

IT IS SO ORDERED.

Dated: December 15, 2015
11:14:07 AM


Kay Woods

Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

SANDRA D. CARPER and
SCOTT W. CARPER,

Debtors.

* * * * *

SANDRA D. CARPER,

Plaintiff,

v.

HARLEY-DAVIDSON CREDIT CORP.,

Defendant.

CASE NUMBER 08-41491

ADVERSARY NUMBER 15-4010

HONORABLE KAY WOODS

OPINION REGARDING

(i) DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON THE
APPLICATION OF 11 U.S.C. § 1325(a)(5)(B)(i)(I)(aa); AND

(ii) PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

The issue to be decided in determining the parties' cross motions for partial summary judgment is whether Harley-Davidson Credit Corp. ("Harley Davidson") is required to turn over the title to the 2006 Harley Davidson Sportster ("Motorcycle") to Debtor Sandra D. Carper ("Debtor"). In order to resolve this issue, the Court must determine whether Harley-Davidson is entitled to enforce the terms of the purchase agreement for the Motorcycle (the "Contract"), which contains an annual percentage rate of interest of 21.59% ("Contract Interest Rate"). As set forth below, this Court finds that Harley Davidson's failure to object to confirmation of the Debtor's plan constitutes acceptance of the plan pursuant to § 1325(a)(5)(A)¹ and, hence, § 1325(a)(5)(B) does not apply. Alternatively, under applicable nonbankruptcy law, Harley Davidson is judicially and equitably estopped from asserting the Contract Interest Rate. As a consequence, Harley-Davidson is required to turn over the Motorcycle title to the Debtor.

Before the Court are Defendant Harley Davidson's Motion for Partial Summary Judgment ("H-D's Motion") (Doc. 16) and Plaintiff Sandra D. Carper's Motion for Partial Summary Judgment ("Debtor's Motion") (Doc. 17), both of which were filed on October 13, 2015.

¹ Unless otherwise indicated, all statutory references are to the Bankruptcy Code, 11 U.S.C. § 101, *et seq.*

Debtor Sandra D. Carper commenced this adversary proceeding on February 9, 2015 alleging that Harley Davidson violated the automatic stay and confirmation order by refusing to turn over title to the Motorcycle and threatening repossession. Harley Davidson maintains that it has not violated the automatic stay or the confirmation order because it is entitled to retain its lien on the Motorcycle until it is paid in full under nonbankruptcy law, *i.e.*, enforce all terms of the Contract, including the Contract Interest Rate.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and General Order No. 2012-7 entered in this district pursuant to 28 U.S.C. § 157(a). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The following constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

I. FACTUAL AND PROCEDURAL BACKGROUND

On October 13, 2015, the Debtor and Harley Davidson filed Joint Stipulations Between Sandra D. Carper and Harley-Davidson Credit Corp. ("Stipulations") (Doc. 15). All facts set forth herein are from the Stipulations, the pleadings filed in the Debtors' Main Case, or the Proof of Claim No. 5-1 ("Claim 5") filed by Harley Davidson.

On May 22, 2008, Debtors Sandra D. Carper and Scott W. Carper filed a voluntary petition pursuant to chapter 13. Because the Debtors received a discharge in 2005 in a chapter 7 case (Case No. 05-17164), they were not eligible to receive a discharge in this chapter 13 case. (Stip. ¶ 13.) Prior to filing the chapter 13 case, on March 11, 2006, Sandra D. Carper and Scott W. Carper entered into the Contract to purchase the Motorcycle, a copy of which was attached to Claim 5. (*Id.* ¶ 1).

The Debtors filed their Chapter 13 Plan (Main Case, Doc. 2), which provided for total plan payments of \$25,161.60 to be paid over 60 months in monthly installments of \$419.36. (Plan at 1.) The Debtors identified Harley Davidson as the holder of a "Secured Debt[] Which Will Not Extend Beyond the Length of the Plan" and set forth the "proposed amount of the allowed secured claim" as \$4,781.49, with a monthly payment of \$126.48, to be paid at a 10% interest rate. (Plan at 1; Stip. ¶ 3.) Harley Davidson did not object to confirmation of the Chapter 13 Plan. (Stip. ¶ 10.)

On July 8, 2008, Harley Davidson filed Claim 5, which quantified its secured claim in the amount of \$5,465.07, but did not list an "Annual Interest Rate" in box 4 on the face of Claim 5. (*Id.* ¶¶ 4 and 6.) Attached to Claim 5 was a second page titled "Exhibit A," in which Harley Davidson itemized the "Total Debt as of May 22, 2008" as a "Principal Balance and Accrued Unpaid Interest" in the amount of \$5,465.07 and "Interest at the contract

rate of 21.59% per annum" as "\$0.00". (Claim 5, Ex. A; Stip. ¶ 5.) Michael A. Gallo, the Standing Chapter 13 Trustee ("Trustee"), paid Harley Davidson \$5,465.07 and did not pay any post-petition interest. (Stip. ¶ 7.)

On July 16, 2008, the Court confirmed the Chapter 13 Plan. (Main Case, Doc. 15; Stip. ¶ 12.) On May 15, 2012, the Trustee filed Notice of Completion of Plan Payments (Main Case, Doc. 28). On June 8, 2012, the Trustee filed his Final Report and Account ("Final Report") (Main Case, Doc. 30), which states Harley Davidson's allowed claim was paid in the full amount asserted, *i.e.*, \$5,465.07 at 0% interest. (Final Rpt. at 2.) Harley Davidson did not object to the Trustee's Final Report. (Stip. ¶ 9.) The Court issued the final decree on June 13, 2012 and the case was closed.

On February 2, 2015, the Debtors filed Motion to Reopen Case (Main Case, Doc. 33), which sought permission to reopen their chapter 13 case to pursue Harley Davidson's alleged violation of the automatic stay and confirmation order. On the same date, the Motion to Reopen Case was granted (Main Case, Doc. 33).

On February 9, 2015, Debtor Sandra Carper commenced this adversary proceeding alleging that, despite having its proof of claim paid in full through the Chapter 13 Plan, Harley Davidson misapplied the Debtors' payments, attempted to collect further payments, threatened to repossess the collateral, and failed to

release its lien and turn over the title. (Doc. 1.) Harley Davidson asserts that it is not required to release its lien on the Motorcycle because the Debtor owes an outstanding balance pursuant to the terms of the Contract. (Stip. ¶ 15.)

At a telephonic status conference on September 21, 2015, the Court granted the parties leave to file cross motions for partial summary judgment on the issue of whether Harley Davidson is required to turn over the title to the Motorcycle. On October 13, 2015, the parties filed the Stipulations, along with their cross motions for partial summary judgment. Harley Davidson ("H-D's Response") (Doc. 18) and the Debtor ("Debtor's Response") (Doc. 19), respectively responded to the other party's cross motion. Harley Davidson ("H-D's Reply") (Doc. 20) and the Debtor ("Debtor's Reply") (Doc. 21) also each filed their respective replies.

A. Harley Davidson's Position

In H-D's Motion, Harley Davidson asserts that § 1325(a)(5)(B)(i)(I)(aa) controls whether it is required to release its lien on the Motorcycle and states, "[T]he legal question is what constitutes 'the payment of the underlying debt determined under nonbankruptcy law.'" (H-D's Mot. at 2.) Harley Davidson argues that modification to the terms of a secured claim in a chapter 13 plan does not survive closure of a bankruptcy case when the debtor is ineligible for discharge. (*Id.*) As a consequence, Harley Davidson argues that, with no post-bankruptcy

effect, the original terms of the Contract are enforceable pursuant to state law. Harley Davidson further argues that the Chapter 13 Plan includes language that mirrors § 1325(a)(5)(B)(i); secured creditors "shall retain their mortgage, lien or security interest in collateral until the earlier of (a) the payment of the underlying debt determined under nonbankruptcy law, or (b) discharge under 11 U.S.C. section 1328." (*Id.* at 3.) As a result, because the Debtors did not receive a discharge in this case, Harley Davidson asserts that it is not required to release its lien until it has been paid the full balance and Contract Interest Rate, according to nonbankruptcy law. (*Id.* at 4.)

Harley Davidson also argues that the Chapter 13 Plan (i) "does not contain any language, clear and conspicuous or otherwise, that obligates Defendant to release its lien to Plaintiff within a certain time frame of a triggering event[;]" and (ii) "is void of any notice to Defendant that Defendant's rights under 11 U.S.C. section 1325(a)(5) and as stated in the Plan would be altered by confirmation." (*Id.*) Although Harley Davidson accepts the general proposition that it, as well as the Debtor, is bound by confirmation of the Chapter 13 Plan, Harley Davidson asserts that the modification of the secured contractual obligation between the parties cannot be permanent when, as is the case here, a debtor is not eligible to receive a discharge. (H-D's Reply at 1-2.)

Harley Davidson contends that "Defendant's Proof of Claim specifically states the contract interest rate." (H-D's Resp. at 3.)

B. The Debtor's Position

In the Debtor's Motion, the Debtor argues that § 1325(a)(5)(B)(i) is not applicable to this situation because Harley Davidson's claim was paid in full during the plan. The Debtor contends that, since Harley Davidson did not object to the Chapter 13 Plan nor its treatment therein, and Harley Davidson's allowed secured claim was satisfied in full by payment through the Chapter 13 Plan, the lien does not survive the bankruptcy. The Debtor further argues that Harley Davidson is judicially estopped from attempting to enforce the terms of the Contract, including the Contract Interest Rate, because the "position that [the Debtor] owes outstanding interest at 21.59 percent is plainly inconsistent with the Proof of Claim filed in [the Debtor's] bankruptcy case." (Debtor's Mot. at 6.) Harley Davidson's Claim 5 asserted a secured debt in the principal amount of \$5,465.07 without any stated interest rate, which amount was paid in full by the Trustee. (*Id.*; Stip. ¶¶ 6 and 7.)

The Debtor argues that the cases upon which Harley Davidson relies pre-date *United Student Aid Funds, Inc. v. Espinosa* (*In re Espinosa*), 559 US 260, 275 (2010), wherein the Supreme Court "held that a chapter 13 plan, absent objection from the creditor, remains

binding and enforceable on the creditor after the case has ended.”
(Debtor’s Resp. at 1 (citing *Espinosa*, 559 US at 275).)

II. STANDARD FOR REVIEW

Federal Rule of Civil Procedure 56(a), made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7056, states, in pertinent part:

The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.

FED. R. CIV. P. 56(a) (2015). Material facts are those “that might affect the outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue of material fact exists “if a reasonable person could return a verdict for the non-moving party.” *Jacob v. Twp. of W. Bloomfield*, 531 F.3d 385, 389 (6th Cir. 2008) (citing *Anderson*, 477 U.S. at 248).

“The moving party bears the burden of proving the absence of genuine issues of material fact and its entitlement to judgment as a matter of law.” *Longaberger Co. v. Kolt*, 586 F.3d 459, 465 (6th Cir. 2009) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)). The burden then shifts to the nonmoving party to present specific facts demonstrating the existence of a genuine dispute. *Pucci v. Nineteenth Dist. Court*, 628 F.3d 752, 759-60 (6th Cir. 2010) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*,

475 U.S. 574, 587 (1986)). In evaluating a motion for summary judgment, "the court must view the factual evidence and draw all reasonable inferences in favor of the nonmoving party." *Banks v. Wolfe County Bd. of Educ.*, 330 F.3d 888, 892 (6th Cir. 2003) (citing *Matsushita*, 475 U.S. at 587).

The nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment.'" *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1477 (6th Cir. 1989) (quoting *Anderson*, 477 U.S. at 257). That is, the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact. *Id.* at 1479; FED. R. CIV. P. 56(e).

Where the parties have filed cross-motions for summary judgment, each motion must be evaluated on its own merits and inferences must be drawn against the party whose motion is being considered. *Markowitz v. Campbell (In re Markowitz)*, 190 F.3d 455, 463 n.6 (6th Cir. 1999) (citations omitted).

III. ANALYSIS

A. § 1325(a)(5)(A) Applies

The Debtor put Harley Davidson on notice that she intended to pay its claim in full through the Chapter 13 Plan. (Plan at 2.) "If a creditor is unhappy with its treatment under the plan, it

must take some affirmative action to timely communicate its opposition.” *Goodwyn v. Capital One, N.A.*, Case No. 4:14-CV-219, 2015 WL 5120860, at *4 (M.D. Ga. Aug. 28, 2015) (citing *In re Castleberry*, 437 B.R. 705, 708-09 (Bankr. M.D. Ga. 2010) (collecting cases in support of the general rule that “a secured creditor’s failure to object to a chapter 13 plan may constitute its acceptance of the plan.”)) In *Goodwyn*, the district court faced a situation similar to the facts herein. *Goodwyn* was not eligible for discharge, paid the creditor’s secured claim in full during the plan, and yet the creditor refused to release its lien until its debt was satisfied under nonbankruptcy law. The result hinged on the effect of the debtor’s chapter 13 plan on the debt.

Much like the facts at hand, *Goodwyn*’s plan included language mirroring § 1325(a)(5). Nevertheless, the court found *Goodwyn*’s position persuasive that “the debt is extinguished as long as the debtor’s [c]hapter 13 plan is confirmed and the debtor completes the plan” because § 1325(a)(5)(A) applies when the creditor accepts the plan. *Id.*

The [c]ourt is convinced that [the creditor’s] mere filing of its proof of claim did not constitute an objection to the confirmation of the [c]hapter 13 plan. By failing to object and by receiving payments under the plan that fully paid the principal amount of the debt plus a reasonable interest rate, [the creditor] accepted the plan.

Id. The *Goodwyn* court held that since the creditor accepted the plan, “the plan could permanently modify her debt. Section

1322(b)(2) allows for modification of rights to creditors, and a debtor who is not entitled to a discharge may still permanently modify a loan in a bankruptcy plan.”² *Id.* (internal citation omitted). The court reasoned that “because the no-discharge case is closed without discharge, rather than dismissed, the code sections that reverse any lien avoidance actions . . . upon conversion or dismissal are not implicated, and, thus, do not act to prevent the permanence of the lien avoidance.”

Harley Davidson insists that its failure to object to the proposed Plan does not change the application of § 1325(a)(5)(B)(i) and references the Plan provision that states, “Secured creditors shall retain their mortgage, lien or security interest in collateral until the earlier of (a) the payment of the underlying debt determined under nonbankruptcy law, or (b) discharge under 11 U.S.C. § 1328[,]” which mirrors the language in § 1326(a)(5). In focusing only on § 1325(a)(5)(B)(i), however, Harley-Davidson ignores the effect of § 1325(a)(5)(A).

Section 1325(a)(5)(B)(i) would only apply if the modifications to the loan had been forced upon [the creditor] over its objection. . . . [N]o objection was raised by [the creditor] and thus its treatment (in this instance, payment in full with interest at the presumptively reasonable rate set by SC LBR 3015-6(a)) was accepted by and not forced upon [the creditor], so the requirements of § 1325(a) were met.

² Section 1322(b) states [T]he plan may . . . (2) modify the rights of holders of secured claims, other than a claim secured only by a security interest in real property that is the debtor’s principal residence, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims.” 11 U.S.C. § 1322(b)(2) (2015).

In re Crawford, 532 B.R. 645, 651 (Bankr. D.S.C. 2015). Similar to the case at hand, the *Crawford* Court also explored this issue in the context of a post-plan completion dispute about the release of a lien when the debtor paid the creditor's claim in full during the plan where the creditor never objected to the plan's confirmation. In *Crawford*, the creditor's failure to object to confirmation was determinative, despite the ineligibility of the debtor to receive a discharge.

In fact, it is well established that the failure to object to confirmation constitutes acceptance of the plan:

[I]f a secured creditor fails to object to confirmation, the creditor will be bound by the confirmed plan's treatment of its secured claim under § 1325(a)(5). This is because the failure to object constitutes acceptance of the plan. And a creditor's acceptance of a Chapter 13 plan is one way to satisfy the requirements of § 1325(a)(5) with respect to that creditor's allowed secured claim. . . . [A] creditor's failure to object constitutes acceptance and permits confirmation even if the plan does not treat an allowed secured claim in accordance with § 1325(a)(5)(B). . . . This holding is consistent with our prior case law and our decision today that the conditions regarding allowed secured claims in § 1325(a)(5) are mandatory: if the creditor objects (i.e., does not accept the plan under § 1325(a)(5)(A)), the plan must meet the requirements of § 1325(a)(5)(B).

In re Jones, 530 F.3d 1284, 1291 (10th Cir. 2008) (internal citations omitted).

[T]he courts that have considered the question have overwhelmingly concluded that a secured creditor's lack of objection may constitute acceptance of the plan for purposes of § 1325(a)(5)(A). . . . Unlike chapter 11, chapter 13 has no balloting mechanism by which secured

creditors may evidence acceptance of a plan. It is, therefore, only the negative – a filed objection – that evidences the lack of acceptance. For this reason, when a creditor is properly noticed of the provisions in a chapter 13 plan and takes no timely action, i.e., files no objection, the judicial doctrine of “implied” acceptance fills the drafting gap in the Code.

In re Flynn, 402 B.R. 437, 443-44 (B.A.P. 1st Cir. 2009) (internal quotation marks and citations omitted).

Harley Davidson admits that it failed to object to confirmation of the Debtor’s Chapter 13 Plan. (Stip. ¶ 10.) It took no action to trigger § 1325(a)(5)(B); therefore, the Court finds that Harley Davidson accepted the Debtor’s Chapter 13 Plan. As a result, Harley Davidson’s debt was permanently modified by its treatment under the plan – Claim 5 was paid in full satisfaction of the secured claim.³

B. Application of Nonbankruptcy Law

Even if Harley Davidson had objected to confirmation of the Chapter 13 Plan, the outcome here would not be any different.

³ The cases Harley Davidson relies on are distinguishable from the instant facts; therefore, its reliance is misplaced. See *In re Harrison*, 394 B.R. 879 (Bankr. N.D. Ill. 2008); *In re Lilly*, 378 B.R. 232 (Bankr. C.D. Ill. 2007). While the *Harrison* and *Lilly* courts allowed the creditors to accrue interest at the contract rate during the debtors’ plans, despite the confirmation of plans that included a reduced interest rate, they did so in the context of an objection to plan confirmation. These cases differ from the situation before this Court because (i) Harley Davidson did not object to plan confirmation; and (ii) Harley Davidson was paid the full amount it asserted in Claim 5. Harley Davidson did not object to the Debtor’s plan confirmation, and it accepted, without objection or comment, the Trustee’s payment of the amount it asserted in the proof of claim it filed.

Application of § 1325(a)(5)(B)(i)(I) finds the same result. This section provides:

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

* * *

(B)(i) the plan provides that -

(I) the holder of such claim retain the lien securing such claim until the earlier of -

(aa) the payment of the underlying debt determined under nonbankruptcy law; or

(bb) discharge under section 1328;

11 U.S.C. § 1325 (2015) (emphasis added).

Harley Davidson asserts that it is not required to release its lien on the Motorcycle because, pursuant to the terms of the Contract between the Debtor and Harley Davidson and the applicable nonbankruptcy law, Harley Davidson has not been paid in full to date. The Debtor argues that Harley Davidson has been paid in full because the Trustee paid all amounts set forth by Harley Davidson in Claim 5.

Neither party has identified the relevant nonbankruptcy law applicable in this case. The Contract was signed in Ohio; the Debtors at all relevant times resided in Ohio; the dealership that sold the Motorcycle to the Debtors is located in Ohio; and the Motorcycle was titled in Ohio. The only non-Ohio reference is that the lender is identified as having a post office box address in Carson City, Nevada. Based on all of these facts, the Court finds that the applicable nonbankruptcy law would be the law of Ohio.

Having identified the relevant applicable nonbankruptcy law, the first question is whether, after receiving payment of \$5,465.07 through the Chapter 13 Plan, Harley Davidson now has any Contract rights that it can enforce under Ohio law.

1. Harley Davidson Asserted its Position in Claim 5

In this Court, long-established practice requires the Trustee to pay a creditor based on the amount on the proof of claim if such amount is different from the amount proposed in a debtor's plan.⁴ If a debtor disagrees with the amount or classification of a filed claim, the debtor is required to object to such proof of claim. Here, the Debtor's Chapter 13 Plan proposed \$4,781.49 as the amount of Harley Davidson's secured claim with an interest rate of 10.00%. Harley Davidson did not object to the Chapter 13 Plan; instead, Harley Davidson filed a proof of claim, which was denominated Claim 5, in which it asserted that the Debtor owed Harley Davidson a secured claim in the amount of \$5,465.07, with the "Annual Rate of Interest" left blank. No party objected to Claim 5; as a consequence, the claim was deemed allowed as filed and constituted prima facie evidence of the validity and amount of the debt owed by the Debtor to Harley Davidson. See 11 U.S.C. § 502; FED. R. BANK. P. 3001(f). The Trustee paid the allowed Claim 5 in accordance with its terms, *i.e.*, \$5,465.07 without any post-

⁴ If Harley Davidson had not filed a proof of claim, it would have received the amount and interest rate proposed by the Debtors in the confirmed Chapter 13 Plan, *i.e.*, \$4,781.49 at 10.00% interest.

petition interest. (Stip. ¶ 7.) Harley Davidson concedes that it received and accepted the amounts as paid by the Trustee. (*Id.* ¶ 8.)

If Harley Davidson wanted to be paid the Contract Interest Rate, it should have filed a proof of claim asserting a secured claim in the amount of \$5,465.07 plus the "Annual Interest Rate" of 21.59%; however, Harley Davidson did not file such claim. Instead, Harley Davidson filed a proof of claim that asserted a secured claim amount, listed no annual rate of interest and attached an Exhibit A to the claim form that referenced a "contract rate of 21.59% per annum," while at the same time listing "\$0.00" as the amount of interest owed as part of the "Total Debt as of May 22, 2008." (Claim 5 at 2.)

2. Claim 5 is Blank for the Annual Interest Rate

Harley Davidson contends that "Defendant's Proof of Claim specifically states the contract interest rate." (H-D's Resp. at 3.) Harley Davidson's offers the following explanation:

The interest rate is itemized at \$0.00 because [Harley Davidson] was not including any pre-petition interest in the Proof of Claim. However, [Harley Davidson] submitting an accurately itemized, timely Proof of Claim that identifies the contract rate of interest and reflects no pre-petition interest due does not summarily waive [Harley Davidson's] claim to interest within the rights available to it under 11 U.S.C. 1325(a)(5)(B)(i) [sic].

(*Id.*)

There is no dispute that Harley Davidson did not fill in any amount as the "Annual Interest Rate" in box 4 on the face of the proof of claim form. The space following this designation on the proof of claim form is blank.

Exhibit A to Claim 5 is titled "ITEMIZATION OF CLAIM AND SUMMARY OF SUPPORTING DOCUMENTS FOR CLAIM OF HARLEY-DAVIDSON FINANCIAL SERVICES." This itemization is set forth as:

<u>Total Debt as of May 22, 2008</u>	
Principal Balance and Accrued Unpaid Interest	\$5,465.07
Interest at the contract rate of 21.59%	<u>(\$0.00)</u>
TOTAL DEBT	\$5,465.07

(Claim 5, Ex. A.) Harley Davidson argues that the second line of the itemization on Exhibit A, which states "Interest at the contract rate of 21.59% per annum . . . (\$0.00)" means only that there was no accrued, but unpaid, interest as of the petition date. However, this explanation is at odds with the first line of the itemization, which specifically includes "Accrued Unpaid Interest" as of the filing date. (Claim 5 at 2.) Crediting Harley Davidson's explanation means that, since the first line of the itemization already accounts for accrued, but unpaid, interest as of May 22, 2008, line two is redundant and unnecessary. No purpose was served by Harley Davidson's inclusion of the second line of the

itemization because this component was already accounted for in the first line's total of \$5,465.07.⁵

The most logical reading - in fact, the only plain reading - of Claim 5 is that Harley Davidson asserted (i) no claim for any interest rate; and (ii) no accrued, but unpaid interest on its secured claim. The blank space on the face of the proof of claim form for the "Annual Interest Rate," coupled with the itemization of \$0.00 as "Interest at the contract rate of 21.59% per annum" on Exhibit A, can only be read to mean that the Trustee should pay Harley Davidson \$5,465.07 with no interest on its secured claim. This conclusion is bolstered by the fact that at no time did Harley Davidson object to the amount of the Trustee's payments, including the Trustee's Final Report, which showed he paid Claim 5 as filed.

All elements of a claim are required to appear on the face of the proof of claim. Harley Davidson failed to assert any annual interest rate on the official proof of claim form, despite including of all other claim details, such as (i) the "Nature of Property" securing the claim (Motor Vehicle); (ii) the "Value of Property" (\$5,465.07); (iii) the "Amount of Secured Claim" (\$5,465.07); and (iv) the "Amount Unsecured" (\$0.00). The proof of claim form is required to be signed by the person filing the

⁵ On its proof of claim form, Harley Davidson checked the box which stated "check this box if claim includes interest or other charges in addition to the principal amount of claim." (Claim 5 at 1.)

claim. The bottom of the proof of claim form warns, "*Penalty for presenting fraudulent claim: Fine of up to \$500,000 or imprisonment for up to 5 years, of both. 18 U.S.C. §§ 152 and 3571.*" (Form B10, Official Proof of Claim Form; Claim 5.) Thus, the person signing Claim 5 on behalf of Harley Davidson was put on notice that all amounts set forth in Claim 5 had to be accurate and truthful.

In contrast, Exhibit A to Claim 5, which is not signed, purports to be only an itemization and summary. Even though "Interest at the contract rate of 21.59%" was itemized on Exhibit A, this exhibit cannot control over the official proof of claim form, which the representative of Harley Davidson signed under penalties of perjury.⁶ Line two on Exhibit A is ambiguous, at best. If, however, Harley Davidson intended line two to be the sole indication that it was claiming – and the Trustee should pay – the Contract Interest Rate on its secured claim, line two would constitute an intentional misrepresentation of the amount of Harley Davidson's secured claim.

Claim 5, on its face, is a representation to the Court, the Debtor, the Trustee, and all other parties in interest that the Debtor owed Harley Davidson \$5,465.07 plus zero interest in full satisfaction of its secured claim. In reliance upon Harley

⁶ Form B10 (Official Form 10) contains a reference to 18 U.S.C. §§ 152 and 3571 which makes it a crime to, *inter alia*, knowingly and fraudulently present a false claim against a debtor's estate. (Claim 5 at 1.)

Davidson's own statement of what it was owed, the Debtor did not object to Claim 5. If Harley Davidson had requested the Contract Interest Rate in box 4 on the face of Claim 5, the Trustee would have paid the claim with that interest rate, perhaps requiring the Debtor to amend her plan to increase the plan payments to provide for payment of Harley Davidson's claim with the Contract Interest Rate. But, this is all supposition because that is not the claim that Harley Davidson filed. Instead, Claim 5, as filed, was deemed allowed by the Court. Harley Davidson's conduct in filing Claim 5 with a blank "Annual Interest Rate" and \$0.00 as the amount of interest owed is inconsistent with its current position that it was not paid in full through the Chapter 13 Plan.

3. Judicial and Equitable Estoppel

The Debtor argues that Harley Davidson is judicially estopped from asserting its current position that it has not been paid in full because it concedes that the "[T]rustee paid [Harley Davidson] the proof of claim amount of \$5,465.07." (Stip. ¶ 7.) Judicial estoppel is an equitable doctrine applied to preserve the integrity of the courts by preventing a party from abusing the judicial process through cynical gamesmanship. "[T]he doctrine of judicial estoppel applies to preclude a party from assuming a position in a legal proceeding inconsistent with one previously asserted." *Bruck Mfg. Co. v. Mason*, 616 N.E.2d 1168, 1170 (Ohio Ct. App., 8th

Dist. 1992) (citing *Oneida Motor Freight v. United Jersey Bank*, 848 F.2d 414, 419 (3rd Cir. 1988); *In re H.R.P. Auto Ctr., Inc.*, 130 B.R. 247, 254 (N.D. Ohio 1991); *Matter of Freedom Ford, Inc.*, 140 B.R. 585, 587 (M.D. Fla. 1992)).

Although the Debtor does not use the term equitable estoppel in her arguments, her arguments about judicial estoppel also assert the essence of equitable estoppel. The two doctrines are closely related, but serve different purposes.

The difference between judicial and equitable estoppel stems from their different purposes. Judicial estoppel exists to "protect the courts 'from the perversion of judicial machinery'" through a party's attempt to take advantage of both sides of a factual issue at different stages of the proceedings. . . . In contrast, equitable estoppel serves to protect *litigants* from unscrupulous opponents who induce a litigant's reliance on a position, then reverse themselves to argue that they win under the opposite scenario.

Teledyne Indus., Inc. v. N.L.R.B., 911 F.2d 1214, 1220 (6th Cir. 1990) (internal citations omitted; emphasis in original).

"The doctrine [of judicial estoppel] applies only when a party shows that his opponent: (1) took a contrary position; (2) under oath in a prior proceedings; and (3) the prior position was accepted by the court." *Griffith* at 380. Courts have applied this doctrine when inconsistent claims were made in bankruptcy proceedings that predated a civil action.

Greer-Burger v. Temesi, 879 N.E.2d 174, 183 (Ohio 2007) (quoting *Griffith v. Wal-Mart Stores, Inc.*, 135 F.3d 376, 380 (6th Cir. 1998)).

Harley Davidson now asserts that it is entitled to collect the Contract Interest Rate under applicable nonbankruptcy law. Harley Davidson's current position directly contradicts its representation in Claim 5 that contained no Annual Interest Rate and claimed \$0.00 in interest. Claim 5 was (i) signed under penalty of perjury; and (ii) accepted as an allowed claim by the Court.

Two Ohio cases dealing with judicial and equitable estoppel in connection with bankruptcy are instructive. In *Greer-Burger v. Temesi*, 879 N.E.2d 174 (Ohio 2007), the Supreme Court of Ohio found that a debtor's concealment of a pending lawsuit and the discharge of her attorney fees related to that lawsuit judicially estopped her from asserting her right to those attorney fees as damages in a subsequent proceeding. Greer-Burger unsuccessfully sued her employer for sexual harassment. The employer then filed a tort action against her for abuse of process, malicious prosecution and intentional infliction of emotional distress. The Ohio Civil Rights Commission filed suit against the employer for retaliation, which resulted in a hearing on damages in which Greer-Burger testified that she incurred legal expenses of more than \$16,000.00 in defending the retaliation suit. Thereafter, Greer-Burger filed for bankruptcy protection; she did not list the pending retaliation claim on her schedule of assets, but her debts, including her attorney fees, were discharged. The OCRC subsequently ordered the

employer to pay Greer-Burger \$16,000.00 for attorney fees. On appeal, the Supreme Court of Ohio held,

We also note that because her attorney fees were discharged in bankruptcy, and because she took an inconsistent factual position in not listing her pending retaliation claim, she is equitably and judicially estopped from recovering attorney fees for that claim.

* * *

By concealing the claim Greer-Burger undermined the bankruptcy trustee's ability to perform his duties because the performance of those duties is contingent on an accurate and complete disclosure.

Id. at 182-183. The court found that judicial estoppel applied

because (1) she was aware of the retaliation claim when she filed for bankruptcy, so there was no reason it was not listed as an asset, (2) a motive to conceal can be inferred because the fees were discharged, so she would be able to personally recover those fees, and (3) there is a lack of evidence that she timely took "affirmative action to fully inform the court and the trustee of the asset's existence."

Id. at 184 (quoting *In re Johnson*, 345 B.R. 816, 823 (Bankr. W.D. Mich. 2006)).

Similarly, in *Bruck Mfg. Co. v. Mason*, 616 N.E.2d 1168 (Ohio Ct. App., 8th Dist. 1992), Bruck Manufacturing brought an action against a debtor for repayment of a loan and for commissions that had been paid but were allegedly not earned. The debtor filed a counterclaim against Bruck and a third-party complaint against individuals for work done on their behalf. The debtor subsequently filed for chapter 13 bankruptcy protection, but did not schedule

his counterclaim as an asset or the company's commission claim as a debt.

The trial court granted summary judgment in favor of Bruck and the individuals. The trial court also denied the debtor's motion for summary judgment and held that the counterclaim and third-party claim were disposed of by the bankruptcy court and that the debtor's claims were precluded under principles of equitable or judicial estoppel. On appeal, the court held:

In the present case, appellant asserted his claim by way of a counterclaim and third-party claim prior to his petition for Chapter 13 protection. Appellant failed to state his claim as an asset on his "Chapter 13 Statement" or at any time during the bankruptcy proceedings. In reliance thereupon, appellee Bruck chose not to file a proof of claim concerning commissions allegedly paid to, but unearned by, appellant. Thereafter, upon conclusion of appellant's Chapter 13 proceedings, he reasserted his claim against appellees. However, appellant's failure to disclose the relevant claim estops him from asserting it now. Accordingly, the trial court did not err in ruling that the doctrine of equitable and/or judicial estoppel applies.

Bruck Mfg. Co., 616 N.E.2d at 1170.

Although the holdings of *Greer-Burger* and *Bruck Mfg.* are based on a debtor's conduct, in contrast to the facts before this Court, which deal with a creditor's conduct, the rationale of these cases apply here. Harley Davidson concealed its claim for the Contract Interest Rate when it filed Claim 5 and left blank the "Annual Interest Rate" in box 4. The Trustee's ability to perform his duties of distribution to creditors was undermined by Harley

Davidson's concealment. As set forth above, had Harley Davidson asserted a claim for interest at the rate of 21.59%, absent an objection, the Trustee would have paid Claim 5 with interest at the rate of 21.59%. Similar to the conduct of Greer-Burger, (i) Harley Davidson was aware of the Contract Rate of Interest when it filed Claim 5, so there was no reason it was not set forth in box 4 on the face of the proof of claim; (2) Harley Davidson had potential motive to conceal the Contract Interest Rate if it intended to collect an increased amount from the Debtor after the bankruptcy case was closed; and (3) Harley Davidson made no effort to inform the Court or the Trustee that it was to be paid interest at the rate of 21.59% as full payment of its claim.

Both the Trustee and the Debtor relied on Harley Davidson's Claim 5 as a complete statement of the secured amount the Debtor owed to Harley Davidson. In reliance on the face of Claim 5, the Trustee paid Harley Davidson \$5,465.07 with no interest and the Debtor did not object to Harley Davidson's secured claim. At no time did Harley Davidson inform the Trustee or file any document with the Court to indicate that it was not being paid the full amount of Claim 5 or that it expected to be paid interest at the Contract Interest Rate of 21.59%. By filing Claim 5, Harley Davidson represented to the Court, as well as all parties in interest, that the principal amount of \$5,465.07 was the "TOTAL

DEBT" (see Claim 5, Ex. A) that the Debtor owed to Harley Davidson on the secured claim.

Based upon the holdings of Ohio courts in *Greer-Burger v. Temesi* and *Bruck Mfg Co. v. Mason*, this Court finds that, if Harley Davison filed suit to attempt to collect the amount it asserts the Debtor still owes for the Motorcycle under the Contract, a trial court would determine that Harley Davidson is judicially and equitably estopped from asserting this position in contradiction to the position Harley Davidson took in its Claim 5. As a consequence, Harley Davidson has no rights under applicable nonbankruptcy law to enforce the Contract Rate.

4. No Remaining Balance Due

Harley Davidson argues that, because the Debtor did not receive a discharge, its secured claim could not be permanently modified by the Debtor's Chapter 13 Plan. Based on Harley Davidson's acceptance of the Debtors' Plan, however, this argument fails.

As long as the requirements for confirmation set forth in § 1325(a)(5) are met, "nothing in § 1325(a)(5) prevents a debtor from modifying payment terms or interest rates under section 1322(b)(2)" for creditors whose claims are secured by property other than a debtor's principal residence. Even a debtor who is not eligible for discharge may permanently modify a loan in a chapter 13 plan. *In re Bolden*, No. 12-14979, 2013 WL 3897048 at *4 (E.D. Mich. Jul. 29, 2013) (citing *In re Hopkins*, 371 B.R. 324, 327 (N.D. Ill. 2007)).

In re Crawford, 532 B.R. 645, 648-49 (Bankr. D.S.C. 2015).

Harley Davidson's argument further misses the mark because when it filed Claim 5 with a blank interest rate, Harley Davidson changed the Debtor's payment obligation during the Chapter 13 Plan. Harley Davidson represented to the Court, the Trustee, the Debtor, and all other parties in interest that there was no Annual Interest Rate on its secured claim. Accordingly, Harley-Davidson could not accrue interest on the secured debt in contravention of this representation. As a consequence, Harley Davidson was required to modify its record of the Debtor's account to reflect 0% interest rate during the pendency of the Debtor's bankruptcy case consistent with the express terms of Claim 5.

Moreover, because the Debtor paid this debt in full as outlined in Claim 5, there is no balance remaining upon which the Contract Interest Rate may apply. When a chapter 13 plan is completed without discharge of a debtor, application of nonbankruptcy law may allow a creditor to reinstate the contract terms to any balance of the claim that remains unpaid at the conclusion of the Chapter 13 Plan. However, that is not the case here, because Harley Davidson did not assert the Contract Interest Rate in Claim 5. Because Harley Davidson's allowed Claim 5 was paid in full as filed, there was no balance remaining at the conclusion of the Debtor's Chapter 13 Plan.

Since Harley Davidson's claim was specified in the Chapter 13 Plan to be a "Secured Debt[] Which Will Not Exceed the Length of

the Plan," Harley Davidson was put on notice that the Debtor expected Harley Davidson's secured claim to be paid in full through the Chapter 13 Plan. Harley Davidson did not object to the Chapter 13 Plan and filed Claim 5 to participate in the Chapter 13 Plan. The Trustee, on behalf of the Debtor, paid Harley Davidson the full amount of Claim 5. (Final Rpt. at 2; Stip ¶ 7.) As a result, Harley Davidson's secured claim was paid in full and there is no unpaid balance on the debt. As a consequence, Harley Davidson has no rights that it can enforce under the Contract and it is required to release its lien on the Motorcycle.

V. CONCLUSION

Based on all of the evidence before the Court, there are no genuine issues of material fact pertinent to these cross motions for partial summary judgment. Harley Davidson failed to object to confirmation of the Debtor's Chapter 13 Plan. As a result, pursuant to § 1322(b)(2), permanent modification of Harley-Davidson's secured claim survives the bankruptcy case despite the Debtor's ineligibility for a discharge. In addition, Harley Davidson is judicially and equitably estopped from enforcing its current position, under applicable nonbankruptcy law, because (i) it affirmatively set forth a contrary position in Claim 5 regarding the annual rate of interest; and (ii) failed to object to the confirmation of the Debtor's plan, or otherwise alert the parties in interest that it disagreed with the payments it received from

the Trustee. As a result, the Court will grant the Debtor's Motion and will deny Harley Davidson's Motion. An appropriate order will follow.

#

IT IS SO ORDERED.

Dated: December 15, 2015
11:14:07 AM


Kay Woods

Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

SANDRA D. CARPER and
SCOTT W. CARPER,

Debtors.

* * * * *

SANDRA D. CARPER,

Plaintiff,

v.

HARLEY-DAVIDSON CREDIT CORP.,

Defendant.

CASE NUMBER 08-41491

ADVERSARY NUMBER 15-4010

HONORABLE KAY WOODS

ORDER (i) DENYING DEFENDANT'S MOTION FOR PARTIAL SUMMARY
JUDGMENT ON THE APPLICATION OF 11 U.S.C. § 1325(a) (5) (B)
(i) (I) (aa); (ii) GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY
JUDGMENT; AND (iii) REQUIRING HARLEY DAVIDSON TO RELEASE ITS
LIEN AND TURN OVER TITLE WITHIN 14 DAYS

Before the Court are Defendant Harley Davidson Credit's Motion for Partial Summary Judgment ("Harley Davidson's Motion") (Doc. 16) and Plaintiff/Debtor Sandra D. Carper's Motion for Partial Summary Judgment ("Debtor's Motion") (Doc. 17), both of which were filed on October 13, 2015.

For the reasons set forth in the Court's Memorandum Opinion entered on this date, the Court finds that (i) Harley Davidson's failure to object to confirmation of the Debtor's Chapter 13 Plan constitutes acceptance of the Plan and does not trigger the application of § 1325(a)(5)(B); and alternatively, (ii) under nonbankruptcy law, Harley Davidson is judicially and equitably estopped from asserting the Contract Interest Rate. As a consequence, Harley Davidson is required to turn over title of the 2006 Harley Davidson Sportster ("Motorcycle") to the Debtor.

As a consequence, the Court hereby:

- (i) **DENIES** Harley Davidson's Motion;
- (ii) **GRANTS** the Debtor's Motion; and
- (iii) **ORDERS** Harley Davidson to release its lien and turn over the Motorcycle title to the Debtor within 14 days after entry of this Order.

#