SO ORDERED

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: December 12, 2019

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:

KIMBERLEY ROXANN OWENS, **CASE NO. 18-04738-NPO**

DEBTOR. **CHAPTER 13**

ORDER GRANTING MOTION TO MODIFY BANKRUPTCY PLAN

This matter came before the Court for hearing on December 2, 2019 (the "Hearing"), on the Motion to Modify Bankruptcy Plan (the "Motion") (Dkt. 29) filed by the debtor, Kimberley Roxann Owens (the "Debtor"); the Response to Motion to Modify Chapter 13 Plan After Confirmation (the "Response") (Dkt. 33) filed by Ron's Auto Sales, Inc. ("Ron's Auto'); and the Trustee's Objection to Debtor's Motion to Modify Chapter 13 Plan (the "Trustee's Objection") (Dkt. 30) filed by James L. Henley, Jr., the chapter 13 trustee (the "Trustee") in the above-referenced chapter 13 bankruptcy case (the "Bankruptcy Case"). At the Hearing, Thomas Carl Rollins, Jr. ("Rollins") represented the Debtor, Charles H. Keeton ("Keeton") represented Ron's Auto, and Tylvester O. Goss represented the Trustee. At the Hearing, Rollins informed the Court that the Trustee's Objection had been resolved. (10:53:20-10:53:30).[1] A separate order will

[1] The Hearing was not transcribed, all citations are to the timestamp of the audio recording.

be entered on the Trustee's Objection consistent with this Order. After considering the evidence and arguments of counsel, the Court took the Motion and the Response under advisement. The Court, being fully advised in the premises, finds that the Motion should be granted for the reasons that follow.

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)(A), (B), and (O). Notice of the Motion was proper under the circumstances.

Facts

1. On November 25, 2017, the Debtor purchased a 2005 Nissan Maxima (the "Maxima") from Ron's Auto for a total sale price of $6,829.75. (Claim 2-1 at 7). The Debtor made a down payment of $1,200.00 and Ron's Auto financed the balance of $5,629.75 at an annual percentage rate of twenty-five percent (25%). (Claim 2-1 at 7). The Debtor agreed to pay Ron's Auto $150.00 bi-weekly beginning December 8, 2017 with the final installment payment of $111.29 due on September 13, 2019. (Claim 2-1 at 7, 9). The Debtor also agreed, among other things, to maintain collision insurance on the Maxima with Ron's Auto named as the loss payee.

2. On November 25, 2017, the same day as the purchase, the Debtor returned to Ron's Auto to relinquish possession of the Maxima because the transmission was malfunctioning, and the odometer was not working. (Test. of Debtor at 10:58:00–10:58:08; 11:03:00–11:03:15). Ron's Auto refused to accept the Maxima, refund the down payment of $1,200.00, or repair the Maxima. (Test. of Debtor at 10:58:08–10:58:32; 11:03:19–11:03:23).

3. Approximately two months later, the Debtor returned to Ron's Auto with the Maxima because the transmission still was not working properly. (Test. of Debtor at

10:58:28-10:58:33). Ron's Auto kept the Maxima for three to four months to repair the problem. (Test. of Debtor at 10:58:28–10:58:45). When the Debtor returned, in approximately May of 2018, Ron's Auto claimed the problem was resolved; however, the Maxima still was not working properly. (Test. of Debtor at 10:58:48–10:59:19).

4. The Debtor continued to have routine maintenance performed on the Maxima, including regular oil changes, and even purchased four new tires at Gleason's Tire Service in Morton, Mississippi. (Test. of Debtor at 10:57:40–10:57:54; 11:01:50–11:01:58).

5. At some point after purchasing the Maxima but before filing the Bankruptcy Case, the Debtor allowed the collision insurance to lapse on the Maxima. (Test. of Debtor at 11:01:00-11:01:49).

6. On December 11, 2018, the Debtor voluntarily filed the petition for relief (Dkt. 1) under chapter 13 of the U.S. Bankruptcy Code and the proposed Chapter 13 Plan (the "Plan") (Dkt. 2).

7. In the Plan, the Debtor listed the Maxima as collateral to Ron's Auto's secured claim in the amount of $6,381.29. (Dkt. 2 at 2). The Plan identified the Maxima as a "910" motor vehicle that the Debtor intended to retain and required the Debtor to pay Ron's Auto the amount of the secured claim in full. (Dkt. 2 at 2). The Debtor intended to complete the filed Plan in sixty (60) months. (Dkt. 2 at 2; Test. of Debtor at 10:56:55–10:56:59).

8. Ron's Auto filed a proof of claim in the amount of $4,492.78 (the "Proof of Claim") (Claim 2-1) in the Bankruptcy Case.

9. On April 12, 2019, 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. 24). The confirmed Plan listed the Maxima as collateral to Ron's Auto's secured claim of

$4,492.78, the amount stated in the Proof of Claim. (Dkt. 24 at 3). The confirmed Plan provided for a zero percent (0%) pro rata distribution to timely filed and "[a]llowed nonpriority unsecured claims that are not separately classified." (Dkt. 24 at 4). The Confirmation Order also provided that "[t]he debtor shall be responsible for the preservation and protection of all property of the estate not transferred to the trustee." (Dkt. 24 at 1).

10. In approximately May of 2019, the Maxima completely stopped working, and the Debtor took the Maxima to an auto-repair shop in Morton, Mississippi. (Test. of Debtor at 11:04:05–11:04:56). At the auto-repair shop, the Debtor learned that the Maxima's transmission had failed, disabling the Maxima, and could not reasonably be repaired.[2] (Test. of Debtor at 10:57:08–10:57:21). As of the date of the Hearing, the Maxima has remained at the auto-repair shop. (Test. of Debtor at 11:03:55–11:04:01).

11. On September 20, 2019, the Debtor filed the Motion asking the Court for permission to modify the Plan to surrender the Maxima to Ron's Auto and cease payments to Ron's Auto under the Plan. (Dkt. 29).

12. Ron's Auto filed the Response objecting to the proposed modification on the ground that the Plan has been confirmed. (Dkt. 33). Ron's Auto also argued that even if the Court were to allow the Debtor to surrender the Maxima, any deficiency that remained after the sale of the Maxima should be paid in full through the Plan or, in the alternative, its lien should not be avoided upon completion of the Plan.[3] (Dkt. 33).

[2] The quote to repair the Maxima was approximately $5,000.00. (Test. of Debtor at 10:57:30–10:57:34).

[3] Because the Court approves the Debtor's proposed modification to surrender the Maxima and treat any deficiency as an unsecured claim, the lien avoidance issue is irrelevant.

13. The Debtor testified at the Hearing in support of the Motion. Ron's Auto did not present any evidence at the Hearing beyond its cross-examination of the Debtor, and Keeton stated at the Hearing that Ron's Auto does not have any evidence supporting its objection to the proposed modification other than the Debtor's testimony. (10:55:40-10:55:48).

Discussion

A confirmed chapter 13 plan binds all parties who were involved in the confirmation process. 11 U.S.C. § 1327(a).[4] The Bankruptcy Code, however, allows a debtor, trustee, or unsecured creditor to modify a plan post-confirmation. 11 U.S.C. § 1329. The ability to modify is "based on the premise that, during the life of the plan, circumstances may change, and parties should have the ability to modify the plan accordingly." *Meza v. Truman (In re Meza)*, 467 F.3d 874, 877 (5th Cir. 2006) (rejecting view that *res judicata* bars post-confirmation modifications). Subsection (a) provides that a plan may be modified to: (1) increase or reduce plan payments on claims of a particular class; (2) extend or reduce the time for plan payments; (3) alter the distribution to a creditor under the plan to account for payments made outside of the plan; or (4) reduce the amount to be paid under the plan in light of the debtor's purchase of health insurance, subject to certain conditions. 11 U.S.C. § 1329(a)(1)-(4). Section 1329 also sets out some exceptions to the ability to modify a chapter 13 plan post-confirmation. Relevant to this case is the condition that any plan modification must comply with the content requirements of § 1322(a) and (b) and the confirmation requirements of § 1325(a). 11 U.S.C. § 1329(b)(1)-(2).

There is a split among courts regarding a debtor's ability to modify a plan to surrender collateral and treat any deficiency as an unsecured claim. In *In re Tucker*, 500 B.R. 457 (Bankr.

[4] Hereinafter, all code sections refer to the United States Bankruptcy Code found at Title 11 of the United States Code unless otherwise noted.

N.D. Miss. 2013), the above-signed judge provided a review of the current landscape of decisions addressing this issue. In the absence of authority from the Fifth Circuit Court of Appeals, this Court in *Tucker* joined the majority view[5] that a post-confirmation modification to surrender collateral and treat any deficiency as an unsecured claim is authorized by § 1329(a)(1) and (3). The Court was not persuaded by the narrow reading of § 1329(a) by the Sixth Circuit Court of Appeals, the only circuit court that has addressed the issue, that the statute allows a debtor to change the amount or timing of payments but not to alter or reclassify an allowed secured claim. *In re Nolan*, 232 F.3d 528 (6th Cir. 2000).

The Court in *Tucker* rejected *Nolan's* rigid rule barring any post-confirmation modification to surrender collateral and treat the deficiency as an unsecured claim. The Court explained that such a rigid rule is unnecessary in light of the statutory safeguards that protect creditors' interests regarding plan modifications under § 1329. Accordingly, this Court concluded that a debtor may modify a confirmed plan to surrender collateral and reclassify any deficiency as an unsecured claim provided that the modification satisfies the requirements of § 1325(a)(1) and (3), and is consistent with § 502(j) as to the reclassification and reconsideration of secured claims. In that regard, § 1329(a)(1) allows a debtor to modify a plan to "increase or reduce the amount of payments on claims of a particular class provided for by the plan." Section 1329(a)(3) allows a debtor to "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." Finally, § 502(j) allows for reconsideration of a claim if "cause" has been shown according to the requirements of Rule 60(b) of the Federal Rules of Civil Procedure (as made applicable by Rule

[5] For a more detailed analysis of the Court's reasoning, see *In re Tucker*, 500 B.R. at 459-63.

9024 of the Federal Rules of Bankruptcy Procedure) and if the "equities of the case" support reconsideration. Having disposed of Ron's Auto's argument that the proposed modification is barred *per se*, the Court turns to its other arguments at the Hearing, which require the Court first to consider whether the Debtor proposes the modification in good faith. If so, the Court next must determine whether the proposed modification satisfies § 502(j).

A. The Motion to surrender the Maxima and reclassify the deficiency satisfies the good faith requirement of § 1325(a).

Section 1325(a)(3), which applies to post-confirmation modifications through § 1329(b)(1), requires any plan (or in this case, any modification) to be "proposed in good faith and not by any means forbidden by law." To determine good faith, the Fifth Circuit has adopted a totality of the circumstances test. *In re Anderson*, 545 B.R. 174, 180 (Bankr. N.D. Miss. 2015). Some of the factors to consider in determining good faith include: (1) the reasonableness of the proposed repayment plan; (2) whether the plan shows an attempt to abuse the spirit of the Bankruptcy Code; (3) whether the debtor genuinely intends to effectuate the plan; (4) whether there is any evidence of misrepresentation, unfair manipulation, or other inequities; (5) whether the filing of the case was part of an underlying scheme of fraud with an intent not to pay; (6) whether the plan reflects the debtor's ability to pay; and (7) whether a creditor has objected to the plan. *Suggs v. Stanley (In re Stanley)*, 224 F. App'x. 343, 346 (5th Cir. 2007). If the Court discovers unmistakable manifestations of bad faith, the modification should be denied. *In re Scarver*, 555 B.R. 822, 838 (Bankr. M.D. Ala. 2016) (quotations omitted) (quoting *Shell Oil Co. v. Waldron*, 785 F.2d 936, 941 (11th Cir. 1986)).

