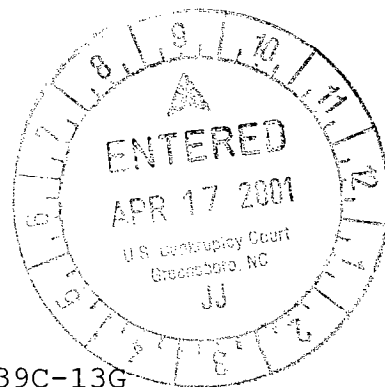


UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION



IN RE:)
)
Stephanie Marie Dillard,) Case No. 01-10439C-13G
)
Debtor.)
)

ORDER

This case came before the court on March 20, 2001, for hearing upon a motion by General Motors Acceptance Corporation ("GMAC") for relief from stay and upon Debtor's motions for turnover and for sanctions against GMAC. Pamela P. Keenan appeared on behalf of GMAC, Phillip E. Bolton appeared on behalf of the Debtor and Anita Jo Kinlaw Troxler appeared as Chapter 13 Trustee.

In its motion, GMAC seeks relief from the automatic stay to foreclose its security interest in a 1998 Mitsubishi automobile owned by the Debtor or, alternatively, for adequate protection "including but not limited to proof of continuing insurance coverage on the Vehicle naming GMAC as loss payee, and reimbursement to GMAC of the \$465.00 in repossession costs in connection with the Debtor's default under the Contract."

In her motion for turnover, the Debtor requests an order requiring the return of her 1998 Mitsubishi automobile, which was repossessed by GMAC shortly before the filing of this case. In the motion for sanctions, the Debtor asserts that GMAC violated the automatic stay by refusing to return her vehicle and prays for damages pursuant to § 362(h) of the Bankruptcy Code.

GMAC's motion for relief from stay and the Debtor's motion for turnover¹ have been resolved by orders that were entered on March 22, 2001. The Debtor's motion was granted and GMAC was required to turnover possession of Debtor's automobile upon the Debtor providing evidence of adequate collision insurance coverage and the Debtor having paid the first plan payment to the Trustee. GMAC's motion for relief was denied based upon a finding of adequate protection. Hence, the only matter left unresolved is the Debtor's motion for sanctions pursuant to § 362(h) of the Bankruptcy Code.

Having received and considered the evidence offered by the parties and having considered the arguments of counsel for the parties, the court finds and concludes as follows, pursuant to Rule 7052 of Federal Rules of Bankruptcy Procedure:

FACTS

On or about July 14, 2000, the Debtor purchased a 1998 Mitsubishi automobile pursuant to an installment contract which obligated the Debtor to pay 60 consecutive monthly installments of \$312.06, beginning on August 29, 2000, and to secure such obligation by a security interest in the 1998 Mitsubishi. Subsequent to July 14, 2000, the installment contract was assigned to General Motors Acceptance Corporation ("GMAC"), who thereafter

¹The parties consented to turnover being determined in the context of a motion, rather than in an adversary proceeding pursuant to Bankruptcy Rule 7001.

perfected a security interest in the 1998 Mitsubishi by having its security interest entered on the title to the 1998 Mitsubishi. The Debtor made monthly payments to GMAC in September, October and December, but failed to make the November payment, or any of the payments that have come due since December of 2000. In January of 2001 GMAC was notified that effective January 24, 2001, the collision coverage on the 1998 Mitsubishi was being canceled. On February 13, 2001, GMAC repossessed the 1998 Mitsubishi automobile and thereby incurred \$465.00 in repossession costs.

On February 20, 2001, this Chapter 13 case was filed by the Debtor. GMAC was given telephonic notice of the filing of this case on February 20, 2001, when Debtor's counsel called GMAC and informed GMAC of the filing and made demand for the return of Debtor's 1998 Mitsubishi. Debtor's counsel also mailed a copy of the Circular Letter and Proposed Plan in this case to GMAC on February 20, 2001. On February 22, 2001, Debtor's counsel faxed to GMAC proof that Debtor had obtained insurance on the 1998 Mitsubishi, and again demanded that GMAC turnover possession of the 1998 Mitsubishi to the Debtor. GMAC declined to release the 1998 Mitsubishi and referred Debtor's counsel to an attorney who had been employed to represent GMAC regarding Debtor's bankruptcy case. On February 27, 2001, Debtor's counsel talked by telephone with GMAC's counsel and made demand that GMAC release the 1998 Mitsubishi automobile to the Debtor. GMAC, though its counsel,

refused to release the 1998 Mitsubishi to the Debtor.

In refusing to release the 1998 Mitsubishi on February 27, 2001, GMAC contended that as adequate protection it was entitled to a commitment from the Debtor that the \$465.00 of repossession costs could be included in GMAC's secured claim in the Debtor's case and repaid in full. The Debtor contended that GMAC's secured claim was limited to the value of the 1998 Mitsubishi, which was less than the principal and interest owed GMAC, and that GMAC therefore was not entitled to be reimbursed in full for the reimbursement costs.

On March 2, 2001, while still in possession of Debtor's 1998 Mitsubishi, GMAC filed the motion for relief from stay that came before the court on March 20, 2001. The Debtor filed her motion for turnover of the 1998 Mitsubishi and her motion for sanctions on March 2, 2001, as well.

LAW AND ANALYSIS

The remaining motion raises the issue of whether GMAC, after having lawfully repossessed Debtor's automobile pre-petition, had an affirmative duty to return the automobile immediately upon the filing of this Chapter 13 case. As reflected in the cases cited by the parties, there is a sharp disagreement among the courts regarding this issue. A number of cases, perhaps a majority, have concluded that a Chapter 13 debtor is entitled to the return of a lawfully repossessed vehicle immediately upon the filing of a

Chapter 13 case.² Other cases, growing in number, have concluded that the repossessing creditor does not have an affirmative duty to return property repossessed pre-petition until provided with adequate protection.³ The primary point of disagreement involves § 362(a)(3), which prohibits "any act to obtain possession of property of the estate . . . or to exercise control over property of the estate . . ." (Emphasis supplied). The courts are split on whether a creditor who continues to hold lawfully repossessed property "exercises control" over the property within the meaning of § 362(a)(3) and thereby violates the automatic stay.

²California Employment Dev. Dept. v. Taxel (In re Del Mission Ltd., 98 F.3d 1147, 1151 (9th Cir. 1996); Knaus v. Concordia Lumber Co., Inc. (In re Knaus), 889 F.2d 773, 775 (8th Cir. 1989); Stmima Corp. v. Carrigg (In re Carrigg), 216 B.R. 303, 305 (1st Cir. BAP 1998); Abrams v. Southwest Leasing & Rental Inc. (In re Abrams), 127 B.R. 239, 241-43 (9th Cir. BAP 1991); Carr v. Security Sav. & Loan Assoc., 130 B.R. 434, 438 (D.N.J. 1991); In re Sharon, 200 B.R. 181, 187 (Bankr. S.D. Ohio 1996), aff'd, 234 B.R. 676 (6th Cir. BAP 1999); In re Jackson, 251 B.R. 597 (Bankr. D. Utah 2000); In re Bergcheit, 223 B.R. 579 (Bankr. D. Wyo. 1998); In re Belcher, 189 B.R. 16, 18 (Bankr. S.D. Fla. 1995); Brooks v. World Omni (In re Brooks), 207 B.R. 738, 741 (Bankr. N.D. Fla. 1997).

³Nash v. Ford Motor Credit Co. (In re Nash), 228 B.R. 669 (Bankr. N.D. Ill. 1999); Spears v. Ford Motor Credit Co. (In re Spears), 223 B.R. 159 (Bankr. N.D. Ill. 1998); Gouveia v. IRS (In re Quality Health Care), 215 B.R. 543, 572-78 (Bankr. N.D. Ind. 1997), appeal denied, remanded, 228 B.R. 412 (N.D. Ind. 1998); Brown v. Joe Addison, Inc. (In Matter of Brown), 210 B.R. 878, 884 (Bankr. S.D. Ga. 1997); Massey v. Chrysler Fin. Corp. (In re Massey), 210 B.R. 693, 696 (Bankr. D. Md. 1997); In re Young, 193 B.R. 620, 621 (Bankr. D. Dist. Col. 1996); Deiss v. Southwest Recovery (In re Deiss), 166 B.R. 92, 94 (Bankr. S.D. Tex. 1994); In re Richardson, 135 B.R. 256, 259 (Bankr. E.D. Tex. 1992); Cf. Citizens Bank of Md. V. Strumpf, 516 U.S. 16, 116 S.Ct. 286, 133 L.Ed.2d 258 (1995) (holding a pre-petition administrative freeze on a bank account does not constitute a violation of stay).

Although satisfied that an automobile owned by the debtor that was repossessed pre-petition remains property of the estate, the court is not willing to adopt a rule under which such property must be returned by the creditor without the creditor being provided adequate protection. In the typical Chapter 13 case, in order to provide adequate protection for turnover of a motor vehicle, the debtor must provide the creditor with proof that the vehicle is covered by collision insurance and must have made the first plan payment to the Chapter 13 Trustee. While the creditor is entitled to retain possession until adequate protection has been provided, the creditor must act in good faith and risks the imposition of sanctions by frivolously opposing turnover of property of the estate that was repossessed pre-petition.

Consistent with the foregoing, the court concludes that GMAC did not violate the automatic stay in this case. The parties were unable to agree as to whether adequate protection should include reimbursement of the repossession expenses and GMAC acted with reasonable promptness in seeking a court determination of the disagreement. Damages pursuant to § 362(h), therefore, will be denied.

IT IS SO ORDERED.

This 17th day of April, 2001.

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge