

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE DIVISION

IN RE:

MATTHEW SAMONS
CRYSTAL LYNN SAMONS

CASE NO. 10-70578

DEBTORS

MEMORANDUM OPINION AND ORDER

This matter is before the Court following a hearing held on October 27, 2010 on creditor Green Tree Servicing LLC's ("Green Tree") Application for an Order Pursuant to Bankruptcy Code Sections 362(c)(3)(a) and 362(j) ("Application")[Doc. 10], and on Debtors' Amended Motion to Extend Stay on 1998 Oakwood, Classic 14' X 76' Mobile Home, Serial Number HONC03316712, for Ninety (90) Days to Allow for Confirmation ("Motion")[Doc. 16]. The parties submitted post-hearing memoranda and this matter is ripe for decision.

For the reasons set forth below, the court holds that unless timely extended, a stay termination in a repeat filer's chapter 13 case is not negated by a subsequently confirmed plan; however, the provisions of the confirmed plan on account of the creditor's claim are binding on the creditor.

Facts. The facts are not in dispute.

Debtors filed their first voluntary petition under chapter 13 of the Bankruptcy Code on September 20, 2006. That case was dismissed on July 31, 2007.

Debtors filed their second voluntary petition under chapter 13 of the Bankruptcy Code on August 27, 2007. That case was dismissed on June 24, 2010.

Debtors filed the instant chapter 13 proceeding less than a month later on July 20, 2010.

On September 7, 2010, Green Tree filed the Application seeking (a) confirmation of the termination or absence of the automatic stay on the 30th day after the filing of the current bankruptcy because Debtors had a prior case dismissed within one year of the bankruptcy, and (b) permission to commence a replevin action and eviction with regard to the mobile home (see Doc. 10, 30).

On September 9, 2010, the Debtors filed their response in opposition to the Application (Doc. 12) and the Motion seeking to extend the automatic stay for 90 days to allow Debtors' chapter 13 plan to be confirmed. These matters were scheduled for hearing on October 27, 2010.

Prior to the hearing, on September 21, 2010, Debtors' Amended Chapter 13 Plan (Doc. 17) was confirmed (Doc. 23). The confirmed plan provided for the Debtor's retention of the mobile home and monthly payments to Green Tree of \$323.44. The plan estimates Green Tree's claim to be \$23,274.32 with the secured value of the claim set at \$15,000.00. Green Tree did not oppose the plan. There is nothing in the record indicating that debtors have not made the required payments, and nothing in the record indicating that Green Tree has not accepted payments.

Conclusions of Law

Section 362(c)(3)(A) of the Bankruptcy Code provides:

(3) if a single or joint case is filed by or against debtor who is an individual in a case under chapter 7, 11 or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b)-

(A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case.

Here, the Debtors had a prior case dismissed within one year of this bankruptcy; thus, the stay terminated on the 30th day after the bankruptcy filing with respect to the Debtors. Although Section 362(c)(3)(B) provides that the stay may be extended upon timely motion, that provision requires both that the request be made and the requested relief granted within the initial thirty day period. Debtors' Motion to "extend" the automatic stay filed after the 30 day period expired is untimely. 11 U.S.C. § 362(c)(3)(B).

The Court agrees with In re Robinson, 427 B.R. 412 (Bankr. W.D. Mich. 2010) to the extent that it holds that the automatic stay remains terminated despite the confirmation of the plan. This conclusion, however, begs the question of the effect of the confirmed plan on Green Tree's state law remedies.

Green Tree contends that confirmation of a plan does not prohibit Green Tree from exercising its state law remedies citing In re Cline, 386 B.R. 344 (Bankr. N.D. Ala. 2008). Cline held that plan confirmation and the provisions of 11 U.S.C. § 1327(a) do not implicitly or otherwise overrule a preconfirmation order allowing the stay to expire under Section 362(c)(3), and that the expiration or termination of the stay pursuant to Section 362(c)(3) "transcends confirmation." Id. at 353. However, the Cline Court further ruled that notwithstanding stay termination, if a creditor accepts and retains payments tendered under a confirmed plan, then the creditor should be estopped from denying the binding and superceding effects of

confirmation. Id. at 354.

The Court finds that the better reasoned analysis is that set forth in In re Kurtzahn, 342 B.R. 581 (Bankr. D. Minn. 2006). In Kurtzahn, the court held that as a result of plan confirmation in a repeat filer's current chapter 13 case, and notwithstanding stay termination, the secured creditor could not exercise its rights in its mobile home collateral so long as the debtor remained current with her payments under her confirmed plan. The court reasoned that a confirmed plan binds creditors to the payments provided by the plan on account of their claims, i.e., that the plan provisions supplant the original contract terms. Accordingly, a creditor does not have a right to default remedies in a non-bankruptcy forum until such time as there is a default in the new contractual (i.e., the plan) terms. Id. at 585-586. Thus, although the stay is terminated as provided in Section 362(c)(3)(A), Green Tree's right to seek replevin/eviction is limited by and subject to the Debtors' performance under the confirmed plan.

Finally, Green Tree argues that the Debtors have failed to show that the present case was filed in good faith, and requests that it be given thirty days to appraise the mobile home to have a valuation hearing. The court concludes that good faith and valuation were issues that could have been raised at confirmation by Green Tree, but Green Tree failed to do so. The plan is *res judicata* as to those issues. The Sixth Circuit has noted that "Section 1327(a) has been consistently interpreted as barring the relitigation of any issue which was decided or which could have been decided at confirmation." In re Storey, 392 B.R. 266, 272 (6th Cir. BAP 2008) (emphasis in original). "Under §1327(a), '[t]he 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.' . . . Thus, absent a timely appeal, a confirmation order is res judicata and not subject to collateral attack." Id. at 270.

For the foregoing reasons, the court hereby GRANTS Green Tree's Application to the extent it requests a determination pursuant to 11 U.S.C. § 362(j) that the stay is terminated and DENIES the Debtors' Motion for Stay Extension; however, Green Tree may not commence a replevin/eviction action with regard to the subject mobile home so long as the Debtors remain current on their payments to Green Tree under the confirmed plan. Green Tree's alternative request to be allowed 30 days to appraise the mobile home in order to have a valuation hearing is likewise DENIED.

Copy to:

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Beverly M. Burden, Esq.

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***The affixing of this Court's electronic seal below is proof this document has been signed by the Judge and electronically entered by the Clerk in the official record of this case.***



**Signed By:**  
***Tracey N. Wise***  
**Bankruptcy Judge**  
**Dated: Wednesday, December 29, 2010**  
**(tnw)**