SO ORDERED.
SIGNED this 28th day of February, 2018

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

Shelley D. Rucker
UNITED STATES BANKRUPTCY JUDGE

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

In re:	)	
	)	
Glenn L. Mikes	)	**No. 1:17-bk-14836-SDR**
	)	**Chapter 13**
Debtor	)	

ORDER AND MEMORANDUM

This is a question of first impression for the court regarding the new chapter 13 form plan implemented by the court on December 1, 2017, pursuant to Fed. R. Bankr. P. 3015.1 and E. D. Tenn. LBR 3015-1. The court has before it the objection of the chapter 13 trustee to the proposed plan of Glenn Mikes. The plan was confirmed on January 24, 2018, but the court set a *de novo* hearing on confirmation regarding the trustee's objection for February 8, 2018. The plan attempts to treat the claim of a secured creditor, Quick Loans, as an unsecured claim on the

basis that the creditor's security interest is not perfected. The trustee's objection is that the provision for Quick Loans is not in the correct section of the plan. The provision is contained in the "Nonstandard Plan Provisions" section of the district's form plan. The trustee contends that the provision, which effectively avoids a lien, should be in the section titled "Lien Avoidance." The court asked the parties to discuss where such a provision should be placed and whether it was appropriate. After considering the argument of the parties and the applicable law, the court concludes that there is no place in the form plan for a provision that seeks to determine the extent, validity, or priority of a lien pursuant to section 544(a)(2) through the confirmation process.

The district form plan requires disclosures on the first page of the plan to alert creditors that the plan may: (1) limit the amount of a secured claim, resulting in less than full payment of the claim; (2) avoid a judicial lien or security interest; or (3) contain a "Nonstandard Plan Provision" in section 8.1. Plan, sections 1.1, 1.2, and 1.3 (Doc. no. 18). The relevant portion of section 8.1 of the debtor's plan provides "Quick Loans – this creditor has an unperfected security interest in consumer personal property. The secured value is zero dollars. The balance is unsecured." At the hearing, the debtor's counsel explained that no claim had been filed at the time the debtor had to make a decision regarding treatment of this obligation. The debtor's attorney had been unable to find a recorded financing statement evidencing any security interest in favor of Quick Loans and therefore believed that the debtor had a good faith basis on which to avoid the lien based on the creditor's failure to perfect its lien.

The trustee contends that the form plan requires that a provision regarding the avoidance of a secured creditor's lien be included under section 3.4. Despite the section's broad title, it relates to only "judicial liens and nonpossessory, nonpurchase money security interests securing

the claims listed in this section" that may be avoided under 11 U.S.C. § 522(f). The authority for avoidance of a lien due to a failure to perfect is 11 U.S.C. § 544(a)(2), and whether the lien can be avoided by the trustee is unrelated to whether the lien impairs an exemption. Therefore, the court finds that the correct placement of a provision attempting to avoid a lien for failure to perfect would not be in section 3.4. Quick Loans security interest is not a judicial lien, nor does the debtor contend that it should be avoided because it impairs an exemption. It is a non-standard provision and should be placed in section 8.1, if it may be included at all.

The correct placement of a provision does not relieve a debtor of his obligation to include provisions that comply with title 11. 11 U.S.C. § 1325(a)(1). The court must find that the plan complies with the bankruptcy code. *Id.* The plan must be proposed in good faith and not by any means forbidden by law. *Id.* at (a)(3). Section 1322(b)(2) provides that the rights of secured creditors may be modified in a plan, but it does not go so far as to provide that all liens may be avoided through the confirmation process. Any modification of a secured claim must also comply with the requirements for confirmation under section 1325(a)(5). Under that subsection, the debtor has three options for providing for an allowed secured claim: He may propose treatment that the creditor accepts, he may provide that the creditor retains its lien and is paid the value of that allowed secured claim as of the effective date, or he may return the collateral to the secured creditor. 11 U.S.C. § 1325(a)(5). In this case, the debtor's attorney admitted that he does not really know what the value of the collateral is despite the statement in the proposed plan that the value is "zero." Without the information contained in the proof of claim identifying the collateral, he cannot be sure of the property that secures the loan or its value. His basis for using a nonstandard provision was that the lien was not perfected before the case was filed, which is not an issue of value.

Section 544(a)(2) grants the trustee[1] the status of a hypothetical lien creditor on the date of filing and allows the trustee to avoid any lien on which that hypothetical lien creditor has priority under state law. A hypothetical lien creditor would have priority over an unperfected secured creditor under Tennessee law. Tenn. Code Ann. §§ 47-9-310(a), 47-9-317(a)(2). The debtor's problem, assuming he has standing, is that avoidance of a lien pursuant to section 544 requires an adversary proceeding under Fed. R. Bankr. P. 7001(2) and cannot be done in the context of confirming a plan.

The new form plan was intended to make a chapter 13 confirmation more efficient by allowing the valuation of collateral and the avoidance of liens that impair exemptions to be handled as part of the plan confirmation process. Recent rule changes clarify that a separate motion is not necessary to resolve these issues, though separate motions are still allowed. Fed. R. Bankr. P. 3012 and 4003. Creditors now receive additional notice of the debtor's intentions to modify their rights on the front page of the plan. Similar changes were not made for avoidance actions under section 544 or any other of the trustee's avoidance powers under chapter 5 used to determine the validity, priority, or extent of a lien. Avoidance of a lien in those circumstances still requires an adversary proceeding.

The parties also suggested that the lien avoidance could be accomplished by placing a similar provision in section 3.2, titled "Request for Valuation of Security, Payment of Fully Secured Claims, and Modification of Undersecured Claims." The debtor could effectively avoid

[1] The Code does not clearly authorize a chapter 13 debtor to bring an avoidance action. *Compare* 11 U.S.C. § 1303, with §§ 1107 and 1203. Some courts have held that a chapter 13 debtor's powers are limited to avoidance to protect exemptions. 11 U.S.C. § 522(h). *See* Keith M. Lundin & William H. Brown, CHAPTER 13 BANKRUPTCY, 4th Ed., § 53.1 at ¶ 5 n.14, Sec. Rev. June 14, 2004. Because the Quick Loans lien was a voluntary transfer, the collateral may not be exempt even if the transfer is avoidable. Section 522(g) makes the debtor's ability to avoid the lien even more questionable.

the lien in the plan if the collateral were in fact worthless and the plan was completed. Should the debtor take that approach, and without making any ruling on the value of the collateral at this time, lien avoidance resulting from valuation under 11 U.S.C. § 506(a) and (d) is appropriately addressed in section 3.2. That section allows the debtor to propose a value for the collateral and a modification of a lien. However, section 3.2 would not be available if the loan had been incurred within the year before the bankruptcy filing and if it was a purchase money loan.[2] As with avoidance of liens that impair exemptions, the rules have been modified to allow the plan to function as a motion to value collateral in order to "strip down" or "strip off" a lien based on the value of the property securing the debt. In that case, the confirmation order will bind the parties on that issue. Should the debtor determine that this is the action he wants to take, the court finds that checking the box "yes" in section 1.1 would also be required, and the plan would need to be served on the creditor, in compliance with Fed. R. Bankr. P. 3012(b).

In conclusion, the court finds that a plan term proposing to avoid a lien pursuant to the trustee's authority under section 544 is contrary to the limitations on contents of a plan contained in section 1322, the requirements for the treatment of an allowed secured claim under section 1325(a)(5), and the procedural requirements of Fed. R. Bankr. P. 7001. Therefore, the court will deny confirmation of the plan on the basis that it does not comply with the other provisions of the code and rules.

Because this is a matter of first impression regarding the chapter 13 form plan, the court will allow the case to continue as confirmed except that the provision regarding Quick Loans shall have no effect. The court will give the debtor 30 days to modify the plan consistent with

[2] Had those conditions been present, the debtor would have had to provide for Quick Loans in section 3.3, and Quick Loans secured claim would be excluded from reduction based on the value of the collateral. 11 U.S.C. § 1325(a) (hanging paragraph).

this opinion and provide the appropriate notice of the modification to creditors and parties in interest. If the debtor fails to do so, the plan provision relating to Quick Loans will be stricken.

The court delivered this opinion orally on February 8, 2018. Upon further consideration, the court determined that a written opinion would be more beneficial to the parties and the bar. This opinion has been modified pursuant to Fed. R. Bankr. P. 9024 and Fed. R. Civ. P. 60(a) to make corrections in the oral opinion delivered regarding the procedural posture of the case and to make edits for grammar, style, and citation. To the extent that there is any inconsistency between the two opinions, this opinion supersedes the prior oral opinion.

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