

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION AT HAMMOND

WE-18J

IN RE:)
RAUL AGOSTO)
) BANKRUPTCY NO. 08-20094
)
Debtor)

MEMORANDUM OPINION AND ORDER

Final hearing held on August 19, 2008 in this Chapter 13 case on Objection filed by GMAC (“Objectant”) on March 11, 2008, to the Confirmation of the Plan filed by the Debtor.

Debtor appears by counsel.

Trustee appears.

Objectant appears by counsel.

Submitted.

The Objectant’s only witness was the Debtor, who testified that the Fair Market Retail Value of the 2000 Chevy Tahoe motor vehicle in which the Objectant has a security interest as \$7,500.00. This is the amount set out in the Debtor’s proposed Plan. The Court finds that the testimony of the Debtor was credible and reliable and that the Fair Market Retail Value of said motor vehicle is \$7,500.00.

The Debtor has the burden of proving the conditions of confirmation in §§1322 and 1325(a). Lundin, Chapter 13 Bankruptcy 3rd Ed. (2000 + Supp. 2004). §217.1, P. 217-1 + N.1 (Collecting cases). However, the Objectant has the initial burden of coming forward with the evidence in support of its Objection to a Plan. In re Valley Park Group, Inc., 96 B.R. 16, 21 (Bankr. N.D.N.Y. 1989); In re Silver Falls Petroleum Corp., 55 B.R. 495, 497 (Bankr. S.D. Ohio 1985); In re Northeast Dairy Co-op Federation, Inc., 73 B.R. 239, 248 (Bankr. N.D.N.Y. 1987). As stated by the Court in In re Blevin, 150

B.R. 444 (Bankr. W.D. Ark. 1992):

[i]n Education Assistance Corp. v. Zellner, 827 F.2d 1222 (8th Cir. 1987), the Eighth Circuit Court of Appeals agreed with the reasoning of Menden hall [54 B.R. 44 (Bankr. W.D. Ark. 1985)], stating that:

[g]enerally, in civil litigation, the party seeking to change the status quo has the ultimate burden of proving his allegations are true. See Joseph A. Bass Co. v. United States, 340 F.2d 842, 844 (8th Cir. 1965) (“[i]t is fundamental that the burden of proof * * * rests upon the party who, as determined by the pleadings or the nature of the case, asserts the affirmative of an issue”). Since a Chapter 13 plan that meets the requirements of section 1325(a) would be confirmed absent the objections of the creditor, the creditor has, at minimum, “the initial burden of producing satisfactory evidence to support the contention that the debtor is not applying all of his disposable income” to the plan payments. In re Fries, 68 B.R. 676, 685 (Bankr. E.D. Pa. 1986); see also In re Menden hall, 54 B.R. 44, 45-46 (Bankr. W.D. Ark. 1985).

827 F.2d at 1226. The holding of Education Assistance Corp. v. Zellner is binding in this Circuit.

Substantial support exists for the Eighth Circuit’s view. For example, a leading treatise on bankruptcy states that:

An objection to confirmation gives rise to a contested matter which is to be litigated by the parties directly involved, including the debtor and the objecting creditor or creditors. Generally, the burden of going forward with evidence and the ultimate burden of proof is borne by the party objecting to confirmation, and if that party fails to prosecute the objection, the objection should be dismissed.

5 Collier on Bankruptcy, ¶1324.01[3] (15th ed. 1991). See also, I re Packham, 126 B.R. 603 (Bankr. D. Utah 1991); In re Fricker, 116 B.R. 431 (Bankr. E.D. Pa. 1990); In re Colon Vasquez, 111 B.R. 19 (Bankr. D.P.R. 1990); In re Carver, 110 B.R. 305 (Bankr. S.D. Ohio 1990); In re Stein, 91 B.R. 769 (Bankr. S.D. Ohio 1988); In re Keffer, 87 B.R. 509 (Bankr. S.D. Ohio 1988); In re Navarro, 83 B.R. 348 (Bankr. E.D. Pa. 1988); In re Cruz, 75 B.R. 56 (Bankr. D.P.R. 1987); In re Fries, 68 B.R. 676 (Bankr. E.D. Pa. 1986); In re DeSimmons, 17 B.R. 862 (Bankr. E.D. Pa. 1981); HCC Consumer discount Co. v. Tomeo (In re Tomeo), 1 B.R. 673 (Bankr. E.D. Pa. 1979). Therefore the creditor has the burden of proof on issues raised by the objection.

In this case, no credible evidence concerning value was received. Therefore, the bank failed to meet its burden of proof on the issue of valuation. The objection to confirmation is overruled and the plan is confirmed.

Id. 150 B.R. at 446. See also, Lundin, Chapter 13 Bankruptcy 3rd Edition (2000 + 2004 Supp.). §217.1, P. 217-3 + NN. 3 +4 (Collecting cases).

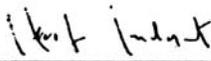
Accordingly, because the Objectant has failed to present any evidence in support of its Objection that the Fair Market Retail Value of said motor vehicle is \$12,975.00, it has not met its initial burden of coming forward with the evidence. Therefore, said Objection shall be denied. It is therefore,

ORDERED, ADJUDGED, AND DECREED, that the Objection by GMAC to the Confirmation of the Plan by the Debtor is hereby **DENIED**.

The Clerk shall enter this Order upon a separate document pursuant to Fed. R. Bk. P. 9021.

Dated: August 20, 2008

Distribution
Debtor, Attorney for Debtor
Attorney McIntosh
Attorney Dabertin
Trustee
U.S. Trustee



JUDGE, U. S. BANKRUPTCY COURT