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JUDGE: M. A. Mahoney

PARTIES: Ann C. Leath, BDK Motor Works, Inc., William C. Beam

CHAPTER: 13

ATTORNEYS: M. D. Lewis, T. P. Ollinger, Jr.

DATE: 11/5/97

KEY WORDS:

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

ANN C. LEATH

Case No. 96-12571-MAM-13

Debtor.

ANN C. LEATH

Plaintiff,

v.

Adv. No. 96-1281

BDK MOTOR WORKS, INC. and
WILLIAM C. BEAM

ORDER AND JUDGMENT FOR PLAINTIFF

Martin D. Lewis, Mobile, AL, Attorney for the Plaintiff
Thomas P. Ollinger, Jr., Mobile, AL, Attorney for BDK Motor Works
and William C. Beam

This matter was tried to the Court on September 16, 1997. The appearances were as noted in the record. The Court read findings of fact and conclusions of law into the record on October 16, 1997 which are incorporated by reference. The Court ordered Plaintiff's counsel to submit an affidavit detailing his attorney's fees by October 24, 1997. The Defendant could respond by November 3, 1997.

The Plaintiff's counsel seeks \$3,770 in attorneys fees. The time spent by counsel and the hourly rates charged are reasonable. The litigation was complex factually and legally.

BDK's counsel asserts that the issues involved preclude a fee award. Also, the fact that the Debtor was unsuccessful in many of her claims is relevant to whether any fee award is appropriate.

BDK is correct in certain respects. Although the Court ultimately determined that the legal issue about which there is a split in authority was not determinative, the Court cannot conclude that the defense of BDK Motor Works or William Beam was without merit or inappropriate. Even though the Court ruled that BDK's position was adequately protected by the October 1, 1996 order allowing BDK's claim as secured and the October 1, 1996 order confirming Ms. Leath's plan and the provision of insurance on the vehicle, BDK believed it did not have to turn the property over to the Debtor because its lien rights arose from a statutory possessory repairman's lien. ALA. CODE § 35-11-110.¹ The issue of when a creditor must turn over property of a debtor legally in possession of the creditor at the time of the filing of the bankruptcy case is not settled. *In re Sharon*, 200 B.R. 181 (Bankr. S.D. Ohio 1996); *In re Knaus*, 889 F.2d 773 (8th Cir. 1989). Compare *In re Young*, 193 B.R. 620 (Bankr. D. Dist. Col. 1996); *Matter of Brown*, 210 B.R. 878 (Bankr. S.D. Ga. 1997). Second, the Court dismissed the case against Mr. Beam. Third, not all of the relief requested by Ms. Leath was awarded. Many of her alleged damage claims were denied. The Court concludes that a little less than one-half of the attorney's fees requested, or \$1,500, should be awarded in light of these circumstances.

¹BDK still questions whether its possessory lien is like a contractual secured claim because upon dismissal of the case, its lien would be voided. 11 U.S.C. § 349. The Court believes BDK's position, although certainly understandable and appropriate, is not valid because the Court can fashion whatever relief is appropriate to protect BDK in the event of a dismissal. *In re Samford*, 102 B.R. 724 (Bankr. E.D. Mo. 1989), *aff'd* 125 B.R. 230 (E.D. Mo. 1991); *In re County of Orange*, 183 B.R. 594 (Bankr. C.D. Cal. 1995); *In re Sorry Charlie's of Upper St. Clair, Inc.*, 100 B.R. 258 (Bankr. W.D. Pa. 1989).

THEREFORE, IT IS ORDERED AND ADJUDGED:

1. The Plaintiff, Ann C. Leath, is awarded the sum of Four Thousand One Hundred Twenty Seven and no/100ths Dollars (\$4,127).

2. The Plaintiff, Ann C. Leath, is awarded the return of the sum paid by her to BDK Motor Works for the repair of her vehicle.

3. BDK Motor Works shall have the right to file a claim in the bankruptcy case for the cost of the repairs to the Debtor's vehicle.

Dated: November 5, 1997

MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE