

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)	
)	
PATRICK McATEE and)	
NICOLE McATEE,)	CASE NO. BK99-80004
)	
DEBTORS.)	CH. 13

MEMORANDUM

Hearing was held on February 25, 1999, on a Motion for Turnover filed by the debtors and Objection filed by Cash In A Flash, Inc. Appearances: Sam Turco for the debtors and Sandra Markley for Cash In A Flash, Inc. 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).

Background

In August of 1998, prior to filing a bankruptcy petition, the debtors entered into an agreement with Cash In A Flash, Inc. (Cash In A Flash). It appears that as part of the agreement, the debtors transferred title to their automobile to Cash In A Flash in consideration of a payment to the debtors from Cash In A Flash in the amount of \$1,000.00. Then, in a separate transaction, the debtors executed a document entitled "Automobile Lease Agreement" whereby they leased the same vehicle from Cash In A Flash for a period beginning on August 10, 1998, and ending on August 10, 1999.

The Lease

The lease contains numerous provisions, many of which are ambiguous or inconsistent with each other. A sample follows.

At paragraph 3 of the lease, it provides that the lease fee is \$10.00 per calendar day payable on the first and fifteenth day of each month and that the expiration date of the lease is August 10, 1999.

Paragraph 4 on page 1 of the lease provides for a purchase option. According to that paragraph, the Lessee has

the right to purchase the vehicle anytime before August 10, 1999, for \$1,000.00 plus a \$90.00 account setup fee and applicable taxes, license and title fees. That paragraph then states, however, "[T]his purchase option becomes void if the Lessee is not in full and continuous compliance with all terms and conditions of this agreement at all times during the term hereof. The Lessee understands and agrees that the minimum term of this Lease is 30 days. . . ."

At the bottom of the first page of the lease, there is a box that contains paragraphs 1 through 7 and paragraph 10. Paragraph 3 in the box reiterates the fact that the Lessee has the option to purchase the leased vehicle at the time and for the price set forth in paragraph 4 above. Paragraph 10 in the box states:

Lessee is not liable for the value of the leased vehicle upon expiration of the Lease unless Lessee exercises its option to purchase at the conclusion of the 30-day minimum term. 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 Lessee of its option to purchase in accordance with paragraph 4. Rental payments that are 72 hours past due are subject to \$15.00 late fee, in addition to daily lease rate. (Emphasis added)

On the second page of the lease document, paragraph 8 contains language that is totally inconsistent with the language contained in paragraph 10 on the first page. Paragraph 8 on page 2 states, "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 Lessor may terminate this agreement without notice and obtain immediate possession of the vehicle. . . ." In other words, although paragraph 10 on page 1 states that the only way the lease can be terminated is by the Lessee exercising an option to purchase or by voluntarily surrendering or returning the leased vehicle upon expiration of the lease term, paragraph 8 on page 2 purports to give the Lessor the power to terminate the agreement without notice if the debtor fails to make a lease payment on the due date.

Paragraph 10 on page 2 provides for the remedy of repossession. The applicable language is the following:

The vehicle may be repossessed. . . upon the failure of the Lessee to make any lease payment within 5 days after due date. . . . In any such instance, Lessor may terminate this lease without notice of any kind and retake possession of said vehicle at any time and for such purpose to enter upon the premises of Lessee without becoming liable for trespass.

In contrast, at paragraph 15 on page 2, the document states that "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."

To summarize, the lease provides, on the one hand, and in more than one place, that it cannot be terminated by either party except under the limited circumstance of either a voluntary return of the vehicle at the end of the lease term or the exercise of an option to purchase after the expiration of thirty days. On the other hand, the agreement permits the Lessor to repossess the vehicle if the Lessee fails to make any lease payment within five days after the due date. Separately from repossession, the lease provides that the Lessor may terminate the lease without notice of any kind and retake possession of the vehicle, upon failure of the Lessee to make any lease payment within five days after the due date. In another part of the lease, the language states that rental payments that are seventy-two hours past due are subject to a \$15.00 late fee in addition to the daily lease rate.

So, it appears that if the Lessee fails to make a rental payment by the due date, the Lessee will be in default and the Lessor may terminate the agreement. See paragraph 8, page 2. Or, in lieu thereof or in addition thereto, if the Lessee fails to make payments by the due date and for a period of seventy-two hours thereafter, the Lessee will suffer a daily charge of \$15.00 as a late fee, plus the regular daily rental fee. Next, although the Lessee appears to have an option to purchase the vehicle at any time after the first thirty days, that option is void if the debtor is in default at any time during the period of the lease. Accordingly, the Lessee loses the option to purchase if even one payment is not made by the

due date. Finally, the lease provides that it is not terminable by either party except upon the exercise of the option to purchase. It also provides that under some circumstances, in contrast to such a non-termination provision, the Lessor may terminate the lease without any notice and retake possession.

The Problem

The above description of the terms of the lease are included in this Memorandum because the debtor/Lessees failed to make their payments when due in September, October and November, 1998. In late November, Cash In A Flash obtained possession of the vehicle and now the debtors want the vehicle returned. There is no evidence in this record which shows any written or oral notice to terminate the lease. There is conflicting evidence with regard to the manner in which Cash In A Flash obtained possession. The debtor suggests that the vehicle was repossessed and an officer of Cash In A Flash suggests that the debtors voluntarily surrendered the vehicle.

Within a few weeks following the transfer of possession of the vehicle to Cash In A Flash, the debtors filed this Chapter 13 case and filed a motion requesting a turnover of the vehicle. The motion is resisted on the theory that the lease was terminated by repossession.

The Law and Discussion

Property of the bankruptcy estate includes all legal or equitable interests of the debtor in property as of the commencement of the case. 11 U.S.C. § 541(a)(1). In this case, the lease does not terminate by a voluntary surrender and return of the vehicle prior to the expiration of the term. Therefore, even if the officer of Cash In A Flash is correct that the debtors did voluntarily surrender possession of the vehicle, such a voluntary act is not a termination of the lease. See paragraph 10 in the box on page 1.

If the debtors failed to make rental payments when due and the vehicle was repossessed by Cash In A Flash without permission of the debtors/Lessees, such a fact does not necessarily require the conclusion that the lease was terminated. Paragraph 10 in the box on page 1 of the document prohibits a termination of the lease by either party except under specific, limited, circumstances. Paragraph 8 on page 2

of the lease provides that if the Lessee fails to make lease payments, the Lessor may terminate the agreement without notice and obtain immediate possession of the vehicle. That paragraph does not say that taking possession of the vehicle terminates the lease. Similarly, paragraph 10 on page 2 provides that the Lessor may terminate the lease if payments are not made within five days after the due date and further provides that the Lessor may retake possession of the vehicle. That paragraph does not state that repossession of the vehicle terminates the lease. Both of those paragraphs provide the Lessor with a remedy of repossession and an option to terminate the lease. Such option is expressly contrary to the language of paragraph 10 in the box on page 1.

Both Cash In A Flash and the debtors have provided affidavit evidence concerning what remedies officials of Cash In A Flash informed the debtors of at the time of the repossession. The debtors suggest that they were told that the only way they could obtain possession of the vehicle was to pay the entire unpaid balance of the lease agreement and the vehicle option purchase price. The total amount under that scenario is \$4,730.00 to retake possession of the vehicle that they "sold" a few months earlier for \$1,000.00.

In contrast, the affidavit of the officer of Cash in A Flash states, at paragraph 5, "[T]hat at the time of repossession, under the terms of this lease agreement, Patrick and Nicole McAtee could have repurchased this vehicle by paying \$1,000.00, the back lease payments owed, and a \$90.00 setup fee, which is a total amount of \$1,863.80. (This includes Nebraska sales tax of 6% on the lease payments.)" Such a statement, if true, is totally inconsistent with at least some of the language in the lease document. As was discussed above, the lease provides for the option to purchase becoming void if the debtors are not "in full and continuous compliance with all terms and conditions of this agreement at all times during the term hereof." See paragraph 4, page 1. Since the debtors had not paid from September through November, they obviously were not in full and continuous compliance with the lease terms.

Cash In A Flash asserts the debtors had no interest in the lease of the vehicle on the bankruptcy petition date. However, assuming that the statement in paragraph 5 of the affidavit of the officer of Cash In A Flash is accurate, such a statement supports the position of the debtors that they had

a continuing interest in the vehicle even after they lost possession. If the debtor still had the right to exercise a purchase option by paying the rental amounts which were in default and paying the \$1,000.00 option price, plus a \$90.00 setup charge, then it appears that the lease had not actually been terminated by repossession. If that is true, and Cash In A Flash took no other action to terminate the lease, then, on the petition date, the debtors had rights under the lease, including the right to possession upon making certain payments.

If one accepts the debtors' version, rather than that of the officer of Cash In A Flash, they were told they had to pay the full amount of the lease payments plus the purchase option in order to retake possession. If so, it is obvious that the lease had not been terminated under that scenario either. If the lease had been terminated, there would be no further obligation to pay the balance of the rental payments through August 10 of 1999.

Therefore, under either scenario, the lease had not been terminated by repossession (even if such termination is actually permitted by the language of the lease) and the debtors did have an interest in the lease, and in the vehicle, on the bankruptcy petition date. That interest is property of the bankruptcy estate and, pursuant to 11 U.S.C. § 542(a), that property must be returned to the debtors.

There is a pending dispute between the debtors and Cash In A Flash with regard to the legal significance of the document which has been referred throughout this memorandum as a lease. The debtors suggest that the actual transaction was a loan of \$1,000.00 and the granting of a security interest in the vehicle. Cash In A Flash asserts that the document is a true lease with an option to purchase. That particular issue cannot be resolved by this motion, and must await the filing of the appropriate adversary proceeding by either party. However, there is no question that Cash in A Flash has a monetary interest in the vehicle. That interest needs to be adequately protected and, therefore, the debtors shall be required, pending a final determination of the interest of each party, to pay, as adequate protection payments, \$100.00 per month, with the first payment due ten days after the vehicle is delivered to the debtors.

It is, therefore, ordered that Cash In A Flash, Inc., shall, no later than 1:00 P.M. Central Standard Time, March 25, 1999, make the vehicle available to the debtors. Within

ten days thereafter, the debtors shall pay Cash In A Flash \$100.00 and pay \$100.00 per month thereafter until all issues are resolved.

Either party may file the appropriate adversary proceeding, and upon receipt of an Answer, the matter will be scheduled for trial on an expedited basis.

Separate journal entry to be filed.

DATED: March 22, 1999

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:

MARKLEY, SANDRA	391-0343
TURCO, SAM	92

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.

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FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:)	
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PATRICK McATEE and)	
NICOLE McATEE,)	CASE NO. BK99-80004
)	A
<u>DEBTOR(S)</u>)	CH. 13
)	Filing No. 4,7
Plaintiff(s))	
vs.)	<u>JOURNAL ENTRY</u>
)	
)	DATE: March 22, 1999
<u>Defendant(s)</u>)	HEARING DATE: February
)	25, 1999

Before a United States Bankruptcy Judge for the District of Nebraska regarding Motion for Turnover filed by the debtor and Objection filed by Cash In A Flash, Inc.

APPEARANCES

Sam Turco for the debtors
Sandra Markley for Cash In A Flash, Inc.

IT IS ORDERED:

It is, therefore, ordered that Cash In A Flash, Inc., shall, no later than 1:00 P.M. Central Standard Time, March 25, 1999, make the vehicle available to the debtors. Within ten days thereafter, the debtors shall pay Cash In A Flash \$100.00 and pay \$100.00 per month thereafter until all issues are resolved. See Memorandum entered this date.

BY THE COURT:

/s/Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:
MARKLEY, SANDRA 391-0343
TURCO, SAM 92

Copies mailed by the Court to:
Kathleen Laughlin, Trustee
United States Trustee

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