

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

IN RE:)
)
Kristle Leigh McClamrock,) Case No. 03-59006 C-7W
)
Debtor.)
_____)

ORDER

This matter came on for hearing before the undersigned Bankruptcy Judge on July 1, 2003 in Winston-Salem, North Carolina, after due and proper notice, upon the Motion for Relief from Stay with respect to a 1999 Ford Escort filed by Ford Motor Credit Company (the "Creditor") against the Debtor, Kristle Leigh McClamrock (the "Debtor"). Appearing before the Court was Stan H. Dick, on behalf of the Debtor, and Tommy S. Blalock, on behalf of the Creditor. Having reviewed the file and considered the arguments of counsel and the testimony of witnesses, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

The Debtor and her former spouse, Robert Miller, filed a voluntary joint petition for relief under Chapter 13 of the Bankruptcy Code on September 10, 2001, and their plan was confirmed on January 3, 2002. In the Chapter 13 petition, the Debtor and Miller listed a 1999 Ford Escort subject to a lien held by Ford Motor Credit Company. The Order Confirming Plan treated this debt as fully secured in the amount of \$6,685.11 and provided that the entire debt was to be paid including contract interest and that disbursements would be from the Chapter 13 office in the amount of \$155 per month.

The Debtor de-consolidated and converted her case to a Chapter 7 proceeding on March 21, 2003. On the Debtor's Claim for Property Exemptions filed March 21, 2003, she exempted a 1999 Ford Escort with a fair market value of \$4,725 subject to a lien in favor of Ford Motor Credit Company in the amount of \$4,341.34.

On April 3, 2003, Ford Motor Credit Company by and through a Bankruptcy Specialist at the National Bankruptcy Service, sent an offer to the Debtor's counsel. The offer provided that if the Debtor elected, she could make voluntary payments to Ford in the amount of \$155.50 per month with the payments to be due by the 20th of each month. A new account number was assigned to the loan.

On May 19, 2003, Ford Motor Credit Company filed a Motion for Relief from Stay regarding the 1999 Ford Escort showing a duly perfected lien. On June 6, 2003, counsel for the Debtor filed a Response to the Creditor's Motion stating that the Debtor had been making monthly payments to the Creditor in response to Ford Motor Credits' offer.

At the hearing on the Motion for Relief from Stay, the Debtor presented evidence of timely payments to Ford in the amount of \$155.50 for the months of April, May and June 2003. Counsel for the Creditor argued at the hearing that, pursuant to the Vehicle Retail Installment Contract entered into by the parties, the monthly payment amount owed the Creditor was \$303.70 per month, and that the letter sent to Debtor's counsel recited an incorrect monthly payment term. Counsel for the Debtor argued that the letter constituted a modification of the monthly payment term upon which the Debtor had relied in making payments since April of 2003.

DISCUSSION

Modification of a contract for the sale of goods over \$500 is governed by Article 2 of the Uniform Commercial Code. See N.C. Gen. Stat. § 25-2-209; see also Mulberry-Fairplains Water Assn., Inc. v. North Wilkesboro, 105 N.C. App. 258, 412 S.E.2d 910 (1992). Under N.C. Gen. Stat. § 25-2-209, a modification to a contract: (1) does not require consideration to be binding; (2) requires a signed writing if the original agreement so required; (3) must satisfy the Statute of Frauds if the agreement so modified falls within its provisions; and (4) may operate as a waiver if the above requirements are not met. Id. The defense of Statute of Frauds to a contract modification must be affirmatively pled. See Mulberry-Fairplains Water Assn., Inc., 105 N.C. App. at 266, 412 S.E.2d at 916 (citing N.C. Gen. Stat. § 1A-1, Rule 8(c) (1990)). Failure to affirmatively plead a defense constitutes a waiver of the right to assert that defense. See Bone Int'l., Inc. v. Johnson, 74 N.C. App. 703, 707, 329 S.E.2d 714, 717 (1985); see also Smith v. Hudson, 48 N.C. App. 347, 352, 269 S.E.2d 172, 176 (1980) (citations omitted).

Furthermore, "modification of a sales contract may be established by a course of conduct." Mulberry-Fairplains Water Assn., Inc., 105 N.C. App. at 267, 412 S.E.2d at 916. N.C. Gen. Stat. § 25-2-208 states that "course of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance." N.C. Gen. Stat. § 25-2-208(3).

In this case, the Creditor did not raise the defense of the Statute of Frauds. Because the Creditor failed to raise this defense, it is deemed waived and the Court need not address this issue. The evidence that is before the Court shows a course of conduct whereby the Creditor issued a letter to the Debtor with payment terms, the Debtor tendered a monthly payment of \$155.50 to the Creditor each month for three months and the Creditor accepted said payments by

cashing each check as it was received.¹ As this payment amount was inconsistent with the original contract payment amount, these payments are relevant evidence to show a modification of the contract under the U.C.C. The Debtor also testified that she intended each check to serve as a full monthly payment to the Creditor, and believed that this was the amount sought by the Creditor pursuant to its letter. Therefore, the evidence presented supports the conclusion that the Letter sent by the Creditor to Debtor's counsel served as an offer to modify the monthly payment term to \$155.50 per month and the Debtor accepted by performance of tendering payment as requested. When the Creditor accepted and cashed the checks, it assented to this modification of the monthly payment term.

For the foregoing reasons, IT IS ORDERED, ADJUDGED AND DECREED that the monthly payment term has been modified by the parties to \$155.50 per month, payable by the Debtor until the balance of the Creditor's secured claim at the contract rate of interest of 2.90 percent (%) is paid in full. However, if the Debtor fails to comply with the terms under the modified agreement, the Creditor is entitled to exercise all of its remedies pursuant to state law.

This the 21st day of July, 2003.

CATHARINE R. CARRUTHERS

Catharine R. Carruthers
United States Bankruptcy Judge

¹ The Creditor had been accepting this amount (less fifty cents) each month from the Chapter 13 office while the Debtor was in a Chapter 13 proceeding. It is conceivable that the Creditor intended to continue payments at this amount, and the letter served to memorialize this intention rather than to re-institute the original payment term as counsel for the Creditor argues.