

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON SALEM DIVISION**

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|---------------------------------|---|-------------------------|
| In re |) | |
| |) | |
| ROBBIE LEE CALLOWAY |) | Case No 10-50531 |
| ATHENA MICHELLE CALLOWAY |) | Chapter 13 |
| |) | |
| Debtors |) | |
| |) | |
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| |) | |
| _____ |) | |

ORDER GRANTING MOTION FOR RELIEF FROM STAY

This matter came on for hearing before the undersigned Bankruptcy Judge after due and proper notice on the Motion for Relief from Stay or Adequate Protection filed by Fifth Third Bank and appearing before the Court were Christine M. Lamb on behalf of the Bank (“Fifth Third”), Jennifer A. Ledford on behalf of the Debtors, and Kathryn L. Bringle, Chapter 13 Trustee.

FINDINGS OF FACT

1. The Debtors filed a Chapter 13 Bankruptcy petition on March 26, 2010.
2. At the time of the filing, the Debtors drove a 2005 Toyota Tacoma, VIN:3TMMU52N75M001064 (hereafter, the “Vehicle”). The Debtors had entered into a Motor Vehicle Lease Agreement (hereafter, the “Lease”) on or about April 7, 2005 with Fifth Third. The Lease provided for payments over 60 months with the last payment due on April 7, 2010 and also provided for excessive wear and use under which the Lessee (the Debtors) would be charged for excess milage at a rate of \$0.12 for each mile recorded on the Vehicle’s

odometer in excess of 75,000 miles.

3. Pursuant to the terms of the Lease, if the Lessee (the Debtors) has paid in full all monthly payments, is not in default, and has paid all other amounts required under the lease, then the Lessee has an option to purchase the Vehicle at the end of the Lease for \$12,723.00. The Lease does not require Fifth Third to finance the option to purchase the Vehicle.
4. The Debtors' schedules reflected a 2005 Toyota Tacoma with 108,000 miles, stating that they had a lease with Fifth Third with an option to purchase. They indicated that the Vehicle had a value of \$13,375.00 and Fifth Third had a claim secured by the Vehicle in the amount of \$12,400.00. Despite listing the Lease on Schedule B, the Debtors did not list the Vehicle on Schedule G - "Executory Contracts and Unexpired Leases."
5. On March, 26, 2010, the Debtors initially proposed a plan reflecting as follows:

Personal Property Secured Claims

Claims secured by personal property will be paid by the Trustee as follows:

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|------------------------|--------------------|-------------|-------------|-------------|
| Fifth Third Auto Lease | 2005 Toyota Tacoma | \$12,400.00 | \$264.58/mo | 5% interest |
|------------------------|--------------------|-------------|-------------|-------------|

6. On May 5, 2010, Fifth Third filed a Proof of Claim noting the claim was based upon a "LEASE" and attaching a copy of the Lease and the title to the Vehicle.
7. On June 2, 2010, the Debtors proposed a plan that provided as follows:

Personal Property Secured Claims to be Paid in Full

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|------------------|--------------------|-------------|-------------|----------------|
| Fifth Third Bank | 2005 Toyota Tacoma | \$13,725.48 | \$260.00/mo | 5.25% interest |
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8. Creditors were given an opportunity to object to the plan. No objections were filed and the Plan was confirmed on July 8, 2010. The treatment of Fifth Third

was unchanged.

9. On July 26, 2010, Fifth Third filed its Motion for Relief from Stay alleging that the Debtors did not assume the Lease prior to confirmation or in the Confirmation Order and therefore, Fifth Third was entitled to relief from the automatic stay for cause under § 362(d)(1).
10. The Debtors contend that the Confirmation Order is binding, that Fifth Third is attempting to relitigate the claim, and that the recent Supreme Court ruling in *United Student Art Funds, Inc. v. Espinosa*, 130 S.Ct. 1367 (2010) provides that a confirmation order will not be set aside even though it contains legal error.

DISCUSSION

It is clear that the contract between the Debtor and Fifth Third is a lease and not a disguised security agreement. The Uniform Commercial Code, as adopted in North Carolina General Statute § 25-1-203, sets forth the test to determine if a transaction is a lease or a security agreement. It provides:

(b) A transaction in the form of a lease creates a security interest if the consideration that the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease and is not subject to termination by the lessee, and:

- (1) The original term of the lease is equal to or greater than the remaining economic life of the goods;
- (2) The lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods;
- (3) The lessee has an option to renew the lease for the remaining economic life of

the goods for no additional consideration or for nominal additional consideration upon compliance with the lease agreement; or

(4) The lessee has an option to become the owner of the goods for no additional consideration or for nominal additional consideration upon compliance with the lease agreement.

N.C. Gen. Stat. § 25-1-203 (2010).

Paragraph 5 of the Lease in question provides that the Lessee may terminate the Lease provided the Lessee pays the Lessor certain amounts due under paragraph 6(e) of the Lease. Assuming the Debtor did not have the right to terminate, it would still be a true lease as the residual value of the Vehicle at the end of the lease term is \$12,423.00 (certainly not a nominal sum) and there is no provision to renew the Lease for the remaining economic life of the Vehicle. Therefore, the Chapter 13 plan was required to treat Fifth Third's claim as a Lease and not as a secured debt.

What is required of a Debtor in Chapter 13 with respect to an unexpired Lease?

Federal Rule of Bankruptcy Procedure 6006 and § 1322(b)(7) provide that a Chapter 13 plan may allow for the debtor to assume, assign, or reject an unexpired lease subject to the provisions of § 365. Section 365(p)(3) provides that in a case under Chapter 13, if the debtor is the lessee with respect to personal property and the lease is not assumed in the plan confirmed by the court, the lease is deemed rejected as of the conclusion of the hearing on confirmation. If the lease is rejected, the stay under § 362 and any stay under § 1301 is automatically terminated with respect to the property subject to the lease. 11 U.S.C. § 365(p)(3) (2006).

The debtor has two options, the debtor can: (1) file a motion prior to confirmation to request to be allowed to assume, assign, or reject an unexpired lease; or (2) set forth the request

to be allowed to assume, assign, or reject an unexpired lease in the Chapter 13 plan. When a plan provides for the assumption, assignment, or rejection of an unexpired lease, the other party to the contract must timely object to the lease treatment or else confirmation will bind all parties. *See* 11 U.S.C. § 1327(a).

In the matter before the court, the plan made no provision for the assumption of the Lease. In order to assume a lease under Chapter 13, the court must find that: (1) the debtor can cure the default or provide adequate assurance that the default will be promptly cured; and (2) the debtor must provide adequate assurance of future performance under the lease. *See* 11 U.S.C. § 365(b)(1)(A)-(C).

The court uses the business judgment standard to determine whether to approve assumption or rejection of a lease. *See Lubrizol Enter., Inc. v. Richmond Metal Finishers, Inc.*, 756 F.2d 1043, 1046 (4th Cir.1985). Under the terms of the Lease on this Vehicle, the Debtors would have been required to pay Fifth Third for excess mileage on the Vehicle. The Lease expressly provided for up to 75,000 miles with any “excess miles” to be paid at the rate of \$0.12 per mile. The Debtors listed the mileage on the vehicle at 108,000, thereby resulting in an excess mileage fee of approximately \$3,960.00 (33,000 excess miles at \$0.12 per mile). The excess mileage cost would be a factor to be considered under the business judgement test.

Even if the Court had permitted the Debtors to assume the Lease, Fifth Third was not obligated to finance the purchase of the Vehicle. The Chapter 13 plan can give the Debtors no greater property rights in the Vehicle than exist outside of bankruptcy. *E.g., In re Olympia Holding Corp.*, 188 B.R. 287, 295 (M.D. Fla. 1994); *In re PSA, Inc.*, 335 B.R. 580, 588 (Bankr. D. Del. 2005). Property rights are determined by State court. *Butner v. United States*, 440 U.S. 48, 55 (1979). Fifth Third is the legal owner of the Vehicle; title has never been in the Debtors’

name and a provision to treat Fifth Third as a secured creditor does not grant the Debtors any ownership interest in the Vehicle.

The stay lifted when the Debtors failed to assume the Lease and the Vehicle is no longer property of the estate.

IT IS SO ORDERED.

SERVICE LIST

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Athena Michelle Calloway
Debtors

Jennifer Ledford
Attorney for Debtors

Christine Lamb
Attorney for Creditor

Kathryn L. Bringle
Trustee

Michael D. West
US Bankruptcy Administrator