



SO ORDERED.
SIGNED this 23rd day of September, 2014

THIS ORDER HAS BEEN ENTERED ON THE DOCKET.
PLEASE SEE DOCKET FOR ENTRY DATE.

A handwritten signature in black ink, appearing to read "Richard Stair Jr.", written over a horizontal line.

Richard Stair Jr.
UNITED STATES BANKRUPTCY JUDGE

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

In re

Case No. 13-32603

AMY MARIE THOMPSON

Debtor

**MEMORANDUM AND ORDER ON
MOTION FOR RELIEF FROM STAY**

Before the court is the Motion for Relief From Stay filed by First Heritage Credit on July 29, 2014, seeking modification of the automatic stay to allow it to foreclose its lien encumbering the Debtor's 2004 Ford Focus, diamond earrings, diamond sapphire earrings, laptop, two Magnavox televisions, and two DVD players. The Debtor opposes the Motion for Relief From Stay, arguing that the creditor, whose late-filed claims were disallowed, should not be allowed stay relief in the face of the Debtor's confirmed Chapter 13 plan providing for payment of First Heritage Credit's claim.

The court takes judicial notice, pursuant to Rule 201 of the Federal Rules of Evidence, of the following undisputed material facts. The Debtor filed the Voluntary Petition commencing her Chapter 13 bankruptcy case on July 16, 2013, and listed in her Schedule D - Creditors Holding Secured Claims a debt owed to First Heritage Credit in the amount of \$4,091.00, secured by a 2004 Ford Focus valued at \$3,000.00, with an unsecured portion of \$1,091.00. The meeting of creditors was held on August 29, 2013, and November 27, 2013, was set as the deadline for filing proofs of claim for all creditors other than governmental units. No objections to confirmation of the Debtor's proposed Chapter 13 plan were filed, and on September 6, 2013, the court entered an Order Confirming Chapter 13 Plan providing for, *inter alia*, bi-weekly payments in the amount of \$440.00 for sixty months, payment of all tax refunds, and a 100% dividend to unsecured creditors. The Confirmed Plan specifically addresses First Heritage Credit's claim, valuing the 2004 Ford Focus securing the claim at \$3,000.00, to be paid \$250.00 monthly plus 6% interest, with any unsecured portion to be paid with other general unsecured creditors, and provides that upon payment of the underlying debt or discharge, First Heritage Credit's claim would be released.

On March 11, 2014, First Heritage Credit filed a proof of claim in the amount of \$3,704.48. A second proof of claim was filed by First Heritage Credit on April 15, 2014, in the amount of \$3,454.48. Both proofs of claim attached documents supporting First Heritage Credit's claim to a security interest in the 2004 Ford Focus and other described personal property. Because both claims were filed after the November 27, 2013 claims bar date, the Chapter 13 Trustee filed objections to First Heritage Credit's claims on April 17, 2014 and June 18, 2014, respectively. On May 21, 2014, the court entered an Order Resolving Chapter 13 Trustee Objection to Proof of Claim Filed by

Sharon Frankenberg on Behalf of First Heritage Credit, disallowing the late-filed claim filed by First Heritage Credit on March 11, 2014, and on July 22, 2014, the court entered an Order Resolving Chapter 13 Trustee Objection to Proof of Claim Filed by First Heritage Credit disallowing the late-filed claim filed by First Heritage Credit on April 15, 2014.

On July 29, 2014, First Heritage Credit filed a Motion for Relief From Stay, seeking to terminate the automatic stay with respect to the 2004 Ford Focus and other collateral securing its claim for lack of adequate protection. At the hearing on the Motion for Relief From Stay, the court afforded the Debtor time to file a brief in support of her opposition, which she filed on September 10, 2014, arguing that she has complied with the terms of and made all payments due under the Confirmed Chapter 13 Plan, which is binding on creditors, and that First Heritage Credit's failure to timely file a proof of claim and participate in distribution under the plan should be subject to equitable considerations, especially in light of the fact that the 2004 Ford Focus securing First Heritage Credit's claim is the Debtor's sole form of transportation.

Motions for relief from the stay are governed by 11 U.S.C. § 362(d), which provides, as is material to this contested matter:

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay —

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest[.]

11 U.S.C. § 362(d)(1) (2006). First Heritage Credit, as the creditor seeking relief from the automatic stay, “bears the burden of producing evidence establishing a legally sufficient basis for such relief”

and must establish that the Debtor owes it a debt, that it possesses a valid security interest securing the debt, and that the collateral securing the debt is declining in value while the Debtor has failed to provide adequate protection. *In re Vankell*, 311 B.R. 205, 215 (Bankr. E.D. Tenn. 2004) (citations omitted). As is reflected in her statements and schedules as well as her Confirmed Chapter 13 Plan, the Debtor does not dispute that First Heritage Credit holds a security interest in the 2004 Ford Focus and other described personal property. There is also no dispute that First Heritage Credit filed two claims which were disallowed as late-filed claims and is, therefore, not receiving disbursements from the Chapter 13 Trustee under the Debtor's Confirmed Plan. *See* FED. R. BANKR. P. 3021 (“[A]fter a plan is confirmed, distribution shall be made to creditors whose claims have been allowed[.]”). Accordingly, because First Heritage Credit is not receiving payments on its debt, the value of its lien on the 2004 Ford Focus is declining, and it is not being adequately protected.

The court recognizes that the Debtor did as she was required by scheduling First Heritage Credit's claim in her statements and schedules and by providing for payment of its claim in her Chapter 13 plan. Nevertheless, secured creditors are not, pursuant to Rule 3002 of the Federal Rules of Bankruptcy Procedure, required to file proofs of claim unless they want to participate in distribution under a confirmed plan, and the failure to file a proof of claim does not affect the lien securing the underlying debt.

In *In re Kressler*, 252 B.R. 632, 633 (Bankr. E.D. Pa. 2000), the bankruptcy court succinctly summarized the result of a secured creditor failing to file a timely proof of claim in a Chapter 13 debtor's bankruptcy. The court observed:

[T]he failure of a secured creditor to file a proof of claim will not result in the loss of the creditor's lien and generally speaking, after the bankruptcy case is concluded, the creditor may pursue the collateral to satisfy its lien.

This court recognizes that the holder of a secured claim has the option of relying solely on its lien in satisfaction of debtor's indebtedness and to therefore opt to decline to file a proof of claim if the secured creditor wants no distribution under a proposed plan.

In re Hogan, 346 B.R. 715, 723 (Bankr. N.D. Tex. 2006) (internal citations omitted).

Notwithstanding the above, the Debtor argues in her brief that it is unreasonable and inequitable for First Heritage Credit to chose not to participate first in the plan confirmation process and again in the claims process and to now be allowed to alter the terms of the Confirmed Chapter 13 Plan by repossessing the 2004 Ford Focus and undercutting the \$3,000.00 valuation, the 6% interest rate, and the provision that First Heritage Credit's lien will be released upon discharge or payment of the underlying debt. If the Debtor had no opportunity to correct the perceived inequity, her argument might have some merit; however, Rule 3004 of the Federal Rules of Bankruptcy Procedure offers the following remedy in a situation when a creditor who is provided for in a confirmed plan fails to file a proof of claim prior to the bar date:

If a creditor does not timely file a proof of claim under Rule 3002(c) or 3003(c), the debtor or trustee may file a proof of the claim within 30 days after the expiration of the time for filing claims prescribed by Rule 3002(c) or 3003(c), whichever is applicable. The clerk shall forthwith give notice of the filing to the creditor, the debtor and the trustee.

FED. R. BANKR. P. 3004. Rule 3004 was specifically designed to protect debtors in situations when a secured creditor does not file a proof of claim. *See, e.g., In re Kincaid*, 316 B.R. 735, 741 (Bankr. E.D. Cal. 2004) ("Because a lien will survive the chapter 13 discharge if the debt it secures is not satisfied, a chapter 13 debtor is usually motivated to file a proof of claim on behalf of the secured claim holder. This insures the claim will be paid, ultimately freeing the claim's collateral from the lien."). Additionally, "[a] debtor . . . who fails timely to file a proof of claim on behalf of a creditor under Fed. R. Bankr. P. 3004, may obtain an enlargement of the Rule 3004 deadline for 'cause

shown' where 'the failure to act was a result of excusable neglect.'" *Hogan*, 346 B.R. at 721 (quoting FED. R. BANKR. P. 9006(b)(1)); *see also In re Strohl*, 2014 WL 202648, at *2 (Bankr. M.D. Pa. Jan. 16, 2014) (same).

In this case, the deadline for non-government entities to file a proof of claim was November 27, 2013. Accordingly, when First Heritage Credit did not file a claim by that date, the Debtor, as permitted by Rule 3004, had through December 27, 2013, to file a proof of claim on behalf of First Heritage Credit. She acknowledged this opportunity in her brief, stating that she did not file a proof of claim because she "did not have the necessary documentation in order to file a proper secured claim." BRIEF at 2. That she did not have the supporting documentation, however, is not a valid reason for not filing a claim when she could have requested supporting documentation and attached to the proof of claim the writings evidencing the same. It was in the Debtor's best interest to monitor whether the secured creditors she provided for in her Confirmed Chapter 13 Plan actually filed claims in order to receive distribution under the plan and, in the event that they did not, for her to then file a proof of claim on their behalf under Rule 3004. The result of not filing a claim on the creditor's behalf is that First Heritage Credit does not hold an allowed claim and cannot receive distribution under the Debtor's Confirmed Chapter 13 Plan. First Heritage Credit is, therefore, entitled to relief from the automatic stay in order to enforce its lien against the 2004 Ford Focus and other described personal property because its collateral is not being adequately protected, and its Motion for Relief From Stay filed on July 29, 2014, is GRANTED. The automatic stay of 11 U.S.C. § 362(a) is modified to allow First Heritage Credit to foreclose its lien encumbering the Debtor's 2004 Ford Focus, diamond earrings, diamond sapphire earrings, laptop, two Magnavox televisions,

and two DVD players in accordance with the terms of its collateral security documents and the laws of the State of Tennessee. The 14-day stay imposed by Rule 4001(a)(3) of the Federal Rules of Bankruptcy Procedure shall have no application to this order.

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