


Honorable Mike K. Nakagawa
United States Bankruptcy Judge



Entered on Docket
October 13, 2016

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re:)	Case No.: 15-15142-MKN
)	Chapter 7
DAVID S. COOPER and VIRGINIA A. COOPER,)	
)	
)	Date: October 11, 2016
Debtors.)	Time: 9:30 a.m.

**ORDER ON MOTIONS FOR ORDERS ESTABLISHING
VALUE OF COLLATERAL AND AUTHORIZING THE REDEMPTION OF
PERSONAL PROPERTY UNDER 11 U.S.C. §722¹**

On October 11, 2016, the court conducted an evidentiary hearing on two motions brought by the above-captioned debtors to redeem two separate automobiles. The appearances of counsel were noted on the record. After arguments were presented, both matters were taken under submission.

BACKGROUND

On September 8, 2015, a voluntary Chapter 7 petition was filed by David S. Cooper and Virginia A. Cooper (“Debtors”). (ECF No. 1). On September 23, 2015, Debtors filed their schedules of assets and liabilities (“Schedules”) as well as their Statement of Financial Affairs. (ECF No. 11).

On their personal property Schedule “B,” Debtors listed a 2009 BMW 3 Series

¹ In this Order, all references to “ECF No.” are to the numbers assigned to the documents filed in the case as they appear on the docket maintained by the clerk of the court. All references to “Section” are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to “NRS” are to provisions of the Nevada Revised Statutes. All references to “FRBP” are to the Federal Rules of Bankruptcy Procedure.

1 automobile (“328i”) as having a value of \$9,959, a 2008 BMW 750 automobile (“750L”) as
2 having a value of \$10,119, and a 2003 Mercedes Benz CL500 automobile as having a value of
3 \$5,236. On their creditor Schedule “D,” Debtors listed BMW Financial Services (“BMW”) as
4 having a claim in the amount of \$23,919 secured by a lien against the 328i and BMW as having
5 a separate claim in the amount of \$31,264 secured by a lien against the 750L. On their
6 exemption Schedule “C,” Debtors did not claim any of their vehicles as exempt under Section
7 522. Debtors did file a Statement of Intention indicating their intention to retain both the 750L
8 and the 328i by redeeming both vehicles under Section 722.

9 On December 9, 2015, Debtors filed a motion to value the 750L for purposes of
10 redemption under Section 722. (ECF No. 28). Debtors seek to establish a redemption value of
11 the 750L of no more than \$9,589.20. On the same date, Debtors filed a similar motion with
12 respect to the 328i. (ECF No. 30) (jointly “Redemption Motions”). Debtors seek to establish a
13 redemption value of the 328i of no more than \$10,675.53.

14 On December 22, 2015, opposition to both Redemption Motions was filed by BMW.
15 (ECF Nos. 41 and 42). BMW alleges that the redemption value of the 750L is at least \$14,593,²
16 and that the redemption value of the 328i is at least \$13,255.

17 On April 7, 2016, scheduling orders were entered for an evidentiary hearing to be
18 conducted on both Redemption Motions. (ECF Nos. 50 and 51).

19 On September 27, 2016, after multiple continuances by stipulation of the parties, the
20 evidentiary hearing on the Redemption Motions commenced. The evidentiary hearing was
21 continued, however, due to the Debtors’ failure to give proper notice to BMW with respect to
22 their intention to present certain exhibits and witness testimony.³

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24 ² Attached as Exhibit “2” to BMW’s opposition is an unauthenticated copy of an on-line
25 printout of a Kelley Blue Book (“KBB”) estimate of \$14,593 for a sale to a private party of a
similar 750L vehicle in “Very Good Condition” as of September 17, 2015.

26 ³ The hearing also was continued to permit the Debtors to file a proposed amendment to
27 their Schedule “C” to claim both vehicles as exempt for purposes of seeking redemption under
28 Section 722. Debtors filed a motion to amend their Schedule “C” (ECF No. 76) that was heard
on October 11, 2016, pursuant to an order shortening time. BMW filed opposition (ECF No. 80)
and the Debtors filed a reply. (ECF No. 83). At the evidentiary hearing, the motion was

1 On October 11, 2016, the evidentiary hearing on both Redemption Motions was held.
2 Live witness testimony was presented by Daniel Grossardt, a service writer employed at the
3 local BMW dealership in Henderson, Nevada. Debtor David Cooper also testified. Expert
4 witness testimony as to the value of both vehicles was presented by Dan Watson on behalf of the
5 Debtors and Terance Buck on behalf of BMW. All witnesses were subject to direct and cross-
6 examination. Various documents were admitted into evidence. After the close of evidence, final
7 oral arguments were presented and both Redemption Motions were taken under submission.

