

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

IN RE:

GEORGE AUGUST HILL,
ELLEN YETTA HILL,

CASE NO. 99-11315-WSS

Debtors.

**ORDER AWARDING ATTORNEY FEES TO
FORD MOTOR CREDIT COMPANY**

This matter came before the Court on the motion for relief from the automatic stay of Ford Motor Credit Company (hereinafter "Ford"). James Johnson appeared for the Debtor, and William Howell appeared for Ford. 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 matter is a core proceeding pursuant to 28 U.S.C. §157(b)(2). After due consideration of the evidence, the arguments of counsel, and the brief submitted by Debtors' counsel, the Court makes the following findings of fact and conclusions of law:

The Debtors filed their chapter 13 petition on April 12, 1999. Prior to filing their petition, the Debtors entered into a sales contract and security agreement with Ford for the purchase of a 1994 Ford Explorer. According to Louis Magee, Ford's representative, the net rebated balance on the account was \$9,280.76 as of October 12, 1999, and the fair market value of the automobile was \$8,825.00. The Debtors' amended chapter 13 plan provided a monthly \$267.94 preference payment to Ford.

On September 27, 1999, Ford filed a motion for relief from the automatic stay. At the time that Ford filed the motion, the Debtors were behind in their Chapter 13 plan payments. However, by the time that the motion for relief was set for final hearing on December 1, 1999,

the Debtors were current on their Chapter 13 payments. Counsel for Ford requested an attorney fee of \$375.00 and costs of \$75.00. The sales contract between Ford and the Debtors contains the following provisions related to fees and costs:

E. Collection Costs: You must pay any cost paid by the Creditor to collect any late payment, as allowed by law. Acceptance of a late payment does not excuse your default or mean that you can keep making payments after they are due. The Creditor may take the steps set forth below if there is any default.

F. Default: You will be in default if (1) you fail to make any payment when it is due, or (2) a bankruptcy petition is filed by or against you, or (3) you have provided false or misleading material information on a credit application related to this contract, or (4) any local, state, or federal authority seizes the vehicle and does not promptly and unconditionally release the vehicle back to you, or (5) you fail to keep any other agreement in this contract. If you are in default, the Creditor may require you to pay at once the unpaid Amount Financed, the earned and unpaid part of the Finance Charge and all other amounts due under this contract. He may repossess (take back) the vehicle, too. He may also take goods found in the vehicle when repossessed and hold them for you.

...

The money from the sale, less allowed expenses, will be used to pay the amount still owed on this contract. Allowed expenses are those paid as a direct result of having to retake the vehicle, hold it, prepare it for sale, and sell it. Lawyers' fees and legal costs permitted by law are allowed too. If there is any money from the sale left (a surplus), it will be paid to you. If the money from the sale is not enough to pay off this contract and costs, you will pay what is still owed to the Creditor if allowed by law. (Emphasis added.)

The Debtors maintain that attorney fees should not be awarded for Ford's counsel because the sales contract does not specifically provide for them for work performed in

connection with a motion for relief from the automatic stay. They further assert that Ford requested only relief from the stay and did not ask for attorney fees or costs in their motion, and did not put on evidence of attorney fees and cost at the hearing on the motion for relief. The Debtors cited In re LaRoche, 115 B.R. 93 (Bankr. N.D. Ohio 1990) in support of their argument that to recover fees and costs under 11 U.S.C. §506, they must be expressly provided for in the contract between the parties, and In re Schwartz, 87 B.R. 41 (S.D. Ohio 1988) as an example of a contract (a mortgage) which lacked the detail required to award attorney fees under §506(b).

The contract at issue in In re LaRoche had no provision for attorney fees or costs, only a reference to a federal statute which allowed for recovery of attorney fees and costs. LaRoche, 115 B.R. at 94-95. In Schwartz, the mortgage contained several paragraphs that allowed the recovery of attorney fees in specific situations. However, the paragraph dealing with foreclosures, the circumstance at issue in Schwartz, did not provide for attorney fees. In re Schwartz, 77 B.R. 177, 181 (Bankr. S.D. Ohio 1987).¹ The bankruptcy court noted that the omission was probably due to the fact that state law did not allow for recovery of attorney fees in foreclosure actions at the time that the mortgage was executed. Schwartz, 77 B.R. at 181. In the present case, the language at issue is less clear. The contract between the Debtors and Ford does state that the Debtors “must pay any cost paid by the Creditor to collect any late payment.” (Emphasis added.) In addition, the paragraph dealing with a default includes lawyer’s fees and costs as allowed expenses for retaking and selling the vehicle in the event of a default. This language does not explicitly provide for payment of attorney fees for filing a motion for relief

¹This case is the lower court’s opinion which was affirmed by the case cited by the Debtors, In re Schwartz, 87 B.R. 41 (S.D. Ohio 1990).

from the stay; however, an attorney fee is an expected cost in retaking a vehicle when a debtor is in bankruptcy. A motion for relief from the automatic stay is a necessary step in repossession. The Court considers an attorney fee to be part of the cost associated with collecting a late payment, incurred as a result of the Debtors' default.

The Debtors emphasize the issue of whether Ford is over-secured or under-secured in its collateral for purposes of awarding attorney fees under §506(b). However, the issue before the Court is not one of determining attorney fees as part of an allowed secured under §506(b). The matter before the Court is a motion for relief from the automatic stay under 11 U.S.C. §362(d). Under this section, "the court shall grant relief from the stay provided under subsection (a) of [§362], such as by terminating, annulling, modifying, or conditioning such stay." (Emphasis added.) The parties have asked the Court to conditionally deny Ford's motion for relief. One of the conditions usually imposed on debtors in this district is the obligation to pay the creditor's attorney fees and costs incurred for bringing the motion for relief. The Court finds that an award of attorney fees and costs are appropriate in the present case as a condition to the stay. But for the Debtors' failure to make their Chapter 13 payments on a timely basis, Ford would not have incurred an attorney fee and costs in filing the present motion. Based on the foregoing, the Court finds that Ford's motion for relief from the automatic stay is due to be conditionally denied. It is hereby

ORDERED that the motion of Ford Motor Credit for relief from the automatic stay as to the 1994 Ford Explorer, VIN # 1FMDU32X6RUD94588, is **CONDITIONALLY DENIED** subject to the following:

1. The Debtors shall make timely payments to the Chapter 13 Trustee.

2. The Debtors shall maintain insurance on the vehicle as required by the terms of their contract with Ford named as loss payee.

3. The Debtors shall pay to Ford a reasonable attorney fee of \$375.00 and costs of \$75.00, payable directly to Ford at \$50.00 per month until paid in full.

DATED: March _____, 2000

WILLIAM S. SHULMAN
U.S. BANKRUPTCY JUDGE