

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

IN RE: Edgar Dean Phillips)	Case No. B-9950198-C7
Frankie Darlene Phillips)	
Debtors,)	Adversary Proceeding No.: 00-6019
)	
)	
W. Joseph Burns, Trustee in)	
Bankruptcy for Edgar Dean)	
Phillips and Frankie Darlene)	
Phillips)	
Plaintiff,)	
)	
vs.)	
)	
American General Finance Inc.,)	
)	
Defendant.)	

**ORDER DENYING TRUSTEE'S MOTION FOR SUMMARY JUDGMENT
AND GRANTING AMERICAN GENERAL FINANCE'S MOTION FOR
SUMMARY JUDGMENT**

THIS MATTER came on for hearing after due and proper notice before the undersigned Bankruptcy Judge on January 31, 2001, in Winston-Salem, North Carolina on the cross motions for summary judgment filed by W. Joseph Burns, Trustee in Bankruptcy for Edgar Dean Phillips and Frankie Darlene Phillips, and American General Finance, Inc. Appearing before the Court were W. Joseph Burns, Attorney for the Trustee, and Albert Diaz, Attorney for American General Finance, Inc. Having considered the motions before the Court and the matters of record in this case, the Court finds and concludes the following:

All the material facts to the determination of the legal issues in this case have been stipulated to by the parties or are not otherwise in dispute and therefore summary judgment is appropriate

under Bankruptcy Rule 7056.

As of March 19, 1998, Union Acceptance Corporation had a duly perfected first lien on a 1998 Pontiac Firebird (the "Vehicle"), which was owned the Debtor, Frankie Darlene Phillips. On July 1, 1998, the Debtors obtained a loan from American General Finance, Inc. ("AGF") to pay off the balance of the Debtors' previous loan on the vehicle. In connection with the loan, the Debtors granted a security interest in the vehicle to AGF. AGF issued a check payable to the Debtors and Union Acceptance Corporation in full payment of the Debtors' debt secured by the vehicle. The check had the following language:

Endorsement acknowledges receipt of PAYMENT IN FULL for the vehicle described below and title is hereby GUARANTEED to the maker of said check. MAKE Pontiac YEAR 1998 MOTOR NO. 2G2FS22K4N2204570. You may negotiate this check only (1) when account is paid in full, (2) when all items have been satisfied and (3) when the title has been mailed to the payor.

Union Acceptance Corporation and both Debtors endorsed the check. Despite the restrictive endorsement, on July 14, 1998, Union Acceptance Corporation executed the Certificate of Title releasing its lien on the Vehicle and delivered the title to the Debtors instead of AGF. AGF telephoned the Debtors and requested that they forward the title to AGF so that it could record its security interest in the vehicle. The Debtors advised AGF that they did not have the title. Thereafter, AGF requested that Union Acceptance apply for a Duplicate Certificate of Title, which they did on January 21, 1999, noting AGF as the first lienholder. On January 27, 1999, a Duplicate Certificate of Title for the vehicle was issued noting AGF as the first lienholder.

The Debtors defaulted on the loan with AGF in the fall of 1998 and as a result of the default, on February 3, 1999, AGF repossessed the vehicle. The following day, February 4, 1999, the Debtors filed a petition under Chapter 13 of Title 11 of the United States Code.

On March 10, 1999, AGF filed a secured Proof of Claim in the bankruptcy case in the

amount of \$23,339.77. AGF valued the vehicle at \$19,475.00 and attached a copy of the Duplicate Certificate of Title. After AGF filed its proof of claim, it was discovered that the vehicle had been wrecked and repaired.

