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ADV. NUMBER: 95-1006
JUDGE: M. A. Mahoney
PARTIES: Jefferey M. Branum, Michelle Lee Branum, Azalea City Federal Credit Union
CHAPTER:
ATTORNEYS: J. M. Orr, Jr., H. V. Satterwhite
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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

JEFFEREY M. BRANUM and
MICHELLE LEE BRANUM,

Debtors.

Case No. 94-12491-MAM

JEFFEREY M. BRANUM and
MICHELLE LEE BRANUM,

Plaintiffs,

v.

Adv. No. 95-1006

AZALEA CITY FEDERAL
CREDIT UNION,

Defendant.

ORDER DENYING DEBTORS' COMPLAINT TO DETERMINE OBLIGATION UNDER LOAN AGREEMENT

James M. Orr, Jr., Mobile, AL for Plaintiffs
Harry V. Satterwhite, Mobile, AL for Defendant

This matter came before the Court upon the complaint of Jefferey M. Branum and Michelle Lee Branum ("Debtors" or "Branums") to determine their obligation under a loan agreement with Azalea City Federal Credit Union ("Defendant" or "Credit Union" or "Azalea"). Specifically, Branums' complaint seeks to determine the nature, extent and validity of the debt to Defendant.[1]

The Court has jurisdiction over this matter pursuant to 11 U.S.C. §§ 157 and 1334. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (I) and (K). Proper notice of

[1]The Debtors' complaint asked the Court to determine the dischargeability of Azalea's debt and to avoid its lien as well. These requests for relief are incorporated in a determination of the nature, validity and extent of Azalea's lien and will not be discussed separately.

the hearing was given and appearances were as noted in the record. Based upon the reasoning below, the entire debt of the Branums to the Credit Union is not dischargeable and the lien and debt are valid.

On or about November 28, 1990, Michelle L. Blakenship Branum, entered into an "open-end" credit plan with Defendant known as a Loanliner Credit Agreement ("Loanliner Plan" or "Plan"). Her account number was 425597264. Under a loanliner agreement, Debtors may borrow money from time to time as needed. Each periodic amount is known as an "advance." Each advance is a "subaccount."

In the Branums' Loanliner Plan, there was both a cross-collateralization[2] and cross-default clause.[3] The Debtor signed this contract, agreeing to be bound by all of its terms and conditions.

The Branums requested advances under the Loanliner Plan. By April 13, 1994, Debtors owed Credit Union $1,354.04. On April 14, 1994, Debtors borrowed $8,836.35 ("First Loan") from Defendant for debt consolidation purposes. Security for the First Loan was a 1988

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[2]The section of the Plan entitled "Security Interest" states in part:

> Property given as security under this plan or for any other loan may secure all amounts you owe the credit union now and in the future.

Loanliner Plan at p. 3.

[3]The section of the Plan entitled "Default" states in part:

> You will be in default if you do not make a payment of the amount required when it is due. . . . You will be in default if you die, file for bankruptcy, become insolvent . . . When you are in default the credit union can demand immediate payment of the entire unpaid balance under this plan without giving you advance notice. If demand for immediate payment has been made, the shares and deposits given as security for this Plan can be applied toward what you owe. (Emphasis added.)

Loanliner Plan at p. 3.

Oldsmobile Cutlass Calais automobile and a 1966 Chevrolet pickup truck. The Disbursement Voucher and Security Agreement signed by both debtors listed the account number 425597264, the same number listed on the initial Loanliner Plan.

On June 15, 1994, Debtors borrowed $13,021.17 from Defendants to finance the purchase of a 1994 Geo Prizm automobile ("Second Loan"). The Geo Prizm was offered as security for this loan. The Disbursement Voucher and Security Agreement executed for this Second Loan also referenced account number 425597264.

On November 29, 1994, Debtors voluntarily filed for protection under Chapter 7 of the Bankruptcy Code. At that time, Debtors owed the Defendant a total of $21,510.10 pursuant to the Loanliner Plan.

On December 8, 1994, Debtors sought to reaffirm the debt on the Second Loan for the Geo Prizm which had a balance of $12,235. They did not wish to reaffirm the First Loan or the other debt under the Plan. The Credit Union found the offer of the Debtors to bifurcate their debt unacceptable. Since the Loanliner Plan contained cross-collateral and cross-default clauses, the Credit Union asserted that all of the debt must be reaffirmed, or all of the security must be surrendered or redeemed. 11 U.S.C. § 521(2). Consequently, the Credit Union has refused Debtors' attempts to pay solely the Second Loan through a reaffirmation agreement. Because of this dispute, this proceeding ensued.

Loanliner Plan

Cross-collateralization and cross-default provisions are enforceable according to their terms under Alabama law.[4] The United States Supreme Court has long recognized the rights of states to regulate such transactions. *Butner v United States,* 440 U.S. 48, 99 S. Ct. 914, 59 L. Ed.

