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JUDGE: M. A. Mahoney

PARTIES: Donald W. Koontz, Jr., Lonnie Mixon

CHAPTER: 7

ATTORNEYS: L. C. Williams, T. O. Bear

DATE: 9/30/98

KEY WORDS:

PUBLISHED: No

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

DONALD W. KOONTZ, JR.

Case No. 95-13354-MAM-7

Debtor

LONNIE MIXON, Trustee

Plaintiff

v.

DONALD W. KOONTZ, JR.

Adv. No. 98-1089

Defendant.

**ORDER AND JUDGMENT IN FAVOR OF TRUSTEE
FOR DAMAGES, RENT AND DIRECTING DEBTOR
TO VACATE CERTAIN REAL PROPERTY**

This case is before me on the trustee's complaint for waste committed to the estate property by Donald W. Koontz, Jr. (Koontz), for rent from Koontz for the use and occupancy of property of the bankruptcy estate, and for an order directing Koontz to vacate the property of the estate. This court has jurisdiction to hear this matter pursuant to 28 U.S.C. § § 1334 and 157 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b) and the court has the authority to enter a final order. For the reasons indicated below, judgment is entered in favor of the trustee.

FACTS

On December 4, 1995, Koontz filed a chapter 7 bankruptcy case. He owned five vehicles which were scheduled in his bankruptcy filing. Koontz valued these vehicles at \$32,000 and was allowed an exemption of \$1 in their value. On March 15, 1995, prior to his bankruptcy, Koontz had granted a security interest in the five vehicles to Helen F. O'Connor. The security interest

was set aside in this court's February 6, 1998 Order and Judgment Avoiding Security Interest of Helen F. O'Connor, Adv. No. 97-1263.

On February 14, 1996, the trustee started all of the vehicles and examined them for obvious defects. After O'Connor's lien was avoided in 1998, the trustee sought a purchaser for the vehicles. Prior to the lien avoidance, there had been no equity for the estate, so the trustee had not tried to sell the vehicles. John I. Burge, Jr. (Burge) agreed to purchase the vehicles. In the early part of 1998, when Burge inspected the vehicles before purchase, he found that they were missing parts which made them inoperable; other parts such as tires and interior instrument panels were missing; one vehicle had been repainted. In sum, the vehicles were not left intact over the two-year period.

Koontz testified that he had left the vehicles with his former business partner, Toney Gautsche (Gautsche), who had been working on the cars. He also stated that he was trying to sell the vehicles prior to the avoidance of the O'Connor lien to pay off the lien. Koontz also thought that an agreement he made with the trustee to pay him for certain nonexempt property included the vehicles.

At trial, Burge testified as an expert regarding the value of the vehicles. The following chart lists the five vehicles and their value as scheduled by Koontz when he filed for bankruptcy, their value in February of 1996 (before value) according to Burge's testimony, and their value in the early part of 1998 when Burge went to pick up the vehicles (after value). The decline in value resulted from the disappearance of the engines and numerous other parts.

VEHICLE	SCHEDULED VALUE	BEFORE VALUE	AFTER VALUE
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1973 Dodge Challenger 1973 VIN JH23G3B216107	\$3,500	\$2,500	\$1,000-1,200
1973 Dodge Challenger VIN JH23G3B506858	\$4,500	not provided	\$700 ¹
1972 Dodge Challenger VIN JH23G2B460324	\$6,500	\$6,000-6,500	\$500
1973 Plymouth Cuda VIN B523H3B315702	\$9,500	\$4,500-5,000	\$1,000-1,200
1970 Plymouth Cuda VIN B523H0B401308	\$8,500	\$6,500	\$1,200-1,500
TOTAL	\$32,500	\$19,500-20,500 +	\$4,400

On three different occasions, the trustee's attorney notified Koontz's attorney in writing that Koontz agreed not to transfer, drive, or alter the vehicles in any way. *See*, Trustee's Exhibit 3. Koontz denied ever seeing these letters.

Koontz's chapter 7 schedules also listed non-homestead real property described as Elberta East Subdivision Lot 5 slide 1216A, Baldwin County, Alabama (the building). Koontz has continued to occupy the building since he filed for bankruptcy on December 4, 1995. From that time through July of 1998, Koontz leased part of the building to Southern Computer Services for \$100 or \$200/month, although the exact amount of rent received cannot be determined because he did not keep any records. Koontz testified that he paid about \$200-250/month for the building's utilities. Until April of this year, Koontz also made monthly payments of \$600 for a first mortgage on the building.

¹ Burge did not provide a value for one of the 1973 Challengers. He agreed to pay \$4,400 for all five of the vehicles in their "after" condition. I will set the "after" value of the 1973 Challenger that Burge did not value at \$700 because this reconciles its value with what Burge believed to be the aggregate value of the vehicles.

LAW

Once Koontz filed for bankruptcy, the five vehicles and the building became property of the estate under 11 U.S.C. § 541. Section 542 requires the debtor to deliver all property of the estate to the trustee unless the trustee permits the debtor to retain custody of the property.

A.

In accordance with § 542(a), the trustee permitted Koontz to have custody over the vehicles so long as they would not be transferred, driven or altered. If Koontz neglected to fulfill his duty to preserve the vehicles for the estate, then he may be required to account for his waste or neglect. *See, Dillard v. Gill*, 47 So.2d 203, 205 (Ala. 1950) (neglect in defendant's duty to make necessary repairs to buildings is waste and subject to equitable proceedings). As evidenced by the letters contained in Trustee's Exhibit 3, Koontz had a duty to insure that the vehicles were not driven or damaged. Even if Koontz never saw these letters as he contends, his testimony indicates that he knew that he did not have any interest in the vehicles after he filed for bankruptcy and therefore, he should have known that he could not strip or alter the vehicles without permission from the trustee.

In his defense, Koontz implied that if the vehicles were damaged or altered then Gautsche was probably to blame. However, Koontz and Gautsche were business partners and Koontz testified that he instructed Gautsche to do things like have the vehicles brought to the shop when the trustee wanted to see them. Therefore, Koontz's testimony established that Gautsche was his agent and that he is liable for Gautsche's failure to properly care for the vehicles. Even if Gautsche was not Koontz's agent, Koontz is required to help the trustee when he agrees to do so. Furthermore, allowing the vehicles to remain at Gautsche's shop without checking on their

condition was unreasonable and a breach of Koontz's custodial duty to care for the vehicles. Consequently, Koontz is liable for any damage to the vehicles that occurred after they became property of the estate.

The logical method to determine how much damage the vehicles incurred is to subtract their value at the time Burge came to pick them up (after value) from their value when they became property of the estate (before value). The trustee contends that the values provided by Koontz in his schedules best reflect the before value of the vehicles. However, this court finds that the testimony of the trustee's own expert, Mr. Burge, offers the most accurate valuations because of his knowledge and experience with "classic cars" like those involved in this case. In contrast, Koontz had limited knowledge regarding similar vehicles and unlike Burge, he does not refurbish or sell these types of cars. Based on the foregoing, this court sets the before value at \$19,500 and the after value at \$4,400 (see chart in Facts section). Therefore, Koontz's neglect of the vehicles resulted in a \$15,100 reduction in their value.

B.

As discussed above, Koontz continued to occupy the building and rent a portion to Southern Computer Services after commencement of his chapter 7 case. The trustee contends that Koontz must reimburse the estate for his use and occupancy of the building and that he must vacate the premises. Koontz claims that he is not liable because the trustee never requested rental payments and because Koontz paid the utilities and maintained the premises, although he did not offer any corroborating evidence. Koontz has agreed to vacate the premises when ordered.

The trustee can recover the fair rental value of the premises for the time that Koontz occupied the building after it became part of the bankruptcy estate even though there was not an express rental agreement between the parties. *Thomas v. Smoot*, 56 So. 1 (Ala. 1911) (although owner of mill could not recover under any express contract, he could recover the value of the use and occupation of his mill by defendant). The parties did not provide any information to help in determining either the actual amount of rent owed by Koontz to the trustee or the fair rental value of the building. This court finds, based primarily on the monthly mortgage payments, that \$600/month is the reasonable rental value of the building. From December 4, 1995 thru April of this year Koontz made mortgage payments of \$600/month and maintained the property. This completely offsets any rent owed for that period. Thus, Koontz owes \$600/month for May of 1998 through September of 1998. Additionally, he must vacate the premises by October 15, 1998 and pay \$300 rent for the first half of October or a prorated amount until the day he leaves the property.

THEREFORE IT IS ORDERED that the trustee is awarded judgment for \$15,100 for waste of estate property, for \$3,300 for use of estate property (\$600/month in rent for May of 1998 through September and \$300 for rent for the first half of October), and for an order directing Koontz to vacate the premises by October 15, 1998.

Dated: September 30, 1998

MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE