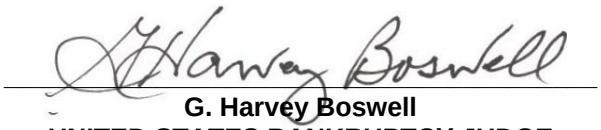
Not intended for publication

Dated: July 12, 2004
The following is SO ORDERED.



G. Harvey Boswell
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

IN RE	
Angela Burks,	**Case No. 04-11796**
Debtor.	**Chapter 13**
Angela Burks,	
Plaintiff,	
v.	**Adv .Pro. No. 04-5134**
Community Choice,	
Defendants.	

MEMORANDUM OPINION AND ORDER RE
PLAINTIFF'S COMPLAINT TO COMPEL TURNOVER OF A 1994 TOYOTA
AND A 1999 FORD MUSTANG FROM COMMUNITY CHOICE

The Court conducted a hearing on the debtors' Complaint to Compel Turnover on Jun 17, 2004. FED. R. BANKR. P. 7001, et seq. Pursuant to 28 U.S.C. section 157(b)(2), this is a core proceeding. After reviewing the testimony from the hearing and the record as a whole, the Court makes the following findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

I. FINDINGS OF FACT

The debtor in this case, Angela Burks, ("Burks"), filed a prior chapter 13 case, case no. 03-14496, on September 22, 2003. The Chapter 13 Trustee filed a motion to dismiss that case on February 20, 2004, for failure to make payments. Because Burks made a payment of $360 on March 3, 2004, the trustee's motion was conditionally denied on March 18, 2004. The debtor made an additional payment of $900.00 on April 14, 2004. Burks thought this payment brought her case current; however, her case was still substantially behind and the Chapter 13 trustee dismissed her case. An order dismissing the case was entered on May 17, 2004.

Prior to the dismissal of case no. 03-14496, Community Choice Financial Services filed a motion to lift the automatic stay as to the debtor's 1999 Ford Mustang and 1994 Toyota Camry. Community Choice's motion was granted on April 15, 2004. An order was prepared immediately; however, due to a problem with some of the language in the proposed order, the order lifting the stay with prejudice was not entered until April 27, 2004. Community Choice repossessed the vehicles sometime between April 27 and May 17, 2004.

Although the order dismissing case no. 03-14496 was not entered until May 17, 2004, the debtor was informed of the dismissal prior to that time. Unaware that an order dismissing the case had not been entered, Burks filed a new chapter 13 petition on April 22, 2004. Burks filed this adversary proceeding on May 17, 2004. At the trial on her complaint, Burks testified that she was using the 1994 Toyota to get back and forth to work and to do outside sales for her job. Burks also testified that her daughter was using the 1999 Mustang to get back and forth to school and to work. Since the cars were repossessed by Community Choice, Burks has had to lease a car for herself at a cost of approximately $1,250.00. Burks has not rented a car for her daughter to use, and, as a result, her daughter has had to quit her job.

II. CONCLUSIONS OF LAW

Section 542(a) of the Bankruptcy Code provides that:

> an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

11 U.S.C. § 542(a). Section 363(b)(1) further provides that the trustee may only "use, sell or lease . . . property of the bankruptcy estate." 11 U.S.C. § 363(b)(1). In the case of *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 203, 103 S.Ct. 2309, 2312-13, 76 L.Ed.2d 515 (1983), the Supreme Court found that property repossessed by a secured creditor pre-petition is property of the estate. Although *Whiting Pools* involved a chapter 11 reorganization, the vast majority of courts have extended that holding to chapter 13

cases as well. *Nat'l. City Bank v. Elliot (In re Elliot)*, 214 B.R. 148, 151 (6th Cir. BAP 1997); *American Honda Finance Corp. v. Littleton (In re Littleton)*, 220 B.R. 710, 715 (Bankr. M.D.Ga. 1998); *In re Fitch*, 217 B.R. 286, 290 (Bankr. S.D.Cal. 1998); *In re Attinello*, 38 B.R. 609, 611 (Bankr. E.D.Pa. 1984); *In re Robinson*, 36 B.R. 35, 37 (Bankr. E.D.Ark. 1983); *Pileckas v. Marcucio*, 156 B.R. 721, 725 (N.D.N.Y. 1993).[1] Despite this inclusion of repossessed property within the bankruptcy estate, the debtor must provide the secured creditor with adequate protection of its interest in the collateral before the creditor may be compelled to turnover property under the Code. *Transouth v. Sharon (In re Sharon),* 234 B.R. 676, 689 (B.A.P. 6th Cir. 1999).

In the case at bar, the Court finds that the debtor is entitled to turnover of the 1994 Toyota and the 1999 Ford Mustang from Community Choice. Said turnover is conditioned upon the debtor (1) reimbursing Community Choice the repossession costs for both vehicles and (2) making full payments on the vehicles. The Court also finds that the debtor's case should be placed on probation and if her case is dismissed for any reason related to payments, the dismissal shall be with prejudice under 11 U.S.C. § 109(g).

III. ORDER

It is therefore **ORDERED** that the Plaintiff's Complaint to Compel Turnover of the 1994 Toyota and the 1999 Ford Mustang is **GRANTED** with the following conditions:

1. The debtor shall pay Community Choice the repossession costs for both vehicles;
2. The debtor's case is hereby placed on probation; and
3. If the debtor's case is dismissed for any reason related to payments, said dismissal shall be with prejudice under 11 U.S.C. § 109(g).

Mailing information

Debtors
Timothy Latimer, attorney for debtor
Stephen Hughes, attorney for Community Choice

[1] *See also* T.C.A. § 47-9-506 which allows a debtor to redeem repossessed collateral "at any time before the secured party has disposed of collateral or entered into a contract for its disposition under § 47-9-504 or before the obligation has been discharged under § 47-9-505(2)."