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JUDGE: M. A. Mahoney

PARTIES: Regina Rhonda Bush, Nissan Motor Acceptance Corp.

CHAPTER: 13

ATTORNEYS: I. Grodsky, E. J. Breithaupt, J. J. Hartley

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UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF ALABAMA

IN RE

REGINA RHONDA BUSH

Case No. 96-13110-WSS-13

Debtor.

**ORDER DENYING MOTION TO MODIFY PLAN  
AND GRANTING RELIEF FROM STAY**

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Eric J. Breithaupt, Birmingham, Alabama, Attorney for Nissan Motor Acceptance Corp.  
Jeffery J. Hartley, Mobile, Alabama, Attorney for the Chapter 13 Trustee

This matter is before the Court on the motion of Nissan Motor Acceptance Corp. for relief from stay and the motion of Regina Rhonda Bush to amend and/or modify her confirmed chapter 13 plan. The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 1334 and 157 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b) and the Court has the authority to enter a final order. For the reasons indicated below, the motion of the debtor to modify her plan is denied and the motion of Nissan for relief from the stay is granted.

**FACTS**

The debtor Regina Rhonda Bush filed for relief pursuant to chapter 13 of the Bankruptcy Code on August 28, 1996. An order confirming her chapter 13 plan was entered October 30, 1996. Nissan Motor Acceptance Corp. was provided a preference claim in the amount of \$340 per month. This was based on Nissan's total, grossed-up (i.e., including payment for present value interest) secured claim of \$18,000. Nissan's collateral is a 1995 Buick Regal. The portion of Nissan's allowed claim in excess of its secured claim (\$806.73) was to be treated as unsecured and paid pro rata dividends in full.

On August 20, 1998, the Court entered an order finding that the debtor had fulfilled her requirements under her plan and should therefore be discharged from all debts provided for by her plan. Her case was closed that same day. However, Nissan was not paid any portion of its secured or unsecured claims prior to the discharge order. It therefore moved to have debtor's case reopened. This motion was granted for the purpose of allowing the trustee to attempt to recoup funds disbursed pursuant to debtor's plan to be paid to Nissan. On May 5, 2000, Nissan filed this motion for relief from stay.

The trustee successfully recouped some of the funds of the debtor administered by the trustee. As of June 27, 2000, Nissan received \$7,023.76 in satisfaction of its secured claim and no money for its unsecured claim.

On June 27, 2000, the debtor moved to modify her plan to reduce Nissan's secured claim to \$4,250 and satisfy this claim by a preference payment of \$250 per month for the duration of debtor's plan (the plan has approximately seventeen months remaining) and to reduce pro rata distributions to unsecured creditors to 5% of their allowed claims. Debtor testified that the current value of Nissan's collateral is \$4,250. She also stated that she makes less money now than at the time her plan was originally confirmed. Her net pay is approximately \$1,310 per month and her living expenses total approximately \$1,080 per month. Debtor testified that she needs the vehicle for transportation to and from work.

#### LAW

This motion for relief from stay is controlled by debtor's attempt to modify her plan. If confirmable, Nissan is more than adequately protected and not entitled to relief. If not confirmable, Ms. Bush admittedly cannot make the payments under her current plan. "Cause"

therefore exists to grant Nissan relief from the stay pursuant to 11 U.S.C. § 362(d)(1). *In re Gilpin*, 209 B.R. 490 (Bankr. W.D. Mo. 1997); *In re Shariyf*, 68 B.R. 604 (E.D. Pa. 1986) (default in making plan payments and unfeasibility of plan were “cause” to lift stay).

Is the proposed plan modification permitted by the Bankruptcy Code? “The provisions of a confirmed plan bind the debtor and each creditor.” 11 U.S.C. § 1327(a). This provision essentially clarifies that a confirmed plan is res judicata as to any issue subject to resolution at the confirmation hearing. *See, Wallis v. Justice Oaks II, LTD (In re Justice Oaks, LTD)*, 898 F.2d 1544 (11th Cir. 1990) (chapter 11 case). This includes issues regarding the proper amount of a secured claim under § 1325(a)(5) of the Bankruptcy Code. *In re Meeks*, 237 B.R. 856, 859 (Bankr. M.D. Fla. 1999); *In the Matter of Bernard*, 189 B.R. 1017 (Bankr. N.D. Ga. 1996).

Section 1329 provides three exceptions to the res judicata effect of a confirmed plan. This provision was invoked by Ms. Bush. Unfortunately for her, § 1329 does not permit modification of the amount of a secured claim. *Meeks*, 237 B.R. at 860. “The claim amount is fixed at the confirmation hearing, and no provision in § 1329 allows for the later modification or reexamination of the claim amount.” *Id.* Section 1329 may permit a debtor to surrender collateral after confirmation and receive credit against the lien holder’s claim, but it does not permit debtors to reclassify secured claims as unsecured. *Id.* at 861. Essentially, this is what Ms. Bush requests. The full \$10,976.24 balance of Nissan’s secured claim must continue to receive treatment as a secured claim.

Ms. Bush has had continued possession and use of the vehicle since the date of filing her case. At the hearing on confirmation, she chose to keep her vehicle rather than surrendering it to Nissan. 11 U.S.C. § 1325(a)(5). This entitled Ms. Bush to receive any benefit of post-

confirmation appreciation. Thus, even assuming the vehicle is worth only \$4,250 now as Ms. Bush contends, it would be inequitable to permit her to shift the loss resulting from the vehicle's depreciation to Nissan. *Chrysler Financial Corp. v. Nolan*, 234 B.R. 390 (M.D. Tenn. 1999) (surrender of collateral post-confirmation does not permit debtor to reclassify remaining portion of secured claim as unsecured); *Meeks*, 237 B.R. 856 (same); *In re Dunlap*, 215 B.R. 867 (Bankr. E.D. Ark. 1997).

If plans could be continuously modified to impair creditors' rights, creditors would never consent to confirmation. Consent to a plan which impaired one's rights would simply establish a new baseline for each modification. *See, Carter v. The Peoples Bank and Trust Co. (In re BNW, Inc.)*, 1996 WL 604311 (August 26, 1996, Bankr. S.D. Ala.) (request to reconsider confirmation of chapter 11 plan). Confirmation orders must be final, with res judicata effect, absent a specific statutory provision permitting modification or reconsideration.<sup>1</sup>

THEREFORE, IT IS ORDERED AND ADJUDGED:

- (1) the motion of Nissan Acceptance Motor Corp. for relief from stay is GRANTED;
- (2) The motion of Regina Rhonda Bush to modify her confirmed chapter 13 plan is DENIED.

Dated:

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MARGARET A. MAHONEY

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<sup>1</sup>Although not expressly raised by the debtor, one might argue that a secured claim may be reconsidered after confirmation pursuant to 11 U.S.C. § 502(j). Even assuming possible, the Court finds there is no cause for such a reconsideration, especially since the original confirmation order was entered almost four years ago. *See, In re Bernard*, 189 B.R. at 1022-1023 (motion pursuant to 502(j) unfounded because it was filed more than 26 months after confirmation).

CHIEF BANKRUPTCY JUDGE