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JUDGE: M. A. Mahoney

PARTIES: James Evans, Jennifer Renee Jones Evans, General Motors Acceptance Corporation

CHAPTER: 13

ATTORNEYS: R. C. Wilson, G. W. Finkbohner, Jr.

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KEY WORDS:

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

JAMES EVANS and
JENNIFER RENEE JONES EVANS,

Case No. 95-11022-MAM-13

Debtors.

ORDER

Robert C. Wilson, Mobile, AL for Debtor
George W. Finkbohner, Jr., Mobile, AL for GMAC

This matter came before the Court upon General Motors Acceptance Corporation's ("GMAC") motion to dismiss the case, confirmation of the Debtors' amended proposed plan dated August 31, 1995, and upon the Debtors' objection to Claim No. 2 of GMAC. 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. The matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). For the reasons indicated below, GMAC's motion to dismiss is continued, confirmation of Debtors' amended plan is denied, and Debtors' objection to GMAC's Claim No. 2 is denied without prejudice.

FACTS

James Evans (a co-debtor) and GMAC entered into an agreement on July 18, 1994 for the lease of a 1995 Chevrolet Lumina automobile. (GMAC Exhibit 1.) Evans paid \$2,500 at signing, which included the first of his 24 monthly payments. Thereafter, Evans was obligated to pay \$374 a month for 24 months for a total of \$8,976. Evans is obligated to return the Lumina at the end of the 24 months, but has an option to purchase the car for the predetermined price of \$11,673.74. Evans is not obligated to purchase the Lumina. In fact, the first full paragraph of the lease agreement states in part:

This is an agreement to lease the vehicle described below. This is a lease only.
This is not a purchase agreement. Lessor owns the vehicle.

(GMAC Exhibit 1.)

The Debtors filed their Chapter 13 petition on May 2, 1995 and scheduled, on Schedule D, GMAC as the creditor on a fixed and liquidated secured debt for a 1995 Chevrolet Lumina with a total claim amount of \$5,894. On Schedule G, the Debtors listed GMAC as the lessor of the Lumina. On Schedule C, the Debtors claimed \$10,000 of the Lumina value as exempt. The Debtors have proposed to assume the lease as part of their Chapter 13 plan. Paragraph 13 of the Plan; *see*, 11 U.S.C. § 1322(b)(7). However, the plan proposes to modify the lease.

This plan proposes to pay GMAC a \$374 “preference payment” on the Lumina until July 18, 1996, when the last lease payment is due. The preference payment of \$374 is the monthly lease payment amount. The plan proposes to modify the lease by providing that the Court will determine the purchase option price (instead of using the contractual value) and allow Debtors to pay it through the plan at 12% per annum interest. The plan does not address the issue of arrearages. On September 1, 1995, GMAC filed a written objection to this plan and a motion to dismiss the Chapter 13 proceeding.

GMAC timely filed a proof of claim on May 25, 1995 listing a secured claim of \$18,193.56, with a \$161.82 arrearage. The claim does not state that GMAC’s claim involves a lease, but a copy of the lease was attached. On September 21, 1995, Debtors filed an objection to GMAC’s claim, alleging that the claim does not reflect a credit for the rebated interest and finance charges.

LAW

The central questions for this Court are (1) whether the agreement with the Debtors is an unexpired lease for the purposes of 11 U.S.C. § 365 or a secured claim; (2) what effect the GMAC secured claim filing has on the plan; and (3) whether the plan is confirmable in light of the status of GMAC's claim. The Court finds that GMAC's agreement with the Evans is a lease. GMAC's proof of claim may indicate it wants to have a secured claim or a lease claim, but it is unclear as filed. Since the claim must be clarified, the plan cannot be confirmed and GMAC must amend its claim.

I.

The treatment of a lease or security interest in a Chapter 13 bankruptcy is a question of federal law pursuant to 11 U.S.C. §§ 365 and 1325. However, in *Butner v. United States*, 440 U.S. 48 (1979), the Supreme Court determined that the existence, nature and extent of a lease or security interest is a state law question.

Alabama Code Section 7-1-201(37)(b) lists several factors that must be considered in such a determination:

[The] transaction creates a security interest if . . . the lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods, the lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement or the lessee has an option to become the owner of the goods for no additional consideration upon compliance with the lease agreement.

ALA. CODE § 7-1-210(37)(b).

The contract between GMAC and Debtors in the immediate case does not bind Debtors to purchase the Lumina after making 24 monthly payments of \$374.00, nor are Debtors able to purchase the Lumina for some post-lease nominal value. In fact, after making the 24 lease payments, the agreement allows, but does not require, James Evans to purchase the Lumina outright for \$11,673.74, hardly a "nominal" sum. *In re Winston*, 181 B.R. 589 (Bankr. N.D. Ala.

1995); *Jahn v. M. W. Kellogg Co., Inc. (In re Celeryvale Transport, Inc.)*, 882 F.2d 16 (6th Cir. 1987); *In re Farrell*, 79 B.R. 300 (Bankr. S.D. Ohio 1987).

Section 7-1-201(37)(b) continues, describing situations that do not create security interests merely because:

[T]he lessee has an option to renew the lease or to become the owner of the goods . . . the lessee has an option to become the owner of the goods for a fixed price that is equal to or greater than the reasonably predictable fair market value of the goods at the time the option is to be performed.

ALA. CODE § 7-1-201(37)(b).

The contract with GMAC allows Debtors to make monthly payments for use of a car. GMAC retains ownership rights of the Lumina. “In order to be viewed as creating a security interest, the lease agreement must provide the lessee with some ownership of the leased property.” *In re Winston*, 181 B.R. at 594; citing, *Sharer v. Creative Leasing, Inc.*, 612 So. 2d 1191, 1194 (Ala. 1993). Here, the only ownership interest bestowed upon the debtors would come after 24 months of rental payments and a \$11,673.74 payment. Therefore, the contract with GMAC is not a security interest, it is a true lease.

II.

Since the parties have a lease agreement between them, this Court must determine the effect of GMAC’s timely filed proof of claim. A proof of claim filed in accordance with Bankruptcy Rule 3003(c) supersedes the debtors’ schedules. Fed. R. Bankr. P. 3003(c)(4). GMAC’s proof of claim is prima facie evidence of the validity and amount of the claim. Fed. R. Bankr. P. 3001(f). GMAC’s proof of claim states that it is a secured creditor and then attaches the lease to the claim form. At the hearing, GMAC’s counsel indicated that the claim was a lease claim; however, the \$18,193.56 claim amount appears to cover the purchase option as well. GMAC’s claim is ambiguous. GMAC needs to file a proof of claim which clearly sets forth its

position. Ambiguities will be construed against the draftee—in this case, GMAC. Amendments to a proof of claim generally are freely allowed, but there are limitations. *In re International Horizons, Inc.*, 751 F.2d 1213 (11th Cir. 1985). GMAC must comply with these. If GMAC does amend its claim, the purpose of the amendment must be to cure a defect in the claim as originally filed. *Id.* Post-bar date amendments must be genuine and not assert an entirely new claim under the guise of an amendment. *Id.* The Court realizes that the Chapter 13 Trustee requires lessors to file proofs of claim similar to those required of secured creditors. However, if a creditor is seeking to obtain payment under a lease, that position should be made very clear on the claim.

III.

Given that Debtor's obligation to GMAC is not a secured debt (unless clarified by GMAC that a security interest is what it claims and the Debtors do not object) the proposed Chapter 13 plan does not conform to 11 U.S.C. § 1325. Further, because Debtors have chosen to assume the lease, they are now required to provide GMAC the protections of 11 U.S.C. § 365. 11 U.S.C. § 365(b)(1) requires that Debtors give GMAC the following assurances: (1) prompt cure of any defaults; (2) compensation for pecuniary losses; and (3) adequate assurance of future performance of the lease agreement. Debtors are prohibited from treating GMAC as a secured creditor based on the lease. 11 U.S.C. § 506(a). Attempting to modify a lease and pay it through a Chapter 13 plan does not satisfy the requirements of 11 U.S.C. § 1325 and is contrary to those requirements mandated in 11 U.S.C. § 365. The lease is assumed in total or is rejected. Accordingly, confirmation of the plan as proposed is inappropriate at this time and must be denied.

CONCLUSION

Therefore, it is ORDERED that:

1. GMAC must amend its proof of claim, if desired, by January 22, 1996 and Debtors shall object to any amendment by January 31, 1996.
2. Debtors are given until January 31, 1996 to amend their plan to comply with 11 U.S.C. §§ 1322 and 1325 and any amended proof of claim of GMAC.
3. A continued hearing on confirmation of any amended plan and objection to claim of GMAC, and GMAC's motion to dismiss shall be heard on **February 26, 1996 at 1:30 p.m.** in Courtroom 2, United States Bankruptcy Court, 201 St. Louis Street, Mobile, Alabama 36602.

Dated: January 9, 1996

MARGARET A. MAHONEY
U.S. BANKRUPTCY JUDGE