



SO ORDERED,

**Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: May 24, 2017**

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

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI**

IN RE:

KATRINA SMITH,

CASE NO. 17-00481-NPO

DEBTOR.

CHAPTER 13

ORDER OVERRULING OBJECTION TO SECURED CLAIM(S) AND OTHER RELIEF

There came on for hearing on May 1, 2017 (the “Hearing”), the Objection to Secured Claim(s) and Other Relief (the “Objection”) (Dkt. 9) filed by the debtor, Katrina Smith (the “Debtor”), and the Proof of Claim (the “POC”) (Cl. #1-1) filed by the Mississippi Department of Employment Security (“MDES”) in the above-referenced chapter 13 bankruptcy case (the “Bankruptcy Case”). At the Hearing, Douglas Joel Graham represented the Debtor, and Samuel J. Duncan represented J.C. Bell, the standing chapter 13 panel trustee (the “Trustee”). No one appeared at the Hearing on behalf of MDES. 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. These are core proceedings pursuant to 28 U.S.C. § 157(b)(2)(B). Notice of the Objection was proper under the circumstances.

Facts

1. On February 10, 2017, the Debtor filed a voluntary petition for relief (the “Petition”) (Dkt. 1) under chapter 13 of the Bankruptcy Code. In her bankruptcy schedules, the Debtor listed unsecured claims of \$87,555.00 (Dkt 4 at 12-15) and nonpriority secured claims of \$5,763.94 (Dkt. 4 at 10-11). She did not list any real property. (Dkt. 4 at 3). Her personal property consisted of a 2007 Toyota Corolla and assorted household items valued at \$8,900.00 and a cash deposit of \$25.00. (Dkt. 4 at 7). She claimed a personal property exemption of \$8,900.00. (Dkt. 4 at 8-9); 11 U.S.C. § 522(b); MISS. CODE ANN. § 85-3-1(a).

2. On the same date the Debtor filed the Petition, she filed the Chapter 13 Plan (the “Plan”) (Dkt. 2), in which she proposed to make thirty-six (36) monthly plan payments of \$161.00. (Plan at 1). The Plan listed MDES as a secured creditor with a claim in the amount of \$3,963.94. (*Id.* at 2). The Debtor proposed to pay MDES the alleged value of its collateral, \$100.00, at an annual interest rate of five percent (5%) over the life of the Plan. (*Id.*). To Speedy Cash, the only other secured creditor listed in the Plan, the Debtor proposed to pay \$1,800.00, the amount allegedly owed on a debt secured by the 2007 Toyota Corolla.¹ The Plan proposed to pay zero

¹ The Proof of Claim (Cl. #3-1) filed by “Speedy/Rapid Cash” indicated a different amount. The Debtor filed the Objection to Secured Claims(s) and Other Relief (Dkt. 11), and after a hearing, the Court entered an order requiring the Debtor to pay Speedy Cash the amount owed of \$3,960.20 (Dkt. 26), as reflected in its Proof of Claim (Cl. #3-1).

dollars to unsecured creditors, whose claims totaled approximately \$91,418.94. (*Id.*). Of this amount, \$87,195.00 was student loan debt.

3. On February 22, 2017, MDES filed the POC, indicating that it held a secured claim of \$3,848.39, plus interest at the annual rate of five percent (5%), for overpaid unemployment benefits, accrued interest, and related costs (the “Overpayment”). The Overpayment consisted of \$1,876.00 in overpaid unemployment compensation, \$2,130.39 in statutory interest, and \$12.00 in process costs, less \$170.00, the amount already repaid by the Debtor² (Claim 1-1 Part 4). According to the POC, MDES’s claim is secured by a statutory lien against the real and personal property of the Debtor. (Cl. #1-1 at 2). Attached to the POC are copies of a Notice of Determination (the “Notice”) (Claim #1-1 Part 2) issued to the Debtor on October 11, 2006; a Warrant for Collection of Overpayment (the “Warrant”) (Claim #1-1 Part 3) enrolled in the Lauderdale County Judgment Roll; and an Overpayment Inquiry—List of Overpayments (Claim #1-1 Part 4) indicating the alleged balance due MDES from the overpayment of unemployment benefits. The Notice indicated that while receiving unemployment benefits, the Debtor failed to report to MDES her gross earnings for the weeks ending October 29, 2005 through December 31, 2005.

4. In the Objection, the Debtor proposed to bifurcate MDES’s claim by paying MDES \$100.00 (the purported value of the personal property securing its statutory lien) over the life of the Plan, at an annual interest rate of five percent (5%), and the balance of MDES’s claim at the same percentage as other unsecured, nonpriority claims, which is zero under the Plan. At the Hearing, counsel for the Debtor explained that the value of \$100.00 was chosen because it is a *de minimis* amount, and the Debtor owns no real property and little personal property to which

² \$3,848.39 = \$1,876.00 + \$2,130.39 + \$12.00 - \$170.00.

MDES's statutory lien could attach. In the Objection, the Debtor asked that "either upon payment of the underlying debts determined under non-bankruptcy law or a discharge [*sic*] under Bankruptcy Code § 1328, all liens [*sic*] be cancelled." (Obj. at 1-2).

Discussion

Based on the POC and the Objection, the sole issue raised by the Trustee at the Hearing was whether the Debtor may "cram down" MDES's secured claim from \$3,848.39 to \$100.00, the alleged present-day value of its collateral.³ Under Mississippi law, MDES may recoup the Overpayment to the Debtor pursuant to MISS. CODE ANN. § 71-5-19(4) and MISS. CODE ANN. § 71-5-363 through § 71-5-383. As part of its collection efforts, MDES enrolled the Warrant in the Lauderdale County Judgment Roll pursuant to MISS. CODE ANN. § 71-5-367. Once filed, the Warrant became "a lien upon the title to and interest in all real and personal property" of the Debtor. MISS. CODE ANN. § 71-5-367.

A chapter 13 plan that proposes to retain collateral over the objection of a secured creditor and pay a deferred stream of future payments over the length of the plan must satisfy the cram down requirements of 11 U.S.C. § 1325(a)(5)(B)(ii). Under that statute, the payments must have a total "value, as of the effective date of the plan, . . . not less than the allowed amount of such claim." 11 U.S.C. § 1325(a)(5)(B)(ii). The amount of a secured claim is determined under 11 U.S.C. § 506(a), which provides, in pertinent 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 . . . is less than the amount of such allowed claim.

³ At the Hearing, the Trustee questioned why MDES filed the POC as a secured claim rather than as a priority claim. *See* 11 U.S.C. § 507(a). No one appeared at the Hearing on behalf of MDES to answer that question.

11 U.S.C. § 506(a).

There are two statutory provisions that, if applicable, could preclude the Debtor from bifurcating MDES's secured claim. First, 11 U.S.C. § 1322(b) does not allow a chapter 13 debtor to modify "a claim secured only by a security interest in real property" during the pendency of a plan. 11 U.S.C. § 1322(b)(2). That exception does not apply here because the Debtor does not own any real property. Second, the unnumbered paragraph that immediately follows 11 U.S.C. § 1325(a)(9), known as the "hanging" paragraph, does not allow a debtor to cram down certain claims secured by a purchase money security interest. 11 U.S.C. § 1325(a). That provision also does not apply here because MDES's interest is a statutory interest, not a security interest. The Bankruptcy Code defines a "statutory interest" as a lien that arises "solely by force of a statute on specified circumstances or conditions" and "does not include [a] security interest or judicial lien." 11 U.S.C. § 101(53). Here, it is undisputed that MDES's lien arose by virtue of MISS. CODE ANN. § 71-5-367 and not by agreement of the parties. 11 U.S.C. § 101(51) (defining a "security interest" as a "lien created by an agreement"). Moreover, MDES's use of the judicial process by enrolling the Warrant did not transform the nature of its lien from statutory to judicial. *See In re Stewart*, No. 08-13320-DWH (Bankr. N.D. Miss. Feb. 9, 2009) (Dkt. 30) (holding that lien of MDES for overpayment of benefits is unavoidable statutory lien); *see also Riverbend Condo. Ass'n. v. Green (In re Green)*, 793 F.3d 463, 469 (5th Cir. 2015) (holding that subsequent actions taken by a creditor to preserve a lien that arose "solely by force of statute" did not alter the nature of the lien).

Having determined that the Debtor may invoke the bifurcation provision in 11 U.S.C. § 1325(a)(5)(B)(ii), the Court turns next to the Debtor's valuation of MDES's collateral.⁴ The

⁴ The Debtor's decision to attempt to bifurcate MDES's secured claim, even though its statutory lien cannot be avoided under 11 U.S.C. § 522(c)(2) or (f) and may be non-dischargeable under 11 U.S.C. § 523(a)(2)(A), is not at issue.

Debtor valued MDES's interest as nominal, apparently because she takes the position that the statutory lien attached only to her non-exempt property. Under Mississippi law, however, the statutory lien of MDES for the overpayment of unemployment benefits attaches to both exempt and non-exempt property. *In re Robertson*, No. 08-13590-DWH, 2009 WL 1456453, at *2 (Bankr. N.D. Miss. May 22, 2009) (holding that an overpayment of benefits to a debtor constitutes an "assessment" and pursuant to MISS. CODE ANN. § 85-3-47, property is not exempt from sale for non-payment of an assessment). Because the Debtor listed exempt personal property of \$8,900.00 in her bankruptcy schedules (Dkt. 4 at 8-9) but proposes to pay MDES only \$100.00 in the Objection, the Debtor does not propose to pay the value of MDES's secured claim over the plan as required by 11 U.S.C. § 506(a). Accordingly, the Court finds that the Objection should be overruled.

IT IS, THEREFORE, ORDERED that the Objection is overruled.

##END OF ORDER##