

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE
WINCHESTER DIVISION

In re:

No. 90-10805
Chapter 13

DONALD KEITH HODGES

Debtor(s)

DONALD KEITH HODGES

Plaintiff

v.

Adversary Proceeding
No. 96-1074

COFFEE COUNTY BANK, ROY GIPSON
and SHANNON VAUGHN,

Defendants

MEMORANDUM

Appearances: Thomas C. McBee, McBee & Ford, Winchester, Tennessee, Attorney
for Plaintiff

Alec Garland, Manchester, Tennessee, Attorney for Defendant Coffee
County Bank

Harold Fisher, Harrison & Fisher, Manchester, Tennessee, Attorney
for Defendant Shannon Vaughn

R. THOMAS STINNETT, UNITED STATES BANKRUPTCY JUDGE

The plaintiff, Mr. Hodges, is the debtor in a chapter 13 bankruptcy case. On April 9, 1996, he filed this action against Coffee County Bank, Mr. Gipson, and Ms. Vaughn. Coffee County Bank was a creditor in Mr. Hodges' chapter 13 case. Mr. Gipson is one of the bank's loan officers. The other defendant, Ms. Vaughn, bought a car from the Mr. Hodges during his chapter 13 case. This opinion deals with motions for summary judgment filed by Coffee County Bank and Ms. Vaughn. The court's analysis begins with Mr. Hodges' complaint.

The Complaint

The complaint makes the following allegations. Mr. Hodges filed his chapter 13 case on February 22, 1990. He owned a 1989 Nissan Pulsar that secured a debt to Coffee County Bank. His proposed chapter 13 plan valued the car at \$7,500. The bank would not agree to this valuation. Mr. Hodges modified the plan to provide that he would pay the amount of the bank's claim, \$10,574.96, plus 12% interest. The court confirmed this plan on April 16, 1990. On or around July 23, 1990, Mr. Hodges sold the car to Ms. Vaughn. This was done with the agreement of Mr. Gipson, the loan officer at the bank. The bank continued to hold the certificate of title, and Ms. Vaughn was added to the note. Mr. Hodges modified his chapter 13 plan to provide the car payments would be made outside the plan. The bank negligently released the title certificate to Ms. Vaughn when she still owed several thousand dollars. As a result, she stopped making payments, and the bank began taking money from Mr. Hodges' bank account to collect the balance. This caused Mr. Hodges great hardship. Mr. Hodges asks that the defendants be held in

contempt and liable for damages in the amount the bank withheld from his account and applied to the car note.

The Bank's Answer

The bank admits the substance of the transactions among Mr. Hodges, the bank, and Ms. Vaughn. The bank denies that Mr. Hodges modified his chapter 13 plan when he sold the car to Ms. Vaughn. The bank denies releasing the title to Ms. Vaughn before the car was paid for. As an affirmative defense, the bank asserts that all claims involving this transaction were settled by confirmation of Mr. Hodges' modified chapter 13 plan on July 19, 1993.

Ms. Vaughn's Answer

Ms. Vaughn's answer denies that she stopped making payments before the debt was paid. She asserts that she began making payments on the car note in November 1990 and made payments through September 1994, when the debt was paid in full. She received the title certificate from the Bank in October 1994.

The Bank's Motion for Summary Judgment

The bank supported its motion for summary judgment with documents and affidavits to explain the events leading to modification of the plan in July 1993. The story goes as follows:

The bank filed a proof of claim that showed the total debt to be \$14,186.40. The proof of claim deducted \$3,611.44 in payments and credits. This left a balance due of \$10,424.96. The bank added an attorney's fee of \$120, which made the total claim \$10,574.96. At the meeting of creditors, Mr. Hodges amended his plan to provide for payment of this amount plus 12% interest at the rate of \$235.25 per month. The bank's lawyer had nothing more to do with Mr. Hodges' chapter 13 case until April 1993. Mr. Hodges came to the lawyer's office demanding that the bank release the title to a pick-up truck he had financed with the bank. The bank's lawyer agreed to look into the problem and write to Mr. Hodges' lawyer. The bank's lawyer wrote a letter, dated May 6, 1993, to Mr. Hodges' lawyer. The letter recounts the facts as follows:

In November 1990 Mr. Hodges sold the car to Ms. Vaughn. The net pay-off at the time was \$10,097. Mr. Hodges signed the back of the title certificate and a bill of sale, but the title certificate was not transferred to Ms. Vaughn, and the bank did not make a new loan to her. The loan officer agreed that Ms. Vaughn would begin making payments of \$250 per month in November 1990. At Mr. Hodges' request, the payments received from the chapter 13 trustee were deposited in his checking account beginning in November 1990. In January 1991 Mr. Hodges obtained a loan from the bank to buy a truck. He made regular payments on the loan for about 10 months. When his payments stopped in late 1991, the bank began applying the chapter 13 plan payments to the debt. During this time the bank applied \$1,604.46 to the debt secured by the truck and deposited \$3,214.68 to Mr. Hodges' checking account. The letter from the bank's lawyer to Mr. Hodges' lawyer ends with this statement:

In July, 1992, all of the money received from the [chapter 13] trustee was once again applied to the note on the 1989 Nissan Pulsar. The note balance is \$4566.11.

In his affidavit the bank's lawyer states that Mr. Hodges then filed a modified plan proposing to treat the bank as fully secured. Since the bank did not object to this, the bank's lawyer did not appear at the meeting of creditors on the proposed modification. On the day after the meeting, the chapter 13 trustee called the bank's lawyer, who sent him a copy of the letter that he had sent to Mr. Hodges' lawyer. The chapter 13 trustee responded with a letter to the bank's lawyer. The trustee demanded repayment of the chapter 13 payments that the bank had diverted to Mr. Hodges' checking account and to the debt secured by the truck.

The bank's lawyer wrote to the trustee to advise him that the bank would repay the \$1,604.46 applied to the truck debt and the \$3,214.68 deposited to Mr. Hodges' checking account, provided the trustee would not object to the bank's filing of a claim for the amount due it as of the date of the modification. In his affidavit, the bank's lawyer says that the bank filed an unsecured claim for the balance of the loan, no one filed an objection to the claim, and it was eventually paid in full under Mr. Hodges' chapter 13 plan.

The bank also supported its motion with an affidavit from a bank employee, Debra Anderson. Ms. Anderson makes the following statements. In May 1993 she was asked to review all of Mr. Hodges' loan and payment records from 1990 forward and to

make a list for the bank's lawyer. The bank's lawyer used this list to prepare the letter he sent to Mr. Hodges' lawyer in May 1993. The list is attached to her affidavit.

Ms. Anderson's affidavit continues. In July 1993 she prepared and delivered to the bank's lawyer, for mailing to the chapter 13 trustee, a cashier's check for \$4,819.14. The bank filed an amended proof of claim for the unpaid balance after the repayment to the chapter 13 trustee. The debt was re-classified by the bank as a non-interest bearing unsecured loan. The bank began receiving payments from the chapter 13 trustee in December 1994 and the debt was paid in full in January 1996.

At this point, the court will not attempt to explain the accounting shown in the list attached to Ms. Anderson's affidavit. The court has prepared a summary chart that will be used later in this opinion.

The bank also filed a copy of the proof of claim that was filed after confirmation of Mr. Hodges' modified plan. The amount of the claim is \$4,840.32. This is not the amount the bank refunded to the chapter 13 trustee, which was \$4,819.14. The list of payments attached to Ms. Anderson's affidavit shows that the bank received the smaller amount. The proof of claim states that it is secured by the Nissan Pulsar that Mr. Hodges had sold to Ms. Vaughn.

Mr. Hodges' Answer to the Bank's Motion for Summary Judgment

Mr. Hodges in effect says that the bank's motion misses the point. He contends the bank did not collect the full amount from Ms. Vaughn. According to Mr.

Hodges, the bank negligently released the title certificate to her before full payment, she stopped making payments after that, and as a result, the bank collected the balance from his checking account.

The Bank's Response

The bank answered this with another affidavit from Ms. Anderson concerning her summary of Mr. Hodges' debts and payments to the bank. In her affidavit Ms. Anderson makes the following statements:

In May, 1993, I was asked to review all of the loan and payment records of Donald Hodges from 1990 forward, and to make a list of them for the bank's attorney, Alec Garland. A copy was attached as an Exhibit to my Affidavit on May 6, 1996.

As the result of that review, everything that Donald Keith Hodges and/or the Trustee had paid on the Nissan Pulsar note since it was sold to Shannon Vaughn was refunded to the Trustee in July, 1993.

Since May, 1993, Shannon Vaughn continued to make \$250 monthly payments on the 1989 Nissan Pulsar. In September, 1994, when she made the final payment of \$277.75, the title was released to her.

Every payment made on the note that Shannon Vaughn assumed in 1990 was made by Shannon Vaughn, and it was paid in full and the title was released after the last payment.

Ms. Vaughn's Motion for Summary Judgment

Ms. Vaughn's motion for summary judgment asserts that she made all payments on the debt secured by the car and did not receive the title certificate until she

paid the debt in full. The motion relies on the evidence submitted by the bank in support of its motion.

Mr. Hodges' Answer to Ms. Vaughn's Motion for Summary Judgment

Mr. Hodges responded with his affidavit. He states that Ms. Vaughn, in his presence, executed a note to the bank for \$10,100. Mr. Gipson, the bank officer in charge of the transaction, agreed to hold the title certificate until Ms. Vaughn paid the debt. Ms. Vaughn began making payments on the debt, but when the chapter 13 payments paid off his original note, the bank released the title to Ms. Vaughn even though she had not completed payments.

Ms. Vaughn's Response

Ms. Vaughn responded with her own affidavit. She states that she agreed to buy the car for the pay-off to the bank, which was \$10,097. She paid the bank that amount plus accrued interest on the note. After the last payment, the bank released the title to her.

The Case File

The court can take judicial notice of certain facts shown by the case file. *Fed. R. Bankr. P.* 9017; *Fed. R. Evid.* 201; Hon. Barry Russell, *Bankruptcy Evidence Manual* § 201.5 (1995) It reveals the following. The bank's amended proof of claim, the one filed after confirmation of the modified plan, included a copy of the bank's contract with Mr.

Hodges. Mr. Hodges financed \$10,970. The annual percentage rate of interest was 13.23%. The repayment schedule required 48 monthly installments of \$295.55. On April 16, 1990, the court first confirmed a chapter 13 plan. It provided that the bank would be paid the amount of its claim with 12% interest at the rate of \$235.25 per month. It provided for 25% payment on unsecured claims. On May 10, 1993, Mr. Hodges filed a proposed modified plan. It provided for payment of the bank outside the plan and for 25% payment on unsecured claims. This proposed modified plan was apparently changed at the meeting of creditors to provide for 40% payment on unsecured claims. It was confirmed on June 14, 1993. On June 25, 1993 Mr. Hodges proposed a second modified plan. It provided for payment of the bank outside the plan and for 100% payment on unsecured claims. The court confirmed this plan on July 19, 1993. On February 12, 1996, the court entered an order releasing the chapter 13 withholding order on Mr. Hodges' earnings.

Discussion

The court can grant summary judgment only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Fed. R. Bankr. P. 7056(c); Fed. R. Civ. P. 56(c)*.

Under the original confirmed chapter 13 plan, the bank could not have had a claim for an unsecured balance on the car loan debt. The plan provided for payment of the full amount of the bank's claim plus interest. In other words, the plan treated the claim as fully secured. 11 U.S.C. § 1325(a)(5)(B). The arrangement with Ms. Vaughn was the same. She agreed to pay the full amount of the debt owed by Mr. Hodges at the time she

began payments plus interest. Thus, the bank still could not have had a claim for an unsecured balance on the car loan *if* Ms. Vaughn completed payments as agreed.

Mr. Hodges' allegations seem to mean that the bank did not agree to release him from the debt when he sold the car to Ms. Vaughn. Thus, the bank still had a claim against him to the extent Ms. Vaughn failed to pay the car loan debt. When the sale took place, Mr. Hodges did not amend the plan. The bank did not amend its claim or notify the chapter 13 trustee so that the plan might be modified. The bank deposited the chapter 13 payments on the car loan to Mr. Hodges checking account, took some of the payments to collect on the truck loan, which was made after confirmation of the plan, and applied some of the payments to the car loan, at the same time that Ms. Vaughn was supposed to be making payments.

When the chapter 13 trustee discovered this in the spring of 1993, it led to modification of the chapter 13 plan. The bank paid to the chapter 13 trustee about \$4,800. The bank calculated this amount on the basis of chapter 13 payments it had received and not applied to the car loan; in particular, it had applied \$1,600 to the truck loan and deposited \$3,200 to Mr. Hodges' checking account. The bank could have had a claim for this amount as new money paid to the trustee for Mr. Hodges' benefit, in effect a new loan. The bank, however, filed an unsecured claim for a slightly different amount and identified the claim as a claim for the unsecured balance of the car loan. Apparently, the bank still

had a claim against Mr. Hodges for the balance of the car loan, to the extent Ms. Vaughn failed to pay the debt. The bank also could have had a claim for new money; the money paid to the trustee.

Mr. Hodges' complaint asserts that the bank took money from his account that it should not have taken. This raises another question regarding the bank's claim. Did the bank set off part of the payment to the trustee against Mr. Hodges' account? The bank may have set off against Mr. Hodges' bank account on the ground that the money came from the chapter 13 payments in the first place. This does not mean the amount set off could be treated as the bank's money and repaid to it. In summary, the court is unable to determine the basis of the bank's unsecured claim for the \$4,800.

One thing is certain. The money was repaid to the bank. The bank's payment to the trustee caused it no loss except possibly some interest it failed to earn. Furthermore, the bank and Ms. Vaughn contend that she paid the entire car loan debt. If this is true, then the bank should not have collected any of the debt from Mr. Hodges after the first three payments under the chapter 13 plan. With these facts in mind, consider the chart below that summarizes the accounting furnished by the bank, specifically Ms. Anderson's list, for the period from the beginning of Mr. Hodges' chapter 13 case until April 1993.

Chapter 13 payments				Ms Vaughn's Payments
Month	Checking	Car Loan	Truck Loan	
1990 Aug.		386.34		
Sep.		192.96		
Oct.		246.30		
Total		825.60		
Nov.	243.46			250.00
Dec.	301.85			250.00
1991 Jan.	240.00			250.00
Feb.	239.00			250.00
Mar.				250.00
Apr.	535.52			250.00
May	238.88			250.00
Jun.	298.30			
Jul.	357.72			250.00
Aug.	119.18			250.00
Sep.	300.01			250.00
Oct.	237.90			250.00
Nov.	77.58		161.28	
Dec.				250.00
1992 Jan.	25.28		213.58	500.00
Feb.			238.23	250.00
Mar.			178.68	
Apr.				250.00
May			221.34	
Jun.			479.50	361.00
Jul.		104.97	111.85	250.00
Aug.		178.96		
Sep.		234.95		
Oct.		343.04		250.00
Nov.				
Dec.		370.96		
1993 Jan.		791.36		
Feb.		235.25		
Mar.		235.25		
Apr.				500.00
TOTALS	3,214.68	2,494.74	1,604.46	5,361.00

The chart shows that the bank applied about \$2,500 from Mr. Hodges' chapter 13 payments to the car loan debt after Ms. Vaughn began paying the debt. Thus,

the bank's evidence seems to mean that it received full payment of the car loan debt from Ms. Vaughn, and it received another \$2,500 on the car loan from Mr. Hodges' chapter 13 payments.

This makes the court doubt that Ms. Vaughn paid the entire car loan debt. Another problem adds to this doubt. The amortization of the debt by Ms. Vaughn does not work out or has not been proved. Beginning in November 1990, Ms. Vaughn was supposed to make payments of \$250 per month. The bank contends that Ms. Vaughn made the last payment in September 1994. The last payment was \$277.75. Thus, the actual payment period was 47 months. The original principal debt was \$10,097. For Ms. Vaughn to pay this amount plus interest in 46 monthly payments of \$250 and a final payment of \$277.75, the bank must have agreed to an interest rate below 8%. Seven months earlier the court had confirmed Mr. Hodges' chapter 13 plan with a 12% interest rate on the same debt.

Furthermore, the bank's accounting shows that Ms. Vaughn was almost nine payments behind in April 1993. The deficit was \$2,139. Ms. Vaughn could not have paid off the debt in September 1994 by making regular monthly payments of \$250 plus \$277.75 in the last month. She would have been required to make extra payments to catch up the amount she was behind (probably with interest). Of course, the bank would not have been concerned with this arrearage if it had collected the missed payments from Mr. Hodges' checking account.

Suppose the bank required Ms. Vaughn to pay a much higher interest rate, such as the 12% in Mr. Hodges' chapter 13 plan. Ms. Vaughn could have paid the debt in full in September 1994 only by making payments that averaged much more than \$250 per month after April 1993. She would have been required to pay not only the arrearage but also extra principal.

The bank has not introduced any evidence of its agreement with Ms. Vaughn, any evidence of exactly what payments she made after April 1993, or any evidence of deductions from Mr. Hodges' checking account during his chapter 13 case.

The court cannot grant summary judgment to the bank or Ms. Vaughn on this evidence. It suggests that Ms. Vaughn did not pay all of Mr. Hodges' debt, as agreed, or that the bank was overpaid on the car loan debt since it received full payment from Ms. Vaughn and another \$2,500 from Mr. Hodges.

The bank argues that these facts are irrelevant because all the disputes between it and Mr. Hodges were finally decided as a result of confirmation of the modified plan in July 1993. In other words, confirmation of the modified plan in July 1993 precludes Mr. Hodges from questioning the effect of his prior dealings with the bank and the effect of its subsequent dealings with Ms. Vaughn.

The court does not agree. The modified plan provided for payment of the car loan debt "outside the plan." "Outside the plan" generally means direct payment instead of payment through the chapter 13 trustee. *Foster v. Heitkamp (In re Foster)*, 670 F.2d 478

(5th Cir. 1982). It does not necessarily mean that Mr. Hodges gave up any claim he might have against the bank based on their prior dealings or subsequent events.

The modified plan also provided for full payment of unsecured claims. The bank filed an unsecured claim, no one objected, and the claim was paid. The chapter 13 trustee apparently agreed not to object to the claim. The evidence does not show that Mr. Hodges agreed not to object.

Confirmation usually does not settle the validity or amount of unsecured claims. The debtor generally can object to a claim after confirmation. *Woolaghan v. United Mortgage Services, Inc. (In re Woolaghan)*, 140 B.R. 377 (Bankr. W. D. Pa. 1992); *In re Ross*, 162 B.R. 785 (Bankr. N. D. Ill. 1993). The court sees nothing in the modified plan that amounts to a settlement of claims between the bank and Mr. Hodges.

The real question seems to be whether Mr. Hodges waited too long to raise the issues raised in his complaint. The complaint could be viewed as an objection to the bank's claim. The letter from the bank's lawyer to Mr. Hodges' lawyer, in May 1993, revealed that the bank applied some of Mr. Hodges' chapter 13 payments to the car loan at the same time that Ms. Vaughn was supposed to be paying the debt. The bank's evidence shows that this amounted to about \$2,500. If the bank never released Mr. Hodges' from the car loan debt, he could have ultimately been liable to the bank for this \$2,500 and more.

In this regard, the bank apparently is *not* arguing that confirmation of the modified plan somehow released Mr. Hodges from the car loan debt. The bank also has not argued that there was a new agreement with Mr. Hodges, such as an agreement to release him from the car loan in return for being allowed to keep the \$2,500. Thus, the evidence does not show that the bank ever released Mr. Hodges from the car loan.

As a result, the bank could have had a claim to the \$2,500 until Ms. Vaughn finished paying the car loan debt, which supposedly occurred more than a year after confirmation of the modified plan. The point is that Mr. Hodges was not necessarily entitled to a return of the \$2,500 or a credit against the bank's claim when the court confirmed his modified chapter 13 plan. Mr. Hodges could have assumed that the bank was entitled to keep this money until Ms. Vaughn finished paying the debt; then the bank would return it to him. Mr. Hodges certainly did not intend that the bank could treat this money as having been paid by Ms. Vaughan and release the title certificate to her before she paid the car loan debt in full. Mr. Hodges did not complete payments on the bank's \$4,800 unsecured claim until January 1996. He filed his complaint on April 9, 1996. The court does not think the complaint came too late. If cause is shown, the court can reconsider a claim at any time during a case. 11 U.S.C. § 502(j). Mr. Hodges had proved good cause for reconsideration of the bank's claim. *United States v. Rhode (In re R & W Enterprises)*, 181 BR. 624 (Bank. N. D. Fla. 1994); *In re Lee*, 189 BR. M. D. Tenn. 1995).

For these reasons, the court will enter an order denying the motions for summary judgment.

This Memorandum constitutes findings of fact and conclusions of law as required by Fed. R. Bankr. P. 7052.

ENTER:

BY THE COURT

[entered 3/20/1997]

R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE
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In re:

No. 90-10805
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Debtor(s)

DONALD KEITH HODGES

Plaintiff

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Adversary Proceeding
No. 96-1074

COFFEE COUNTY BANK, ROY GIPSON
and SHANNON VAUGHN,

Defendants

ORDER

In accordance with the Memorandum entered by the court,

It is ORDERED that the Motion for Summary Judgment filed on behalf of Coffee
County Bank is DENIED; and

It is further ORDERED that the Motion for Summary Judgment filed on behalf of
Shannon Vaughn is DENIED.

ENTER:

BY THE COURT

[entered 3/20/1997]

R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE