IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF ARKANSAS
LITTLE ROCK DIVISION

IN RE: CYNTHIA FOOTE D/B/A TOMORROW'S CHILD EDUCARE ACADEMY, Debtor. **4:02-bk-11975 E CHAPTER 13**

CYNTHIA FOOTE D/B/A TOMORROW'S CHILD CHRISTIAN EDUCARE ACADEMY, Debtor **PLAINTIFF**

v. **AP NO. 4-02-AP-1050E**

SMART CHEVROLET CO. AND MOTORS FINANCE CO. **DEFENDANTS**

ORDER GRANTING COMPLAINT FOR TURNOVER OF PROPERTY OF THE ESTATE

Debtor's Complaint For Turnover of Property of the Estate is before the Court. A hearing was held on May 1, 2002, and the Court took the matter under advisement. Sheila F. Campbell, Esq. appeared for the Plaintiff and Debtor, Cynthia Foote, who was also present. Robert H. Wyatt, Jr., Esq. appeared for Defendants, Smart Chevrolet Company and Motors Finance Company. Defendants' credit manager, Jerry F. Canfield ("**Canfield**"), also appeared. Joyce Bradley Babin, Esq., the standing Chapter 13 Trustee, was also present.

The issue before the Court is whether Debtor retained an interest in certain repossessed vehicles at the time of Debtor's chapter 13 bankruptcy filing such that the vehicles should have been turned over to Debtor upon her request. The Defendants, Smart Chevrolet Company ("**Smart**") and Motors Finance Company ("**Motors**"), assert that the vehicles were sold to a good faith purchaser prior to the Debtor's bankruptcy filing. Debtor asserts that the Defendants are alter egos of each other, and the alleged sales between them were not valid sales. The Court finds that Smart and

Motors are alter egos, that no sales took place, that even if the vehicles were sold, the transfers were not made in good faith, and for these reasons, the vehicles were not validly transferred pre-petition. Accordingly, the vehicles were property of the Debtor's estate under 11 U.S.C. § 541 on the day of Debtor's bankruptcy filing and must be turned over to Debtor pursuant to 11 U.S.C. § 542(a).

This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(E), and the Court has jurisdiction to enter a final judgment in this case. The following constitutes findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

FACTS

The Defendants in this case, Smart and Motors, are not separate entities. Smart and Motors share the same business address and telephone number, and significantly, Motors is not a corporation authorized to do business in Arkansas.[1] Canfield was employed by Smart as the credit manager for both Smart and Motors, and Canfield did not make a distinction as to whether he was acting on behalf of Smart or Motors in his telephone conversations with Debtor. Smart and Motors also referred to themselves interchangeably in exhibits introduced in evidence and at the May 1, 2002 hearing. Other facts supporting the Court's finding that Smart and Motors are alter egos of each other are described in the facts presented below. Smart and Motors are hereinafter referred to as "**Smart/Motors**" unless otherwise indicated.

Evidence in the record indicated that Debtor purchased two vehicles, a 1997 Chevrolet van and a 1997 Cadillac El Dorado, from Smart, an Arkansas corporation, and that the vehicles were financed by Motors (*i.e.*, Smart/Motors) who took a security interest in the vehicles at the time of

[1]The court takes judicial notice of the Arkansas Secretary of State's public records as of this date which reflect that no corporation named "Motors Finance Company" is registered to do business in Arkansas.

sale pursuant to separate Retail Installment Sale Contracts (the "**Contracts**"). On January 8, 2002, Smart/Motors repossessed the Debtor's Cadillac. On January 18, 2002, Smart/Motors repossessed the Debtor's van. Smart/Motors sent letters to Debtor on the respective dates of each vehicle's repossession stating that Smart had repossessed the vehicles (although Motors had executed Affidavits of Repossession of Vehicle), that Motors assigned the Contracts to Smart with full recourse, and that Smart would sell the vehicles at a specified time and place ten days after each vehicle's respective repossession date. These letters were returned to Smart/Motors unclaimed.

Smart/Motors entered into evidence four Bid Forms for Repossessed Collateral for the purpose of proving that the Cadillac was sold to Smart at a public auction held January 18, 2002. Smart/Motors contends that these bid forms prove that Smart was the highest bidder on the Cadillac, and that bids were also made by Anita Woodie for Anita's Car Store, Inc., Don Huffman for H&H A/S, and Matt Woodruff, individually. Smart/Motors also entered into evidence three Bid Forms for Repossessed Collateral for the purpose of proving that the van was sold at public auction held January 28, 2002. Again, Smart/Motors asserts that these bid forms prove that Smart was the highest bidder on the van and that bids were also made by Anita Woodie for Anita's Car Store, Inc., and Don Huffman for H&H A/S. Canfield testified that he filled out the basic information on the bid forms including the vehicles' make and model and vehicle identification number. The evidence proves that Canfield also filled in the dollar amounts of the bids (this is clearly evidenced by the handwriting on the bid forms). The Court finds that Canfield created the bid forms, that the same three parties signed both sets of bid forms, and that the bid forms do not represent actual bids from third parties. Accordingly, the bid forms, taken along with other testimony offered by Smart/Motors, do not prove that a public auction was held with respect to the vehicles or that the vehicles were sold to Smart as

Defendants allege. (Neither Defendants' oral arguments or Canfield's testimony clearly indicate whether Defendants assert that Motors or Smart sold the vehicles to Smart at public auctions. The exhibits entered into evidence would indicate that Smart should have been the seller, having been assigned the Contracts with full recourse to Motors. Defendants' inability to clarify who was the seller of the vehicles further evidences the existence of only one entity.) Finally, no evidence was presented to show that actual monetary transactions took place with respect to these alleged sales (Canfield testified that he did not know whether monetary transactions took place).

Following the repossession and alleged sales of the vehicles, Debtor spoke to Canfield on the phone two to three times a week; the subject matter of these conversations is disputed by the parties. The Debtor testified that during these conversations, she was told that she would get the vehicles back if she caught up on her payments. Specifically, Debtor testified that on February 21, 2002, Canfield told her that if she paid approximately $2,000 on each vehicle, she could get the vehicles back. Canfield testified that he never told Debtor she could get her vehicles back. Canfield testified that these conversations were not about Debtor's redemption of the vehicles, but about the collection of the deficiency allegedly due Smart/Motors following the vehicles' sales at auction. When Canfield was asked by Debtor's counsel why Debtor called him, if not to redeem the vehicles, he testified that the Debtor called him and told him she had some money for him, and he testified that he was "more than willing to take it." Canfield's testimony is not supported by logic and indicates that he worked for one entity (*i.e.*, Smart/Motors) which held the cars and made the loan. The Court does not believe that the Debtor would continue talking to Smart/Motors unless she was told that payment would result in return of the vehicles. The Court finds these facts concerning Smart/Motors' attempt to collect money after repossession to be strong irrefutable evidence that

there was only one entity. The entity was represented by Canfield who had the authority to return the vehicles to Debtor when the loans were brought current by the Debtor.

Debtor filed a chapter 13 petition on February 20, 2002. Smart/Motors received notice of the Debtor's bankruptcy filing on February 22, 2002. Debtor testified that she attempted to make payment and retrieve the vehicles on Saturday, February 23, 2002, but Canfield told her the vehicles had been sold and were no longer on the lot. In this conversation, Canfield acknowledged to the Debtor that he was aware of Debtor's bankruptcy filing. Prior to this conversation, Debtor had never been told that the vehicles had been sold. The vehicles were on Smart/Motors' car lot on February 23, 2002 (which was admitted by Canfield), and remained on the lot approximately one month after Debtor filed bankruptcy. The vehicles have since been sold by Smart/Motors to third parties.

DISCUSSION

Pursuant to 11 U.S. C. § 542(a), a non-custodian third party holding any property of the debtor that the trustee can use under 11 U.S.C. § 363 is required to turn that property over to the trustee. In the case of a Chapter 13 case, the debtor is given the rights and powers of a trustee under § 363(b) and (e). 11 U.S.C. § 1303. *See also Robinson v. Ford Motor Credit Co. (In re Robinson)*, 36 B.R. 35, 37 (Bankr. E.D. Ark. 1983). The property of a debtor's estate includes nonpossessory interests of the debtor. *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 103 S. Ct. 2309 (1983); *In re Clelland*, 268 B.R. 539, 540 (Bankr. E.D. Ark. 2001). Where property has been repossessed following a debtor's default, a secured party may dispose of the collateral in a commercially reasonable manner, and provided such transfer is made in good faith, the secured party's disposition of the collateral transfers to a transferee for value all of the debtor's rights in the collateral. *See* Ark. Code Ann. §§ 4-9-610 and 4-9-617 (Michie Repl. 2001).

In this case, the creditor, Smart/Motors, had possession of property of the Debtor's estate on the date Debtor filed bankruptcy, and the Debtor still had rights in that property. Under § 542(a), the Debtor's property should have been returned to the Debtor upon her request. Rather than returning the property, and in reliance on "orchestrated" invalid sales between the same entity, Smart/Motors transferred the vehicles from its possession following the filing of Debtor's bankruptcy with knowledge of the Debtor's bankruptcy. In sum, a creditor cannot extinguish a debtor's rights in property and avoid a turnover action in bankruptcy by trumping up a sale of the collateral to itself.

Furthermore, even if Smart and Motors were separate entities, or Smart could validly sell the vehicle to itself in good faith under these facts, Debtor did not lose her rights in the vehicles because the vehicles were not purchased by Smart/Motors in good faith. Smart/Motors never took the position that the vehicles had been sold until Debtor filed bankruptcy. Rather, Canfield's representations to Debtor following the alleged sales demonstrate that no sales had taken place and that Debtor could still redeem the vehicles. The Court has found that no sales took place, but even if Smart/Motors had proven that an actual transfer for value occurred, such a transfer could not be in good faith given Smart/Motors' behavior in creating fake bid forms and representing to the Debtor (until learning of her bankruptcy filing) that she could redeem her vehicles.

For these reasons, Debtor is entitled to turnover of the vehicles or comparable vehicles, and Smart/Motors is entitled to file a motion with the Court to determine whether it is entitled to receive adequate protection for its claim.

CONCLUSION

Debtor's Complaint for Turnover of Property of the Estate is **GRANTED** and the Defendants Smart Chevrolet Company and Motors Finance Company are ordered to deliver possession of the Debtor's 1997 Chevrolet van and 1997 Cadillac El Dorado, or comparable vehicles, to Debtor promptly.

IT IS SO ORDERED.

____
HONORABLE AUDREY R. EVANS
UNITED STATES BANKRUPTCY JUDGE

DATED:_____________________________

cc: Ms. Sheila F. Campbell
Mr. Robert H. Wyatt, Jr.
Ms. Joyce Bradley Babin
U.S. Trustee