IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:	)	
	)	
HELENE L. WILLIAMS,	)	CASE NO. BK02-82461
	)	
Debtor(s).	)	CH. 13

MEMORANDUM

Hearing was held in Omaha, Nebraska, on August 22, 2002, on Debtor's First Amended Motion for Turnover of Property from First Nebraska Educators Credit Union (Fil. #5). David Hicks appeared for the debtor, and Donald Roberts appeared for First Nebraska Educators Credit Union. This memorandum contains findings of fact and conclusions of law required by Fed. R. Bankr. P. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 28 U.S.C. § 157(b)(2)(E).

The debtor and her husband purchased a motor vehicle in 1999. First Nebraska Educators Credit Union ("Credit Union") financed the purchase and noted its lien on the title. Several months later the debtors became delinquent on their payments and the credit union provided notice to the debtors of their right to cure the delinquency within a certain amount of time. After the second notice, but before the credit union took any action with regard to foreclosing its lien, the debtors filed a Chapter 13 bankruptcy case.

During the year 2002, the debtor and her husband separated, and because all payments were not being made to the Chapter 13 Trustee as required, the case was dismissed. Immediately after the case was dismissed, the credit union repossessed the vehicle.

Mrs. Williams had been in possession of the vehicle at the time of its repossession, and in order to protect her interest in the vehicle, she filed a second Chapter 13 case, individually.

The credit union had acted quickly, and immediately upon repossession, applied to the local county offices for what the parties have described as a "repossession title," purportedly authorized by Neb. Rev. Stat. § 60-111(1)(d). When demand was made upon the credit union to turn over the vehicle, its response was that it had title to the vehicle and it had no

legal requirement to turn it over to the debtor for administration by the bankruptcy court.

The debtor then filed this motion requesting the court to order turnover. The credit union resisted.

The question of whether the debtor, on the petition date, had a legal or equitable interest in the motor vehicle, thereby permitting the debtor to obtain possession of the motor vehicle and deal with her obligation to the credit union through a Chapter 13 plan, is a question of law and statutory interpretation.

In general, the Nebraska Uniform Commercial Code applies to the creation, perfection, and enforceability of security interests in personal property. U.C.C. §§ 9-109(a)(5) and (6) provide for the applicability of Article 9 to security interests arising under specific statutory provisions.

On the other hand, the motor vehicle title statute, at Neb. Rev. Stat. § 60-110, states:

> The provisions of article 9, Uniform Commercial Code, shall never be construed to apply to or to permit or require the deposit, filing, or other record whatsoever of a security agreement, conveyance intended to operate as a mortgage, trust receipt, conditional sales contract, or similar instrument or any copy of the same covering a motor vehicle.

Section 60-110 does not deal with the enforceability of the rights of a creditor holding a security interest under the Motor Vehicle Title Act. It, instead, deals solely with the perfection of a lien on a motor vehicle, priority of such liens, and the discharge of such liens. Therefore, the logical inference is that Article 9 is applicable in this case, because the issue concerns the procedural requirements for enforcing a creditor’s security interest in a motor vehicle.

The credit union advances two arguments in support of its alleged ownership of the vehicle. First, the credit union suggests that it obtained ownership of the motor vehicle by virtue of its 1999 notices to the debtor of the payment deficiency and the right to cure the deficiency. The credit union cites Neb. Rev. Stat. §§ 45-1,106 and 45-1,107. Those provisions require a creditor dealing with a consumer credit

transaction to give written notice of the deficiency and the right to cure. Those provisions also prohibit the creditor from accelerating the maturity of the unpaid balance of the obligation or taking possession of collateral, except voluntarily surrendered collateral, until 20 days after the notice of the consumer's right to cure is given.

Finally, those provisions provide, at § 45-1,107(2), that "[w]ith respect to defaults on the same obligation after a creditor has once given notice of the consumer's right to cure, the consumer shall have no further right to cure and the creditor has no obligation to proceed against the consumer or the collateral."

Based upon the above-cited statutory language, the credit union suggests that the debtor, on the bankruptcy petition date, had no right to cure the deficiency because the credit union had, in 1999, complied with the cure notice provisions of the consumer credit statute.

However, such a position is inconsistent with the credit union's argument that its lien or security interest is created under the motor vehicle title statute, § 60-110, rather than under the Uniform Commercial Code. The inconsistency in the argument is that § 45-1,105(1) defines the term "collateral" as used in the notice and cure statutory sections as "property subject to a security interest as defined by the Uniform Commercial Code". In other words, the cure provisions in § 45-1,106 and § 45-1,107 apply only to collateral which is the subject of a security interest created by the Uniform Commercial Code. Because the motor vehicle title statute, at § 60-110, specifically excludes the creation and perfection of a security interest under Article 9 of the Uniform Commercial Code from the creation, perfection, and priority of liens on motor vehicles, the debtor cannot have lost her right to cure the deficiency solely because of the notice received in 1999 under the consumer credit statutory provisions.

In contrast to the inapplicability of the notice and cure provisions under § 45-1,106 and § 45-1,107, because the motor vehicle statutory provisions do not deal directly with the enforcement of a security interest after default in the underlying obligation, Nebraska Uniform Commercial Code provisions on such subject must be applicable to this situation. Those provisions, beginning at § 9-609, authorize a secured party, after default, to take possession of the collateral

pursuant to judicial process or without judicial process if it can be done without a breach of the peace. After such action taking possession of the collateral, a secured party may dispose of the collateral in a commercially reasonable manner pursuant to § 9-610. Prior to such disposition, § 9-611 requires notice to the debtor and § 9-614 defines the contents and form of such notification in a consumer-goods transaction. A "consumer-goods transaction" is defined at § 9-102(a)(24) as a consumer transaction in which an individual incurs an obligation primarily for personal, family, or household purposes and a security interest in consumer goods secures the obligation.

In this case, the motor vehicle is a consumer good, as it is used for family purposes, and it is secured by a security interest perfected by noting a lien on the title. No notice of disposition was provided to the debtor.

However, it is the position of the credit union that the enforcement provisions of the Uniform Commercial Code do not apply to security interests perfected by lien notation on motor vehicle titles. Instead, as its alternative argument for ownership, the credit union takes the position that § 60-111(1)(d) gives a creditor with a perfected security interest in a motor vehicle the absolute right to repossess the motor vehicle, if no breach of the peace occurs, and, without notice to the debtor, obtain ownership of the vehicle.

That statutory provision states:

> [W]henever repossession is had upon default in performance of the terms of a chattel mortgage, trust receipt, conditional sales contract, or other like agreement, the county clerk of the county in which the last certificate of title to such motor vehicle was issued or the Department of Motor Vehicles if the last certificate of title was issued by the department, upon surrender of the prior certificate of title or the manufacturer's or importer's certificate, or when that is not possible, upon presentation of satisfactory proof of ownership and right of possession to such motor vehicle, and upon payment of the fee prescribed in section 60-115 and the presentation of an application for certificate of title, may issue to the applicant a certificate of title thereto. . . . Only an affidavit by the person or agent of the person to whom possession of such

> motor vehicle has so passed, setting forth facts entitling him or her to such possession and ownership, together with a copy of the journal entry, court order, or instrument upon which such claim of possession and ownership is founded shall be considered satisfactory proof of ownership and right of possession, except that if the applicant cannot produce such proof of ownership, he or she may submit to the department such evidence as he or she may have, and the department may thereupon, if it finds the evidence sufficient, issue the certificate of title or authorize the county clerk to issue a certificate of title, as the case may be.

The statutory language is clear. Unless the party requesting a "repossession" certificate of title presents the county clerk with a journal entry, court order, or other instrument upon which such claim of possession and ownership is founded, as well as an affidavit setting forth the facts concerning a right to possession and ownership, the county clerk has no authority to issue such a certificate of title. Instead, if the applicant has no proof of ownership such as a journal entry, court order, or other instrument, the applicant must submit to the Department of Motor Vehicles whatever evidence the applicant has and the department may, if it finds the evidence sufficient, issue the certificate or authorize the county clerk to issue it.

In this case, there is no evidence that the credit union, as applicant, presented any proof of the right to ownership of the vehicle to the county clerk. The credit union could not have presented a journal entry, court order, or other instrument. It may have submitted an affidavit asserting default in payment by the debtor and peaceable repossession by the credit union, but, according to the statute, such evidence is insufficient to permit the county clerk to issue a certificate of title.

Based upon the above analysis, I conclude that on the bankruptcy petition date, the debtor retained an interest in the motor vehicle which would permit her to decelerate the obligation and treat the obligation in the Chapter 13 plan. The creditor had not complied with the disposition notice requirements of the Uniform Commercial Code. The 1999 notices did not cut off the debtor's right to cure. The motor vehicle title statutes do not deal with the enforceability of security

interests perfected through lien notations on titles. The Uniform Commercial Code collateral disposition provisions are applicable to motor vehicles. Finally, a "repossession title" is only valid to the extent that the statutory provisions authorizing the issuance of such title are strictly complied with.

The Motion for Turnover is granted. The credit union is ordered to turn the motor vehicle over to the debtor within ten days. Separate order will be entered.

DATED: August 29, 2002

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

Notice given by the Court to:
*David Hicks
Donald Roberts
Chapter 13 Trustee
United States Trustee

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

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ORDER

Hearing was held in Omaha, Nebraska, on August 22, 2002, on Debtor's First Amended Motion for Turnover of Property from First Nebraska Educators Credit Union (Fil. #5). David Hicks appeared for the debtor, and Donald Roberts appeared for First Nebraska Educators Credit Union.

IT IS ORDERED the Debtor's First Amended Motion for Turnover is granted. The credit union is ordered to turn the motor vehicle over to the debtor within ten days.

See Memorandum entered this date.

DATED: August 29, 2002

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

Notice given by the Court to:
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