



Charles M. Walker
U.S. Bankruptcy Judge
Dated: 10/11/2019



IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

IN RE:)	
)	Case No: 3:09-bk-10426
Equipment Finders, Inc.)	Chapter 11
of Tennessee,)	Honorable Charles M. Walker
)	
Debtor.)	
_____)	

ORDER GRANTING DEBTOR’S MOTION
REGARDING PAYOFF UNDER CHAPTER 11 PLAN

Although confirmation of a plan is a primary goal of most Chapter 11¹ debtors, it is not the be-all, nor is it the end-all, of the case. Completion of the plan by making all required payments is the true indication of a successful reorganization. Most hurdles occur prior to confirmation, with post-confirmation being the unimpeded sprint to the finish line. Here, however, a hurdle has appeared at the finish line in the form of a dispute as to a final plan payment nine years after confirmation.

Jurisdiction

The issue before the Court involves a post-confirmation pre-effective date agreement between Reliant Bank (“Reliant”) and Equipment Finders, Inc. of Tennessee (“Debtor”). As such, jurisdiction is conferred on this Court by Title 28, United States Code, section 1334. Pursuant to subsections 1334(a) and 157(a), the standing order of reference in this district places jurisdiction with this Court for all core proceedings arising in a case under Title 11. 28 U.S.C.

¹ 11 U.S.C. § 101 *ff.* Any reference to “chapter” or “section” or “the Code” is a reference to the Bankruptcy Code unless another reference is stated.

§ 157(b). Further, the Code provides the authority for this Court to enforce § 1141 through § 1142(b).² Moreover, Bankruptcy Courts have the power to interpret their own orders. *See Travelers Indem. Co. v. Bailey*, 557 U.S. 137, 146, 129 S. Ct. 2195, 174 L. Ed. 2d 99 (2009). A confirmed plan is considered to be an order of the bankruptcy court giving it the power to interpret such a plan. *Harper v. Oversight Committee (In re Conco, Inc.)*, 855 F.3d 703 (6th Cir. 2017) citing *Terex Corp. v. Metropolitan Life Ins. Co. (In re Terex Corp.)*, 984 F.2d 170, 172 (6th Cir. 1993), *Official Committee of Unsecured Creditors v. Dow Corning Corp. (In re Dow Corning Corp.)*, 456 F.3d 668, 675-76 (6th Cir. 2006). “Even those courts which view postconfirmation jurisdiction more restrictively agree that subject matter jurisdiction continues if it “bear[s] on the interpretation or execution of the debtor's plan.” *Lefkovtiz v. Michigan Trucking, LLC (In re Gainey Corp.)*, 447 B.R. 807, 814 (Bankr. W.D. Mich. 2011), *aff'd*, 481 B.R. 264 (B.A.P. 6th Cir. 2012), citing *Bank of La. v. Craig’s Stores of Texas, Inc. (In re Craig’s Stores of Texas, Inc.)*, 266 F.3d 388, 391 (5th Cir. 2001).

Background

The Debtor filed for relief under Chapter 11 on September 11, 2009. The Court entered an Order confirming the *Amended and Restated Plan of Reorganization* (“Plan”) on October 13, 2010. On November 18, 2010, the Debtor executed a promissory note (“Note”) that evidenced the Debtor’s obligations to Reliant as set forth in the Plan. From 2010 to 2018, the Debtor made monthly payments of \$27,464.35 to Reliant as called for in the Plan. When the Debtor requested a payoff for the final payment, Reliant responded that in addition to the final monthly payment of \$27,464.35, an additional \$41,196.30 was past due representing late charges accrued over the

² “The court may direct the debtor and any other necessary party . . . to perform any other act . . . that is necessary for the consummation of the plan.” 11 U.S.C. § 1142(b).

past nine years. The Debtor challenged the late charges resulting in the *Debtor's Motion for Determination of Payoff of Class 11 Claim of Reliant Bank Under Debtor's Plan of Reorganization* (ECF 283), placing this issue before this Court: Does the Note evidence a new agreement between the Debtor and Reliant such that the payment terms of the Plan are modified to include payment of late fees to Reliant, or is the Note an "existing finance agreement" under the Plan and therefore, deemed modified to conform to the Plan upon the Effective Date?

The pertinent terms of the plan are as follows:

- a) The effective date of the plan was December 1, 2019 ("Effective Date");
- b) Reliant is a Class 11 claimant to be paid in fixed monthly installments in the amount of \$27,464.35 with interest at the prime rate of 2%;
- c) Distribution payments were to begin on January 5, 2011 and continuing until Reliant's claim is paid in full;
- d) Any terms of the existing finance documents evidencing an Allowed Claim³ which may conflict with the terms of the Plan shall be deemed modified by the terms of the Plan.

The Note listed 16 previous loan agreements between the Debtor and Reliant comprising the Class 11 claim as identified in the Plan and totaling \$2,568,242.9. The Note provided, in relevant part:

The foregoing instruments are amended, restated and consolidated pursuant to Borrower's confirmed plan of reorganization . . . Capitalized terms used but not defined herein shall have the meanings set forth in the plan.

Reliant Bank's Response to Debtor's Motion to Determine Payoff. ECF 290 – Ex. B, p.1.

4. Payment Schedule. All payments received hereunder shall be applied first to the payment of any expense or charges payable hereunder or under any other loan documents executed in connection with this Note (such other documents referred to collectively as the "Loan Documents"), then to interest due and

³ Pursuant to Section 2.02 of the Plan: "Allowed Claim" shall mean a Claim that is evidenced by a proof of claim that has been filed under §501 or deemed filed under §1111(a), and any timely filed objection has been resolved by a final non-appealable order. The Debtor shall have until the Effective Date of the Plan to object to any proof of claim filed by a Creditor. The amount of any Claim shall be reduced by any post-petition payments made to the Creditor prior to the Effective Date of the Plan. As used herein, Claim shall include claims against property of the estate that may be allowed as secured under §506 of the Code."

payable, with the balance applied to principal, or in such other order as Lender shall determine at its option.

Fixed Principal and Interest. Principal and interest shall be paid in consecutive equal installments of \$27,464.35, payable monthly, commencing on the fifth day of the first month following the Effective Date of the Plan, and continuing on the same day of each successive month thereafter, until all principal and interest due hereunder has been repaid. Once repaid, amounts borrowed hereunder may not be reborrowed. If, on any payment date, accrued interest exceeds the installment amount set forth above, Borrower will also pay such excess as and when filled.

Id. at p. 2.

7. Delinquency Charge. To the extent permitted by law, Lender may impose a delinquency charge of up to five percent (5%) or any payment that is more than fifteen days late.

Id. at p.3.

14. Controlling Document. To the extent that this Note conflicts with or is in any way incompatible with any other document related specifically to the loan evidenced by this Note, this Note shall control over any other such document, and if this Note does not address an issue, then each other such document shall control to the extent it deals most specifically with that issue.

Id. at p. 4.

The Debtor's Position

The Debtor asserts that the Note was signed as an accommodation to Reliant and served to memorialize and consolidate all sixteen (16) loans covered under the Plan into one document for Reliant's records and was not intended to modify the Plan by providing additional terms, *i.e.* late charges. The Debtor makes several points supporting this position:

- 1) Reliant did not attempt to collect any late charges over the nine-year Plan payment period.
- 2) Reliant raised no issue with payments during the nine years it accepted payments according to the Plan terms.
- 3) The Debtor entered into several agreements with other similarly situated creditors simply to accommodate those creditors' accounting systems.

- 4) Reliant never objected to the Plan or the terms of the Plan applicable to Reliant as a Class 11 creditor, and those terms did not provide for late charges.
- 5) The Plan contains provisions regarding any Plan defaults when payments were not tendered according to the Plan, and Reliant did not seek to enforce those provisions.

Scott Hatcher, the Debtor's Owner and President, testified at the hearing that after confirmation of the Plan, he received a call from John Wilson, Executive Vice President of Reliant. Mr. Hatcher knew Mr. Wilson because he was his contact in banking relations with Reliant. Mr. Wilson requested that the 16 notes Reliant held, and that constituted Reliant's claim, be consolidated into one Class 11 note for Reliant's banking records and maintenance of the account. This is the Note executed on November 18, 2010. Mr. Hatcher stated that it was his understanding the Note was an accommodation to Reliant which he gladly made in order to maintain good relations with the bank. He testified that the Note carried the same interest rate as the Plan and that he understood it to be a memorialization of the Plan terms for Reliant's purposes, similar to agreements he entered into with other creditors holding similar claims. Mr. Hatcher offered credible testimony to support the Debtor's position, thereby illustrating his understanding of the effect of the Note in relation to the Plan: the Plan terms controlled.

Reliant's Position

Reliant contends that the Note does not contradict any term of the Plan and should be construed in accordance with the Plan. In other words, the combination of the two documents evidences the total agreement of the parties. In support of this position, Reliant states that there exists no provision in the Plan that prohibits any term of the Note, specifically as to late charges. Therefore, the Note terms are in compliance with the Plan and evidence the agreement of the parties. Moreover, the Note was executed post-confirmation, therefore, it serves to clarify and control the terms in the confirmed Plan. Reliant points to the following:

- 1) The Note was not an “existing finance document” as described in the Plan because it was executed after the Plan was confirmed.
- 2) The Note contains three paragraphs – 7, 8, and 9 – that detail the terms applicable to late payments and resulting late fees.
- 3) The Plan does not prohibit the imposition of late fees on payments made according to the Plan, and the Note payments are such payments.
- 4) The late fee provision is enforceable as a loan amendment.

Reliant offered a Promissory Note between the Debtor and Textron Financial Corporation dated December 1, 2010 in the amount of \$840,295.93 to support their contention that although the Debtor did enter into notes with other creditors memorializing the Plan terms for the benefit of the creditors’ records, those notes did not contain a late fee provision like the Reliant Note and therefore, Reliant cannot be grouped in with those creditors who were merely asking for a record-keeping accommodation with their note.

Reliant also submitted five notices of late payment to assert that the Debtor was on notice that payments were being made late and accruing delinquency charges. These notices were dated as follows:

December 15, 2010	Late charge balance: N/A ⁴
April 11, 2011	Late charge balance: \$ 1,373.21
December 23, 2011	Late charge balance: \$13,732.10
December 24, 2012	Late charge balance: \$30,210.62
November 20, 2018	Late charge balance: \$41,196.30

Reliant offered no evidence at the hearing as to any communications between Reliant and the Debtor,⁵ or between Mr. Wilson and Mr. Hatcher, regarding the Note. On cross-examination, Reliant inquired if Mr. Hatcher was aware of paragraph 7 of the Note regarding delinquency

⁴ This invoice did not contain late charges assessed at the time of issuance, but like the others submitted, contained a statement regarding additional late charges. This one read: “ADD ADDITIONAL LATE CHARGE OF 1,373.21 IF NO PAYMENT IS RECEIVED BY 12/20/10 OUR RECORDS INDICATE THAT THE PAYMENT ON YOUR NOTE IS PAST DUE. LATE FEES SHOWN WILL BE ADDED TO YOUR TOTAL DUE AMOUNT AFTER THE DUE DATE. WE MAY REPORT INFORMATION ABOUT YOUR ACCOUNT TO CREDIT BUREAUS. LATE/MISSED PAYMENTS OR OTHER DEFAULTS ON YOUR ACCOUNT MAY BE REFLECTED IN YOUR CREDIT REPORT.”

⁵ With the exception of the invoices as noted.

charges. Mr. Hatcher's response indicated that he was aware, but he did not think it altered the Plan, just accommodated Reliant's procedures and maintained his favorable relationship with the bank.

The Chapter 11 Plan, the Note, and Contract Interpretation

When a Chapter 11 plan is confirmed, it becomes a contract between the Debtor and its creditors, subject to state law contract principles of interpretation. *Conco*, 855 F.3d at 711, citing *Dow Corning*, 456 F.3d at 676. Under Tennessee contract law, “[t]he cardinal rule for interpretation of contracts is to ascertain the intention of the parties and give effect to that intention, consistent with legal principles.” *Bob Pearsall Motors, Inc. v. Regal Chrysler-Plymouth, Inc.*, 521 S.W.2d 578, 580 (Tenn. 1975). Tennessee contract law is premised on two basic principles: (1) contracts are to give effect to the intent of the contracting parties, and any interpretation should seek to do the same; see *Individual Healthcare Specialists, Inc. v. BlueCross BlueShield of Tennessee, Inc.*, 566 S.W.3d 671 (Tenn. 2019); and (2) the sole objective of contract interpretation is to enforce the agreement between the parties as it was mutually understood at its inception; see *McNairy v. Thompson*, 33 Tenn. 141, 149 (1853) (citations omitted).

When determining the intent of the parties, the contract's terms are to be given their “ordinary meaning” in the absence of ambiguity. *Riverside Surgery Ctr., LLC v. Methodist Health Sys., Inc.*, 182 S.W.3d 805, 811 (Tenn. Ct. App. 2005) (citing *Winfree v. Educators Credit Union*, 900 S.W.2d 285, 289 (Tenn. Ct. App. 1995)). “[O]rdinary meaning is that meaning which would have been derived from its words by reasonable persons dealing in the same situation as that of the contracting parties.” *Moore v. Moore*, 603 S.W.2d 736, 739 (Tenn. Ct. App. 1980).

The first consideration when interpreting the terms of a contract is to determine whether an ambiguity exists in the contract terms. *Planters Gin Co. v. Federal Compress & Warehouse Co.*, 78 S.W.3d 885 (Tenn. 2002). If the subject language is deemed ambiguous, the court must apply established rules of construction to determine the parties' intent. *Id.* Contractual language "is ambiguous only when it is of uncertain meaning and may fairly be understood in more ways than one." *Allstate Ins. Co. v. Watson*, 195 S.W.3d 609, 611 (Tenn. 2006) citing *Farmers–Peoples Bank v. Clemmer*, 519 S.W.2d 801, 805 (Tenn. 1975). A contractual term is ambiguous if it is reasonably subject to different or inconsistent interpretations, but the fact that parties to a contract interpret a provision differently does not render the contract ambiguous. *Burlison v. United States*, 533 F.3d 419, 429 (6th Cir. 2008), citing *Campora v. Ford*, 124 S.W.3d 624, 628 (Tenn. Ct. App. 2003).

The parties do not dispute that the Note is construed in conjunction with the Plan and does not modify the Plan. *Reliant Reply Brief*, ECF 295, pp. 1-2; *Debtor's Memorandum of Law in Support*, ECF 294, pp. 3-4. So what, then, is the purpose of the Note? What does "construed in conjunction with the Plan" mean?

Reliant asserts that "construed in conjunction with the Plan" means the Note modified the loan terms that are subject to payment under the Plan (i.e. the 16 loans constituting the Class 11 claim). The Debtor explained that the Note was merely an administrative accommodation to Reliant for the Plan payments by consolidating treatment of the 16 loans into one instrument for purposes of Reliant's accounting.

Plain Meaning or Ambiguity

The Debtor asserts that the Plan's silence on the issue of late fees does not create an ambiguity within the Plan subjecting it to Court analysis. In other words, nothing is left to

question in the absence of terms providing for or prohibiting late fees. No mention of late fees means no late fees.

It is fundamental in bankruptcy law that a confirmed Chapter 11 plan is to be regarded as a contract. *In re UNR Industries, Inc.*, 212 B.R. 295, 301 (Bankr.N.D.Ill.1997). Where the words of a contract have a plain meaning, the court has no alternative but to interpret the plan in accordance with that plain meaning. 17A Am.Jur.2d, Contracts §§ 337, 359.

Ohio Medical Instrument Co. v. Eagle–Picher Industries, Inc. (In re Eagle–Picher Industries, Inc.), 270 B.R. 842, 844 (Bankr. S.D. Ohio 2001). The plain meaning of the Plan is not subject to interpretation because it is clear: there is no provision for late fees because none are to be assessed. Under Tennessee law, there is then no need for the Court to look outside the four corners of the Plan to ascertain the intent of the parties. The language of the Plan sets forth the unmistakable agreement: Reliant will not charge late fees for Plan payments made after the monthly due date.

Reliant maintains that the Plan’s failure to address the assessment of late fees raises an ambiguity requiring the Court to look to the Note to clarify the parties’ agreement. In other words, the terms of the Note clarify the parties’ agreement without modifying the Plan because the Plan does not contain any provision that addresses late fees, or “any number of other provisions included in the [.] . . Note that the Debtor signed.” *Reliant Brief in Support*, ECF 295, p. 2.

If this were an instance where silence created an ambiguity, a proper analysis to ascertain the intention of the parties must be gathered from the whole instrument taken in connection with the surrounding circumstances. *In re Pyramid Operating Auth., Inc.*, 144 B.R. 795, 812 (Bankr. W.D. Tenn. 1992) citing *Greyhound Lines, Inc. v. Sharpe*, 565 F. Supp. 419, 421 (E.D. Tenn. 1983). Here, the whole instrument is the Plan, with the surrounding circumstances including the

Note, and the parties' performance and conduct throughout consummation of the Plan. This would give the Court insight into the parties' understanding of the Plan terms by their actions. The Court would have nine years of surrounding circumstances that include the performance and behavior of both parties during the payment period. An excellent indication of the parties' intentions.

The record indicates that the Debtor has never calculated late charges, or promised payment of late charges or, previous to this motion, refused to pay late charges when a demand was made. Throughout the nine years the Debtor has made payments to Reliant pursuant to the Plan, and the Debtor has never paid a late charge for the minimal number of times payments were tendered beyond the monthly due date.

Reliant did not object to the Plan, nor did it act in any way controversial to the plain language of the Plan. Reliant accepted those payments for nine years without once seeking to collect late fees. Reliant offered selected statements to indicate that the late charges were added to the Debtor's account. However, what Reliant did not show is that the late charges were ever made part of the amount due for the month following a month in which a late payment was made. In other words, Reliant credited the Debtor's account as if the late charges were not applicable in that subsequent payments were not first applied to account for late charges, pursuant to section 4 of the Note. No payments were applied to a balance that included late charges. All payments were applied pursuant to Plan terms. Reliant did not act under the terms of the Note, but under those in the confirmed Plan.

Therefore, no provision of the Note was ever implemented, indicating both parties understood that the Note was merely an instrument by which Reliant consolidated all 16 previous notes in order for proper application of Plan payments to the total amount due on Reliant's claim.

Thus, if there were an ambiguity in the Plan language, the analysis would favor the Debtor's position.

The Timing of the Note

Reliant also argues that the post-confirmation timing of the Note favors a ruling that the Note terms control. This argument fails on two levels: (1) a change in payment terms would constitute a plan modification, and no such action was brought before the Court for required approval; and (2) the effective date was after the Note was executed.

(1) Plan Modification

Significant reasons exist for the more involved procedures required to modify terms of a confirmed Chapter 11 plan. Paramount is that confirmation of a Chapter 11 plan establishes a new contractual agreement between the debtor and all other parties. *In re Burnsbrooke Apartments of Athens, Ltd.*, 151 B.R. 455, 457 (Bankr. S.D. Ohio 1992); 11 U.S.C. § 1127(a) and (b). Most notable here is the lack of disclosure and formal requirements for post-confirmation modification.

Modification of a confirmed Chapter 11 plan is governed by 11 U.S.C. § 1127(b) which provides:

(b) The proponent of a plan or the reorganized debtor may modify such plan at any time after confirmation of such plan and before substantial consummation of such plan, but may not modify such plan so that such plan as modified fails to meet the requirements of sections 1122 and 1123 of this title.... Such plan as modified under this subsection becomes the plan only if circumstances warrant such modification and the court, after notice and a hearing, confirms such plan as modified, under section 1129 of this title....

Burnsbrooke Apartments, 151 B.R. at 456–57.

Neither the Debtor nor Reliant sought to implement the proper path to a modification of the Plan. No motion, no disclosures, and no hearing was held to consider changing the terms of the Plan as they relate to Reliant. No facts support this contention and no law upholds it.

Therefore, the Note cannot and does not act as a modification of the Plan.

(2) Effective Date

Reliant also argues that the Note is not subject to modification by the Plan terms because the Note was not an “existing finance document” when the Plan was confirmed. *Debtor’s Amended and Restated Plan of Reorganization Dated August 3, 2010*, ECF 290-3 at p. 3. This argument is misplaced in that it completely ignores the timing and effect of the effective date on the Plan provisions.

