

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF IOWA**

In the Matter of:

Dennis E. Campbell,

Case No. 03-06108-Imj7

Debtor

**MEMORANDUM OF DECISION
(date entered on docket: October 2, 2006)**

Chapter 7 Debtor Dennis E. Campbell (“Debtor”) filed a motion to redeem a 2000 Ford Contour from Community Bank of Muscatine, Iowa (“Bank”) for an alleged Kelley Blue Book wholesale value of \$4,225.00. Contending the redemption amount should be \$6,750.00, the retail value reflected in the National Automobile Dealers Association Guide (NADA Guide), the Bank objected. Having conducted an evidentiary hearing on the controversy and having reviewed the record and the arguments of the parties, the Court now enters its decision finding Debtor has failed to establish by a preponderance of the evidence that the redemption value of the vehicle in issue should be wholesale value.

The Court has jurisdiction of this matter pursuant to 28 U.S.C. section 1334 and the standing order of reference entered by the United States District Court for the Southern District of Iowa. This is a core matter under 28 U.S.C. section 157(b)(2)(K).

BACKGROUND

When Debtor filed a petition for relief under Chapter 7 of the United States Bankruptcy Code, he listed the 2000 Ford Contour as having a current market value of \$8,000.00 on both Schedule B (Personal Property) and Schedule D (Creditors Holding Secured Claims). On Schedule D, he indicated the Bank’s total claim was \$8,600.00.

When Debtor filed his motion to redeem two months later, he alleged that the 2000 Ford Contour had a fair market value of \$4,225.00. In its written objection filed a few days later, the Bank contended the fair market value was \$7,416.00. Meanwhile, the Chapter 7 Trustee filed a Notice of Abandonment that specifically listed the vehicle in issue as property of the estate to be abandoned. No party in interest timely objected to that notice.

At the evidentiary hearing on the contested matter, the Debtor did not offer any exhibits or call any witnesses. The Bank offered and the Court admitted into evidence Exhibits A (N.A.D.A. December 2003 Retail Value Chart), B (N.A.D.A. December 2003 Mileage Table) and C (Installment Contract dated September 10, 2003). The Bank called Jane Phillips, a Bank employee familiar with how the Bank processes repossessed vehicles, as its only witness.

Ms. Phillips testified that the Bank never auctions its repossessed vehicles either directly or indirectly. Instead, the Bank sells its repossessed vehicles either by displaying them on its own property or by placing them on the lots of certain car dealers free of charge. Occasionally, the Bank will advertise that a vehicle is for sale. She explained that the Bank looks at the N.A.D.A. retail value to determine the selling price. Based on Exhibit A, the 2000 Ford Contour had a basic retail value of \$5,925.00. To that was added \$175.00 for alloy wheels, \$75.00 for an anti-theft system, and, based on Exhibit B, \$575.00 for estimated low mileage (35,001 to 40,000) for a total retail value of \$6,750.00. Ms. Phillips reported that the Bank obtains close to retail value in most of its sales. When asked if repossessed vehicles ever result in a selling price lower than retail due to customers being concerned about maintenance issues, she responded that

a mechanic inspects and, if necessary, services all of the Bank's repossessed vehicles. She added that the vehicles are reconditioned to enhance their value.

APPLICABLE LAW

11 U.S.C. section 722 (2000), that applies only in Chapter 7 cases pursuant to 11 U.S.C. section 103(b) (2000),¹ provides:

An individual debtor may, whether or not the debtor has waived the right to redeem under this section, redeem tangible personal property intended primarily for personal, family, or household use, from a lien securing a dischargeable consumer debt, if such property is exempted under section 522 of this title or has been abandoned under section 554 of this title, by paying the holder of such lien the amount of the allowed secured claim of such holder that is secured by such lien.

11 U.S.C. § 722 (2000). Federal Rule of Bankruptcy Procedure 6008, which governs redemption of property from lien or sale, provides:

On motion by the debtor, trustee, or debtor in possession and after hearing on notice as the court may direct, the court may authorize the redemption of property from a lien or from a sale to enforce a lien in accordance with applicable law.

Fed. R. Bankr. P. 6008. The movant bears the burden of proof by a preponderance of the evidence. See In re Ard, 280 B.R. 910 (Bankr. S.D. Ala. 2002) (citing In re Brown, 244 B.R. 603, 610-11 (Bankr. W.D. Va. 2000) that was discussing lien stripping in the context of a Chapter 13 case).

