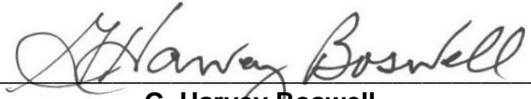




Dated: August 16, 2005
The following is SO ORDERED.


G. Harvey Boswell
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

IN RE:

BILLY W. LUMLEY,

CASE NO. 05-11511

Debtor.

Chapter 13

MEMORANDUM OPINION AND ORDER RE
OBJECTION TO CONFIRMATION BY BANK OF HALLS

The Court conducted a hearing on the Bank of Halls' Objection to Confirmation on June 16, 2005. FED. R. BANKR. P. 9014. Resolution of this matters is a core proceeding. 28 U.S.C. § 157(b)(2). The Court has reviewed the testimony from the hearing and the record as a whole. This Memorandum Opinion and Order shall serve as the Court's findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

I. FINDINGS OF FACT

The debtor in this case, Billy Lumley, ("Lumley") financed a 1994 Chevy Silverado with the Bank of Halls, ("Bank"), on February 27, 2002. Lumley filed a previous chapter 13 petition on March 11, 2003. In that case, case number 03-11186, Lumley proposed to retain the vehicle and make monthly payments to the Bank as a secured creditor. The Chapter 13 Trustee's office disbursed a total of \$560.00 to the Bank in that case. Case number 03-11186 was dismissed on March 25, 2005, for non-payment. At that time, Lumley was in arrears to the Bank \$3,077.25.

Lumley filed the case at bar on March 31, 2005. In his current plan, Lumley proposes to surrender the 1994 Chevy to the Bank. The Bank objects to this proposal and claims that they do not want the vehicle back because it is now worthless. The Bank alleges that Lumley should be required to pay the Bank’s debt in accordance with the terms of the plan in his previous chapter 13 case. As support for this assertion, the Bank cited the case of *In re Jock*, 95 B.R. 75 (Bankr. M.D. Tenn. 1989). At the time of filing, Lumley owed the Bank approximately \$4257.00. Lumley’s case was confirmed without prejudice to the Bank on May 26, 2005.

II. CONCLUSIONS OF LAW

The Bank has alleged that the debtor should be forced to pay his debt to the bank in accordance with the proposed plan in his prior chapter 13 case. Curiously, the Bank relied on the case of *In re Jock*, 95 B.R. 75 (Bankr. M.D. Tenn. 1989) as support for its position. In *Jock*, Judge Lundin held that a debtor could modify a confirmed chapter 13 plan to provide for surrender of an automobile and pay any deficiency as an unsecured claim. *Jock* also held that the debtor was bound by the terms of the confirmed plan through the date of surrender and had to make any pre-surrender payments in accordance with the plan. Clearly, *Jock* is different from the fact situation in the case at bar. Lumley is not attempting to surrender his truck post-confirmation. Instead, he has proposed to surrender his truck from the time he filed his original plan.

Even if the facts in this case were similar to those in *Jock*, however, the Bank’s reliance on the *Jock* opinion is misguided. *Jock* was abrogated by the 6th Circuit in the case of *In re Nolan*, 232 F.3d 528 (6th Cir. 2000). In that case, the Sixth Circuit held:

that a debtor cannot modify a plan under section 1329(a) by: 1) surrendering the collateral to a creditor; 2) having the creditor sell the collateral and apply the proceeds toward the claim; and 3) having any deficiency reclassified as an unsecured claim.

Id. at 535. *Nolan*’s holding is a narrow one and serves only to prohibit debtors who have a confirmed chapter 13 plan from modifying that plan by surrendering collateral to a secured creditor and reclassifying any deficiency as an unsecured claim. The payments discussed in *Jock* are no longer applicable because *Nolan* dictates that a debtor must comply with the terms of the confirmed plan whether or not he surrenders the collateral post-confirmation.

Having determined that the *In re Jock* and *In re Nolan* decisions have no relevance to the case at bar, the Court must now determine the true issue in this case: whether or not a confirmed chapter 13 plan in a case that was dismissed prior to discharge is binding on the debtor in a subsequent case. Section 1327(a) of the Bankruptcy Code provides that “[t]he 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.” 11 U.S.C. § 1327(a). “The general effect of this section is to bind creditors to the terms of a debtor’s plan by causing all issues that were or that could have been decided to become *res judicata*.” *In re Harris*, 293 B.R. 438, 441 (Bankr. N.D. Ohio 2003); however, in cases where the debtor abandons the plan prior to discharge, i.e. by failing to make plan payments, courts have found that (1) creditors are not bound by the terms of the plan and (2) “debtors are barred from claiming any benefits provided” under the plan. *In re Shaffer*, 48 B.R. 952, 955 (Bankr. Ohio 1985); *In re Pearson*, 214 B.R. 156, 160 (Bankr. N.D. Ohio 1997); *In re Wallace*, 46 Fed. Appx. 819, 821 (6th Cir. 2002). Essentially, the terms of abandoned plans “no longer have effect.” *Shaffer*, 48 B.R. at 955.

Turning to the case at bar, it is clear that Lumley is not bound by the terms of the confirmed plan in his prior case. Section 1325(a)(5) of the Bankruptcy Code provides that “the court shall confirm a plan if” one of three conditions is satisfied: (1) the holder of the allowed secured claim accepts the plan; (2) the debtor invokes the “cram down” provision; or (3) the debtor surrenders the property securing the claim. 11 U.S.C. § 1325(a)(5). The debtor’s right to surrender is an absolute one and it does not require the consent of the secured creditor. *In re White*, 282 B.R. 418, 422 (Bankr. N.D. Ohio 2002). Once the collateral is surrendered and disposed of, the creditor may file a general unsecured claim for any deficiency. *In re Eubanks*, 219 B.R. 468, 473 (6th Cir. BAP 1998).

III. ORDER

It is therefore **ORDERED** that the Objection to Confirmation filed by the Bank of Halls is **OVERRRULED**.

IT IS SO ORDERED.

Mailing List:

Debtor’s Attorney
Bank of Halls’ Attorney
Chapter 13 Trustee