UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re:

Robert Lee,

Debtor.

Chapter 13
Case No.: 00-11410

APPEARANCES:

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Andrea E. Celli
Chapter 13 Standing Trustee
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Hon. Robert E. Littlefield, Jr., United States Bankruptcy Judge

Memorandum, Decision & Order

The present matter was brought before the court by Berkshire Bank's ("Creditor") objection to the confirmation of Robert Lee's ("Debtor") Chapter 13 plan.

Jurisdiction

This core proceeding is within the court's jurisdiction pursuant to 28 U.S.C. §§ 157(a)(2)(A) and (L) and 1334(b).

Facts

Based upon the pleadings before it, the court finds the following facts:

1. On September 6, 1997, the Debtor and Ken Goewey Dodge entered into a retail installment contract and security agreement ("Agreement") for the purchase of a 1993 Dodge Shadow. On that date, the Agreement was assigned to the Creditor.

2. Pursuant to the Agreement, the Debtor pledged as security the above-mentioned vehicle. The security interest was properly perfected with the New York State Department of Motor Vehicles.

3. On March 16, 2000, the Debtor filed a voluntary Chapter 13 petition and plan.

4. On April 24, 2000, the Creditor filed a secured proof of claim in the amount of $5,534.51.

5. In his original plan the Debtor proposed surrendering the 1993 Dodge Shadow in full satisfaction of the debt due to the Creditor.

6. The Creditor objected to confirmation arguing that the Debtor's counsel had just informed it that the Debtor did not know the whereabouts of the vehicle. Several years prior, the Debtor's girlfriend had been driving the car in North Carolina when it broke down and was left at a repair shop. When the Debtor attempted to retrieve the vehicle, the repair shop was no longer in business and the vehicle was missing.[1]

7. The Debtor never informed the Creditor of the vehicle's disappearance. Rather, the Debtor continued to make payments on the automobile for approximately two years.

8. In response to the Creditor's opposition, the Debtor offered an amended plan which proposed to surrender whatever interest he has in the vehicle and to treat the Creditor's claim as unsecured.

9. The Creditor has objected to the amended plan arguing that it does not comply with 11 U.S.C. § 1325.

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[1]The court is uncertain of just how long the Debtor waited before attempting to retrieve the automobile. The Creditor asserts that it was over one year and the Debtor does not dispute this allegation. In any event, due to the fact that the repair shop closed and disposed of the vehicle, the court is convinced that a substantial amount of time had elapsed before the Debtor attempted to reclaim it.

10. The Chapter 13 Standing Trustee ("Trustee") supports confirmation.

Arguments

As noted, the Creditor objects to confirmation, arguing that the proffered plan does not comport with 11 U.S.C. § 1325(a)(5); that this subsection does not permit the reclassification of a secured claim in the manner the Debtor requests. The Creditor offers various case law supporting this position.

Both the Debtor and the Trustee disagree with the Creditor. They argue that courts have determined that a claim may be treated as unsecured if a debtor indicates an intention to surrender the property to the secured creditor but, through no fault of its own, is unable to actually tender the collateral. The Trustee provides the court with case law supporting that position.

Discussion

11 U.S.C. § 1325 governs confirmation of a Chapter 13 plan and states in part,

> (a) Except as provided in subsection (b), the court shall confirm a plan if – ...
> (5) with respect to each allowed secured claim provided for by the plan –
> (A) the holder of such claim has accepted the plan
> (B)(i) the plan provides that the holder of such claim retain the lien securing such claim; ... ; or
> (C) the debtor surrenders the property securing such claim to such holder

The fundamental question is whether the Debtor's intent to surrender the property, even though he does not know its whereabouts, is sufficient to satisfy subsection (5)(C). In the present case, with these facts, it is not, and therefore, confirmation of this plan is denied.[2]

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[2]This decision does not foreclose the Debtor from offering an amended plan for confirmation. However, he is forewarned that a plan which satisfies solely this Creditor to the

The court has reviewed the case law proffered by both parties and finds that the rationale of the cases provided by the Debtor and the Trustee is highly persuasive. However, the court further finds that the present case is factually dissimilar and requires a different result.

The Debtor and Trustee rely upon *In re Alexander*, 225 B.R. 665 (Bankr. E.D. Ark. 1988), to support their contention. In *Alexander* and the cases relied upon therein, the bankruptcy court determined that debtors who were wholly blameless for their inability to relinquish the collateral would be allowed to surrender their interest and treat the claims as unsecured. As noted, this court agrees with that result. However, what was crucial to that determination is that the debtor was truly blameless, a victim of other people's actions. That is not the situation here.

In the present case, it is not the act of another but rather the Debtor's own actions, or more precisely, his own inaction, that has led to the current situation. This Debtor allowed the vehicle to remain at a repair shop in North Carolina for what had to be an extended period of time.[3] He offers no evidence of a good faith attempt to reclaim the vehicle. He merely states, "Approximately two years ago, Mr. Lee's girlfriend drove the vehicle to North Carolina, where it broke down, requiring a new engine. It was brought to a shop for engine replacement or repair. When she returned to retrieve the vehicle, the shop was no longer there and the vehicle had disappeared with it. Mr. Lee continued with the installment payments for two years before seeking relief under Chapter 13." (Debtor's Response to Objection dated August 10, 2000 ¶ 2.)

The court is confident that if the Debtor had attempted to contact the repair shop, he

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detriment of unsecured creditors might not be confirmable.

[3]See n. 1.

would have been advised of the situation and could have made some type of alternative arrangement that would have allowed either himself or the Creditor to reclaim the vehicle. Instead the Debtor apparently did nothing at all and, in effect, abandoned the property. His conduct leads the court to conclude that the Debtor is at least partially responsible for the present problem, and therefore, he does not fit within the *Alexander* rubric.

The Creditor has provided case law which holds that to comply with 11 U.S.C. § 1325(a)(5)(C) a debtor must, without exception, physically tender the collateral to the secured creditor. The Creditor invites this court to follow this line of cases; the court declines to do so. This court has previously stated, "[i]f the debtor selects the surrender option, it must make the personalty available to the creditor or explain its absence. It does not have to pack up or deliver the collateral, merely make it available for pickup. In other words be reasonable."[4] *In re Bushey*, Case No. 96-12483, (Bankr. N.D.N.Y. January 31, 1997). The court reaffirms that position today. In this case, because of his own inaction, the Debtor cannot adequately explain the absence of the vehicle nor can he make it available for pickup. Thus, the Debtor is foreclosed from utilizing the surrender option of 11 U.S.C. § 1325(a)(5)(C) and reclassifying this claim.

For the reasons articulated, the Creditor's objection to confirmation is sustained and confirmation of this plan is denied.

It is so ORDERED.

Dated:
Albany, New York

Hon. Robert E. Littlefield, Jr.
United States Bankruptcy Judge

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[4]In *Bushey*, the court was discussing "surrender" pursuant to 11 U.S.C. § 521. The court is cognizant of the differences between that section and 11 U.S.C. § 1325, however, that distinction does not compel a different result.