The Code does not provide a definition of “effective date.” Ballentine’s Law Dictionary defines “effective date” as the date when “a code of laws, a constitution, or a single statute or constitutional amendment becomes binding as law.” Thus, the date upon which a contract becomes operative is its effective date. Before this date, the contract has not yet taken effect and is therefore not in operation.

The parties do not dispute the meaning of “effective date.” The Plan at issue includes “effective date of the plan” in its definitions section, but only defines it as “the later of (i) the first business day of the second full month following the Confirmation, or (ii) the first business day after an appeal of an order confirming this Plan has become final unappealable.” *Id.* at p. 2. Note that this definition does not explain *what* becomes effective on that date and thus *what is not* in effect before that date.

If the entire Plan is ineffective until the effective date, then the provision in Class 11 that “[a]ny terms of the existing finance documents evidencing this Allowed Claim which may conflict with the terms of the Plan shall be deemed modified by the Terms of the Plan” was not operative until the effective date. If this is true, the November promissory note would have been an “existing finance document” when the Plan took effect in December subject to modification by the confirmed Plan terms.

If, however, the Plan was in effect immediately upon confirmation, then the promissory note would not have been an “existing finance document” when the Plan took effect—it would have to be a plan modification in order to control, which it has already been determined it is not.

As noted above, “[e]ffective’ in common parlance means ‘ready for service or action; to effect.’ ‘Effect’ in turn means ‘a quality or state of being operative.’” *In re Musil*, 99 B.R. 448, 450 (Bankr. D. Kan. 1988) (citing Webster’s New Collegiate Dictionary (1975)). The *Musil* court continued to explain that the effective date of a plan cannot logically exist before the date that the plan was filed. *Musil*, 99 B.R. at 450. In other words, a Plan cannot take effect before it exists. Case law supports this theory. See *Collins v. Tennessee Dep’t of Rev. (In re Faye Foods, Inc.)*, 766 F. App’x 204, 211 (6th Cir. 2019); *In re Potomac Iron Works, Inc.*, 217 B.R. 170, 172 (Bankr. D. Md. 1997). Further, the Sixth Circuit recently recognized that the effective date of a plan “is commonly understood as the date on which the plan goes into effect, which means the debtor starts implementing the plan and making payments to creditors.” *Faye Foods*, 766 F. App’x at 211.

It is worth noting that while most discussions regarding the effective date of a Chapter 11 Plan seem to revolve around the commencement of payments by the Debtor, they all also tend to include some sort of remark regarding “other provisions” of a plan. For instance, Weintraub and Crammes note that the effective date signals the “commencement of the operation of [a plan’s] provisions.” Benjamin Weintraub & Michael J. Crammes, *Defining Consummation, Effective Date of Plan of Reorganization and Retention of Postconfirmation Jurisdiction: Suggested Amendments to Bankruptcy Code and Bankruptcy Rules*, 64 AM. BANKR. L.J. 245, 277 (1990). Thus, the effective date of a Chapter 11 Plan signifies both the commencement of payment—

unless otherwise stipulated in the Plan—and the first day of operation of *every* provision in the Plan.

Conclusion and Ruling

The Note was an accommodation by the Debtor to Reliant to assist in the proper application of payments under the Plan. Those payments, as applied under the Plan, would be made on one claim, the Class 11 claim of Reliant. The Class 11 claim constituted 16 loans made by Reliant to the Debtor prepetition. It is unmistakable from the evidence presented at the hearing and the actions of the parties, that the Note was intended to simply consolidate for Reliant's purposes those 16 loans.

Therefore, the Court makes the following findings:

- 1) Under Tennessee law, the Plan's silence on the assessment of late fees does not give rise to an ambiguity in the Plan subject to interpretation. The plain language within the four corners of the Plan control: no provision provides for the assessment of late fees.
- 2) The Note does not act as a modification of the Chapter 11 Plan.
- 3) By operation of the effective date, the Note is an existing finance document subject to modification in accordance with Plan terms.

Therefore, IT IS HEREBY ORDERED that the Debtor's motion is GRANTED, and the final payment due Reliant under the Plan is \$27,464.35.

This Order has been electronically signed. The Judge's signature and Court's seal appear at the top of the first page.
United States Bankruptcy Court.