

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF NEW YORK

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IN RE:

THOMAS P. EMERSON  
SHARON A. EMERSON

Debtors

CASE NO. 97-67608

Chapter 13

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THOMAS P. EMERSON  
SHARON A. EMERSON

Plaintiffs

vs.

ADV. PRO. NO. 99-80193A

ASSOCIATES HOUSING FINANCIAL, LLC

Defendant

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APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

The Court considers herein three distinct motions each of which seek a different form of relief but all of which present common questions of fact and law.

The first of the motions was filed by Associates Housing Finance LLC (“Associates”) on May 27, 1999, and seeks relief from the automatic stay, abandonment or, in the alternative, adequate protection.<sup>1</sup> The second motion was also filed by Associates on September 1, 1999, and seeks summary judgment in Adversary Proceeding number 99-80193A.<sup>2</sup> The final motion was filed by the Debtors on November 9, 1999, and seeks to modify their confirmed Chapter 13 plan by “cramming down” Associates’ claim. All three motions, after several consensual adjournments, found their way onto this Court’s November 30, 1999 motion calendar in Utica, New York. At the November 30, 1999 motion term, the Court indicated to the parties that it would attempt to rule from the bench on all three motions by December 28, 1999, its next motion date in Utica, New York. On December 28, 1999, the Court reconsidered ruling from the bench and indicated it would take the motions under advisement and issue a written decision.

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<sup>1</sup> Associates apparently took an assignment of a Note and Mortgage originally executed between the Debtors and Ford Consumer Finance Company, Inc.

<sup>2</sup> On July 22, 1999, Thomas and Sharon Emerson (“Debtors”) commenced an adversary proceeding against Associates seeking a determination of the extent of Associates’ lien on the Debtors’ manufactured home.

## JURISDICTIONAL STATEMENT

The Court has core jurisdiction over the parties and subject matter of this motion pursuant to 28 U.S.C. §§ 1334(b), 157(a), 157(b)(1), (2)(G) and (O).

## FACTS

On December 18, 1997, the Debtors filed a voluntary petition pursuant to Chapter 13 of the Bankruptcy Code (11 U.S.C. §§ 101- 1330) (“Code”). Subsequently, on January 21, 1998, Debtors filed an Amended Petition and appropriate schedules together with a Chapter 13 plan (“Plan”). Debtors’ Plan was confirmed by Order of this Court dated June 16, 1998 (“Confirmation Order”). The Plan as amended by the Confirmation Order provided, *inter alia*, that Debtors would pay the secured claim of Associates in full, directly to Associates, outside the Plan. In addition, the Plan, as amended, provided that Associates’ claim for prepetition arrears in the amount of \$3,309.82 would be paid by the Chapter 13 Trustee through the Plan.

It appears that Debtors made the required payments to Associates until on or about March 1999. As indicated, on May 27, 1999, Associates filed a motion seeking relief from the automatic stay pursuant to Code § 362, as well as a motion to compel abandonment pursuant to Code §554.<sup>3</sup> The security for Associates’ claim is a 1997 Fleetwood Manufactured Home and real property on which the home is located and identified as 916 Phillips Road, Fort Plain, New York

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<sup>3</sup> The Court does not consider the thirty day requirement of Code § 362(e) to be applicable to this motion having concluded that the parties have consented to its extension, given the number of consensual adjournments of this motion.

13339.

Debtors oppose the lift stay motion asserting, *inter alia*, they had commenced an adversary proceeding to determine the extent of Associates' lien. While the lift stay motion was pending, Associates filed its second motion on September 1, 1999, seeking summary judgment with regard to Debtors' pending adversary proceeding. Finally, on November 9, 1999, the Debtors filed their motion to modify their confirmed Plan whereby they seek to now "cram down" Associates' secured claim to \$40,000 to be paid over 20 years with interest at 7% per annum with the balance of the claim to be paid as an unsecured claim receiving a 10% dividend.

### **ARGUMENTS**

The Debtors contend that following the filing of their Chapter 13 case, they experienced numerous problems with their manufactured home. As a result of these various problems, the building inspector, for the town in which their home is located, will not issue a certificate of occupancy. As a result, Debtors contend they have been forced to expend significant amounts of money to attempt to repair the home. In addition, Debtors assert that in June 1998, Debtor Thomas Emerson lost his job and did not regain employment until July or August 1998. Although he had regained employment, the employment as a trucker is sporadic at best. Moreover, in addition to their own six children, the Debtors are now supporting a grandchild.

Debtors' counsel asserts that he did not propose to modify Associates' claim in the Debtors' initial Plan because he was not aware that their residence was a "mobile home," nor was he aware of the decision of the Second Circuit Bankruptcy Appellate Panel ("BAP") in *In re*

*Thompson*, 217 B.R. 375 (2d Cir. BAP 1998), which had been “handed down less than a week before the Debtors noticed their Plan for confirmation.” (See affidavit of Donald W. Biggs, Esq. sworn to on November 4, 1999 at ¶ 10(a) and (b)).<sup>4</sup> That decision concluded that under certain circumstances a claim secured by a mobile home could be modified in a Chapter 13 plan notwithstanding Code § 1322(b)(2).

In response to Debtors’ contentions, Associates argues that modification of the Plan at this point should not be allowed pursuant to the doctrines of *res judicata* and collateral estoppel. Associates argues that by filing the instant adversary proceeding and attempting to modify their Plan, the Debtors are choosing to unfairly relitigate matters regarding warranties on their home, interpretation of the home loan documents and other matters regarding the certificate of occupancy. All of these issues, Associates alleges, existed at the time of confirmation and the Debtors are estopped from litigating them at this point. Associates does concede that Debtors assert a change in their household income and the addition of another dependant, but points out that the only creditor whose claim they seek to modify is Associates and, in fact, Debtors’ monthly payments under the modified plan would increase rather than decrease.

In addition, Associates argues that although Debtors’ Plan was confirmed on June 16, 1998, it has not received a payment since March 3, 1999. Pursuant to Code § 362(d)(1), these delinquencies constitute cause and, therefore, this Court should award Associates relief from the automatic stay. Should the Court not grant Associates relief from the automatic stay, Associates requests that the Court order the Debtors to make adequate protection payments to Associates.

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<sup>4</sup> *In re Thompson, supra*, was decided by the BAP on February 6, 1998.

## DISCUSSION

The doctrine of *res judicata* precludes the relitigation of claims where the earlier decision was a final judgment on the merits “rendered by a court of competent jurisdiction, in a case involving the same parties, or their privies, where the same [claim] is asserted in the later litigation.” See *In re Klus*, 173 B.R. 51, 54 (Bankr. D. Conn. 1994) (quoting *Amalgamated Sugar Co. v. NL Indus., Inc.*, 825 F.2d 634, 639 (2d Cir. 1987)). It has been held that under Code § 1327, a confirmation order is *res judicata* as to issues which were decided or could have been decided at a confirmation hearing. See *Klus*, 173 B.R. at 54 (quoting *In re Szostek*, 886 F.2d 1405, 1408 (3d Cir. 1989)).

Code § 1327 provides:

### Effect of Confirmation

- (a) The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted or has rejected the plan.
- (b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.
- (c) Except as otherwise provided in the plan or in the order confirming the plan, the property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for by the plan.

11 U.S.C. § 1327

Confirmation of the Debtors’ Plan clearly involves a final judgment rendered by this Court which was and is a court of competent jurisdiction. In addition, it involves the same parties. Thus, the only remaining question for the Court to determine is whether the issues which

were decided in confirming the Debtors' Plan are the same issues the Court must decide in considering whether to allow the Debtors to modify their Plan.

In making its analysis, the Court must determine whether the transaction, evidence and factual issues in making both determinations are the same. *See Klus*, 173 B.R. at 55 n. 3 (quoting *Hurendeen v. Champion Int'l Corp.*, 525 F.2d 130, 133 (2d Cir. 1975)). In addition, the Court may consider whether a decision regarding the disposition of Associates' claim would "impair or destroy rights or interests established by the judgment entered [before]." *Id.*

In the case at bar, it is clear that the Court is considering the disposition of the same claim that was decided during the confirmation hearing, namely Associates' secured claim. It involves the same transaction, the same evidence, and the same factual issues that were present at the time of the confirmation hearing. However, the Debtors assert that at the time the Plan was confirmed, their counsel was unaware that their residence was a mobile home and of the BAP decision in *In re Thompson, supra*.

Assuming, *arguendo*, that *Thompson* would have applied to the instant situation, Debtors' argument is inappropriate. The "sameness" of claims is not determined by legal theory, but by the identity of the facts surrounding the claim. *See Klus*, 173 B.R. at n.3 (citing *Woods v. Dunlop Tire Corp.*, 972 F.2d 36, 39 (2d Cir. 1992) (citations omitted)). If the "sameness" of claims was determined by legal theory, claimants could attempt to relitigate claims each time a court made a different ruling on a similar point of law. Debtors' counsel's assertion that he was unaware of the ruling in *Thompson, supra*, is immaterial, as the facts surrounding the instant claim were the same when the Plan was confirmed. Because the instant facts are the same as they were during the original confirmation hearing, this motion is subject to the doctrine of *res judicata*.

As the Court has determined that the doctrine of *res judicata* applies to the instant claim, the Court must now determine if, pursuant to Code § 1329, Debtors may modify the Plan notwithstanding the *res judicata* doctrine. Code § 1329 states:

- (a) At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to--
  - (1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;
  - (2) extend or reduce the time for such payments; or
  - (3) alter the amount of the distribution to a creditor whose claim is provided for by the plan to the extent necessary to take account of any payment of such claim other than under the plan.

11 U.S.C. § 1329 (1999). Due to the apparent contradiction of the foregoing statute with the doctrine of *res judicata*, the Court must decide how to reconcile the modification of a confirmed plan with that doctrine.

Review of case law discussing the interplay of Code § 1329 and the doctrine of *res judicata* reveals two lines of cases. One line of cases holds that “the doctrine of *res judicata* limits the permissible grounds for modification of a confirmed plan.” *See Klus*, 173 B.R. at 58 (quoting *In re McNulty*, 142 B.R. 106, 109 (Bankr. D.N.J. 1992)); *In re Weissman*, 126 B.R. 889, 893 (Bankr. N.D.Ill. 1991); *In re Fitak*, 92 B.R. 243, 249-250 (Bankr. S.D. Ohio 1988), *aff’d* 121 B.R. 224 (S.D. Ohio 1990). The above courts allow the use of Code § 1329 only when the movant shows a substantial change in circumstances which affect debtor’s ability to pay and could not have been reasonably foreseen at confirmation by the moving party. *See Fitak*, 92 Br. at 249, 250.

The second line of cases holds that modification of a confirmed plan is permissible under the plain meaning of the statute, and that the moving party has no obligation to show even a minimal change in circumstances. *See In re Witkowski*, 16 F.3d 739, 746 (7<sup>th</sup> Cir. 1994); *In re Powers*, 140 B.R. 476, 479 (Bankr. N.D. Ill. 1992); *In re Perkins*, 111 B.R. 671, 673 (Bankr. M.D. Tenn. 1990). These cases conclude that Code § 1329 is an exception to the *res judicata* doctrine and reject the necessity of a debtor asserting a change in circumstances. *See Klus*, 173 B.R. at 58 (citing *Witkowski*, 16 F.3d at 745).

In order to incorporate both lines of reasoning into his decision in *Klus*, Bankruptcy Judge Alan H.W. Shiff applied a “harmonized” application of both of these lines of reasoning. *See Klus*, 173 B.R. at 59. In *Klus*, Judge Shiff found the following:

[A] plan may be modified at the request of the debtor, trustee, or an unsecured creditor who seeks to change the plan in one or more of the ways permitted by [Code] § 1329(a) so long as the modification is consistent with the statutory limitations of 1329(b)(1).

*Id.*

Moreover, Judge Shiff concluded that a modification should only be allowed to accommodate unanticipated changes in circumstances substantially affecting a debtor’s ability to pay. *Id.*

In the situation at bar, Debtors claim that they have had a substantial and significant change in circumstances as a result of the repairs on their manufactured home that have been necessary since the filing of their Petition, temporary loss of employment of one Debtor and reemployment on a sporadic basis at best, and the addition of a dependent due to the birth of their grandchild in October 1999. *See* Affidavit of Debtors, sworn to on October 11, 1999. Assuming, *arguendo*, that the Court would conclude that these changes would qualify as a substantial and significant change of circumstances which were not anticipated by the Debtors, “cramming

down” a creditor post-confirmation is not one of the options listed in Code § 1329(a) which would necessitate that the Court consider circumventing the doctrine of *res judicata* as applied to the prior confirmation of the Plan pursuant to Code § 1327. *See In re Arms*, 1998 WL 283160 at \* 2 (Bankr. D. Vt. May 28, 1998) (holding that a Code § 1322 cram down does not fit within the permissible modifications to a Chapter 13 Plan under Code § 1329(a)); *In re Dunlap*, 215 B.R. 867, 870 (Bankr. E.D. Ark. 1997); *Mercury Finance Co. v. Banks*, (*In re Banks*), 161 B.R. 375,378 (Bankr. S.D. Miss. 1993); *In re Abercrombie*, 39 B.R. 178, 179 (Bankr. N.D. Ga. 1984). Therefore, because the proposed modification does not fit within those modifications permitted by Code § 1329(a), the Court finds that Debtors cannot modify their Plan as proposed, regardless of changed circumstances.

Debtors initiated their adversary proceeding seeking a determination of the extent of Associates’ lien in order for them to then cram down Associates’ claim.<sup>5</sup> Because the Court has concluded that the Debtors cannot modify their Plan by cramming down Associates’ claim, the relief sought in their complaint is inappropriate and, accordingly, the Court will grant Associates’ motion to dismiss the adversary proceeding.

Associates has also filed a motion for relief from the automatic stay. Upon filing a bankruptcy petition, Code § 362(a) provides for an automatic stay against any attempt to enforce or collect any prepetition debt. *See* 11 U.S.C. § 362(a) (1999). This stay remains in effect until the earliest of: (a) the case is closed; or (b) the case is dismissed; or (c) a discharge is granted or denied. *See* 11 U.S.C. § 362(c). In a Chapter 13 case, debtors are not entitled to a discharge until

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<sup>5</sup> Debtors counsel indicated he believed he was required to initiate an adversary proceeding in order to modify the claim of a secured creditor in a Chapter 13.

after they complete all payments under the plan. *See* 11 U.S.C. § 1328. Failure to make postconfirmation payments will serve as cause to lift the automatic stay within the meaning of Code § 362(d)(1). *See In re Taylor*, 151 B.R. 646, 648 (E.D.N.Y. 1993); *In re Davis*, 64 B.R. 358, 359 (Bankr. S.D.N.Y. 1986) .

In its motion for relief from the automatic stay, Associates alleges it has not received a payment since March 3, 1999.<sup>6</sup> In response, Debtors ask the Court to excuse their delinquency because of the birth of their new grandchild and the continuing problems with their manufactured home. Notwithstanding Debtors' explanations, failure to make payments under the Chapter 13 plan is *ipso facto* cause to award a creditor relief from the automatic stay. As Debtors' have not made a payment to Associates since March 3, 1999, this Court finds that cause exists to award Associates relief from the automatic stay.<sup>7</sup>

Based on the foregoing, it is hereby

**ORDERED** that Debtors' motion to modify the Plan pursuant to Code § 1329 is denied; it is further

**ORDERED** that Associates' motion for summary judgment seeking to dismiss Debtors' adversary proceeding is granted; and it is finally

**ORDERED** that Debtors have sixty (60) days to cure all delinquencies under the terms

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<sup>6</sup> Pursuant to an Order of this Court dated December 2, 1999, Debtors were required to provide a payment for the month of December 1999 as interim adequate protection. The Court presumes that the payment was made.

<sup>7</sup> In opposition to Associates Code § 362(d) motion and elsewhere, the Debtors assert that the alleged lack of a certificate of occupancy for the manufactured home prohibits Associates from accruing interest on the amount financed. This Court believes that it has insufficient facts to determine that issue and makes no finding in that regard.

of Associates' Note and Mortgage that exist as of the date of this Order. If those delinquencies are not cured within sixty (60) days, or if the Debtors fail to make all payments to Associates coming due after the date of this Order according to the terms of the Note and Mortgage, Associates shall have relief from the automatic stay pursuant to Code § 362(d)(1).

Dated at Utica, New York

this 3rd day of February 2000

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STEPHEN D. GERLING  
Chief U.S. Bankruptcy Judge