

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE
SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:)	Chapter 13 Case
)	Number <u>95-10946</u>
MICHAEL TANKSLEY)	
VELVEETA TANKSLEY)	
)	
Debtors)	
_____)	
)	
GREEN TREE FINANCIAL SERVICING)	FILED
CORPORATION)	at 12 O'clock & 34 min. P.M.
)	Date: 12-15-95
Movant)	
)	
vs.)	
)	
MICHAEL TANKSLEY)	
VELVEETA TANKSLEY, Debtors)	
AND BARNEE C. BAXTER,)	
CHAPTER 13 TRUSTEE)	
)	
Respondents)	

ORDER

By motion, Green Tree Financial Servicing Corporation ("Green Tree") seeks reconsideration of its claim pursuant to Federal Rule of Bankruptcy Procedure ("FRBP") 3008¹. The motion is

¹Federal Rule of Bankruptcy Procedure 3008 states:

A party in interest may move for reconsideration of an order allowing or

a thinly veiled attempt to circumvent the res judicata effect of the order of confirmation. 11 U.S.C. §1327(a)².

The facts necessary to resolve the motion are set forth in the file. The debtors Michael Tanksley and Velveeta Tanksley filed for relief under Chapter 13 of Title 11 United States Code on June 14, 1995. Green Tree was a listed creditor. In conjunction with the filing of their petition, the debtors submitted a plan and motion to determine value of security pursuant to FRBP 3012³ which plan, relative to the interest of Green Tree provided as follows:

2(b) Secured creditors shall retain liens securing their claims. Creditors *who file claims* and whose claims are allowed as secured

disallowing a claim against the estate. The court after a hearing on notice shall enter an appropriate order.

²11 U.S.C. §1327(a) states:

The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.

³Federal Rule of Bankruptcy Procedure 3012 states:

The court may determine the value of a claim secured by a lien on property in which the estate has an interest on motion of any party in interest and after a hearing on notice to the holder of the secured claim and any other entity as the court may direct.

claims shall be paid the lesser of (1) the amount of their claim, or (2) the value of their collateral as set forth here: Green Tree Acceptance \$5,000.00 . . .

(c) Subsequent to secured creditors, dividends to unsecured creditors *who file claims* and whose claims are allowed (including the unsecured balance of any partially secured debt) shall be paid: check one: . . .
[X] pro-rata, for remaining funds in an amount to be estimated at confirmation. . . .

10. Debtor hereby moves the Court to approve the values set forth in Paragraph 2(b) . . . at the time of the confirmation hearing.

The notice issued by the clerk of this court in conjunction with the debtors' plan provided:

DATE, TIME, AND LOCATION OF MEETING OF CREDITORS
July 17, 1995, 3:00 p.m., U.S. Bankruptcy Court, Suite 150, 827 Telfair Street, Augusta, Georgia

FILING OF PLAN AND DATE, TIME, AND LOCATION OF HEARING ON CONFIRMATION OF PLAN
The debtor has filed a plan. The plan or a summary of the plan is enclosed. Hearing on confirmation will be held: October 23, 1995, 9:00 a.m. U.S. Bankruptcy Court, Suite 150, 827 Telfair Street, Augusta, Georgia 30901. . .

OTHER MATTERS. At confirmation the court will conduct a hearing on any objections to the debtor's claim of exemptions, and any motion to value collateral or to avoid liens as set forth in Plan. Objections to the plan, valuation or lien avoidance shall be filed 5 days prior to confirmation. Copy of debtor's plan is shown on the reverse side.

Relative to Green Tree, the debtors' schedules listed as secured

creditor "Green Tree Acceptance, 2300 Lake Park Drive, Suite 150, Smyrna, GA 30080" describing the collateral securing their claim as "Siding on house" with a value of \$5,000.00 and a total claim of \$9,000.00. Green Tree received the notice of filing and the debtors' proposed plan. The meeting of creditors was conducted on July 17, 1995 at 3:00 p.m. The meeting notes filed by the Chapter 13 failed to reflect any appearances on behalf of Green Tree.

By proof of claim filed July 28, 1995 Green Tree Financial Corporation with listed address 332 Minnesota Street, Suite 610, St. Paul, Minnesota 55101-1311 filed a proof of secured claim listing a principal balance due of \$8,301.86 plus future interest at a rate of 15.99% and a prepetition payment arrearage claim of \$188.38 representing the June 5, 1995 payment. Attachments to the proof of claim included documents entitled Retail Installment Contract and Security Agreement, Security Deed and Deed of Trust Assignment. No objection was filed to the proof of claim.

On August 24, 1995 J. Mark Daniel, Attorney at Law and member of the law firm Shapiro and Swertfeger filed an objection to confirmation of the debtors' plan and notice of appearance and request for service of papers listing Mr. Daniel as attorney and providing for service upon him at "Shapiro and Swertfeger, P. O. Box 49047, Atlanta, Georgia 30359." The objection to confirmation states as a basis for objection "debtors' plan lists an incorrect amount of arrearage (\$5,000.00) owed to Green Tree. The correct

arrearage is \$8,301.86 plus interest at 15.99%." The objection contradicts the filed proof of claim and misstates the terms of the debtors' plan.

By notice issued October 5, 1995 the confirmation hearing was reassigned to November 6, 1995. The clerk served the notice in accordance with the mailing matrix which listed three addresses for service for Green Tree: Green Tree Financial Corporation, Suite 610, 332 Minnesota Street, St. Paul, Minnesota 55101, Green Tree Acceptance, 2300 Lake Park Drive, Suite 150, Smyrna, Georgia 30080 and Shapiro and Swertfeger, P. O. Box 49047, Atlanta, Georgia 30359. Green Tree and Green Tree's counsel of record in this case received notice of the reassigned confirmation hearing.

Confirmation hearing was held on November 6, 1995. Green Tree's counsel failed to appear in prosecution of their objection to confirmation and a review of the objection clearly establishes that the grounds set forth are without merit. The objection was overruled and the debtors' plan was confirmed and valuation of the collateral securing Green Tree's claim was established at \$5,000.00. Based upon this valuation, the fully allowed claim of Green Tree was bifurcated as a secured claim of \$5,000.00 and an unsecured claim of \$3,301.86.

On November 16, Green Tree through Mr. Scott J. Klosinski an attorney practicing in the Augusta Division of the United States Bankruptcy Court for the Southern District of Georgia sought

reconsideration of the "disallowance of [Green Tree's] fully secured claim." As grounds for reconsideration of the claim, Green Tree asserts that the plan as confirmed violates the provisions of 11 U.S.C. §1322 in that it modifies the rights of Green Tree, the holder of a claim secured only by a security interest in real property that is the debtor's principal residence. Additionally, Green Tree contends that "this court could not confirm the plan unless 'the value as of the effective date of the plan, of the property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim.' 11 U.S.C. §1325(a)(5)." Additionally, Mr. Klosinski contends that he appeared on behalf of Green Tree at the scheduled October 23 hearing "but that hearing was continued . . . [and he] did not receive notice of the reassigned hearing on confirmation."

The motion for reconsideration is nothing more than an objection to the plan based upon a contention that the plan misclassifies the claim of Green Tree. The res judicata effect of the order of confirmation bars this reconsideration. 11 U.S.C. §1327(a); see also In re: Simmons, 765 F.2d 547 (5th Cir. 1985); In re: Justice Oaks, II, Ltd., 898 F.2d 1544 (11th Cir. 1990) cert. denied, 498 U.S. 959, 111 S.Ct. 387, 112 L.E.2d 398 (1990).

Bankruptcy Code §502(j)⁴ and Bankruptcy Rule

⁴11 U.S.C. §502(j) provides:

3008 provide the authority and procedure for claim reconsideration. Section 502(j) contemplates the possibility for claim reconsideration after confirmation of a plan and distribution under the plan. Reconsideration of both allowed and disallowed claims may occur at any time before a case is closed, but in such reconsideration, the court must weigh the extent and reasonableness of any delay, or prejudice to any party in interest, the effect on efficient court administration and the moving party's good faith. In re: Resources Reclamation Corporation of America, 34 B.R. 771 (BAP 1983).

Johnson v. Farmers Furniture Company (In re: Johnson) 1990 WL 6050 89 at 2 (Bankr. S.D. Ga.).

In Johnson, the debtor objected to the claim of Farmers Furniture Company after confirmation. The objection went not only to the amount of the claim contending that claimed attorney's fees should

(j) A claim that has been allowed or disallowed may be reconsidered for cause. A reconsidered claim may be allowed or disallowed according to the equities of the case. Reconsideration of a claim under this subsection does not affect the validity of any payment or transfer from the estate made to a holder of an allowed claim on account of such allowed claim that is not reconsidered, but if a reconsidered claim is allowed and is of the same class as such holder's claim, such holder may not receive any additional payment or transfer from the estate on account of such holder's allowed claim until the holder of such reconsidered and allowed claim receives payment on account of such claim proportionate in value to that already received by such other holder. This subsection does not alter or modify the trustee's right to recover from a creditor any excess payment or transfer made to such creditor.

not be allowed but also as to the fair market value of the property securing the claim as less than the amount of the allowed secured claim. In Johnson, "[t]he debtors' request for reconsideration [sought] . . . to disallow that portion of the allowed secured claim in the amount of Six Hundred Eighty-Nine and 08/100 (\$689.08) Dollars designated attorney's fees. The order of confirmation . . . [did] not bar such reconsideration." However, as to the valuation issue raised in the claim objection, in Johnson, I found

where the confirmed plan resolves the valuation issue §1327(a) does apply and bars reconsideration . . . [t]he plan addressed the issue of valuation and '[t]he provisions of [the] confirmed plan bind the debtor [and each creditor, whether or not the claim of such creditor is provided for the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.]' 11 U.S.C. §1327(a). The order of confirmation is res judicata as to all justiciable issues decided and is not subject to collateral attack . . . In re: Simmons, supra at 557-558 [citing In re: Lewis, 8 B.R. 132 (Bankr. D.Idaho 1981); 5 Collier on Bankruptcy ¶1327.01 (L.King 15th Ed. 1989)].

Johnson supra at 3. The analysis in the Johnson case applies equally in this instance. In Johnson, the debtor attempted to use a claim objection to circumvent the res judicata effect of the order of confirmation. In this case, the creditor attempts to use the claim reconsideration process for the same purpose. Neither is acceptable.

[W]hen the objection is based on an argument

that *the plan* misclassifies the objectionable claim, the objection must be made prior to confirmation of the plan. Cf. 8 Collier on Bankruptcy L.King 15th Ed. 1989) ¶3007-.03 at 3007-8 (*Simmons* . . . involved claim[] misclassification in the plan).

In re: Justice Oaks *supra* at 1553.

In the present case Green Tree filed its claim which was allowed and at confirmation the debtors' motion to value the collateral securing the claim of Green Tree was resolved. Green Tree failed to appear to prosecute its plan objection and the plan objection as filed did not address the issue of valuation. The objection was overruled, the value was determined and the plan was confirmed. The order of confirmation binds the debtor and this creditor and a claim objection nor a request for reconsideration of the claim based upon a misclassification of the claim under the debtors' plan can circumvent the res judicata effect of the confirmation order.

Regarding Mr. Klosinski's contention that he did not receive notice of the reassigned confirmation hearing, until the filing of this motion for reconsideration there is no reference in the record to Mr. Klosinski's involvement in this case. Mr. Daniel and his law firm are attorneys of record for Green Tree in this case. The fact that Mr. Daniel may have requested Mr. Klosinski appear on his behalf does not excuse Mr. Daniel from responsibility as counsel of record. The record reflects proper notice.

It is therefore ORDERED that the motion for

reconsideration is denied.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 15th day of December, 1995.