Here, the testimony of the Debtor was the only evidence presented at the Hearing. Ron's Auto did not present any evidence to refute the testimony of the Debtor beyond cross-examination. The Debtor testified that since the first day she purchased the Maxima, the transmission did not

operate properly. In fact, the Debtor testified she returned to Ron's Auto on the day of the purchase to relinquish possession of the Maxima and obtain a refund of her down payment or, in the alternative to have Ron's Auto repair the Maxima. Ron's Auto refused to remedy the Debtor's dissatisfaction. On a second occasion, the Debtor attempted to remedy the problems with the Maxima with Ron's Auto with little success. In the meantime, the Debtor continued to pay for routine maintenance and other upkeep on the Maxima until it became completely disabled in May of 2019. The Court finds that from the date the Debtor initially filed the Plan on December 11, 2018 through the date of the confirmation of the Plan on April 12, 2019, the undisputed evidence establishes that the Debtor intended in good faith to continue driving the Maxima.

Moreover, Ron's Auto is not unfairly prejudiced by the proposed modification, given its knowledge of the likely depreciation in value of the Maxima. Ron's Auto kept the Maxime for three to four months while attempting to repair the ongoing problem with the transmission. The transmission problem was not unexpected for a fourteen (14)-year old vehicle, and, indeed, Ron's Auto—the seller, creditor, and mechanic at times—was made aware of that ongoing mechanical problem from the date of delivery. In *In re Anderson*, 545 B.R. 174 (Bankr. N.D. Miss. 2015), the bankruptcy court similarly held that a modification was in good faith when the transmission problem on a thirteen (13)-year-old truck was not a result of the debtor's negligence or misconduct and not unexpected given the age of the vehicle. *Id.* at 182.

Finally, although the Debtor allowed the collision insurance to lapse on the Maxima at some point, the Court rejects the view that a lapse of insurance creates a *per se* showing of the absence of good faith. In those cases that seemingly have held that a lack of insurance is dispositive of the issue of good faith, the failure to maintain the insurance caused the loss in the value of the collateral. The bankruptcy court in *In re Knappen*, 281 B.R. 714 (Bankr. D.N.M.

2002), a case relied upon by the U.S. Bankruptcy Court for the Northern District of Mississippi in *In re Jefferson*, 345 B.R. 577 (Bankr. N.D. Miss. 2006), provides an example of a situation where a proposed modification to surrender collateral would not satisfy the good faith requirement of § 1325(a)(3). According to the court in *Knappen*, "were the debtor to fail to maintain insurance on a vehicle, *and then lose the value of the collateral for that reason* . . . the motion to modify would probably be denied." 281 B.R. at 720 (emphasis added); *see In re Odlin*, No. 07-62298, 2010 WL 3791486 (Bankr. D. Or. Sept. 22, 2010) (denying a motion to modify due to lack of good faith after the debtor allowed her insurance to lapse and the creditor described the vehicle as "trashed"—reducing the value to $500.00); *In re Butler*, 174 B.R. 44 (Bankr. M.D.N.C. 1994) (holding that a debtor failed to satisfy the good faith requirement by breaching the provisions of the confirmation order by failing to maintain collision insurance, continuing to operate the vehicle without having insurance, and, consequently, destroying the vehicle in a collision). Indeed, the above-signed judge in *Tucker* likewise held that the debtor lacked good faith by failing to comply with the loan agreement that required the debtor to maintain collision insurance on the vehicle and the confirmation order that rendered the debtor "responsible for the preservation and protection of all property of the estate not transferred to the trustee." However, in *Tucker* the loss in the value of the vehicle damaged in a fire was a direct result of the debtor's failure to maintain insurance. *Tucker*, 500 B.R. at 463-64. Here, the Maxima was not rendered disabled by a collision or other similar event where the loss might have been covered by collision insurance if it had been in place. For these reasons, the Court finds that the Debtor proposed the modification in good faith.

B. The Debtor meets the standard for reconsideration of the claim under § 502(j) for cause and according to the equities of the Bankruptcy Case.

In *Tucker*, the Court held that irrespective of the express language in § 1329(a)(1) and (3), a post-confirmation modification to surrender collateral is allowed pursuant to the Court's power

to reconsider a claim under § 502(j). *Tucker*, 500 B.R. at 460. Section 502(j) permits (a) a claim that has been allowed or disallowed to be reconsidered for "cause," and (b) a reconsidered claim to be allowed or disallowed according to the "equities of the case." The majority of courts, including the Fifth Circuit, have tied the issue of "cause" under § 502(j) to Rule 60 of the Federal Rules of Civil Procedure ("Rule 60"), as made applicable by Rule 9024 of the Federal Rules of Bankruptcy Procedure. Accordingly, Rule 60(b) allows reconsideration of an order allowing or disallowing a claim for "any other reason that justifies relief." *See Colley v. Nat'l Bank of Tex. (In re Colley)*, 814 F.2d 1008, 1009 (5th Cir. 1987); *In re Sellers*, 409 B.R. 820, 827-28 (Bankr. W.D. La. 2009). Courts have found that § 502(j), in conjunction with § 506(a), allows the reconsideration and reclassification of secured claims post-confirmation in certain situations where collateral is surrendered. *In re Davis*, 404 B.R. 183, 194-95 (Bankr. S.D. Tex. 2009); *In re Zieder*, 263 B.R. 114, 116-17 (Bankr. D. Ariz. 2001).

Here, the Court first finds that because the surrender of the Maxima demands a change in the treatment of Ron's Auto's claim in the Plan, there is cause to reconsider the claim and relief is justified on that basis. *In re Anderson*, 545 B.R. at 183. Second, the Court finds that the equities of the case weigh in favor of the modification. *Id.* As the court held in *Anderson*, situations where a vehicle—through no negligence or misconduct of the debtor—becomes particularly burdensome are "perfect candidates for the reconsideration provision of § 502(j)." *Anderson*, 545 B.R. at 183; *see Baxter v. Americredit Fin. Servs. (In re Dykes)*, 287 B.R. 298, 303 (Bankr. S.D. Ga. 2002); *Zieder*, 263 B.R. at 117. For these reasons, the Court finds that the proposed modification is consistent with § 502(j)

Conclusion

For the above and foregoing reasons, the Court concludes that the Motion should be granted. The Debtor may modify the confirmed Plan by surrendering the Maxima and having any deficiency treated as an unsecured claim. At the Hearing, the parties did not propose or address the treatment of the monthly Plan payment following the Debtor's proposed modification. The Plan provides for a scheduled monthly payment of $161.42 and for zero percent (0%) distribution to unsecured creditors. According to the Trustee's Objection, the unsecured claims total $7,054.71. The Debtor's proposed order attached to the Motion provides that the "Trustee shall adjust the wage order as necessary for the modification [and that the] Debtor must make payments as specified by modification." (Dkt. 29-1). The Trustee's Objection, however, proposes that the Debtor's Plan payment be used to pay timely filed unsecured creditors. The Trustee's Objection was resolved prior to the Hearing, but the terms of the agreement reached between the Debtor and the Trustee have not been disclosed to the Court. Therefore, the Court finds that the order resolving the Trustee's Objection should modify the Plan to address the distribution of the Plan payments consistent with this Order and *DaimlerChrysler Financial Services Americas, LLC v. Miller (In re Miller),* 570 F.3d 633 (5th Cir. 2009).

IT IS, THEREFORE, ORDERED that the Motion to surrender the Maxima and treat any deficiency as an unsecured claim is hereby granted.

IT IS FURTHER ORDER that within fourteen (14) days of this Order, the Debtor and the Trustee shall submit a proposed order that resolves the Trustee's Objection and that modifies the Plan further to address the distribution of the Plan payments consistent with this Order and

DaimlerChrysler Financial Services Americas, LLC v. Miller (In re Miller), 570 F.3d 633 (5th Cir. 2009).

##END OF ORDER##