

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WISCONSIN

In re

PAUL CHRISTENSEN and
MARSHA CHRISTENSEN,

Debtors.

Case No. 03-32627

Chapter 13

MEMORANDUM DECISION ON CREDITOR'S MOTION TO COMPEL PAYMENTS

The creditor brought a motion for relief from the automatic stay, as well as a motion to compel the standing chapter 13 trustee to disburse plan payments. The court issued an oral ruling on both motions on April 17, 2007, and reserved the right to expand upon its analysis regarding the motion to compel. The following supports the court's earlier decision granting said motion.

This is a core proceeding under 28 U.S.C. § 157(b)(2)(A), and the court has jurisdiction under 28 U.S.C. § 1334. The following constitutes the court's findings of facts and conclusions of law pursuant to Fed. R. Bankr. P. 7052.

BACKGROUND

The debtors filed a chapter 13 petition on August 19, 2003. Their confirmed plan provided for payment on all secured claims, including that of DaimlerChrysler (f/k/a Chrysler Financial) on a pro rata basis. DaimlerChrysler initially filed a proof of claim (no. 5) in the amount of \$25,578.12, with \$20,262.50 as secured and \$5,315.62 as unsecured. An amended proof of claim (no. 21) was filed on June 23, 2005, in the amount of \$31,910.15, with \$26,594.53 as secured and \$5,315.62 as unsecured. After the debtors filed an objection to the amended

claim, DaimlerChrysler filed a second amended claim (no assigned number) on February 6, 2007, in the amount of \$29,059.78, with \$23,744.16 as secured and \$5,315.62 as unsecured. As of the date of this decision, this claim had not been objected to. So far, the trustee has paid \$19,726.69 to the creditor.

After DaimlerChrysler failed to receive disbursements from the trustee from December 2006 through February 2007, it filed a motion for relief from the automatic stay on March 9, 2007. According to DaimlerChrysler's review of the trustee's records, the debtors were delinquent in the amount of \$1,825.50, or approximately 2.4 payments. The debtors had made a partial plan payment in December 2006 and a full plan payment in January 2007, but those funds were disbursed to the Internal Revenue Service on its secured and priority claims because of the pending objection to DaimlerChrysler's first amended claim. Then, on March 13, 2007, the debtors paid \$1,300 into the plan, probably in response to DaimlerChrysler's motion for relief.

Because the trustee has a standard practice of holding disbursements to secured creditors that have filed a motion for relief, DaimlerChrysler filed the subject motion to compel payments in order to challenge this practice. After the trustee stops payments to the secured creditor, he disburses them to other creditors (secured, priority, or unsecured). The court ordered the trustee to hold these funds until a decision was made on DaimlerChrysler's motion to compel payment. Otherwise, the funds the trustee received in March would be paid to the Internal Revenue Service, as occurred while the objection to claim was pending.

The debtors' objection to the motion for relief from stay alleged that DaimlerChrysler was adequately protected by the disbursements it will receive per the plan – ironically, the same payments the trustee refuses to pay DaimlerChrysler on account of the same pending motion.

ARGUMENTS

The trustee defends the suspension of payments because he asserts DaimlerChrysler is attempting to recover through two different means (recovery of regular plan payments while attempting to lift the automatic stay to recover the collateral). He argues the election of remedies doctrine is implied, and double recovery could occur.

The doctrine of election of remedies is discussed in *Matter of Witte*, 841 F.2d 804 (7th Cir. 1998). The court in that case held that repossession of real estate by a land contract vendor constituted election of remedies which precluded the vendor from also recovering a judgment for periodic payments on the same contract. The contract itself provided for liquidated damages in the form of retention of payments made before default.

If the debtors were not in a chapter 13 and this were being addressed as a redemption question under state law, DaimlerChrysler would not be able to force the debtors to pay them during that time. *See* Wis. Stat. §§ 425.203, 425.208. He argues that DaimlerChrysler should not be allowed to have the payments and vehicle, too.

The trustee notes that if DaimlerChrysler is able to sell the vehicle for more than the remainder of its secured loan, which is possible if the trustee continues to pay pending relief from the stay, then the other creditors would not be protected. He also notes that if the creditor feels the time for notice and hearing is too long and its interests will be irreparably damaged in the interim, it should ask for expedited relief under section 362(f).

It is the moving party's burden to demonstrate that the value of the collateral has fallen below the amount owed when asking for the stay to be lifted. 11 U.S.C. § 362(g)(1). The trustee points out that he has paid \$19,726.60 so far to DaimlerChrysler, leaving a secured amount of

\$4,017.47. The current NADA value for a comparable vehicle is \$9,675. The total of the secured and unsecured amounts remaining on DaimlerChrysler's claim is \$9,333.09, which is less than the NADA value.

DaimlerChrysler argues the trustee's practice to withhold payments to the secured creditor pending the resolution of the motion for relief is unfair and deprives it of adequate protection. As is often the case, the filing of a motion for relief will prompt debtors to bring their payments current or at least to make an effort to do so. When a hearing is had on the motion for relief, the court often finds that the debtors' efforts to continue with their plan payments constitute adequate protection and the stay remains in effect. Other times, the parties reach a stipulation. However, by the time that orders are entered, the funds that have been paid to the trustee pursuant to the plan have been disbursed to other creditors, and the creditor that prompted the debtors' recovery of their plan compliance is not adequately protected.

DaimlerChrysler disagrees with the trustee's argument that a pending motion for relief is akin to a notice of default prompting a cure or redemption period under state law. *See* Wis. Stat. §§ 425.104, 425.208. The essence of a cure or redemption period is for the debtors to become current to the creditor. Under the trustee's practice, *other* creditors receive the windfall when the debtor makes payments to attempt a cure. DaimlerChrysler also disputes the trustee's argument that disbursements to a secured creditor seeking relief from the stay may result in double recovery. Not only is relief unlikely when debtors are making an effort to bring their payments current, but the creditor was entitled to those funds for the months that its collateral was used. If relief is granted, no double recover is possible because the creditor is only allowed to retain the funds it is owed pursuant to the claim. Because DaimlerChrysler is seeking only one payment on

its secured claim, it is not inconsistent or contrary to the election of remedies doctrine to seek recovery of its collateral as well as plan payments.

DISCUSSION

Although the trustee's reasons for withholding payments to secured creditors pending relief are understandable, DaimlerChrysler's arguments are more compelling. The trustee points out that during a redemption period, the creditor is not allowed to force the debtors to pay it. In this case, however, it is quite reasonable to assume that the debtors *want* the secured creditor to be paid.

The court has been unable to find case law in favor of or against this practice. In fact, the practice might harm the debtors if relief from stay is denied, because the debtors are that much further behind in payments to the secured creditor. That harm is a necessary consequence of the trustee's practice in that the debtors are required to make payments to the trustee for the secured claim on the car, and car payments have to come from the trustee pursuant to the confirmed plan. The debtors cannot legally protect their interest by bypassing the trustee and making car payments directly.

In this district, payments on secured real estate are typically made by the debtor directly to the creditor, whereas cars are paid for through plan payments made by the trustee. Thus, debtors can prevent having payments go to other creditors, excluding creditors that have a secured interest in collateral the debtors want to keep. One of the primary reasons debtors file chapter 13 cases is to retain secured property, and the bankruptcy code and cases have consistently supported that policy. For example, one interesting, albeit unpublished, case found the *creditor's*

refusal to accept payments while relief from stay was pending was an impermissible “tactic designed to advance the creditor’s cause to the detriment of the debtor and the other creditors.” *In re Jordan*, 2006 WL 3355190 (Bankr. M.D. Ga.) (court consistently refused to grant stay relief when creditors refused to accept payments from debtors absent compelling reasons). The refusal to continue adequate protection while a motion for relief is pending frustrates the policy in most cases.

Oddly enough, the trustee’s reasons for withholding payment might make sense in the current case because the value of the vehicle may actually be more than what is remaining to be paid on the secured portion of the claim. Likewise, it might make sense when the collateral is real estate that is not depreciating. As a practice as a whole though, it cannot hold up under the election of remedies doctrine because double recovery in most cases is highly unlikely. A secured claim on an automobile is quite unlike the *Witte* situation relied on by the trustee wherein the contract provided for different types of recovery which required election. DaimlerChrysler is entitled to only one recovery, the dollar amount loaned, and it fully acknowledges that fact.

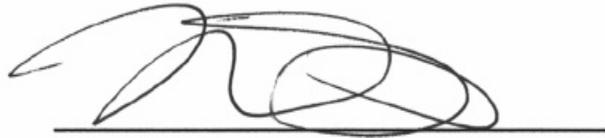
Furthermore, double recovery is preventable. The creditor is still entitled to payments on its secured claim until paid in full. If the result of the motion is that relief from the stay is granted, the order from relief could provide that if the proceeds of the sale exceed the remaining amount of the secured claim, the creditor will pay this excess to the trustee. The trustee will then make distributions to other creditors, including any unsecured deficiency, pursuant to the plan.

There may, of course, be circumstances in which the trustee should retain funds pending a creditor’s motion for relief from the automatic stay. Such a situation might require the court to estimate the value of the collateral and whether or not it is depreciating or appreciating. If

brought to the court's attention, it could protect the interests of all parties involved.

In this case, however, the court finds it appropriate to grant DaimlerChrysler's motion to compel payments while the motion for relief from stay was pending, up to the amount that would have been paid according to the terms of the plan. A separate order consistent with this decision has previously been entered by the court.

May 22, 2007

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the end, positioned above a solid horizontal line.

Margaret Dee. McGarity
Chief Judge, U.S. Bankruptcy Court