

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re

Rafael Webb,

Debtor.

Case No. 03-11345
Chapter 13

APPEARANCES:

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Hon. Robert E. Littlefield, Jr., U.S. Bankruptcy Judge

Memorandum Decision & Order

The matter before the court involves the Debtor's motion for turnover of a 2002 Chevrolet Tracker 2D convertible. The court has jurisdiction over this core proceeding pursuant to 28 U.S.C. §§ 157(a), 157(b)(1), 157(b)(2)(E) and 1334(b).

Facts

The parties have filed a joint stipulation of facts which the court incorporates by reference. In addition, the court finds the following facts:

On March 6, 2003, less than one month after receiving her Chapter 7 discharge, the Debtor filed a Chapter 13 bankruptcy petition and plan. Her Chapter 13 plan provides for

payment of \$1,450 to her attorney as a priority claim. The only other claims mentioned in her plan are those of General Motors Acceptance Corp. (“GMAC”). The plan states the value of GMAC’s secured claim will be set at \$12,000 via a “cramdown.”¹ It also provides for 6% interest on the secured claim over the life of the plan and a monthly payment of \$232.15. The balance of GMAC’s claim, namely \$4,453.78, is to be treated as unsecured.

The Debtor’s Chapter 13 plan also provides for a 10% distribution on all unsecured, nonpriority claims. It concludes with a provision for a monthly payment of \$263.78 using a “Direct Payment Plan.”

On March 19, 2003, the Debtor filed a motion to compel turnover of her Tracker which GMAC had repossessed prior to the Debtor filing her Chapter 13 petition. As part of her turnover application, the Debtor asked the court to issue an order to show cause and a temporary restraining order.

The court issued an order to show cause and scheduled a hearing for March 20, 2003. At the hearing on that date, the court, guided by the same principles it articulated in a memorandum decision it issued in a case entitled “Amy Rowe, Case No. 03-10304,”² ordered the turnover of the Tracker to the Debtor over GMAC’s opposition. The court also ordered the Debtor to pay \$100 per month adequate protection to GMAC. The turnover order provides for GMAC’s retention of a lien on all “proceeds” the Debtor pays to the Chapter 13 Trustee to the extent necessary to pay the preconfirmation adequate protection. It further provides for GMAC’s right

¹“Cramdown” is a term used to describe the ability of a debtor to reduce an undersecured creditor’s secured claim to the value of its collateral in a plan of reorganization.

²The *Rowe* turnover order was appealed; it is pending in District Court. An *amicus curiae* brief was filed on behalf of Manufacturers and Traders Trust Company by Miller & Meola, P.C., the law firm representing GMAC in this case.

to repossess the Tracker if the Debtor fails to make the adequate protection payments.

During oral argument, GMAC requested an opportunity to brief the turnover issue, particularly the “Chapter 20”³ context in which it arose. Although the court ultimately ordered the turnover, it agreed to allow the parties to file briefs.⁴

Arguments

GMAC argues the court should not have ordered the turnover because the possibility of an effective reorganization does not exist here. According to GMAC, the concept of adequate protection presupposes a confirmable plan. GMAC contends a “Chapter 20 debtor” who does not reaffirm a secured automobile loan during a prior Chapter 7 case cannot utilize Chapter 13 to recover a vehicle validly repossessed prior to the Chapter 13 filing.

As support for its main contention, GMAC cites *Johnson v. Home State Bank*, 501 U.S. 78 (1991). It argues the Supreme Court decided lien stripping is allowed in a subsequent Chapter 13 if the affected creditor still has a claim against the debtor or against his property. GMAC contends it neither has a claim against the Debtor, because of her prior Chapter 7 discharge, nor does it have a claim against the Debtor’s property.

According to GMAC, the only property interest the Debtor had when she filed her Chapter 13 petition was her right to redeem the validly repossessed vehicle; it cites *In re Alberto*, 271 B.R. 223 (N.D.N.Y. 2001) as support for that contention. GMAC claims it would

³When a debtor files a Chapter 13 case upon receiving a Chapter 7 discharge, this strategy is sometimes referred to as a “Chapter 20”.

