UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Southern Division

In re:	)	Bankr. No. 00-40914
	)	
RAY MEINDERS	)	Chapter 13
Soc. Sec. No. [redacted]-3256	)	
	)	
and	)	DECISION RE: FIRST PREMIER
	)	BANK'S MOTION FOR RELIEF
JOY MEINDERS	)	FROM THE AUTOMATIC STAY
Soc. Sec. No. [redacted]-2994	)	
	)	
Debtors.	)	

The matter before the Court is the Motion for Relief From Automatic Stay filed by First Premier Bank on April 24, 2002, and the responses thereto. This is a core proceeding under 28 U.S.C. § 157(b). This Decision and Order shall constitute the Court's findings and conclusions under Fed.Rs.Bankr.P. 7052 and 9014. As set forth below, the Court concludes that Debtors' confirmed plan must be revised to reflect all creditors' correct status on the petition date. Relief from the automatic stay will not be granted at this time.

Summary of Facts.

Ray and Joy Meinders obtained four loans from First Premier Bank ("Bank"). The first two were secured by real property mortgages. The third loan was made on September 14, 2000. Under it, the Meinders borrowed $6,716.77. From this sum, the Meinders used $2,000 to pay attorney's fees related to a state court matter and $4,246.77 was applied on the two notes secured by real property. This brought the two real estate mortgage notes current.

The fourth loan was made on October 25, 2000, shortly before the Meinders filed bankruptcy. They borrowed $7,891.64. Of this

sum, $6,821.64 was used to pay the third loan in full; $1,000 was made payable to Debtors' bankruptcy attorney, A. Thomas Pokela, though the Bank claims it did not agree to this use; and the balance of $70 was credited to prepaid finance charges. The Meinders signed a security agreement in conjunction with the fourth note. The security agreement described the collateral as "1987 Ford F150 pickup, 1990 Chrysler New York 5th Ave, 1983 Oldsmobile Ciera." However, the Bank's lien was never noted on the title for the Ford pickup or the 1990 Chrysler. Also, the Meinders actually owned a 1985 Oldsmobile Ciera, not a 1983. A lien for the Bank was noted on the title to the 1985 Oldsmobile, according to county records, on April 24, 2001, which was after the Meinders filed bankruptcy. Accordingly, on the Meinders' bankruptcy petition date, the Bank's lien was not noted on the titles to any of the three vehicles that were to secure the fourth loan, a task that the Bank apparently had delegated to Debtors.

The Meinders ("Debtors") commenced their Chapter 13 case in bankruptcy on October 30, 2000. In their schedules, Debtors stated the Bank held two claims secured by real property, one claim secured by vehicles, and a VISA credit card account. However, the amount of the Bank's secured claims were not consistently stated. On Schedule A of real property, Debtors listed mortgages totaling $222,521 on the real property. On Schedule D of secured claim holders, Debtors stated the Bank's claims secured by the real property mortgages totaled $143,361, and the Bank's claim secured

by the vehicles totaled $8,268. Both Schedules A and D, however, indicated that the Bank was fully secured. The Bank filed one proof of claim for an unsecured, nonpriority claim of $3,893.70, which apparently was for the credit card debt. Fleet Mortgage Group, another mortgage holder, was listed on Schedule D as totally unsecured for $74,000. It filed a proof of claim for $72,240.85 and claimed a mortgage on Debtors' real property at 520 South Conklin Avenue in Sioux Falls.[1]

Confirmation of the first two plans that Debtors proposed was denied. The Bank did not object to either plan. However, the Bank's attorney, by letter to Debtors' counsel dated January 11, 2001, verified an earlier telephone conversation between them regarding the Bank's understanding of the plan then pending. The letter stated that Debtors and Bank had agreed that all the Bank's loans were cross-collateralized and that the loans would be repaid under the plan "according to the loan terms directly." The Bank's attorney also stated in the letter that the loans were all current. On March 15, 2001, the fourth note held by the Bank matured by its own terms.

On August 6, 2001, Debtors filed their third modified plan and noticed it for a confirmation hearing. This plan provided, as had the two previous, that secured creditors whose claims were not in default would be paid under the terms of their original agreements.

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[1] Fleet Mortgage Group's claim has now been assigned to Chase Manhattan Mortgage Corporation.

The plan did not name the creditors in this class. For secured claims in default, this plan referenced only one creditor, the Estate of Florence Docken. (The two earlier plans had not referenced any secured claims in default.) Neither the Bank nor Fleet Mortgage Group were specifically referenced in the plan. For unsecured claim holders, the August 6, 2002, plan proposed about a 28% dividend plus any disposable income. The liquidation analysis attached to the plan, which was the same as those attached to the two earlier plans, did not specifically reflect a secured claim on any of Debtors' personalty. The plan and notice were served on the Bank. The Bank did not file an objection. Two confirmation hearings were held. A confirmation order was eventually entered on October 22, 2001. The order did not alter the terms of the plan as it had been filed on August 6, 2001.

On October 29, 2001, after the confirmation order was entered, the Bank's counsel again wrote Debtors' counsel. He advised Debtors' counsel that the loan secured by the vehicles (the fourth loan) had matured on September 15, 2001, and that the present payoff amount was $9,091.58. The Bank offered to restructure the note, and Debtors' counsel was told he could negotiate that directly with a Bank officer. The Bank's counsel wrote Debtors' counsel again on December 10, 2001, regarding the delinquent loan. By letter dated January 29, 2002, Debtors' counsel requested documentation for the loan secured by Debtors' Oldsmobile. On January 31, 2002, the Bank's counsel responded with another letter,

which apparently followed some telephone calls. In this letter, the Bank's counsel opined that Debtors could not now modify their confirmed plan to treat the Bank as unsecured on the fourth loan. The Bank offered some settlement terms. The Bank's attorney wrote a follow-up letter on February 11, 2002, when he did not hear back from Debtors' attorney. By letter dated February 20, 2002, Debtors' counsel informed the Bank's attorney that the 1990 Chrysler New Yorker Fifth Avenue was "junk" and that Debtors did not intend to pay the Bank anything for it.

On April 24, 2002, the Bank moved for relief from the automatic stay regarding the three vehicles in which it claimed a security interest (the 1987 Ford pickup, the 1985 Oldsmobile Ciera, and the 1990 Chrysler New Yorker Fifth Avenue) on the grounds that Debtors had not made any payments pursuant to the fourth loan and that Debtors would not voluntarily surrender the vehicles. Debtors responded stating that the Bank did not have a lien noted on the title to any of the three vehicles on the petition date and that the Bank therefore was not a secured claim holder under the confirmed plan. The Estate of Florence Docken also responded to the Bank's motion and claimed a constructive trust in some of Debtors' assets.

A hearing was held June 12, 2002. Appearances included Trustee Dale A. Wein, A. Thomas Pokela for Debtors, and Scott M. Perrenoud for the Bank. The parties agreed to submit the matter on stipulated facts, which they filed that day, and briefs. (The

other objecting party, the Estate of Florence Docken, did not participate further in these proceedings.)

Discussion: Problems with the Confirmed Plan.

While the formal motion before the Court is the Bank's request for relief from the automatic stay, the real questions are what claim treatment was afforded to the Bank under Debtors' confirmed plan and was that treatment correct. To say that there were several miscues, misunderstandings, or oversights surrounding Debtors' confirmed plan would be an understatement. Several of these problems will be addressed and then a remedy will be set forth.

Debtors cannot rely of the Bank's failure to file a proof of claim for its secured claims as justification for treating the fourth loan as unsecured. The Bank was not required to file a proof of claim for its secured claims; it could rely on Debtors' schedules. Fed.R.Bankr.P. 3002(a). Apparently, the Bank was satisfied with how Debtors had scheduled these three claims because the Bank filed a proof of claim only for its unsecured credit card debt. Moreover, after acknowledging the Bank's three secured claims in their schedules, Debtors did not commence any proceeding to dispute the Bank's secured claims, including whether the Bank's liens on the vehicles had been timely perfected. Thus, there was nothing in the record to advise the Bank that Debtors no longer considered the Bank's claims fully secured.

Debtors' third modified plan did not address the Bank's fourth loan. Based only on a plain reading of Debtors' third modified plan, which was eventually confirmed, and the official record on the confirmation hearing date, the Court concludes that Debtors' third modified plan did not specifically cover the Bank's fourth loan at all. The plan does not name the Bank's fourth loan as one of the secured claims in default, so it cannot be found in that class. The fourth loan also cannot be found in the class of secured claims not in default because the note for the fourth loan had already matured on March 15, 2001, before Debtors' third modified plan was even filed.

In the third modified plan, the description of the class of secured claims not in default had not changed from Debtors' two earlier plans and this class did not name the creditors included. Thus, it was reasonable for the Bank to assume that its three secured claims were still included in that class, as Debtors' counsel had told the Bank's counsel in the January 2001 letter. However, it was not reasonable for anyone to assume that Debtors were treating the Bank's fourth loan as unsecured. The schedules did not treat the loan as unsecured, Debtors' counsel confirmed in a letter that Debtors' loans were all cross-collateralized and that they would be treated as fully secured, and Debtors did not commence any formal action seeking a determination that the fourth loan was unsecured.

Debtors cannot rely on their third modified plan's liquidation analysis to establish that the Bank's fourth loan was unsecured. Debtors state that their third modified plan's liquidation analysis confirms that they were treating the Bank's fourth loan as unsecured. That reliance is misplaced due to some inconsistencies in the record and the lack of detail in the liquidation analysis.

According to Debtors' Schedule A of real property, Debtors had equity of $24,479 in a nonexempt home at 520 South Conklin in Sioux Falls. If Fleet Mortgage Group had the only mortgage on this property and if Debtors' scheduled value for the home is correct, the equity for judgment lien holders or unsecured creditors under § 1325(a)(4) should have been closer to $25,759.25. Both of these equity numbers are close to the $25,000 in equity in real property that Debtors stated on their liquidation analysis. However, on Schedule D of secured claims, Fleet Mortgage Group was recognized as totally unsecured and the Bank was scheduled as fully secured, thus leaving no equity for a judgment lien held by the Estate of Florence Docken or for unsecured creditors. In contrast, it was in the third modified plan that Debtors included, for the first time, the Florence Docken Estate as a fully secured judgment lien creditor for $90,000. The Florence Docken Estate had been scheduled as a disputed unsecured creditor, and in the two earlier plans this creditor had not been specifically referenced at all. The record is not clear from where this $90,000 in real property equity came to support the judgment lien of the Florence Docken

Estate. This judgment lien is also not clearly reflected on the liquidation analysis.

These discrepancies or inconsistencies regarding the Bank's, the Florence Docken Estate's, and Fleet Mortgage Group's interests in the real property are troubling enough. Yet there is another conflict in the record regarding Debtors' real property. On their Schedule C of exempt property, Debtors claimed a homestead exemption in the house at 311 South Jessica in Sioux Falls.[2] On the liquidation analysis, the homestead is now listed as 520 South Conklin in Sioux Falls.

Finally, there is not enough detail in the liquidation analysis regarding Debtors' personal property to assess how the Bank's claim of a security interest in the vehicles was treated; no personalty is itemized or valued. Also, though a more minor problem, the value of Debtors' personal property and the value of their exempt property in the liquidation analysis did not match the amounts set forth in their schedules, though the available equity was similar.[3]

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[2] In their schedules, Debtors claimed exempt $30,000 in equity in the house at 311 South Jessica under S.D.C.L. § 43-45-4, which governs only personal property. The Court presumes that Debtors intended to reference the homestead exemption statute at S.D.C.L. § 43-45-3.

[3] Debtors listed a wedding ring on their schedule of personal property with a value of $150; on their schedule exemptions, they claimed the ring exempt but only valued the exemption at $0. That zero, of course, would mean that Debtors did not exempt any equity in the ring. *Soost v. NAH, Inc. (In re Soost)*, 262 B.R. 68, 71-74 (B.A.P. 2001). However, since the wedding ring is claimed as an absolute exemption under S.D.C.L. § 43-45-2 and since no secured

The Bank's present attempt to label the fourth loan as one procured by fraud and thus, as cause for relief from the stay, is untimely. Fraud-based nondischargeability issues are not directly resolved in Chapter 13 cases under § 523(a)(2), (4), or (6). *Compare* 11 U.S.C. §§ 523 and 727(b) with § 1328(a). Instead, creditors who hold a claim arising from fraud must look to the treatment afforded them under a plan and object to confirmation of that plan if it does not meet the requirements of §§ 1322(a), 1325(a), and 1325(b), including the requirement of good faith under § 1325(a)(3).

Throughout the first year and a half of this case, the Bank did not raise any concerns that its fourth note was procured by fraud. If the Bank wanted this loan handled outside a confirmed plan because of this alleged fraud, it should have pursued that concern more timely through an earlier relief from stay motion or an objection to the confirmation of any of Debtors' three proposed plans.

The Bank is incorrect that the sample Chapter 13 plan form in this District reflects a policy or general practice of not requiring specific treatment of claim. In its reply brief, the

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claim in the ring was scheduled, the Court has presumed that Debtors intended to claim the full $150 value of the ring exempt. Also, Debtors' schedule of exemptions appeared to erroneously list two values for a group of four chairs. The Court presumed the correct value of this exempt property was $20 since that was the value Debtors listed for the chairs' current *market* value on both their schedule of personal property and their schedule of exemptions.

Bank states that it did not have to formally object to Debtors' third modified plan because Chapter 13 plans in the District of South Dakota are not required to be

> superspecific as to the exact treatment of the creditor's claims, not only as to amount and precise treatment of the claim in terms of payment, but also other terms such as continuation of insurance, location of collateral and other provisions which are routinely not specified in Chapter 13 plans. This would be a departure from the general practice ... which encourages brevity in Chapter 13 plans.

The sample Chapter 12 and 13 plan at Appendix 20 of the Local Bankruptcy Rules does not reflect such a policy. To the contrary, the sample plan lists each priority creditor, each secured creditor holding a claim in default, and each other secured creditor, the amount of their claim, the interest rate on their payment, the payment amount, the term over which each creditor is to be paid, and the total to be paid to each creditor. Within the two secured classes in the sample plan, special language was added regarding lien status. In addition, one section of the sample plan is set aside for any special provisions regarding claim treatment, a debtor's postpetition credit needs, and the debtor's intentions regarding executory contracts. In essence, the sample plan is geared to insure that a plan is cleanly structured and complete, not causal or imprecise. When a plan is incomplete, imprecise, or confusing, a creditor should file an objection.

Remedy.

As delineated above, there are several problems with the confirmed plan in this case. Most cannot be resolved on the present record: (1) Debtors and the Bank's dispute on whether the Bank's notes are cross-collateralized and whether Debtors can now, in good faith, change their position on the Bank's status after advising the Bank that it was fully secured and cross-collateralized or can now, in good faith, surrender the 1990 Chrysler New Yorker Fifth Avenue without compensating the bankruptcy estate for the interim use; (2) the priority and extent of the Bank's real estate mortgages, Fleet Mortgage Group's mortgage, and the Florence Docken Estate's judgment lien; and (3) what actually was Debtors' homestead on the petition date. Since several parties contributed to this problematic confirmed plan, the most equitable remedy is to vacate the confirmation order. Debtors and their creditors may then start with a clean slate.

Debtors shall immediately file amended schedules, as needed, and notice for confirmation a fourth modified plan that addresses the several problems discussed herein. The extent to which creditors have already received payments under the plan confirmed on October 22, 2001, should be reflected in the fourth modified plan. Any needed adversary proceedings regarding the validity, priority, or extent of a security interest or lien in Debtors' real property should be commenced immediately by either Debtor or the creditor.

The only issue that the Court can resolve on the present record is the validity of the Bank's liens on the vehicles. The Court is satisfied that the parties intended that the Bank's security interest attach to the 1985 Oldsmobile Ciera, not a 1983 Ciera. However, the Bank admits that its lien was not noted on any of the three vehicles' titles on the petition date. Thus, regardless of who is to blame for this lack of perfection, the three vehicles cannot be included as part of the Bank's collateral for its fourth note from Debtors. To hold otherwise would deprive unsecured creditors, who did not contribute to the problem, of possible value under § 1325(a)(4).

The Court will enter an equitable order under 11 U.S.C. § 105(a) denying the Bank's motion for relief from the automatic stay and vacating the October 22, 2001, confirmation order and setting certain deadlines.

Dated this 6 day of September, 2002.

BY THE COURT:

Irvin N. Hoyt
Bankruptcy Judge

ATTEST:
Charles L. Nail, Jr., Clerk

By: Dian Droup
Deputy Clerk

(SEAL) UNITED STATES BANKRUPTCY COURT SEAL

NOTICE OF ENTRY
Under F.R.Bankr.P. 9022(a)
Entered

SEP 06 2002

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

I hereby certify that a copy of this document was electronically transmitted, mailed, hand delivered or faxed this date to the parties on the attached service list.

SEP 06 2002

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