

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

In Re:)	Case No. 01-18950
)	
ANNE MARIE,)	Chapter 13
)	
Debtor.)	Hon. Mary Ann Whipple
)	

ORDER DENYING CONFIRMATION OF DEBTOR'S PLAN

This case came before the court for hearing on April 30, 2002, upon objections to and confirmation of Debtor's Modification of Chapter 13 Plan ("proposed plan") [Doc. #16].

Debtor's proposed plan offers to make \$100.00 monthly payments to the Chapter 13 Trustee and to pay secured creditors out of the proceeds from the sale of real property. The affected secured creditors have objected to the fairness, good faith and feasibility of such a plan. At prior hearings on confirmation, the court has also expressed its scepticism as to the legal viability under the Bankruptcy Code of the concept of a "liquidating chapter 13 plan" as being advanced in both Debtor's originally proposed plan and in her modified proposed plan.

Sale of property is not expressly listed as a permissible provision of a chapter 13 plan in 11 U.S.C. § 1322(b). Section 1322(b)(8) does, however, provide for the payment of claims from "property of the estate" or "property of the debtor", and Section 1322(b)(10) permits inclusion in a plan of any other appropriate provision not inconsistent with the Bankruptcy Code. Moreover, Section 1303 grants chapter 13 debtors the same rights and powers as a trustee under Section 363, which governs, among other things, sale of property of the estate.

Some courts have nevertheless held that funding a plan solely through liquidation of assets is not permissible under Chapter 13. *See, e.g., In re Gavia*, 24 B.R. 573 (B.A.P. 9th Cir. 1982). Other courts have held that chapter 13 sale plans are permissible as long as proceeds of liquidated

assets are not the only source of plan funding, which is the situation in this case where Debtor also proposes a nominal monthly payment. *See, e.g., In re Hogue*, 78 B.R. 867 (Bankr. S.D. Ohio 1987). Those courts that do permit chapter 13 plans to be funded at least in part through asset liquidation generally require that the circumstances and conditions of sale be carefully detailed in the plan, so as to prevent the plan from being merely an illusory delaying tactic that results in creditors never actually getting paid anything through a confirmed chapter 13 plan. *See, e.g., In re Erickson*, 176 B.R. 753 (Bankr. E.D. Pa. 1995).

This court agrees with the holdings of cases like *Erickson* and *In re Newton*, 161 B.R. 207 (Bankr. D. Minn. 1993). As these holdings are applied to this case, the proposed plan utterly fails to include those “objective commitments” regarding the terms of sale that are prerequisites to a feasible and confirmable “liquidating plan.” Debtor has offered no proof that she actually intends to sell the property, as opposed to a scenario where she would make the minimal monthly payments being proposed to the Chapter 13 Trustee, but makes no real effort to actually sell the property for 3 years, makes no payments to secured creditors in the meantime and then simply voluntarily dismisses her case pursuant to Section 1307(b). Such a scenario would technically comply with the bare terms of Debtor’s proposed plan, but would not be in good faith in the court’s view. There is no indication of the terms of sale, the method of sale (via broker, via auction or neither), whether there will be a minimum price, the deadline for sale, what happens if the property is not sold by that deadline, and how the proceeds of sale are to be distributed. No evidence has been submitted as to any prior efforts at sale or market conditions demonstrating the likelihood of property of this nature in this location being sold at fair market value within a reasonable period of time.

Debtor argues that she should be allowed three years or more to sell the property, and that no payments need to be made to secured creditors in the meantime, as they are adequately

protected through property value, which does not appear to be in dispute now. The court disagrees; these arguments only enhance the court's concern that the plan is being proposed in bad faith. The following standard articulated in *Newton*, 161 B.R. at 217-18, seems equally apt here:

“For a proposed cure-by-sale to pass muster, the debtor must make certain objective commitments in the plan, and meet any objection to confirmation by shouldering the burden of production of evidence at the hearing. The plan should specify the terms under which the debtor proposes to market the property, including the listing price and the length and commencement date of the listing agreement. It also should incorporate a default remedy to relieve the affected mortgagee(s) from the automatic stay, if the sale does not close by the end of the proposed cure period. If an affected mortgagee objects to confirmation, the debtor must produce evidence as to past marketing efforts, the state of the market for the subject asset, current sale prospects, the existence and maintenance of any “equity cushion” in the property, and all other circumstances that bear on whether the creditor will see its way out of the case financially whole. If the debtor cannot produce anything more than remote speculation as to the terms or date of a sale; if market conditions are eroding the value of the collateral; if the debtor's efforts at a sale are not directed or energetic enough; or if any other factors demonstrate that the creditor will not receive the value of its secured rights within a circumscribed, specified, and “reasonable” cure period, the court cannot confirm the plan.”

In the absence of detailed commitments regarding the sale, Debtor has failed to prove the feasibility of her plan. The court is not now in a position from the plan and existing record to make the findings required by Section 1325(a)(1), (3), (5) or (6) as a condition to confirmation of the proposed plan. Any sale of property proposed to fund the Debtor's plan must be specific, stating at a minimum a prompt deadline by which the property is to be sold, the manner in which the property will be sold, what happens if the property is not sold by the deadline and a detailed disposition of the proceeds from the sale. *Cf.*, *Gavia*, 24 Bankr. at 574; *In re Proudfoot*, 144 Bankr. 876, 878 (B.A.P. 9th Cir. 1992). The court strongly urges the Debtor to consider proposing some monthly payments to secured creditors until the sale occurs, as an element of both good faith and adequate protection for their interests. The hallmark of plans of reorganization in bankruptcy is negotiation, and the court further urges the Debtor to address these issues with the affected creditors in developing a new proposed plan that might also resolve the pending objections to confirmation.

Therefore, for good cause shown,

It is ORDERED that Debtor's Motion to Modify Chapter 13 Plan Before Confirmation [Doc. #16] and thereby confirmation of Debtor's modified chapter 13 Plan as proposed is **DENIED**; and

It is FURTHER ORDERED that Debtor shall file any further proposed modified plan on or before 21 days from the filing date of this Order.

Dated:

Mary Ann Whipple
United States Bankruptcy Judge