

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA

ENTERED
MAR 31 2004
U.S. BANKRUPTCY COURT
MDNC - JL

IN RE:

Robert Allen Waegner
Lori L. Waegner,

Debtors.

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Case No. 03-84099

ORDER

This case came on for hearing before the undersigned bankruptcy judge on March 23, 2004, for a hearing on Confirmation on the Debtors' Proposed Chapter 13 Plan and an Objection to Confirmation that was filed on behalf of Ford Motor Credit Company ("Ford"). Brett S. Yauger appeared on behalf of the Debtors, Pamela P. Keenan appeared on behalf of Ford and Benjamin Lovell appeared as attorney for the Chapter 13 Trustee.

The matter for determination by the court is whether the Debtors' proposed plan satisfies the requirement under § 1325(a)(3) of the Bankruptcy Code that the plan be proposed in good faith and not by any means forbidden by law. Ford asserts in its objection that the proposed plan does not satisfy this requirement because this is the Debtors' second Chapter 13 filing and the Debtors propose to value Ford's collateral (a 2001 Ford Explorer) as of the petition date in this case. Ford contends that, in order for the plan to meet the good faith requirement, the Plan must provide Ford with a secured claim of no less than \$19,001.91 (representing the \$18,276.91 principal balance owed to Ford at the close of the Debtors' first case, plus \$375.00 in prepetition repossession fees and \$350.00 in prepetition attorney fees.¹)

¹Judge Wolfe signed an agreed order allowing the prepetition repossession fees and the prepetition attorneys fees. This court will not set aside that order.

The Debtors purchased the vehicle on or about July 14, 2000 and the installment sales contract was assigned to Ford. The cash sales price of the vehicle was \$27,432.00. The Debtors paid \$1,000.00 down and purchased a \$1,500.00 service contract such that the total amount financed was \$29,102.16. The contract provided for payments in the amount of \$604.93 per month for a period of 60 months with interest to accrue at the rate of 8.90% per annum.

The Debtors filed their first Chapter 13 petition on June 28, 2001. The plan was confirmed on September 10, 2001 and provided that Ford held a lien against the 2001 Ford and that the vehicle would be valued at \$26,833.00, with Ford to be paid the contract rate of interest not to exceed 11% on its secured claim. Additionally, the order provided that Ford would have 60 days to object to the valuation of the vehicle. If Ford's claim exceeded \$26,833.00, the balance of the claim would be treated as a general unsecured claim. Ford did not object to valuation and was given a secured claim in the amount of \$26,833.00 and an unsecured claim in the amount of \$76.42.

The Debtors remained in the first Chapter 13 for a period of 29 months and during that period Ford was paid the sum of \$8,644.99 in principal and \$5,058.71 in interest for a total of \$13,703.70. Ford did not receive any monies on its \$76.42 unsecured claim. The total amount paid in by the Debtor during the first Chapter 13 was \$41,850.00. The case was dismissed for failure to make plan payments on November 25, 2003. The last disbursement by the Trustee to Ford was made on December 31, 2003. At the time the case was dismissed, the principal balance on the secured claim was \$18,188.99.²

At some point in time after the dismissal of the first Chapter 13 case on November 25,

²Ford states that the principal balance due on its secured claim at the time of dismissal is \$18,276.91. However this figure does not give credit for all the payments made by the Chapter 13 Trustee. The Trustee continued to disburse funds after dismissal.

2003, and before the filing of the second Chapter 13 case on December 8, 2003, Ford repossessed the Vehicle. On January 9, 2003, Ford filed a Motion for Relief from the Automatic Stay and alleged that they still had possession of the Vehicle and requested relief to liquidate the collateral. An agreement was reached whereby the motion for relief was denied and the vehicle was returned to the Debtors. The Order providing for the return of the vehicle was entered on January 22, 2004.

The Debtors have proposed a plan in which Ford would have a secured claim of \$16,897.50,³ to be paid at the contractual rate of interest. Pursuant to prior orders of the court, Ford's secured claim would be increased by \$725.00 and Ford would have a period of 60 days to object to the proposed value of the car. Ford would have an unsecured claim for the balance of the monies owed. The Debtors propose to pay a minimum dividend of 25% to unsecured creditors.

Ford objects to confirmation of this Plan, not on the basis of valuation, but due to lack of good faith. Ford states "[i]n light of the Debtors' continuous use and possession of the Vehicle since the filing of the first case, thereby causing it to continue to depreciate in value, and the Debtors' failure to comply with the terms of the prior Chapter 13 Plan, Ford Credit believes that the Debtors' attempt to now impose a second 'cram down' to the value of Ford Credit's claim relative to the Vehicle in this repeat case is in bad faith." Ford argues that the standard value of 90% of NADA retail should not control as the second petition was filed in bad faith and therefore Ford's secured claim should be computed at the outstanding principal balance as of dismissal of the first Chapter 13, plus the sum awarded in Judge Wolfe's order.

³ All parties agree that this figure represents 90% of the NADA retail value of the Vehicle, which is the standard method of valuation in this district.

First, it is undisputed that Ford repossessed the vehicle prepetition and held the vehicle up to and including at least January 9, 2004. Ford had possession of the vehicle for at least one month and this court questions how Ford can file a pleading acknowledging the seizure and retention of the vehicle in one paragraph and alleging bad faith on the part of the Debtor for the continuance use and possession of the Vehicle in the preceding paragraph.

Secondly, in the first case Ford was allowed a secured claim for all but \$76.42 of its claim. The court does not consider the reduction of a secured claim by a mere \$76.42 to constitute a meaningful cramdown. Furthermore, the proposed treatment of Ford's claim in the second case complies with the provisions of the Bankruptcy Code regarding a creditor's secured status and cramdown. See 11 U.S.C. §§ 506(a), 1325(a)(5).

The Fourth Circuit Case of Neufeld v. Freeman, 794 F.2d 149 (4th Cir. 1986) sets forth a non-inclusive list of factors to consider in determining whether a plan was proposed in good faith. Those factors include: the percentage of proposed repayment to creditors, the debtor's financial situation, the period of time over which creditors will be paid, the debtor's employment history and prospects, the nature and amount of unsecured claims, the debtor's past bankruptcy filings, the debtor's honesty in representing facts, and any unusual or exceptional problems facing the particular debtor. The test of good faith is based on the totality of the circumstances. Neufeld, 794 F.2d at 152 (citing Deans v. O'Donnell, 692 F.2d 968, 972 (4th Cir. 1982)). The burden of proof on the issue of confirmation of the Chapter 13 Plan is on the Debtor. See In re Cushman, 217 B.R. 470, 475 (Bankr. E.D.Va. 1998).

Ford argues that this case is similar to the case of In re Thompson, in which Judge Stocks denied confirmation of a debtor's second Chapter 13 due to lack of good faith. Ford's reliance on Thompson is misplaced. The facts are clearly distinguishable. In Thompson, the debtor's first

Chapter 13 plan was never confirmed. No monies were ever remitted to the creditors and when the debtor received a refund of approximately \$4,000.00, no monies were remitted to GMAC as the lienholder on the debtor's vehicle. The debtor in Thompson had filed a prior Chapter 7 bankruptcy and the personal liability to GMAC had been discharged. In Thompson, the debtor **did have** continuous use of the vehicle without any payments to the creditor. As a result, the denial of confirmation for lack of good faith was appropriate in Thompson.


This case presents a very different factual situation. The Debtors were in Chapter 13 for twenty-nine months and paid in over \$41,000.00. They have never filed a Chapter 7 case and have now proposed to pay Ford the fair market value of the vehicle with contract interest. The fact that their first Chapter 13 failed is unfortunate, but the refiling does not constitute bad faith. The Debtors did not have continuous use of the vehicle between the two Chapter 13 filings.

Chapter 13 is a voluntary bankruptcy proceeding wherein the debtor commits to pay his secured creditors in full with interest to the extent of the value of the collateral and commits to pay unsecured creditors as much as possible in order to meet the best efforts test of 11 U.S.C. § 1325. In this case, based upon the Debtors' income, this plan represents the Debtors' best efforts and this second filing is not an abuse of the provisions of the Bankruptcy Code.

Based on the totality of the circumstances, this Court finds that Ford's objection to confirmation is DENIED and the plan as proposed is CONFIRMED.

IT IS SO ORDERED.

This the 31 day of March, 2004.


Catharine R. Carruthers
United States Bankruptcy Judge