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JUDGE: M. A. Mahoney

PARTIES: Dexter Undra Grandison, Christine Rose Grandison, Wells Fargo Financial
Acceptance f/k/a Fidelity Financial Services

CHAPTER: 13

ATTORNEYS: J. A. Lockett, Jr., P. R. Knighten, D. Sicay-Perrow

DATE: 5/31/01

KEY WORDS:

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

DEXTER UNDRA GRANDISON
CHRISTINE ROSE GRANDISON,

Case No. 99-14458

Debtors.

ORDER

John A. Lockett, Jr., Selma, Alabama, Attorney for Debtor
Paul R. Knighten and David Sicay-Perrow, Atlanta, Georgia, Attorneys for Wells Fargo
Financial Acceptance Fidelity Financial Services f/k/a Fidelity Financial Services
John C. McAleer, III, Mobile, Alabama, Chapter 13 Trustee

This matter is before the Court on the motion of Wells Fargo Financial Acceptance f/k/a Fidelity Financial Services (“Fidelity”) for relief from stay. 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) and the Court has the authority to enter a final order. For the reasons indicated below, the Court is denying the motion of Wells Fargo for relief from stay.

FACTS

The debtors, Dexter and Christine Grandison, filed this Chapter 13 bankruptcy case on December 17, 1999. The schedules listed a debt to Fidelity Financial Services. The debt was for a loan on a 1995 Mazda. The debtors listed the value of the vehicle as \$15,000. Debtors’ Chapter 13 plan provided for Fidelity by paying it \$1 which represented “the value of the loan on the 1995 Mazda Millenia.” The plan proposed to pay unsecured claims 16% pro rata. Fidelity filed an objection to the plan together with a relief from stay motion. The plan was confirmed on March 16, 2000, subject to an amendment being filed which increased payments to creditors to

\$125 per month, but the amendment did not change Fidelity's treatment. Fidelity did not appear at the confirmation hearing so the Court overruled its objection to the plan. The amendment was filed and a confirmation order was entered on April 7, 2000.

On July 26, 2000, Fidelity filed a motion to set aside confirmation and to reset confirmation. A hearing was held, and this Court concluded that insufficient evidence had been provided to establish that the confirmation order should be reconsidered or vacated. The motion for relief from stay was set for final hearing on March 16, 2000. The debtors and Fidelity submitted, and this Court signed, a consent order requiring the debtors to maintain insurance on the 1995 Mazda vehicle, or if they did not, the stay would lift automatically. Fidelity has now filed a second motion for relief from stay on the basis that the 1995 Mazda had been destroyed and insurance proceeds are available. Fidelity is the named beneficiary of the insurance policy. The insurance proceeds for the vehicle total approximately \$9,300. Fidelity has been paid \$1 as provided in the plan. Fidelity's unsecured portion of its claim is in the amount of \$22,914.88. According to the Chapter 13 Trustee, Fidelity has been paid \$324.53 on the unsecured claim. At the hearing on this matter, Fidelity asserted that pursuant to § 1325(b)(1)(B) debtors must pay all of their projected disposable income to their creditors and debtors receipt of the insurance proceeds increased their disposable income.

LAW

The issues before this Court are (1) whether Fidelity has a right to use the insurance proceeds to pay off its unsecured claim in full; and (2) if not, whether the debtors' increase in income as a result of the proceeds must be paid to all of debtors' unsecured creditors pro rata. The Court will discuss each of the issues in turn.

A.

This Court ruled recently in a similar case, *In re Aletha Franchelle Witherspoon*, Case No. 97-12178 (Bankr. S.D. Ala., January 9, 2001). In the *Witherspoon* case, debtor's car was "totaled" and the creditor filed a motion requesting the turnover of the insurance proceeds to payoff its secured and unsecured claims in full. Both Ms. Witherspoon and this debtor were insured by State Farm Insurance Company and had the same policy terms and conditions. This Court held that the insurance proceeds were property of the bankruptcy estate and that the creditor's interest in the proceeds was governed by the debtor's confirmed plan. The secured debt, as established in the plan, had to be paid. "Upon that payment, the debt to [the creditor] will be paid in full and a discharge of the debtor from liability on the remainder of the debt is appropriate." *In re Witherspoon*, Case No. 97-12178 (Bankr. S.D. Ala., January 9, 2001). Following this Court's order in the *Witherspoon* case, this Court finds that the proceeds in the instant case are property of debtors' bankruptcy estate and Fidelity's interest in the proceeds is limited to the amount to be paid under debtors' confirmed plan. Fidelity's secured portion of its claim is \$1, which has already been paid. The remainder of its claim is unsecured and is to be paid 16% pro rata under the plan. Therefore, Fidelity only has a right to the insurance proceeds to the extent that its 16% share of its unsecured claim remains unpaid.

B.

As to the issue of whether the proceeds constitute disposable income and must be paid to all of debtors' unsecured creditors pro rata, the real question is whether the debtors can be compelled to modify their plan to account for the additional income. Section 1329(a) provides that an unsecured creditor can modify a confirmed plan to "increase or reduce the amount of payments on claims of a particular class provided for by the plan." There is a split of authority as to whether or not such a modification shall be granted as a matter of right so long as it

complies with the Code requirements of a plan or whether it is granted only upon a showing of substantial change in the debtor's ability to pay. See *Barbosa v. Soloman*, 235 F.3d 31 (1st Cir. 2000). This Court has analyzed that issue recently in *In re Flenory*, Case No. 99-14099 (Bankr. S.D. Ala., May 23, 2001). In the Flenory case the debtor received an unexpected tax refund in the amount of \$3,447. This Court followed the majority rule. For a trustee or creditor to compel modification of a confirmed plan there must have been a substantial change in the debtor's circumstances. In the *Flenory* case, the tax refund did not constitute a substantial change and thus, the trustee could not modify the plan against the debtor's wishes. In this case, the insurance proceeds total \$9,300.

The question remaining is whether the \$9,300 of additional income (or the part that remains) constitutes a substantial change in the Grandisons' ability to pay. Fidelity's assertion that the plan should be modified was not raised until the hearing on the motion for relief from stay. No evidence was presented as to debtors' current income or expenses or as to whether debtors will need to purchase another car. Without more, this Court is unable to determine whether the additional income is a substantial change in debtors' circumstances. Due to the fact that this issue was only raised orally at the hearing on relief from stay, debtors were unable to prepare a complete response. In addition, the *Flenory* case on which this Court would rely, was heard on the same day as the hearing in this case and was not decided until later that month. This Court considers Fidelity's argument concerning debtors' disposable income to be an oral motion to modify the plan. This Court thinks it appropriate to set that motion for hearing at a later date, so that both sides can be prepared for trial.

THEREFORE, IT IS ORDERED AND ADJUDGED:

1. The motion of Wells Fargo Financial Acceptance f/k/a Fidelity Financial Services for relief from stay is DENIED as it relates to payment of any of the \$9,300 insurance proceeds to it, except as to its secured claim and 16% of its unsecured claim.

2. The motion of Fidelity to modify debtors' confirmed plan pursuant to § 1329(a) is set for final hearing in Selma, Alabama, on **June 28, 2001 at 11:00 a.m.**

Dated: May 31, 2001

MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE