UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

IN RE

Randy & Janice Wilson **CASE NUMBER 96-12039**

Chapter 13

MEMORANDUM OPINION AND ORDER RE
UNION PLANTERS' MOTION TO COMPEL DEBTORS TO AMEND PLAN

The Court conducted a hearing on Union Planters' Motion to Compel Debtors to Amend Plan on May 25, 2000. FED. R. BANKR. P. 9014. Pursuant to 28 U.S.C. § 157(b)(2), this is a core proceeding. After reviewing the testimony from the hearing and the record as a whole, the Court makes the following findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

I. FINDINGS OF FACT

The following facts were stipulated to by the parties at the hearing on Union Planters' Motion to Compel Debtors to Amend Plan. The Debtors, Randy and Janice Wilson, filed their Chapter 13 bankruptcy on June 28, 1996. Their confirmed plan required them to make payments to Union Planters' predecessor, Bank of Middleton, as follows: $6,185.00 at 10% interest with a monthly payment of $140.00 per month. This debt was secured by a 1986 Nissan. At the time of the May 25th hearing, Union Planters had been paid $4,568.66 toward the principle and $1,541.34 in interest, leaving a principle balance of $1,616.34.

Sometime in the latter part of 1999, while Janice Wilson's brother was driving the 1986 Nissan, the vehicle became inoperable due to a "blown engine." Ms. Wilson's brother took the vehicle to Dennis Mitchell's Automotive Center to have the engine repaired. The debtors did not

learn that the car was at Dennis Mitchell's until after Dennis Mitchell claimed a lien on the car of $1,353.71 for repairs and storage fees.

On January 25, 2000, Dennis Mitchell filed a "Motion to Lift Stay" seeking permission to enforce their rights under state law on the lien. The Court granted this motion on March 27, 2000. Subsequently, Dennis Mitchell sold the Nissan to satisfy its lien.

On February 16, 2000, the debtors filed a "Motion to Surrender Collateral," in which the Wilsons sought to (1) surrender the Nissan to Union Planters, (2) move Union Planters to an unsecured status, (3) cancel any forced place insurance and (4) reduce the plan payments accordingly. Although Union Planters was served with a copy of the debtor's motion, they did not oppose it. The Court granted the "Motion to Surrender" on April 3, 2000.

On May 5, 2000, Union Planters filed a "Motion to Compel Debtors to Amend Plan." In this motion, Union Planters alleges that the debtors failed to make clear to the Court or to the creditor in their "Motion to Surrender" that the vehicle was not in the Debtor's possession but was, in fact, in the possession of Dennis Mitchell Automotive with a storage lien of $2353.00. Union Planters further alleges that the debtors' failure to disclose this fact was either negligently or intentionally misleading. Had it known about Dennis Mitchells' storage lien, Union Planters alleges it would have objected to the Debtors' "Motion to Surrender."

II. CONCLUSIONS OF LAW

At issue in this case is whether or not the debtors should be compelled to amend their plan to pay the remaining balance owed to Union Planters' as a secured claim. Union Planters urges this Court to rely on the case of *Chrysler Fin'l. Corp. v. Nolan*, 234 B.R. 390 (M.D. Tenn.

1999) and find that such treatment of their claim is required. Although the Court agrees with Union Planters that the debtors should be compelled to amend their plan, it does not agree that *Nolan* provides the basis. *Nolan* is a highly fact-specific case which deals with the issue of belatedly surrendered collateral which had depreciated since confirmation of the plan. In the case at bar, the debtors proposed to surrender collateral which, at the time of filing their motion with the Court, they knowingly did not possess. Based on this fact, the Court feels confident in granting Union Planters' "Motion to Compel" based on a simple "good faith" analysis.

Section 1329 of the Bankruptcy Code provides:

> (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;
> >
> > (2) extend or reduce the time for such payments; or
> >
> > (3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan.
>
> (b)(1) Sections 1322(a), 1322(b), and 1323(c) of this title and the requirements of section 1325(a) of this title apply to any modification under subsection (a) of this section.
>
> > (2) The plan as modified becomes the plan unless, after notice and a hearing, such modification is disapproved.
>
> (c) A plan modified under this section may not provide for payments over a period that expires after three years after the time that the first payment under the original confirmed plan was due, unless the court, for cause, approves a longer period, but the court may not approve a period that expires after five years after such time.

11 U.S.C. § 1329. Many courts allow debtors who wish to surrender collateral post-confirmation to pay any deficiency balance as an unsecured claim. *In re Rimmer,* 143 B.R. 871 (Bankr. W.D.Tenn. 1992); *In re Johnson*, 247 B.R. 904 (Bankr. S.D. Ga. 1999), *In re Jock*, 95 B.R. 75 (Bankr. M.D. Tenn. 1989); *In re Stone*, 91 B.R. 423 (Bankr. N.D. Ohio 1988); *In re Williams*, 108 B.R. 119 (Bankr. N.D. Miss. 1989); *See also* Keith M. Lundin, 2 Chapter 13 Bankruptcy § 6354 (2d ed. 1997). Such modifications are not allowed, however, if the debtor fails to meet § 1325(a)(3)'s requirement of good faith. *Rimmer,* 143 B.R. at 876 (". . . the debtor bears the burden of proof on the attempted modification meeting the requirements of § 1329(b)(1). An extremely important element of this proof will be the good faith requirement of § 1325(a)(3)."); *Jock*, 95 B.R. at 78 ("[t]he Bankruptcy Code protects the secured claim holder from abusive depreciation between confirmation and modification by applying the 'good faith' test at confirmation of a modified Chapter 13 plan."); *Johnson*, 247 B.R. at 908 ("[A] modified plan must be 'proposed in good faith and not by any means forbidden by law.'").

According to the stipulated facts in the case at bar, the Wilsons loaned their 1986 Nissan to Janice Wilson's brother. While in his possession, the car became inoperable and Ms. Wilson's brother took the car to Dennis Mitchell's Automotive Center to have it repaired. The debtors claim they had no knowledge of the car's location until Dennis Mitchell claimed a lien on the car for repairs and storage fees. While this claim may be true, the Court finds that the Wilsons definitely knew of the car's location on January 25, 2000, when Dennis Mitchell filed a "Motion

to Lift Stay" in this Court seeking to enforce their rights under state law on the lien.[1]

Despite knowing that the car was in Dennis Mitchell's possession with a substantial lien on it, the debtors filed a "Motion to Surrender Collateral" to Union Planters on February 16th–some 21 days after knowing where the car was. The Wilsons did not inform either the Court or their creditors that, at the time of filing the motion, they did not have possession of the car. In addition to keeping quiet about the location of the vehicle, the Wilsons also did not inform the Court or the creditors that Dennis Mitchell had a substantial lien on the collateral they were attempting to surrender.

Taking all the facts in this case into account, the Court finds that the Wilsons acted in bad faith in proposing to surrender the Nissan to Union Planters. In the other cases discussing post-confirmation surrender of collateral, all the debtors actually surrendered the collateral securing a creditors claim. What was at issue in those cases was whether or not, after the creditor had sold the surrendered collateral, any remaining deficiency could be paid as an unsecured claim. In the case at bar, Union Planters' had no opportunity to sell the collateral and recover as much as possible on their claim. Had the debtors actually turned the Nissan over to them, Union Planters may have been able to sell the vehicle for the entire amount of the claim, thereby alleviating the need to continue payments to the bank at all either as a secured or unsecured creditor. The Court simply will not allow debtors to act in such a devious and dishonest manner. As a result, Union

[1]Although the debtors claim that Union Planters was served with a copy of Dennis Mitchell's "Motion to Lift Stay," the Certificate of Service filed with the Court on February 2, 2000, by Dennis Mitchell's attorney shows that only the debtors, the debtors' attorney and the Chapter 13 Trustee were served.

Planters "Motion to Compel Debtors to Amend Plan" is granted. The debtors shall have fifteen days from entry of this order to amend their plan to pay Union Planters the full amount of their claim as secured over the remaining life of their plan.

III. ORDER

It is therefore **ORDERED** that Union Planters' Motion to Compel Debtors to Amend Plan is **GRANTED**. The Debtors shall have fifteen days from entry of this Order to amend their plan to provide for payment to Union Planters of the entire amount of their claim as a secured creditor.

It is so ordered.

By the Court,

G. Harvey Boswell
United States Bankruptcy Judge

Date: July 7, 2000

cc:

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