

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re
JENNIFER ANN JAMISON-MCGEE,
Debtor.

Case No. 04-23035-L
Chapter 13

**ORDER DENYING MOTION FOR RELIEF FROM AUTOMATIC STAY OR,
IN THE ALTERNATIVE FOR ADEQUATE PROTECTION**

THIS MATTER came on for hearing on April 27, 2004, upon the motion of Nuvell Credit Corporation (“Nuvell”) for relief from the automatic stay or, in the alternative for adequate protection. This matter raises the question of whether a creditor’s treatment under a confirmed Chapter 13 plan may be the basis of a subsequent motion for relief from the automatic stay. After considering the testimony of the Debtor, Jennifer Ann Jamison-McGee, and reviewing the exhibits admitted at trial, the court is of the opinion that the motion should be denied. The following constitutes the court’s findings of fact and conclusions of law in accordance with FED. R. BANKR. P. 7052. This is a core proceeding. 28 U.S.C. § 157(b)(2)(G).

The following background facts are generally not in dispute. Debtor received a solicitation in the mail which advertized a \$2,500 rebate to qualified buyers of a new automobile from Bud Davis Cadillac/Memphis Suzuki. Debtor visited the showroom on December 10, 2003. Debtor provided information for the completion of a credit application and signed the application, but did not personally fill out the application. The amount of child support received by Debtor as shown on the application is incorrect. Although she is married and her husband accompanied her to the car lot, Debtor made the credit application solely in her name. Debtor was told that she did not qualify to purchase the automobile she selected but that she could purchase a 2003 Suzuki Aerio sedan. The cash price listed on the Retail Installment Sale Contract was \$20,687.96. Debtor traded in a 2000 Oldsmobile Alero which contributed nothing to the purchase price of the Aerio after payment of the existing lien. The \$2,500 rebate was credited to the cash price. After miscellaneous fees of \$309.50 were added, the total amount financed was \$18,497.46. The annual percentage rate disclosed in the contract was 17.99%. The loan was to be repaid over 72 months in installments of \$421.78. Debtor introduced into the record the Vehicle Invoice for her car which shows an invoice amount of \$15,929.96 and a retail amount of \$16,594.00. The difference between the retail amount shown on the invoice and the cash price shown on the contract was not explained. A buyer's order, which might have disclosed additional charges, was not made a part of the record. Counsel for Debtor argued that the cash price of the car was inflated to include the amount of the rebate, but the difference between the cash price and the retail price is actually \$4,093.96, considerably more than \$2,500.

Debtor testified that her husband lost his job shortly after she purchased the Aerio sedan. She further testified that she purchased a money order on January 15, 2004, to make the first

payment which was due January 10, 2004. She testified that she is aware that Nuvell claims that it never received her payment and stated that she has not been able to trace the lost money order. Debtor said that although she did not rely on her husband's credit in purchasing the car, she did rely on his income to pay other household bills. When her husband was unable to find work, she filed her Chapter 13 petition on February 25, 2004. The Chapter 13 plan proposed by Debtor bifurcates the claim of Nuvell into a secured claim in the amount of \$9,600 with the balance to be paid as unsecured. The secured claim is to be repaid together with interest at 15% in monthly installments of \$300 over 41 months. The plan proposes semi-monthly payments of \$250 for 60 months. Debtor's plan was confirmed without objection on April 16, 2004.

Nuvell filed its motion for relief from the automatic stay or, in the alternative for adequate protection on March 9, 2004. The motion alleges that Debtor failed to make her first payment; and that, even though the plan lists Nuvell as a secured creditor with a collateral value of \$9,600.00 and an interest rate of 15%, the balance owed to Nuvell as of the petition filing date was \$19,219.47 and the contract rate of interest was 17.99%. The motion requests that the automatic stay be terminated and that the provisions of Rule 4001(a)(3) be waived, or that Nuvell be granted adequate protection, but does not indicate which provisions of the Bankruptcy Code upon which Nuvell relies. At the hearing, counsel for Nuvell argued that the automatic stay should be terminated for cause pursuant to 11 U.S.C. § 362(d)(1) because the plan was not proposed in good faith and does not provide adequate protection to Nuvell. At the hearing, counsel for Nuvell focused solely on the prepetition acts of Debtor to support its motion for relief from the automatic stay. Counsel did not assert that the court should treat the motion for relief as in any way equivalent to or a substitute for an objection to confirmation of Debtor's plan. Debtor is performing her obligations under the confirmed plan.

The effect of confirmation of a Chapter 13 plan is clearly spelled out at 11 U.S.C. § 1327(a) which states:

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.

The leading commentator on Chapter 13 bankruptcy describes the far-reaching effects of this provision as follows:

The fundamental binding effect of confirmation under § 1327(a) has been honored in a vast number of reported decisions: if notice is adequate, the creditor that fails to object to confirmation and then to appeal an adverse decision is bound by the confirmed plan even if it contains provisions that are inconsistent with the Code that could have been defeated by a timely objection; a confirmed plan cannot be collaterally attacked after confirmation under the guise of other contests such as a request for relief from the stay or a motion to dismiss; and debtors are just as bound by confirmation as creditors – confirmation precludes debtor behavior that is inconsistent with the plan.

3 Keith M. Lundin, *Chapter 13 Bankruptcy* 229-2 (3rd ed. 2000) (numerous citations omitted). In a case factually similar to the present one, the United States District Court for the Eastern District of Virginia held that a car lender that failed to object to confirmation of a debtor's proposed plan was barred by theories of *res judicata*, collateral estoppel, and waiver from seeking relief from the automatic stay on the basis of a lack of adequate protection. *Chevy Chase Bank v. Locke*, 227 B.R. 68 (E.D. Va. 1998). The only factual distinction between the *Locke* case and the present case is that in *Locke* the motion for relief from the automatic stay was filed *after* the confirmation of the Chapter 13 rather than before. This distinction makes no material difference to the outcome of this case.

The motion for relief from the automatic stay filed in this case cannot be read to include an

objection to confirmation of the plan. The motion is styled as a motion for relief from the automatic stay; counsel did not assert that the motion was intended to serve as an objection to confirmation; the motion makes no reference to confirmation of the plan; the motion makes no claim that the plan was not proposed in good faith; and counsel did not appear in opposition to confirmation of the plan. Further, even if the motion were to be interpreted as a timely objection to confirmation, the plan was confirmed *after* the motion was filed. If Nuvell had intended its motion to serve as an objection to confirmation, it is reasonable to expect that Nuvell would have appeared at the confirmation hearing. It did not, nor did it request that an exception to confirmation be made for the pending motion. Nuvell did not object to the adequacy of notice of the provisions of the proposed plan or the hearing to consider confirmation of the proposed plan. The motion for relief makes reference to the provisions of the proposed plan leaving no doubt that Nuvell received a copy of the plan on or before March 9, 2004. By virtue of the confirmation of Debtor's plan, Nuvell is collaterally estopped from raising, or has waived, issues such as lack of good faith in proposing the plan or that the plan fails to provide adequate protection of Nuvell's interest in Debtor's automobile. As Nuvell has asserted no other grounds for its motion, the motion should be denied.

At the hearing, Debtor's counsel attempted to demonstrate that the purchase price for Debtor's car was improperly inflated. Debtor has not sought rescission of her purchase, nor has she sought affirmative relief against Nuvell. Thus, the Court expresses no opinion concerning Debtor's arguments.

For the foregoing reasons, the motion for relief from the automatic stay or, in the alternative for adequate protection is **DENIED**.

cc: Debtor
Attorney for Debtor
Nuvell Credit Corporation
Attorney for Nuvell Credit Corporation
Chapter 13 Trustee