

14

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

CHARLES ANDERSON PARIS
d/b/a Anderson Paris Excavating
Debtor

Case No. 91-13694 K

DECISION AND ORDER

In this Chapter 13 case American Credit Services, Inc. ("ACSI") seeks relief from the 11 U.S.C. § 362 automatic stay to permit it to enforce its lien upon the debtor's 1988 Ford Mustang, which ACSI seized on October 10, 1991, just prior to the Chapter 13 filing. While ACSI and others who finance automobiles are typically seen to return the vehicle in such instances (so long as appropriate provision is made for them under the terms of the Chapter 13 Plan) three factors were recited at hearing as underlying ACSI's decision not to do so in this case:

1. The vehicle is only worth \$5500, against a total debt of \$13,725.83 including a five-month arrearage of \$1820.30. Since the debtor's plan will pay only two percent (2%) to unsecured claims, ACSI would rather liquidate its collateral than participate in a plan which would, if successful, yield only two percent (2%) (over three years) of the \$8200 unsecured portion of its claim.

2. ACSI is concerned about the debtor's ability or trustworthiness to make the payments called for by the Plan, thus questioning whether payments will be made even on the secured portion of the claim and raising the specter (in its mind) of a need for a future re-repossession.

3. ACSI allegedly had great difficulty in repossessing the vehicle and is concerned about its ability to do so in the future. (ACSI's exhibits documenting these difficulties do not comport with the Federal Rules of Evidence, have been objected to as such, and will not be considered by the Court.)

The debtor attests that the vehicle is necessary to his occupation and therefore to his Chapter 13 Plan. But he has not yet filed the Adversary Proceeding requisite to recover the vehicle under 11 U.S.C. § 542. (See Bankruptcy Rule 7001(1).) His plan was confirmed without prejudice to ACSI's pursuit of this motion to lift stay.

In the meantime, the vehicle is in the possession of ACSI and is in no danger of waste, though it may be depreciating. To the extent that ACSI is suffering lost opportunity costs with regard to the value of the car, this is to some extent a self-inflicted wound since it has thus far elected not to return the car and receive payments under the Plan.

Under such circumstances, and for a reasonable period of time, it would seem that ACSI is adequately protected by the status quo (§ 362(d)(1)). There is evidence that the vehicle is necessary to the debtor's rehabilitative effort (§ 362(d)(2)(B)) and I have no competent evidence of other "cause" for lift of the stay (§362(d)(1)). Consequently, ACSI's motion is denied, with leave to restore it to the Court's docket without payment of further fee, by

application to the Court at an appropriate time (as described below).

The debtor's request, in his Answering Affidavit, for an Order directing ACSI to return the vehicle is also denied. Absent ACSI's consent to resolve § 542 turnover issues upon summary procedures, Bankruptcy Rule 7001(1) requires the plenary protection afforded ACSI by the Adversary Proceedings Rules. This denial of the debtor's request is without prejudice to his commencing such proceeding, and without prejudice to any rights he may have under State Law (see G.O.L. § 7-401, P.P.L. § 302, and Lien Law § 203) or under the contract to cure defaults and redeem the vehicle.

I emphasize that to the extent that this decision today addresses "adequate protection," it does so only with regard to protecting ACSI's collateral while ACSI is in possession thereof; I make no ruling on what "adequate protection" would substitute for such possession in the context of a § 542 turnover proceeding. Moreover, today's holding addresses only a relatively short time frame. The vehicle is presumably depreciating, but I have no evidence of the rate at which it is doing so; I am satisfied only that ACSI would not be injured by a brief period for the debtor to determine whether to "walk away" from this vehicle, or to commence the § 542 action.

Similarly, ACSI is currently receiving no money from this collateral (either by means of payments or by sale), which it may

use or reinvest. There are limits upon the length of time I may continue that state of affairs. The motion and cross-motion are both denied.

SO ORDERED.

Dated: Buffalo, New York
January 15, 1992

/S/ MICHAEL J. KAPLAN

U.S.B.J.