UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re

JOSEPH L. & SHIRLEY A. SCIOTTI — Case No. 99-13400
Chapter 13

Debtor(s).

In re

ROBERT T. & BARBARA SUE KING — Case No. 01-14357
Chapter 13

Debtor(s).

APPEARANCES:

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Hon. Robert E. Littlefield, Jr., U.S. Bankruptcy Judge

MEMORANDUM-DECISION AND ORDER

The current matters before the court are the motion of Joseph and Shirley Sciotti ("Debtors Sciotti") to modify their confirmed plan, the motion of the Chapter 13 Standing Trustee ("Trustee") to deem the secured claim of General Motors Acceptance Corporation ("GMAC") withdrawn and reclassify any balance owed as unsecured in the Sciotti case and the motion of Robert and Barbara King ("Debtors King") to modify a confirmed Chapter 13 plan to surrender a boat to KeyBank USA, NA ("KeyBank") and reclassify any deficiency as unsecured. The court has jurisdiction over these core proceedings pursuant to 28 U.S.C. §§ 157(a), 157(b)(1), 157(b)(2)(B), 157(b)(2)(L), 157(b)(2)(O) and 1334(b).

FACTS

The matters before the court involve two Chapter 13 cases. The issues in both cases derive from the larger "surrender/reclassification" issue analyzed by many courts across the country. The relevant facts specific to each case follow:

I. The Sciotti Case

1. The Debtors Sciotti filed a Chapter 13 petition on June 4, 1999.

2. When they filed, GMAC had a perfected security interest in their 1991 GMC Jimmy 2D 4WD motor vehicle ("Jimmy"). M&T Bank had a perfected security interest in a 1993 Geo Metro.

3. Their plan proposed to pay GMAC the value of the Jimmy through the plan, plus interest.

4. Their plan was confirmed by order dated September 21, 1999.

5. They filed a modified plan on or about March 19, 2001, proposing to surrender the

Jimmy to GMAC due to a "blown engine."[1] Similarly, the modified plan proposes to surrender the Geo Metro to M&T.

6. Although the Trustee initially filed a notice of objection to the proposed modification, ultimately, she filed a brief in support of it. She also filed a motion to deem GMAC's secured claim as withdrawn without prejudice to the rights of GMAC to file an amended unsecured deficiency claim for any remaining balance.

7. GMAC filed an objection to the proposed plan and the Trustee's motion. M&T, however, has not objected to the surrender treatment provided for in the modified plan.

8. When the Jimmy was ultimately scrapped, neither the Debtors Sciotti nor GMAC received any money.

II. The King Facts

1. The Debtors King filed a Chapter 13 petition on July 5, 2001.

2. The court confirmed their plan on August 18, 2001.

3. KeyBank is a secured creditor with a lien upon a 1996 Suntracker boat.

4. The confirmed plan provides for the Debtors King to retain the boat and pay KeyBank a $7,500 secured payment, paid through the plan at 6% interest, and pay the balance of its claim as an unsecured claim.

5. On or about December 5, 2001, the Debtors King filed a notice of motion to modify the confirmed plan. The modified plan provides for the surrender of the boat to KeyBank and for the treatment of any deficiency as an unsecured claim.

6. KeyBank has objected to the modification.

DISCUSSION

I. Chapter 13 Plan Modification Involving Surrender/Reclassification

As mentioned above, many courts have reviewed the surrender/reclassification issue in

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[1]The Trustee and counsel for GMAC both state in their briefs that the Jimmy had a "blown engine." The brief filed by the Debtors Sciotti indicates the engine problem occurred with the Geo Metro. The court presumes the Trustee and GMAC have more accurately recounted which car had the blown engine.

the context of a proposed modification to a Chapter 13 plan. Most of the analyses focus on section 1329(a) and (b)[2] of Title 11 and a number of different legal approaches have developed.

A. The *Jock* approach

In re Jock, 95 B.R. 75 (Bankr. M.D. Tenn. 1989), and its progeny stand for the proposition that it is permissible for a debtor to initially elect to cramdown a secured claim pursuant to 11 U.S.C. § 1325(a)(5)(B)[3] and then modify the confirmed plan to surrender the collateral and treat any remaining claim as unsecured. These cases state that such a modification

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[2]Section 1329 is entitled "Modification of plan after confirmation" and states, in relevant part:

(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.

(b)(1) Sections 1322(a), 1322(b), and 1323(c) of this title and the requirements of sections 1325(a) of this title apply to any modification under subsection (a) of this section.

(2) The plan as modified becomes the plan unless, after notice and a hearing, such modification is disapproved.

[3]Section 1325 is entitled "Confirmation of plan" and states, in relevant part:

(a)...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; and

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim s not less that the allowed amount of such claim; or

(C) the debtor surrenders the property securing such claim to such holder;

would increase or reduce the amount of payment on a particular class provided for by the plan within the meaning of section 1329(a)(1). Specifically, such a modification changes the amount of payments to the sum of the payments made to the creditor plus the value of the surrendered car. The *Jock* court commented that assuming no debtor misconduct and a creditor asserting its rights at confirmation, the value of the car at modification should equal the value at confirmation minus the payments received through the plan. *Jock*, 95 B.R. at 77-78.

B. The *Nolan* approach

The circuit case *In re Nolan*, 232 F.3d 528 (6th Cir. 2000), rejected the *Jock* analysis and adopted the interpretation provided by *In re Coleman*, 221 B.R. 397 (Bankr. S.D. Ga. 1999). In *Nolan*, the Sixth Circuit stated that section 1329 does not permit claim reclassification but only alterations on timing or amounts of payments. *Nolan*, 232 F.3d at 532. The court identified five specific deficiencies they perceived in the *Jock* decision:

> 1. Section 1329 does not expressly allow the debtor to alter, reduce or reclassify a previously allowed claim;
>
> 2. The surrender modification would violate section 1325(a)(5)'s mandate that a secured claim is fixed in amount and status and must be paid in full once it has been allowed;
>
> 3. The surrender modification would violate section 1327(a)[4] by allowing debtors to shift the burden of depreciation to a secured creditor by giving up collateral when the debtor no longer needs or wants the devalued asset;
>
> 4. A secured creditor does not have the ability to modify in the event the value of the collateral appreciates; and

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[4]Section 1327 is entitled "Effect of confirmation" and subsection (a) states:

> 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.

5. *Jock* misinterprets "payment" as including or being synonymous with "claim." *Nolan*, 232 F.3d at 532-534.

C. The *Zieder* approach

The court in *In re Zieder,* 263 B.R. 114 (Bankr. D. Ariz. 2001), focused on the reclassification aspect of the issue. The debtor surrendered and the creditor liquidated a truck and applied the sales proceeds to the debt.[5] The debtor then moved to reclassify the secured debt and add that balance to the previously allowed unsecured claim. The court granted the motion, relying not on section 1329(a) but on sections 502(j)[6] and 506(a).[7] *Zeider*, 263 B.R. at 117. The court concluded that the voluntary surrender provided the cause needed and 506(a) made the claim unsecured. *Id*.

D. The *Cameron* approach

The bankruptcy court in *In re Cameron,* 274 B.R. 457 (Bankr. N.D. Tex. 2002), held that the *res judicata* effect of section 1327(a) would prohibit a debtor from revisiting the original election he or she made pursuant to section 1325(a)(5). *Cameron,* 274 B.R. at 460-461. Thus,

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[5]The creditor apparently did not object to the surrender.

[6]Section 502 is entitled "Allowance of claims or interests" and subsection (j) states, in relevant part:

> A claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case.

[7]Section 506 is entitled "Determination of secured status" and subsection (a) states, in relevant part:

> An allowed claim of a creditor secured by a lien on property in which the estate has an interest...is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property...and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to set off is less than the amount of such allowed claim.

by electing a retention option at confirmation, the debtor would not be able to change in midstream and abandon the collateral. *Id*.

II. The Court's Analysis of the Issue

The court agrees that, as a general rule, section 1327(a) is *res judicata* of all issues involving the debtor and any creditors that could or should have been litigated at the confirmation hearing. *In re Cameron*, 274 B.R. at 460 (citing *In re Coffman*, 271 B.R. 492, 495 (Bankr. N.D. Tex. 2002)and *In re Goos*, 253 B.R. 416, 419 (Bankr. W.D. Mich. 2000)). Section 1329 is a narrow exception to the *res judicata* effect of section 1327. Section 1329(a)'s three possible bases for modification are:

> (1) increase or reduce payments;
> (2) extend or reduce time for those payments; or
> (3) alter distribution to a creditor to reflect a payment made other than under the plan.

None of the three allows for the involuntary transfer of collateral back to the secured lien holder or the reclassification of claims.

Under paragraph 1, a debtor may reduce payments to a secured creditor. Under paragraph 2, the reduction could persist until the end of the plan. However, this would have no effect on the underlying allowed secured claim. At the scheduled completion date of the plan, the debtor would not be eligible for a discharge because the debtor would not have paid that claim as required by section 1325(a)(5)(B)(ii). *See In re Carr*, 159 B.R. 538 (D. Neb. 1993).[8]

Section 1329(a)(3) may seemingly allow a surrender by taking account of a payment (i.e.,

[8]*Carr* dealt with the failure to pay a priority claim during the pendency of a Chapter 13 and the resulting denial of discharge for failing to make all payments required under the plan. The *Carr* reasoning would extend to the failure to pay allowed secured claims.

the return of the vehicle) other than under the plan. However, if the modified plan itself proposed the surrender, then the debtor would not have met the statute's requirement of having rendered a "payment...other than under the plan" that would then trigger a modification "to the extent necessary to take account of [the payment outside of the plan]." 11 U.S.C. § 1329(a)(3). If the surrender, however, is on consent or the result of a creditor's section 362 lift stay motion, then after the liquidation of the collateral and application of the proceeds to the secured claim, the issue shifts to the reclassification of the balance of the claim. In such a situation, this court agrees with the *Zieder* court's use of section 502(j) rather than section 1329.

Section 502(j) has two prongs: a claim may be reconsidered if "cause" exists and then substantively decided based on the equities of the case. What may be reconsidered by the court is discussed in a learned treatise. According to Collier on Bankruptcy, citing to an Advisory Committee Note on Fed. R. Bankr. P. 3008, [9] "the court, after reconsideration, may allow or disallow the claim, increase or decrease the amount of a prior allowance, accord the claim a priority different from that originally assigned it, or enter any other appropriate order." COLLIER ON BANKRUPTCY, p. 502-76 (15th ed. rev.).

Cause would be shown by the lack of any collateral to secure the claim. *See Zeider,* 263 B.R. at 117. The variable that would go to the heart of the issue would be the equities of the case. The debtor would have the burden to convince the court that the equities tilted in his or her favor.

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[9]Rule 3008 is entitled "Reconsideration of Claims" and states:
A party in interest may move for reconsideration of an order allowing or disallowing a claim against the estate. The court after a hearing on notice shall enter an appropriate order.

III. The Sciotti Case

The motion of the Debtors Sciotti to modify the plan is moot; they scrapped the Jimmy with GMAC's consent and M&T has accepted their surrender of the Geo Metro without challenge. Because the plan does not provide for any further treatment of these creditors' security interests or their claims, and given that M&T has not opposed the modified plan or the Trustee's motion, it appears the only issue left is the Trustee's motion to, in effect, reclassify GMAC's secured claim.

Applying the above analysis to the facts in the Sciotti case, the court concludes that GMAC's secured claim must remain as provided for in the confirmed plan. The Trustee has shown "cause" to reconsider the claim because there is no longer any collateral to secure the creditor's claim. However, the court is not persuaded that the equities of the case favor the Debtors Sciotti. All that has been shown is that the vehicle suffered a blown engine. Neither the Trustee nor the Debtors Sciotti have provided a reasonable explanation for the engine damage and how it may have occurred. To allow this claim to be reclassified with virtually no record to back it up would be tantamount to declaring open season on all secured creditors and their claims.

IV. The King Case

The Debtors King are also bound, pursuant to 11 U.S.C. § 1327(a), to the "retain and pay" option they originally elected pursuant to 11 U.S.C. § 1325(a)(5)(B). Even if KeyBank had consented to a surrender, thereby triggering a potential section 1329(a)(3) modification, the facts that exist in their case would make it difficult, if not impossible, for their proposed modification to overcome section 1329(b)'s requirement of meeting all of the prerequisites of section 1325(a),

including proposing the plan in good faith. If they pursued reclassification of the claim in addition to or instead of the plan modification route, it would also be difficult for the Debtors King to convince the court that the equities of the case favor them as required by 11 U.S.C. § 502(j). The boat is not a necessity, thus, to allow them to elect retention and then opt for the surrender of such an item when the boating season is over would be to totally disregard the *res judicata* effect of 11 U.S.C. § 1327(a).

A debtor's initial decision to retain and pay as opposed to surrender, especially when involving luxury items, must be a rational one, carefully thought out with all the potential repercussions in mind. The Debtors King simply state they have elected to surrender the boat. This cavalier attitude coupled with the time line involved is unsettling. The date of the proposed modification is November 29 and the court assumes that the pre modification process took a number of weeks in order to contact the attorney, obtain an appointment and then prepare the pleadings. That would mean the actual decision to surrender the boat was made in October, approximately two months after confirmation of the plan to retain and cramdown the boat took place. Once again, to allow the reclassification of this claim on these facts would be tantamount to declaring open season on secured creditors in general and KeyBank in particular.

CONCLUSION

Although the equities in these cases do not support a reclassification, the court recognizes that in many instances the reasonable creditor will accept a voluntary surrender of the liened property because that enables the immediate receipt of collateral, the value of which should equal its allowed secured claim minus the depreciation that occurred while the confirmed plan was in place. In those instances, the return of the car will constitute a "payment outside the

plan," triggering section 1329(a)(3), and, perhaps, section 502(j) as well.

The motion to modify the plan in the Sciotti case is moot. The court denies the Trustee's motion to deem the claim of GMAC as withdrawn and treat any balance as unsecured. The court also denies the motion to modify by the Debtors King.

Dated:

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