

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 98-13213-JMD  
Chapter 13

Ann Blais,

Debtor

*Jay L. Hodes, Esq.**BOSSIE, KELLY, HODES, BUCKLEY & WILSON P.A.**Attorney for Debtor**Lawrence P. Sumski, Esq.**Chapter 13 Trustee*

**MEMORANDUM OPINION**

**I. INTRODUCTION**

Lawrence P. Sumski, the Chapter 13 Trustee (the “Trustee”), has filed a Motion to Modify Plan (the “Motion”) (Doc. No. 65) based upon the Debtor’s sale of her home which resulted in her receipt of approximately \$80,000.00 in proceeds after payment of all secured claims against the property and settlement expenses. In the Motion the Trustee seeks to have the non-exempt proceeds from the sale of the Debtor’s residence, or \$50,516.00, paid to the Trustee for distribution to unsecured creditors. The Debtor objects to the Motion.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the “Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire,” dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

## II. FACTS

On August 21, 1998, the Debtor commenced this proceeding by filing a voluntary petition under Chapter 13 of the Bankruptcy Code. In her schedules the Debtor listed her residence in Manchester, New Hampshire at a value of \$135,000.00, subject to a mortgage in the amount of \$85,491.00. She also claimed a \$30,000.00 homestead exemption in the residence to which no objection was filed. On July 7, 1999, the Debtor filed motions to avoid the judicial liens against her residence held by Sears Roebuck and Co. (Doc. No. 27) and Telephone Credit Union of NH (Doc. No. 28) (collectively the "Motions to Avoid"). In the Motions to Avoid, the Debtor valued her residence at \$121,900.00, based upon a drive by comparative market analysis conducted by Asset Disposition Management, Inc. No objections to the Motions to Avoid were filed and on August 4, 1999, the Court entered orders avoiding both the judicial liens in the aggregate amount of \$17,100.00. See Doc. Nos. 32 and 33.

On August 6, 1999, the Court entered an order confirming the Debtor's Amended Chapter 13 Plan Dated July 7, 1999 (the "Plan"). See Doc. No. 36. Under the terms of the Plan the Debtor was to pay the Trustee the sum of \$185.00 per month for approximately 60 months, commencing on October 15, 1998, for total Plan payments of \$11,100.00. After payment of the Trustee's statutory commission, of no more than \$1,110.00, the Plan provided for the payment of \$9,985.00 for priority real estate tax claims and mortgage arrearage claims against the residence and \$5.00 towards general unsecured claims in the amount of \$44,113.00.

Throughout the bankruptcy proceeding the Debtor has had difficulty in making her Plan payments in a timely manner. On January 22, 2002, the holder of the first mortgage on her residence filed a Motion for Relief From the Automatic Stay (the "Motion for Relief") alleging that the Debtor was in arrears on her post-confirmation mortgage payments and that she had no

equity in her residence. See Doc. No. 58. The Trustee did not object to the Motion for Relief and reported that the Debtor had made 37 of the 40 Plan payments then due. See Doc. No. 62. The Debtor objected to the Motion for Relief claiming that the property had appreciated in value since the commencement of the proceeding resulting in equity in the property. The Debtor also claimed that she had made 35 mortgage payments during the 41 months of her Chapter 13 proceeding and that the property was essential to her completion of the Plan. See Doc. No. 61. On March 7, 2002, the Debtor and the holder of the first mortgage filed a stipulation (the “Stipulation”) which was approved by the Court. See Doc. No. 64. Under the terms of the Stipulation the Debtor was to make monthly mortgage payments beginning on March 1, 2002, and was to sell her residence and pay the first mortgage in full on or before August 1, 2002. Id.

The Debtor’s residence was sold for approximately \$191,750.00, less closing costs and a credit to the buyer for \$5,752.00 of deferred maintenance items, resulting in her receipt of \$80,516.00 in net proceeds. See Doc. No. 67. In his Motion the Trustee seeks to require the Debtor to pay the amount of the proceeds above her homestead exemption to the Trustee and to amend the Plan to provide for the distribution of the proceeds to creditors. The Trustee contends that such amendment will result in a 100% dividend to unsecured creditors.

### **III. DISCUSSION**

#### **A. The First Circuit’s Decision in Barbosa.**

The Trustee relies upon Barbosa v. Soloman, 235 F.3d 31 (1<sup>st</sup> Cir. 2000), aff’g 243 B.R. 562 (D. Mass. 2000), aff’g 236 B.R. 540 (Bankr. D. Mass. 1999). In Barbosa the debtors filed a voluntary petition under Chapter 13 on October 9, 1996. See Barbosa, 236 B.R. at 542. Nearly

two years later, on September 23, 1998, the bankruptcy court confirmed a Chapter 13 plan. Id. Prior to confirmation of the Chapter 13 plan the debtors and the holder of a first mortgage on investment real estate agreed to a cram down of the mortgagee's claim from \$114,000.00 to the \$64,000.00 agreed upon value of the investment real estate. Id. Five months after confirmation, and 28 months after the filing of the Chapter 13 petition, the debtors sought bankruptcy court authorization to sell the investment real estate for \$137,500.00 or 214% more than the stipulated value immediately prior to confirmation. Id.