⁴It was the intent of the court that the order directing turnover and awarding adequate protection, dated and entered April 1, 2003, be treated as an interim order and that the court would issue this final order after allowing the parties an opportunity to submit memoranda of law.

never assert a claim against the Debtor's right to redeem. It argues that since the Debtor is unable to meet the "claim against the debtor or the debtor's property" requirement of *Johnson*, she cannot use section 1325(a)(5) to cramdown the car. GMAC notes that had the Debtor reaffirmed her obligation in her prior Chapter 7, she would have met "the *Johnson* prong" because the reaffirmed debt would have constituted a claim GMAC would have had against her in the instant Chapter 13. GMAC asserts debtors in Chapter 7 cases should carefully consider all of the possible ramifications when deciding whether to reaffirm car loans.

Next, GMAC contends that if the Debtor could overcome "the *Johnson* hurdle," her plan must still comply with section 1322(e) by operation of section 1325(a)(1). To GMAC, section 1322(e) requires a debtor to pay the amount required under state law in order to cure a default. Citing N.Y.U.C.C. § 9-623(b), GMAC asserts the Debtor must pay the full amount secured by the collateral, and the parties have stipulated that amount is \$19,441.50. Because the Debtor's plan only provides for a \$12,000 secured claim, GMAC argues the plan does not meet the mandates of sections 1322(e) and 1325(a)(1). According to GMAC, the court cannot confirm such a plan.

Finally, GMAC argues the Debtor has not met the statutory requirements for turnover. Citing section 542 and noting there are specific sections of the Bankruptcy Code cited therein, GMAC contends the court can order turnover only if the vehicle is property of the estate or the Debtor/Chapter 13 Trustee acquired the right to use the vehicle. It contends that under *Alberto*, only the Debtor's right to redeem is estate property, not the vehicle itself.

As for the right to "use" the vehicle, GMAC contends the Debtor has not shown how the Chapter 13 Trustee may use the vehicle within the limits of section 363 because that section only allows the Trustee to exercise the rights the Debtor possessed under state law at the time of

filing. Since it lawfully repossessed the vehicle prior to the Debtor filing her Chapter 13 petition, GMAC asserts the only property interest the Debtor had when she filed was the right to redeem. According to GMAC, in New York, a debtor cannot use a lawfully repossessed vehicle until the debtor exercises the right of redemption and it is not a self-executing right. GMAC argues that since the Debtor did not meet either of the two prerequisites to turnover, her offer of adequate protection was not a relevant concern for the court to consider.

In its conclusion, GMAC asks for an order modifying the turnover order and dismissing the case, or in the alternative, it asks the court to terminate the stay unless the Debtor presents a plan that proposes to pay GMAC its entire claim, namely \$19,441.50.⁵ GMAC also asks the court to direct the Debtor to make the vehicle available for its recovery.

The Debtor begins her argument with an examination of *United States v. Whiting Pools, Inc.*, 462 U.S. 198 (1983). She argues a debtor who does not execute a reaffirmation agreement in a Chapter 7 case does not waive the state law right to redeem if and when the creditor subsequently repossesses the vehicle. She also argues the right to redeem is part of a bundle of rights, and the redemption right itself is sufficient to effectuate turnover of the vehicle. She cites *In re Sharon*, 234 B.R. 676 (B.A.P. 6th Cir. 1999), *In re Spears*, 223 B.R. 159 (N.D. Ill. 1998), *In re Patterson*, 263 B.R. 82 (E.D. Pa. 2001), and other cases as support for that argument.

In the second part of her argument, the Debtor discusses *Butner v. United States*, 440 U.S. 48 (1979). She contends *Butner* stands for the proposition that property interests in a bankruptcy case should be analyzed under state property law except where Congress has established a federal interest that requires a different result. According to her, New York law,

⁵ Although this relief is sought in the conclusion of GMAC's brief, procedurally, the only motion before the court for affirmative relief is the Debtor's motion for turnover.

particularly N.Y.U.C.C. §§ 9-610 and 9-623, provides debtors with a right of redemption before their ownership rights can be cut off by a creditor's repossession and requires the creditor to conduct a commercially reasonable disposition of the collateral. The Debtor also notes a debtor's ownership rights will survive after a default on a car loan occurs; she cites *In re Moffett*, 288 B.R. 721 (Bankr. E.D. Va. 2002)⁶ as support for that contention.

