

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF TENNESSEE  
WINCHESTER DIVISION

In re:

No. 97-12851

Chapter 13

JOE BAKER  
KELLY BAKER

Debtor(s)

**MEMORANDUM AND ORDER**

This case is before the court on the objection by the debtors to the claim of Nissan Motor Acceptance Corporation (NMAC) because it was filed after the bar date. The debtors filed their Chapter 13 case in May 1997. The schedules listed a debt to Nissan Motor Acceptance Corporation (NMAC) secured by a 1993 Nissan Altima automobile. The court confirmed a Chapter 13 plan that splits NMAC's claim into two claims, a secured claim for \$10,000 and an unsecured claim for the balance of the debt. The plan provides for payment of the \$10,000 secured claim with interest. NMAC filed its proof of claim about 17 months after the bar date. The debtors filed an objection to NMAC's claim without stating a basis for the objection. NMAC filed a written response, and the original hearing was continued by mutual consent.

At the hearing, the court asked the debtors' attorney if the objection applied only to the NMAC's unsecured claim or also to the secured claim. In situations like this, the objection is usually directed only to the unsecured claim because disallowance of the secured claim will not benefit the debtor. For example, if the court disallows NMAC's secured claim, it will not be paid under the Chapter 13 plan, but when the debtors complete the plan and receive a discharge, the car will still be subject to NMAC's security interest. *Southtrust Bank of Alabama v. Thomas (In re Thomas)*, 883 F.2d 991 (11<sup>th</sup> Cir. 1989) cert. den. 497 U.S. 1007 (1990); *Washington v. Nissan Motor Acceptance Corp. (In re Washington)*, 158 B.R. 722 (Bankr. S. D.

Ohio 1993); *see also In re Baldrige*, 232 B.R. 394 (Bankr. N. D. Ind. 1999) (necessity of filing proof of claim). As a result, the debtors will not be able to keep the car without paying NMAC even if the court disallows the secured claim.

The debtors' attorney indicated that the objection also applied to NMAC's secured claim. The court stated that it would enter an order disallowing both the secured portion and the unsecured portion of the claim filed by NMAC. On reconsideration, the court believes its decision was wrong as to NMAC's secured claim.

The confirmed plan had the effect of forcing NMAC into a modified contract with the debtors. *Memphis Bank & Trust Co. v. Whitman*, 692 F.2d 427 (6<sup>th</sup> Cir. 1981); *Associates Commercial Corp. v. Rash*, — U.S. —, 117 S.Ct. 1879, 138 L.Ed.2d 148 (1997). The cram-down provision gave the debtors a choice of confirmable plans. They could surrender the car or they could keep it in return for payments under the plan on NMAC's secured claim. The debtors chose to keep the car in return for paying NMAC's secured claim as provided in the plan. 11 U.S.C. § 1325(a)(5)(B) & (C). The debtors' right to keep the car depends on NMAC's receipt of payments under the plan. *Cone v. Davies (In re Davies)*, 143 B.R. 747 (Bankr. D. Idaho 1992); *In re Hines*, 20 B.R. 44 (Bankr. S. D. Ohio 1984). Thus, the confirmed plan is essentially a contract under which the debtors have promised to pay NMAC's secured claim, as provided in the plan, in return for continued possession of the car and eventual release of the security interest. The confirmed plan binds the debtors and bars them from obtaining disallowance of the secured claim on the ground of late filing. 11 U.S.C. § 1327(a); *In re Dennis*, 230 B.R. 344 (Bankr. D. N. J. 1999); *Cone v. Davies (In re Davies)*, 143 B.R. 747 (Bankr. D. Idaho 1992).

The result might also be based on judicial estoppel. The debtors obtained confirmation of a plan that allows them continued possession of the car and eventual release of NMAC's security interest. They obtained confirmation of this plan on the basis of the promise to pay NMAC as provided in the plan. They can not renege on the promise to make payments to NMAC solely because it failed to file a timely proof of claim. *In re Rankin*, 141 B.R. 315 (Bankr. W. D. Tex. 1992); *Citizens Bank of Americus v. Kennedy (In re Kennedy)*, 79 B.R. 950 (Bankr. M. D. Ga. 1987); *In re Burkey Lumber Co.*, 149 B.R. 177 (Bankr. D. Colo. 1993); see also *In re Alcon Demolition, Inc.*, 204 B.R. 440 (Bankr. D. N. J. 1997) (extent of estoppel); *Griffith v. Wal-Mart Stores, Inc.*, 135 F.3d 376 (6<sup>th</sup> Cir. 1998) (judicial estoppel generally).

In this regard, the court also notes that the debtors have not shown any prejudice to them as a result of NMAC's late filing. None is apparent from the record.

Confirmation of the plan did not, however, bar the objection to NMAC's unsecured claim. *In re Ross*, 162 B.R. 785 (Bankr. N. D. Ill. 1993). Confirmation was not based on the allowance or disallowance of any particular unsecured claim. Proof of compliance with the cram-down standard as to unsecured claims did not require it. 11 U.S.C. § 1325(a)(4). The plan also did not make any specific representations as to payment of NMAC's unsecured claim. Accordingly,

IT IS ORDERED THAT claim number 11 filed by Nissan Motor Acceptance Corporation is allowed as a secured claim in the amount of \$10,000, and the balance of the claim is disallowed.

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

ENTER:

BY THE COURT

---

R. THOMAS STINNETT  
UNITED STATES BANKRUPTCY JUDGE

entered Sept. 1, 1999