IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

IN RE:

MARTY W. MATLOCK, BK #91-10326-WHB
Chapter 13

Debtor.

MEMORANDUM OPINION AND ORDER ON OBJECTION
TO CONFIRMATION FILED BY SELMER BANK AND TRUST COMPANY

The objection of Selmer Bank and Trust Company to the confirmation of the debtor's plan was heard on April 10, 1991, at which time the Court took under advisement the issue presented, and by agreement of the parties the facts concerning the objection of Selmer Bank and Trust Company were submitted to the Court by letter from the creditor's counsel. That letter asserts that the Selmer Bank and Trust Company was in possession of a 1988 GMC Pick Up truck which has over 120,000 miles on it and which the bank anticipates can be sold for no more than $2,000.00 to $3,000.00 in its present condition. The bank's outstanding claim is $9,297.24 before application of any sales proceeds. This vehicle was purchased new by the debtor, with zero miles, shortly before the debtor filed his first Chapter 13 bankruptcy.

Selmer Bank and Trust asserts and the Court's files reflect that it has received no money in the two prior Chapter 13's filed by this debtor. The prior Chapter 13 cases were Number 89-1191-B, which was dismissed on June 13, 1990 and case Number 90-11274-K, which was dismissed on January 17, 1991.

It is the bank's position that the vehicle, which was purchased new in May, 1988, should have been paid as a secured claim through the prior Chapter 13 plans and that the debtor should not be permitted to alter the position of the bank by listing the bank as an unsecured creditor now in the present Chapter 13 bankruptcy plan.

These facts raise an issue similar to that presented in In re Jock, 95 B.R. 75 (Bankr. M.D. Tenn. 1989), a decision of Judge Keith M. Lundin. In the Jock opinion, Judge Lundin permitted the debtor to

modify, post-confirmation, his Chapter 13 plan so as to permit the debtor to surrender secured collateral, a car, to Boatman's Bank and to treat the deficiency as an unsecured claim. However, Judge Lundin held that the secured creditor was "entitled by §1327(a) to the binding effect of the original confirmation order through the date the debtor surrendered the car." 95 B.R. at 78.

The difference in Jock and the present case of course is that Jock involved a debtor in one case who sought to modify the original secured position of Boatman's Bank by surrendering the vehicle in that case and altering the position of Boatman's from secured to unsecured in that same case. In the present context, we have a debtor who has been in two prior Chapter 13 cases, in which cases the debtor treated Selmer Bank and Trust Company as a secured creditor but failed to make any payments through the plans to apply to the secured debt of Selmer Bank and Trust. The debtor has now filed a new plan which proposes to pay Selmer Bank and Trust as a secured creditor for $7,500.00 and as unsecured for $3,500.00. However, the Bank had repossessed the truck prior to this bankruptcy filing, and the Court has entered an order on March 25, 1991, permitting the Bank to sell its collateral.

The Court is faced with the reality that a dismissal of a Chapter 13 case terminates the plan, terminates the automatic stay and restores the parties to their non-bankruptcy positions. See, e.g., Lugo v. Saez, 721 F. 2d 848 (1st Cir. 1983). A dismissal, for example, permits a secured creditor to proceed to recover its collateral outside of bankruptcy. See, e.g., In re Barnes, 119 B.R. 552 (S.D. Ohio 1990). The Court cannot treat the present case as a true In re Jock scenario since the debtor is not attempting to modify a presently confirmed plan. However, "[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. 11 U.S.C. §1329(b)(1)." In re Jock, 95 B.R. at 78.

Moreover, §1325 of the Code yields some protection for this creditor in its requirements for confirmation of the plan. Section 1325(a)(3) provides that the plan must be proposed in good faith. The only evidence before the Court, by stipulation of counsel for the parties, is the submission by the creditor's counsel that the vehicle was purchased new, with zero miles, in May, 1988, shortly before the debtor filed his first

Chapter 13 plan, that the creditor received no payments as a secured creditor through the two prior Chapter 13 cases, that the vehicle now has in excess of 120,000 miles placed upon it by the debtor, and that finally the usage of the vehicle has reduced its value to far less than the claim of the creditor. This is some evidence, and the only evidence before the Court, "that the debtor abused the [vehicle] after [it's purchase and that] the proposed [new plan] might be portrayed as a bad faith effort by the debtor to shift the loss caused by the debtor's misconduct [in using the vehicle and failing to pay the secured debt on it] to the secured claim holder." In re Jock, 95 B.R. at 78.

The Court does not find it appropriate for a debtor to file successive Chapter 13 cases, to evidence an inability to pay secured claims in those cases, while all the time utilizing the depreciable secured assets and failing to pay for them, and then ultimately to surrender a greatly devalued asset to the secured creditor in the final Chapter 13 case which proposes to pay less than the original secured debt and to pay the unsecured deficiency at less than 100%.[1] In the absence of proof from the debtor that such a course of action was reasonable and necessary, the Court finds this course of action to be bad faith on the part of this debtor.

Therefore, the Court concludes under §1325(a)(3) that this plan is proposed in lack of good faith as to the Selmer Bank and Trust Company and that the plan may not be confirmed as to that bank as it presently exists. Confirmation for the Selmer Bank and Trust Company would require, at a minimum, that the debtor, following the rationale of In re Jock, pay in this plan an amount equivalent to the secured claim in the first Chapter 13 case, number 89-11991-B (which amount was $7,500.00 at 12% interest) until the debtor surrendered the vehicle or the bank picked up the vehicle after the dismissal of the second Chapter 13 case. In other words, during that period of time that the debtor had possession of and utilized the vehicle, Selmer Bank and Trust should be treated as a secured creditor and should be entitled to file such a claim in this present Chapter 13 case. Selmer Bank and Trust may further sell the vehicle for the highest possible price and apply those proceeds to its total secured claim and may then file a proof of claim for what it considers to be its

[1] The present plan proposes to pay unsecured creditors 10% of their claims.

secured claim and its unsecured claim. If the debtor objects to either claim, a hearing shall be held on that objection.

If the debtor chooses to modify his plan, a hearing will be held on that modification to determine if the modified plan may be confirmed. If the debtor chooses not to modify the plan within fifteen days from this order, the Chapter 13 plan confirmation will be denied and the case shall be dismissed, which would place the Selmer Bank and Trust Company in the position of pursuing, under non-bankruptcy remedies, its claim against the debtor.

SO ORDERED this 22nd day of April, 1991.

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WILLIAM HOUSTON BROWN
UNITED STATES BANKRUPTCY JUDGE

cc:

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