

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION**

IN RE

**Gary W. Mills &
Brenda G. Mills,**

Case No. 01-10536

Debtors.

Chapter 13

**MEMORANDUM OPINION AND ORDER RE
OBJECTION TO CONFIRMATION FILED BY GMAC**

The Court conducted a hearing on GMAC's Objection to Confirmation on April 26, 2001. FED. R. BANKR. P. 9014. Pursuant to 28 U.S.C. § 157(b)(2), this is a core proceeding. After reviewing the testimony from the hearing and the record as a whole, the Court makes the following findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

I. FINDINGS OF FACT

Pursuant to the Court's mandate, the parties in this matter filed a Stipulation of Facts on June 19, 2001. The stipulated facts are as follows:

1. Appearing by Attorney, Ken Walker, on the 5th day of February, 2001, the above named Debtors filed herein a Petition proposing a Plan of settlement of debts under Chapter 13 of the Federal Bankruptcy [Code].
2. A stay-order or injunction has been issued by the Court enjoining the enforcement of lien rights against the Debtor on their property.
3. Prior to the filing of the Debtors' Petition proposing said plan, a 1996 Chevrolet Corsica, Identification No. 1G1LD5545TY236880, was delivered to debtors, Gary W. and Brenda G. Mills, on a Security Agreement executed by the Debtors, and retaining title to said property in the secured party or the secured party's assignee until the balance of the indebtedness was paid, and General Motors Acceptance Corporation is the assignee and holder for value of said Security Agreement.

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4. Prior to the filing of the Debtor's Petition proposing said Plan, a 1997 Chevrolet "400-GMT" Truck, Identification No. 2GCEC19M6V1142213, was delivered to Debtors, Gary W. and Brenda G. Mills, on a Security Agreement, executed by the Debtors, and retaining title to said property in the secured party or the secured party's assignee until the balance of the indebtedness was paid, and General Motors Acceptance Corporation is the assignee and holder for value of said Security Agreement.
5. On December 16, 1999, Debtors, Gary W. Mills and Brenda G. Mills, filed Bankruptcy No. 99-14077-GHB.
6. There was Objection to Confirmation of the Plan of Bankruptcy No. 99-14077-GHB filed on January 12, 2000.
7. Agreement was reached between the parties that the value of the 1997 Chevrolet "400-GMT" Truck was \$16,550.00, with such indebtedness to be retired at the rate of 9.50% per annum, in monthly payments of \$355.81, over a period of approximately 58 months. However, when representatives of GENERAL MOTORS ACCEPTANCE CORPORATION, appeared at the scheduled Meeting of Case Creditors, it was learned that Bankruptcy No. 99-14077 had been dismissed.
8. There was immediately filed Bankruptcy No. 00-10256 on January 20, 2000. The Order dismissing Bankruptcy No. 99-14077 was filed on January 27, 2000, subsequent to the filing of Bankruptcy No. 00-10256, on January 20, 2000.
9. On March 16, 2000, there was entered a Consent Order Establishing the Value of the 1997 Chevrolet "400 GMT" Truck at \$16,824.81, with interest to accrue at the rate of 9.5% per annum, payable in monthly installments of \$355.81 over a period of approximately 59 months.
10. On February 1, 2001, there was an Order entered in Bankruptcy Case No. 00-10256 voluntarily dismissing the Debtors' Chapter 13 case.
11. Bankruptcy No. 01-10536 was filed on February 5, 2001.
12. The Plan of Payment indicated that it was the Debtors' intention to surrender the 1997 Chevrolet "400 GMT" Truck.

13. An Agreed Order of Voluntary Surrender Allowing the Disposition of the Vehicle as to General Motors Acceptance Corporation and reserving the right of GMAC, should there be a deficiency resulting from the sale, that the deficiency be either secured or unsecured as circumstances dictate pursuant to the holding of the In Re: Nolan case was filed on April 10, 2001.

14. The Debtors knowingly and deliberately dismissed the Bankruptcy No. 00-10256 and refiled Bankruptcy No. 01-10536 to escape the consequences of the In re: Nolan case.

15. The value of the Chevrolet "400 GMT" Truck has yet to be established but will be established at the sale of same, with the result of such sale presented to the Bankruptcy Trustee upon receipt of same.

II. CONCLUSIONS OF LAW

GMAC has asserted that the case of *In re Nolan*, 232 F.3d 528 (6th Cir. 2000), prohibits the debtors' surrender of their automobile to GMAC. In *Nolan*, a debtor owed Chrysler Financial Corporation \$12,291.45 for an automobile. According to her Chapter 13 plan, the debtor proposed to retain the vehicle and pay Chrysler Financial's claim as a secured one. Two years after confirmation of the plan, the debtor moved to modify her Chapter 13 plan by surrendering the vehicle to Chrysler and reclassifying any deficiency as an unsecured claim. In analyzing the 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. Because the debtors in the case at bar are not attempting to modify their chapter 13 plan in any way, *Nolan* has no applicability.

Chapter 13 debtors have an absolute right to voluntarily dismiss their case at any time. 11 U.S.C. § 1307(b). *In re Nolan* does not modify or take away this right. When a debtor

subsequently refiles a new Chapter 13 case, secured creditors are included in the plan with a claim that is secured to the extent of the collateral's value as of the *effective date of the plan*. 11 U.S.C. § 1325(a)(5)(B) (emphasis added). The Court can find no authority, either in *Nolan* or any other case, which modifies § 1325(a)(5)(B)'s time of valuation.

As a result of *Nolan's* inapplicability to the case at bar and §§ 1307 and 1325(a)'s mandates, the Court finds that GMAC's Objection to Confirmation should be overruled. In so making this decision; however, it is important to point out that the Court does not reach a determination regarding any other issues in this case, such as the debtor's good faith in refileing.

III. ORDER

It is therefore **ORDERED** that GMAC's Objection to Confirmation is **OVERRULED**.
It is so ordered.

By the Court,

G. Harvey Boswell
United States Bankruptcy Judge

Date: July 21, 2001