

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

DAVID L. BLUNT
DEAIDRA J. BLUNT

Case No. 02-12865-MAM-13

Debtors.

**ORDER AND JUDGMENT SUSTAINING SECURED CREDITOR'S
OBJECTION TO DEBTORS' CHAPTER 13 PLAN**

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This matter is before the Court on the objection of Mobile Gas Service Corporation ("MGSC") to the confirmation of David Blunt's chapter 13 bankruptcy plan. The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2) and the Court has the authority to enter a final order. For the reasons indicated below, the Court finds that Blunt's plan cannot be confirmed unless it is amended to show that MGSC's \$2,700.00 claim is a secured claim to the extent of \$1,000.00 and an unsecured claim as to \$1,700.00.

FACTS

David Blunt signed a \$3,487.07 contract with MGSC to finance the purchase of an Armstrong condensor, cooling coil, and furnace on July 7, 1998. The contract granted MGSC a security interest in the Armstrong unit. Blunt selected Mike Tillery, an independent contractor, to install the Armstrong unit. When Tillery arrived at Blunt's home to install the unit, Tillery offered to install a Heil unit rather than the Armstrong unit. Blunt testified that he did not want to accept the Heil unit but because he had been without air conditioning for 3 months he

accepted it. Tillery removed Blunt's prior unit, a \$2,000.00 Carrier unit according to Blunt, and installed the Heil unit.

MGSC filed a UCC-1 financing statement on October 29, 1998 with the probate judge of Mobile County, Alabama that covered the following property:

- One Armstrong Condensor;
- One Armstrong Cooling Cool; and
- One Central Furnace

After filing the financing statement that covered the Armstrong unit, MGSC reissued a new contract for the Heil unit that Tillery installed in Blunt's home. The new contract granted MGSC a security interest in the Heil unit. MGSC did not file a new UCC-1 financing statement that covered the Heil unit.

Under the new contract that Blunt signed with MGSC, he was obligated to remit monthly payments of \$60.99. Blunt failed to remit these payments and MGSC filed a complaint against him for \$4,660.41 in the District Court of Mobile County on September 22, 1999. The district court entered a \$2,700.00 judgment in MGSC's favor on March 3, 2000. Blunt filed a motion for an extension of time to file an appeal but it was denied on March 19, 2000. On May 22, 2002 Blunt filed a chapter 13 bankruptcy petition; in his schedules, he listed MGSC's \$2,700.00 judgment as an unsecured nonpriority claim due to an "appliance dispute."

The Court held a hearing on the confirmation of Blunt's chapter 13 plan on October 17, 2002. MGSC orally objected to the confirmation of Blunt's plan because its \$2,700.00 judgment was listed as an unsecured nonpriority claim rather than as a secured claim. Blunt argued that the amount of the district court judgment was not binding on the Court because the district court did not take into account the offset due to Blunt for the removal of his Carrier unit. The Court

granted MGSC partial summary judgment, holding that the \$2,700.00 judgment as to the amount of the debt owed MGSC was binding under claim preclusion (res judicata). The Court held a further hearing on the confirmation of Blunt's chapter 13 plan on November 14, 2002. Although the Court had previously held that MGSC's \$2,700.00 district court judgment against Blunt had a preclusive effect on the amount of the MGSC claim, the Court heard testimony regarding the value of the unit and the alleged offset due to Blunt.

Blunt testified that he is not satisfied with the quality of the Heil unit and he would prefer MGSC to reinstall his prior Carrier unit. Blunt stated that the Heil unit has a 3-ton condensor unit on the outside but has a 5-ton coil unit on the inside; this causes the Heil unit to consume excess amounts of electricity to run properly according to Blunt. He testified that due to its defects, the Heil unit is worth about \$250.00 to \$300.00 on the street. Counsel for MGSC stated that it would offer a witness who would testify that the Heil unit is worth about \$1,000.00 to \$2,000.00 and he would value the unit at \$1,500.00; counsel for Blunt agreed to stipulate that MGSC's witness would testify that the Heil unit is worth that amount.

In addition to testifying that he would prefer for MGSC to reinstall his Carrier unit, Blunt testified that he never signed the contract for the Heil unit. He stated that both of the contracts consisted of two pages and MGSC took his signature page from the first contract and attached it to the second contract. Jefferson, however, testified that MGSC's original contract consisted of one page with print on the front and back but when MGSC made copies of the contract, it copied the front and back on separate pages for ease of use - therefore, MGSC could not have taken Blunt's signature page from the first contract and attached it to the second one.

The Carrier unit was removed by Tillery and MGSC's credit and collections coordinator, Paula Jefferson, testified that MGSC does not know what happened to the Carrier unit after Tillery removed it. Jefferson stated that MGSC only financed the Heil unit, it did not install the Heil unit nor did it remove the Carrier unit.

LAW

David Blunt filed a chapter 13 bankruptcy petition listing MGSC's \$2,700.00 district court judgment against him as unsecured nonpriority claim due to an "appliance dispute;" however, there is no dispute over the amount of MGSC's claim because the district court judgment is a preclusive finding that this Court will not disturb. *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981) (under the doctrine of claim preclusion (res judicata) "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.")

Although Blunt now argues that he should be allowed a \$2,000.00 "set off" against the amount he owes to MGSC in consideration of the Carrier unit removed by Mike Tillery, the Court finds that he is precluded from raising that issue against MGSC in this case because it should have been raised in the district court. Blunt may have a claim against Tillery, who was not a party to the district court case, but that issue is not before the Court because Tillery is not listed as a party in this case. Therefore, the only issue for the Court to decide is whether Blunt must treat MGSC's \$2,700.00 claim as a secured claim in his chapter 13 bankruptcy plan.

Under its contract, MGSC acquired a security interest in the Heil unit it financed for Blunt.¹ The contract was signed in 1998; therefore, the validity of MGSC's security interest is

¹Blunt testified that he did not sign the contract for the Heil unit; he asserted that both the Armstrong and Heil contracts consisted of two pages and MGSC took his signature page from the Armstrong contract and attached it to the Heil contract. Jefferson, the credit and collections

assessed under Ala. Code 1975, § 7-9-203,² which states that “a security interest is not enforceable against the debtor or third parties with respect to the collateral and does not attach unless”:

- (a) The collateral is in the possession of the secured party pursuant to agreement, or the debtor has signed a security agreement which contains a description of the collateral . . . ; and
- (b) Value has been given; and
- (c) The debtor has rights in the collateral.

Ala. Code § 7-9-203 (1975). Blunt signed MGSC’s financing contract for the Heil unit; it contained a security agreement describing the collateral and obligated Blunt to pay for the unit. Additionally, the Heil unit was installed in Blunt’s home, giving him rights in the collateral. Therefore, MGSC had a valid and enforceable security interest in the Heil unit under Ala. Code § 7-9-203.

When Blunt failed to make payments on the Heil unit, MGSC filed a complaint against him in the amount of \$4,660.41 in the District Court of Mobile County; the district court entered a \$2,700.00 judgment against Blunt on March 3, 2000. Blunt filed his chapter 13 bankruptcy petition on May 5, 2002 and MGSC filed its \$2,700.00 claim against him. The amount of

coordinator for MGSC, testified that MGSC’s contract consisted of only one page with print on the front and the back; therefore, MGSC could not have taken Blunt’s signature page from the Armstrong contract and attached it to the Heil contract. Additionally, the Court observed the signatures on both contracts that were entered into evidence. Although the signatures are generally similar, they are not exactly alike. Even to the untrained eyes of the Court, it is obvious that the signature on the Heil contract is not an exact copy of the signature on the Armstrong contract. Based on the testimony of the witnesses for both parties as well as the Court’s observation of the contracts, the Court finds that Blunt’s assertion is not credible. The Court finds that Blunt signed both contracts.

²This section was repealed when Alabama adopted the Article 9, effective January 1, 2002.

MGSC's claim was established by the district court judgment; this Court must determine if MGSC has a secured claim under § 506 of the Bankruptcy Code.

Section § 506(a) states:

(a) An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

11 U.S.C. § 506(a). MGSC held a lien against the Heil unit pursuant to its contract with Blunt; therefore, it holds a secured claim for the present value of the Heil unit under §506(a). The initial amount of MGSC's claim was established by a \$2,700.00 judgment entered in its favor by the District Court of Mobile County. However, the parties disagreed regarding the present value of the Heil unit; therefore, the Court must determine the present value of the Heil unit.

Blunt testified that the unit is worth about \$250.00 to \$300.00 on the street, whereas, MGSC's witness would have testified that the unit is worth about \$1,000.00 to \$2,000.00 with a value of \$1,500.00 as the actual value he would assess. The United States Supreme Court has held that "under § 506(a), the value of property retained because the debtor has exercised the § 1325(a)(5)(B) 'cram down' option is the cost the debtor would incur to obtain a like asset for the same 'proposed . . . use.'" *Associates Commercial Corp. v. Rash*, 520 U.S. 953, 965 (1997). Accordingly, the Court finds that the amount it would cost Blunt to replace the Heil unit with a similar unit is the present value of the unit.

The Court finds that Blunt's testimony regarding the present value of the Heil unit is unreliable because of the extremely low value he attributed to the unit as well as his lack of

credibility as a witness. Blunt is not an expert on the valuation of assets such as the Heil and the value he attributed to the unit is significantly lower than the stipulated valuation of the expert MGSC offered to produce. Additionally, Blunt's testimony regarding his signature on the Heil contract hurt his credibility because the Court found that he did sign the contract.

Based on the testimony of witnesses for both parties, the Court finds that it would cost Blunt about \$1,000.00 to obtain a like unit for the same proposed use as the Heil unit; therefore, the Court finds that the Heil unit has a value of \$1,000.00. The Court has held that Blunt is precluded from arguing the validity of his "set off" claim against MGSC because he should have raised that issue in the district court. Accordingly, the Court finds that MGSC has a \$1,000.00 secured claim and a \$1,700.00 unsecured claim against Blunt if he retains the Heil unit.

MGSC objected to the confirmation of Blunt's chapter 13 bankruptcy plan because Blunt listed MGSC's \$2,700.00 judgment as an unsecured nonpriority claim rather than as secured claim. The Court has found that MGSC has a \$1,000.00 secured claim as well as a \$1,700.00 unsecured claim under its \$2,700.00 judgment; therefore, Blunt's plan must provide for MGSC's secured claim under § 1325(a)(5) of the Bankruptcy Code, which states:

(a) Except as provided in subsection (b), the court shall confirm a plan if--

....

(5) with respect to each allowed secured claim provided for by the plan--

(A) the holder of such claim has accepted the plan;

(B)(i) the plan provides that the holder of such claim retain the lien securing such claim; and

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; or

(C) the debtor surrenders the property securing such claim to such holder.

11 U.S.C. § 1325(a)(5). The Court will not confirm Blunt's chapter 13 bankruptcy plan until he revises it to conform with the criteria required by § 1325(a)(5).

IT IS ORDERED:

1. The objection of MGSC to the confirmation of David Blunt's chapter 13 bankruptcy plan is sustained.
2. The debtors shall amend their plan to comply with this order by December 31, 2002.
3. A further hearing on confirmation will be heard on January 30, 2003 at 1:00 p.m. in Courtroom 2, U.S. Bankruptcy Court, 201 St. Louis Street, Mobile, AL 36602.

Dated: December 13, 2002

/s/ Margaret A. Mahoney
MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE