UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In the Matter of	:	
DANA LAMAR LISENBEE and KARRIE LINNE LISENBEE,	:	Case No. 91-1674-C H
Debtor.	:	Chapter 13
	:	

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ORDER--APPLICATION FOR ACCEPTANCE OR REJECTION OF EXECUTORY CONTRACT

A hearing was held on September 18, 1991. Present were the trustee, Joe W. Warford, the Debtors' attorney, Martha Easter Wells, and the creditor's attorney, Terry J. Abernathy. The matter was taken under advisement and a briefing deadline was set. The attorneys were instructed to brief two issues--whether the application for acceptance or rejection of the contract should be construed as an objection to the plan and whether the cramdown of an executory contract is allowable. The parties have filed briefs and the court considers this matter fully submitted.

The Debtors filed their Chapter 13 petition and plan on June 6, 1991. The Chapter 13 statement lists Ford Motor Credit Co. (Ford) as a secured creditor pursuant to its lease with the debtors for a 1988 pickup. The debtors valued the pickup at $3,000. In both their Statement of Executory Contracts and in their plan the Debtors indicated they intended to affirm their executory contract with Ford. Under the terms of their plan, the Debtors proposed to pay Ford

$2,492 in lease payments and $3,000 to buy out the car. The Debtors' certificate of mailing indicates a copy of the plan and the bar date for objections were served on all creditors including Ford. The bar date for objections to the plan was July 10, 1991.

On July 9, 1991, Ford filed an "Application for Acceptance or Rejection of Executory Contract." The application cites 11 U.S.C. § 365 and seeks a court order directing the Debtors to assume or reject the executory contract. The motion asserts the vehicle continues to depreciate in value, the Debtors have no equity in the vehicle, have refused to voluntarily surrender the vehicle, and have failed to maintain physical damage insurance. The Debtors filed a document captioned "Opposition to Application to Accept or Reject Executory Contract" on July 15, 1991. The Debtors' plan was confirmed on August 1, 1991.

In the briefs assertions were made regarding the nature of the lease in question and whether it was a "true lease" or a lease intended as security. A security agreement is an agreement that creates or provides for a security interest. 11 U.S.C. § 101(50). Whether a lease constitutes a security interest under the Bankruptcy Code depends on whether it constitutes a security interest under applicable state or local law. H.R. No. 95-595, 95th Cong., 1st Sess. 314, reprinted in 1978 U.S.C.C.A.N. 5963, 6271. The Court

concludes the Debtors' lease with Ford was a true lease and notes the $3134.00 purchase option price is not nominal consideration for the purchase of the vehicle. See Iowa Code § 554.1201(37); Corporate Center Associates v. Total Group Services of Iowa, Inc., 462 N.W.2d 713, 714 (Iowa App. 1990). As a true lease the parties' executory contract was not subject to the cramdown provisions of 11 U.S.C. § 1325(a)(5)(B). See In re Farrell, 79 B.R. 300 (Bankr. S.D. Ohio 1987) (lease of vehicle); In re Huffman, 63 B.R. 737 (Bankr. N.D. Ga. 1986) (lease of electric range); In re Peacock, 6 B.R. 922 (Bankr. N.D. Tex. 1980) (lease of farm equipment).

While the lease in this case was an executory contract which would not ordinarily be subject to cramdown, the Court cannot conclude the application filed by Ford on July 9, 1991, constituted an objection to the treatment of its claim under the plan. The application seeks an order directing the Debtors to assume or reject the lease. The Debtors had indicated in their proposed plan their intention to affirm the contract. While some of the contentions in Ford's application are framed in the nature of concerns about the adequate protection of the leased vehicle (and might more appropriately have been set forth in a motion for relief from stay), nothing in the application specifically objects to the Debtors' proposed cramdown of Ford's claim. A creditor must provide

the debtor and the court with a specific statement of the grounds on which the creditor objects to confirmation of a debtor's plan. See In re DeSimone, 17 B.R. 862, 863-64 (Bankr. Ed. Pa. 1982). Had Ford's application specifically objected to its treatment under the plan, the Court would address the issue. As it is, Ford's application sought only to compel acceptance or rejection of the lease, and the Debtors' plan provided for its acceptance. Ford offered no evidence of a default which would require cure or adequate assurance pursuant to 11 U.S.C. § 365(b). The provisions of a confirmed plan bind each creditor, 11 U.S.C. § 1327(a), and Ford is bound by the repayment provisions of the Debtors' plan.

IT IS HEREBY ORDERED the Application for Acceptance or Rejection of Executory Contract is denied.

Dated this 28th day of January, 1992.

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RUSSELL J. HILL
U.S. BANKRUPTCY JUDGE

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

JUDGMENT IN A CIVIL CASE

FORD MOTOR CREDIT COMPANY

Plaintiff

vs. CASE NUMBER 3-92-cv-80038

DANA LAMAR LISENBEE, ETAL.,

Defendant

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

Decision by Court. This action came to consideration before the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the appeal of Ford Motor Credit Company of the ruling entered by the bankruptcy court on January 28 1992 is denied. The bankruptcy court's ruling is affirmed.

May 27, 1992

JAMES R. ROSENBAUM
Clerk

Diane Duncan
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

FORD MOTOR CREDIT COMPANY, Appellant, vs. DANA LAMAR LISENBEE and KARRIE LINNE LISENBEE, Appellees.	)	NO. 3-92-CV-80038 DECISION ON APPEAL

The appellant, Ford Motor Credit Company (FMCC), appeals the ruling entered by the bankruptcy court on January 28, 1992, denying FMCC's application for Acceptance or Rejection of Executory Contract. The bankruptcy court's ruling is affirmed.

Background. The following background facts are taken from the bankruptcy court's January 28, 1992, ruling and are undisputed by the parties: The Lisenbees filed a Chapter 13 petition and plan on June 6, 1991. The Chapter 13 statement lists FMCC as a secured creditor pursuant to its lease with the debtors for a 1988 pickup. The Lisenbees valued the pickup at $3,000. In both their Statement of Executory Contracts and in their plan the Lisenbees indicated they intended to affirm their executory contract with FMCC. Under the terms of the Lisenbees' plan, they proposed to pay FMC $2,492 in lease payments and $3,000 to buy out the car. The Lisenbees' certificate of mailing indicates a copy of the plan and the bar date for objections were served on all

creditors, including FMCC; the bar date for objections to the plan was July 10, 1991.

On July 9, 1991, FMCC filed an "Application for Acceptance or Rejection of Executory Contract" that cited 11 United States Code section 365 and sought a court order directing the Lisenbees to assume or reject the executory contract.

The Lisenbees' Chapter 13 plan was confirmed by order dated August 1, 1991.

On September 18, 1991, a hearing was held on FMCC's application and on January 28, 1992, the bankruptcy court filed a ruling denying the application. The bankruptcy court held that even though the parties' executory contract was not subject to the cramdown provisions of 11 United States Code section 1325(a)(5)(B), FMCC is bound by the repayment provisions of the debtors' plan which was confirmed without objection on August 1, 1991.

FMCC appeals the January 28 ruling of the bankruptcy court. FMCC argues that the bankruptcy court should consider its application even after confirmation of the debtors' plan, and that absence of an objection to the debtors' plan does not reduce the bankruptcy court's responsibility to determine whether the plan satisfied the requirements of the bankruptcy code.

Discussion. A case addressing almost identical issues was recently decided by the Third Circuit Court of Appeals. In In re Szostek, 886 F.2d 1405 (3d Cir. 1989), a creditor sought to have a confirmed Chapter 13 plan dismissed, revoked, or modified because it did not provide for the calculation of present value of the

creditor's claim, a requirement of section 1325(a)(5)(B)(ii). The Szostek court engaged in exhaustive analysis of the

> clash between two seemingly divergent policies involved in the Bankruptcy Code. On the one hand is the policy of finality, as evidenced by § 1327, which provide that, absent fraud, confirmation of a debtor's plan binds both the debtor and the creditors. Under § 1327, a confirmation order is res judicata as to all issues decided of which could have been decided at the hearing on confirmation. On the other hand is the language of § 1325(a) which provides that a court shall confirm a plan which meets the conditions listed in that section.

886 F.2d at 1048.

The Szostek court noted,

> While we do not understate the importance of the obligation of the bankruptcy court or the trustee to determine that a plan complies with the appropriate sections of the Bankruptcy Code prior to confirmation of the plan, we nonetheless recognize that the affirmative obligation to object to the [debtors'] plan rested with [the creditor], not with the bankruptcy court or the trustee. *** [The creditor's] position that, even in the absence of fraud, a confirmed plan which does not comply with the present value provision in § 1325(a)(5)(B)(ii) can be vacated is inconsistent with the general policy favoring the finality of confirmed plans as evidenced by the Supreme Court's decision in Stoll [v. Gottlieb, 305 U.S. 165 (1938).]

886 F.2d at 1414. The court held that the provisions in section 1325(a)(5) are not mandatory and do not require revocation of a confirmed plan where the creditor had not timely objected to the plan's confirmation. This court finds the Szostek court's analysis and conclusions persuasive.

FMCC did not object to the debtors' plan prior to confirmation. Its failure to object should be deemed an acceptance of the plan. See Szostek, 886 F.2d at 1413 (citing and discussing In re Ruti-Sweetwater, Inc., 836 F.2d 1263 (10th Cir. 1988) and

Republic Supply Co. v. Shoaf, 815 F.2d 1046 (5th Cir. 1987)). The Lisenbees' Chapter 13 plan was confirmed on August 1, 1991. FMCC did not appeal the confirmation, nor has FMCC ever sought to set aside the plan's confirmation. Therefore, absent a showing of fraud, see § 1330(a), the provisions of the confirmed plan are final and cannot be challenged under section 1325(a)(5). 11 U.S.C. § 1327(a) ("The provisions of a confirmed plan bind the debtor and each creditor***").

FMCC's Application for Acceptance or Rejection of Executory Contract seeks to collaterally attack the confirmed plan. "[A] confirmation order is res judicata as to all issues decided or which could have been decided at the hearing on confirmation." Szostek, 886 F.2d at 1408. FMCC could have objected to the Lisenbees' plan as contrary to the cramdown provisions of the Bankruptcy Code before the confirmation hearing and order. The bankruptcy court correctly applied the applicable law when it denied FMCC's application. The bankruptcy court ruling is affirmed.

IT IS SO ORDERED.

Dated this 26th day of May, 1992.

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CHARLES R. WOLLE, CHIEF JUDGE
UNITED STATES DISTRICT COURT