

2-28-06

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
NEWNAN DIVISION**

<b>IN THE MATTER OF:</b>	:	<b>CASE NUMBER</b>
	:	
JONATHAN BERNARD FOSTER	:	05-13797-WHD
ALETHA RENE FOSTER,	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 7 OF THE
Debtors.	:	BANKRUPTCY CODE

**ORDER**

The Debtors filed a voluntary petition under Chapter 7 of the Bankruptcy Code on October 11, 2005. On October 25, 2005, the Debtors filed a statement of intention, indicating that they intended to reaffirm a debt owed to Fidelity Bank, which is secured by a 2005 Ford F150. On November 8, 2005 the Debtors amended their statement of intention to provide that they would redeem the 2005 Ford 150 and also filed a motion to redeem the vehicle for a redemption amount of \$18,485. In accordance with Local Rule 6008-2, the motion provided notice to Fidelity that a response to the motion to redeem was required within 20 days from the service of the motion and that, if no response were filed, the Court would consider the motion unopposed and may grant the motion. The Debtors also served Fidelity with a notice of a hearing on the motion scheduled for December 9, 2005. Fidelity failed to respond to the motion or appear at the December 9th hearing. On December 19th, 2005, the Court entered an order allowing the Debtors to redeem the vehicle for \$18,485 within 30 days of the date of the entry of the Order.

The Debtors submit that they required financing in order to complete the

redemption and that the proposed lender lost the paperwork for the loan, which resulted in the Debtors' inability to close the financing transaction. Accordingly, the Debtors were unable to complete the redemption within the 30-day period, which expired on January 18, 2006.

On January 27, 2006, Fidelity filed a motion for relief from the automatic stay with regard to the 2005 Ford Taurus. Fidelity asserts that its interest in the vehicle is not adequately protected and that the Debtors cannot legally retain the vehicle without either redeeming or reaffirming the debt. Fidelity also states that it refuses to allow the Debtors to redeem the vehicle after the expiration of the deadline in the Court's December 19th Order and refuses to allow the Debtors to reaffirm the debt. The motion appears to reserve Fidelity's right to object to service of the motion to redeem.

On January 31, 2006, the Debtors filed a motion to extend the time provided in the December 19th Order to permit the Debtors to redeem the vehicle. On February 24, 2006, the Court heard Fidelity's motion for relief and the Debtors' motion for an extension of time.

During the course of the hearing, counsel for Fidelity stated that his client failed to respond to the motion or to appear at the hearing due to an internal error, which Fidelity asserts was caused by the fact that the debt is held in a name other than the name on the Debtors' bankruptcy petition and on the Debtors' motion to redeem. Fidelity also disputes the redemption value of the vehicle, as listed in the Court's December 19th Order. For this reason, Fidelity refused to allow the Debtors to redeem the vehicle at that price and opposed

the Debtors' motion for an extension of time to complete the redemption. Fidelity contends that, since the Debtors can neither redeem nor reaffirm, the Court has no choice but to lift the automatic stay.

### CONCLUSIONS OF LAW

Section 722 of the Bankruptcy Code provides that "[a]n individual debtor may, whether or not the debtor has waived the right to redeem under this section, redeem tangible personal property intended primarily for personal, family, or household use, from a lien securing a dischargeable consumer debt, if such property is exempted under section 522 . . . or has been abandoned under section 554 . . . , by paying the holder of such lien the amount of the allowed secured claim of such holder that is secured by such lien." 11 U.S.C. § 722. Section 722 does not provide any time limit for performing the redemption.

However, section 521 requires the debtor to file a statement of intention with regard to debts secured by property of the estate. This statement must specify whether the debtor intends to retain or surrender the property that serves as collateral, and, if the debtor intends to retain the property, whether the debtor intends to reaffirm the debt or redeem the property. This statement must be filed within 30 days after the petition date or on or before the date of the first meeting of creditors, whichever is earlier, unless the court, for cause, within the period, extends the time. *See* 11 U.S.C. § 521(2)(A). Additionally, within 45 days after the filing of the notice of intent, or within such additional time as the court, for cause, within the original 45-day period orders, the debtor must perform the stated

intention. *See id.* § 521(2)(B). Section 521(2)(C) provides that “nothing in [section 521(2)(A) or (B)] shall alter the debtor’s . . . rights with regard to such property.” *Id.* § 521(2)(C).

In this case, the Debtors did comply with section 521(2)(A) by filing their statement of intention within 30 days after the petition date. The Debtors also filed their motion to redeem, which was the first step in performing their stated intention, on the same day they filed their statement of intention. It is the deadline contained within the Court’s December 19th Order with which the Debtors failed to comply and for which the Debtors failed to seek an extension. The Court does not accept Fidelity’s position that the Debtors’ failure to complete the redemption by the Court’s deadline eviscerated their right to redeem the vehicle.

There is a split of authority as to whether the debtor retains the substantive right to redeem property notwithstanding the failure to comply with section 521(2)(B). For example, in *In re Rodgers*, the court permitted the debtor to redeem property, even though the debtor filed the motion to redeem 90 days after the expiration of the 45-day deadline, which the debtor had not moved to extend. *See In re Rodgers*, 273 B.R. 186, 192 (Bankr. C.D. Ill. 2002); *see also In re Chance*, 1994 WL 16005470, \*3 (Bankr. S.D. Ga. May 3, 1994) (holding that “a debtor may exercise his right of redemption at any time before the case is closed or a foreclosure sale of the property has occurred”); *In re Eagle*, 280 B.R. 910 (Bankr. N.D. Ohio 1985). *But see In re Jones*, 261 B.R. 479 (Bankr. N.D. Ala. 2001) (the failure to perform timely the statement of intention extinguishes the statutory right of

redemption provided by section 722). The *Rodgers* court reasoned that section 521(2)(B) is a procedural provision, which does not specifically state that the debtor's substantive right to redeem will evaporate if the debtor fails to perform timely. The court concluded that "[d]espite violating the letter and spirit of section 521(2), the Debtor's right to redeem is nevertheless preserved by section 521(2)(C)."<sup>1</sup> *Rodgers*, 280 B.R. at 192. This Court is persuaded by, and hereby adopts, the reasoning of the majority of the courts to have considered this issue, and holds that the failure to redeem property within the time provided by section 521(2)(B) does not eliminate the debtor's substantive right to redeem the property.

Because the Debtors have retained the right to redeem the vehicle, the question is whether Fidelity should be bound by the redemption amount provided within the Court's December 19th Order. In order to permit the Debtors to rely on the redemption amount stated in the December 19th Order, the Court must grant the Debtors an extension of the deadline found within the Order. The Court generally has the authority to extend a deadline established by an order of the Court "on motion made after the expiration of the specified period . . . where the failure to act was the result of excusable neglect." SEE FED. R. BANKR. P. 9006(b)(1). "[E]xcusable neglect' is to be determined by reference to a four-factor test: 'the danger of prejudice to the [nonmovant], the length of delay and its

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<sup>1</sup> The court noted that the proper remedy for the secured creditor is to move for relief from the automatic stay or to compel the debtor to perform the stated intention. For cases filed on or after October 17, 2005, amendments to section 362 will render this step unnecessary, as the automatic stay will terminate if the debtor fails to file the statement of intention or perform the stated intention within the applicable time period. See 11 U.S.C. § 362(h).

potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.” *Advanced Estimating System, Inc. v. Riney*, 130 F.3d 996, 998 (11th Cir. 1997) (citing *Pioneer Inv. Svcs. v. Brunswick Assocs. LP*, 507 U.S. 380, 395 (1993)); *Cheney v. Anchor Glass Container Corp.*, 71 F.3d 848 (11th Cir. 1996).

Here, the Debtors’ counsel stated that the failure to complete the redemption was due to the fact that the lender providing the redemption financing lost the loan application and the Debtors could not complete the transaction on time. Fidelity did not question the Debtors’ stated reason for not completing the transaction. However, the Court has insufficient evidence from which it can conclude that the Debtors’ reason for failing to perform prior to the deadline constitutes excusable neglect.

First, if the Court permits the Debtors to redeem the vehicle under the terms of the original order, Fidelity will be prejudiced in that it will be bound by the valuation amount stated in the December 19th Order. Although Fidelity admitted that it received notice of the Debtors’ motion to redeem and failed to appear, Fidelity contends that this failure was due to the fact that the account held by Fidelity is in a name other than the name on the Debtors’ bankruptcy petition and the motion to redeem. Accordingly, when Fidelity received the motion to redeem, which contained the caption of the case in a name other than that in Fidelity’s records, Fidelity failed to recognize that the motion implicated the debt owed by the Debtors. This result may have been compounded by the fact that the motion to redeem was not properly served on Fidelity in accordance with Rule 7004. The motion

was served on Fidelity Bank, but was not served on an officer of the bank, as required by Rule 7004(h). In light of the fact that Fidelity was not properly served, the Court finds that Fidelity's failure to respond to the motion was justifiable and that the prejudice that would result from an extension of the time limit contained within the December 19th Order is a legitimate factor to consider in determining whether excusable neglect exists.

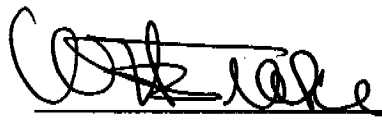
Second, the Court has insufficient evidence to conclude that the loss of the paper work by the lender is a sufficient reason for the Debtors' failure to complete the transaction within the 30 day time-frame permitted by the December 19th Order. The Debtors filed their motion to redeem on November 8, 2005. The motion was granted on December 19, 2005. It appears that the Debtors were given ample time to ensure that they had appropriate financing available to complete the redemption transaction. The Debtors' counsel prepared the order granting the motion to redeem. If the Debtors had any reason to believe that the redemption financing would take longer than 30 days, the Debtors' counsel could have proposed a longer period of time. Additionally, the Debtors offered no explanation as to why, when the 30-day deadline was approaching and the loan had not been closed, they did not seek an extension of time prior to the expiration of the 30 days. Simply to say that the loan paperwork was lost is not sufficient. It appears that the Debtors were not diligent in complying with the terms of the Court order and that they only moved the Court for an extension of the time to perform when prompted to do so by the filing of Fidelity's motion for relief. For these reasons, and because the Court prefers to resolve matters on the merits whenever possible, the Court concludes that the Debtors have not established that their

failure to redeem the vehicle within the 30 days provided for in the December 19th Order was due to excusable neglect.

However, because the Debtors continue to have the right to redeem the vehicle, the Court will consider the Debtors' motion to extend as a new motion to redeem. As Fidelity has opposed the motion on the basis that the redemption amount is insufficient, the Court must determine the appropriate amount. Accordingly, the Court shall hold an evidentiary hearing on this matter on **March 31, 2006 at 11:00a.m.** in Second Floor Courtroom, United States Courthouse, 18 Greenville Street, Newnan, Georgia 30264.

**IT IS SO ORDERED.**

At Newnan, Georgia, this 28 day of February, 2006.

  
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W. HOMER DRAKE, JR.  
UNITED STATES BANKRUPTCY JUDGE



**CERTIFICATE OF SERVICE**

**05-13797**

I certify that on the date stated below, I served a copy of the foregoing document on each of the persons and entities named in the following list by United States Mail.

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February 28, 2006

  
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Karen Bristol  
Courtroom Deputy Clerk  
to Judge Drake