

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION**

IN RE

Sylvaine Hugh Cooper & Kathy Mae Cooper,

Case No. 01-10552

Debtor.

Chapter 13

**MEMORANDUM OPINION AND ORDER RE
(1) OBJECTION TO CONFIRMATION FILED BY GMAC and (2) MOTION TO
ACCEPT SURRENDER/RESERVE RIGHT TO BE PAID ANY DEFICIENCY
RESULTING FROM SALE FILED BY GMAC**

The Court conducted a hearing on GMAC's Objection to Confirmation and Motion to Accept Surrender/Reserve Right to be Paid any Deficiency Resulting from Sale filed by GMAC on April 26, 2001,. 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

Pursuant to the Court's mandate, the parties in this matter filed a Stipulation of Facts on May 31, 2001. The stipulated facts are as follows:

1. Appearing by Attorney, Robert B. Vandiver, Jr., on the 6th day of February, 2001, the above named Debtor filed herein a Petition proposing a Plan of settlement of debts under Chapter 13 of the Federal Bankruptcy [Code].
2. Prior to the filing of the Debtor's Petition proposing said Plan, a 1996 Century, Identification No. 1G4AG55M3T6438873, purchased from Graves Pontiac, Buick, Inc., on the 17th day of September, 1996, financing \$15,874.37 with interest to accrue at the rate of 8.5% per annum, payable in monthly installments of \$326.80 over a period of 60 months.
3. The Debtor, Kathy Mae Cooper, refinanced the indebtedness owing to GMAC by refinancing agreement dated December 1, 1999, financing the balance on the original contract, \$8,926.85,

"Memorandum Opinion and Order re Objection to Confirmation and Motion to Accept Surrender
filed by GMAC"

with interest to accrue at the rate of 10.50% per annum, payable in 42 monthly installments of \$255.97.

4. Sylvaine Hugh Cooper and Kathy Mae Cooper previously filed on October 16, 2000, Bankruptcy No. 00-13854-GHB.

5. A Consent Order was entered in Bankruptcy No. 00-13854 on the 6th day of December 2000, establishing the value of the 1996 Buick Century at \$7,954.44, with interest to accrue at the rate of 10.5% per annum, payable in monthly installments of \$200.00 over a period of 49 months.

6. On January 17, 2000, there was filed an Order of Voluntary Dismissal of Bankruptcy No. 00-13854-GHB.

7. The insurance was cancelled on the subject vehicle on January 26, 2001.

8. The Debtor states that one month after the Debtor's Plan in Case No. 00-13854 was confirmed, the 1996 Buick Century automobile financed through GMAC broke down. The Debtors state that they have been advised by a mechanic that the automobile has 2 cracked pistons and will need repairs estimated between \$1,500.00 and \$2,000.00 plus labor.

9. Because of the amount of the Debtor's plan payments, the Debtors stated they were not able to raise the funds necessary to repair the car.

10. The Debtors have purchased a 1987 Chevrolet "Chevette" with cash from their income tax refund.

11. The Debtors voluntarily dismissed Case No. 00-13854, and refiled under Case No. 01-10552, proposing to surrender the vehicle to GMAC.

12. It is the Creditor's insistence that the voluntary dismissal of Bankruptcy No. 00-13854 on January 17, 2001, and the refiling of Bankruptcy No. 01-10552 on February 6, 2001, was in an effort to escape the ruling in *In re: Nolan*, 232 F.3d 528 (6th Cir. 2000).

13. It is the Debtor's insistence that because the Debtors are not proposing to modify the Plan in Case No. 00-13854, but have filed a new Plan under a new case number, that the ruling in *In re: Nolan*, 232 F.3d 528 (6th Cir. 2000) does not apply.

II. CONCLUSIONS OF LAW

GMAC has asserted that the case of *In re Nolan*, 232 F.3d 528 (6th Cir. 2000), prohibits the debtors' surrender of their automobile to GMAC. In *Nolan*, a debtor owed Chrysler Financial Corporation \$12,291.45 for an automobile. According to her Chapter 13 plan, the debtor proposed to retain the vehicle and pay Chrysler Financial's claim as a secured one. Two years after confirmation of the plan, the debtor moved to modify her Chapter 13 plan by surrendering the vehicle to Chrysler and reclassifying any deficiency as an unsecured claim. In analyzing the case, the Sixth Circuit held:

that a debtor cannot modify a plan under section 1329(a) by: 1) surrendering the collateral to a creditor; 2) having the creditor sell the collateral and apply the proceeds toward the claim; and 3) having any deficiency reclassified as an unsecured claim.

Id. at 535. *Nolan's* holding is a narrow one and serves only to prohibit debtors who have a confirmed chapter 13 plan from modifying that plan by surrendering collateral to a secured creditor and reclassifying any deficiency as an unsecured claim. Because the debtors in the case at bar are not attempting to modify their chapter 13 plan in any way, *Nolan* has no applicability.

Chapter 13 debtors have an absolute right to voluntarily dismiss their case at any time. 11 U.S.C. § 1307(b). *In re Nolan* does not modify or take away this right. When a debtor subsequently refiles a new Chapter 13 case, secured creditors are included in the plan with a claim that is secured to the extent of the collateral's value as of the *effective date of the plan*. 11 U.S.C. § 1325(a)(5)(B) (emphasis added). The Court can find no authority, either in *Nolan* or any other case, which modifies § 1325(a)(5)(B)'s time of valuation.

As a result of *Nolan's* inapplicability to the case at bar and §§ 1307 and 1325(a)'s mandates, the Court finds that GMAC's Objection to Confirmation should be overruled. In so making this decision; however, it is important to point out that the Court does not reach a determination regarding any other issues in this case, such as the debtor's good faith in refiling.

In re Cooper
Case No. 01-10552
Chapter 13

4

"Memorandum Opinion and Order re Objection to Confirmation and Motion to Accept Surrender
filed by GMAC"

III. ORDER

It is therefore **ORDERED** that GMAC's Objection to Confirmation is **OVERRULED**.

It is **FURTHER ORDERED** that GMAC's Motion to Accept Surrender is **GRANTED**.

Any deficiency resulting from the sale shall be included in the Debtor's Chapter 13 plan as an
unsecured claim.

It is so ordered.

By the Court,

G. Harvey Boswell
United States Bankruptcy Judge

Date: July 20, 2001