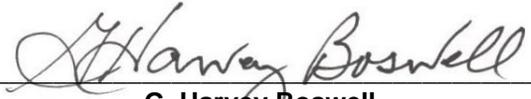




Dated: December 16, 2004
The following is SO ORDERED.


G. Harvey Boswell
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

IN RE:

Frank and Regina Gilford,

Case No. 03-12717

Debtors.

Chapter 13

MEMORANDUM OPINION AND ORDER
RE: MOTION TO CEASE DISBURSEMENTS TO FB FINANCIAL AND ADJUST THE
CHAPTER 13 PLAN PAYMENTS AND DELETE COURT INSURANCE

The Court conducted a hearing on the Debtor's Motion to Cease Disbursement on October 14, 2004. FED. R. BANKR. P. 9014. Resolution of this matter 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 parties submitted a "Stipulation of Fact" in this matter on November 10, 2004. That stipulation sets forth the following:

1. The debtors filed for relief under Chapter 13 of the Bankruptcy Code on June 6, 2003, bearing Case No. 03-12717-GHB.
2. FB Financial Services, Inc., is included in the debtor's confirmed plan to receive \$6,587.18 plus 12% interest, payable at the rate of \$200.00 per month, which is secured

by a 1994 Ford F140 pickup and various items of personal property, the non-avoidable items of which had a value of \$450.00.

3. The subject 1994 Ford F150 was damaged in an automobile accident on April 20, 2004. The cost to repair the vehicle was in excess of its fair market value resulting in the insurance company and debtor agreeing to “total” the vehicle.

4. FB Financial Services, Inc. received an insurance check in the amount of \$2,723.90 on May 18, 2004, and filed an amended proof of claim in the amount of \$3,863.28.

5. Debtor retained possession of the subject vehicle which had an agreed upon salvage value of \$250.00. FB Financial Services, Inc., retains possession of the title with its lien duly noted.

6. Disbursements in Case Number 03-12717-GHB thus far to FB Financial Services, Inc. are as follows:

Principal – \$1,403.26

Interest – \$596.74

For a total disbursement of \$2,000.00

II. CONCLUSIONS OF LAW

The issue before the Court is whether or not a debtor can modify a confirmed chapter 13 plan to classify a deficiency balance on a secured claim as unsecured where the collateral was destroyed in an accident. FB Financial asserts that the Sixth Circuit case of *In re Nolan*, 232 F.3d 528 (6th Cir. 2000) prohibits any reclassification of a secured claim post-confirmation. The debtor, on the other hand, alleges that the *Nolan* ruling does not apply to this case because in *Nolan* the debtor was attempting to voluntarily surrender the collateral, whereas here the collateral was accidentally destroyed. The debtor is seeking to classify the remaining balance of FB Financial’s secured claim as unsecured.

In *Nolan*, the Sixth Circuit stated:

We hold 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 classified as a secured claim.

Nolan, 232 F.3d at 535. In reaching this decision, the court engaged in a thorough analysis of § 1329 and set forth five factors which prohibited reclassifying a secured creditor. Three of those factors mandate that the debtor’s proposed plan modification in the case at bar is prohibited by § 1329.

First, the *Nolan* court stated that “section 1329(a) does not expressly allow the debtor to alter, reduce or reclassify a previously allowed secured claim. Instead, section 1329(a)(1) only affords the debtor a right to request alteration of the amount or timing of specific payments.” *Id.* at 532. If a debtor

could reclassify a secured creditor as unsecured, it would have the effect of adding a claim to the unsecured creditors. The court stated that such an addition is prohibited by § 1329(a).

The second factor the *Nolan* court relied on in making its decision was that § 1325(a)(5)(B) “mandates that a secured claim is fixed in amount and status and must be paid in full once it has been allowed.” *Id.* at 533. When a debtor attempts to “bifurcate a claim that has already been classified as fully secured into a secured claim as measured by the collateral’s depreciated value and an unsecured claim as measured by any unpaid deficiency,” the debtor is violating § 1325(a)(5)(B)(ii). *Id.*

Lastly, the *Nolan* court stated that § 1329 does not allow a debtor to reduce or increase the amount of a claim once the plan is confirmed; however, § 1329 does allow a debtor to increase or reduce the amount of payments to a particular class or to extend or reduce the time for such payments. The *Nolan* court based this finding on the use of language in the statute and concluded that “if the term ‘payments’ in section 1329(a) referred to the secured claim itself rather than to individual payments, the separate use of ‘claims’ in section 1329(a)(3) would be superfluous.” *Id.* at 535.

Based on the conclusions reached by the Sixth Circuit in *In re Nolan*, this Court has no other option but to rule that the debtor’s proposed plan modification in the case at bar is prohibited. Although the specific holding of the *Nolan* court stated that a debtor could not surrender collateral and then classify the deficiency as unsecured, the statutory inquiry engaged in by the court clearly demonstrates that any proposed post-confirmation reclassification of a secured creditor’s claim is prohibited by § 1329. While this Court recognizes that collateral destroyed in an accident is fundamentally different from collateral voluntarily surrendered, the same statutory considerations apply. Until such time as the Sixth Circuit revisits its *Nolan* decision, this Court holds that a debtor cannot reclassify any deficiency balance owing to a secured creditor as unsecured.

III. ORDER

It is therefore **ORDERED** that the “Motion filed by Debtor to Cease Disbursements to FB Financial and Adjust the Chapter 13 Plan Payments and Delete Court Insurance” is **DENIED as follows:**

The Debtor is not allowed to classify the remaining balance of FB Financial’s secured claim as unsecured.

Mailing information:

Debtors
Debtors’ Attorney
Stephen Hughes, Creditor’s Attorney
Chapter 13 Trustee