.2d 797 (3d Cir. 1985)] in its enactment of § 348(f)(1)(A), Congress intended to avoid penalizing debtors for their chapter 13 efforts by placing them in the same economic position they would have occupied if they had filed chapter 7 originally. See *In re Pearson*, 214 B.R. 156, 164 (Bankr. N.D. Ohio 1997). In other words, § 348(f)(1)(A) was designed to mitigate the effect of § 1306(a) in cases converted from chapter 13 by excluding from property of the estate in the converted case property brought into the estate under § 1306(a).

*In re Fobber*, 256 B.R. at 277-78 (internal parenthetical and n.4 omitted).

Reliance upon *In re Pearson* also does not support the argument for offset because the *Pearson* case dealt with whether a lien that had been stripped off in a chapter 13 case remained stripped off after conversion to chapter 7 (when such lien could not have been stripped off in an original chapter 7). The *Pearson* court also acknowledged that post-petition, pre-conversion increases in equity were to inure to the benefit of the debtor.

However, a debtor should not be discouraged from honestly attempting a Chapter 13 reorganization, either. Indeed, the legislative history behind a new provision to the Bankruptcy Code makes this goal clear. This new provision, which was added by the Bankruptcy Reform Act of 1994, is § 348(f)(1)(B). It provides that valuations of collateral made in the Chapter 13 shall remain upon conversion of the case to

Chapter 7, and the secured claim shall be reduced to the extent of payments made on the secured portion. The general purpose of § 348(f) was to equalize the treatment a debtor would receive under a Chapter 13 case that converted to a Chapter 7 case with the treatment the debtor would receive if he filed a Chapter 7 originally. The legislative history makes clear that Congress was concerned that debtors would be counseled to file Chapter 7 cases rather than Chapter 13 cases because, in the event the plan could not be completed and the debtor would have to convert to a Chapter 7, debtors would lose any equity in the collateral they may have gained by making payments on the secured claim during the Chapter 13. H.R. Rep. 103-834, 103rd Cong., 2nd Sess. 42-43 (Oct. 4, 1994); 140 Cong. Rec. H10770 (Oct. 4, 1994). That is, if the debtor had filed a Chapter 7 case and thereafter made the same payments on the secured claim they would have made under the Chapter 13 plan, they would be able to retain the equity so derived. Thus, Congress showed its concern that debtors not be discouraged from filing Chapter 13 cases which they may subsequently have to convert to Chapter 7.

*In re Pearson*, 214 B.R. 156, 164 (Bankr. N.D. Ohio 1997). As noted above, the instant case is not concerned with any increase in equity in the Vehicles. The Debtors expressly acknowledge that the collective value of the Vehicles is \$20,000.00, which was the value as of the Petition Date. (Resp. to Turnover at 1; Doc. # 1, Sch. B at 3.)

The Debtors' Brief cites several cases (although no cases from the Sixth Circuit) for the proposition that a chapter 7 trustee in a case converted from chapter 13 is not entitled to turnover of assets if the unsecured creditors have received the value of what they would have received if the case had been originally filed as a chapter 7 case. One of the cases cited by

the Debtors is *In re Grein*, 435 B.R. 695 (Bankr. D. Colo. 2010), which held:

[W]hen a Chapter 13 case is converted to a Chapter 7 case, courts have held that property of the estate does not need to be surrendered to the Chapter 7 Trustee if (1) unsecured creditors received in the Chapter 13 case as much as they would have received if the Chapter 13 case had been a Chapter 7 case from the outset; or (2) the debtor used property of the estate for ordinary and necessary living expenses provided that said use was not in bad faith.

*Id.* at 703 (n.43 omitted); *accord*, *In re Sparks*, 379 B.R. 178 (Bankr. M.D. Fla. 2006) (Because debtor's chapter 13 payments of \$3,989.06 to unsecured creditors nearly equaled total non-exempt value of vehicle of \$4,000.00, chapter 7 trustee's motion for turnover was denied.) Following this line of reasoning, the Debtors argue that they are not required to turn over the Vehicles to the Trustee.

