

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE

In re:

No. 97-14703
Chapter 13

KARLA RAE LEVENGOOD

Debtor

MEMORANDUM AND ORDER

Appearances: Kenneth C. Rannick, Kenneth C. Rannick, P.C., Chattanooga,
Tennessee, Attorney for Debtor, Karla Rae Levengood

Brent James, Hanzelik & Associates, Chattanooga, Tennessee,
Attorney for Creditor, Equity One

HONORABLE R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

A creditor, Equity One ("Creditor"), has objected to confirmation of the chapter 13 plan proposed by the debtor, Karla Rae Levensgood ("debtor"), on the ground that it undervalues the Creditor's collateral, a Kirby vacuum cleaner ("Collateral").

The debtor bought the Collateral new from a Kirby salesman with non-recourse financing provided by Creditor. The debtor paid \$1,500 for the Collateral in May 1997. The debtor filed her chapter 13 case about three months later, on August 18, 1997. The proposed chapter 13 plan values the Collateral at \$500 and provides for payment of this amount as the Creditor's allowed secured claim. 11 U.S.C. §§ 506(a) & 1325(a)(5). The hearing on the objection was held on November 6, 1997, about six months after the debtor bought the Collateral.

The debtor testified that she went to the place of business of the Creditor about two weeks before the hearing. The Creditor had a used model G4 Kirby vacuum cleaner for sale for \$500. The Collateral is a model G5. The debtor did not know of any difference in features between the G4 and the G5, but they looked identical. The debtor also testified that the Collateral is in like-new condition.

Mr. Art Brewer testified for Equity One. He is the area distributor for Kirby vacuum cleaners. He is the owner of a franchise and was (through one of his salesmen) involved in the original sale of the Collateral. He contracts with sales representatives who do retail sales. He has been in the business for about one and a half years. Mr. Brewer testified that Kirby vacuum cleaners have a lifetime warranty, but it generally protects only the original buyer. He also testified if a vacuum is less than one year old, he (or another

factory authorized dealer) can resell the product with the warranty carrying over to the new buyer. Thus, according to Mr. Brewer, a person could buy a vacuum like the debtor's, including the lifetime warranty, for \$900 to \$1,000.

Mr. Brewer testified that under a contract with one finance company he had repossessed a vacuum that was less than a year old and had resold it with the lifetime warranty. He paid the finance company \$275 for the vacuum and sold it as his own. In this situation, he can sell the vacuum with the lifetime warranty for \$800 to \$1,000. Mr. Brewer testified that he would not repossess and resell a vacuum for a commission from the finance company. He would only resell a used vacuum if he owned it. Mr. Brewer said that he would pay up to \$700 for a used vacuum that he could resell with the warranty, even though he pays the same amount for a new vacuum of the same model. He explained that he could afford to pay \$700 because the resale price would still be enough to recover the \$700 cost and pay his commission. Mr. Brewer testified earlier that the commission is approximately \$330 on a new machine sold for \$1,500.

Mr. Brewer stated that he only sells vacuums with the manufacturer's warranty, including used vacuums that are less than one year old. He does not advertise. Sales are made by appointment in a prospective buyer's home or door to door. The sales representative "builds value" in the machine by demonstrating it. A sales representative will tell the customer up front if the vacuum is a repossessed machine, for those who can not afford the price of a new machine.

Mr. Brewer also testified that prospective buyers of new vacuums often mention lower prices for used machines in classified ads; his response is to point out that the buyer will not get the warranty, and to build value in the new machine that is being demonstrated.

Section 506(a) of the Bankruptcy Code provides that the amount of an allowed secured claim is the value of the secured creditor's interest in the bankruptcy estate's interest in the collateral. 11 U.S.C. § 506(a). The second sentence of § 506(a) provides a general rule for determining the value of the secured creditor's interest. It provides:

Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest.

11 U.S.C. § 506(a)

The United States Supreme Court has recently settled the question of what valuation standard should be used when the debtor's chapter 13 plan provides that the debtor will keep the collateral and cram down on a creditor. The Supreme Court adopted the replacement value standard. *Associates Commercial Corp. v. Rash*, — U.S. —, 117 S.Ct. 1879, 138 L.Ed.2d 148 (1997).

The Supreme Court's decision mirrors the reasoning of the Sixth Circuit regarding the interest rate to be paid on an allowed secured claim. The Sixth Circuit held:

when a chapter 13 plan enables the debtor to keep the collateral, the plan in effect requires the secured creditor to make a new loan to the debtor, and therefore, the interest rate should be determined by the current market. *Memphis Bank & Trust Co. v. Whitman*, 692 F.2d 427, 429 (6th Cir. 1982). The Supreme Court's decision in *Rash* follows the same reasoning as to valuation: the debtor is treated as if she were buying the collateral now (in its present condition). *Rash*, 117 S.Ct. 1879, 1886, citing *Winthrop Old Farm Nurseries, Inc. v. New Bedford Institution for Savings (In re Winthrop Old Farm Nurseries)*, 50 F.3d 72, 75 (1st Cir. 1995) (economic benefit to the debtor equal to the replacement value).

The debtor testified that Equity One recently had a used Kirby model G4 for sale for \$500. The court can assume that the model G4 has about the same features as the debtor's model G5. Still, the debtor could not obtain from Equity One the lifetime warranty that she has on her vacuum. According to Mr. Brewer's testimony, a person can buy a used vacuum like the debtor's, one that is less than a year old, with the same lifetime warranty as a new vacuum.

In *Rash* the Supreme Court said that replacement value should not include the value of items the debtor does not receive as a result of retaining the collateral. *Rash*, 117 S.Ct. 1879, note 6. The Supreme Court used the retail price of a used vehicle as an example. The Supreme Court said that the retail price may be based partly on items, such as warranties and reconditioning by the seller, that the debtor does not receive by keeping her vehicle; according to the Supreme Court, the cost of such items must be deducted from the retail price to determine the replacement cost.

The problem is determining whether the items and their prices are comparable. In the car example, the used car with a warranty and reconditioning by the dealer is not comparable to the debtor's used car without the warranty and reconditioning; likewise, their prices are not comparable to the extent the warranty and reconditioning add to the dealer's price for the used car. The problem does not arise in this case. The debtor has a used Kirby vacuum less than one year old and with the manufacturer's lifetime warranty. Mr. Brewer testified to the price of a used Kirby vacuum less than one year old and with the manufacturer's lifetime warranty. Mr. Brewer's testimony should be an accurate guide to replacement cost.

Of course, this is assuming that Mr. Brewer's testimony is based on the correct market for used Kirby vacuum cleaners. The debtor attempted to prove the price should be determined by considering a different market, newspaper classified advertisements and the repossessed vacuum for sale by Equity One. Suppose a person set out to buy a used Kirby vacuum less than one year old and the manufacturer's lifetime warranty. How easy would it be for the prospective buyer to find one? If the prospective buyer could not find one after a reasonable search for a reasonable period of time, Mr. Brewer's testimony might not prove replacement cost. It might prove only that replacement cost must be determined by considering different sources, with or without the warranty. *Compare In re Chrapliwy*, 207 B.R. 469 (Bankr. M. D. N. C. 1996).

Mr. Brewer has been in the business for a year and an half, but during that time he apparently has sold only one used Kirby vacuum with the lifetime warranty. Mr.

Brewer's testimony about building value in a new vacuum suggests that sales representatives do not readily reveal the availability of used vacuums less than a year old that can be bought with the lifetime warranty. On the other hand, Mr. Brewer's testimony suggested that used machines are available with the warranty for buyers who can not afford new ones. Thus, Mr. Brewer's testimony only suggests the problem. None of the testimony by Mr. Brewer or the debtor proved that used Kirby vacuums with the lifetime warranty are so hard to find that the market is essentially non-existent. Therefore, the court must accept Mr. Brewer's testimony as to replacement cost. Furthermore, the debtor's testimony relates to a vacuum that is not comparable to hers because the evidence did not show that the price includes the lifetime warranty.

With regard to replacement value, Mr. Brewer testified to a price of \$900 to \$1,000 for a used vacuum less than one year old with the manufacturer's warranty. The court concludes the replacement cost value is \$900, the lower of the two.

The debtor has requested that her plan be amended to conform to the opinion of the court on replacement value of the Collateral, and to provide payment of such value at 18% interest per annum at \$25.00 per month until this secured portion of Creditor's claim is paid.

IT IS SO ORDERED.

This Memorandum constitutes findings of fact and conclusions of law as required by Fed. R. Bankr. P. 7052.

At Chattanooga, Tennessee.

BY THE COURT

entered March 3, 1998

R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE