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In re Knight, Case No. 397-33409-psh7

8/1/97

PSH

Published

Debtor was obligated on a vehicle lease which, at the time she filed bankruptcy, was not in default. The creditor moved to compel the trustee to assume or reject the vehicle lease under section 365(a). The court denied the motion, reasoning that the creditor was actually seeking to have the court compel the trustee to assume the lease and assign it to the debtor, because if a lease is not assumed within 60 days after the order for relief, it is deemed rejected. 11 U.S.C. § 365(d)(1). Section 365(a) assigns the court the responsibility of reviewing, not dictating, the trustee's decision to assume or reject. The trustee's decision is based on what is in the best interest of the estate. Under some circumstances, assumption of a vehicle lease would be a detriment to the estate.

The court also noted that creditors should take care not to violate the permanent injunction of section 524(a) and be certain that any reaffirmations are in compliance with section 524(c) and (d).

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case No.
) 397-33409psh7
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DIANNA D. KNIGHT)
) MEMORANDUM OPINION
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_____)

On May 24, 1996, the debtor and her nondebtor spouse signed a contract denominated "GMAC Lease Agreement" and leased a 1996 Oldsmobile Bravada. This contract obliged them to pay \$385.95 each month for three years to the lessor's assignee, Central Originating Leasing Trust. The contract designated GMAC as the servicing agent for the Agreement. This Chapter 7 case was filed on April 28, 1997; an order of relief was entered on that date and a trustee appointed. At the time of the bankruptcy filing, the debtor and her nondebtor spouse had possession of the vehicle, were current on their lease payments, and wished to keep the Bravada. GMAC has filed a motion to compel the trustee to assume or reject the vehicle lease under

1 11 U.S.C. § 365(a)¹. The trustee filed an objection in which the
2 U.S. Trustee has joined.

3 When a bankruptcy petition is filed under Chapter 7 the
4 trustee appointed to administer the estate which is created takes
5 custody and control of all estate assets, including the debtor's
6 rights under any lease. Section 365(a) directs that the trustee may
7 either assume or reject a debtor's interest in such lease. In
8 Chapter 7 the debtor has no authority to exercise the option of
9 assuming or rejecting leases.

10 GMAC argued that pursuant to § 365(d)(1), if the trustee
11 neither assumes or rejects the lease it is deemed rejected. Under §
12 365(g) the rejection of a vehicle lease constitutes a breach of such
13 lease. Due to the breach, it could be argued that the statute also
14 effects a termination of the lease. Further, paragraph 25 of the
15 subject lease itself gives GMAC the option, upon the debtor's
16 default, to terminate the lease. This is because paragraph 24
17 defines a default by the debtor, in part, as doing "any other act
18 that is a default under a Lease contract under applicable law."
19 Despite the fact that the debtor might want to keep the vehicle and
20 is current on her payments, upon receiving relief from the automatic
21 stay, pursuant to the lease terms GMAC could declare the lease
22 terminated and take steps to recover the vehicle. On the other
23 hand, if the trustee assumed the lease, he could then assign his
24 interest in the lease back to the debtor pursuant to § 365(f)(2).

25
26 ¹ All section references are to Title 11 of the United States
Code unless otherwise specifically indicated.

1 Upon such assumption and assignment GMAC would agree not to raise
2 any issues of adequate assurance of future performance, under either
3 § 365(b)(1)(C) as to the trustee or under § 365(f)(B) against the
4 debtor/assignee. Both the debtor and GMAC then would have the right
5 to enforce the lease pursuant to its original terms.

6 GMAC further informed me that nationwide more and more
7 debtors are filing bankruptcy having outstanding vehicle leases. In
8 Oregon it is filing motions to compel in all Chapter 7 cases,
9 whether or not the debtors are current in their lease payments upon
10 filing and whether or not they want to keep the vehicle. It is
11 opposed to the trustee's filing a notice of abandonment of the
12 estate's interest in the lease, as such a procedure would not result
13 in an assumption of the lease. It takes the position that under
14 circumstances where a leased vehicle has been surrendered
15 postpetition it must wait for 60 days from the order of relief for
16 the trustee to act under § 365 before taking any steps to process
17 the vehicle. I am told that in other districts where it has filed
18 these motions the trustees have agreed to assume such leases
19 "without recourse" and then assign the estate's interest to the
20 debtors.

21 The trustee objected to the motion on several bases. He
22 pointed out that the language of § 365(a) is not mandatory. It
23 allows him to choose whether to assume or reject a lease based on
24 what is in the best interest of the estate. Under these facts he
25 believes that it is unfair to the debtors for him to make a decision
26 to either assume or reject a lease which will directly impact only

1 the debtor. If the trustee were to reject the lease, GMAC would
2 have the option as to whether it wanted to do business with the
3 debtor. The debtor would have no option. Further, the trustee will
4 often not know that there is an outstanding lease until the § 341
5 hearing. If this is true, he may not have time, within the 60 day
6 deadline imposed by § 365(d)(1), to file a motion to assume or
7 reject. Additionally, if the court were to require the trustee to
8 file motions under § 365 on all outstanding vehicle leases, it could
9 be setting a precedent which would obligate the trustee to
10 thoroughly review all the debtor's ongoing contract payments and
11 file § 365 motions to assume or reject on every one, including, but
12 not limited to, utility services, furniture and appliance leases and
13 medical equipment leases. GMAC's proposed process would place a
14 significant burden on the trustee and on the court. In asset cases,
15 the cost of filing such pleadings may be at the expense of the
16 estate's creditors.

17 ANALYSIS

18 When a vehicle lessee files a Chapter 7 bankruptcy petition,
19 in the normal course the lessee/debtor shortly thereafter will
20 obtain a personal discharge from her lease payment obligation.
21 Section 524(a) then enjoins the lessor from any act to collect the
22 lease payments from the debtor. If the debtor does not wish to keep
23 the vehicle, she may surrender it to the lessor. If, at the time of
24 bankruptcy filing, the debtor is not current on her lease payments,
25 the lessor may file a motion for relief from stay and probably will
26 obtain relief to exercise its right under the contract to repossess

1 the vehicle. However, if, at the time of filing, the debtor is
2 current on her lease payments and decides to continue the payments
3 and drive the vehicle the lessor has fewer options.² It may be
4 unsuccessful with any motion for relief from stay for the purpose of
5 taking possession of the vehicle because the debtor is not in
6 default under the terms of the lease.³ If at any time in the future
7 during the lease term the debtor decided to stop making the lease
8 payments the lessor would be prohibited from collecting the balance
9 of the lease payments from the debtor. Meanwhile, the debtor has had
10 the use of a depreciating vehicle. If, postbankruptcy, the debtor
11 missed a lease payment but wished to cure the default and continue
12 the lease payments, because of the discharge of her personal
13 liability for the payments, the lessor cannot tell the debtor that
14 if she wants to cure the default and keep the vehicle she has an

15
16 ² There is a split among the circuits as to whether, as to
17 secured consumer debts, the debtor who is current on her payments is
18 limited by the language of § 521(2)(B) to either redeeming or
19 reaffirming the applicable debt or surrendering the collateral. See
20 In re Taylor, 3 F.3d 1512 (11th Cir. 1993) (yes); In re Edwards 901
21 F.2d 1383 (7th Cir. 1990) (yes); In re Belanger, 962 F.2d 345 (4th
22 Cir. 1992) (no); Lowry Federal Credit Union v. West, 882 F.2d 1543
23 (10th Cir. 1989) (no). This issue has not been decided by the Ninth
24 Circuit. In an unpublished opinion the Oregon bankruptcy court has
25 held that in addressing secured consumer debt a debtor is not
26 limited by the language of § 521(2)(B) to redemption, reaffirmation
or surrender of collateral. Valerie Gay Winters, #395-35580-dds7.
Section 521(2)(B) applies only to secured debt, not to true leases.
This court has not determined whether the GMAC vehicle lease is a
true lease or a security document.

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28 ³ In Oregon the bankruptcy court has held that a contractual
29 provision which designated filing bankruptcy as an act of default is
30 unenforceable and that any action to enforce that provision would
31 violate 11 U.S.C § 362 while the case is open and 11 U.S.C. §
32 524(a)(2) after the case is closed. In re Winters, 69 B.R. 145
33 (Bankr. D.Or. 1986).

1 obligation to make timely future payments. If the trustee were to
2 assume the vehicle lease and assign it to a debtor who was current
3 on her lease payments and wished to keep the vehicle, GMAC's dilemma
4 would be solved. It could enforce all its rights under the terms of
5 the original lease, including its right to recover the balance of
6 the lease payments from the debtor.

7 GMAC's motion is misnomered. GMAC is actually asking this
8 court to compel the trustee to assume its lease and assign it to the
9 debtor. If lease rejection were an acceptable option to GMAC, it
10 need not have filed the motion at all. If a Chapter 7 trustee takes
11 no steps to either assume or reject a personal property lease §
12 365(d)(1) treats it as rejected. I decline the request to order the
13 trustee to assume this lease. The language of §365(a) clearly
14 assigns the court the responsibility of reviewing, not dictating, a
15 trustee's decision to assume or reject. In determining whether and
16 in what regard he should exercise the power to assign or reject an
17 executory contract or lease the primary concern of the trustee must
18 be what is in the best interest of the estate. Sharon Steel v.
19 National Fuel Gas Distribution Corporation, 872 F.2d 36, 40 (3rd
20 Cir. 1989); Texaco Inc., v. Louisiana Land and Exploration Co. 136
21 B.R. 658, 664 (M.D.La. 1992); In re Upland/Euclid Ltd., 56 B.R. 250
22 (9th Cir. BAP 1985); In re Chi-Fen Huang, 23 B.R. 798 (9th Cir. BAP
23 1982). GMAC has not shown that the estate would benefit in any way
24 if I were to grant the motion.

25 This court believes that in some cases, assumption of GMAC's
26 lease, as urged, would be a detriment to the estate. If the trustee

1 were to assume the lease, absent a subsequent assignment he would be
2 obligated, pursuant to 11 U.S.C. § 365(b)(1), to cure any defaults
3 under its terms, including bringing any late payments current, to
4 compensate for any actual pecuniary loss arising from any default,
5 and to make all future payments. GMAC has pointed out that under
6 the facts of this case if the trustee were to assume the lease,
7 there would be no defaults to cure nor, due to immediate assignment
8 to the debtor, would he have any future payments to make. However,
9 there is a flaw in this argument. GMAC has stated that it is
10 presently filing motions to compel in all Chapter 7 cases where the
11 debtor, at filing has an outstanding vehicle lease. This would
12 necessarily include cases where, at filing, the debtor was in
13 default in her lease payments.

14 Because 11 U.S.C. § 365(d)(1) provides for the treatment, in
15 Chapter 7, of an unexpired lease of the debtor's personal property
16 if the trustee takes no steps to either assume or reject it, the
17 trustee should feel no compulsion to take any further administrative
18 steps regarding such leases. Nothing in the Bankruptcy Code
19 prohibits him from filing a notice of intent to abandon the estate's
20 interest in such leases under § 554(a) if he finds that the
21 conditions of that subsection have been met. This, however, would
22 appear to be an unnecessary act.

23 At the hearing on the motion this court's question about how
24 GMAC handled its vehicle leases prior to its decision to file
25 motions to compel remained unanswered. It is interesting to note
26 that GMAC initiated its new procedure immediately after Sears was

1 severely sanctioned nationwide by the bankruptcy court for
2 systematically obtaining reaffirmation agreements with debtors which
3 were never filed with or approved by the bankruptcy court. Because
4 of this coincidence and because I have denied its motion, I offer
5 these cautionary comments to GMAC.

6 Although § 365(g) of the Bankruptcy Code treats the rejection
7 of a lease as a breach, it does not specify that a breach
8 constitutes a termination of the lease. Courts are in disagreement
9 on this issue and the Ninth Circuit Court of Appeals has not
10 addressed it within the context of a personal property lease.

11 "A debtor may enter into an agreement with a creditor to
12 reaffirm an otherwise dischargeable debt. [However t]he agreement
13 will be binding only if made in compliance with [11 U.S.C. §] 524(c)
14 and (d)." In re Getzoff, 180 B.R. 572, 573 (9th Cir. BAP 1995)
15 citing In re Bowling, 116 B.R. 659, 663 (S.Ind. 1990). "Section
16 524(c) applies to agreements 'between a holder of a claim and the
17 debtor, the consideration for which, in whole or in part, is based
18 on a debt that is dischargeable . . .'" Id. at 574. "Section 524
19 references the consideration given by the debtor, not the lender."
20 Id. at 575. Thus, a creditor who enters into a postpetition
21 contract or lease which obligates the debtor under similar terms to
22 those which existed under a prebankruptcy agreement, without
23 observing the reaffirmation rules of 11 U.S.C. § 524(c) and (d), may
24 find itself in violation of the permanent postbankruptcy injunction
25 of § 524(a). Under such circumstances, the creditor will have the
26 burden of proving that the agreement represents a new, postpetition

1 obligation.

2 A debtor may voluntarily repay any debt. § 524(f). This
3 section, however, should not be read to condone repayment agreements
4 which are in any way the product of the slightest creditor duress.

5 This Memorandum Opinion contains the court's findings of fact
6 and conclusions of law and pursuant to Bankruptcy Rule 9014, which
7 incorporates Rule 7052, they will not be separately stated. An
8 order consistent herewith shall be entered.

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Polly S. Higdon
Bankruptcy Judge

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