

**United States Bankruptcy Court
District of New Mexico**

Document Verification

Case Title: Chase Automotive Finance v. Rodolfo Dominguez, et al.
Case Number: 99-01052
Nature of Suit:
Judge Code: S
Reference Number: 99-01052 - S

Document Information			
Number:	21		
Description:	Memorandum Opinion re: Cross [15-1] Motion For Summary Judgment by Guadalupe E. Dominguez, Rodolfo Dominguez .		
Size:	9 pages (20k)		
Date Received:	01/13/2000 09:45:45 AM	Date Filed:	01/13/2000
		Date Entered On Docket: 01/13/2000	
Court Digital Signature			View History
8d c4 a6 37 5d 0a 7f 50 d7 a7 6c 52 47 05 56 5f fb 19 6e 6c 72 1f a0 ab 55 b8 b6 71 4b ac 5c 4a 6e de d6 c8 67 73 61 98 73 c4 99 93 6a 22 1d 6b 47 65 75 af 1a a8 39 62 3a 53 50 86 7b 59 dc 53 f3 e8 fd 4e 11 e6 12 03 6e e9 98 e7 67 34 41 1d c8 0c 01 ee 48 f7 6e 21 f7 44 43 51 9e 05 b8 3c 42 32 ac 6c 0b 37 39 3c f5 1b 44 c1 62 5e 11 9c 94 a2 77 47 5e 3b 9c e8 e7 b3 99 95 d7 45 6f 77			
Filer Information			
Submitted By:			
Comments: Memorandum Opinion on Cross Motions for Summary Judgment			

Digital Signature: The Court's digital signature is a verifiable mathematical computation unique to this document and the Court's private encryption key. This signature assures that any change to the document can be detected.

Verification: This form is verification of the status of the document identified above as of *Wednesday, December 22, 2004*. If this form is attached to the document identified above, it serves as an endorsed copy of the document.

Note: Any date shown above is current as of the date of this verification. Users are urged to review the official court docket for a specific event to confirm information, such as entered on docket date for purposes of appeal. Any element of information on this form, except for the digital signature and the received date, is subject to change as changes may be entered on the Court's official docket.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:

RODOLFO DOMINGUEZ and
GUADALUPE E. DOMINGUEZ,
Debtors.

No. 7-98-17701 SR

CHASE AUTOMOTIVE FINANCE,
Plaintiff,
v.

Adv. No. 99-1052 S

RODOLFO DOMINGUEZ and
GUADALUPE E. DOMINGUEZ,
Plaintiffs,

**MEMORANDUM OPINION ON CROSS MOTIONS
FOR SUMMARY JUDGMENT**

This matter came before the Court for an initial pretrial conference on May 18, 1999. Plaintiff appeared through its attorneys J. Ward Holliday & Associates, P.C. (James N. Curzan) and local counsel Michael Daniels. Defendants appeared through their attorney Michael Gomez. After the initial pretrial conference attorney Brad Eubanks substituted in for Michael Daniels as local counsel. At the pretrial conference the parties represented that this case was amenable to summary judgment, and the Court set a schedule for the motions. Having reviewed both parties motions for summary judgment and the responses thereto, and the Joint Stipulation of Facts and Joint Stipulation of Admissibility of Documentary

Evidence the Court enters this Memorandum Opinion¹.

Plaintiff's complaint centers around a 1996 Dodge Pickup on which it has a perfected first lien (Complaint ¶3, Answer ¶2), on which the balance due was \$17,281.09 as of December 2, 1998 (Complaint ¶4, Answer ¶1). The pickup was stolen while the debtors were in Mexico on August 15, 1998. The debtors' insurance company refused coverage, because the policy was limited to operation of the vehicle in the United States and Canada. With their original statements and schedules filed in the bankruptcy, debtors stated the intention of "surrendering" the vehicle. Obviously they cannot deliver possession because the vehicle was stolen; they did, however, mail the keys to plaintiff's attorney. Plaintiff seeks to have the debt held nondischargeable under various theories, including §105, §521(2)(A), §523(a)(2)(A), and/or §523(a)(6). Plaintiff also asks the Court to require the debtors to reaffirm the debt under §524(c). Finally, Plaintiff asks the Court to dismiss under §707(a) for failure to comply with §521(2)(A).²

¹ This is a core proceeding under 28 U.S.C. § 157(b)(2)(I). This memorandum opinion constitutes the Court's findings of fact and conclusions of law under Bankruptcy Rule 7052.

² Plaintiff has not asked for stay relief to pursue recovery of the vehicle from whomever may have it. Presumably the debtors would not oppose such relief.

Stipulated Facts and Documentary Evidence

1. The defendants are the debtors, having filed their voluntary petition on December 22, 1998.
2. Plaintiff is the owner and holder of a Vehicle Retail Installment Contract ("Agreement") signed by Defendants. Plaintiff is secured under the Agreement by a properly perfected first lien security interest in a 1996 Dodge pickup, and had a claim in the amount of \$17,281.09 as of December 2, 1998.³
3. Defendants were obligated under the terms of the Agreement to maintain collision and comprehensive insurance coverage on the vehicle. Progressive Insurance Company issued policy number 10361516-0 for insurance coverage on the vehicle within the United States of America or Canada.
4. On approximately August 15, 1998, defendants entered into Mexico.
5. On or about August 15, 1998, the vehicle was stolen in Juarez, Mexico. At the time of the theft, the vehicle was not covered by insurance providing coverage in Mexico.

³ The parties stipulated that Plaintiff "is the holder of a secured claim against defendants." The Court disagrees with this legal conclusion, as set forth below.

6. Defendants filed a statement of intent in their bankruptcy stating they would surrender the vehicle pursuant to §521(2)(A).
7. Defendants are unable to surrender the vehicle as the property is not within their possession, custody, or control.
8. Defendants filed a "Reporte de Vehiculo Robado" with the Policia Federal de Caminos, Juarez, Mexico on August 15, 1998.
9. Defendants submitted a claim to their insurance company but it was denied because the loss took place in Mexico.

Conclusions of Law

1. Summary judgment is appropriate when there is no genuine dispute over a material fact and the moving party is entitled to judgment as a matter of law. Russillo v. Scarborough, 935 F.2d 1167, 1170 (10th Cir. 1991).

THE SECTION 521 AND 707 CLAIMS

2. A claim is secured by a lien on property only "to the extent of the value of such creditor's interest in the estate's interest in such property" and is unsecured for any remaining balance due. §506(a). See also 4 Collier on Bankruptcy ¶506.03[5][a] ("If, for example, the collateral was transferred ... and the debtor retained no

interest in the property or the transfer cannot be set aside, the estate will have no interest in the collateral and, hence, the creditor's interest in the estate's interest in the collateral will be zero.")

3. The value of the estate's interest in the stolen vehicle is zero. See In re Gabor, 155 B.R. 391, 394 (Bankr. N.D. W.Va. 1993)("[Debtor] cannot drive the [involuntarily transferred] car and a trustee cannot sell it. The estate's interest in the car is of no value."); In re Elliott, 64 B.R. 429, 430 (Bankr. W.D. Mo. 1986)(creditor unsecured when collateral is stolen prepetition.)
4. Plaintiff is an unsecured creditor in this bankruptcy.⁴
5. Section 521(2) is limited by its terms to "consumer debts⁵ which are secured by property of the estate", and therefore does not apply to the debt owed plaintiff in this case. In re Smith, 207 B.R. 26, 31 (Bankr. N.D. Ga. 1997)("Obviously, a bankruptcy estate must have an interest in property at some point for an allowed secured claim to exist.") "The plain English of the section

⁴ Plaintiff still has a valid and enforceable lien on the vehicle despite the involuntary disposition. See e.g., In re Elliott, 64 B.R. 429, 430 (Bankr. W.D. Mo. 1986).

⁵The debt involved in this case is a consumer debt. See 11 U.S.C. § 101(8).

requires every debtor in possession of collateral to make an election whether to retain or relinquish the property." Lowry Federal Credit Union v. West, 882 F.2d 1543, 1545 (10th Cir. 1989)(emphasis added.)

6. Plaintiff argues that since "surrender" is used in both section 1325 and section 521 of the Bankruptcy Code, case law construing either section should be persuasive.⁶ The Court does not need to determine the meaning of "surrender" in this case because neither code section 521 or 1325 is relevant. Bankruptcy Courts do not have the jurisdiction to answer hypothetical questions or issue advisory rulings. Matter of Fedpak Systems, 80 F.3d 207, 211-12 (7th Cir. 1996).
7. The Court does note, however, that under Tenth Circuit law Section 521 does not grant a creditor any rights when a debtor fails to comply with its mandatory directives. Lowry Federal Credit Union v. West, 882 F.2d 1543, 1546 (10th Cir. 1989); Green Tree Financial Servicing Corp. v. Theobald (In re Theobald), 218 B.R. 133, 135 (10th Cir. B.A.P. 1998).

⁶The creditor in Green Tree Financial Servicing Corp. v. Theobald (In re Theobald), 218 B.R. 133, 134 n.3 (10th Cir. B.A.P. 1998) raised this same issue. The Appellate Panel recognized the argument, but did not explicitly rule on it.

8. Plaintiff urges the Court to use sections 105⁷ and 521 to declare the debt nondischargeable. Because section 521 does not apply to this case, defendant is entitled to summary judgment on the section 521 issues.

Specifically, the Court finds that the debt should not be held nondischargeable under section 521. The section 707 motion to dismiss, based as it is on failure to comply with 521, should also be denied.

THE SECTION 524 CLAIM

9. Plaintiff also asks the Court to use section 105 to force the debtors to reaffirm the debt. Creditors lack standing to force reaffirmation agreements, because the code and rules only authorize debtors to bring reaffirmation agreements. See Section 524(c)(if the debtor is represented by an attorney, attorney affidavit must state "such agreement represents a fully informed and voluntary agreement by the debtor"); Section 524(d)(if the debtor is not represented by an attorney,

⁷ Section 105 also probably does not establish a private cause of action for a creditor. See, e.g., Official Unsecured Creditors' Committee v. Stern (In re SPM Manufacturing Corp.), 984 F.2d 1305, 1311 (1st Cir. 1992); Holloway v. Household Automotive Finance Corp., 227 B.R. 501, 504 (N.D. Ill. 1998). It also does not authorize the Court to supplement the detailed list of nondischargeable debts specified at 11 U.S.C. section 523(a). In re Weir, 173 B.R. 682, 692 (Bankr. E.D. Ca. 1994).

"if the debtor desires to make an [reaffirmation] agreement ..."; Bankruptcy Rule 4008 ("A motion by the debtor for approval of a reaffirmation agreement ...")(Emphasis added). See also In re Carlos, 215 B.R. 52, 61-62 (Bankr. C.D. Ca. 1997)("[C]reditor lacks standing in the bankruptcy court ...to bring a motion to approve a reaffirmation agreement.")

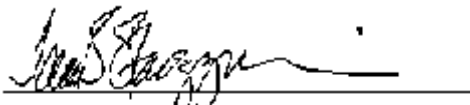
10. The Court should not, and perhaps may not, force the debtors to execute a reaffirmation agreement.

THE SECTION 523 CLAIMS

11. Plaintiff has also asked for judgment under 523. From the record, the Court cannot find that plaintiffs have made a prima facie case under either section 523(a)(2)(A) or 523(a)(6), and therefore will deny summary judgment on the 523 claims.

SUMMARY

Judgment will be granted against Plaintiff on its section 707, 521, and 524 claims for relief. The Court will set a status conference to determine whether there are remaining section 523 issues between the parties.



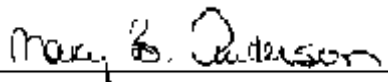
Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that, on the date file stamped above, a true and correct copy of the foregoing was either electronically transmitted, faxed, mailed, or delivered to the following:

Mr. E.C. Mike Gomez
Attorney at Law
P.O. Box 2931
Roswell, NM 88202-2931

Mr. Bradford H. Eubanks
Attorney at Law
2100 N. Main St. #3
Las Cruces, NM 88005

Mr. James N. Curzan
Attorney at Law
501 Elm Street, Suite 445, LB13
Dallas, TX 75202


Mary B. Anderson
Mary B. Anderson