

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

IN RE

James Marcus Clark,

Case No. 01-11334

Debtor.

Chapter 13

**MEMORANDUM OPINION AND ORDER RE
(1) OBJECTION TO CONFIRMATION FILED BY GMAC and
(2) MOTION TO DISMISS FILED BY GMAC**

The Court conducted a hearing on GMAC's Objection to Confirmation and Motion to Dismiss on July 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

On June 6, 2001, the parties filed the following stipulation of facts with the Court:

1. Prior to the filing of the Debtor's Petition proposing said Plan, Debtor did, on the 19th day of March, 1999, enter into a Lease Agreement with Serra Chevrolet of Jackson, Inc., for the lease of a certain 1999 Chevrolet Truck, Identification No. 1GCCS14W4X8123307, which Lease Agreement was assigned to Creditor, GENERAL MOTORS ACCEPTANCE CORPORATION, as assignee and holder for value of said Lease Agreement.
2. Said security agreement is in default for the installments due and continues to be in default, breaching said security agreement, and the conditions upon which Debtor's right of possession depended.

3. The account was past due for December 19, 2000, at the time the first bankruptcy, Bankruptcy No. 01-10621-GHB, was filed on February 8, 2001. The Debtor, in Bankruptcy No. 01-10621-GHB, proposed to retain the subject vehicle and pay the amount due GMAC, although the Debtor had erroneously represented to his attorney that the vehicle was secured by a Retail Installment Sales Contract rather than through a Lease.
4. A Motion was filed in behalf on GMAC to Compel the Debtor to Accept or Reject the Lease, and That Hearing Thereon be Expedited on March 23, 2001.
5. This Motion, which compelled Debtor to Accept or Reject Lease and that a Hearing Thereon be Expedited, was returned by the Bankruptcy Clerk's Office since an Order of Dismissal had been entered by the Court on March 19, 2001.
6. Shortly after the dismissal of Bankruptcy No. 01-10621-GHB, the Debtor, on March 26, 2001, filed Bankruptcy No. 01-11334-GHB.
7. In Bankruptcy No. 01-11334-GHB, the Debtor listed in the Plan GMAC Lease, 1999 Chevy S-10, direct payment by Debtor; however, contemporaneously with the filing of Bankruptcy No. 01-11334-GHB, there was filed by the Debtor a Motion to Reject the Lease Agreement with GMAC, stating that the Debtor could not afford the payments.
8. Upon being notified by the filing of Bankruptcy No. 01-11334-GHB and the Motion to Reject Lease filed in behalf of the Debtor, contact was made by GMAC's attorney with the office of the attorney for the Debtor requesting the turnover of the subject vehicle.
9. When the subject vehicle was not turned over to GMAC, as indicated in the Motion to Reject the Lease, GMAC found it necessary to file, on April 18, 2001, a Motion to Compel Debtor to Accept or Reject the Lease and Hearing Thereon Be Expedited. Said Motion was set for hearing on May 3, 2001, at 9:00 a.m.;

however, the Motion to Reject the Lease Agreement filed on behalf of the Debtor was scheduled April 26, 2001, at 9:00 a.m.

10. On April 26, 2001, the Debtor appeared and disclosed the location of the subject vehicle, and a representative of GMAC, upon being apprised [sic] of the location, immediately moved to repossess same.

11. The Debtor requested in meeting with his attorney and the attorney representing GMAC that he be allowed to change the original wheels his custom wheels [sic], which the Debtor stated were located on the subject vehicle.

12. Despite attempts by the Debtor's attorney, both through attempted telephone communication and written communication, the Debtor did not contact the office of his attorney, nor was the vehicle returned to GMAC.

13. The deficiency owed by the Debtor to GMAC has yet to be determined.

14. The applicability of the holding of *In re Nolan* upon this sequence of events is yet to be determined by the Court.

At the hearing on GMAC's Objection to Confirmation and Motion to Dismiss, the attorney for GMAC announced that the debtor had turned over the 1999 Chevrolet Truck to GMAC.

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.

As far as GMAC's Motion to Dismiss, no *proof* of any kind was presented to the Court that (1) the debtor was guilty of bad faith or any other behavior which would necessitate dismissal of his case or (2) GMAC suffered any damages as a result of the debtor's behavior. Without proof, the Court has no other choice but to deny GMAC's motion.

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: August 22, 2001