[4]It is not uncommon for the terms "dragnet clause" or "cross-security clause" to be used when referring to such provisions.

2d 136 (1979). In *Dixie Ag. Supply, Inc. v Nelson,* 500 So. 2d 1036 (Ala. 1986), the Alabama Supreme Court specifically rejected the notion that such clauses must explicitly and unambiguously describe each debt and item of property secured. A dragnet clause must, however, clearly refer to a specific debt.

> It is Alabama law, however, that a dragnet clause which, although not itemizing the existing indebtedness, does by clear and unequivocal terms, reference and include a specific and identifiable antecedent debt, extends the coverage of the security agreement to that antecedent debt. The dragnet clause, therefore, may be given the full effect of its terms.

Id. at 1040.

Further upholding the validity of cross-security clauses, in *Badie v. First Capital Mortgage Corp., 576 So.* 2d 191 (Ala. 1991), the Alabama Supreme Court indicated Ala. Code § 7-9-204 (1975) generally allows open-ended security agreements. In *Badie,* the court determined that "such [cross-collateral] clauses may secure the debts between the parties to the agreement other than the debt that is specified in the agreement." *Id.* at 191 (brackets added). *See also Ex parte Chandler,* 477 So. 2d *360* (Ala. 1985).

Future advance clauses also have been held valid and enforceable in Alabama. *American Nat'l Bank &Trust Co. of Mobile v. Robertson,* 384 So. 2d 1122, 1124-25 (Ala. Civ. App. 1980); *see also In re Kennemer,* 143 B.R. 275 (N.D. Ala. 1992). In *Kennemer,* the court upheld the validity of clauses regarding future advances, maintaining that they do not require the description of the exact property that may serve as collateral for some future advance. *Id.* at 278. *See Southern Ready Mix, Inc. v. AmSouth Bank, N.A.,* 576 So. 2d 188 (Ala. 1991). In this case, the Loanliner Plan states that "all" advances are made under the terms of the Loanliner contract; the contract conspicuously contains cross-collateral and cross-default provisions. Therefore, the contract, although each new subaccount does not describe the total security package each time a

new advance is made, makes it clear that any security offered secures the entire debt. This is what the case law allows.

It is not a defense to state that the Debtor, Michelle Branum, did not understand that the Geo Prizm was security for the entire debt. The Debtor freely signed the Loanliner Plan. In fact, the Loanliner Plan itself instructed all parties to read the entire agreement thoroughly before signing. It is well settled law in Alabama that absent fraud, misrepresentation or deceit, a debtor's ignorance of her agreement does not release her from the terms of a contract. *American Nat'l Bank & Trust Co. of Mobile v. Robertson, supra* at 1125.

Debtors also claim that the after-acquired property clause found in the Loanliner Plan is unlawful pursuant to Ala. Code § 7-9-204(2) (1975). They allege that the Geo Prizm is a "consumer good" and as such it cannot serve as security for preexisting loans even though open-ended credit arrangements are typically enforceable. They argue that the car can only secure the advance with which the car was purchased, relying on the language of Ala. Code § 7-9-204 (1975) which states in relevant part:

> After-acquired property; future advances.
>
> (1) Except as provided in subsection (2), a security agreement may provide that any or all obligations covered by the security agreement are to be secured by after-acquired collateral.
>
> (2) No security interest attaches under an after-acquired property clause to consumer goods other than accessions (Section 7-9-314) when given as additional security unless the debtor acquires rights in them within 20 days after the secured party gives value.

"Consumer goods" are defined in Ala. Code § 7-9-204 (1975) as:

> (1) "Consumer goods" if they are used or bought for use primarily for personal, family or household purposes.

The Geo Prizm is a"consumer good."

The first issue to be addressed in determining the applicability of Section 9-204(2) to the Branums' debt is whether the Geo Prizm was acquired within 20 days of Azalea advancing the Branums the money to purchase it. It cannot be resolved due to the lack of evidence. Although it seems likely that the Branums purchased the Geo Prizm within 20 days of receiving $13,021.17 from Credit Union, the facts presented are insufficient for the Court to so rule. If the exchange was contemporaneous (within 20 days), then the after-acquired clause is valid and the Geo Prizm is security for the Second Loan. If the Geo was not purchased within 20 days of the Second Loan, then the clause does not result in a security interest in the Geo Prizm at all. Therefore, the parties must submit facts to the Court as to when the Prizm was acquired. A hearing on this issue will be held on May 16, 1995 at 9:30 a.m. if the parties do not submit a written stipulation as to the issue of the date the Branums "acquired rights" in the Geo Prizm.

If the Geo Prizm was acquired within the 20-day window, and is security for the Second Loan, is it also security for the First Loan and other Loanliner debt? The fact that the auto was not acquired within 20 days of the First Loan does not negate the effect of the cross-collateral provision. Section 9-204(2) speaks to the attachment (or not) of the security interest. It attaches if the secured party gives value no more than 20 days before the debtor gets the property to be used as collateral. This issue remains to be determined in this case. If the rights in the car were acquired within 20 days of the loan, the Credit Union did not need to give all of the value under the Loanliner Plan to the Branums within 20 days of the Branums obtaining the Prizm. The Credit Union only had to give some value. Azalea did this. When value was given, the Credit Union had a lien on the Prizm. Once the lien attached, the cross-collateral provision of the Loanliner Agreement became effective. The Prizm was collateral for all loans from Azalea under the Loanliner Plan. Section 9-204(2) only speaks to the attachment of the lien; it does not govern what happens after the lien attaches pursuant to other provisions of parties' contracts. Ala. Code

§ 7-9-108 (1975) also makes clear that after-acquired collateral "shall be deemed to be taken for new value and not as security for an antecedent debt." It can be collateral for value given prior to the last advance of value. Therefore, if the Branums obtained rights in their Geo Prizm no later than July 15, 1994, the Prizm is security for the whole loan. The further hearing will determine this.

The Reaffirmation

If the Court determines that Azalea has a lien on the Geo Prizm, the Branums have three options in regard to their contract with Azalea: surrender the collateral, redeem the collateral, or reaffirm the debt. 11 U.S.C. § 521 (2); *In re Taylor,* 3 F.3d 1512 (11th Cir. 1993).[5] To reaffirm, the debtor and the holder of a claim enter into a new agreement regarding the further extension of credit. *In re Hunter,* 121 B.R. 609 (Bankr. N.D. Ala. 1990); 11 U.S.C. § 524. Section 524 uses the term "agreement" several times. By definition, a reaffirmation agreement involves voluntary participation by all parties. In fact, in *Taylor, supra,* the Eleventh Circuit embraced this voluntary standard. Quoting from *In re Edwards,* 901 F.2d 1383 (7th Cir. 1990), the *Taylor* court found in part that:

> Reaffirmation is supposed to involve a fully voluntary negotiation on both sides. Permitting a debtor to retain property while keeping up installment payments without a reaffirmation of personal liability allows a debtor to force a new arrangement on the creditor. This negates the voluntarism contemplated by the statute.

In re Taylor, 3 F.3d at 1515. The Credit Union has the right to condition its consent to the reaffirmation of the Geo Prizm debt upon the reaffirmation of Debtors' entire Loanliner indebtedness (if the lien is proven). *Matter of Brady,* 171 B.R. 635 (Bankr. N.D. Ind. 1994).

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[5]As the court noted in *In re Whatley,* 16 B.R. 394 (Bankr. N.D. Ohio 1982), the debtor could have filed a Chapter 13 petition. This would have allowed installment payments on the Loanliner Plan obligation. Since the Branums chose Chapter 7 protection, they must now accept its consequences.

Accord Home Owners Funding Corp. of America v. Belanger (In re Belanger), 962 F.2d 345 (4th Cir. 1992) states:

> Reaffirmation requires the consent of the creditor in order to comply with § 524(c). This enables the creditor to compel the debtor either to meet the creditor's terms of reaffirmation or to surrender the property.

Indeed, based on the Loanliner Plan and applicable Alabama state law, the Branums have no choice but to reaffirm the entire debt if they wish to keep the Geo Prism. This entire issue can be summarized as follows:

> The secured creditor holding a lien on collateral of the debtor to a discharged debt may not propose an agreement or order to require the debtor to reaffirm; and the debtor likewise may not unilaterally propose an agreement or order to require the creditor to reaffirm. The statute clearly anticipates an executed, voluntary "agreement between" the debtor and creditor prior to application for approval by bankruptcy court at the discharge hearing. (Emphasis added.)

Matter of Vinson, 5 B.R. 32 (N.D. Georgia 1980); *See also In re Pendlebury,* 94 B.R. 120 (Bankr. E.D. Tenn. 1988); *In re Schweitzer,* 19 B.R. 860 (E.D.N.Y. 1982); *In re Whatley, 16* B.R. 394 (N.D. Ohio, 1982); *In re Cruseturner,* 8 B.R. 581 (D .Utah 1981). Of course, any agreement to reaffirm and the resulting agreement or any decision not to reaffirm and the precipitating factors must be based upon grounds which are constitutional and not unconscionable. In the immediate case, Azalea is not commanding the Branums to reaffirm; however, to reaffirm, it is requiring that Debtors live up to the conditions of the underlying contract. This is appropriate under the law and the choice will now be the Branums'.

Therefore, it is ORDERED that:

1. A further hearing on this matter is set for May 16, 1995 at 9:30 a.m. unless a written fact stipulation is filed before that date to determine when the Debtors acquired rights in the Geo Prizm.

2. A judgment will be entered consistent with these findings and conclusions once the May 16 hearing is held or the fact stipulation is presented.

Dated: April 25, 1995

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MARGARET A. MAHONEY
U.S. BANKRUPTCY JUDGE