



SO ORDERED,

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: November 29, 2016

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:

CATRINA L. LEWIS,

CASE NO. 16-10842-NPO

DEBTOR.

CHAPTER 13

ORDER DENYING MOTION TO MODIFY CHAPTER 13 PLAN

This matter came before the Court for hearing on November 3, 2016 (the “Hearing”), on the Motion to Modify Chapter 13 Plan (the “Motion”) (Dkt. 31) filed by the debtor, Catrina L. Lewis (the “Debtor”), and the Trustee’s Response to Motion to Approve Loan Modification (the “Response”) (Dkt. 33) 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 Hearing, Michael W. Boyd (“Boyd”) represented the Debtor and W. Jeffrey Collier (“Collier”) appeared on behalf of the Trustee. After fully considering the matter, the Court finds as follows:

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 is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B). Notice of the Motion was proper under the circumstances.

Facts

1. The Debtor filed a voluntary petition for relief pursuant to chapter 13 of the Bankruptcy Code on March 8, 2016 (the “Petition”) (Dkt. 1).

2. The Debtor filed the Chapter 13 Plan (the “Plan”) (Dkt. 11) on April 4, 2016. In the Plan, the Debtor proposed to make semi-monthly payments of \$139.00 for sixty (60) months. The Debtor proposed to pay 0.00% to her unsecured creditors through the Plan. (Plan at 2). The Plan listed only two secured creditors, “Auto Credit” and “MDES.” (*Id.*). The Order Confirming the Debtor’s Plan, Awarding a Fee to the Debtor’s Attorney and Related Orders (Dkt. 28) was entered on May 26, 2016.

3. Mississippi Title Loans, Inc. (“MS Title”) filed the Proof of Claim (the “POC”) (Claim No. 3) on July 27, 2016. In the POC, MS Title provided that it held a claim of \$1,175.99 for a “Title Lien,” secured by a 2004 Pontiac Grand Prix (the “Pontiac”) (POC at 2). Attached to the POC was the Title Pledge Agreement and Disclosure (the “Agreement”) (POC at 4-7), which indicates that MS Title loaned the Debtor \$700.00 at a 304.17% annual rate of interest (Agreement at 1). Also attached to the POC was the Certificate of Title for the Pontiac. (POC at 9).

4. The Debtor filed the Motion on September 2, 2016, requesting the Court’s permission to modify the Plan to treat MS Title as a secured creditor. (Mot. at 1). The Debtor proposed to pay MS Title \$1,175.99 pursuant to the POC at 5.00% interest. (*Id.*).

5. The Trustee filed the Response on September 26, 2016. In the Response, the Trustee alleged that “[u]pon information and belief, the [Pontiac] was involved in an accident and is no longer in Debtor’s possession.” (Resp. at 1). Accordingly, MS Title “should be paid ‘the replacement value of such property as of the date of the filing of the petition,’” with the remaining balance treated as unsecured. (*Id.*) (citing 11 U.S.C. § 506(a)(2)). The Trustee argued that

paying MS Title as fully secured instead of treating the portion of the claim remaining after considering the replacement value of the Pontiac as unsecured discriminates against other creditors. (*Id.*). The Trustee noted that the Plan proposed “to pay [“Auto Credit”] to release the lien on a 2005 Nissan Altima,” meaning that the Pontiac “is not necessary for maintenance and support of Debtor or her family.” (*Id.*). After the replacement value of the Pontiac is determined, the Trustee argued that the Debtor should be required to show that the proposed modification of the Plan to pay for a second vehicle is in good faith pursuant to § 1325(a)(3).¹ (*Id.*).

6. At the Hearing, Boyd argued that the facts of the Bankruptcy Case are similar to the facts of *In re Ogburn*, Case No. 15-12946-NPO (Bankr. N.D. Miss. Apr. 15, 2016), except that unlike the debtor in *In re Ogburn*, the Debtor did file an incident report with the Greenville Police Department (the “Incident Report”) (Hr’g Ex. A). According to Boyd, the Debtor’s father drove the Pontiac without her permission and wrecked it, resulting in a total loss.

7. Collier argued at the Hearing that the Bankruptcy Case is distinguishable from *In re Ogburn* and the similar case of *In re Williams*, Case No. 16-10624-NPO (Bankr. N.D. Miss. Aug. 8, 2016), because the Pontiac was destroyed pre-petition. The Incident Report indicated that the accident occurred on March 6, 2015, approximately one (1) year before the Debtor filed the Petition.² According to Collier, MS Title is at least partially unsecured, and elevating it to fully secured status would discriminate against the unsecured creditors. Another distinction Collier identified was that in *In re Ogburn* and *In re Williams*, the loss of the collateral was unexplained,

¹ Hereinafter, all code sections refer to the Bankruptcy Code found at title 11 of the U.S. Code unless indicated otherwise.

² Collier later acknowledged that he was mistaken about the facts of those cases. Like the Pontiac, the collateral was lost or destroyed pre-petition in both *In re Ogburn* and *In re Williams*.

whereas in the Bankruptcy Case, the Incident Report evidences the loss of the Pontiac. Thus, Collier argued that MS Title should not be treated as fully secured.

Discussion

Pursuant to § 502(a), a claim is deemed allowed if it complies with § 501, but a debtor can rebut this presumption by “going forward with evidence concerning the validity and the amount of the claim under Federal Rule of Bankruptcy Procedure 3001(f) and Code section 502(a).” 4 COLLIER ON BANKRUPTCY ¶ 502.02[3][f] (16th ed. 2016). Although the Debtor proposed to modify the Plan to treat MS Title as a fully secured creditor, the Trustee objected, arguing that allowing MS Title to be treated as fully secured would unfairly discriminate against the Debtor’s unsecured creditors. Essentially, the Trustee argued that MS Title’s claim should be bifurcated under § 1322(b)(2). Under § 1322(b)(2), if the creditor’s claim is not secured solely “by a security interest in real property that is the debtor’s principal residence,” the debtor may bifurcate the secured creditor’s claim into a partly secured and partly unsecured claim. *In re Lara*, No. 07-60188, 2008 WL 961892, at *2 (Bankr. S.D. Tex. Apr. 8, 2008). The fair market value of the collateral securing the claim is treated as a secured claim while the remaining debt owed on the claim is treated as an unsecured claim. *Id.* A determination regarding the value of the collateral securing a portion of the claim is governed by § 506(a), which provides that the fair market value is the replacement value on the date of filing. 11 U.S.C. § 506(a). The Court must determine the proper treatment of the POC in order to determine whether the Debtor should be permitted to modify the Plan to treat MS Title as fully secured.

A debtor is permitted to modify his or her chapter 13 plan pursuant to § 1329(a)(1), but the requirements of § 1322(b) apply to the proposed modification. 11 U.S.C. § 1329(a)(1). Section 1322(b)(1) allows a plan to designate a class or classes of unsecured claims as long as it does not

unfairly discriminate against one of those classes. 11 U.S.C. § 1322(b)(1). If MS Title should be treated as an unsecured creditor, the Debtor's elevation of its claim to secured status would unfairly discriminate against the Debtor's unsecured creditors, who will be paid nothing through the Plan.

Although the Pontiac was involved in an accident and is no longer in the Debtor's possession, the Debtor proposed to treat MS Title as fully secured. In the plan confirmation context, property that has "been stolen from the debtor or lost through some casualty must be described and explained in the schedules." Keith M. Lundin & William H. Brown, CHAPTER 13 BANKRUPTCY, 4th Edition, § 30.5, at ¶ 1, Sec. Rev. Apr. 1, 2009, www.ch13online.com. "Lost or stolen property for which there is no police report or contemporaneous evidence of loss" is a red flag. *Id.* at ¶ 2. "If the debtor's only explanation of missing collateral is 'it was stolen,' confirmation could be a problem." *Id.* The treatise compares unexplained missing collateral to the transfer of assets on the eve of bankruptcy, which "is a lightning rod for intense scrutiny of the debtor's good faith." Keith M. Lundin & William H. Brown, CHAPTER 13 BANKRUPTCY, 4th Edition, § 181.1, at ¶ 1, Sec. Rev. June 7, 2004, www.ch13online.com.

In *In re Ogburn*, the debtor objected to a creditor's proof of claim, arguing that the claim should be unsecured because the collateral, a car, was no longer in her possession. *In re Ogburn*, Case No. 15-12946-NPO, slip. op. at *2. The debtor in *In re Ogburn* stated that the car had malfunctioned, and she abandoned it on the side of the road. *Id.* When the debtor went back to get the car, it was no longer there. *Id.* Because the collateral was no longer in her possession, the debtor in *In re Ogburn* argued that she could not surrender it to the creditor and, therefore, the creditor's claim was unsecured. *Id.*

In *In re Ogburn*, this Court found persuasive the bankruptcy court's reasoning in

American Express Travel Related Servs., Co. v. Klauder (In re Klauder), 91-0242JC, slip op. (Bankr. S.D. Miss. Mar. 19, 1993), in which the bankruptcy court considered the dischargeability of a debt. In the debtors' statement of financial affairs in *In re Klauder*, they provided that the collateral, which was jewelry, had been stolen. *Id.*, at *3. Although the debtors called a friend who was a police officer, they did not file a police report and did not file a claim on their insurance. *Id.*, at *4. The bankruptcy court noted that the debtors relied on their own testimony to prove that the jewelry was stolen and "offered no evidence to corroborate their testimony." *Id.*, at *6-7. Likewise, in *In re Ogburn*, there was no evidence to prove that the car was missing or had been stolen, and the debtor did not attend the hearing to offer any testimonial evidence as to why the car was no longer in her possession. *In re Ogburn*, slip op. at *4. This Court, therefore, held that the creditor was secured and ordered the debtor to amend her chapter 13 plan accordingly. *Id.*, at *5.

In *In re Williams*, the debtor objected to the creditor's proof of claim, arguing that the collateral, also a car, "became inoperable and is no longer in [her] possession," and, therefore, the claim should be treated as unsecured. *In re Williams*, Case No. 16-10624-NPO, slip op. at *2. At the hearing in *In re Williams*, the debtor testified that the "motor went out" on the car and she "took [it] to the junkyard." *Id.* This Court found that, like the debtor in *In re Klauder*, the debtor in *In re Williams* "relied solely on her own testimony that the Impala is no longer in her possession, and offered no corroboration." *Id.*, at *4. Because the debtor offered no corroborating evidence to support her claim that the collateral was no longer in her possession, the Court determined that the claim should be treated as secured. *Id.*

In the Bankruptcy Case, unlike the debtors in *In re Ogburn* and *In re Williams*, the Debtor provided corroborating evidence to support her claim that the Pontiac is no longer in her possession. Although the Debtor contended in the Motion that MS Title should be treated as fully

secured, the Incident Report, which Collier stated that he verified, evidences the fact that the Pontiac was damaged when it “crashed into [a] utility pole.” (Incident Report at 1). Accordingly, the Debtor rebutted the presumption that the POC is *prima facie* valid, and MS Title should not be treated as fully secured. The Debtor did not offer any justification or explanation as to why she proposed to treat the claim as fully secured despite the fact that the loss of the collateral was explained. The Court, therefore, finds that treating the POC as fully secured would constitute unfair discrimination against the Debtor’s unsecured creditors.

Although the Trustee argued in the Response that the POC should be bifurcated pursuant to § 1322(b)(2), under § 506(a), the replacement value is determined on the date of filing. The replacement value under § 506(a) is “the price a willing buyer in the debtor’s trade, business, or situation would pay a willing seller to obtain property of like age and condition.” *Assocs. Comm. Corp. v. Rash*, 520 U.S. 953, 959 n.2 (1997). Under this standard, the replacement value of the Pontiac on the Petition date was \$0.00, which was explained by the Incident Report. Accordingly, MS Title is a fully unsecured creditor. For the foregoing reasons, the Court finds that the Motion should be denied. The Debtor shall have fourteen (14) days from the date of this Order in which to submit a modified plan that complies with this Order.

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

IT IS FURTHER ORDERED that the Debtor shall have fourteen (14) days from the date of this Order in which to submit a modified plan that complies with this Order.

##END OF ORDER##