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**IT IS SO ORDERED.**

**Dated: November 16, 2005**

  
Lawrence S. Walter  
United States Bankruptcy Judge

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**UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF OHIO  
WESTERN DIVISION AT DAYTON**

In re: LAQUITA D. CURRY

*Debtor*

Case No. 05-36056

Judge L. S. Walter  
Chapter 13

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**DECISION OF THE COURT:**

**1) DENYING TIDEWATER FINANCE COMPANY'S MOTION TO TERMINATE THE AUTOMATIC STAY; AND**

**2) OVERRULING TIDEWATER FINANCE COMPANY'S OBJECTION TO CONFIRMATION OF CHAPTER 13 PLAN.**

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**MATTER BEFORE THE COURT**

This matter is before the court on the Objection of Tidewater Finance to Confirmation of Chapter 13 Plan [Doc. 15] and its related Motion to Terminate the Automatic Stay [Doc. 9]. The court considered Tidewater's filings at the confirmation hearing held on August 23, 2005. The court took the matter under advisement and allowed the parties to file post-hearing briefs [Docs.

28 and 30] and a Joint Stipulation of Fact [Doc. 31]. The court has reviewed the filings and the arguments of the parties and is now prepared to render its decision.

### **SUMMARY OF RESOLUTION**

Tidewater Finance Company (“Tidewater”) is a secured creditor in this Chapter 13 bankruptcy case with a lien on the vehicle of Debtor Laquita D. Curry (“Debtor”). Tidewater objects to confirmation of the Debtor’s Chapter 13 plan based on the plan’s “cram down” treatment of its claim and requests relief from the automatic stay to dispose of the Debtor’s vehicle that Tidewater repossessed prior to the bankruptcy filing. In its various pleadings, Tidewater argues that its lawful prepetition repossession of the Debtor’s vehicle changes the Debtor’s property rights in the vehicle so that Tidewater’s secured claim is no longer subject to modification and “cram down” in a Chapter 13 case.

Although Tidewater’s arguments have been determined valid by other circuits interpreting various state laws regarding repossession and its impact on property rights, case law in the Sixth Circuit interpreting applicable Ohio statutes establishes that a debtor’s property rights in a repossessed vehicle remain intact until that vehicle is sold. Consequently, a debtor may modify the secured creditor’s claim and cram it down in a Chapter 13 plan even if the creditor lawfully repossessed the collateral prior to the bankruptcy filing. Pursuant to this precedent, the Debtor’s retention of the vehicle and treatment of Tidewater’s claim in her Chapter 13 plan is valid. For these reasons, Tidewater is not entitled to relief from the automatic stay and its objection to confirmation is overruled.

### **FACTUAL AND PROCEDURAL BACKGROUND**

The following facts are derived from the parties’ Joint Stipulation of Fact [Doc. 31] and the exhibits attached thereto:

On January 6, 2004, the Debtor purchased a 2000 Saturn SL vehicle from Jeff Wyler Chevrolet and financed it through a Retail Installment Contract and Security Agreement (“Contract”). [Doc. 31, ¶ 1 and Ex. A.] The vehicle was the collateral for the Debtor’s promise to make monthly payments. [Id.] Tidewater is the assignee of the Contract and perfected its security interest in the vehicle by noting its lien on the title. [Id., ¶ 2 and Ex. B; Doc. 15, ¶ 2.]

Prior to the Debtor’s bankruptcy filing on June 17, 2005, the Debtor defaulted on her monthly payments to Tidewater resulting in Tidewater repossessing the vehicle on May 25, 2005. [Doc. 31, ¶¶ 3-4.]

On the filing date, the NADA retail value of the vehicle was \$7875 and its trade in value was \$6200. The average of these two is \$7038. [Id., ¶ 5 and Ex. C.]

The accelerated balance due under the Contract on the filing date was \$10,718.83. This amount consisted of \$10,008.88 in principal, \$300.95 in accrued interest, \$9.00 in late charges and \$400.00 in repossession fees. [Id., ¶ 6.] Tidewater has paid the repossession fees. [Id.]

On the filing date, Tidewater had not obtained a Certificate of Title to the vehicle pursuant to Ohio Rev. Code § 4505.10. [Id., ¶ 7.] In addition, Tidewater had not disposed of the vehicle pursuant to Ohio Rev. Code § 1317.16 or § 1309.610. [Id., ¶ 8.]

If the Debtor had not filed a bankruptcy petition, she could have exercised her rights to: 1) redeem the vehicle by paying cash in the amount of \$10,718.83 pursuant to Ohio Rev. Code § 1309.623 [Id., ¶ 9]; or 2) reinstate the Contract by paying Tidewater the sum of \$1544.17 pursuant to Ohio Rev. Code § 1317.12 [Id., ¶ 10]. The Debtor did not exercise her right to redeem the vehicle or reinstate the Contract on or before the bankruptcy filing date. [Id., ¶ 11.] In addition, the Debtor does not exercise her state law right to redeem the vehicle or reinstate the Contract in her Chapter 13 plan. [Id., ¶ 12.]

The Debtor filed her Chapter 13 plan valuing the vehicle and Tidewater's allowed secured claim at \$6700. [*Id.*] The Debtor treats the remainder of the claim as an unsecured claim. [*Id.*] Because the Debtor's plan proposes to pay less than the contract rate of interest on the secured portion of the claim and only 9% of the unsecured portion, the plan will not satisfy the entire monetary amount due under the terms of the Contract.

### **LEGAL ANALYSIS**

Tidewater argues that under state law, its lawful repossession of the Debtor's vehicle prior to the bankruptcy petition filing date limits the Debtor's rights in the vehicle to a right of redemption or of reinstatement of the debt. According to Tidewater, the Debtor's rights in the repossessed vehicle are so changed and limited that the Debtor's use of 11 U.S.C. § 1322(b)(2) to modify and cram down Tidewater's secured claim in her Chapter 13 plan is rendered invalid. Consequently, Tidewater asserts entitlement to full payment of its claim as a secured creditor or relief from the automatic stay to dispose of the repossessed vehicle.

Although Tidewater's arguments have been held to have merit based on interpretations of other state laws regarding property rights in repossessed collateral, the case law of this circuit interpreting applicable Ohio statutes supports a contrary view. The Sixth Circuit Bankruptcy Appellate Panel has specifically addressed a debtor's rights in a repossessed vehicle under Ohio law based on facts similar to those in the case at hand. In *National City Bank v. Elliott (In re Elliott)*, National City Bank had a security interest in the debtors' vehicle. 214 B.R. 148, 150 (B.A.P. 6<sup>th</sup> Cir. 1997). The debtors defaulted on their payments and National City Bank lawfully repossessed the debtors' vehicle pursuant to the requirements of Ohio statutory law in order to sell the vehicle at auction. *Id.* However, prior to the scheduled auction date, the debtors filed their bankruptcy petition. *Id.* National City Bank filed a motion for relief from the automatic stay to sell the vehicle which was denied in the bankruptcy court. *Id.*

On appeal to the Bankruptcy Appellate Panel, National City Bank relied on the fact that, prior to the bankruptcy filing, it had obtained a repossession title to the vehicle under Ohio Rev. Code § 4505.10(A). This Ohio statute allows a secured creditor to obtain a repossession title so that the creditor may then sell the vehicle at auction. *Id.* at 150-51. National City Bank argued that its repossession title constituted a transfer of ownership so that the vehicle did not become property of the debtors' estate when they filed their bankruptcy petition. *Id.* at 150.

While recognizing that National City Bank had both possession of the vehicle and repossession title prior to the bankruptcy filing, the Bankruptcy Appellate Panel rejected National City Bank's argument and concluded that the vehicle was still property of the estate until the sale of the vehicle. In coming to its conclusion, the Appellate Panel relied in part on the broad definition of property of the estate and in part on the limited property rights a secured creditor has in a vehicle under Ohio law until it is sold at auction.

Property of the bankruptcy estate is broadly defined within the Bankruptcy Code to include "all legal and equitable interests" of the debtor in property "wherever located and by whomever held." 11 U.S.C. § 541(a)(1). In *Elliott*, the Bankruptcy Appellate Panel noted that this broad definition encompasses property made available to the estate by other provisions of the Bankruptcy Code including property of the debtor repossessed by a secured creditor. 214 B.R. at 151 (relying on *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 205-207 (1983)). Specifically, under 11 U.S.C. § 542(a), property of the estate encompasses property in possession of a third party if the property may be used, sold or leased by a bankruptcy trustee. *Id.* Consequently, property lawfully repossessed by a creditor in which the debtor no longer has a possessory interest at the commencement of the case may still be property of the debtor's estate as long as ownership has not been fully transferred. *Id.* at 151-52.

The Sixth Circuit Appellate Panel further analyzed Ohio law to determine that full ownership of a repossessed vehicle is not transferred until sold at auction. *Id.* at 152. Although a secured creditor may obtain transfer of title upon repossession under Ohio Rev. Code § 4505.10(A), this transfer does not give the secured party full ownership rights in or unrestricted control over the vehicle. *Id.* Until the vehicle is actually sold at auction or otherwise disposed of under applicable Ohio law, a debtor continues to have a right to redeem the vehicle pursuant to Ohio Rev. Code § 1309.49 (repealed and replaced by substantially similar provisions in Ohio Rev. Code § 1309.623 and § 1309.624). The Appellate Panel concluded that unless such sale occurs prior to the bankruptcy filing, the repossessed vehicle may be recovered by the estate and remains estate property. *Id.*

Finally, the Sixth Circuit Appellate Panel discussed a Chapter 13 debtor's power to modify a repossessing secured creditor's contractual rights. Citing the supporting decision of the Sixth Circuit in *Federal Land Bank of Louisville v. Glenn (In re Glenn)*, 760 F.2d 1428 (6<sup>th</sup> Cir. 1985), the Appellate Panel concluded that 11 U.S.C. § 1322(b)(2) was written to allow a debtor to modify the contract rights of a secured creditor in a Chapter 13 plan. *Id.* A debtor's power to modify the rights of a secured creditor with respect to repossessed property is not cut off until full ownership of the property transfers to the secured creditor. *Id.* Noting the Ohio law discussed above, the Appellate Panel concluded that a debtor retains the right to modify a secured creditor's contractual rights with respect to repossessed collateral unless that collateral is sold or otherwise disposed of prior to the bankruptcy filing. *Id.* at 152-53.

The court recognizes that decisions from other circuits may appear to conflict with *Elliott*. Specifically, the Fourth Circuit concluded that upon repossession, a debtor's rights in the vehicle may be limited to a right of redemption under Virginia state law, although the court

stopped short of recognizing repossession as a transfer in ownership. *Tidewater Finance Co. v. Moffett (In re Moffett)*, 356 F.3d 518 (4<sup>th</sup> Cir. 2004).

Furthermore, the Eleventh Circuit has held that pursuant to Florida statutory law, the repossession of a vehicle fundamentally changes the debtor's property interest in the vehicle. *Bel-Tel Federal Credit Union v. Kalter (In re Kalter)*, 292 F.3d 1350 (11<sup>th</sup> Cir. 2002). The Eleventh Circuit determined that the prepetition repossession of a vehicle by the secured creditor transfers ownership of the vehicle to the creditor under Florida law. *Id.* at 1360. Consequently, the court concluded that a repossessed vehicle does not become property of the estate under 11 U.S.C. § 541. *Id.* See also *Charles R. Hall Motors, Inc. v. Lewis (In re Lewis)*, 137 F.3d 1280 (11<sup>th</sup> Cir. 1998) (construing Alabama law to conclude that a debtor's interest in a repossessed vehicle is limited to a right of redemption and this limited right of redemption is the only property interest that becomes property of the estate upon the debtor's bankruptcy filing).

It should be noted, however, that the Eleventh Circuit came to an entirely different conclusion when it examined the impact of a prepetition repossession of a vehicle under Georgia law. In *Motors Acceptance Corp. v. Rozier (In re Rozier)*, the Eleventh Circuit certified to the Georgia Supreme Court the issue of whether ownership of collateral passes to a creditor upon repossession. 376 F.3d 1323 (11<sup>th</sup> Cir. 2004). The Georgia Supreme Court concluded that ownership of the collateral does not pass to the creditor upon repossession, "but remains with the debtor until the creditor complies with the disposition or retention procedures of the Georgia UCC." *Id.* at 1324 (further citation omitted). As such, the Eleventh Circuit held that under Georgia law, a repossessed vehicle that has not been sold prior to the bankruptcy filing remains property of the debtor's estate and must be returned to the debtor by the repossessing creditor or that creditor will be in violation of the automatic stay. *Id.*

These circuit cases demonstrate nothing more than that a debtor's rights in a repossessed vehicle at the time of a bankruptcy filing depends upon state law and state law interpretation that may vary from state to state. As such, this court is compelled to follow the Sixth Circuit Bankruptcy Appellate Panel's lucid interpretation of applicable Ohio statutory law and its determination that a repossessed vehicle becomes property of a debtor's estate unless the vehicle is sold or otherwise disposed of prior to the bankruptcy filing. *Elliott*, 214 B.R. at 153. *See also Sharon v. TranSouth Financial Corp. (In re Sharon)*, 234 B.R. 676 (B.A.P. 6<sup>th</sup> Cir. 1999) (citing *Elliott* to support that a repossessed vehicle that has not been sold prior to the bankruptcy filing becomes property of the estate and is subject to the automatic stay).

In the case at hand, Tidewater lawfully repossessed the Debtor's vehicle prior to the filing of the bankruptcy petition but had not yet obtained a repossession title or disposed of the vehicle by sale or otherwise. Pursuant to the Bankruptcy Appellate Panel's determination in *Elliott*, the repossessed vehicle remained property of the Debtor's estate and the Debtor retained the ability to modify Tidewater's secured claim in her Chapter 13 plan.

### **CONCLUSION**

Tidewater Finance Company's lawful repossession of Debtor Laquita Curry's vehicle prior to the bankruptcy filing did not terminate the Debtor's ownership interest in the vehicle or limit the Debtor's ability to modify Tidewater's claim under 11 U.S.C. § 1322(b)(2). For these reasons, the court denies Tidewater Finance Company's motion to terminate the automatic stay and overrules Tidewater Finance Company's objection to confirmation of the Debtor's Chapter 13 plan.

**SO ORDERED.**

cc:

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