

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

IN RE:

KEIRDRIK ANTHONY FREEMAN,

CASE NO. 98-11344-WSS

Debtor.

ORDER DENYING DEBTOR'S MOTION
TO TURNOVER VEHICLE

This matter came on for hearing on the motion of the Debtor, Keirdrick Anthony Freeman (hereinafter "Freeman"), for Mobile Postal Employees Credit Union (hereinafter "Mobile Credit Union") to turnover vehicle to the Debtor. Herman Padgett appeared for Freeman, and Robert Johnston appeared for Mobile Credit Union. After due consideration of the evidence and testimony, the court makes the following findings of fact and conclusions of law:

Freeman had previously obtained a line of credit with Mobile Credit Union. There are two sub-loans to the line of credit, the first being a loan secured by the automobile with a balance of approximately \$19,672.00, and the second being a signature loan with a balance of \$1,875.00, for which the automobile serves as cross-collateral. Freeman filed a chapter 13 petition, Case no. 98-10008, on January 5, 1998 after his 1995 Nissan Pathfinder, the same vehicle at issue in the present motion, had been repossessed on December 29, 1997. At the time that the automobile was repossessed, Freeman had not made a payment since October 1997. In addition, Freeman had not maintained insurance on the vehicle. Mobile Credit Union returned the automobile to Freeman at his request after receiving notice of his chapter 13. Freeman's case subsequently was dismissed on March 27, 1998. Mobile Credit Union received no payments from Freeman during his first chapter 13 proceeding.

Freeman filed his present chapter 13 petition on April 16, 1998. On April 29, 1998, Freeman filed a motion for Mobile Credit Union to turnover his Nissan Pathfinder, which had been repossessed on April 7, 1998. In his chapter 13 plan, Freeman offered Mobile Credit Union a preference payment of \$400.00, and testified that he would obtain insurance for the automobile. Freeman believes the value of the automobile to be \$14,000-15,000.00. He testified that his former employer wants him to return to work, but he has no means of transportation without the Nissan. He is currently collecting unemployment compensation in the amount of \$190.00 a week.

Mobile Credit Union still has possession of the automobile, and has storage fees calculated at \$7.50 per day, in addition to repossession fees of \$295.00 for the April 1998 repossession and \$340.00 for the December 1997 repossession. It also has incurred attorney fees. A Mobile Credit Union representative has inspected the automobile and found it to have several scratches and dents, a chipped windshield, a smashed kickboard, no radio, and mileage of 58,143. The representative testified that the NADA retail value of the automobile is \$20,325.00 and the trade-in value is \$17,525.00. The representative also testified that Freeman has not offered to redeem the automobile by tendering full payment of the debt in addition to expenses and legal fees.

Section 542 of the Bankruptcy Code requires an entity holding property of the bankruptcy estate to turnover the property to the trustee or debtor for the benefit of the estate. The central issue before the court is whether the 1995 Nissan is property of the estate. In Charles R. Hall Motors, Inc. v. Lewis (In re Lewis), 137 F.3d 1280 (11th Cir. 1998), the Court of Appeals for the Eleventh Circuit found that under Alabama law, a secured party, upon

repossession of a vehicle, gains both the title and the statutory right of possession to the vehicle, and that the purchaser of the vehicle has only a statutory right of redemption under § 7-9-506 of the Code of Alabama (1975). The Lewis court determined that while the right of redemption becomes property of the estate upon filing of the bankruptcy petition, the automobile does not. It follows that since the automobile is not property of the estate, it is not subject to the turnover provisions of §542(a). Id. at 1284-85. The court explained that the debtor's state law right of redemption requires further action "to change the otherwise dormant right to redeem repossessed collateral into a meaningful ownership interest". Id. at 1284; see also Warren v. SouthTrust Bank, N.A. (In re Warren), No. 98-00737, AP No. 98-00042 (Bankr. N.D. Ala. May 8, 1998). Based on the holding in Lewis, this court finds that the 1995 Nissan Pathfinder is not property of the estate, and is therefore not subject to turnover under 11 U.S.C. §542(a).

Under the Lewis decision, Freeman does have his statutory right of redemption under Alabama Code (1975) §7-9-506:

At any time before the secured party has disposed of collateral or entered into a contract for its disposition under Section 7-9-504 or before the obligation has been discharged under Section 7-9-505(2) the debtor or any other secured party may unless otherwise agreed in writing after default redeem the collateral by tendering fulfillment of all obligations secured by the collateral as well as the expenses reasonably incurred by the secured party in retaking, holding and preparing the collateral for disposition, in arranging for the sale, and to the extent provided in the agreement and not prohibited by law, his reasonable attorneys' fees and legal expenses.

The official comment to §7-9-506 defines "tendering fulfillment" as "more than a new promise to perform the existing promise; it requires payment in full of all monetary obligations then due and performance of all other obligations then matured." Code of Alabama (1975) §7-9-506, cmt.; see In re Warren, No. 98-00737, AP No. 98-00042 (Bankr. N.D. Ala. May 8, 1998).

The statute also requires that all expenses and legal fees associated with the repossession be paid as well. Freeman has offered Mobile Credit Union a preference payment of \$400.00 per month in his chapter 13 plan to satisfy Mobile Credit Union's security interest. While Freeman's proposal may pay Mobile Credit Union over the life of his chapter 13 plan, it does not tender fulfillment of all of Freeman's obligations under the agreement with Mobile Credit Union at the present time. Further, the offer of a preference payment through Freeman's chapter 13 plan is merely a promise to perform an existing promise, which does not fulfill the requirements of §7-9-506. There is also no assurance that Mobile Credit Union's interest will be adequately protected because Freeman is currently unemployed, and has failed to insure the automobile in the past. The court concludes that the 1995 Nissan Pathfinder has not been redeemed to become property of the estate. Based on the foregoing, the court finds that Freeman's motion to turnover property is due to be denied. It is hereby

ORDERED that the motion of the Debtor for Mobile Postal Employees Credit Union to turnover vehicle to the Debtor is **DENIED**.

DATED: May ____, 1998

WILLIAM S. SHULMAN
U.S. BANKRUPTCY JUDGE