#### **B. The Trustee's Position**

The Trustee's Brief does not directly address the offset issue, but instead focuses on the fact that the Debtors voluntarily chose to convert their chapter 13 case to chapter 7 instead of seeking a hardship discharge or dismissal. As a consequence, he argues that this is no longer a chapter 13 case and, consequently, the provisions of chapter 7 control. Accordingly, the Trustee argues that he is required by statute to collect property of the estate, *i.e.*, the Vehicles, and reduce such property to money.

Based on the Trustee's Objection to Reconversion, as well as the Motion for Turnover, it is apparent that the Trustee believes the Debtors are attempting every means possible to avoid surrendering property of the chapter 7 bankruptcy estate for distribution to their creditors. The Trustee notes that the Debtors could have chosen to (i) dismiss the chapter 13 case - in which case the Debtors could have kept the Vehicles, but they would not have received a discharge; or (ii) seek a hardship discharge under 11 U.S.C. § 1328(b) - in which case, they could have kept the Vehicles, but only if they could have proven they met the criteria for a hardship discharge. Instead, the Debtors chose to voluntarily convert to a chapter 7 case, which brought the Vehicles within the purview of property of the chapter 7 bankruptcy estate.

The Trustee argues that he has a fiduciary duty to collect property of the bankruptcy estate, reduce the property to money and distribute to the unsecured creditors. (Trustee's Br. at 3.)

### **III. ANALYSIS**

The Debtors' main focus appears to be retention of the Vehicles. "In essence, this case originated under Chapter 13 for one simple reason; that the debtors understood that initiating the case under Chapter 7 would result in liquidation of property, particularly their Hummer." (Debtors' Br. at 3.)

The Debtors will evidently go to great lengths to retain the Vehicles (see Mot. to Reconvert).

The single-minded focus of the Debtors, however, does not diminish the fact that the Debtors are entitled to offset the payments they made pursuant to the chapter 13 plan, but only to the extent that such payments equal or exceed the value that unsecured creditors would have received if the case had been originally filed as a chapter 7 case. In addition, there is no basis for the Debtors to reduce the non-exempt value of the Vehicles by costs of sale and administration.<sup>3</sup> Thus, this Court must determine if the amount paid to the Debtors' unsecured creditors equals or exceeds the non-exempt value of the Vehicles.

In order to confirm a chapter 13 plan, a court must find that "the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date[.]" 11 U.S.C. § 1325(a)(4) (West 2013). As set forth in the Background section, *supra*, the Debtors originally were required to make monthly payments of \$360.00 for 60 months and provide a 5%

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<sup>3</sup> Such reduction may be appropriate in attempting to negotiate a redemption amount, but it is not a factor in considering whether the Debtors can offset the payments made pursuant to their chapter 13 plan.

dividend to general unsecured creditors (See Doc. # 19). The Final Confirmation Order provided for 48 monthly payments in the amount of \$360.00 and a dividend of 16% to general unsecured creditors (See Doc. # 38).

The Chapter 13 Standing Trustee's Final Report and Account reports payments of \$10,357.49 to allowed general unsecured claims in the amount of \$91,196.01. Sixteen percent of \$91,196.01 equals \$14,591.36. Allowed general unsecured claims in the Debtors' case have received \$10,357.49, or the equivalent of 11.36%. Thus, the Debtors have not yet paid their general unsecured creditors the amount such creditors would have been entitled to receive if the case had been originally filed under chapter 7; there is a shortfall of \$4,233.87.

As a consequence, the Court finds that the Debtors are entitled to offset payments of \$10,357.49 against the non-exempt equity in the Vehicles. The Order dated April 25, 2013, is hereby supplemented and modified, as set forth herein, but otherwise remains in full force and effect.

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