The redemption statute does not expressly set out a valuation standard,² but it does refer to payment of a creditor's "allowed secured claim," and that is determined under 11 U.S.C. section 506(a) (2000) as follows :

¹ 11 U.S.C. section 103(b) (2000) states: "Subchapters I and II of chapter 7 of this title apply only in a case under such chapter." 11 U.S.C. section 722 (2000) appears in Subchapter II (Collection, Liquidation, and Distribution of Estate).

An allowed claim of a creditor secured by a lien on property in which the estate has an interest, or that is subject to setoff under section 553 of this title, is a secured claim to the extent of the value of such creditor's interest in the estate's interest in such property, or to the extent of the amount subject to setoff, as the case may be, and is an unsecured claim to the extent that the value of such creditor's interest or the amount so subject to setoff is less than the amount of such allowed claim. Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

11 U.S.C. § 506(a) (2000). The first sentence of section 506(a) tells a court what it must evaluate, and that is how much of a secured creditor's claim is secured, based on the value of its collateral, and how much is unsecured, based on the difference between the total claim and the value of the collateral. Associates Commercial Corp. v. Rash, 520 U.S. 953, 961, 117 S.Ct. 1879, 1884-85, 138 L.Ed.2d 148 (1997). The second sentence tells a court how to value the secured creditor's collateral, and that is by focusing on the proposed disposition or use of that collateral by the debtor. Rash, 520 U.S. at 962, 117 S.Ct. at 1885.

DISCUSSION

The parties do not dispute that the 2000 Ford Contour is tangible personal property intended primarily for personal, family, or household use or that the Bank's lien secures a dischargeable consumer debt. The Chapter 7 Trustee specifically abandoned the vehicle from the bankruptcy estate pursuant to 11 U.S.C. section 554(a) (2000).³ Therefore, the vehicle may be redeemed pursuant to 11 U.S.C. section 722. The only issue is the amount of the Bank's allowed secured claim. The Debtor argues

² In a redemption setting, fair market value is not a benchmark for valuation of collateral. In re Podnar, 307 B.R. 667, 672 (Bankr. W.D. Mo. 2003).

³ 11 U.S.C. section 554(a) (2000) states: "After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate."

the amount should be determined by using a Kelley Blue Book wholesale value because creditors typically do not obtain retail prices for repossessed vehicles. Relying on the evidence presented, the Bank argues it is a small creditor that routinely sells its repossessed vehicles locally at close to retail price and, therefore, the amount should be based on the NADA retail value.⁴

Unlike the Chapter 13 debtors in the Rash case, the Debtor herein is not seeking to retain and to use the 2000 Ford Contour while paying the Bank the present value of the vehicle over time pursuant to 11 U.S.C. section 1325(a)(5)(B) (2000).⁵ In that cram down context, the United States Supreme Court held that the replacement-value standard, “the price a willing buyer in the debtor’s trade, business, or situation would pay to obtain like property from a willing seller,” was the appropriate standard. Rash, 520 U.S. at 960, 117 S.Ct. at 1884. The replacement-value standard “distinguishes retention from surrender and renders meaningful the key words ‘disposition or use.’” Rash, 520 U.S. at 962, 117 S.Ct. at 1885.

Since the Debtor herein is not proposing to surrender the 2000 Ford Contour but rather is seeking to repurchase it for a lump sum, the Rash replacement-value standard does not best reflect the disposition or use in a redemption setting

⁴ In its written objection to the motion, the Bank also asserted that its secured claim should include two-thirds of the value of the warranty and service contract. The Bank, however, neither offered a copy of the contract nor presented any testimony explaining the terms of the contract.

⁵ 11 U.S.C. section 1325(a)(5)(B) (2000) states:

(a) Except as provided in subsection (b), the court shall confirm a plan if—

....
(5) with respect to each allowed secured claim provided for by the plan—

....
(B)(i) the plan provides that the holder of such claim retain the lien securing such claim;
and

(ii) the value, as of the effective date of the plan, of property to be distributed under the plan on account of such claim is not less than the allowed amount of such claim.

11 U.S.C. § 1325(a)(5)(B) (2000).

according to most courts deciding redemption issues in cases filed prior to the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. The majority viewpoint has favored a liquidation-value. For example, in Triad Fin. Corp. v. Weathington (In re Weathington), 254 B.R. 895 (B.A.P. 6th Cir. 2000), the Sixth Circuit Bankruptcy Appellate Panel, referring to Associates Commercial Corp. v. Rash, 520 U.S. 953 (1997), found that the

...Rash analysis of valuation is useful in the present case. However, because the decision in Rash only dealt with the issue of valuation in a Chapter 13 cramdown, it is not binding in this Chapter 7 case. After Rash, the bankruptcy court decisions addressing the valuation of collateral in the context of a Chapter 7 redemption have recognized that the use and disposition of collateral in the Chapter 7 redemption context is quite different from the Chapter 13 cramdown context. These decisions have thus determined that the replacement value is not an appropriate valuation standard. Rather, these cases conclude that the creditor's allowed secured claim in these circumstances should be determined by the liquidation value, the amount that the creditor would receive if the creditor repossessed and sold the collateral in the manner most beneficial to the creditor. See In re Henderson, 235 B.R. 425 (Bankr. C.D. Ill. 1999); In re Dunbar, 234 B.R. 895 (Bankr. E.D. Tenn. 1999); In re Williams, 224 B.R. 873 (Bankr. S.D. Ohio 1998); and In re Donley, 217 B.R. 1004.

Triad, 254 B.R. at 899. The court used the terms "liquidation" and "wholesale" valuation interchangeably, finding that both terms referred to the secured creditor's expected recovery upon repossession and sale by auction or other wholesale means. Id. at n.1. The court found that the liquidation value best reflected Congressional intent because the commercial reality is that creditors that repossess vehicles most often sell them wholesale at auctions. "Indeed, because the process of repossessing and selling a vehicle involves some additional cost to the creditor, it is likely that when a debtor pays the creditor the liquidation value of a vehicle to redeem it, the creditor may actually receive more money than if it had repossessed the vehicle." Id.

In this case, the Debtor provided no evidence in support of his contention that the wholesale value of his vehicle was \$4,225.00. He presented no testimony or exhibits about the condition of his vehicle. The Bank, however, established that it is a creditor that does not sell repossessed vehicles at auction. It provided a witness that credibly explained why the Bank's disposition of repossessed vehicles through local direct sales was commercially reasonable for this particular small creditor. Nevertheless, Ms. Phillips acknowledged that the Bank repairs and reconditions vehicles as needed for such sales. Since redemption does not equate with a debtor purchasing the vehicle in a repaired and reconditioned state and since N.A.D.A. retail values for used cars assume the cars have been cleaned, repaired, reconditioned and otherwise prepared for sale by an automobile dealer, the lack of facts regarding the condition of the 2000 Ford Contour hampers the Court's ability to determine an appropriate redemption value. Accordingly, under the particular circumstances of this case and unless the parties have reached another agreement while this matter has been pending under advisement, the Debtor may redeem the 2000 Ford Contour from the Bank for \$6,075.00 which is 90% of its total retail value. See In re Mayland, No. 06-10283, 2006 WL 1476927 (Bankr. M.D.N.C. May 26, 2006).⁶

CONCLUSION

WHEREFORE, for the reasons set forth in this Memorandum of Decision, the Court finds that the Debtor has failed to establish by a preponderance of the evidence

⁶ Unlike the pending case, In re Mayland, No. 06-10283, 2006 WL 1476927 (Bankr. M.D.N.C. May 26, 2006) is a decision interpreting the proper valuation standard for a vehicle in a Chapter 7 case under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. The court in that case comes to the conclusion that "[u]sing ninety percent (90%) of the NADA retail value of a vehicle as a starting point for valuing the vehicle is therefore consistent with new Section 506(a), consistent with prior practice in this District, and consistent with the assumptions inherent in the NADA Guide." Id. at 2.)

that the value of the 2000 Ford Contour for the purpose of redeeming the vehicle from Community Bank is the Kelly Blue Book wholesale value. Unless the parties have reached another agreement while this matter has been pending under advisement, the Debtor may redeem the 2000 Ford Contour for \$6,075.00.

A separate Order shall be entered accordingly.

/s/ Lee M. Jackwig
LEE M. JACKWIG
U.S. BANKRUPTCY JUDGE

Parties receiving this Order from the Clerk of Court:
Electronic Filers in this Chapter Case