On June 11, 1999, this Court entered an Order confirming the Debtors' Chapter 13 Plan. With respect to the AGF lien on the Vehicle, the Order Confirming the Plan provided as follows:

A lien on 1998 Pontiac. The debtors desire to release the vehicle to the creditor. The creditor shall have until September 30, 1999, to both liquidate the collateral and to file a deficiency claim with the Trustee. Any timely filed deficiency claim will be allowed as unsecured, absent objection by any party in interest and further orders of this Court otherwise. The release of the vehicle will be deemed in full satisfaction of the debtors' liability if the creditor fails to file a deficiency claim by this deadline.

There were no objections by any party as to the treatment of AGF in the plan. On June 22, 1999, the vehicle was sold for \$11,300.00 and after commissions and fees, AGF received the sum of \$11,200.00. After the sale, AGF filed a deficiency claim in the amount of \$11,310.92.

On June 25, 1999, the Debtors' bankruptcy case was converted to a case under Chapter 7 and W. Joseph Burns was appointed Trustee.

The Trustee made demand for the return of the vehicle as an alleged preferential transfer under 11 U.S.C. § 547 and on May 17, 2000, the Trustee filed a Complaint against AGF commencing this adversary proceeding. The Trustee seeks to avoid the AGF security interest in the vehicle as a preferential transfer or alternatively as an alleged unauthorized post-petition transfer pursuant to 11 U.S. C. § 549(a) and seeks a judgment against AGF in favor of the Trustee in the amount of \$19,475.00. AGF contends that such relief is barred by the preclusive effect on the confirmation order which has been entered in this case and seeks a dismissal of the Complaint.

Section 1327(a) of the Bankruptcy Code provides that "[t]he provisions of a confirmed [chapter 13] plan bind the debtor and each creditor, whether or not the claim of such creditor is

provided for by the plan, and whether or not such creditor had objected to, has accepted, or has rejected the plan.” 11 U.S.C. § 1327 (a). This provision requires that the order confirming the plan be given res judicata effect as to those issues which were or could have been decided at the time of confirmation. In re Woods, 130 B.R. 204 (W.D. Va. 1990). It is clear that “a confirmed Chapter 13 plan is res judicata as to all parties who participate in the confirmation process.” In re Duke, 153 B.R. 913, 918 (Bankr. N.D. Ala. 1993), (quoting Sun Finance Co. v. Howard (In re Howard), 972 F.2d 639, 641 (5th Cir. 1992)). “The binding effect of confirmation commits the Chapter 13 Trustee as well.” In re Lee, 189 B.R. 692, 694 (Bankr. M.D. Tenn. 1995). Absent a timely appeal, “the confirmed plan is res judicata and its terms are not subject to collateral attack.” In re Talbot, 124 F.3d 1201, 1209 (10th Cir. 1997).

In order to provide finality in the Chapter 13 confirmation order, a court cannot subsequently address arguments that were or could have been made at the time of confirmation.¹ In re Tippins, 221 B.R. 11, 23 (Bankr. N.D. Ala. 1998); see also In re Clark, 172 B.R. 701, 703 (Bankr. S.D. Ga. 1994); In re Patterson, 107 B.R. 576, 578 (Bankr. S.D. Ohio 1989). The res judicata effect of the confirmation orders is applied equally as against debtors and creditors and therefore a debtor is prohibited from modifying the confirmation order absent substantial and unanticipated change of circumstances. In re Arnold, 869 F.2d 240 (4th Cir. 1989).

The only exception to the finality and res judicata effect of the confirmation order is where the court finds that a due process violation has occurred a creditor did not receive adequate notice that its claim was subject to modification in bankruptcy. In re Therneau, 214 B.R. 782, 785 (Bankr. E.D.N.C. 1997) (modification of a lien through valuation process of § 506(a) and (d) was enough

¹It is permissible for an order confirming a plan to specifically reserve the right to address issues at a later date.

to render modification of a lien in a confirmation order binding upon a secured creditor). The Fourth Circuit has consistently held that there will be no res judicata effect to a plan's confirmation order if the creditor's due process rights were violated due to lack of adequate notice. See In Re Deutchman, 192 F.3d 457, 460-61 (4th Cir. 1999); In re Linkous, 990 F.2d 160, 162-63 (4th Cir. 1993).

Lack of proper notice was not an issue in this case. All parties had notice and fully participated in the treatment of the AGF secured claim. The plan was very specific as to the treatment of the claim. The claim was valued under § 506 which does not require an adversary proceeding. If the Chapter 13 Trustee had decided to contest the validity of the lien as a preference, she would have been required to bring an adversary proceeding and take the affirmative steps to avoid the lien. Cen-Pen Corp. v. Hanson, 58 F.3d 89, 93 (4th Cir. 1995) (confirmation generally cannot have a preclusive effect as to the validity of a lien, which must be resolved in an adversary proceeding). The Trustee did not bring an adversary proceeding and used the plan process to determine the value of the secured claim. The plan clearly details the treatment of the AGF claim and how it will be paid.

In a case factually similar, a Chapter 13 plan recognized Foothill Credit Corporation ("Foothill") as a secured creditor and specifically dealt with the claim. There was no appeal from the confirmation order which required that Foothill receive monthly payments on its secured claim. The Chapter 13 Trustee did not disburse payments and brought a motion to avoid a preferential lien. Foothill filed a motion for relief from stay to repossess the vehicle. Judge Stocks found that "[a] confirmation order in a Chapter 13 case which allows a claim bars re-litigation of that claim." In re Castevens, No. 99-51008C-13, Order of William L. Stocks (Bankr. M.D.N.C. May 1, 2000) (citing In re Duke, 153 B.R. 913, 918 (Bankr. N.D. Ala. 1993)). "The assertion that the lien is preferential

is a matter which could have been raised prior to the confirmation hearing, and the Trustee's effort to now raise the issue involves an effort to re-litigate the claim and treat it differently than it was treated under the confirmation order. As such, the motion must be denied." In re Castevens at 5.

A different result is not reached just because a debtor converts and a Chapter 7 Trustee is appointed. Section 348 (f)(1)(B) of the Bankruptcy Code provides that "when a case under chapter 13 of this title is converted to a case under another chapter under this title....valuations of property and of allowed secured claims in the chapter 13 case shall apply in the converted case, with allowed secured claim reduced to the extent that they have been paid in accordance with the chapter 13 plan." 11 U.S.C. § 348 (f)(1)(B). Here the AGF secured claim was allowed and valued in the Debtors' confirmed plan. The valuation was fixed when AGF sold the vehicle for \$11,200.00. The sale of the vehicle, as provided for in the Chapter 13 plan, resulted in the payment in full of AGF's secured claim. "The express intent of Bankruptcy Rule 1019 which implements Section 348 is to preserve any action taken in the case prior to conversion to Chapter 7." In re Ford, 61 B.R. 913, 916 (Bankr. W.D. Wis. 1986). Conversion to a Chapter 7 will not undo that which the was set forth in the confirmation order. Payments made pursuant to a confirmed plan cannot be avoided. In re Hoggarth, 78 B.R. 1000, 1002 (Bankr. D.N.D. 1987); see also Vogel v. Russell Transfer, Inc., 852 F.2d 797, 799 (4th Cir. 1988).

AGF received payment in full for its secured claim during the Chapter 13 case and pursuant to the terms of the confirmed plan. The conversion of the case to Chapter 7 does not revive the lien. Liens satisfied in a Chapter 13 plan are not revived on conversion to Chapter 7. In re Cooke, 169 B.R. 662 (Bankr. W.D. Mo. 1994).

Now, therefore, it is **ORDERED, ADJUDGED, AND DECREED** as follows:

- (1) The Trustee's Motion for Summary Judgment is hereby **DENIED**; and
- (2) The Motion for Summary Judgment filed by AFG is hereby **GRANTED** .

This the 15, day of February, 2001.

CATHARINE R. CARRUTHERS

Catharine R. Carruthers
United States Bankruptcy Judge