

U.S. BANKRUPTCY COURT
District of South Carolina

Case Number: 08-04627

ORDER

The relief set forth on the following pages, for a total of 6 pages including this page, is hereby ORDERED.

FILED BY THE COURT
01/07/2009



Entered: 01/08/2009

US Bankruptcy Court Judge
District of South Carolina

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:

Amanda Leigh Jackson,

Debtor(s).

C/A No. 08-04627-hb

Chapter 13

ORDER

This matter came before the Court on GMAC's Motion to Retroactively Annul the Automatic Stay, GMAC's Objection to Confirmation of Plan, and Debtor's Objection to Claim of GMAC.

FINDINGS OF FACT

1. On April 19, 2005, GMAC and Debtor entered into an agreement providing that GMAC would finance the purchase of a 2005 Chevrolet Equinox automobile on behalf of Debtor and Rebecca Johnson Lawson ("Codebtor"). GMAC perfected its security interest.

2. Debtor and Codebtor defaulted on the loan prompting a claim and delivery action by GMAC against Debtor and Codebtor to recover the automobile.

3. On July 9, 2008, Debtor and Codebtor received notice of the claim and delivery action. That same day, Debtor contacted GMAC and stated her intention to surrender the automobile at Fred Caldwell Chevrolet in Clover, South Carolina.

4. On July 10, 2008, the Codebtor contacted GMAC to explain that the automobile had in fact been delivered as promised.

5. On July 16, 2008, GMAC gave written notice to Debtor and Codebtor that the automobile would be sold by private sale at some point after July 31, 2008.

6. On August 1, 2008, Debtor filed her Chapter 13 petition for relief.

7. On August 4, 2008, GMAC sold the automobile. On that same date, Debtor's counsel asserts that he mailed notice of Debtor's bankruptcy to GMAC. Court records indicate that official court notice of the bankruptcy was mailed to GMAC on August 6, 2008. GMAC admits that on August 6, 2008, Debtor's attorney contacted GMAC's attorney by phone and requested turnover of the automobile.

8. On August 13, 2008, Debtor filed an adversary proceeding (A/P No. 08-80160) demanding turnover of the automobile from GMAC. An initial hearing was held on August 21, 2008. The attorneys for the parties were not aware of the status of the automobile at the time of the hearing, so an order was entered on September 9, 2008, instructing GMAC to return the automobile to Debtor if it had not been sold, or to advise Debtor as to the date and disposition of the automobile within ten days if it had been sold prior to that time. Debtor then filed an amended complaint on December 1, 2008, which considered the August 4 sale. The amended complaint also requested that the court void the sale of the automobile, restore title to Debtor, require GMAC to recover and deliver the automobile to Debtor, and find GMAC liable for willful violations of §§ 362 and 542.

10. On September 19, 2008, GMAC filed its Motion for Relief from Stay seeking retroactive annulment of the automatic stay. Debtor timely objected to the requested relief.

11. On October 13, 2008, Debtor filed an amended Chapter 13 plan that provided for Debtor's retention of the sold automobile and payment to GMAC in the plan as a secured creditor. GMAC filed its Objection to Confirmation of Plan on November 6, 2008.

12. After the sale of the automobile, GMAC applied the sale proceeds to the debt owed on the contract. The deficiency remaining is approximately \$12,743.38. GMAC filed an unsecured proof of claim. On October 24, 2008, Debtor objected to GMAC's claim. Debtor's objection contended that GMAC's sale was in violation of the automatic stay and should be treated as void, resulting in treatment of GMAC's claim as secured and payment on such claim through the Chapter 13 plan.

CONCLUSIONS OF LAW

After the filing of a bankruptcy petition, § 542 provides the basis for turnover or return of property of the estate. In re Abrams, 127 B.R. 239, 243 (9th Cir.BAP 1991). "The commencement of a case under § 1301 creates an estate which 'is composed of all the following property, wherever located and by whomever held: (1) . . . all legal or equitable interests of the debtor as of the commencement of the case.'" Johnson v. All American Title Loans (In re Johnson), 99-05021-D, A/P No. 99-80316-D, slip op. at 3 (Bankr. D.S.C. February 11, 2000). Furthermore, "because a debtor in a Chapter 13 case exercises identical rights and powers relating to the use, sale, and lease of property of the estate as does a trustee, the property of the estate should be turned over to the debtor. Id. (citing 5 Collier on Bankruptcy ¶ 1303.01 (Lawrence P. King, *et al.* 15th ed.)). However, debtors must adhere to certain requirements when demanding the turnover or return of property lawfully recovered by the creditor prepetition. See Bolen v. Mercedes Benz, Inc. (In re Bolen), C/A No. 01-13028-W, A/P. No. 01-80333-W, slip op. at 9 (Bankr. D. S.C. Jun. 21, 2002). Such a turnover demand requires: (1) written notification to the creditor regarding the existence of the bankruptcy, (2) a written demand for turnover of the collateral, and (3) submitting proof of insurance to show that

the creditor's interest in the collateral is protected. Id. (citing In re Jennings, 2001 WL 1806980 (Bankr. D.S.C. 2002)).

Debtor did not give effective written notice of the bankruptcy or demand turnover with proof of insurance in time to stop the sale of the automobile. This fact contributed to the postpetition sale—technically in violation of the automatic stay of 11 U.S.C. § 362.

Generally, actions violating the automatic stay are considered void. In re Barr, 318 B.R. 592, 597 (Bankr. M.D. Fla. 2004). However, “the court has the authority to retroactively annul the automatic stay to validate actions taken during the pendency of the stay.” In re Santangelo, 325 B.R. 874, 880 (Bankr. M.D. Fla. 2005) (citing In re Albany Partners, Ltd., 749 F.2d 670, 675 (11th Cir. 1984)). The Fourth Circuit has acknowledged the authority of bankruptcy courts to provide retroactive relief via annulling the automatic stay. Shaw v. Ehrlich, 294 B.R. 260 (W.D. Va. 2003), aff'd, 99 Fed. Appx. 466 (4th Cir. 2004). Furthermore, if a creditor can show compelling circumstances, retroactive relief from the stay may be appropriate. Barr, 318 B.R. at 598. In the case of In re Scott, this court held that decisions to grant retroactive relief “should be made on a case-by-case basis.” 260 B.R. 375, 381 (Bankr. D.S.C. 2001). More specifically, the Scott case provided a non-exhaustive list of compelling circumstances that might permit retroactive relief from the stay:

(1) [I]f the creditor had actual or constructive knowledge of the bankruptcy filing and, therefore, of the [stay]; (2) if the debtor has acted in bad faith; (3) if there was equity in the property of the estate; (4) if the property was necessary for an effective reorganization; (5) if grounds for relief from the stay existed and a motion, if filed, would have been granted prior to the violation; (6) if failure to grant retroactive relief would cause unnecessary expense to the creditor; and (7) if the creditor has detrimentally changed its position on the basis of the action taken.

Id. at 382 (citing In re Lett, 238 B.R. 167, 195 (Bankr.W.D.Mo. 1999)).

There is no evidence that GMAC had actual or constructive knowledge of the bankruptcy filing at the time of the sale. Debtor's voluntary surrender of the automobile suggests that it was not necessary for an effective reorganization around the time the case was filed and further supports a finding that GMAC acted in good faith in disposing of the collateral according to what it believed to be the wishes of the Debtor. While Debtor's action of surrendering the vehicle certainly was not in bad faith, it was at least eventually misleading to a creditor that was not aware of the bankruptcy filing and Debtor's change of plans. There is no evidence of equity in the automobile as, even after its disposition by GMAC, an unsecured deficiency remains. Grounds for relief from stay were present at the time of the sale and GMAC has detrimentally relied on Debtor's actions of surrendering the automobile for sale and failing to effectively demand turnover prior to the sale. If retroactive relief is not granted, GMAC will bear unnecessary time and expense. These collective facts provide sufficient grounds to retroactively annul the automatic stay.

IT IS THEREFORE ORDERED:

That GMAC's Motion to Retroactively Annul the Automatic Stay is granted; that GMAC's Objection to Confirmation of Plan is sustained; that Debtor's objection to GMAC's claim is overruled; and that Debtor shall file an amended plan within 20 days.