

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

FILED
95 JAN 27 PM 3:18
U.S. BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

IN RE:

Kelly Denise Green,

Debtor.

Kelly Denise Green,

Plaintiff,

v.

Wachovia Bank of South Carolina,

Defendant.

C/A No. 94-73849

Adv. Pro. No. 94-8200

ENTERED

JAN 27 1995

JUDGMENT V. A. C.

Chapter 13

Based upon the findings of fact and conclusions of law as stated in the attached Order of the Court, Wachovia Bank of South Carolina shall turn over the automobile to the Debtor upon a showing of proof of adequate insurance. The Debtor shall pay to Wachovia, its costs of repossession in the amount of \$290.00 within six (6) months of the entry of the Order and shall provide Wachovia with adequate protection of its collateral by maintaining adequate insurance on the vehicle and keep the Chapter 13 Plan payments current. Failure to adequately protect the interest of Wachovia will result in the granting of relief from the automatic stay upon filing of an affidavit of default with the Bankruptcy Court.

Columbia, South Carolina,
January 27, 1995.


UNITED STATES BANKRUPTCY JUDGE

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V. A. C.

Findings of Fact, Conclusions of
Law, and Final Order

Adversary No. 94-8200

The debtor, Kelly Denise Green, filed this adversary seeking the turnover of a 1992 Buick automobile (the "car") pursuant to 11 U.S.C. §542(a).¹ The car was legally repossessed by the defendant creditor, Wachovia Bank of South Carolina, N. A. ("Wachovia") prior to the filing of the debtor's current petition in Chapter 13. Wachovia has asserted rights and a lack of adequate protection, and refused the requests of the debtor to return the car and seeks reimbursement for its costs of repossession.

FINDINGS OF FACT

The debtor purchased a used 1992 Buick in October of 1992, and financed it through Wachovia's predecessor, South Carolina National Bank. The financing

¹ Section 542(a) provides:

Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

JWPD

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agreement called for monthly payments. The debtor subsequently encountered financial difficulties, and fell behind in her payments. The debtor filed a Chapter 13 case on May 19, 1994. That case was dismissed on July 20, 1994, and the car was lawfully repossessed by Wachovia on August 5, 1994. On August 11, 1994, the debtor filed her current Chapter 13 case. The debtor's Chapter 13 Plan was confirmed on October 31, 1994, subject to the Reservation of rights by Wachovia to seek the right to retain and sell the car.

The debtor demanded the return of the vehicle immediately upon filing her petition, and Wachovia refused but agreed not to sell the car pending the outcome of this turnover action, and Wachovia retains possession at this time. Wachovia's representative testified that the bank incurred repossession costs of \$290.00.

The parties have stipulated that the value of the car is \$8,000.00, and that the balance due under the note is approximately \$10,694.08. The confirmed Chapter 13 Plan sets the value at \$8,450.00, and calls for payments of \$192.00 per month until the Plan value plus interest is paid in full. The Plan payments are current.

The debtor testified that the car is her sole means of transportation to work, that the borrowed vehicle she had used during the pendency of this action "died" the week before the hearing, and that it is beyond repair. She further testified that she had investigated purchasing another vehicle, but that because of her circumstances, could not afford the required down payment on a suitable vehicle. She also testified that it is approximately thirty miles from her home to work, and, that without reliable transportation, her job is in jeopardy. The debtor testified that her father is a mechanic

and that, while she is a fairly high mileage driver, the car has been well maintained mechanically.

There was testimony by Wachovia's representative that the insurance on the car had lapsed due to non payment of premiums by the debtor, and Wachovia raised the issue that proof of adequate insurance coverage should be provided before the vehicle could be released.

Wachovia raised the issue that it could not be adequately protected because the high mileage usage of the debtor could cause the vehicle to depreciate at a rate faster than the payback of the loan, and by the debtor's inability to pay the insurance premium semiannually. I find that Wachovia's concerns are outweighed by the provisions in the debtor's budget for monthly insurance premiums and repairs and maintenance.

BURDEN OF PROOF

The burden of proof in a turnover proceeding under §542 is at all times on the party seeking turnover and that party must establish a *prima facie* case by a preponderance of the evidence. In re Weiss-Wolf, Inc., 60 B.R. 969 (Bankr. S.D.N.Y. 1986).

CONCLUSIONS OF LAW

Turnover of the Car

Section 542(a) requires that all property of the debtor's estate, created by §541, be turned over to the trustee if the property has more than inconsequential value or benefit to the estate. In re Sanders, 78 B.R. 444 (Bankr. D.S.C. 1987). Although §542 provides that all estate property be turned over to the trustee, it is widely acknowledged that the debtor in a Chapter 13 case exercises identical rights and powers over the sale

and lease of property of the estate as does a trustee. See 5 Collier on Bankruptcy ¶1303.01 (15th ed.). Section 1303 grants these rights and powers and §1306 specifically provides that “the debtor shall remain in possession of all property of the estate.”

United States v. Whiting Pools, Inc., 462 U.S. 198, 103 S.Ct. 2309, 76 L.Ed. 2d 515 (1983), established that the §541 definition of “property of the estate” encompassed more than just property in the debtor’s possession at the time of filing the debtor’s petition. As stated in the case of In re Leverette, 118 B.R. 407 (Bankr. D.S.C. 1990):

Section 541 brings into the estate all legal or equitable interest of the debtor in property except as defined in §541(b) and §541(c)(2), which sections are inapplicable to the instant case. See, McLean v. Central States, Southeast and Southwest Areas Pension Fund. (In re McLean), 762 F.2d 1204 (4th Cir. 1985).

110 B.R. at 410.

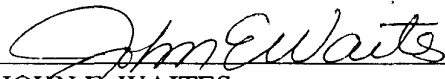
In re Leverette and In re Mathews, 118 B.R. 398 (Bankr. D.S.C. 1989) hold that the right of redemption provided to a debtor pursuant to South Carolina Code Ann. §36-9-506 (1976) is a sufficient interest in property to be included in the §541 definition of property of the estate. The debtor’s right of redemption is available to the debtor in this case because the car, though lawfully repossessed prepetition by Wachovia, had not been sold prior to the filing of the debtor’s petition. Therefore, pursuant to §542, the debtor is entitled to immediate return of the vehicle subject to Wachovia’s right to be adequately protected.

It is further found that the car is the debtor’s only vehicle, and that it is necessary for her successful reorganization, and the debtor should be allowed to retain it subject to Wachovia’s right to adequate protection.

CONCLUSIONS AND ORDER

Therefore, it is ORDERED, ADJUDGED, AND DECREED:

- (1) the car is deemed and determined to be property of the estate and shall be returned to the debtor in accordance with §542 upon a showing of proof of adequate insurance coverage on the vehicle by the debtor;
- (2) the debtor shall pay to Wachovia its costs of repossession in the total/ amount of \$290.00, within six (6) months of the date of entry of this Order;
- (3) the debtor shall provide Wachovia with adequate protection of its collateral as follows:
 - a. proof of insurance on the vehicle shall be given directly to Wachovia each time that a premium payment is made; and
 - b. the payments to the trustee under the debtor's Chapter 13 Plan will be kept current;
- (4) should the debtor default in her adequate protection requirements set forth in (2) or (3) above, Wachovia shall be entitled to relief from the automatic stay by the filing of an affidavit of default with the Bankruptcy Court.



JOHN E. WAITES
BANKRUPTCY JUDGE

Columbia, South Carolina

January 27, 1995