

**United States Bankruptcy Court
District of New Mexico**

Document Verification

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Case Number: 98-11047
Chapter : 13
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Description:	Findings of Fact and Conclusions of Law and Order Granting [13-1] Motion For Relief From Stay re: funds in the debtor's share account w/the credit union in the amt of \$1,819.12 by NM Educators Federal Credit Union. IT IS ORDERED that the stay is granted.		
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Comments: Findings of Fact and Conclusions of Law and Order on Motion for Relief from Stay filed by New Mexico Educator's Federal Credit Union			

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
NANCY DAVIS,
Debtor.

No. 13-98-11047 R

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND
ORDER ON MOTION FOR RELIEF FROM STAY FILED
BY NEW MEXICO EDUCATOR'S FEDERAL CREDIT UNION**

This matter came before the Court on January 20, 1999, to consider the Motion for Relief from Automatic Stay filed by New Mexico Educator's Federal Credit Union ("NMEFCU") and the objection thereto filed by the Debtor. NMEFCU seeks to modify the stay to offset Debtor's share account against the balance due on its claim. For the reasons set forth below, the Court finds the motion well taken, and it will be granted.

FACTS

1. Debtor filed her Chapter 13 Proceeding on February 20, 1998.
2. The original Schedule B shows no checking, savings or other deposits.
3. The Schedule D lists NMEFCU as a secured creditor for two personal loans in the amounts of \$2,520.47 and \$1,148.56, secured by a savings account of unknown value. Both loans are listed as totally unsecured.
4. Debtor filed her Chapter 13 Plan ("Plan") on February 23, 1998.
5. Paragraph 3 of the Plan, dealing with secured claims,

states:

Secured creditors shall retain their liens until any allowed secured claims have been paid. In the event the collateral is registered or titled, within ten (10) days of competition [sic] of the payments to the Lienholder herein, the Lienholder shall release to the Debtor the registration or title with the lien thereon released. The remainder of the amount owing shall be treated under the provisions of paragraph 3(d)[unsecured nonpriority claims]. The terms of the Debtor's prepetition agreement with the secured creditor shall continue to apply, except as otherwise provided for in this Plan or the Confirmation Order. (Emphasis added.)

6. Paragraph 7 of the Plan states:

Avoidance of Liens

The Debtor hereby MOVES, pursuant to §522(f)(1)(A) and §522(f)(1)(B), to avoid the judicial lien or non-purchase money security interest held by the following creditors:
N/A.

7. Nowhere in the Plan is NMEFCU mentioned by name.

8. NMEFCU filed a proof of claim on March 18, 1998, setting forth a secured claim in the amount of \$1,174.90 plus an unsecured claim of \$3,960.28, both "plus interest."

Attached to the proof of claim are the loan applications and a "Disclosure Statement and Agreement" that grants a security interest in all present and future deposits.

9. The Debtor's Statement of Intention, filed March 25, 1998 does not mention NMEFCU's claim or collateral.

10. The Plan was confirmed by order entered March 27, 1998.

11. On April 7, 1998, Debtor amended her exemptions to claim

"Deposits of money with banks" exempt in the amount of \$1,819 under 11 USC §522(d)(5).

12. No objections were filed to the claim of exemption.
13. On April 13, 1998, the standing Chapter 13 Trustee filed a "Motion for Clarification and Notice" requesting that the court clarify the treatment of NMEFCU's proof of claim because the Plan had no provision to pay the claim either through the plan or outside the plan. Neither Debtor or NMEFCU responded to this motion; no order was ever entered clarifying the treatment.
14. On October 30, 1998, NMEFCU filed its motion for relief from stay, seeking to offset \$1,819 in Debtor's share account against its debt of \$2,530.
15. Debtor objected, stating that 1) the funds are exempt, 2) the Plan was confirmed, 3) NMEFCU had an affirmative duty to seek offset before confirmation, and 4) the right of setoff was extinguished by confirmation.
16. Schedule B has not been amended to list the deposit as an asset.

CONCLUSIONS OF LAW

1. This is a core proceeding under 28 USC §157(b)(2)(A), (B), (G), and (K).
2. Bankruptcy Code Section 1327 provides:

Effect of confirmation

(a) 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.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as otherwise provided in the plan or in the order confirming the plan, the property vesting in the debtor under subsection (b) of this section is free and clear of any claim or interest of any creditor provided for by the plan. (Emphasis added.)

3. Bankruptcy Code Section 1325 provides, in part:

Confirmation of plan

(a) Except as provided in subsection (b), the court shall confirm a plan if -

(1) The plan complies with the provisions of this chapter and with the other applicable provisions of this title;...

(5) with respect to each allowed secured claim provided for by the plan -

(A) the holder of such claim has accepted the plan;

(B)(i) the plan provides that the holder of such claim retain the lien securing such claim; and

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim; or

(C) the debtor surrenders the property securing such claim to such holder. (Emphasis added).

4. A claim is "provided for" when the plan "makes a provision" for, "deals with" or "refers to" a claim. Rake v. Wade, 113 S.Ct. 2187, 2193 (1993).

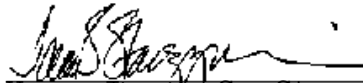
5. Debtor's plan did not specifically "provide for" NMEFCU's claim.
6. The plan generally provided for the same treatment of all secured claims, namely retention of liens until paid, and that prepetition agreement would continue to apply.
7. The Order of Confirmation is res judicata of any issue actually litigated or necessarily determined, In re Ivory, 70 F.3d 73, 75 (9th Cir. 1995), including whether the plan complies with section 1325. 8 Collier on Bankruptcy, ¶1327.02[1][c] (Lawrence P. King ed., 15th ed. rev. 1998).
8. Therefore, the Confirmation Order in this case is res judicata of the treatment of secured claims, including NMEFCU's. And, that treatment must have complied with section 1325; namely, NMEFCU necessarily retained its lien, and the claim and lien passed through confirmation unscathed. See Matter of Pence, 905 F.2d 1107, 1110 (7th Cir. 1990)(unless lien avoided it remains intact).
9. The Debtor argues that the case of In re Wilde, 85 B.R. 147 (Bankr. D. N.M. 1988) should apply to cancel NMEFCU's offset rights because the collateral is exempt. In Wilde the Court refused to allow setoff of a chapter 7 debtor's exempt property. Id. at 148. This case however is a chapter 13 proceeding, and the Confirmation Order binds the debtor as well as the creditor to the treatment in the plan. 11 U.S.C. § 1327(a).

10. Even if Wilde applied, no action was taken by debtor to avoid the setoff lien before confirmation, so it passed through confirmation.
11. Debtor also argues that under the reasoning of In re Continental Airlines, 134 F.3d 536 (3rd Cir. 1997), the failure to assert offset before confirmation extinguishes the right. In that case, however, the creditor first asserted its secured claim and right to offset in an amended proof of claim filed after the confirmation of the plan. Id. at 537-38. In this case, NMEFCU filed its claim and set forth its secured status before confirmation. Debtor also cites In re Lykes Brothers Steamship Co., 217 B.R. 304 (Bankr. M.D. Fla. 1997) as requiring action on the part of the creditor before confirmation. In that case, however, the plan specifically classified creditors having offset rights and explicitly extinguished those rights in the plan. Id. at 307. In this case the plan preserved NMEFCU's rights. And, in any event, if the debtor were seeking to modify or eliminate NMEFCU's rights, NMEFCU would be entitled to more explicit notice of the treatment proposed for its claim under the plan. See generally Reliable Electric Co. Inc. v. Olson Construction Company, 726 F.2d 620, 623 (10th Cir. 1984)(Due process does not allow substantial impairment of a creditor's claim under a confirmed chapter 11 plan without reasonable notice and an

opportunity to be heard in the confirmation process.) In this case all documents and pleadings up through confirmation gave no notice to NMEFCU that its lien would be avoided. It was only after confirmation that the debtor attempted to exempt the property and avoid NMEFCU's rights.

12. In summary, the Court finds that the status of the collateral as exempt is not relevant to the treatment of NMEFCU's claim under the confirmed plan; the Court further finds that the confirmed plan did not extinguish NMEFCU's offset rights; the Court finds no affirmative duty on the part of NMEFCU to assert offset before confirmation given the fact that the plan did not propose to extinguish those rights.

IT IS THEREFORE ORDERED that the Motion for Relief from Automatic Stay is granted.



Hon. James S. Starzynski
United States Bankruptcy Judge

I hereby certify that, on the date file stamped above, a true and correct copy of the foregoing was either electronically transmitted, faxed, mailed, or delivered to the James Nye and Will Jeffrey.