8 DISCUSSION

9 Section 722 permits an individual debtor to redeem personal property intended primarily
10 for personal, family, or household use, from a lien securing a dischargeable consumer debt if the
11 property is exempted under Section 522. Because the Debtors have now amended their Schedule
12 C to claim both the 750 and 328i as exempt under NRS 21.090(1)(f), they are eligible to seek
13 redemption under Section 722.⁴ Under the statute, redemption is accomplished by “paying the
14 holder of such lien the amount of the allowed secured claim of such holder . . . in full at the time
15 of the redemption.” 11 U.S.C. § 722. (Emphasis added.)

16 Section 506(a) governs the allowance of secured claims. A secured claim is allowed “to
17 the extent of the value of such creditor’s interest in the estate’s interest in property.” 11 U.S.C. §
18 506(a)(1). The value of the interest “shall be determined in light of the purpose of the valuation
19 and of the proposed disposition or use of such property, and in conjunction with any hearing on
20 such disposition.” *Id.* With respect to individual Chapter 7 debtors, “such value . . . shall be
21 determined based on the replacement value of such property as of the date of the filing of the
22 petition without deduction of costs of sale or marketing.” 11 U.S.C. § 506(a)(2). Additionally,

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24 granted, and the Debtors were permitted to proceed with their Redemption Motions. Because the
25 continuance was the result of Debtors’ failure to properly disclose their exhibits and witness,
26 however, the court awarded sanctions to BMW for the attorneys fees incurred in connection with
the September 27, 2016 hearing. At the continued hearing, the court directed counsel for the
Debtors to pay for 2.5 hours of counsel’s time at \$375 per hour, totaling \$937.50.

27 ⁴ By amending their schedules to claim additional exemptions, a new 30-day period to
28 object to the additional exemptions arises under FRBP 4003(b)(1) from the date the amendments
are filed.

1 where the subject personal property is acquired for personal, family, or household purposes,
2 “replacement value shall mean the price a retail merchant would charge for the property of that
3 kind considering the age and condition of the property at the time value is determined.” Id.
4 (Emphasis added).

5 In this instance, the purpose of the valuations is to determine the amount that the Debtors
6 must pay BMW to retain both vehicles. As the Debtors want to keep both vehicles rather than
7 liquidate them, the cost to the Debtors of obtaining a replacement for each vehicle must be
8 determined rather than the payment of a liquidation price. Compare Associates Commercial
9 Corp. v. Rash, 520 U.S. 953, 962-63 (1997). The underscored provision of Section 506(a)(2)
10 directs the court to focus not on what the Debtors would be willing to pay for replacement
11 vehicles, but what a retail merchant would charge for vehicles of like age and condition,
12 excluding costs of sale and marketing.⁵

13 The court has considered the live witness testimony, the documentary evidence
14 presented, and the record in this proceeding.

15 The court accepts Mr. Cooper’s testimony as to the condition of both vehicles prior to
16 commencement of the bankruptcy proceeding, the deferral of any repairs after the bankruptcy
17 proceeding, and the current condition of both vehicles. The court accepts the testimony of the
18 local BMW service writer as to the necessary as well as recommended mechanical and cosmetic
19 repairs due for each vehicle. The service writer testified that he completed an invoice dated
20 August 9, 2016, identifying several recommended services for the 750L that included primarily
21 non-cosmetic, mechanical repair items. Those items included replacement of all tires and a side
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23 ⁵ At closing argument, Debtors’ counsel suggested that the 750L actually has a value of
24 zero because of a significant amount of repair expenses. Based on that premise, counsel
25 suggested that a \$500 payment to BMW would be sufficient to satisfy Section 506(a)(2). The
26 assumption underlying the statute, however, is that the retail merchant has title to the personal
27 property rather than the debtor. If offered only \$500 to transfer title of a similar replacement
28 750L automobile to the Debtors, it is not difficult to imagine that BMW would simply tell the
Debtors to buzz off and would try to find another buyer for the vehicle. The suggested payment
of \$500 is even more absurd given the testimony of Mr. Cooper that he continues to drive the
750L and that the vehicle performs well notwithstanding that there is smoke coming from the
exhaust pipe.

1 view mirror, repairs to the upper timing cover, drive shaft and valve guide seals, and oil filter,
2 coolant, and oxygen sensor service. Those items totaled in excess of \$14,127. Debtors also
3 provided an inspection report from a non-BMW service provider dated December 5, 2015,
4 indicating that the 750L required brake service in the amount of \$910.74. Debtors also provided
5 a preliminary estimate dated August 12, 2016, from a body shop related to BMW, estimating the
6 price for a complete paint job for the 750L at \$9,899.28.

7 The local BMW service writer also testified that he completed an invoice dated August 8,
8 2016, identifying several recommended services for the 328i that included both cosmetic and
9 mechanical repair items. The mechanical items included repairs to the rear main seal, the valve
10 cover, and the belt tensioner, in addition to oil filter, micro filter, and brake fluid service. Those
11 items totaled in excess of \$4,400. Debtors also provided an inspection report from a non-BMW
12 service provider dated December 5, 2015, indicating that the 328i required other repairs to the
13 front struts, power steering, and oil pan totaling \$2,624.47.⁶

14 The court also accepts the testimony of both expert witnesses,⁷ but affords their testimony
15 less weight due to their admitted lack of knowledge as to the actual mechanical condition of each
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17 ⁶ It is not clear why these repairs evident in December 2015 did not appear on the list of
18 recommended repairs generated in August 2016.

19 ⁷ At closing argument, BMW asserted that the Debtors' expert was not qualified to give
20 an opinion of value because his primary experience was as an auctioneer rather than an
21 appraiser. No timely objection to the witness's qualification as an expert, however, was ever
22 made before the witness testified. The objection therefore was waived. BMW also argued at the
23 hearing and in its trial statement (ECF No. 64) that Debtors' expert used the incorrect
24 methodology that allegedly is required in the Ninth Circuit. BMW asserted that vehicle
25 appraisers are required in this circuit to begin with an estimated figure obtained from a KBB or
26 National Automobile Dealers Association ("NADA") guideline, and then adjust the value based
27 on the actual condition of the vehicle. Although certain lower courts in the Ninth Circuit have
28 acknowledged such an approach, *see, e.g., In re Morales*, 387 B.R. 36, 42-45 (Bankr.C.D.Cal.
2008) (adopting KBB or NADA as a baseline), use of that methodology is not required by the
Ninth Circuit. *Compare In re Labrostrie*, 2012 WL 6554727, at *3 (B.A.P. 9th Cir. Dec. 14,
2012) (observing that use of KBB values as a starting point has been "endorsed" by certain lower
courts). Absent any other indicia of value, the KBB, NADA and similar guidelines may provide
a modicum of assurance to a court that a proposed valuation is reasonable. Where expert witness
testimony is provided, however, the expert's familiarity with or consideration of such guidelines
simply goes to the weight given to the testimony.

1 vehicle when they arrived at their original estimates of value.⁸

2 In their Schedules, Debtors stated under penalty of perjury that the 750L was worth
3 \$10,119 on the petition date and that the 328i was worth \$9,959 on the petition date. Debtors'
4 expert witness testified that as of December 5, 2015, based on his visual but non-mechanical
5 inspection of each vehicle,⁹ the 750L was worth \$10,500 and the 328i was worth \$13,300. He
6 also testified that as of the date of the hearing, the value of the 750L would be approximately
7 \$7,000 in light of the subsequent information as to its actual mechanical condition, and the value
8 of the 328i would be \$1,000 less. BMW's expert testified that as of June 20, 2016, based on his
9 similar visual but non-mechanical inspection of each vehicle, the 328i was worth \$13,208.05.
10 He did not, however, offer an opinion of value with respect to the 750L.¹⁰

13 ⁸ Cross-examination of BMW's expert effectively established that he had used an
14 incorrect starting point for his valuation of the 328i. He used a "Clean Retail" value for the 328i
15 under the NADA used vehicle guidelines to establish a baseline value of \$14,162.50. Under the
16 same NADA guidelines, however, the Clean Retail characterization would not apply to a vehicle
17 having the mechanical deficiencies present in the 328i (nor the far more extensive mechanical
18 deficiencies in the 750L). Use of an inappropriate baseline figure significantly decreases the
19 reliability of the \$13,208.05 value reached in the expert's "Condition Report" that he had
20 prepared for the 328i. That report was offered into evidence by BMW and was admitted.
21 BMW's expert testified that he prepared a similar report for the 750L that BMW never offered
22 into evidence.

23 ⁹ Both experts personally inspected each vehicle for their appearance, checked to see if
24 each vehicle would start and would move when put into gear. Other than looking under each
25 vehicle without placing them on an overhead service rack, and seeing if there were signs of oil
26 leaks, neither expert investigated the actual mechanical condition of the vehicles. Likewise,
27 neither of them had a copy of the necessary and recommended repair items list that had been
28 obtained from the service writer for the local BMW Henderson dealership.

24 ¹⁰ On cross-examination, BMW's expert was provided a copy of a printout of a KBB
25 online estimate suggesting a \$12,550 retail price to purchase a similar 750L vehicle from a
26 dealer. The expert suggested that a NADA estimated price might be higher by several thousands
27 of dollars. Despite the information set forth in the KBB printout, BMW's expert still expressed
28 no clear estimate of the value of the 750L even though he had prepared a Condition Report for
that vehicle after he inspected it on June 20, 2016. BMW's expert was never shown a copy of
the KBB estimated private party sale amount for the 750L attached to BMW's original
opposition to the Redemption Motions, see note 2, supra, and that KBB estimate also was never
offered into evidence at the hearing.

1 On this somewhat inconsistent record, the court concludes that a retail merchant having
2 title to a 750L vehicle of similar age and condition would sell it to the Debtors for \$7,900,
3 exclusive of any costs of sale and marketing.¹¹ The court also concludes that a retail merchant
4 having title to a 328i vehicle of similar age and condition would sell it to the Debtors for \$8,200,
5 exclusive of any costs of sale and marketing. These amounts are not a “split-the-baby” midpoint
6 of the value ranges proposed by the parties’ experts, nor a midpoint of the value ranges argued
7 by counsel. Rather, the court has taken into account the credibility of the opinions expressed by
8 each expert witness as well as the Debtors’ original testimony of value set forth in their
9 Schedules. Significant weight also has been given to the undisputed testimony and other
10 evidence of the condition of both vehicles as of the commencement of the case as well as at the
11 time of the evidentiary hearing.

12 **IT IS THEREFORE ORDERED** that the Motion for Order Establishing Value of
13 Collateral and Authorizing the Redemption of Personal Property Under 11 U.S.C. §722, Docket
14 No. 28, be, and the same hereby is, **GRANTED AS PROVIDED IN THIS ORDER.**

15 **IT IS FURTHER ORDERED** that the Motion for Order Establishing Value of
16 Collateral and Authorizing the Redemption of Personal Property Under 11 U.S.C. §722, Docket
17 No. 30, be, and the same hereby is, **GRANTED AS PROVIDED IN THIS ORDER.**

18 **IT IS FURTHER ORDERED** that David S. Cooper and Virginia A. Cooper may
19 redeem the 2008 BMW 750L, VIN WBAHN83578DT77985, by delivery of payment in the
20 amount of **\$7,900.00** to BMW North America, in care of its counsel of record, Jolley Urga
21 Woodbury & Little, no later than 15 calendar days from the date of entry of this order.

22 **IT IS FURTHER ORDERED** that David S. Cooper and Virginia A. Cooper may
23 redeem the 2009 BMW 328i, VIN WBAWR33539P460621, by delivery of payment in the
24 amount of **\$8,200.00** to BMW Bank of North America, in care of its counsel of record, Jolley
25 Urga Woodbury & Little, no later than 15 calendar days from the date of entry of this order.

26 **IT IS FURTHER ORDERED** that the Ballstaedt Law Firm shall pay the amount of
27 _____

28 ¹¹ The court excludes any sales taxes on the vehicles being retained by the Debtors
because they paid those taxes previously.

1 **\$937.50** to counsel for BMW Bank of North America no later than 15 calendar days from the
2 date of entry of this order.

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4 Copies sent to all parties via CM/ECF ELECTRONIC FILING

5 Copies sent via BNC to:

6 DAVID S COOPER
7 VIRGINIA A. COOPER
8 4 MEZZA LUNA CT.
9 HENDERSON, NV 89011

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