

In re Winters, Case No. 395-35580-dds7

11/08/95

DDS

Unpublished

Credit Union filed motion to compel debtor to either perform her stated intention under § 521(2) by redeeming the collateral or reaffirming the debt, or to surrender the collateral. Debtor was not in default at the time of filing and remained current post-petition. Court agreed to reconsider its ruling in In re Winters\*, 69 BR 145 (Bankr. D. Or. 1986) in light of more recent cases addressing the application of §521(2). Court denied the motion. Entry of the requested order would be tantamount to approving a de facto forfeiture; §521 contains no enforcement provision which would provide the remedy sought by Credit Union; Credit Union is not without remedy if debtor subsequently defaults.

P95-19(2)

\*The prior issue was raised in a case with debtors having the same last name. The Winters in the reported case are not the debtor herein.

January 23, 2002

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Re: Valerie Gay Winters, #395-35580-dds7

In her Statement of Intentions, debtor declared her intent to retain her car which is subject to a security interest held by Portland Teacher's Credit Union ("PTCU"). PTCU filed a motion seeking to compel debtor to either perform her stated intention under 11 U.S.C. § 521(2)(B) by redeeming the collateral or reaffirming the debt, or to surrender the collateral. PTCU is undersecured by at least \$1,400. Debtor was not in default to PTCU as of the time of filing, and has remained current on her payments to PTCU post-petition. The issue is whether debtor is precluded by § 521(2)(B) from retaining the vehicle and making payments without reaffirming her obligation to the credit union. As PTCU conceded at the hearing, there is a split of authority in the circuit courts regarding this issue. The Ninth Circuit has not decided the issue.

If the court were to grant PTCU's motion, for all practical purposes debtor's only choice would be to surrender the collateral. Redemption is frequently an option unavailable to a consumer debtor as a practical matter, and appears to be so here. Because the reaffirmation of the debt would include the unsecured portion which would not be in the best interest of the debtor under § 524, the result would be a de facto forfeiture. I have previously ruled that 11 U.S.C. § 521(2)(A) cannot be used by a creditor to validate a bankruptcy forfeiture clause. In re Winters, 69 B.R. 145 (Bankr. D. Or. 1986).

At the request of PTCU I agreed to reconsider my previous opinion in light of the more recent cases addressing the application of § 521(2), in particular In re Taylor, 3 F.3d 1512 (11th Cir. 1993) and In re Edwards, 901 F.2d 1383 (7th Cir.

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November 8, 1995  
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1990). I have done so, and am not persuaded that my ruling in the prior Winters case should be altered. This decision is supported by Homeowners Funding Corp. v. Belanger (In re Belanger), 962 F.2d 345 (4th Cir. 1992) and Lowry Federal Credit Union v. West, 882 F.2d 1543 (10th Cir. 1989).

Applying Winters to the facts herein, I deny PTCU's request for relief for the reason that entry of the order sought by PTCU would be tantamount to approving a de facto forfeiture. As I stated in Winters, 69 B.R. at 147 "[t]he 'if applicable' language in the section [521(2)(A)] destroys the argument that Congress forfeited a non-defaulting debtor's rights under a security agreement by restricting his options or, more narrowly, validated bankruptcy default clauses or other forms of creditor controlled forfeiture." I also noted in Winters that the 1984 amendment to § 521 is procedural and does not improve substantive rights of partially secured creditors. Reaffirmation in this instance would improve PTCU's substantive rights by guaranteeing payment of the unsecured portion of its claim.

I am further guided by the reasoning of courts which have declined to grant an order in the nature of the one sought here by PTCU on the grounds that § 521 contains no enforcement provision which would provide the remedy sought by PTCU. See Lowry Federal Credit Union v. West, 882 F.2d at 1546 and In re Weir, 173 B.R. 682 (Bankr. E.D. Cal. 1994).

Finally, I note that PTCU is not without a remedy. If the debtor defaults under her security agreement once the automatic stay is not in place, PTCU has all its remedies as provided in its security agreement. PTCU may also request relief from the automatic stay prior to discharge.

Very truly yours,

DONAL D. SULLIVAN  
Chief Bankruptcy Judge

DDS:lbd  
cc: U. S. Trustee  
John Mitchell