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UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

IN RE

NAKIA KESHUNA HILL DICKERSON, CASE NO. 98-11779

Debtor. Chapter 13

MEMORANDUM OPINION AND ORDER RE (1) CONFIRMATION OF DEBTOR'S CHAPTER 13 PLAN, (2) OBJECTION TO CONFIRMATION OF DEBTOR'S CHAPTER 13 PLAN AND REJECTION OF THE PLAN FILED BY NAL ACCEPTANCE CORPORATION, AND (3) MOTION TO TERMINATE THE AUTOMATIC STAY FILED BY NAL ACCEPTANCE CORPORATION

Currently pending before the Court are four matters: (1) Confirmation of the Debtor's, Nakia Keshuna Hill Dickerson, ("Dickerson"), Chapter 13 Plan; (2) an Objection to Confirmation of Said Plan and Rejection of Said Plan filed by NAL Acceptance Corporation, ("NAL"); (3) a Motion to Terminate the Automatic Stay filed by NAL; and (4) a Complaint to Compel Turnover filed by the debtor/plaintiff. As will be set forth in this Memorandum Opinion and Order, the Court's decision with regard to the fourth matter, the Complaint to Compel Turnover, controls the Court's decision with regard to the other three matters.

The current chapter 13 case is the debtor's second bankruptcy filing. Prior to the filing of the debtor's previous chapter 13, the creditor in the case at bar, NAL repossessed the debtor's truck. The truck was subsequently turned over to the debtor in that case. Upon the debtor's voluntary dismissal of her previous case, NAL repossessed the vehicle once again based on the debtor's failure to make her monthly car payment. When the instant case was filed, the debtor filed a Complaint to Compel Turnover.

In conjunction with the trial on the Complaint to Compel Turnover, this Court conducted a hearing on the confirmation of the plan, NAL's objection thereto and NAL's Motion to Terminate the Automatic Stay on July 30, 1998. FED. R. BANKR. P. 9014. Pursuant to 28 U.S.C. § 152(bankruptcy)(2)(G) & (L), these are core proceedings. 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

At the hearing on these matters, the parties presented a Stipulation to the Court which read as follows and which the Court now adopts as its Findings of Fact[1]:

1. Debtor purchased the subject 1995 Chevrolet S-10 Pickup ("Vehicle") pursuant to that certain sale contract, dated 2/10/97 ("Contract"), which purchase was financed by NAL. NAL has a first lien on the Vehicle.
2. Debtor was in default for the first payment due under this account as she tendered a check which was not honored due to insufficient funds. NAL repossessed the Vehicle on June 5, 1997 and debtor filed Chapter 13 Case No. 97-12063 on June 10, 1997. In that case, the parties entered into a Consent Order dated July 10, 1997 [which included a "drop dead/last opportunity" clause].
3. Debtor voluntarily dismissed her prior Chapter 13 case on April 9, 1998. NAL again repossessed the Vehicle on May 8, 1998, and this current case was filed on May 12, 1998. At the time of [the] filing of this case on May 12, 1998, the pay-off balance owed to NAL was $17,750.36, and the arrearage was $4,704.86.

In addition to the facts as set forth in the Stipulation, the Court also finds the following to be the facts in this case. The debtor purchased the 1995 Chevrolet Pickup as a used vehicle from Golden Circle Ford for $13,349.41. The annual percentage rate under the sales contract was 19% and the monthly payment was set at $372.49. When purchasing this vehicle, the debtor made a down-payment of $1400.00. The total amount due under the contract, including the finance charges, was $20,114.56. The term of the plan was fifty-four (54) months with the first payment being due under the contract on March 1, 1997.

When, in the debtor's previous case, the parties entered into a consent order providing for the turnover of the pickup to the debtor, a "drop dead/last opportunity" clause was included within the order. Such clause read as follows:

> If (i) Debtor fails to make the payment as and when required in Section I hereof, (ii) any future Plan payment on behalf of Debtor is not made when due to the Chapter 13 Trustee for any reason, and such delinquency is not cured within fifteen (15) days after NAL

[1] In adopting this Stipulation as its Findings of Fact, the Court has omitted all references to Exhibits as they appeared in the Stipulation.

> serves (via U.S. mail) notice of such default upon Debtor and Debtor's attorney, or (iii) this Chapter 13 is dismissed for any reason whatsoever, whether before or after confirmation, then, in any such event, (a) the automatic stay of § 362 of the Bankruptcy Code will be automatically terminated as to NAL, the Vehicle and the proceeds thereof and NAL shall thereupon be allowed to exercise all of its rights and remedies pursuant to its agreements with Debtor and applicable non-bankruptcy law; (b) Debtor shall immediately surrender possession of the Vehicle to NAL or its designee; and (c) such dismissal shall be with prejudice against Debtor as to NAL's rights with respect to the Vehicle and proceeds thereof and without limitation, any subsequent bankruptcy filing, shall be ineffective as to NAL's rights with respect to the Vehicle and proceeds thereof, regardless of any change of circumstance.

At the hearing in this matter, the debtor testified that she was not aware of the "drop dead/last opportunity" clause in the agreed order she entered into with NAL in her previous case.

The proposed plan filed by the debtor in this case designates NAL as a secured creditor with a claim for $12,000.00. The monthly payment to NAL is set forth in the plan as $261.00/month. The interest rate is set at 11%. According to the proposed plan, Dickerson's monthly payment to the Chapter 13 Trustee's office is $161.00/semi-monthly. The proposed payment period is sixty (60) months. The only other secured creditor in Dickerson's plan is Heilig Meyers, which is to receive a monthly payment of $15.00. At the time of filing her chapter 13 petition and proposed plan, the debtor was unemployed and, therefore, proposed to make the payments directly to the Chapter 13 Trustee's Office. Since that time, the debtor has obtained a job and has gone on payroll deduction.

Pursuant to the debtor's Schedule I, Dickerson's monthly income is $793.00. Her husband's monthly income is $1232.00. Dickerson's Schedule J reflects $1703.00 in monthly expenses.

NAL only received two payments of $255.00 in Dickerson's prior chapter 13 case, case number 97-12063. NAL should have received nine monthly plan payments in that case. In the present case, case number 98-11779, the debtor made one payment of $322.00 on June 15, 1998. According to the Chapter 13 Trustee, one partial payment was sent in by the debtor's employer, Greg's Men's Store, on August 17, 1998. At the hearing in this matter, the debtor testified that Greg's is withholding the money from her check in accordance with the payroll deduction order. No additional proof of this fact was presented to the Court.

When the debtor filed her previous case, case number 97-12063, she was employed at Martha White Foods making $10.04/hour. In August 1997, the debtor became ill and had to quit work. The debtor also separated from her husband in the late Summer 1997/early Fall 1998. According to the debtor's testimony, these two events made it extremely difficult for the debtor to make her monthly plan payments and, as a result, the debtor voluntarily dismissed her case in April 1998.

Since the dismissal of her previous case, the debtor has reconciled with her husband and has obtained employment at Greg's Men's Store in Jackson. She currently makes $6.50/hour. Although she is making less money per hour now, the debtor feels she can make her monthly plan payments based on the fact that she and her husband now share expenses.

At the hearing on these matters, the debtor asserted that there are two reasons she needs to regain possession of the pickup. First, the debtor testified that she and her husband cannot share a vehicle because her husband works different shifts at his job than she does at hers. The debtor did admit on cross-examination that she could get to and from her job on public transportation. Secondly, the debtor has a mentally retarded son who has to be taken to Memphis once every two months for appointments with his eye doctor. The debtor further testified that she would adjust her plan payments so that NAL was paid out within their original contract term.

In support of their Motion to Terminate the Automatic Stay, NAL asserts that the "for cause" requirement of § 362(d) exists because (1) they lack adequate protection, (2) the debtor has exhibited bad faith by filing "multiple" cases and her prior plan defaults, (3) there is no equity in the truck, and (4) the truck is not necessary for an effective reorganization. In support of their Objection to Confirmation, NAL asserts that (1) there is a lack of good faith, (2) the monthly payment is too low, (3) the interest rate is inadequate, (3) the debtor's plan is not feasible and (4) the plan does not comply with § 1325(bankruptcy).

In filing the complaint for turnover, the debtor did not propose to reimburse NAL for the repossession costs they incurred on May 8, 1998. The debtor also did not propose to pay NAL the present arrearage of $4704.86 before regaining possession of the truck. As far as the Court can discern from Dickerson's current chapter 13 plan, no provision is made within the plan for the repayment of the arrearage or repossession costs.

II. CONCLUSIONS OF LAW

Section 542(a) of the Bankruptcy Code provides that:

> an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

11 U.S.C. § 542(a). Section 363(b)(1) further provides that the trustee may only "use, sell or lease . . . property of the bankruptcy estate." 11 U.S.C. § 363(b)(1). In the case of *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 203, 103 S.Ct. 2309, 2312-13, 76 L.Ed.2d 515 (1983), the Supreme Court found that property repossessed by a secured creditor pre-petition is property of the estate. Although *Whiting Pools* involved a chapter 11 reorganization, the vast majority of courts have extended that holding to chapter 13 cases as well. *Nat'l. City Bank v. Elliot (In re Elliot)*, 214 B.R. 148, 151 (6th Cir. BAP 1997); *American Honda Finance Corp. v. Littleton (In re Littleton)*, 220 B.R. 710, 715 (Bankr. M.D.Ga. 1998); *In re Fitch,* 217 B.R. 286, 290 (Bankr. S.D.Cal. 1998); In *re Attinello*, 38 B.R. 609, 611 (Bankr. E.D.Pa. 1984); *In re Robinson*, 36 B.R. 35, 37 (Bankr. E.D.Ark. 1983); *Pileckas v. Marcucio*, 156 B.R. 721, 725 (N.D.N.Y. 1993).[2] Despite this inclusion of repossessed property within the bankruptcy estate, the debtor must provide the secured creditor with adequate protection of its interest in the collateral before the creditor may be compelled to turnover property under the Code. *Id.* at 207*; Pileckas v. Marcucio*, 156 B.R. 721, 725 (N.D.N.Y. 1993); *Deiss v. Southwest Recovery, U.S.A. (In re Deiss)*, 166 B.R. 92, 94 (Bankr. S.D.Tex. 1994). Under both Tennessee law and relevant bankruptcy law, such adequate protection requires the debtor to both reimburse the creditor for his repossession costs and cure any pre-petition arrearage. T.C.A. § 47-9-506; *Deiss*, 166 B.R. at 94.

In the case at bar, Dickerson has proposed a chapter 13 plan which calls for a monthly payment to the defendant of $261.00. Only one complete plan payment has been made in this case. In

[2] *See also* T.C.A. § 47-9-506 which allows a debtor to redeem repossessed collateral "at any time before the secured party has disposed of collateral or entered into a contract for its disposition under § 47-9-504 or before the obligation has been discharged under § 47-9-505(2)."

Dickerson's previous case, case number 97-12063, NAL only received two of nine payments due them. Dickerson has had possession of the Chevy truck for eighteen months. Since that time, NAL has only received a total of three payments. NAL has had to repossess the truck twice since financing the vehicle in February 1997 based on Dickerson's failure to make her car payments.

In filing this complaint for turnover, the debtor has not offered NAL any adequate protection in exchange for the return of her truck. No reimbursement of repossession or storage costs has been offered by the debtor, nor has any provision been made within the plan for the curing of the $4704.86 pre-petition arrearage.

Based on this lack of an offer of adequate protection, this Court has no choice but to deny the debtor's complaint for turnover; however, should the debtor be able to propose a method of adequately protecting NAL's secured interest in the truck within fifteen (15) days of entry of this order, the Court will reconsider Dickerson's complaint. The Automatic Stay shall remain in effect until that time. As a result of this decision, the Court will also continue the Confirmation of the Debtor's Plan, NAL's Objection to Confirmation and NAL's Motion to Terminate the Automatic Stay until October 1, 1998. An order will be entered in accordance herewith.

III. ORDER

It is therefore **ORDERED** that the Plaintiff's Complaint to Compel Turnover is **DENIED** at this time.

It is **FURTHER ORDERED** that the debtor, Nakia Keshuna Hill Dickerson, shall have fifteen (15) days to propose adequate protection of NAL's security interest in the 1995 Chevrolet S-10 Pickup.

It is **FURTHER ORDERED** that the Court will reconsider the debtor's Complaint to Compel Turnover on October 1, 1998, at 10:00 a.m..

It is **FURTHER ORDERED** that:

1. Confirmation of the Debtor's Chapter 13 Plan is continued until October 1, 1998, at 10:00 a.m..
2. The Objection to Confirmation of the Debtor's Chapter 13 Plan and Rejection of the Plan filed by NAL Acceptance Corporation is continued until October 1, 1998, at 10:00 a.m..
3. The Motion to Terminate the Automatic Stay filed by NAL Acceptance Corporation is continued until October 1, 1998, at 10:00 a.m..

IT IS SO ORDERED.

BY THE COURT,

G. HARVEY BOSWELL
United States Bankruptcy Judge

Date: September 3, 1998