The Debtor in this case objects to the Motion on the same grounds that were unsuccessfully raised by the debtors in Barbosa (i.e., at confirmation the property of the estate vested in the Debtor free of any creditor's claim) and several other grounds. The Debtor's foremost objection is that the Court has discretionary authority over the allowance of plan modifications under section 1329<sup>1</sup> of the Bankruptcy Code. The Debtor points out that she has at all times acted in good faith and dealt fairly with the Trustee and creditors and that the proceeds from the sale of her homestead are her only significant asset. The Debtor contends that the decision in Barbosa was based upon suggestions or findings of bad faith on the part of the debtors which are not present in this case. In addition, she contends that the sale in Barbosa was voluntary while hers was under the duress of the pending Motion for Relief.

In Barbosa the First Circuit held that even though sections 1327(b) and (c) provide that at the time of confirmation property of the estate vests in debtors free of any claims of creditors, the estate does not cease to exist. Under section 1306(a) the estate continues to exist and is funded by the debtor's regular income and post-petition assets. See Barbosa, 235 F.3d at 36-37. In addition,

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<sup>1</sup> Unless otherwise indicated all references to "section" refer to Title 11 of the United States Code.

the First Circuit concurred with the bankruptcy court and the district court in adopting the approach of the Seventh Circuit in In re Witkowski, 16 F.3d 739 (7<sup>th</sup> Cir. 1994), as modified by the bankruptcy court, with respect to the test for approval of modifications under section 1329. Under the Witkowski test adopted by the First Circuit, when seeking to modify a plan under section 1329, there is no need for a trustee to show that there has been a “substantial” or “unanticipated” change in circumstances since confirmation of a Chapter 13 plan. See Barbosa, 235 F.3d at 41.<sup>2</sup> Thus a trustee is not precluded by “*res judicata*” from seeking an amendment to the plan.” Id.

The only authority cited by the Debtor was the decision in In re Trumbas, 245 B.R. 764 (Bankr. D. Mass. 2000). However, Trumbas involved a motion to modify a Chapter 13 plan based upon appreciation in the debtor’s residence in the absence of a sale or refinance. Accordingly, that decision is not helpful to the Debtor.

Based upon the papers submitted by the parties and the arguments of counsel, the Court finds that the facts of this case are substantially identical to those in Barbosa with only two exceptions. In this case the property sold was the Debtor’s residence, not an investment property, and the sale in Barbosa was contemplated under the plan and was not the result of a consensual resolution of a motion for stay relief. However, the Court does not find those differences to be material to the holding in Barbosa or the application of that holding to the facts of this case. Accordingly, the Court shall order the Debtor to turnover to the Trustee her non-exempt proceeds from the sale of her residence.

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<sup>2</sup> The First Circuit also adopted the caveat set forth by the bankruptcy court that ““motions to modify cannot be used to circumvent the appeals process for those creditors who have failed to object [to] confirmation of a Chapter 13 plan or whose objections to confirmation have been overruled.”” See Barbosa, 235 F.3d at 41 (quoting Barbosa, 236 B.R. at 547.)

**B. Determination of Non-exempt Equity.**

In her objection the Debtor claims that fairness and equity require that she be credited with (1) unstated post-petition repair and maintenance expenses for the residence, (2) post-petition reduction in the principal balance on her mortgage (approximately \$7,000.00 to \$9,000.00), and (3) repairs and improvements to the residence immediately before or after the listing of the property for sale (approximately \$3,000.00). See Doc. No. 67. The Trustee indicated that he had no objection to allowing the Debtor to keep that portion of the non-exempt sale proceeds represented by the last two items, but he objected to the first item. The Trustee claims that any post-petition repairs and maintenance expenses not associated with the sale of the property were part of the Debtor's ordinary and necessary living expenses for which no credit is appropriate. The Court agrees with the Trustee.

**IV. CONCLUSION**

For the reasons set forth above, the Debtor shall pay to the Trustee the non-exempt proceeds from the sale of her residence in the amount of \$50,516.00, less certain credits to be determined as set forth in this opinion and corresponding order.

This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate order consistent with this opinion.

DATED this 25th day of June, 2002, at Manchester, New Hampshire.

/s/ J. Michael Deasy  
J. Michael Deasy  
Bankruptcy Judge