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ADV. NUMBER: None

JUDGE: M. A. Mahoney

PARTIES: Robert Joseph Pearson, III, Evelyn R. Pearson

CHAPTER: 7

ATTORNEYS:

DATE: 10/21/96

KEY WORDS:

PUBLISHED:

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

ROBERT JOSEPH PEARSON III
EVELYN R. PEARSON

Case No. 96-10376-MAM-7

Debtors.

**ORDER GRANTING MOTION TO REDEEM PERSONAL PROPERTY
FROM AVCO FINANCIAL SERVICES OF ALABAMA, INC.**

This is before the Court on the Debtors' Motion to Redeem various items pursuant to 11 U.S.C. § 722. The matter came on for hearing after Avco Financial Services of Alabama, Inc. (Avco) filed an objection to the redemption. Appearances were as noted in the record. The Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). For the reasons indicated below, the Court is granting the motion and crediting the debtors' redemption debt with postpetition payments to Avco.

FACTS

The pertinent facts are not in dispute. An involuntary Chapter 7 bankruptcy case was filed against the Pearsons on February 1, 1996. On February 7, 1996, with the consent of the debtors, an order for relief was entered. On March 15, 1996, debtors filed their schedules and statement of affairs. In the Chapter 7 Individual Debtor's Statement of Intentions, the debtors indicated that they intended to redeem:

One DTR 486 Computer and Printer	\$ 700.00
Day Bed	100.00
Bed	200.00
Two Chairs	150.00
Coffee Table	25.00
Chair	100.00
Coffee Table	50.00
Two Computers	<u>750.00</u>
TOTAL	\$1,400.00

Although the intention was expressed, the debtors then discussed possible reaffirmation of the debt with Avco. Avco actually sent the debtors a reaffirmation agreement which they signed, but never returned to Avco. Debtors' counsel advised them against reaffirmation. While deciding what to do, the debtors paid Avco either \$1,157.44 or \$1,400.00 during the case. The last payment was made in May, July or August 1996. There was no agreement between the parties as to the character of the payments. The debtors had other assets in which Avco had a security interest which were returned to Avco. The debtors and Avco agree that the redemption price of \$1,400 is fair.

LAW

The parties agree that a redemption is possible under these facts. The parties disagree about whether the payments made by the Pearsons postpetition should be credited to the redemption price or whether they should be treated as payments for usage prior to the reaffirmation.

Avco cites a July 10, 1996, decision of Judge Kahn, *Falu vs Progressive Federal Credit Union (In re Falu)*, Case No. 90-00533, Adv. No. 90-0262, as authority for its view that the payments were gratuitous or were payments for use of the items until a redemption decision was made. Judge Kahn held that payments made by the Falus pursuant to a reaffirmation agreement which was later rescinded did not need to be returned to the debtors after their rescission.

Judge Kahn reasoned that the parties could not be put back to their pre-reaffirmation positions and, therefore, on equitable grounds, it was appropriate for both sides to retain the benefits they had each received to the date of the rescission. This meant that the credit union retained the payments made by the debtors; the debtors retained the money they had been allowed to withdraw from their share account and did not have to return two vehicles sold during the period between reaffirmation and rescission.

The Pearsons argue that the case supports their position in this situation. Avco argues that it supports its position. The result reached was based upon the equities of the case. The Court agrees that an equitable analysis is appropriate in this case too.

The Pearsons did not ever reaffirm their debt to Avco. Therefore, the payments they made were not attributable to a reaffirmation agreement. The value they placed on the items they wish to redeem was their value at the date of the filing of their bankruptcy petition. Therefore, the redemption price of \$1,400 contains payment for the use of the items postpetition. Avco could have sought relief from the stay and obtained adequate protection of the property. It did not.

The Pearsons and Avco discussed reaffirmation, and, in line with that likely decision, the Pearsons paid monthly sums to Avco which Avco accepted. Because of the likely reaffirmation and the payments, Avco did not file a relief from stay motion. On the other hand, the Pearsons valued the merchandise at its value on February 1, 1996, and likely expected that their payments would go to pay whichever type of arrangement they made (if they thought about it at all).

The *Falu* case, as stated above, looked at the equities of the situation. The Court believes that that must also be done in this case. The equities favor the debtors.

1. Avco and the Pearsons knew that either a reaffirmation or a redemption was going to occur as to the listed property. Therefore, payments made by the debtors postpetition had to be for one of those options. If Avco sought adequate protection, it would have needed to file a motion for relief from the automatic stay. No adequate protection is appropriate without a court order.

2. The property to be redeemed was valued as of the filing of the bankruptcy case. If the Pearsons were required to pay an additional \$1,400 now, the payment would be duplicative.

3. There was no evidence that \$1,400 approximated any decrease in value in the property due to depreciation.

For these reasons, the Court holds that the Pearsons must pay \$1,400.00 to redeem the merchandise and any sums paid to Avco since the filing of the petition (either \$1,157.44 or \$1,400.00) shall be credited to that sum. Any amount remaining due shall be paid within 15 days from the date of this order.

THEREFORE IT IS ORDERED:

1. The Motion of the Debtors to Redeem Personal Property from Avco Financial is GRANTED; and

2. The Debtors shall pay \$1,400.00 for the property within 15 days from the date of this order; and

3. Any sums paid by the Debtors to Avco Financial since the date of the filing of the bankruptcy petition shall be deducted from the \$1,400 sum due; and

4. If the parties cannot agree upon the sum that has been paid, the Debtors shall file a motion within 10 days from the date of this order so stating and requesting the Court to schedule an expedited hearing on the matter.

Dated: October 21, 1996

MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE