

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

IN RE

TINA MARIE JOHNSON,

Debtor.

Case No. 97-20992-L
Chapter 13

**MEMORANDUM OPINION AND ORDER CONCERNING
DEBTOR'S MOTION TO MODIFY PLAN**

The Debtor filed her "Motion to Modify Plan" on May 21, 1998. An objection was timely raised by National Bank of Commerce ("NBC"), a secured creditor. This Court conducted a hearing concerning this contested matter on July 28, 1998. The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052. This is a core proceeding. 28 U.S.C. § 157(b)(2)(L). Based on the following, the Court grants in part and denies in part the Debtor's motion.

FINDINGS OF FACT

The Debtor filed a voluntary petition for relief under chapter 13 of the Bankruptcy Code on January 17, 1997. "Schedule I—Current Income of Individual Debtor(s)" indicates that the Debtor receives \$800 per month from Social Security and \$250 per month from pension or retirement income, for a total income of \$1,050 per month. The Debtor's schedules reflect that she was not employed when she filed her petition. At the hearing, however, the Debtor testified that she earns approximately \$200-\$300 every two weeks from her employment as a security guard. Therefore, according to the testimony before the Court, the Debtor has a monthly income of approximately

\$1,450.¹ “Schedule J — Current Expenditures of Individual Debtor(s)” reflects monthly expenses of \$460. The information in Schedule J is the only evidence before the Court as to the Debtor’s monthly expenses. The Debtor’s plan was confirmed on March 13, 1997, and she was ordered to pay \$681 per month into her plan. *See* Docket Entry No. 7. Subsequent to the confirmation of her plan, the Debtor was ordered to increase her plan payment to \$797 per month. *See* Docket Entry No. 11. According to the Chapter 13 Trustee, the Debtor is current on her plan payments.

In her motion to modify her confirmed plan, the Debtor seeks to add Memphis Light Gas & Water (“MLGW”) as a post-petition creditor. The Debtor proposes to pay MLGW 100% of its claim of approximately \$1,300 at a rate of \$50 per month. No objection was raised by MLGW or any other creditor with respect to this request, and thus, this request will be granted.

The Debtor owns a 1993 Ford Escort that serves as collateral for the claim of NBC. Pursuant to the confirmed plan, NBC’s secured claim in the amount of \$6,652.02 is to be repaid together with interest at the rate of 12 % per annum in monthly installments of \$147. The Debtor reports that the Escort’s engine “blew up” twice in May of 1998. The Debtor seeks to modify her plan by surrendering the inoperable car to NBC and transferring any deficiency balance after the sale of the

¹ In closing argument, the Debtor’s attorney curiously sought to discredit the Debtor’s testimony regarding her current employment, but offered no additional proof concerning the Debtor’s ability to hold employment.

car to the unsecured class. Pursuant to the confirmed plan, unsecured creditors will receive a distribution of 10% of their allowed claims. The Debtor further seeks permission to purchase another vehicle and pay for the substitute vehicle directly to the financing creditor. Finally, the Debtor seeks to reduce her monthly plan payment from \$797 to \$530, to enable her to make payments to purchase the substitute vehicle. The Debtor testified that she wishes to purchase a 1995 Ford Escort to replace her inoperable 1993 Ford Escort. The Debtor, however, was unable to provide any specific information regarding the terms of a purchase contract, such as the price of the vehicle, the interest rate, or the financing company. The only information the Debtor provided was that she anticipates paying \$250 per month for the vehicle.

NBC objects to being reclassified as an unsecured creditor in a plan that pays 10% to the unsecured creditors. Counsel for NBC stated that the balance owed on its claim is approximately \$4,704.30. NBC believes that the Debtor should be bound by the terms of her confirmed plan. Further, NBC believes that the Debtor has the present ability to pay more than 10% to her unsecured creditors. In essence, NBC asserts that the modification is not proposed in good faith.

CONCLUSIONS OF LAW

Post-confirmation modifications are permitted pursuant to 11 U.S.C. § 1329 which provides:

- (a) At any time after confirmation of the plan but before the completion of payments under such plan, the plan may be modified, upon request of the debtor, the trustee, or the holder of an allowed unsecured claim, to --

(1) increase or reduce the amount of payments on claims of a particular class provided for by the plan;

(2) extend or reduce the time for such payments; or

(3) alter the amount of the distribution to a creditor whose claim is provided for by the plan, to the extent necessary to take account of any payment of such claim other than under the plan.

(b)(1) Sections 1322(a), 1322(b), and 1323(c) of this title and the requirements of section 1325(a) of this title apply to any modification under subsection (a) of this section.

(2) The plan as modified becomes the plan unless, after notice and a hearing, such modification is disapproved.

(c) A plan modified under this section may not provide for payments over a period that expires after three years after the time that the first payment under the original confirmed plan was due, unless the court, for cause, approves a longer period, but the court may not approve a period that expires after five years after such time.

11 U.S.C. § 1329. In determining whether to approve the Debtor's proposed modification, the Court looks for guidance to the opinion of Bankruptcy Judge William Houston Brown in *In re Rimmer*, 143 B.R. 871 (Bankr. W.D. 1992). In order to surrender the 1993 Ford Escort, the Debtor must meet the following requirements. First, the Debtor must provide notice to all creditors. *Id.* at 876. It appears to the Court from the certificate of service filed on this motion that the Debtor has met this requirement. Second, the Debtor has the burden of proof to show a sufficient change of circumstances that justifies the modification sought. *Id.* In *Rimmer*, the court found that engine failure, through no fault of the debtor, constituted a sufficient change in circumstances to support

modification of a confirmed plan. *Id.* at 873. There is no evidence in the record that the Debtor contributed in any way to the engine failure of her 1993 Escort. This Court, therefore, concludes that the Debtor has sufficiently shown changed circumstances to warrant a post-confirmation modification of her plan. Third, the Debtor has the burden of proving that the plan as modified meets the requirements of §§ 1322(a), 1322(b), 1323(c) and 1325(a). *See* 11 U.S.C. § 1329(b)(1). Most importantly, the Debtor must establish that she proposes the modification in good faith. *Rimmer*, 143 B.R. at 876.

While the Court does not question that the damage to the 1993 Escort resulted through no fault of the Debtor, the Court has concerns about the Debtor's proposed reduction in her plan payments and purchase of a substitute vehicle. Based upon the Debtor's testimony, the Debtor appears to have sufficient income to pay as much as 50-70% to her unsecured creditors. The Court does not know what distribution could be made to unsecured creditors if the Debtor's plan payments remain unchanged. The only information in the record regarding the purchase of a replacement vehicle is that the Debtor proposes to pay \$250 per month for a 1995 Ford Escort. The Court does not know whether the credit terms proposed for the purchase of the 1995 Escort are in the Debtor's best interest or whether more favorable terms could be obtained that would permit the Debtor to continue to pay her plan payments at the current level.

Accordingly, the Court will permit the Debtor to surrender the 1993 Escort to NBC, but will schedule another hearing to consider the Debtor's proposed reduction in plan payments and purchase

of substitute transportation.

ORDER

Based upon the foregoing, it is ORDERED that:

1. The Debtor's motion to add MLGW as a post-petition creditor is GRANTED;
2. The Debtor's motion to surrender to the 93 Ford Escort to NBC is GRANTED;
3. The Court will conduct a hearing on Tuesday, August 25, 1998, at 10:00 a.m. in Courtroom 645, 200 Jefferson Avenue, Memphis, Tennessee, 38103, to determine if the Debtor's proposed reduction in plan payments meets the requirements of 11 U.S.C. § 1329 and whether the proposed terms for the purchase of a substitute vehicle are in the Debtor's best interest.

BY THE COURT,

JENNIE D. LATTA
United States Bankruptcy Judge

Date: July 31, 1998

cc: Debtor
Debtor's Attorney
Chapter 13 Trustee
Attorney for NBC
All Creditors and Interested Parties