The Debtor centers on *Alberto* in the third part of her argument. She asserts the District Court's focus in that decision is on what steps a debtor must take in order to effectuate the return of a vehicle repossessed prepetition. She points out Judge Hurd states that if the debtor had brought a turnover motion prior to sale, the bankruptcy court would have had the authority to order the creditor to turn over the vehicle. To the Debtor, while the District Court has added the requirement of a turnover motion, it did not change what she calls "the fundamental law" that a validly repossessed vehicle remains property of the estate.

As for GMAC's argument regarding the Debtor's failure to comply with the New York's statutory requirements for redemption, the Debtor argues the same issues arose in the *Rowe* case. She points out the turnover order in that case is under appeal. To the Debtor, the attorney for GMAC has not raised a new argument and has not cited a new statute or new case law that would cause this court to change its decision of the issues it addressed in *Rowe*.

Regarding GMAC's *Johnson* argument, the Debtor contends the language in that case does not bar her from utilizing the flexible provisions of Chapter 13 to obtain the Tracker's turnover. She contends that by allowing a debtor to file a Chapter 13 case to cure mortgage arrears, the Supreme Court created authority for the modification of lien rights in a Chapter 13

⁶The Debtor cites this decision as a district court decision. *Moffett* was affirmed by the district court. The cite for that case is *In re Moffett*, 289 B.R. 55 (E.D. Va. 2003).

case a debtor files after receiving a Chapter 7 discharge. She repeats her argument that a Chapter 7 discharge of personal liability does not terminate a debtor's right to redeem repossessed property.

The Debtor concludes her brief by stating a denial of her use of her car would frustrate the underpinnings of the Bankruptcy Code and hamper her ability to obtain a fresh start. She submits that the court should confirm her Chapter 13 plan.⁷ The Chapter 13 Trustee endorsed the Debtor's position and the arguments contained in her brief.

In its reply brief, GMAC asserts two points. First, it contends the Debtor merely rehashes *Alberto* and *Rowe* instead of addressing the issue of adequate protection in a Chapter 20 case. GMAC repeats its argument that the Debtor has not proposed a plan that meets the requirements of section 1322(e). It also reiterates its warning that all debtors should carefully consider whether to exercise the "fourth option" the Second Circuit allowed for in *Boodrow*, 126 F.3d 43 (2d Cir. 1997), when contemplating a subsequent Chapter 13.

GMAC's second point is a challenge to the last part of the Debtor's argument. First, GMAC distinguishes *Johnson*, arguing it involved real property subject to a foreclosure, not a validly repossessed vehicle. Then, it reiterates its contention that *Johnson* stands for the proposition that a debtor can modify a secured claim in a subsequent Chapter 13 only if it holds a claim against the debtor or a claim against the debtor's property. To GMAC, *Johnson* supports its position that where there is no claim against the debtor (due to a prior Chapter 7 discharge) or the debtor's property (because the debtor only has a right to redeem), a debtor cannot use section

⁷The Debtor seeks confirmation of her Chapter 13 plan in the conclusion of her brief, however, plan confirmation was not then, and is not now, before the court. Thus, it would be inappropriate for the court to rule on confirmation at this juncture.

1325 to modify the creditor's secured claim.

Discussion

The *Rowe* memorandum decision contains findings of fact and conclusions of law. *Rowe* involves a Chapter 13 debtor who sought turnover of her car. Like the Debtor here, the creditor had repossessed her car prior to her filing a Chapter 13 petition. The creditor in *Rowe* sought a lift stay order in addition to denial of the debtor's turnover motion. The court ordered turnover and later issued a memorandum decision which explained the reasons why it ordered turnover of the car and adequate protection payments by the debtor. It also contains the court's interpretation of the District Court's *Alberto* decision.

Since *Rowe* was not published and the court's discussion of the issues in that case is relevant here, the main points of *Rowe* follow:

The court agrees with the Debtor's extrapolation of the *Alberto* decision. In *Alberto*, the factual scenario before the District Court was different from the instant one. In that case, the debtor did not file a turnover application until the day the car was sold. *See In re Alberto*, Case No. 98-14005, pp. 2, 9 (October 20, 2000). Because the primary matter was the section 362(h) motion for damages that the debtor filed after the bank had sold the car, Judge Hurd's focus was on the creditor's conduct and whether its actions constituted a violation of section 362(a)(3), i.e., whether the bank obtained possession of or exercised control over property of the estate. *Alberto*, 271 B.R. at 225-226. Here, the primary matter is what, if anything, a debtor must do before the bankruptcy court can grant a turnover application and order the creditor to turn over the car when the creditor lawfully repossessed it prepetition?

In reversing this court's determination that the bank had violated the automatic stay by selling the car after the debtor filed, the District Court decided that the bank, by lawfully repossessing the car prepetition, lawfully possessed it after the debtor filed. *Id.* at 226. This court's interpretation of that part of the decision containing the quote the Creditor heavily relies on is that Judge Hurd was carefully considering the debtor's property rights, particularly his right of redemption [footnote omitted], and closely analyzing the context of the creditor's actions. To this court, the District Court's analysis does not suggest Judge Hurd intended any further result, especially when the issue of what amount the debtor needed to pay to get his car back was not before it.

The District Court's subsequent discussion of the *Whiting Pools* and *Barringer* decisions, and other language in the *Alberto* decision, clearly establishes the debtor could have obtained possession of his car if he had taken an affirmative step such as seeking a turnover order. *Id.* While a turnover issue was not before the District Court, Judge Hurd commented that had the debtor brought a turnover motion [footnote omitted] prior to the vehicle being sold, this court would have had authority to order the bank to turn it over after hearing whatever defenses the bank had to the turnover. *Id.* The District Court cited *Barringer* and in *Barringer*, the creditor's defenses included the right to seek adequate protection under section 363(e). *Id.*; *Barringer*, 244 B.R. at 409-410.

Based on the court's interpretation of the dicta in the *Alberto* decision and its recognition that the instant legal matter was not before the District Court in that case, the court ordered the Creditor to turn over the Debtor's car to her subject to the terms and conditions [footnote omitted] set forth in the order dated January 23, 2003. It also denied the Creditor's motion to lift stay. *Rowe*, pp. 3-4.

I. GMAC's Chapter 20 and *Johnson* Arguments

In *Alberto*, the District Court declared the bankruptcy court can order a turnover of a vehicle validly repossessed prior to a debtor's Chapter 13 filing. *Alberto*, 271 B.R. at 227. The same Bankruptcy Code provisions and principals apply in a Chapter 20 scenario as in a straightforward Chapter 13 case. The court is not convinced by GMAC's argument that a Chapter 20 requires a result different from the one the court rendered in *Rowe*, even when the debtor has not reaffirmed his car loan in a prior Chapter 7 case.

The court agrees with the Debtor's position that she had more than a mere right to redeem. The Debtor's ownership interest in the vehicle continued to exist because GMAC had not yet conducted a commercially reasonable sale under New York's Uniform Commercial Code. GMAC asserts the Debtor lost the right to possess the vehicle, and the automatic stay did not entitle her to a self-executing right to get the vehicle back when she filed her Chapter 13 petition. *Contra In re Sharon*, 234 B.R. 676 (B.A.P. 6th Cir. 1999). However, several Bankruptcy Code provisions, namely sections 363, 541 and 542, come into play once she filed.

These provisions allow the court to balance her right to redeem against the creditor's right to possession when deciding whether to compel turnover and order adequate protection.

Furthermore, GMAC has a "claim" in this Chapter 20 scenario. Its claim is a secured one based on its lien interest in the Debtor's vehicle that is not covered by her prior Chapter 7 discharge. The Debtor's property includes the right to redeem and all of the property interests that pertain to that right, namely, entitlement to notice and a commercially reasonable sale. The court is not persuaded by GMAC's conclusive statement that it became the owner of the vehicle once it validly repossessed it. As one court has stated, "Consequently, because the debtor retains rights in the property until such times as the right to redeem is extinguished, this Court cannot find all equitable rights in the vehicle pass to [the creditor] at the time of repossession." *Moffett*, 289 B.R. at 61.

Although *Johnson* is a factually distinguishable case since the issue in that case was whether the creditor had a claim against the debtor or the debtor's real property, not the turnover and adequate protection issues that exist here, it appears the Debtor meets what GMAC calls its "prongs" or "requirements." GMAC continues to have a claim against the Debtor's vehicle as evidenced by its attempt to maintain possession of the Tracker so it can sell it and keep the sales proceeds. Although Judge Hurd's rationale is the Debtor did not have an automatic right to regain possession of her vehicle, this court had the authority to order its turnover. *See Alberto*, 271 B.R. at 227. Once the court ordered turnover, the vehicle became property of the estate, and GMAC's secured claim became one against estate property. *See* 11 U.S.C. § 541(a)(7); *In re Barringer*, 244 B.R. 402, 410 (Bankr. E.D. Mich. 1999).

II. GMAC's Section 1322(e) Argument

The court recognizes that whether a debtor has proposed a facially confirmable plan is to

be given consideration in awarding adequate protection. GMAC, however, incorrectly states that the Debtor's plan is not confirmable, because it does not meet the requirements of sections 1325(a)(1) and 1322(e). Section 1325(a)(1) provides that a plan comply with the Chapter 13 Bankruptcy Code provisions. Under section 1322(e), a plan can cure defaults, but the amount necessary to cure the default is determined in accordance with the underlying agreement and applicable nonbankruptcy law.⁸

Here, the Debtor proposes to pay GMAC a secured claim in the amount of \$12,000 and an unsecured, nonpriority claim in the amount of \$4,453.78, an otherwise "discharged" claim. Her plan does not contain any provisions covering "defaults." Since section 1322 is not at issue, GMAC misplaces its reliance on its requirements.

III. GMAC's Turnover and Adequate Protection Arguments

As noted above, the District Court has ruled the bankruptcy court may order turnover of a vehicle validly repossessed prepetition once the debtor files the proper turnover application. *Alberto*, 271 B.R. at 227. GMAC's remaining arguments regarding turnover and adequate protection are moot as this court has already balanced the interests of the two parties by ordering turnover and adequate protection.

For all of the foregoing reasons, it is

ORDERED, that the Debtor's motion for turnover is granted: and it is further

ORDERED, that the adequate protection payments awarded to GMAC in the court's interim order, dated and entered April 1, 2003, shall remain in effect: and it is further

⁸Section 1322(e) was enacted as part of the Bankruptcy Reform Act of 1994 to overrule the Supreme Court decision in *Rake v. Wade*, 508 U.S. 464 (1993), which had required debtors curing mortgage defaults to pay not only interest on the principal, but also interest on that interest and any other accrued charges. 8 *Collier on Bankruptcy*, ¶ 1322.18 (15th ed. rev. 2003).

ORDERED, that GMAC shall continue to retain a lien on all proceeds paid by the Debtor to the Chapter 13 Trustee to the extent necessary to pay GMAC the preconfirmation adequate protection payments awarded in the event of conversion or dismissal prior to confirmation, and the Chapter 13 Trustee is hereby directed to remit said adequate protections payments to GMAC upon conversion or dismissal prior to confirmation; and it is further

ORDERED, that if the Debtor does not make the required adequate protection payments to GMAC, GMAC shall have the right to repossess the Debtor's 2002 Chevrolet Tracker 2D convertible upon 5 days notice to the Debtor's attorney and the Chapter 13 Trustee.

Dated:
Albany, NY

Honorable Robert E. Littlefield, Jr.
United States Bankruptcy Judge