

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
)	
DAVID & MARY TARSIKES,)	CASE NO. BK96-82095
)	Filing 6
DEBTOR)	CH. 13

MEMORANDUM

Hearing was held on October 8, 1996, on Application for Sanctions and Application for Turnover of Property. Appearances: Howard Duncan for the debtors and Thomas Whitmore for "Cash in a Flash." This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b) (2) (E).

Ten days prior to the filing of the Chapter 13 case, a creditor/lessor of the debtors' automobile repossessed the vehicle. Upon the filing of the Chapter 13 petition, counsel for the debtor informed the Lessor that the vehicle should be returned to the debtors. Along with the request for turnover, counsel provided the Lessor copies of several court decisions, including In re Knaus, 889 F.2d 773 (8th Cir. 1989) to support counsel's position that the property needed to be turned over.

The Lessor refused to turn the property over. Debtors then filed a motion for turnover and a request for expedited hearing. The hearing was held on October 8, 1996. Evidence was submitted by both parties and arguments presented.

It is the position of the Lessor that, pursuant to the terms of the contract between the Lessor and the debtors, once the vehicle was repossessed, the debtors no longer had the right to possession or any other rights with regard to the vehicle or the lease. In other words, although the Lessor admits that the lease was not terminated by repossession, nor did the lease expire as a result of repossession, once the debtors were out of possession as a result of a default in payment, they could never again obtain possession.

The lease document is in evidence as Exhibit 1. There is no clear statement in the lease which would support the position of the Lessor. The Lessor relies upon the language in paragraph 8 and paragraph 10. Paragraph 8 states:

FAILURE TO RETURN VEHICLE ON AGREEMENT EXPIRATION DATE OR PAY LEASE FEE ON THE DUE DATE: If Lessee fails to return the vehicle on the agreement expiration date, or fails to make lease payments on the due date, Lessee will be in default of this agreement and, if Lessee retains possession of the vehicle, will be in unlawful possession of the vehicle.

Paragraph 10 states:

REPOSSESSION OF VEHICLE: The vehicle may be repossessed, at Lessee's cost and without notice, if not returned to the location designated by the Lessor at the expiration of this agreement, or on the failure of the Lessee to make any lease payment within five days after due date, or if illegally parked, used in violation of law or of this agreement, appears to be abandoned, if Lessee fails to maintain and provide evidence of continuous insurance coverage to Lessor or if Lessee gave false or misleading information at the time of making this agreement. In any such instance, Lessor may retake possession of said vehicle at any time and for such purpose to enter upon the premises of Lessee without becoming liable for trespass.

It is not disputed that the debtors failed to make the payments that were due on July 15th, August 1st, August 15th, and September 1st. They were, therefore, in default and the Lessor had the right to repossess the vehicle.

The automobile lease was entered into on May 30, 1996. According to paragraph 3, the expiration date of the lease is May 30, 1997. Paragraph 4 provides Lessee an option to purchase the vehicle anytime before May 30, 1997, for a specified price. However, the option is void if the Lessee is not in full and continuous compliance with all terms and conditions of the agreement at all times during its term.

On the first page of the lease agreement, there is a box containing consumer information. According to the language of paragraph 10 of the consumer information,

Lessee may terminate the agreement without penalty by voluntarily surrendering or returning the leased vehicle upon expiration of the lease term. Neither Lessor nor Lessee may terminate the lease prior to the end of the term except upon exercise by the Lessee of its option to purchase in accordance with paragraph 4. Rental payments

that are seventy-two hours past due are subject to \$3.00 late fee, in addition to daily lease rate.

In paragraph 13, there is the following language:

Rental/Lease Payments that are seventy-two hours past due are subject to \$5.00 late fee (\$3.00 for weekly or bi-weekly plans), in addition to daily lease rate.

Paragraph 15 contains the following language:

CHANGES: any changes in this agreement must be in writing and signed by the Lessor and Lessee. TIME IS OF THE ESSENCE IN ALL MATTERS PERTAINING TO THIS LEASE AGREEMENT. Waiver or reinstatement of any of the terms or conditions of this agreement is at the sole discretion of the Lessor, without waiver of any Lessor's rights or remedies under law. Neither party has the right to terminate the lease prior to the end of the term, subject to Lessee's right to exercise the purchase option provided in paragraph 4 above after the minimum term.

It is clear from the language of the automobile lease agreement, which was drafted by the Lessor, that the lease was not terminated as a result of the repossession of the vehicle. Contrary to the language in paragraph 8 which asserts that retaining possession of the vehicle after a payment default will be an unlawful possession of the vehicle, other paragraphs in the lease agreement provide for only a monetary penalty on a per diem basis. Any ambiguity in paragraph 8 with respect to termination of the lease will be construed against the Lessor. See, Home Fed. Sav. & Loan v. McDermott & Miller. 243 Neb. 136, 497 N.W.2d 678 (1993).

The practice of the Lessor is not consistent with that language which asserts that retention of the vehicle after a failure to pay is unlawful. In this case, the Lessor sent a late payment notice dated July 18, 1996. That late payment notice, which is included in Exhibit 1, dealt with the payment that was due on July 15, 1996. It stated:

You are now in default of this lease. You must correct this default on or before July 23, 1996. If you do so, you may continue with the contract as though you did not default. . . .If you do not correct your default by July 23, 1996, we may exercise any and all rights granted under the laws of Nebraska; Including (sic) but not limited to repossession of said vehicle and/or

legal collection to collect the total amount due under this contract.

In other words, the Lessor provided an opportunity to cure the default and retain the vehicle.

As mentioned above, none of the language in the agreement specifically precludes the debtors from curing a default and none of the language in the agreement terminates the debtors' rights in the vehicle or in the lease agreement itself.

The Bankruptcy Code at 11 U.S.C. § 365(a) permits the trustee to assume or reject an unexpired lease of the debtor. The unexpired lease may be assumed only if any defaults are cured or adequate assurance of a prompt cure is provided and adequate assurance of future performance is provided. 11 U.S.C. § 365(b) (1) (A) and (C).

The bankruptcy estate is comprised of all legal or equitable interests of the debtor in property as of the commencement of the case. 11 U.S.C. § 541(a) (1). The rights under this lease agreement, including the right to possession of the vehicle, are property of the estate.

The Code, at 11 U.S.C. § 362(a) (3), provides that upon the filing of a petition, the automatic stay prohibits any act by a prepetition creditor to exercise control over property of the estate.

The Eighth Circuit Court of Appeals, in the case of In re Knaus, 889 F.2d 773 (8th Cir. 1989), explained that creditors who obtained possession of debtors' property prepetition were required to turn that property over to the debtors upon the filing of the bankruptcy case. Failure to turn the property over upon being notified of the bankruptcy and requested to turn it over, was found to be a willful violation of the automatic stay giving the debtors the right to recover actual damages, including costs and attorney fees, and in appropriate circumstances, punitive damages. See 11 U.S.C. § 362(h).

In this case, the debtors have filed a Chapter 13 plan which proposes to cure the default in payment. The debtors have a need for the vehicle. The vehicle is insured for the benefit of the Lessor. The Lessor, although having some grounds for believing that its possessory interest was superior to any right of the debtors to possession, willfully refused to turn the vehicle over to the debtors and thereby exercise control over property of the estate in violation of Section 362(a). That exercise of control was a willful violation of the automatic stay.

The proper procedure for the creditor, if concerned about the matter, was to turn the property over and immediately file a

motion for relief from the automatic stay or adequate protection. The issue concerning the contractual right to possession versus the statutory provisions contained in Sections 362 could then have been resolved by the court. The creditor does not have the unilateral right to decide that its interest in the vehicle is superior to that of the bankruptcy estate.

As a result of the willful violation of the automatic stay by the Lessor, the debtors are entitled to actual damages and attorney fees.

As stated in Knaus and in Section 362(h), under some circumstances, punitive damages are appropriate. In this case, however, assuming immediate compliance with the turnover order contained in this memorandum and in the journal entry being filed contemporaneously herewith, there are no egregious circumstances which permit the court to impose punitive damages. The Lessor had a contract which, giving some credence to the Lessor's interpretation of the contractual terms, could be interpreted to mean that once the debtor lost possession, such loss of possession was permanent. However, that interpretation is not consistent with the other language in the agreement and is not specific enough to either terminate the rights of the debtors in the lease or the vehicle or to cause an expiration of the lease.

In addition to having such interpretable language in the agreement, the Lessor did consult legal counsel and obtained advice concerning the meaning of the document. Such actions were reasonable and not in any way egregious or outrageous. Therefore, once again assuming immediate turnover, no punitive damages shall be imposed.

The motion for turnover is granted. The Lessor is directed to turn the vehicle over to the debtors no later than 5:00 P.M. on Friday, October 11, 1996.

The debtors are granted ten days to submit affidavit evidence concerning actual damages and attorney fees. thereafter, the Lessor shall have ten days to object to the amounts asserted by the debtors.

Separate journal entry to be filed.

DATED: October 10, 1996

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:

DUNCAN, HOWARD T.	342-8134
WHITMORE, THOMAS	391-6986

Copies mailed by the Court to:

Kathleen Laughlin, Trustee
United States Trustee

Movant (*) is responsible for giving notice of this journal entry to all other parties (that are not listed above) if required by rule or statute.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
DAVID & MARY TARSIKES,)	CASE NO. BK96-82095
<u>DEBTOR(S)</u>)	CH. 13
)	Filing No. 6
Plaintiff(s))	
vs.)	<u>JOURNAL ENTRY</u>
)	DATE: October 10, 1996
<u>Defendant(s)</u>)	HEARING DATE: October 8,
		1996

Before a United States Bankruptcy Judge for the District of Nebraska regarding Application for Sanctions, Application for Turnover of Property and Request for Expedited Hearing filed by the debtors Against Cash in a Flash.

APPEARANCES

Howard Duncan, Attorney for debtors
Thomas Whitmore, Attorney for Cash in a Flash

IT IS ORDERED:

The motion for turnover is granted. The vehicle shall be turned over to the debtors no later than 5:00 P.M. Central Daylight Time, Friday, October 11, 1996. Debtors are granted ten days to submit evidence of actual damages and attorney fees. Lessor is granted ten days thereafter to object. See memorandum entered this date.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

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WHITMORE, THOMAS 391-6986

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