

THIS OPINION IS NOT INTENDED FOR PUBLICATION

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

IN RE:) CASE NO. 00-51602
)
GREGORY & LYNN SHOULTS,) CHAPTER 7
)
DEBTOR(S)) JUDGE MARILYN SHEA-STONUM
)
) **ORDER RE: TRUSTEE'S**
) **NOTICE OF INTENT TO SELL**
) **PROPERTY AND DEBTORS'**
) **EXEMPTION**

This matter comes before the Court on the chapter 7 trustee's notice of intent to sell property [**docket #26**] and the debtors' objection thereto [**docket #28**] (the "Objection"). After a hearing on the matter, the parties were given additional time in which to file memoranda in support of their respective positions. Thereafter the matter was taken under advisement.

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. It is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A) and (B) over which this Court has jurisdiction pursuant to 28 U.S.C. §1334(b). Based upon the arguments of counsel at the hearing, the parties' supplemental pleadings and the documents of record in this chapter 7 case, the Court makes the following findings of fact and conclusions of law.

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FACTS

Debtors filed a voluntary chapter 7 petition on May 30, 2000. On their Schedule B - Personal Property, debtors listed, *inter alia*, a 1996 Jeep Cherokee Sport (the "Vehicle") which they valued at \$8,800.00.¹ On their Schedule D - Creditors Holding Secured Claims, debtors listed National City Bank ("NCB") as holding a \$4,900.82 lien on the Vehicle and on their Schedule C - Property Claimed as Exempt, debtors claimed a \$1,000.00 exemption in the Vehicle pursuant to Ohio Revised Code §2329.66(A)(2) and a \$400.00 exemption in the Vehicle pursuant to Ohio Revised Code §2329.66(A)(18). On their Statement of Intention, debtors indicated that they intended to reaffirm the Vehicle pursuant to 11 U.S.C. §524(c) and on September 22, 2000, debtors filed with the Court a Reaffirmation Agreement regarding the Vehicle which they had entered into with NCB.

Given debtors' valuation of the Vehicle, the chapter 7 trustee determined that there existed \$2899.18 of excess equity net of the applicable exemption (the "Excess Equity") and that the Vehicle should be liquidated so that the Excess Equity could be realized for the benefit of unsecured creditors. Because debtors' intent was to retain the Vehicle, the chapter 7 trustee conveyed an offer to debtors to allow them to redeem the Vehicle from the chapter 7 estate. On October 25, 2000, the chapter 7 trustee filed a "Motion to Compromise Debtors' Equity in Personal Property" (the "Motion to Compromise"), which set forth, in part, the following:

The debtor's 1996 Jeep Cherokee (owned by husband) which, pursuant to appraisal . . . had a fair market value at the time of filing of approximately \$8,800.00. This vehicle is encumbered by a lien in favor of

¹ Debtors' Schedule B has never been amended in this case.

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National City Bank with a payoff balance as of the date of filing of approximately \$4,900.00, and the vehicle is further subject to an exemption in the amount of \$1,000.00 leaving an apparent equity of \$2,900.00.

The debtors have offered to pay said \$2,900.00 to the estate so as to redeem their equity in this vehicle, rather than subject this vehicle to liquidation. In addition, the debtors own a hot tub which has an estate value, after application of all exemptions, in the approximate amount of \$400.00 and the debtors have offered to redeem their equity in this hot tub for the additional sum of \$400.00, thus making the debtors' total obligation to the estate \$3,300.00.

A copy of the Motion to Compromise was served upon debtors, their counsel and all creditors and no objections were filed.

On November 16, 2000, debtors filed a "Notice of Rescission" of the Reaffirmation Agreement with NCB. On December 11, 2000, NCB filed a "Motion for Order Directing Abandonment" regarding the Vehicle [**docket #15**]. In its motion, NCB contended that the Vehicle was "a cumbersome asset of inconsequential value to the estate" with the following value and liens: Value per NADA of \$5,825.00; Movants' Lien of \$4,817.22; and Exemption Entitlement of \$0.00. On December 21, 2000, debtor-husband filed an "Objection to Motion for an Order Directing Abandonment." As a basis for his objection, debtor-husband contended:

(1) Debtor has always asserted exemptions totaling \$1,400.00 in the subject vehicle, and vigorously reasserts them now, under ORC2329.66 A(2) and A(18).

(2) A tentative agreement had been reached with Trustee Corzin on resolving any issues related to this subject vehicle. In conformance with that, Debtor filed a rescission of their [sic] reaffirmation with NCB In the event that the court finds the Trustee is abandoning this property, Debtor would reinstitute the reaffirmation agreement and continue to possess the vehicle.

On December 22, 2000, the trustee filed an "Amended Motion to Compromise Debtor's Equity in Personal Property" [**docket #17**] (the "Amended Motion to

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Compromise"). The text of that motion set forth:

Now comes Harold A. Corzin, Chapter 7 Trustee herein, and amends the motion to compromise the debtor's [sic] equity in personal property filed on October 25, 2000, by deleting any and all references to a redemption of equity in the debtors' 1996 Jeep Cherokee which will be liquidated by the Trustee. The only redemption shall be a redemption of the debtors' hot tub for he [sic] sum of \$400.00. In all other respects, the Motion to Compromise shall remain unmodified and unaltered.

A copy of the Amended Motion to Compromise was served upon debtors, their counsel and all creditors and no objections were filed.² Also on December 22, 2000, the chapter 7 trustee filed an objection to NCB's motion regarding abandonment of the Vehicle. On January 8, 2001, NCB withdrew its motion regarding abandonment of the Vehicle.

Given debtors' failure to redeem the Vehicle from the estate, the trustee, on January 23, 2001, filed a notice of his intent to sell the Vehicle free and clear of all liens and not subject to any exemption rights of debtors. On February 6, 2001, debtors filed the Objection based upon the fact that the trustee did not propose to pay debtors any exemptions from proceeds of the sale of the Vehicle. Neither the Motion to Compromise nor the Amended Motion to Compromise were ever granted pursuant to an Order of this Court and since the filing of their petition until sometime in February 2001, debtors were in possession and had use of the Vehicle.

DISCUSSION

As illustrated by the above background facts, the dispute revolves around an agreement between debtors and the chapter 7 trustee that was never fully consummated

² Debtors did pay the estate \$400.00 to redeem their equity in the hot tub and no dispute exists regarding that asset of the estate.

³ The Court relies upon the submission of proposed, agreed orders in these circumstances and counsel did not submit such a document addressing this matter.

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and never addressed in an Order of this Court.³ Debtors contend that because an Order was never entered and because they properly claimed an exemption in the Vehicle on their Schedules, the trustee is required to pay them the entire exemption amount from any proceeds in excess of NCB's lien that he might receive when the vehicle is liquidated. The Trustee contends that debtors utilized their exemption in the Vehicle as part of the consideration in their agreement to redeem the Vehicle from the estate and that he is under no duty to distribute any excess proceeds from the sale of the Vehicle to debtors. Neither party, however, has provided the Court with any legal authority that directly supports their position.

Both the debtors and the trustee attached miscellaneous correspondence to their pleadings and argue in their briefs that such correspondence either did (in the trustee's case) or did not (in debtors' case) create a binding contract regarding debtors' redemption of the Vehicle from the estate. Such correspondence and argument alone is not sufficient evidence for this Court to determine the issue of contract formation. *See, e.g. Cuyahoga County Hosps. v. Price*, 581 N.E. 2d 1125, 1128 (Ohio Ct. App. 1989) (noting that to recover on an express contract, a proponent must prove the existence of an agreement, based on a meeting of the minds and on mutual assent, to which the parties intend to be bound). *See also Mead Corp. v. McNally-Pittsburgh Mfr. Corp.*, 654 F.2d 1197, 1206 (6th Cir. 1981) (noting that pursuant to Ohio law, questions of contract formation and intent are generally factual issues to be resolved by a fact finder after a review of the evidence). However, even it were determined that no contract was formed, such a finding

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is not determinative as to whether debtors are entitled to an exemption in the Vehicle.

Because no objection to debtors' claimed exemption in the Vehicle was filed, that exemption is deemed allowed pursuant to §522(l) of the Bankruptcy Code, but based upon the values ascribed by the debtors in their Schedules and given debtors' intention to retain the Vehicle and their negotiations (and possible contract) with the chapter 7 trustee to redeem the Vehicle through payments to the estate, the chapter 7 trustee did not immediately attempt to liquidate the collateral to recover value for the estate. This delay in sale was caused solely by debtors who led the trustee to believe that the estate would recover a substantial portion of the Excess Equity without having to incur the cost of liquidation. Because of debtors' failure to redeem, the issue of the Vehicle's depreciation must be addressed. In addition only the debtors have benefitted from the delays that they have caused because through it all they have had the use of this estate property for approximately eight months.⁴ *Cf. Provencher v. Berman (In re Berman)*, 699 F.2d 568 (1st Cir. 1983).

Based upon the foregoing, the Court determines that debtors' \$1,400.00 exemption in the Vehicle shall be allowed but subordinated, that is, debtors shall be paid on that exemption *only after and only if* the trustee recovers the Excess Equity for the benefit of the estate.

IT IS SO ORDERED.

⁴ A dispute also exists as to whether or not debtors remained current on the \$129.25 monthly payments owed to NCB for the Vehicle from after the petition date until they decided not to redeem from the estate. Neither party, however, provided sufficient evidence to the Court to resolve this dispute and, as such, it will not be discussed further in this Order.

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MARILYN SHEA-STONUM
Bankruptcy Judge

DATED: 6/13/01