

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 04-33324

JEFFREY SCOTT HODGE
PHYLLIS ANN HODGE
a/k/a PHYLLIS ANN COTTRELL HODGE
a/k/a PHYLLIS ANN COTTRELL

Debtors

**MEMORANDUM ON OBJECTION OF GENERAL MOTORS
ACCEPTANCE CORPORATION TO CONFIRMATION OF
CHAPTER 13 PLAN AND MOTION FOR NEW TRIAL**

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**RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE**

This contested matter is before the court upon the Objection of General Motors Acceptance Corporation to Confirmation of Chapter 13 Plan and Motion for New Trial (Objection) filed on January 11, 2005, asking the court to vacate the Order Confirming Chapter 13 Plan (Confirmation Order) entered on January 10, 2005, and to consider and ultimately sustain its objection to confirmation of the Debtors' Modified Chapter 13 Plan.

An evidentiary hearing on the Objection was held on March 2, 2005. The record before the court consists of one exhibit stipulated into evidence, along with all relevant documents contained in the Debtors' bankruptcy file, of which the court, upon agreement of the parties, takes judicial notice pursuant to Rule 201 of the Federal Rules of Evidence. No oral testimony was introduced into evidence.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(A) and (O) (West 1993).

I

General Motors Acceptance Corporation (GMAC) is the holder of the following contracts, executed by Mr. Hodge: (1) a Retail Installment Sale Contract dated February 27, 2004, in the amount of \$42,357.05 for the purchase of a 2004 Chevrolet Silverado to be paid \$641.66 monthly over seventy-two months at an annual percentage rate of 2.90%; and (2) a Retail Installment Sale Contract dated September 4, 2003, in the amount of \$50,303.77 for the purchase of a 2003 Chevrolet Suburban to be paid \$839.62 over seventy-two months at an annual percentage rate of 6.25%.

On June 22, 2004, the Debtors filed the Voluntary Petition commencing their case under Chapter 7. The case was subsequently converted to Chapter 13 on September 24, 2004, and the Debtors filed their Chapter 13 Plan on October 7, 2004 (Original Plan). Following conversion to Chapter 13, an Order & Notice of Chapter 13 Bankruptcy Case, Meeting of Creditors, & Deadlines (Conversion Notice) was issued by the court clerk on October 22, 2004, and served on October 24, 2004, on all creditors and parties in interest, evidencing, among other things, that the meeting of creditors would be held on November 15, 2004. The Conversion Notice, with a copy of the Original Plan attached, also scheduled the hearing on confirmation for December 8, 2004, if objections to confirmation were timely filed pursuant to the Local Rules of the United States Bankruptcy Court for the Eastern District of Tennessee. The Conversion Notice also stated that, absent objection, the court could confirm the Original Plan without a hearing or further notice. GMAC was served with the Conversion Notice and the Original Plan.

The Original Plan proposed bi-weekly payments by the Debtors of \$1,780.00 to the Chapter 13 Trustee for sixty months, payment of all secured claims and administrative expenses, and a 100% dividend to non-priority unsecured creditors. In the Original Plan, the Debtors valued the Silverado at \$28,000.00, proposing monthly payments of \$1,100.00 plus 2% interest, and they valued the Suburban at \$30,000.00, proposing to pay \$1,300.00 per month together with 5% interest.¹ None of the Debtors' creditors objected to the Original Plan; however, the Chapter 13 Trustee filed an objection on November 18, 2004, arguing that the Original Plan was not feasible and expressing concerns with the Debtors' acceleration of

¹ These values are consistent with those given by the Debtors in their statements and schedules, subject to the scheduled debts of \$41,293.88 on the Silverado and \$45,587.08 on the Suburban. During the course of their Chapter 7 case, the Debtors reaffirmed the debt to GMAC for both vehicles under the original terms of the September 4, 2003, and February 27, 2004 Retail Installment Contracts.

GMAC's debts. Pursuant to the Conversion Order, the confirmation hearing was held on December 8, 2004, at which only the Debtors and the Chapter 13 Trustee were present. The hearing was adjourned to December 22, 2004, and, subsequently, to January 5, 2005.²

In the meantime, in response to the Trustee's objection, the Debtors filed a Modified Chapter 13 Plan Prior to Confirmation on December 17, 2004 (Modified Plan). Under the terms of the Modified Plan, the Debtors increased their bi-weekly payments to \$1,785.00. They also modified their proposed treatment of GMAC's claims, proposing to decrease the monthly payment on the Silverado to \$805.00 and to decrease the monthly payment on the Suburban to \$905.00. The Debtors did not change their valuations of the vehicles, nor did they modify the proposed interest rates. The Certificate of Service attached to the Modified Plan evidences that it was served on GMAC by mail on December 16, 2004. In addition, the Debtors filed a Notice of Hearing on December 17, 2004 (Confirmation Notice), stating that the confirmation hearing would be held on January 5, 2005. The Certificate of Service attached to the Confirmation Notice also evidences that it was mailed on December 16, 2004.

The hearing on confirmation of the Modified Plan was held by the court on January 5, 2005. No objections to the Modified Plan were filed, and, as before, only the Debtors and the Trustee appeared. At the hearing, the Debtors agreed to the following additional modifications: (1) all claims not properly documented were subject to the Trustee's objection regardless of confirmed treatment; (2) the Trustee was not obligated to insure any property of the Debtors' estate; and (3) upon the Trustee's certification that the plan payments were delinquent, the case would be dismissed without further notice or hearing. Because

² Again, only the Debtors and the Chapter 13 Trustee appeared at the two adjourned hearings.

the Modified Plan cured the Trustee's concerns, her objections were withdrawn on January 7, 2005. The court, thereafter, entered the Confirmation Order on January 10, 2005.

GMAC filed its Objection on January 11, 2005, objecting to confirmation of the Modified Plan. In support of its objection, GMAC contends that the Modified Plan does not adequately protect its interest in the Silverado and the Suburban, was not proposed in good faith, and does not pay GMAC the value of its claims at an appropriate rate of interest. GMAC also avers that it did not receive proper notice of the Modified Plan, which significantly changed GMAC's treatment from the Original Plan, and that the confirmation hearing was held sooner than the time allowed by the Federal Rules of Bankruptcy Procedure. Accordingly, GMAC requests that the court vacate the Confirmation Order and entertain its objections to confirmation of the Modified Plan. Additionally, on January 7, 2005, GMAC filed a Proof of Claim in the amount of \$39,186.47 for the Silverado, which it valued at \$28,900.00. It also filed a Proof of Claim in the amount of \$43,321.34 for the Suburban, valuing it at \$35,275.00.³

The issues before the court are as follows: (1) whether the Confirmation Order should be vacated because GMAC did not receive notice that its secured claims were being treated differently than in the Original Plan; and (2) if the Confirmation Order is vacated, whether the Modified Plan provides for the cramdown of GMAC's claims in the manner required by 11 U.S.C.A. § 1325(a)(5)(B)(ii) (West 2004).

The Debtors argue that the Confirmation Order should not be vacated, and GMAC's Objection should be overruled because GMAC had an opportunity to object to its treatment in both the Original Plan

³ In an earlier Proof of Claim filed on July 15, 2004, in the Debtors' Chapter 7 case, GMAC valued the Suburban at \$31,500.00. It has offered no basis for the \$3,775.00 increase in value between July 2004 and January 2005.

and the Modified Plan, but it failed to do so. First, the Debtors argue that the Modified Plan was served on GMAC and that it did not appear at the confirmation hearing or otherwise object to its treatment under the Modified Plan. Accordingly, they contend that GMAC's Objection is untimely. Second, the Debtors argue that GMAC's objection to confirmation of the Modified Plan, based upon the valuations of the vehicles and the proposed interest rates, should not be entertained because those aspects did not change between the Original Plan and the Modified Plan. Therefore, because GMAC did not object to the Original Plan, the Debtors contend that it should not now be allowed to object to valuation and interest rate.

On the other side, GMAC argues that it did not object to the Original Plan because, based upon the monthly payments proposed, the Silverado would have been repaid in twenty-seven months, and the Suburban would have been repaid within twenty-five months. GMAC maintains that the Modified Plan significantly altered its treatment because it extended the repayment period for both vehicles to thirty-six months and reduced the amount GMAC was to collect each month by almost \$700.00. Accordingly, the decreased payments are not acceptable to GMAC, which also then objects to the valuations and the proposed interest rates. With respect to the Confirmation Notice, GMAC argues that it did not include any deadline for filing objections to the Modified Plan, nor was GMAC given any subsequent notice of an objection deadline. Finally, GMAC argues that the confirmation hearing violated the express terms of Federal Rule of Bankruptcy Procedure 2002(b), which requires a minimum of twenty-five days for objections to confirmation.

II

The first issue before the court is whether the Confirmation Order should be vacated because GMAC did not receive proper notice of the Modified Plan proposing to change the treatment of its secured claims, whereby GMAC was not given the opportunity to object to confirmation. In essence, GMAC has requested that the court alter or amend its Confirmation Order entered on January 10, 2005, pursuant to Federal Rule of Civil Procedure 59(e), which is applicable in bankruptcy cases by virtue of Rule 9023 of the Federal Rules of Bankruptcy Procedure.

Rule 59(e) “can only be used in limited circumstances, and should be used sparingly.” *In re Barber*, 318 B.R. 921, 923 (Bankr. M.D. Ga. 2004). “Motions to alter or amend judgment may be granted if there is a clear error of law, newly discovered evidence, an intervening change in controlling law, or to prevent manifest injustice.” *Gencorp, Inc. v. Am. Int’l Underwriters*, 178 F.3d 804, 834 (6th Cir. 1998) (internal citations omitted). On the other hand, consideration of a motion under Rule 59(e) does not allow the party to reargue his case. *In re No-Am Corp.*, 223 B.R. 512, 514 (Bankr. W.D. Mich. 1998); *see also Mathis v. United States (In re Mathis)*, 312 B.R. 912, 914 (Bankr. S.D. Fla. 2004) (“The function of a motion to alter or amend a judgment is not to serve as a vehicle to relitigate old matters or present the case under a new legal theory . . . [or] to give the moving party another ‘bite at the apple’ by permitting the arguing of issues and procedures that could and should have been raised prior to judgment.”) (citing *In re Halko*, 203 B.R. 668, 672 (Bankr. N.D. Ill. 1996)). “Nor should Rule 59(e) be viewed as a means for overcoming one’s failure to litigate matters fully.” *Condor One, Inc. v. Homestead Partners, Ltd. (In re Homestead Partners, Ltd.)*, 201 B.R. 1014, 1018 (Bankr. N.D. Ga. 1996). “Arguments and

evidence which could have been presented earlier in the proceedings cannot be presented in a Rule 59(e) motion.” *In re See*, 301 B.R. 554, 555 (Bankr. N.D. Iowa 2003).

Based upon the arguments advanced by GMAC, it is proceeding under the contention that inadequate notice of the confirmation hearing is a clear error of law, which compels the court to alter or amend the Confirmation Order. “An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Cent. Hanover Bank & Trust Co.*, 70 S. Ct. 652, 657 (1950). In line with that proposition, Federal Rule of Bankruptcy Procedure 2002 provides the guidelines for providing notice of various bankruptcy matters to parties in interest.

GMAC argues that it should have been afforded twenty-five days notice of the confirmation hearing pursuant to Rule 2002(b), which provides, in material part, that all creditors shall be given “not less than 25 days notice by mail of . . . the time fixed for filing objections and the hearing to consider confirmation of a . . . chapter 13 plan.” FED. R. BANKR. P. 2002(b). However, all of the Debtors’ creditors were given notice of the confirmation hearing by the Conversion Notice, which scheduled the hearing for December 8, 2004, in the event that any objections to confirmation were timely filed. The Trustee filed an objection to confirmation of the Original Plan, and the court held a hearing on December 8, 2004. No creditors, including GMAC, appeared at this hearing, which was adjourned to December 22, 2004, and again to

January 5, 2005. Likewise, no creditors, including GMAC, appeared at either of the adjourned confirmation hearings.⁴

The Debtors modified their Original Plan to cure the Trustee's objection to confirmation.

Modification of Chapter 13 plans prior to confirmation is addressed in § 1323, which provides as follows:

(a) The debtor may modify the plan at any time before confirmation, but may not modify the plan so that the plan as modified fails to meet the requirements of section 1322 of this title.

(b) After the debtor files a modification under this section, the plan as modified becomes the plan.

(c) Any holder of a secured claim that has accepted or rejected the plan is deemed to have accepted or rejected, as the case may be, the plan as modified, unless the modification provides for a change in the rights of such holder from what such rights were under the plan before modification, and such holder changes such holder's previous acceptance or rejection.

11 U.S.C.A. § 1323 (West 2004). Under § 1323(c), GMAC was deemed to have accepted the Modified Plan unless it explicitly rejected it; i.e., filed an objection.

⁴ Objections to confirmation in Chapter 13 cases are also governed, in part, by E.D. Tenn. LBR 3015-3, which provides as follows:

In the Northern and Northeastern Divisions, objections to confirmation of chapter 13 plans shall be filed prior to the conclusion of the meeting of creditors held pursuant to 11 U.S.C. § 341(a). However, the chapter 13 trustee and any creditor attending and participating in the meeting of creditors will be allowed until the close of business on the third business day following the conclusion of the meeting within which to file an objection. An objection filed after the dates fixed in this rule will not be considered unless the court, for cause, extends the time. An objection to confirmation of a chapter 13 plan must be in writing, must set forth with specificity the grounds relied upon by the objecting party, and must contain a certificate of service evidencing service on the debtor, debtor's counsel, chapter 13 trustee, and any other party affected by the objection.

E.D. Tenn. LBR 3015-3 (supplementing Rule 3015 of the Federal Rules of Bankruptcy Procedure). In this case, the Debtors' meeting of creditors was held on November 15, 2004. No creditors were present, so under the Local Rules, any objections to confirmation of the Debtors' Original Plan filed after November 15, 2004, were untimely.

With respect to the time for objecting to a modified plan, the applicable rule is Rule 2002(a)(5) rather than Rule 2002(b), which prescribes a twenty day notice of “the time fixed to accept or reject a proposed modification of a plan[.]” FED. R. BANKR. P. 2002(a)(5). The Modified Plan and Confirmation Notice were mailed on December 16, 2004. The computation of the twenty days began on the following day, December 17, 2004. *See* FED. R. BANKR. P. 9006(a) (“[T]he day of the act . . . from which the designated period of time begins to run shall not be included.”). The confirmation hearing was held on the twentieth day, January 5, 2005; however, GMAC could reject the previously accepted plan any time prior to confirmation. The Confirmation Order was not entered until January 10, 2005, which was the twenty-fifth day following mailing of the Modified Plan and Confirmation Notice. Moreover, the January 5, 2005 confirmation hearing was not a new hearing date, but instead, was the third adjournment of the original confirmation hearing scheduled for December 8, 2004. Clearly, GMAC did not file an objection prior to that date.

Even under Rule 2002(b), GMAC’s Objection, which was filed on the twenty-sixth day after mailing of the Modified Plan and Confirmation Notice, was not timely. The critical time period is not calculated from the date upon which the Modified Plan and Confirmation Notice were filed with the court; it is calculated from the date upon which these documents were mailed by the Debtors’ attorney. Rule 2002(b) states that creditors must be given “not less than 25 days notice by mail,” not that a notice must be filed at least twenty-five days before the hearing date. FED. R. BANKR. P. 2002(b). On the other hand, GMAC was required to actually file and serve its Objection before confirmation. *See* FED. R. BANKR. P. 3015(f) (“An objection to confirmation of a plan shall be filed and served on the debtor, the trustee, and

any other entity designated by the court . . . before confirmation of the plan.”). The Objection was served on January 10, 2005, and filed on January 11, 2005. Although the Objection was served on the twenty-fifth day following service of the Confirmation Notice, it was filed outside the twenty-five days set forth in Rule 2002(b), and, more importantly, the Objection was not filed until after the Confirmation Order was entered by the court on January 10, 2005.⁵ Accordingly, based upon the foregoing analysis, the court determines that no clear error of law has transpired to justify the alteration or amendment of the Confirmation Order.

Additionally, GMAC did not present any newly discovered evidence to support vacating the Confirmation Order, nor is there any manifest injustice to be avoided. Manifest injustice is defined as “[a]n error in the trial court that is direct, obvious, and observable, such as a defendant’s guilty plea that is involuntary or that is based on a plea agreement that the prosecution rescinds.” BLACK’S LAW DICTIONARY 974 (7th ed. 1999). GMAC argues that it will be prejudiced by allowing the Confirmation Order and Modified Plan to stand because it will take longer to pay off its secured claims, and based upon the risk that the Debtors’ Chapter 13 could be dismissed, that extension, coupled with the valuations and interest rates proposed, provide justification with vacating the Confirmation Order, entertaining the Objection, and ultimately, sustaining it.

⁵ Additionally, GMAC argues that it was entitled to an additional three days under Federal Rule of Bankruptcy Procedure 9006(f). This argument is misplaced. “Rule 9006(f) applies only when the time to respond is triggered by service of the pleading or order in question. It does not apply in other circumstances, such as when the time to serve a pleading is fixed by another rule or by the Code.” 10 COLLIER ON BANKRUPTCY ¶ 9006.12[3] (15th ed. rev. 2004).

There are only three changes in the terms of the Modified Plan from the Original Plan. First, the Debtors increased their bi-weekly payments from \$1,780.00 to \$1,785.00. Second, they decreased the monthly payment on the Silverado from \$1,100.00 to \$805.00. Third, the Debtors decreased the monthly payment on the Suburban from \$1,300.00 to \$905.00. The valuations and interest rates for the Silverado and the Suburban did not change between the Original Plan and the Modified Plan. The effects of these changes are as follows: (1) with respect to the Silverado, the payoff time is extended from twenty-seven months to thirty-six months; and (2) with respect to the Suburban, the payoff period is extended from twenty-five to thirty-six months. The court is satisfied that this extension of time does not prejudice GMAC,⁶ and that allowing the Confirmation Order and Modified Plan to stand will not result in the type of manifest injustice envisioned by Rule 59(e). Similarly, GMAC could have objected to the terms in the Original Plan dealing with the proposed valuations and interest rates, yet it did not. “[M]anifest injustice does not exist where, as here, a party could have easily avoided the outcome, but instead elected not to act until after a final order had been entered.” *Piper v. United States DOJ*, 312 F. Supp. 2d 17, 23 (D.C. 2004) (quoting *Ciralsky v. CIA*, 355 F.3d 661, 673 (D.C. Cir. 2004)).

In summary, the court declines to alter or amend the Confirmation Order.

When the Modified Plan was confirmed on January 10, 2005, the following effects attached:

⁶ Under the terms of GMAC’s Retail Installment Contract, calling for payments over seventy-two months, the Suburban would be paid off in September 2009, and the Silverado would be paid out in February 2010. Under the terms of the Confirmed Plan, both vehicles will be paid off well in advance of these contractually agreed upon dates. GMAC’s argument that it is prejudiced because it will take longer to pay off its secured claims under the Modified Plan than under the Original Plan is, at best, disingenuous.

(a) The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as otherwise provided in the plan or in the order confirming the plan, the property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for in the plan.

11 U.S.C.A. § 1327 (West 2004). Creditors who fail to object to a Chapter 13 plan are deemed to have accepted the terms within. *In re Vankell*, 311 B.R. 205, 210 (Bankr. E.D. Tenn. 2004). Accordingly, a confirmed Chapter 13 plan is res judicata, and as such, absent a default under the terms of the confirmed plan, creditors are precluded from making post-confirmation assertions of any interest other than those specifically provided for in the plan. *In re Crowley*, 258 B.R. 587, 591 (Bankr. D. Vt. 2000). GMAC did not timely object to the Modified Plan, and is, therefore, bound by the terms set forth within.

An order consistent with this Memorandum will be entered.

FILED: March 8, 2005

BY THE COURT

s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 04-33324

JEFFREY SCOTT HODGE
PHYLLIS ANN HODGE
a/k/a PHYLLIS ANN COTTRELL HODGE
a/k/a PHYLLIS ANN COTTRELL

Debtors

ORDER

For the reasons stated in the Memorandum on Objection of General Motors Acceptance Corporation to Confirmation of Chapter 13 Plan and Motion for New Trial filed this date, the court directs that, to the extent General Motors Acceptance Corporation, by its Objection of General Motors Acceptance Corporation to Confirmation of Chapter 13 Plan and Motion for New Trial filed on January 11, 2005, seeks to alter or amend the January 10, 2005 Order Confirming Chapter 13 Plan, its Motion is DENIED. All other issues are thereby rendered moot.

SO ORDERED.

ENTER: March 8, 2005

BY THE COURT

s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE