

**U.S. BANKRUPTCY COURT
District of South Carolina**

Case Number: **24-00924-hb**

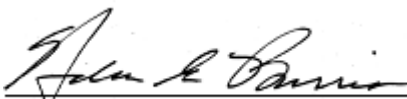
Order

The relief set forth on the following pages, for a total of 11 pages including this page, is hereby ORDERED.

**FILED BY THE COURT
07/11/2024**



Entered: 07/11/2024


Chief US Bankruptcy Judge
District of South Carolina

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA**

IN RE:

Christopher Corey Thomas,

Debtor(s).

C/A No. 24-00924-HB

Chapter 13

**ORDER DENYING CONFIRMATION
OF CHAPTER 13 PLAN FILED
MARCH 12, 2024**

THIS MATTER came before the Court for a confirmation hearing on June 27, 2024, to consider the March 12, 2024, Chapter 13 plan filed by Debtor Christopher Corey Thomas (“March 12 Plan”)¹ and the Amended Objection to Confirmation of the March 12 Plan filed by CNH Industrial Capital America, LLC (“CNH”).² Prior to the hearing, the parties filed Statements of Dispute that, while filed separately, frame the issues to be decided by the Court in the same manner.³ At the hearing, counsel for Thomas, V. Lee Ringler, counsel for CNH, Jesse M. Tillman, III, and Chapter 13 Trustee Annemarie B. Mathews (the “Trustee”) appeared, Thomas testified, and exhibits were admitted into evidence. The Court finds as follows.

FINDINGS OF FACT

Thomas is the one hundred percent (100%) owner of CT Land Solutions, LLC (“CT Land”), which is in the business of land clearing and mulching, among other things. Pre-petition, on April 20, 2022, CT Land entered an Equipment Operating Lease Agreement (the “April 2022 Lease”) with CNH whereby CT Land leased a Case Compact Track Loader TV450B (Serial Number: JAFTV450KNM411847) (the “First Track Loader”) from CNH.⁴ Under the April 2022

¹ ECF No. 7.

² ECF No. 15, filed May 23, 2024.

³ ECF Nos. 27-28, filed June 26, 2024.

⁴ CNH’s Ex. A. The April 2022 Lease was entered between CT Land and lessor G, J & L, Inc., but the terms thereof assigned the lessor’s rights under the agreement and any related guarantees to CNH.

Lease, CT Land was required to make an advance payment of \$3,248.78, followed by fifty-seven (57) monthly payments of \$1,624.39 beginning May 20, 2022, followed by one (1) monthly payment of \$1,624.12 due February 20, 2027. The April 2022 Lease was to terminate on April 20, 2027.

The April 2022 Lease stated “[t]he parties intend that this agreement. . .is a ‘Lease’ as defined in Section 2A-103(1)(j) of the [Uniform Commercial Code]”, which defines a “Lease” as “a transfer of the right to possession and use of goods for a term in return for consideration, but a sale, including a sale on approval or a sale or return, or retention or creation of a security interest is not a lease. Unless the context clearly indicates otherwise, the term includes a sublease.” The April 2022 Lease further clarified that “[t]his Agreement is a true lease only (and not a conditional sale). [CT Land] does not have any right, title or interest in the Equipment, except, so long as no event of default has occurred and is continuing hereunder, the right to use it during the term hereof and, if so indicated, the option to purchase it as provided under this Agreement.”⁵ The April 2022 Lease required CT Land to “promptly notify [CNH] of any loss, damage, theft, destruction, injury, claim, demand, cost or expense related to this Lease or the Equipment.” Further, the agreement required CT Land to “keep [CNH’s] interests in the Equipment insured against fire, theft, physical damage and other hazards under policies listing [CNH] as Lender’s loss payee, with such provisions, for such amounts. . .and by such insurers and terms as shall be satisfactory to [CNH] from time to time, and shall furnish to [CNH] evidence of such insurance satisfactory to [CNH].”⁶ Under the April 2022 Lease, CT Land “assign[ed] (and direct[ed] any insurer to pay) to [CNH] [CT Land’s] interest in the proceeds of any and all insurance related to the Equipment and any

⁵ The agreement provided a purchase option price of \$34,007.31.

⁶ The April 2022 Lease also required CT Land to maintain liability insurance. *See* CNH’s Ex. A, p. 3.

premium refund. . . .” CT Land was also required to “maintain the Equipment in good condition and repair and not permit its intended function or value to be impaired. . . .”

The April 2022 Lease provided CT Land’s failure to make payments or to perform any other obligation under the agreement or any other agreement with CNH, including to maintain insurance on the equipment, constitutes a default under the agreement. Thomas executed a guarantee of CT Land’s performance of all obligations to CNH under the April 2022 Lease.⁷

Thomas testified a drum mulcher attachment was purchased from Amur Equipment Finance, Inc. (“Amur”) and put on the First Track Loader. He further testified that the First Track Loader had mechanical problems, so he decided a second track loader should be leased.

On August 11, 2022, CT Land entered a second Equipment Operating Lease Agreement (the “August 2022 Lease”) with CNH whereby CT Land leased a Case Compact Track Loader TV450B (Serial Number: JAFTV450LNM415632) (the “Second Track Loader”) and a Prinoth Mulching Head M450 (Serial Number: 32025589) from CNH.⁸ The August 2022 Lease required CT Land to make an advance payment of \$4,256.85, followed by fifty-seven (57) monthly payments of \$2,128.43 beginning on September 11, 2022, followed by one (1) monthly payment of \$2,128.13 due on June 11, 2027. The August 2022 Lease was to terminate on August 11, 2027. The August 2022 Lease has the same terms as the April 2022 Lease noted above, except the purchase option price is \$40,200.11. Thomas executed a guarantee of CT Land’s performance of all obligations to CNH under the August 2022 Lease.⁹

⁷ CNH’s Ex. C.

⁸ CNH’s Ex. B. The August 2022 Lease was entered between CT Land and lessor G, J & L, Inc., but the terms thereof assigned the lessor’s rights under the agreement and any related guarantees to CNH.

⁹ CNH’s Ex. D.

Thomas testified an insurance policy covering all the equipment was obtained from Auto-Owners Insurance Co. (the “Insurance Company”) through John Osborne, his insurance broker. Thomas testified that while Amur was named as a loss payee on the policy, CNH was not.

Thomas testified that in February 2023, the First Track Loader continued to run despite attempts to turn it off. He stated that the First Track Loader—with the mulcher purchased from Amur attached to it—eventually caught on fire, though few details of the fire and its origin were provided. Thomas said that after the fire, he immediately called the Insurance Company to inform them of the incident. He testified that he informed Osborne through text messages that CT Land was leasing the First Track Loader from CNH. Thomas said that shortly thereafter, he sent the April 2022 Lease and the contract with Amur to an insurance adjuster named Heath Banks. He stated that he also informed Tony Richards, an employee of the Insurance Company, about the contract with CNH.

In April 2023, Thomas received a check from the Insurance Company for the loss of the First Track Loader and the attached mulcher in the fire for \$125,218.22, made payable to CT Land and Amur.¹⁰ Thomas said he was surprised the check was not made payable to CNH since he informed Osborne, Banks, and Richards about the contract with CNH. He said he sent the check to Amur, and Amur retained enough of the proceeds to satisfy the obligation for the destroyed mulcher and deposited the remaining balance of approximately \$78,000.00.¹¹

Thomas testified that on April 27, 2023, he called CNH and informed them of the \$78,000.00 in insurance proceeds and asked them if that amount could be sent to them and payments on the remaining portion of the obligation under the April 2022 Lease could be

¹⁰ Thomas’ Ex. 1. While the entire check is not visible, the visible portion appears to indicate the check was made payable to CT Land and Amur, which is consistent with Thomas’ uncontroverted testimony on that point.

¹¹ It is unclear from the testimony whether this meant Thomas’ personal account or the CT Land account.

continued. He said that the representative of CNH with whom he spoke said that that would not be possible because CNH does not accept partial payments, and that lease payments should continue until the entire balance of the obligation could be paid in full.¹² Thomas testified that after the conversation, payments continued on the April 2022 Lease from April 2023 to the end of November 2023.

Thomas testified all the approximately \$78,000.00 in insurance proceeds was used to replace the First Track Loader and its attached mulcher with new equipment from a different vendor.

Thomas stated that at the end of 2023, he asked CNH to defer the payment due in December under the April 2022 Lease. He said that at that time, CNH asked for proof of insurance on the First Track Loader.¹³ Thomas said he informed them that the First Track Loader was not insured because it had been destroyed in a fire, after which CNH demanded that the balance of the obligation under the April 2022 Lease be paid in full immediately.

Thomas testified that the Second Track Loader also had mechanical problems. The record includes invoices for repairs made to the Second Track Loader in February 2023, March 2023, April 2023, and May 2023.¹⁴ He said that the Second Track Loader was in a repair shop as of the date of the hearing. There was no evidence introduced indicating that these mechanical problems were caused by Thomas.

On March 12, 2024, Thomas filed a petition for relief under Chapter 13 of the Bankruptcy Code with the assistance of Ringler as counsel. Thomas included schedules and statements with

¹² CNH did not challenge this allegation in its Amended Objection to Confirmation of Plan or at the hearing but did make allegations to the contrary in its Amended Complaint in Adv. Pro. No. 24-80036-hb described below. *See* Adv. Pro. No. 24-80036-hb, ECF No. 2, ¶ 9(h).

¹³ *See* Thomas' Ex. 3.

¹⁴ Thomas' Ex. 2.

the initial filing. Schedule A/B (Property) does not list the equipment at issue and CNH is not listed as a creditor on Schedules D (Creditors Who Have Claims Secured by Property) or E/F (Creditors Who Have Unsecured Claims). However, CNH is listed on the creditor matrix and the leases are listed on Schedule G (Executory Contracts and Unexpired Leases). Schedule J (Your Expenses) lists the net monthly income of Thomas' household as \$7,107.07.

Also included with the initial filing was Thomas' March 12 Plan, which proposes Thomas will pay the Trustee \$9,940.00 per month for sixty (60) months and proposes to include CNH in the pool of non-priority unsecured creditors, who will be paid less than one hundred percent (100%) of their claims. No executory contracts or unexpired leases are listed; however, the actual lessee on the CNH contracts is CT Land, and Thomas is only a guarantor.

On May 21, 2024, CNH timely filed Claim No. 12-1, asserting a non-priority unsecured claim of \$203,905.82, with the pre-petition arrearage listed as \$172,193.30.

On May 22, 2024, the § 341 meeting of creditors was held after being continued twice.

On May 23, 2024, CNH filed an Objection to Confirmation of Plan.¹⁵ On the same date, CNH filed an Amended Objection to Confirmation of Plan. In its Amended Objection to Confirmation of Plan, CNH noted Thomas' conduct pre-petition in failing to name it as loss payee on the insurance policy covering the equipment, asserted Thomas' failure to pay CNH the insurance proceeds constitutes intentional conversion of CNH's property to his own use and benefit, and alleged he intentionally allowed the Second Track Loader to fall into a state of disrepair, resulting in the loss of its intended function and the impairment of its value. CNH asserted that confirming the March 12 Plan would validate Thomas' conversion of CNH's property and would remove CNH's ability to recover the equipment, seek reimbursement for the value of

¹⁵ ECF No. 14.

its property, and seek the insurance proceeds. However, CNH did not specify which sections of the Bankruptcy Code require denial of confirmation.

On June 24, 2024, CNH filed a complaint against Thomas, initiating Adv. Pro. No. 24-80036-hb. On the same date, CNH filed an amended complaint based on essentially the same grounds as its Amended Objection to Confirmation of Plan, asserting that confirmation of Thomas' March 12 Plan should be denied and requesting Thomas' debt to it be deemed non-dischargeable pursuant to 11 U.S.C. § 523(a)(2)(A), Thomas' discharge be denied pursuant to 11 U.S.C. § 727(a)(2), and a judgment against Thomas in the amount of \$210,569.60.

The Court held a hearing on June 27, 2024, to consider confirmation of the March 12 Plan, and Thomas offered the above referenced testimony. At the hearing, counsel for CNH clarified that its basis for objecting to confirmation is that Thomas has not proposed the plan in good faith as required by 11 U.S.C. § 1325(a)(3). Counsel for CNH asserted that Thomas intentionally failed to list CNH as loss payee on the insurance policy and let its equipment deteriorate so he could use the insurance proceeds to purchase new equipment. Counsel for CNH asserted that Thomas has a contractual obligation to pay off the remaining balance of the April 2022 Lease but did not provide proof of the nature and extent of any interest it may have in the insurance proceeds. The Trustee advised that the March 12 Plan is not confirmable even if CNH's objection is overruled, as certain terms needed to be amended and Thomas needs to provide her with a number of documents.

On July 3, 2024, Thomas filed a modified Chapter 13 plan ("July 3 Plan"), with a confirmation hearing to be held on August 8, 2024. The modified plan proposes Thomas will pay the Trustee \$8,825.00 (rather than \$9,940.00 as previously proposed) per month for sixty (60) months and proposes—as in the prior plan—to include CNH in the pool of non-priority unsecured

creditors, who will be paid less than one hundred percent (100%) of their claims. No executory contracts or unexpired leases are listed.

CONCLUSIONS OF LAW

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157, this matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(L), and the Court may enter a final order.

The only issue before the Court is whether to confirm the March 12 Plan pursuant to 11 U.S.C. § 1325. Any determination or relief due regarding the causes of action set forth in the adversary complaint under the authorities stated are reserved for another day. Section 1325 sets forth requirements for a Chapter 13 plan to be confirmed, including that “the plan has been proposed in good faith and not by any means forbidden by law[.]” 11 U.S.C. § 1325(a)(3). The Fourth Circuit has held that determining whether a debtor has proposed a Chapter 13 plan in good faith requires an examination of the totality of the circumstances on a case-by-case basis. *In re Bridges*, 326 B.R. 345, 349 (Bankr. D.S.C. 2005) (citing *Deans v. O’Donnell*, 692 F.2d 968, 972 (4th Cir. 1982)). The factors relevant to that determination include (1) the percentage of proposed repayment; (2) the debtor’s financial situation; (3) the period of time payment will be made; (4) the employment history and prospects of the debtor; (5) the nature and amount of unsecured claims; (6) the debtor’s past bankruptcy filings; (7) the debtor’s honesty in representing facts; (8) any unusual or exceptional problems; (9) the debtor’s pre-filing conduct; and (10) the possibility of non-dischargeability in a chapter 7 proceeding. *In re Pizzo*, 628 B.R. 811, 818 (Bankr. D.S.C. 2021) (quoting *In re Anstett*, 383 B.R. 380, 385 (Bankr. D.S.C. 2008)). These factors are not exhaustive and are not intended to be a checklist, as the Court’s discretion in making the good faith determination is necessarily broad. *Id.* (citations omitted). The overriding objective is to make

sure that there has not “been ‘an abuse of the provisions, purpose, or spirit’ of Chapter 13 in the proposal or plan.” *Anstett*, 383 B.R. at 385 (quoting *Deans*, 692 F.2d at 972). “Debtor has the burden of proving by a preponderance of the evidence that [the] plan meets the confirmation requirements of § 1325(a).” *In re Cullison*, 628 B.R. 829, 834 (Bankr. D.S.C. 2021) (internal quotation marks omitted) (quoting *In re Martellini*, 482 B.R. 537, 541-42 (Bankr. D.S.C. 2012)); *see also Bridges*, 326 B.R. at 349 (citing *In re Marett*, No. 96-75003-W, 1996 WL 33340790, at *7 (Bankr. D.S.C. Nov. 13, 1996)) (“Debtors have the burden of proving by a preponderance of the evidence that this plan meets the confirmation requirements of § 1325(a), including the good faith requirement of § 1325(a)(3).”).

The Court concludes that confirmation of the March 12 Plan must be denied. In addition to the fact that the March 12 Plan has now been amended, the Trustee has indicated that the March 12 Plan is not confirmable and that she still needs several documents from Thomas to evaluate whether a recommendation of confirmation is appropriate. This basis alone provides sufficient grounds to deny confirmation.

However, resolution of the Objection to Confirmation based on a lack of good faith appears appropriate and applicable to both the March 12 Plan and the July 3 Plan. In weighing the relevant factors, the Court finds that CNH’s objection is overruled. Prior to the bankruptcy filing, Thomas and CT Land failed to ensure CNH was named as a loss payee on the insurance policy covering the equipment, and failed to give CNH the insurance proceeds received after the fire. Thomas testified that CNH refused to take the insurance proceeds and offered an explanation regarding his failure to further insist that CNH take the proceeds and why the funds were then used in furtherance of the business. Payments on the leases continued pursuant to CNH’s instructions until shortly

before filing. This is the only evidence in the record. CNH did not produce evidence to the contrary.

On this record, it appears that as between Thomas and CNH, CNH holds a non-priority unsecured claim. No leases of CNH are addressed in the plan as CT Land is the lessee, not Thomas. Thomas' proposed plan treatment for CNH does not appear inappropriate. Therefore, considering the percentage of proposed repayment, the period of time payment will be made, and the nature and amount of unsecured claims, the Court finds no support for CNH's objection. Thomas has no prior bankruptcy filings, and at this point, there is no evidence that Thomas has been dishonest in representing facts relevant to the CNH claim. Thomas' financial situation and employment history and prospects do not appear to be an issue regarding this Objection. That leaves only "any unusual or exceptional problems" and the possibility of non-dischargeability of the debt or debts in a chapter 7 proceeding. Thomas does not appear to face any unusual or exceptional problems, the issues of dischargeability or discharge of debt, if applicable, are reserved for another proceeding that is underway, and this record is insufficient to establish that the possibility of non-dischargeability of the CNH debt in a chapter 7 case should prevent confirmation. Therefore, the Court cannot sustain CNH's objection to confirmation based on § 1325(a)(3) on this record. Should CNH through discovery find evidence to support its claims asserted in the adversary proceeding, that evidence will be considered in that context.

IT IS, THEREFORE, ORDERED that CNH's Objection to the March 12 Plan based on § 1325(a)(3) is overruled, yet the March 12 Plan filed by Debtor Christopher Corey Thomas is not confirmable and confirmation is therefore denied. **Within ten (10) days of the entry of this Order**, Debtor Christopher Corey Thomas must comply with any request made by the Trustee to support confirmation.