Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: August 7, 2017

The Order of the Court is set forth below. The docket reflects the date entered.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF MISSISSIPPI

IN RE:

TRACY D. TUCKER,	**CASE NO. 12-13604-NPO**
DEBTOR.	**CHAPTER 13**

ORDER DENYING MOTION TO MODIFY
PLAN AND ORAL MOTION TO RECONSIDER

This matter came before the Court for hearing on August 3, 2017 (the "2017 Hearing"), on the Motion to Modify Plan (the "Second Motion") (Dkt. 39) filed by the debtor, Tracy D. Tucker (the "Debtor"); the Response to Debtor's Motion [to] Modify Plan (the "Response to Second Motion") (Dkt. 40) filed by Shreveport Federal Credit Union ("Shreveport FCU"); and the Trustee's Joinder to the Response by Shreveport Federal Credit Union[] to Debtor's Motion to Modify Plan (the "Joinder") (Dkt. 43) filed by Locke D. Barkley, the standing chapter 13 panel trustee (the "Trustee") in the above-styled chapter 13 bankruptcy case (the "Bankruptcy Case"). At the 2017 Hearing, L. Paul Kossman ("Kossman") represented the Debtor, Brittan Webb Robinson ("Robinson") represented Shreveport FCU, and Melanie T. Vardaman ("Vardaman") represented the Trustee. After fully considering the matter and being fully advised in the premises,

the Court denied the Second Motion from the bench, finding that it previously ruled on the request in the Memorandum Opinion and Order Denying the Motion to Modify Chapter 13 Plan (the "Order Denying First Motion") (Dkt. 35). This Order memorializes and supplements the Court's bench ruling.

Jurisdiction

The Court has jurisdiction over the parties to and the subject matter of the Bankruptcy Case pursuant to 28 U.S.C. § 1334. This matter constitutes a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(L). Notice of the Second Motion was proper under the circumstances.

Facts

1. The Debtor filed a voluntary petition for relief pursuant to chapter 13 of the Bankruptcy Code (Dkt. 1) and the Chapter 13 Plan (the "Plan") (Dkt. 5) on August 29, 2012.

2. In the Plan, the Debtor listed a 2011 Chevy Camaro (the "Camaro") as collateral for Shreveport FCU's secured claim valued at $37,246.00. (Plan at 2). In the Plan, the Debtor proposed to pay Shreveport FCU the value of its secured claim in full. (*Id.*).

3. Shreveport FCU filed the Proof of Claim (the "POC") (Bankr. Cl. No. 5-1) on September 17, 2012, evidencing a claim valued at $37,246.00, secured by the Camaro. Attached to the POC was the Loan and Security Agreements and Disclosure Statement (the "Loan Agreement") (POC at 3-8). The Loan Agreement required the Debtor "to keep the Property insured against loss and damage, and, if the Property is a vehicle, to maintain liability insurance on the Property in an amount not less than the minimum amount required by law." (Loan Agreement at 3).

4. On November 16, 2012, the Court entered the Order Confirming the Debtor's Plan, Awarding a Fee to the Debtor's Attorney and Related Orders (the "Confirmation Order") (Dkt.

16) confirming the Plan. The confirmed Plan provided for a one hundred percent (100%) pro rata distribution to any general unsecured creditors with allowed, timely filed claims. (Confirmation Order at 5). The Confirmation Order provided that "[t]he debtor shall be responsible for the preservation and protection of all property of the estate not transferred to the trustee." (*Id.* at 2).

5. The Debtor filed the Motion to Modify Plan (the "First Motion") (Dkt. 18) on July 11, 2013, seeking to modify the Plan to surrender the Camaro. The Debtor alleged that on June 18, 2013, while the Camaro was parked at the Memphis Airport, it was damaged by a fire that originated in a neighboring vehicle. (First Mot. at 1). The Camaro was subsequently impounded by the Memphis Police Department, and at the time the Debtor filed the First Motion, it remained impounded. (*Id.*). The Debtor sought to surrender the Camaro and any insurance proceeds to Shreveport FCU in partial satisfaction of its secured claim, have any deficiency treated as unsecured, and have her Plan payments reduced accordingly. (*Id.*). The Debtor also sought to pay $1,751.87 of her unsecured claims. (*Id.*).

6. Both Shreveport FCU and the Trustee responded to the First Motion. In the Response of Shreveport Federal Credit Union to Debtor's Motion to Modify Plan (the "Shreveport FCU Response to First Motion") (Dkt. 20), Shreveport FCU contended that after the Camaro and insurance proceeds are surrendered, any remaining balance should be treated as secured. (Shreveport FCU Resp. to First Mot. at 1). In the Trustee's Response to Motion to Modify Chapter 13 Plan (the "Trustee Response to First Motion") (Dkt. 23), the Trustee did not object to the modification of the Plan as long as allowed general unsecured claims are paid in full. (Trustee Resp. to First Mot. at 1).

7. The Court held a hearing on the First Motion on September 26, 2013 (the "2013 Hearing"). At the 2013 Hearing, the Debtor testified that the insurance on the Camaro had lapsed

at the time it was damaged by the fire. Shreveport FCU did not oppose the surrender of the Camaro, but it did argue that there is a good faith requirement for post-confirmation modifications to reclassify claims. According to Shreveport FCU, the Debtor did not satisfy the good faith requirement because she failed to maintain insurance on the Camaro as required by the Loan Agreement and Confirmation Order. In response, the Debtor contended at the 2013 Hearing that the First Motion should be granted because it was Shreveport FCU's responsibility to ensure the Debtor had insurance on the Camaro.

8. After the 2013 Hearing, the Court entered the Order Denying First Motion. In the Order Denying First Motion, the Court denied the First Motion, finding that the modification was not proposed in good faith because the Debtor failed to maintain insurance on the Camaro as required. (First Order Denying Motion at 10-11). The Court discussed a split of authority regarding a debtor's ability to modify a plan to surrender collateral and treat any deficiency as an unsecured claim, holding that a debtor is permitted to modify a plan to surrender collateral, as long as all other modification standards are satisfied. (*Id.* at 7, 10). Although the Court held that the Debtor is not *per se* prohibited from modifying the Plan to surrender the Camaro, "the Debtor is nevertheless precluded from modifying the Plan because she fails to satisfy § 1325(a)(3)[1]." (*Id.* at 10). The Court held that debtors are required to propose plan modifications in good faith, and the Debtor's proposed modification lacked good faith. (*Id.*). The Court noted that the Debtor failed to maintain insurance on the Camaro, despite the fact that the Confirmation Order required her to be "responsible for the preservation and protection of all property of the estate not transferred to the trustee." (*Id.* at 11). Additionally, she violated the terms of the Loan Agreement by failing to

[1] Hereinafter, all code sections refer to the Bankruptcy Code found at title 11 of the United States Code unless indicated otherwise.

maintain insurance on the Camaro. (*Id.*). "Situations such as this are why § 1329(b)(1) applies the requirements of § 1325(a) to post-confirmation modification." (*Id.*). Thus, the Debtor was required to pay Shreveport FCU's claim in full.

9. Nearly four (4) years after the Court entered the Order Denying First Motion, the Debtor file the Second Motion. In the Second Motion, the Debtor again sought to modify the Plan to account for the damage to the Camaro. (Second Motion at 2). The Debtor sought to modify the Plan "to reduce the claim of Shreveport FCU to the amount already paid, and to reduce her plan payments accordingly." (*Id.*). The Debtor argued in the Second Motion that, due to "slashed federal funding," her income would be reduced by $100.00 per check beginning with her July 21, 2017, paycheck.[2] (*Id.*). According to the Debtor, she has paid Shreveport FCU $41,485.56 through the Trustee. (*Id.*). The Debtor contended that the $41,485.56 she has paid "exceeds the Camaro's value on June 18, 2013, when it was damaged by car fire." (*Id.*). At the time of the fire, the Camaro had a value of "no more than $30,000.00," according to the Debtor. (*Id.*). Had the Camaro been insured, "her insurer would have paid Shreveport FCU the Camaro's $30,000.00 value, without interest." (*Id.*).

10. In the Response to Second Motion, Shreveport FCU noted that the Court denied the First Motion "in regards to this Vehicle due to the Defendant's failure to adequately maintain insurance on the Vehicle." (Resp. at 2). Shreveport FCU contended that the Debtor was acting in bad faith by failing to maintain valid insurance on the Camaro, despite the requirements of the Confirmation Order and Loan Agreement. (*Id.* at 1-2).

[2] On August 2, 2017, the Debtor filed the Amended Schedule I: Your Income (Dkt. 44), evidencing her reduction in income

11. In the Joinder, the Trustee agreed with Shreveport FCU, arguing that the Second Motion should be denied. (Joinder at 1). The Trustee argued that because the Court previously ruled on this issue in the Order Denying First Motion, the Plan should not be modified. (*Id.*).

12. Kossman argued at the 2017 Hearing that the Debtor found out the day before the 2017 Hearing that her employer reduced her wages, necessitating the need for the 2017 Hearing.[3] Based on this "new information," Kossman requested a continuance of the 2017 Hearing so he could determine how the income change affects the Plan.[4] Kossman also requested that the Court reconsider the Order Denying First Motion. Robinson objected to a continuance, stating that she traveled a significant distance for the 2017 Hearing after speaking with Kossman the day before the 2017 Hearing, at which time Kossman indicated that the 2017 Hearing would proceed as scheduled. Robinson contended that the Court has heard this argument before, and denied the First Motion because the Debtor failed to maintain insurance. Vardaman agreed with Robinson, arguing that the Debtor is raising the same issue that has already been decided by the Court. According to Vardaman, the Debtor is again trying to reduce her Plan payment because the Camaro was damaged, even though the Court has already ruled on this issue.

Discussion

The Court incorporates and adopts its ruling in the Order Denying First Motion, and finds that the Second Motion should also be denied. The Court will first discuss why the doctrine of *res judicata* bars the Debtor from raising the same arguments in the Second Motion that the Court

[3] The Court presumes that Kossman meant that he received proof of the Debtor's reduction in income the day before the Hearing because the Second Motion, which was filed on July 5, 2017, provides that the Debtor's income would be reduced by $100.00 per paycheck.

[4] The Court denied Kossman's oral motion to continue the 2017 Hearing because of the prejudice a continuance would cause Shreveport FCU.

addressed and decided in the Order Denying First Motion. Then, the Court will consider Kossman's oral motion to reconsider the Order Denying First Motion.

I. *Res Judicata*

The doctrine of *res judicata* bars the litigation of claims that have either been litigated or should have been raised in an earlier suit. *Test Masters Educ. Servs. v. Singh*, 428 F.3d 559, 571 (5th Cir. 2005). The Fifth Circuit Court of Appeals has held that *res judicata* applies when the following elements are met: 1) the same parties are involved; 2) the prior judgment was rendered by a court of competent jurisdiction; 3) the prior decision was a final judgment on the merits; and 4) the same cause of action is at issue. *Bank of Lafayette v. Baudoin (In re Baudoin)*, 981 F.2d 736, 739 (5th Cir. 1993). All four (4) elements are undoubtedly satisfied in the Bankruptcy Case.

First, the Debtor, Shreveport FCU, and the Trustee were the parties to the First Motion and the Second Motion, and participated at the 2013 Hearing and the 2017 Hearing. Second, the Court had jurisdiction to enter the Order Denying First Motion under 28 U.S.C. § 157(b)(2)(A), (B), and (O). Third, the Order Denying First Motion was a final judgment on the merits as it relates to a reduction of Plan payments due to the fire damage to the Camaro. The Court held the 2013 Hearing on the merits of the First Motion, the Shreveport FCU Response to First Motion, and the Trustee Response to First Motion. After considering the arguments of the parties, the Court conducted a thorough analysis and determined that under the Bankruptcy Code and relevant case law, the Debtor did not propose the modification of the Plan in good faith. Thus, the Court denied the First Motion.

Finally, the same cause of action is at issue in the Bankruptcy Case. The Debtor filed the Second Motion nearly four (4) years after the Court denied the First Motion, raising the same argument: that she should be permitted to reduce her Plan payments because the Camaro was

damaged by a fire. The Court addressed this issue in the Order Denying First Motion. The Court found that the Loan Agreement required the Debtor to maintain valid insurance on the Camaro, which she failed to do. Additionally, the Confirmation Order provided that the Debtor would be "responsible for the preservation and protection of all property of the estate not transferred to the trustee." (Order Denying First Motion at 11). The Court found that it "must protect secured creditors' interests when there is severe and unexpected depreciation in the value of the collateral due to a debtor's neglect or abusive behavior." (*Id.*). The Debtor's failure to maintain valid insurance constituted a lack of good faith, and the Court denied the First Motion. (*Id.* at 11-12). The Debtor again seeks to modify the Plan to reduce her Plan payments based on the fact that the Camaro was damaged as the result of a fire. This is the same argument the Court already rejected. Thus, the Fourth element of *res judicata* is satisfied.

Because all four requirements of the Fifth Circuit's test for *res judicata* are satisfied, the Court finds that the Debtor is barred from again arguing for a modification of the Plan based on the fire damage to the Camaro. The Court thoroughly considered and addressed the issue in the Order Denying First Motion, and denied the First Motion. Accordingly, the Second Motion should be denied.

II. Reconsideration

At the Hearing, Kossman requested that the Court "reconsider" the Order Denying First Motion based on the Debtor' reduction in income. "Motions to 'reconsider,' to 'vacate' or to 'set aside' are motions under Rule 9023 [of the Federal Rules of Bankruptcy Procedure] ("Rule 9023")." *In re Jackson*¸ Case No. 16-03263-NPO, slip op. at *5 (Bankr. S.D. Miss. Dec. 21, 2016) (citing *In re Salmeron*, Case No. 10-38945-H3-13, 2012 WL 1354858, slip op. at *2 (Bankr. S.D. Tex. Apr. 16, 2012)). Under Rule 9023, an aggrieved party may file a motion to alter or amend a

judgment within fourteen (14) days of entry of the judgment. FED. R. BANKR. P. 9023. The Court entered the Order Denying First Motion on October 28, 2013, well over fourteen (14) days ago. Thus, the oral motion to reconsider was untimely under Rule 9023.

The Fifth Circuit has held that when a motion is timely filed under Rule 9023, it should be treated as a motion under Rule 9023 and, if not, it should be treated as a motion under Federal Rule of Bankruptcy Procedure 9024 ("Rule 9024"). *Harcon Barge Co. v. D&G Boat Rentals, Inc.*, 784 F.2d 665, 668 (5th Cir. 1986). Even if the Court treats the oral motion to reconsider as a motion under Rule 9024, which incorporates Federal Rule of Civil Procedure 60 ("Rule 60"), relief should not be granted. Rule 60 provides grounds for relief from a final judgment, order, or proceeding for five (5) enumerated reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence; (3) fraud; (4) the judgment is void; and (5) the judgment has not been satisfied. FED. R. CIV. P. 60(b)(1)-(5). The Debtor did not argue that any of these five (5) categories applies to the Order Denying First Motion, and presented no evidence that shows that any of these categories is satisfied. Rule 60(b) also provides a "catchall" provision as the sixth category. Rule 60(b)(6) provides that a Court may grant relief for "any other reason that justifies relief." FED. R. CIV. P. 60(b)(6). The Fifth Circuit has held that relief under Rule 60(b)(6) "is considered an extraordinary remedy . . . [and] that '[t]he desire for a judicial process that is predictable mandates caution in reopening judgments.'" *Carter v. Fenner,* 136 F.3d 1000, 1007 (5th Cir. 1998) (quoting *Bailey v. Ryan Stevedoring Co., Inc.*, 894 F.2d 157, 160 (5th Cir. 1990)). The Debtor did not present any evidence as to why extraordinary relief is warranted in the Bankruptcy Case.

Even if the Debtor had presented evidence as to why extraordinary relief from the Order Denying First Motion is warranted, Rule 60(c) requires that "[a] motion under Rule 60(b) must be

made within a reasonable time . . . ." FED. R. CIV. P. 60(c)(1). Kossman made the oral motion to reconsider nearly four (4) years after entry of the Order Denying First Motion. The Court finds that this was not within a "reasonable time" under Rule 60(c)(1). Thus, the Court finds that the Debtor's oral motion to reconsider the Order Denying First Motion should be denied.

Conclusion

The Second Motion is barred by the doctrine of *res judicata*. The Court decided the issues raised in the Second Motion in the Order Denying First Motion. Thus, the Second Motion should be denied. The Court also finds that the Debtor's oral motion to reconsider at the 2017 Hearing was untimely under both Rule 9023 and Rule 9024. The Order Denying First Motion was entered on October 28, 2013, nearly four (4) years ago. The Court, therefore, will not reconsider the Order Denying First Motion.

IT IS, THEREFORE, ORDERED that the Second Motion is hereby denied.

IT IS FURTHER ORDERED that the Debtor's oral motion to reconsider is hereby denied.

##END OF ORDER##