Dated: August 16 2005

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No. 05-35664
	)	
Janice McKenzie,	)	Chapter 13
	)	
Debtor.	)	
	)	JUDGE MARY ANN WHIPPLE

MEMORANDUM AND ORDER REGARDING MOTION FOR RELIEF FROM STAY

This case came before the court for hearing on the Motion for Relief from Stay ("Motion") [Doc. # 17] filed by DaimlerChrylser Services North America LLC, successor by merger to Chrysler Financial Company, L.L.C., ("Movant"), and Debtor's response to the Motion [Doc. #21]. Also before the court is a pending Objection to Chapter 13 Plan ("Objection") [Doc. #15] filed by Movant. At the hearing, the court noted that the Motion raises the same issue that is raised in the Objection: whether the automobile lease in issue may now be assumed and the arrearage cured in Debtor's Chapter 13 plan, or whether the lease was terminated pre-petition. The court granted the parties until August 5, 2005, to file a legible copy of the lease in issue and any additional relevant documents, including any legal arguments the parties wished the court to consider. Movant has since filed a copy of the lease and a Memorandum in Support of its Motion and its Objection. Debtor has submitted no further documentation or legal arguments. The underlying facts and documents are not in dispute. After considering the Plan [Doc. #5], the Objection, the Motion, and the briefs in support and in opposition thereto, and after hearing the arguments of counsel, the court will deny

the Motion as moot and will sustain the Objection and deny confirmation of the Plan but will afford Debtor an opportunity to amend the Plan to comply with this order.

FACTUAL BACKGROUND

The following facts are not in dispute. On February 26, 2003, Debtor entered into an agreement with Valiton Motors, Inc., to lease a 2003 Chrysler PT Cruiser. The lease was immediately assigned to Movant. The lease required Debtor to make monthly payments for 36 months. The lease provided Debtor an option to purchase the vehicle at the end of the lease term for $11,769.75, the estimated value of the vehicle at that time. [Doc. #26, unnumbered pp. 2-3]. The lease included the following remedies upon Debtor's default: (1) the lessor may terminate the lease and Debtor's rights to the vehicle before the end of the lease; (2) lessor may take possession of the vehicle without prior demand, unless otherwise required by law; and (3) any other remedy available at law or equity. [*Id.*, ¶ 20 and 23]. The lease is governed by Ohio law. [*Id.*, ¶ 32].

Debtor defaulted in making payments under the lease and Movant repossessed the vehicle on or about May 17, 2005. On May 19, 2005, Movant sent a Notice of Sale to Debtor, stating that on or after June 3, 2005, the subject vehicle would be sold and informed Debtor that the "sale proceeds might not cover your premature termination liability." [Doc. #27, Ex. A]. The Notice also instructed Debtor to contact Movant should she wish "to discuss the possibility of reinstating [the] lease agreement." [*Id.*].

Debtor filed her petition for relief under Chapter 13 of the Bankruptcy Code on June 6, 2005. Thereafter, Debtor requested that Movant return the vehicle to her. Movant refused her request.

LAW AND ANALYSIS

Debtor does not dispute that the lease in issue is a true lease and not a disguised security agreement,[1] and she proposes in her Chapter 13 plan to assume the lease. Movant objects to confirmation of the Chapter 13 plan to the extent the lease is treated as an executory contract to be assumed by Debtor. Movant argues that the lease was terminated prepetition, leaving Debtor no contract to assume. *See In re Williams*, 144 F.3d 544, 546 (7th Cir. 1998)(only unexpired leases can be assumed); *In re Atkins*, 237 B.R. 816, 818 (Bankr. M.D. Fla. 1999)("Nothing remains for the debtor to assume once a lease has expired or is terminated."). The court agrees.

[1] In deciding whether a disputed transaction is a true "lease" or "security agreement" under Ohio law, courts have placed primary emphasis on whether the lease provides the lessee an option to purchase the leased property for little or no consideration. *See Estep v. Fifth Third Bank (In re Estep)*, 173 B.R. 126, 129 (Bankr. N.D. Ohio 1994); *see also* Ohio Rev. Code § 1301.01(KK). In this case, the lease provided Debtor an option to purchase the leased vehicle for $11,769.75, the value of the vehicle at the end of the lease as agreed upon by the parties. This fact is a strong indication that the lease in issue is a "true lease" and not a disguised security agreement. *Estep*, 173 B.R. at 130.

Leases of goods are governed by Chapter 1310 of the Ohio Revised Code, which is Article 2A of the Uniform Commercial Code as enacted in Ohio. Under Ohio law, a "'[l]ease' means a transfer of the right to possession and use of goods for a term in return for consideration." Ohio Rev. Code. § 1310.01(A)(10). Upon a lessee's failure to make a payment when due, a creditor has the right to cancel the lease, to take possession of the property and dispose of the property, as well as any other rights provided in the lease contract. Ohio Rev. Code § 1310.69(A). Unless otherwise provided in the lease agreement, the lessee "is not entitled to notice of default or notice of enforcement from the other party to the lease agreement." Ohio Rev. Code § 1310.48. In this case, there is no dispute that Debtor defaulted in making her payments due under the lease. Under both Ohio law and the terms of the lease, Movant was entitled to retake possession of the vehicle and cancel the lease without notice to Debtor. [2]

The issue before the court is whether DaimlerChrysler cancelled the lease prepetition so that there is now nothing for Debtor to assume in her Chapter 13 case. In *Lamar v. Mitsubishi Motors Credit of America (In re Lamar)*, 249 B.R. 822 (Bankr. S.D. Ga. 2000), the bankruptcy court considered the same issue under the Georgia enactment of Article 2A of the Uniform Commercial Code, which appears to be the same as Ohio law in all respects material to this issue. The lease and the facts at issue in *Lamar* also appear to be essentially the same as in this case. The *Lamar* court held that termination of the lease was effected by the creditor's repossession and subsequent pre-petition notice of sale. In so holding, it rejected the debtors' argument that the separate listing of default remedies in the lease indicated that repossession did not necessarily establish that termination of the lease had occurred upon repossession. It also rejected the argument that the fact that a notice of sale had been sent to the debtors showed that termination had not occurred. Accordingly, the debtors in *Lamar* were not allowed to assume the lease in their Chapter 13 plan and the creditor was not required to turn the vehicle over to the debtors.

This court finds the reasoning of *Lamar* persuasive. As in *Lamar*, the lease at issue in this case conveyed to Debtor only a right to possess the vehicle. This right was subject to the rights of Movant under both the lease and Ohio law to cancel the lease if Debtor failed to make the payments required by the lease. The court finds Movant's repossession of the vehicle in issue and subsequent notice of sale were acts in

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[2]Chapter 1310 distinguishes between cancellation of a lease, Ohio Rev. Code § 1310.01(A)(2), and termination of a lease, Ohio Rev. Code § 1310.01(A)(26). In addressing the issue before the court, DaimlerChrysler and the court have generally used the term "terminated" and not "cancelled." Under the applicable definitions, however, the proper term under the statute appears to be cancellation and not termination. *See* Ohio Rev. Code § 1310.69(C)(1) and (A)(1). The lease uses the word "termination" in its remedies section. This distinction, and DaimlerChrysler's use in the lease and in argument of the word termination, do not affect the outcome here. Under both concepts, all obligations that are still executory on all parties are discharged by either termination, Ohio Rev. Code § 1310.51(B), or cancellation, Ohio Rev. Code § 1310.51(A).

derogation of the lease agreement, signifying its decision to terminate the agreement.[3] The fact that it offered to discuss reinstatement of the lease with Debtor after it repossessed the vehicle is further evidence that Movant exercised it right to terminate the lease since it could be reinstated only if it had previously been terminated. There was no right to reinstatement or redemption in the lease agreement. As explained in *Estep v. Fifth Third Bank (In re Estep)*, 173 B.R. 126, 131 (Bankr. N.D. Ohio 1994):

> While the Code now expressly permits a debtor to assume an executory contract under certain conditions set forth in § 365, there still must be a viable and existing executory contract on the date the petition for relief was filed which could be assumed. If the executory contract was effectively cancelled prior to the intervention of bankruptcy, there remains nothing for the [d]ebtor to assume. *New Media Irjax, Inc. v. DC Comics, Inc. (In re New Media Irjax, Inc.)*, 19 B.R. 199, 201 (Bankr. M.D. Fla. 1982).

Because her Chapter 13 plan may not provide for the assumption of a lease that has been properly cancelled before her bankruptcy petition was filed, Movant's objection to confirmation of the Chapter 13 plan will be sustained.

Although Movant also seeks relief from the automatic stay with respect to retaining possession of the vehicle at issue, the stay does not apply to its exercise of control over the vehicle unless the vehicle is property of the bankruptcy estate. 11 U.S.C. § 362(a)(2); *see Lamar*, 249 B.R. at 828-29. Because Debtor had no remaining interest in the vehicle after Movant repossessed it and terminated the lease, the vehicle is not property of the bankruptcy estate as defined in 11 U.S.C. § 541(a). *See Estep*, 173 at 131. Consequently, the motion for relief from stay filed by Movant will be denied as moot.

THEREFORE, for the foregoing reasons, good cause appearing,

IT IS ORDERED that the Objection [Doc. #15] is sustained and confirmation of the Plan [Doc. #5] is denied; and

IT IS FURTHER ORDERED that Debtor shall have 14 days within which to amend the Plan in accordance with this order; and

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[3]This court does not hold here that repossession alone cannot constitute cancellation of a lease, as the *Lamar* court states. *Cf. Carmichael v. Nissan Motor Acceptance Corp. (In re Carmichael)*, 291 F.3d 1278, 1281 (11th Cir. 2002)(court holds under federal Consumer Leasing Act that repossession after default was "the act which signified to [the debtor] that [the creditor] was exercising its option to terminate the lease."*); Frank Nero Auto Lease, Inc. v. Townsend*, 64 Ohio App. 2d 65, (1979) (explaining that under common principles of bailment, after a lessee defaults, a lessor of a motor vehicle lease "may enforce the agreement and collect future rents or terminate the agreement and repossess the motor vehicle"). This statement in *Lamar* is *dicta*, and this court likewise need not reach that issue in this case where the facts show not just repossession, but also a prepetition notice of sale sent to Debtor. Indeed, in this case, the June 3 date after which Debtor was informed the vehicle would be sold occurred even before Debtor filed her Chapter 13 case on June 6.

IT IS FINALLY ORDERED that the Motion for Relief from Stay [Doc. #17] is **DENIED as moot**.