

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

IN RE:

GORDON RAY BOOTHE,

Debtor.

CASE NO. 99-10449-WSS

Chapter 11

**ORDER GRANTING MOTION FOR RELIEF
FROM STAY OF FORD MOTOR CREDIT COMPANY**

This matter came on for hearing on the motion of Ford Motor Credit Company (hereinafter "Ford") for relief from the automatic stay as to a 1995 Ford LB8000 and a 1995 Ford LN8000. Bill Howell appeared for Ford and Ross Holladay appeared for the Debtor. The Debtor, Gordon Ray Boothe (hereinafter "Boothe"), and Ford entered into an agreement entitled "Commercial Lease Agreement" on November 28, 1995 related to two 1995 Ford LN 800 trucks, one having VIN # 1FDZU82E4SVA81539 and one having VIN # 1FDZU82E2SVA81538 (hereinafter referred to as "the 1539 truck" and "the 1538 truck", respectively).¹ The agreement provides for a four-year lease term.² The lease payment for each vehicle is as follows: the 1539 truck - \$ 1,577.80; the 1538 truck - \$ 1,665.26. The last payment on the lease was made in December 1998 for \$3,243.06, which was applied to the November 1998 payment. Boothe made no payment for December 1998, or for January through May 1999. The total post-petition arrearage due on the vehicles is \$22,268.08.

¹Boothe also entered into supplements to the agreement. See Movant's exhibit 2.

²The lease term for the 1539 truck expires in December 1999, and the lease term for the 1538 truck expires January 2000.

Under the terms of the agreement, Boothe is responsible for maintaining insurance on the vehicles, and paying for repairs, taxes, filing and registration fees. Paragraph 25 of the agreement states that if any court determines that the agreement is not a true lease, the lessee shall grant the lessor a security interest in the leased vehicles, and that the filing of the agreement shall not be evidence of intent to create a security interest under the Uniform Commercial Code.³ Ford did file a UCC-1 with the Secretary of State to perfect its interest in the event that the agreement was found to be a security interest rather than a true lease.

Richard Schwengels (hereinafter “Schwengels”), a customer service supervisor for Ford, testified that the expected economic life of the vehicles is 10 years, which is more than two times the lease term. The projected value at the end of the lease for the 1539 vehicle is \$32,344.75, and the projected value at the end of the lease for the 1538 vehicle is \$30,788.50.⁴ Under the terms of the lease, Boothe is not required to renew the lease or to purchase the vehicles. To become the owner of the vehicles, Boothe could pay the residual value of the vehicles and sales tax. The residual value for the 1539 vehicle is \$15,170.00, and the residual value for the 1538 vehicle is \$14,440.00. The combined sales price for both trucks was \$75,854.04.

Freda Boothe (hereinafter “Mrs. Boothe”), the Debtor’s wife, testified that the trucks were being properly maintained. She also testified that both trucks were necessary for reorganization of Boothe’s company, J & B Dozier Service, as they are responsible for 80-90% of the company’s revenue. In January 1999, the trucks were responsible for \$20,000.00 of the company’s earnings.

³See Movant’s exhibit 1.

⁴Schwengels referred to the June 1999 “Blue book” for the projected values.

Boothe maintains that the agreement with Ford is not a true lease, but rather a security interest. In defining a “security interest,” Section 440.1201(37) of the Michigan Compiled Laws Annotated (1999)⁵ provides:

Whether a transaction creates a lease or security interest is determined by the facts of each case; however, a transaction creates a security interest if the consideration the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease not subject to termination by the lessee, and any of the following:

(a) The original term of the lease is equal to or greater than the remaining economic life of the goods.

(b) The lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods.

(c) The lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement.

(d) The lessee has an option to become the owner of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement.

The section continues to specifically state that “[a] transaction does not create a security interest merely because it provides . . . [t]he lessee assumes risk of loss of the goods, or agrees to pay taxes, insurance, filing, recording, or registration fees, or service or maintenance costs with respect to the goods.” (Emphasis added.)

In In re Winston, 181 B.R. 589 (Bankr. N.D. Ala. 1995), the bankruptcy court addressed the same issues that are present in Boothe’s case. The debtor in Winston maintained that the vehicle lease at issue in the creditor-lessor’s motion for relief from stay was a security interest

⁵The agreement between Boothe and Ford is governed by Michigan law.

rather than a lease. The bankruptcy court examined Alabama's version of §440.1201(37)⁶, and found that the agreement which allowed the debtor to purchase the vehicle at the end of the lease for a substantial price was a true lease. Winston, 181 B.R. at 594. Applying the factors of §440.1201(37) (a)-(d) to the present case, the Court also finds the agreement between Boothe and Ford to be a true lease. The first consideration is whether the lessee can terminate the lease. Under paragraph 15 of the agreement, Boothe as lessee can terminate the lease prior to its end. However, assuming that the lessee cannot terminate the lease prior to its end, the remaining factors of § 440.1202(37) also do not apply in the present case. The original term of the lease (four years) is less than the 10 year economic life of the trucks in question. Boothe is not required to renew the lease for the remaining economic life of the trucks. Finally, while Boothe can renew the lease or become the owner of the trucks, the additional consideration required to exercise these options is more than nominal. To become the owner of the vehicles, Boothe could pay the residual value of the vehicles and sales tax. The residual value for the 1539 vehicle is \$15,170.00, and the residual value for the 1538 vehicle is \$14,440.00, according to Schwengels' testimony. The projected values for the trucks at the end of the lease are \$32,344.75 for the 1539 truck, and \$30,788.50 for the 1538 truck. In light of the value of the trucks at the time that the option to purchase would be exercised, the additional consideration is not nominal.

Under the provisions of § 440.1202(37), the fact that Boothe agrees to assume risk of loss of the trucks, to pay taxes, insurance, filing, recording, or registration fees, and to pay for service and repairs is not an indication of a security interest rather than a true lease. Boothe also argued

⁶As counsel for Ford pointed out, Alabama Code §7-1-201(37) (1975) is identical to the Michigan statute with the exception of some punctuation and paragraphing differences.

that the total amount paid under the lease, or approximately \$144,000.00,⁷ should be compared to the additional consideration required for Boothe to own the trucks to determine whether the consideration is nominal. However, the Court finds the projected values stated by Schwengels to be the correct amount for comparison.

Based on the foregoing, the Court finds the agreement between Boothe and Ford to be a lease rather than a security interest. While counsel for Boothe made an offer of superpriority status for Ford's interest and a mortgage on Boothe's home as adequate protection in closing argument, no evidence of this offer was submitted. Therefore, the Court finds that Ford's motion for relief from the stay is due to be granted due to a lack of adequate protection pursuant to 11 U.S.C. § 362(d)(1). It is hereby

ORDERED that the motion of Ford Motor Credit Company for relief from the automatic stay as to a 1995 Ford LB8000 and a 1995 Ford LN8000 is **GRANTED**.

Dated: June ____, 1999

WILLIAM S. SHULMAN
U.S. BANKRUPTCY JUDGE

⁷Boothe arrived at the \$144,000.00 figure by adding the monthly lease payments of \$1,577.80 and \$1,665.26, and multiplying the sum by 48, the number of months in the lease term.