UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

MICHAEL E. MAGEE
TAMARA J. MAGEE — CASE NO. 90-02354

Debtors — Chapter 13

APPEARANCES:

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STEPHEN D. GERLING, U.S. Bankruptcy Judge

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

This contested matter is before the Court by way of two motions filed by Debtors which seek to modify their confirmed Chapter 13 Plan by "fixing" a creditor's secured claim as an unsecured claim or, alternatively, reducing the payments to be made on the secured claim.

JURISDICTION

The Court has jurisdiction over the parties and subject matter of this core proceeding by virtue of 28 U.S.C.A. §§1334 and 157(a), 157(b)(1) and (b)(2)(A,L,O). (West Supp. l99l).

FACTS

In January of l990, Michael and Tamara Magee ("Debtors") entered into a retail installment contract ("Contract") with an automobile dealer, whereby they purchased a l989 Dodge Dakota pick-up truck (the "collateral"). Subsequently, the dealer assigned its rights in the Contract to Chrysler Creditor Corporation ("CCC").

On September 28, l990, Debtors filed a voluntary petition for relief under Chapter l3 of the Bankruptcy Code (ll U.S.C. §§101-1330) (the "Code"). On February l5, l99l, following resolution of an Objection to Confirmation filed by CCC, this Court entered an Order confirming the Debtors' Chapter l3 Plan, which provided for the payment of priority, secured and unsecured claims. The confirmed Plan treated CCC as holder of a secured claim in the amount of $8,500, and proposed to pay that amount in full with interest at 11% per annum over 60 months at $l84.8l per month. (See Exhibit A attached to Affirmation in Opposition filed by CCC on 6/3/9l).

Thereafter, the collateral was extensively damaged in an automobile accident. Both CCC and the Debtors agree that the collateral is now worth no more than $l00.00.[1]

On March 6, l99l, Debtors moved this Court for an order fixing the claim of CCC as

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[1] The exact date upon which the collateral was extensively damaged is unknown, however, the Affidavit of Louis J. Testa, Esq., sworn to on May 3, l99l and submitted in opposition to Debtors' initial motion, alleges, on information and belief, that it was damaged post-confirmation. Debtors contend that they were unaware of a requirement in the contract to keep the collateral insured and thus, at the time of the accident, the vehicle was uninsured for property damage.

unsecured, pursuant to Code §502. Additionally, on May 2l, l99l, Debtors filed what they termed a "companion motion" to the March 6, l99l motion, seeking alternatively to modify their Plan so as to reduce the amount of payments to be made pursuant to CCC's secured claim. Arguments on these motions were heard on May 7, l99l, and June 4, l99l, respectively. The Court consolidated the motions for purposes of this matter, which was finally submitted on June l8, l99l.

DISCUSSION

Debtors' motions present the Court with two issues: 1) whether, following confirmation of a Chapter l3 plan a secured claim may be fixed or reclassified as unsecured pursuant to Code §502; and 2) whether the amount of a secured claim may be reduced post-confirmation pursuant to Code §1329(a)(l) to reflect the depreciated value of surrendered collateral securing such claim.

Debtors initially moved under Code §502 by objecting to CCC's proof of claim and seeking to fix CCC's secured claim as unsecured. Debtors' reliance upon §502 is misplaced. A secured claim must be acted upon, i.e. objected to, prior to confirmation of a Chapter l3 plan, or such claim is deemed allowed for purposes of the plan. In re Simmons, 765 F.2d 547 (5th Cir. l985).

Here Debtors' Chapter l3 Plan acknowledged the secured status of CCC's claim in the original amount of $7,200, however, after resolution of CCC's Objection, the Plan was modified and confirmed fixing CCC's secured claim at $8,500 to be repaid over 60 months, with interest at the rate of 11% per annum. At that point, Debtors' ability to challenge CCC's claim, other than pursuant to Code §1329(a), was foreclosed.

Assuming, arguendo, that Code §502 applies to this dispute, Code §502(b) provides

that the Court shall "determine the amount of such claim as of the date of the filing of the petition." Here, there is no dispute that as of the date of filing, CCC held a secured claim well in excess of $l00.00. Further, Code §502 does not apply to the classification of claims, but rather to the allowance of claims.

Thus, Code §502 has no application to the relief sought by the Debtors herein and the motion filed March 6, l99l must be denied.

Under §1329(a) of the Code, a debtor may seek modification of a confirmed plan at any time between confirmation of the plan and completion of payments provided for by the plan. Section 1329(a) allows for modification to:

> (1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;
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> (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 extend necessary to take account of any payment of such claim other than under the plan.

Here, Debtors contend, by way of their companion motion, that if they surrender the collateral which secures CCC's claim, payment of such claim should be reduced to $l00.00, the present value of the collateral.

Section 1329 makes no reference, explicit or otherwise, to modification of a confirmed plan in order to reclassify a claim. This was made clear in In re Sharpe, 122 B.R. 708 (E.D.Tenn. l99l), which is factually similar to the present case. There, the debtors also attempted to modify their confirmed Chapter l3 plan by reclassifying a secured claim upon surrender of an automobile to the secured creditor.

The Sharpe court stated that while payments with respect to claims of a particular

class may be altered, the language of §1329(a)(1) is "clear and unambiguous ... (and) does not permit individualized treatment of class members or the re-classification of a single creditor from a secured to an unsecured status." Id. at 710. Additionally, in Matter of Abercrombie, 39 B.R. 178, 179 (Bankr. N.D.Ga. 1984), the court held that §1329 "does not provide the debtor with a means to re-classify a previously allowed secured claim as unsecured after the plan has been confirmed." But see In re Stone, 91 B.R. 423, 425 (Bankr. N.D.Ohio 1988) (finding that §1329(a)(3) expressly authorizes the re-classification of a secured claim as unsecured when collateral has been liquidated and a deficiency is still claimed to be due from the debtor). See also In re Williams, 108 B.R. 119 (Bankr. N.D.Miss. 1989); In re Jock, 95 B.R. 75 (Bankr. M.D.Tenn. 1989).

This Court agrees with the interpretation of §1329 as set forth in Sharpe and Abercrombie, and, therefore, holds that the Debtors may not reclassify CCC's secured claim as unsecured post-confirmation. Debtors' "companion motion" anticipates this result, however, and requests alternative relief in the form of a reduction in the amount of CCC's secured claim.

The Court notes that there is a significant fact which distinguishes this case and In re Sharpe, supra 122 B.R. 708, from those cases which have permitted a debtor to reclassify a secured claim post-confirmation.

Here, as in Sharpe, there is the probability of "bad faith" on Debtors' part. In Sharpe, the debtors returned the motor vehicle to the creditor with a "blown engine"; here the Debtors returned the vehicle to CCC in what apparently was a demolished condition, acknowledging that they had failed to protect the value of the collateral with insurance in violation of the contract.

Debtors contend, however, that since they have surrendered the collateral to CCC and the value of the collateral is now $100.00, the amount of CCC's secured claim should be reduced as opposed to reclassified, pursuant to §1329(a)(1). Thus, they purport to reduce CCC's secured claim

of $8,500 to $l00.00, while treating the balance of $8,400 as unsecured.

The Court believes that Debtors' argument that they are reducing, not reclassifying the CCC claim, is a matter of semantics, and in any event, does not fit within Code §1129a)(1), which permits a reduction in payments (i.e. from l00% dividend to a 75% dividend), but does not permit a reduction in the claim itself.

The Court does believe that the more appropriate subsection of Code §1329(a) is subsection (3) which does permit a reduction in the amount of the claim where a payment has been made on the claim "other than under the plan."

Here, by surrendering the collateral, with an admitted value of $l00.00 to CCC, Debtors should be given credit for that amount against the present balance due on the secured claim.

Thus, the Court will consider Debtors' companion motion as having been made pursuant to Code §1329(a)(3) and direct CCC to credit its claim against the Debtors in the sum of $l00.00. The balance of CCC's secured claim shall be paid in accordance with the Order of February l5, l99l.

IT IS SO ORDERED.

Dated at Utica, New York

this day of l99l

STEPHEN D. GERLING
U.S. Bankruptcy Judge