**SO ORDERED.**

**SIGNED this 09 day of July, 2010.**

**THIS ORDER HAS BEEN ENTERED ON THE DOCKET.**
**PLEASE SEE DOCKET FOR ENTRY DATE.**

Shelley D. Rucker
**Shelley D. Rucker**
**UNITED STATES BANKRUPTCY JUDGE**

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**IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE**

| | | |
|---|---|---|
| **In re:** | ) | |
| | ) | |
| **Milton Dwayne Bolin** | ) | **No. 10-12451** |
| **Amanda Jan Bolin** | ) | **Chapter 13** |
| | ) | |
| **Debtors** | ) | |

**ORDER**

**Order on Amended Motion of Debtors to Compel Turnover of Vehicle**

Before the court is the Amended Motion of Debtors to Compel Turnover of Vehicle. A hearing on this motion was held on May 17, 2010 at 9:30 a.m, and the court heard arguments from counsel for the Debtors and for A-1 Quick Cash, the creditor in possession of the vehicle. Based upon the proof and argument presented at the hearing, the court makes the following findings of fact and conclusions of law.

## I. BACKGROUND

The debtors filed a petition for relief under Chapter 13 of the Bankruptcy Code on April 26, 2010. A-1 Quick Cash was listed as a creditor in the debtors' schedules, holding a claim in the amount of $3,000 secured by a 2004 GMC Envoy ("the vehicle") valued at $5000. A-1 has not filed a claim as of July 5, 2010. The vehicle is claimed as exempt on the debtors' Schedule C.

Mrs. Bolin and A-1 entered into three agreements on January 7, 2010: (1) a Title Pledge Agreement, (2) a Tennessee Title/Property Pledge Agreement Addendum, and (3) a "Federal Chapter 7 and 13 Bankruptcy Waiver Form." These agreements were part of a "title pledge," a form of lending governed by the Tennessee Title Pledge Act, T.C.A. §§ 47-15-101 - 47-15-120; *see* T.C.A. § 45-15-103(10) (defining "title pledge agreement").

The first agreement, entitled "Tennessee Title/Property Pledge Agreement," involved Mrs. Bolin's grant of a security interest in the vehicle to A-1 in exchange for a loan of $1800.00 with interest at 2% per month plus a fee of 20% for a total amount financed of $2,196. The maturity date stated on the agreement is February 6, 2010.[1] The relevant portions of the title pledge agreement, closely following the terms required by the Title Pledge Act, provide as follows:

> In return for a loan of money from Lender [defined as A-1], Pledgor [defined as Amanda Bolin] agrees to give Lender a security interest in unencumbered titled personal property owned by Pledgor. Pledgor agrees for Lender to keep possession of the certificate of title. Pledgor shall have

[1] In the initial pledge agreement, Mrs. Bolin agreed to give A-1 possession of the vehicle's certificate of title. Nevertheless, no evidence was provided that the lien of A-1 was noted on the title delivered by Mrs. Bolin as required by T.C.A. §45-15-110(d).

> the exclusive right to redeem the certificate of title by repaying the loan in full and by complying with this agreement. Lender shall retain physical possession of the certificate of title for the entire length of this agreement but shall not be required to retain physical possession of the titled personal property at any time. When the certificate of title is redeemed, Lender shall release the security interest in the titled personal property and return the personal property certificate to Pledgor. The parties to the Agreement can renew this agreement for additional thirty (30) day periods.
>
> If Pledgor fails to redeem the certificate of title at the end of the original 30 day agreement period, or at the end of any 30 day renewal thereof, Lender shall be allowed to lawfully and without breach of peace or judicial process, take possession of the titled personal property. Lender shall retain possession of the titled personal property and the certificate of title for a twenty (20) day holding period. If, during the twenty (20) day holding period, Pledgor pays the repossession fee, and redeems the titled personal property and certificate of title by paying all outstanding principal, interest and other customary fees, Pledgor shall be given possession of the titled personal property and the certificate of title without further charge.
>
> If Pledgor fails to redeem the titled personal property and certificate of title during the twenty (20) day holding period, Pledgor shall thereby forfeit all rights, title, and interest in and to personal property and certificate of title to the Lender, who shall thereby acquire an absolute right of title and ownership to the titled personal property in good working order.

Ex. D-3.

Mrs. Bolin did not repay the loan on February 6, 2010, as required by the agreement, but instead obtained a Renewal Statement and Receipt reflecting a new payment and statement date of March 6, 2010, and a receipt of a payment of $400.00. The Renewal Statement reflects a new maturity date of April 7, 2010. The Title Pledge Act permits such 30-day renewals and, in fact, makes them automatic unless one of four exceptions is present. One of those exceptions applies when the pledgor is in default. T.C.A. § 45-15-113(a)(4). In that event, the lender is required to give additional disclosures in the renewal statement. *Id.* § 45-15-113(b)(1), (2).

Mrs. Bolin testified that she was able to make a payment in early March but she did not have a receipt for the payment. The local manager of A-1 testified that the March payment only paid the amount that was due on February 6, 2010, and that as of the date of the Renewal Statement, the debt was due for March 6, 2010. In this case, the Renewal Statement was not consistent with the testimony of the A-1 manager. If there were defaults, the Renewal Statement appears to have waived them and modified the maturity date. As required by the Title Pledge Act, the Renewal Statement contained a disclosure of current and past due obligations. On the lines for "past due fees" and "past due principal", the number stated is $0.00. The schedule shows no minimum past due payments that must be made to be current. It sets a new "due date" of April 7, 2010.

Based on the Renewal Statement, Mrs. Bolin was not in default until she failed to pay the amount due on April 7, 2010. When this default occurred, A-1 gained two rights under the Title Pledge Act: (1) it could repossess the vehicle; and (2) if Mrs. Bolin did not pay all sums owing ("redemption," in Title Pledge parlance) within 20 days, her rights in the property would be forfeited and A-1 would accede to them, subject to a provision that any surplus from a commercially reasonable sale be remitted to the pledgor. *See* T.C.A. § 45-15-114(a), (b).

A-1 exercised the first of these rights, repossessing the debtors' vehicle on April 7, 2010. Approximately a week later, Mrs. Bolin received a letter from A-1 giving her notice of the repossession. Mrs. Bolin identified a Notice of Repossession of Pledged Property as the letter she received from A-1. The notice was dated April 2, 2010 a week before the car was repossessed. The notice does not give the date of the repossession but does state that Mrs. Bolin may regain possession of the pledged property by paying

the entire balance owing of $2,588.00. The balance is itemized as including principal of $1,800.00, unpaid interest of $68.00, and unpaid service fees of $720.00, but reflects no repossession or storage fees. This notice appears to contradict the Renewal Statement provided on March 6, 2010, since it shows that two months of fees and interest are due when not even one month has passed since the Renewal Statement was issued.

Mrs. Bolin testified that she contacted A-1 after receiving the letter and spoke with a manager about her deadline to redeem the vehicle. This manager told her that, despite what the notice said, she had until April 27 to redeem. This date is 20 days after the repossession, and thus consistent with the statutory requirement for holding the property after foreclosure under the Title Pledge Act. T.C.A. The application is approved upon review of the record and the attached detailed statement submitted by counsel for the debtors. T.C.A. § 45-15-114(a), (b). Therefore, this is the redemption deadline accepted by the court. Accordingly, when the debtors filed for bankruptcy on April 26, 2010, they were still within the redemption period and the debtor had property rights which remained at filing.

This court has jurisdiction in this matter pursuant to 11 U.S.C. §§ 1334 and 157(B)(2)(E) and (O). Venue is proper pursuant to 28 U.S.C. §1408 and 1409(a).

## II. ANALYSIS

The debtors seek turnover of the vehicle from A-1 pursuant to 11 U.S.C. § 542(a). A-1 objects to this request and, on many of the same grounds, has objected to confirmation of the debtors' Chapter 13 plan.

### A. Turnover

The debtor filed a motion for turnover pursuant to 11 U.S.C. § 542(a). That provision provides states, in relevant part, that

> an entity . . . 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, any 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).

A debtor-in-possession may seek turnover under § 542. *TranSouth Fin. Corp. v. Sharon (In re Sharon)*, 234 B.R. 676, 687 (B.A.P. 6th Cir. 1999). To secure a turnover order, the debtor-in-possession bears the burden of proving, by a preponderance of the evidence, the following elements: "(1) the property [is] in the possession, custody, or control of any entity, (2) the property can be used in accordance with 11 U.S.C. § 363; and (3) the property has more than inconsequential value or benefit to the estate." *Alofs Mfg. Co. v. Toyota Mfg., Ky., Inc. (In re Alofs Mfg. Co.)*, 209 B.R. 83, 91 (Bankr. W.D. Mich. 1997).

#### 1. Form of Proceeding

Before turning to the merits, the court addresses one procedural matter. Generally, a trustee or debtor-in-possession seeking turnover from a non-debtor entity under 11 U.S.C. § 542(a) must initiate an adversary proceeding rather than merely file a motion. Fed. R. Bankr. P. 7001(1); *In re Perkins*, 902 F.2d 1254, 1258 (7th Cir. 1990) ("A turnover action is an adversary proceeding which must be commenced by a properly filed and served complaint."); *Camall Co. v. Steadfast Ins. Co. (In re Camall Co.)*, 16 F. App'x 403, 407 (6th Cir. 2001) ("The Bankruptcy Rules require that a party seeking a turnover file that request

as an adversary proceeding rather than as a motion in another bankruptcy proceeding."); Collier on Bankruptcy ¶ 542.02 (16th ed. 2010) ("If turnover is sought from an entity other than the debtor, an adversary proceeding is the proper procedural mechanism."). "A turnover proceeding commenced by motion rather than by complaint will be dismissed; and a turnover order entered in an action commenced by motion will be vacated." *Perkins*, 902 F.2d at 1258 (citations omitted). Nevertheless, an objection to the form of the proceeding may be waived. *In re Pence*, 905 F.2d 1107, 1109 (7th Cir. 1990). Since A-1 Quick Cash has not objected to the form of this proceeding, any objection it possesses is waived.

**2. "Property of the Estate": The Scope of Debtors' "Redemption Right"**

A party seeking turnover must show that the third party possesses or controls "property of the estate" that can be used, leased, or sold. There is no dispute that A-1 has possession of the vehicle; however the creditor disputes whether the vehicle is still property of the estate. Thus, an initial issue is whether the property being sought is "property of the estate."

Property of the estate is comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1).[2] The scope of the estate is broad and can encompass property repossessed by a secured creditor. *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 205-07 (1983); *TranSouth Fin. Corp. v. Sharon (In re Sharon)*, 234 B.R. 676, 681-82 (B.A.P. 6th Cir. 1999) (repossessed vehicle).

In this case A-1 contends that Mrs. Bolin no longer had a property interest in the

[2] Under § 541(b)(8), certain pledge property is excluded from the estate. However, the parties have not suggested that this provision applies, presumably because the provision exempts title pledges.

vehicle as a result of her failure to make the payment or to redeem the vehicle by April 27, 2010. She did not have physical possession of the vehicle so the court must determine what interest she and her estate do have. Under the pledge agreement and Tennessee's Title Pledge Act, the debtor possesses a "redemption" right, a type of interest that has often vexed bankruptcy courts.

The term "redemption right" itself seems to obfuscate rather than clarify the "property of the estate" analysis, because "redemption rights" vary greatly. Where a state statute merely permits a debtor to reacquire property after a secured creditor has already sold or otherwise disposed of it, the Sixth Circuit has held that the sale cuts off the debtor's rights, leaving only a small redemption interest that is not amenable to plan treatment nor entitled to an extension of stay protection beyond the original redemption period. *See Fed. Land Bank of Louisville v. Glenn (In re Glenn)*, 760 F.2d 1428, 1435-36 (6th Cir. 1985). Conversely, a pre-sale redemption right is a broader interest, which merits stay protection and permits modification and curing under a plan. *Id.; Tidewater Fin. Co. V. Curry ( In re Curry),* 347 B.R.596, 601-06 (BAP 6th Cir. 2006)*; Nat'l City Bank v. Elliott (In re Elliott)*, 214 B.R. 148, 152 (BAP 6th Cir. 1997). Therefore, while a post-sale "redemption right" is not amenable to plan treatment and is not protected by the stay, *Glenn*, 760 F.2d at 1436-42, a pre-sale redemption right often is, *Elliot*, 214 B.R. at 152-53.

Unless the redemption period expired pre-petition, the "redemption right" in this title pledge context is much more like the pre-sale redemption right in *Elliot,* rather than the post-sale redemption rights held by debtors in two of the three cases in *Glenn*. First, there has been no sale or other transfer of full ownership that would cut-off the debtor's legal rights in the property. Indeed, the Title Pledge Act explicitly bars the sale of pledged

property during the redemption period, T.C.A.§ 45-15-114(a)-(b), and only fully transfers the property rights to the lender upon the expiration of the redemption period. *Id.* § 45-15-114(a). Even after this "absolute" transfer, the debtor still has a property right: entitlement to any surplus following a commercially reasonable sale. *Id.* § 45-15-114(b)(2). Taken together, these factors mean that the debtor's "redemption right" is far broader than a mere post-sale redemption right. As such, this court concludes that, as in *Elliot*, the debtor possesses a redemption interest in the vehicle sufficient to justify treatment of the vehicle under a Chapter 13 Plan.

In addition to the cases addressing redemption in the context of a deed of trust grantee or a secured creditor, a second line of cases has analyzed "redemption rights" in the context of personal property pawn agreements. Relying on the holdings in *Fed. Land Bank v. Glenn* that the bankruptcy stay does not toll the redemption period and that the redemption right requirement of a lump sum redemption payment cannot be extended through the use of 11 U.S.C.§ 1322 (b)(3), the District Court for the Middle District of Tennessee held that the redemption period could not be extended nor could the default be cured through a plan in a case involving the Tennessee Pawnbrokers Act, T.C.A.§ 45-6-201 et seq. *Dunlap v. Cash America Pawn of Nashville (In re Dunlap)*, 158 B.R. 724,728 (M.D.Tn.1993). The court found that the Debtor's property rights ended when the redemption period ended.

Although the pawn statute analysis would seem analogous to the Title Pledge Act, a comparison of the two statutes leads the court to a different conclusion. The Pawnbrokers Act addressed in *Dunlap* expressly defines what property interest remains with the debtor after a pawn. "For purposes of all state and federal bankruptcy laws, a

pledgor's interest in the pledged goods during the pendency of a pawn transaction shall be deemed to be that of a right to redemption *only*." T.C.A.§ 45-6-203(4)(B)(Emphasis added.) No similar limitation of a debtor's interest is stated in the Title Pledge Act. The pawnbroker may also retain the pawned property "as the pawnbroker's own" as the holder of "absolute title" as opposed to the Title Pledge lender who acquires "an absolute right of title" but is obligated to sell the property within 60 days after the expiration of the redemption period and to return any excess proceeds to the pledgor. *Compare* T.C.A. § 45-6-211(b)(Pawnbrokers Act) *with* T.C.A.§ 45-15-114(a) and (b)(2)(Title Pledge Act) The Title Pledge lender must also account to the pledgor for the proceeds of a commercially reasonable sale. The standards for the sale cross reference the provisions of the Tennessee Commercial Code except for the requirement of notice to the debtor. T.C.A.§ 45-15-114(b)(2); Tn. Op. Att'y Gen. 05-111(2005)(describing title pawn lenders as secured creditors and discussing the application of the Uniform Commercial Code to their disposition of property). For these reasons, the Court finds that the line of cases addressing the redemption period in the context of pawns is inapplicable, and the treatment of the debtor's interest in property pledged under the Title Pledge Act should be the same as the treatment afforded presale redemption rights in *Elliot* and *Curry.* As such, the debtors have property rights in the vehicle and the debt may be addressed through the plan.

### 3. Property Can Be Used By the Debtor

A-1 also argues that the vehicle is not necessary to a reorganization of the debtors because they have three cars. However, Mrs. Bolin testified that the debtors need each

vehicle: the debtors each use one and one of their minor children uses the third for school and work purposes. Further, the evidence showed that A-1's interest is fully secured (with a comfortable equity cushion), the vehicle itself is insured, and wage orders are in place for the funding of the debtors' Chapter 13 plan. As such, the court finds that the vehicle is necessary to the debtors' family, that A-1's interest is adequately protected and that turnover is proper.

**4. Sanctions**

The debtors also request sanctions against A-1. Sanctions are permitted under § 362(k)(1), which provides that "an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees." 11 U.S.C. § 362(k)(1). A willful violation of the stay can occur when a creditor, who has repossessed a vehicle, fails to turn it over after a request by the debtor. *Sharon*, 234 B.R. at 687-88. Here, A-1 refused turnover despite the debtors' requests and proof of insurance, which suffices under *Sharon* based on A-1's contention that the vehicle was not property of the estate. At the hearing neither party had any authority to present to the court on the merits of A-1's argument. The court was unable to find any ruling on the subject of the Tennessee Title Pledge Act. The parties did not put on proof that the conduct was willful in light of the available case law on the subject. Therefore the court will allow the debtors fourteen days after the entry of this order to renew their motion for sanctions, and provide with authorities on the issue of whether a willful violation of the stay can occur when the refusal to turn over the property is based on an argument that the property is not property of the estate. The debtors shall also include in any motion for sanctions an affidavit supporting the amount requested with an itemization of attorney fees and expenses

incurred in connection with the recovery of the vehicle. A-1 shall have fourteen days to respond after the motion has been filed. The motion will thereafter be set by the court for hearing.

### B. Objection to Confirmation

In addition to objecting to turnover, A-1 has also objected to confirmation of the debtors' plan, apparently on two grounds. First, A-1 points to the debtors' Chapter 13 Plan Waiver. Second, it argues that a title loan is a short term transaction and, as such, the Tennessee Title Pledge Act forbids its treatment under a Chapter 13 plan.

#### 1. Chapter 13 Plan Waiver

First, without case law support, A-1 argues that Mrs. Bolin's purported "bankruptcy waiver" precludes treatment of this debt under a Chapter 13 plan. Such waivers are invalid. *See, e.g., In re Cole*, 226 B.R. 647, 652 nn.6-7 (B.A.P. 9th Cir. 1998) (collecting cases invalidating waivers of discharge and other bankruptcy benefits). Therefore, this "waiver" will be disregarded.

#### 2. Modification of Secured Claim

A-1's main argument is that Tennessee law forbids any modification or extension of the contract entered into by A-1 and the debtor. In particular, A-1 has argued that the debtor must make payments more quickly due to the requirement of the Title Pledge Act, which requires that a pledgor make a principal payment of 5% with each 30-day renewal. § 45-15-113(d).

Contrary to A-1's assertions, the Court does not agree that the strictures of the Tennessee Title Pledge Act apply to a debtor's Chapter 13 modifications. The debtor is not

seeking to “renew” the loan, but rather to modify and cure it, rights specifically provided under 11 U.S.C. § 1322(b)(2) and (b)(3). Further, the payment terms of the Title Pledge Act only apply to renewals of title pledge transactions. The plan, however, does not propose any such renewals; instead, it deals only with “claims,” and § 1322(b)(2) expressly permits the modification of such “claims” and (3) expressly provides for curing defaults. Therefore, A-1's objections to confirmation are overruled.

## III. CONCLUSION

Based on the foregoing findings of fact and conclusions of law, it is hereby ORDERED that the Motion to Compel turnover is granted and A-1 is ordered to turn over the vehicle to the debtors. The relief granted is without prejudice to the rights of A-1 to seek relief from the automatic stay if its interests are not adequately protected going forward. The debtors’ request for sanctions is denied without prejudice subject to their filing a motion in compliance with this order. The court also overrules A-1's objection to confirmation of the plan.

# # #