

**IN THE UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF ARKANSAS
HARRISON DIVISION**

IN RE: DORESLEY D. LOPEZ, Debtor

**No. 3:14-bk-73368
Ch. 13**

ORDER

Before the Court is Truity Federal Credit Union's [Truity] *Objection to Confirmation of Chapter 13 Plan* filed on December 17, 2014. The Court heard the objection on July 7, 2015, and sustained Truity's objection in part.¹ The Court took under advisement the issue of adequate protection and the debtor's failure to file an insurance claim for damage to the debtor's vehicle that occurred pre-petition. Truity has a perfected security interest in the subject vehicle. For the reasons stated below, the Court overrules this part of Truity's objection.

According to the contract the parties entered into when the debtor and Dolores Lopez [co-debtor] purchased the vehicle, the debtor was required to maintain insurance on the vehicle.² The vehicle was damaged pre-petition (apparently multiple times) but the debtor has never filed an insurance claim or had the vehicle repaired. Although the parties are in agreement that the debtor has maintained an insurance policy on the vehicle, Truity argues that the debtor's failure to file an insurance claim and repair the vehicle is tantamount to a failure to maintain insurance as required by the contract. Without insurance, Truity argues that it is not adequately protected. It believes that the debtor has an obligation to file an insurance claim and have the vehicle repaired in order to restore the value of the vehicle. The debtor testified that she did not file insurance

¹ The Court ordered the debtor to modify her plan to remove the provisions stated in section 8., Part (D), paragraph 6 that related to altering the liabilities of a co-debtor, Dolores Lopez.

² Although the Court is aware that Dolores Lopez is a co-debtor/co-obligor on the contract with Truity, the Court will simply refer to "the debtor" when discussing the debtor's and Dolores Lopez's obligations.

claims for the damage to her vehicle because she was afraid her insurance premiums would increase. Based on her limited income, she had no way to pay a higher insurance premium. Truity has the burden of proving that it is not adequately protected in this instance. *In re Mendenhall*, 54 B.R. 44 (Bankr. W.D. Ark. 1985) (discussing burden of persuasion and burden of proof in chapter 13 confirmation cases).

Underlying Truity's argument that it is not adequately protected is a disagreement concerning the value of the vehicle. When the debtor filed her petition, she valued the vehicle at \$12,000 with a scheduled debt amount of approximately \$21,500. She proposes to pay a 4% rate of interest, her proposed monthly payment is approximately \$275, and her proposed pre- and post-confirmation monthly adequate protection payments are \$120. According to Truity's proof of claim, at the time the debtor filed her petition she still owed \$21,920 with a contract rate of interest of 7.79%. Ms. Lee, a credit resolutions officer at Truity, testified that she believed the value of the vehicle would be between \$18,000 and \$21,000 according to the NADA if it was in good condition and repaired or "kept up as it's supposed to be." She also testified that the NADA auction value of the vehicle would be \$13,292 if the vehicle was taken care of according to the contract.

There are three components at issue with regard to the value of the vehicle and Truity's adequate protection. The first component is the value of the vehicle itself. The evidence concerning the value of the vehicle in this case is limited. Before the Court is the debtor's valuation that is contained in her schedules and proposed plan, Ms. Lee's testimony concerning the value if the vehicle was repaired, and the debtor's repair estimate of \$10,494.³ Neither party introduced evidence as to the value of the vehicle on

³ The debtor testified that the vehicle was scratched and that the back part of the vehicle had been hit and was dented. She obtained the repair estimate on October 24, 2014, approximately 3 weeks prior to filing her bankruptcy petition.

the date the confirmation hearing was held.⁴ Consequently, the Court finds that the value of the vehicle is \$12,000, the amount listed in the debtor's schedules.⁵

The second component is the amount of the adequate protection payment. However, even though the Court assumes this vehicle is depreciating to some extent, there is no evidence of the vehicle's depreciation or any other method from which the Court can determine whether Truity is adequately protected with the proposed adequate protection payments of \$120 per month. *United Savings Assoc. of Tex. v. Timbers of Inwood Forest Assoc.*, 484 U.S. 365, 370 (1988) ("interest is not adequately protected if the security is depreciating during the term of the stay"); *In re Butler*, 403 B.R. 5, 11 (Bankr. W.D. Ark. 2009) ("adequate protection is compensation paid to the creditor for the depreciation of its collateral" (citing *Timbers*)). Accordingly, the Court finds that the debtor's proposed adequate protection payment of \$120 per month is sufficient to cover depreciation, if any.

The last component is the rate of interest that would protect Truity's present interest in the vehicle. There is no evidence that 4% interest does not adequately protect the value of Truity's present interest in the vehicle and 4% meets the requirements discussed by the Supreme Court in *Till v. SCS Credit Corp. (In re Till)*, 541 U.S. 465 (2004). Therefore, the Court finds that the debtor's proposed rate of 4% interest over the life of the plan adequately protects Truity's present interest in the vehicle.

Truity also argued that the debtor's failure to repair the vehicle or file an insurance claim for the damages was equivalent to the debtor failing to maintain insurance on the vehicle.

⁴ Courts are split on whether collateral securing a claim should be valued on the date the petition was filed or the date of the confirmation hearing. According to § 1325(a)(5)(B)(ii), the value is determined "as of the effective date of the plan." See *in re Owens*, 120 B.R. 487, 492 (Bankr. E.D. Ark. 1990), for a discussion of the valuation date.

⁵ Such a finding is generally consistent with the repair estimate of approximately \$10,000 and the NADA value of this vehicle in good condition of up to \$21,000.

Truity did not cite any cases that directly support its position, nor was the Court able to locate any cases on point. Further, there is no language in the sales contract that requires the debtor to make such a claim. Without more, the Court cannot find that Truity lacks adequate protection based on the debtor not maintaining insurance on the vehicle. The debtor introduced into evidence her insurance card which reflects that the vehicle was insured when the debtor filed her petition. Additionally, Truity acknowledged that, to the best of its knowledge, the debtor has always had the vehicle insured.

For these reasons, the Court overrules Truity's objection to confirmation as it relates to adequate protection and the debtor's failure to file an insurance claim for damage to the debtor's vehicle that occurred pre-petition. The unsecured portion of the balance due Truity shall be paid pro-rata with the other unsecured creditors.

This result does not mean that Truity is without remedy. Because the debtor is not proposing to pay her obligation to Truity in full, Truity can move for relief from the co-debtor stay under 11 U.S.C. § 1301 to proceed against the co-debtor.⁶ Alternatively, even if the debtor makes all of her plan payments under a confirmed plan and receives a discharge of her personal obligation to Truity, the co-debtor, Dolores Lopez, remains obligated to Truity under the terms of the original contract, including any deficiencies that may accrue during the pendency of the plan. In addition, Truity is entitled to maintain its lien on the vehicle until it is paid in full. *In re Leonard*, 307 B.R. 611, 614 (Bankr. E.D. Tenn. 2004).

⁶ Although the debtor's proposed plan states in section 8., Part (D), paragraph 6 that the co-debtor stay "shall remain in place for the life of the plan," that language is not consistent with § 1301, which states:

- (c) On request of a party in interest and after notice and a hearing, the court shall grant relief from the [co-debtor] stay provided by subsection (a) of this section with respect to a creditor, to the extent that—
...
(2) the plan filed by the debtor proposes not to pay such claim.

The debtor shall have 14 days from the entry of this order to amend her plan to conform to the Court's July 8, 2015 order sustaining Truity's objection to confirmation in part.

IT IS SO ORDERED.

cc: Katrina L. Taylor
Todd F. Hertzberg
Mark McCarty, chapter 13 trustee