

**UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
Harrisonburg Division**

IN RE:

KAREN ANNETTE AVERY,

Case No. 07-50300-7

Debtor

DECISION AND ORDER

Entered at Harrisonburg in said District this 20TH day of July, 2007:

The matter before the court is a motion filed by the above-captioned debtor, by counsel, for authority to redeem personal property of her estate.¹ The issue before the court for determination is the appropriate redemption value. For the reasons stated in this decision and order, the debtor's motion to redeem at the value set forth in her motion will be denied.

Facts:

The facts relevant to the debtor's motion to redeem are not in dispute. At the time of the filing of her petition for relief, the debtor owned a 2005 Kia Sorento and DaimlerChrysler Services North America, L.L.C. (herein DaimlerChrysler) held a perfected lien. As of the date of the filing of debtor's Chapter 7 petition, the payoff on the vehicle to DaimlerChrysler was \$22,816.45.

Debtor's motion alleges, in paragraph 3, that the redemption value should be \$12,125.00 based upon a vehicle condition report attached to the motion.² Attachment 1 is a

¹ The court notes that a motion for relief from stay was filed by DaimlerChrysler prior to the debtor filing a motion to redeem. The motion for relief was granted without opposition from the debtor. It will be addressed by separate order.

² See, Attachment 1.

valuation of the vehicle from Collateral Valuation Services, LLC and, apparently, was made in connection with the debtor's intent to finance the redemption of the vehicle through U. S. Bank, NA.³

Paragraph 4 of the debtor's motion asserts that an alternative redemption value should be the Kelley Blue Book Private Party Value which shows a valuation of the debtor's vehicle at \$12,965.00 based upon a vehicle being in "good" condition.⁴ The motion also carried with it attachments 3, 4 and 5.⁵

DaimlerChrysler filed an objection to the debtor's motion to redeem and took the position that the NADA retail value of the debtor's vehicle was the appropriate valuation for redemption purposes. It relies on Virginia Code, Annotated § 8.01-419.1.⁶

At the hearing on the motion to redeem conducted in Harrisonburg on July 12, 2007, the debtor offered four (4) exhibits which were admitted: Debtor's Exhibit 1 is the Kelley Blue Book definition of Private Party Value and Suggested Retail Value. Debtor's Exhibit 2 is a

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description of the definitions of vehicle condition used by Kelley Blue Book which range from Excellent to Poor. Debtor's Exhibit 3 is the Kelley Blue Book Suggested Retail Value of the

³ Attachment 1 was not offered as evidence at the hearing on the motion for redemption held in Harrisonburg, Virginia, on July 12, 2007. Accordingly, it has no probative value for purposes of this decision and order.

⁴ The Kelley Blue Book Private Party Value was attached as Attachment 2 to the debtor's motion. It was introduced into evidence at the hearing on the motion for valuation as Exhibit 4.

⁵ As with attachment 1, none of these documents was offered or admitted into evidence at the hearing on the motion and will not be considered for purposes of determining the value for redemption.

⁶ Section 8.01-419.1 permits the National Automobile Dealers Association (NADA) valuation books to be admissible evidence of the fair market value of a vehicle. However, as will be seen in the discussion, the statute does not restrict determination of value solely to this source.

debtor's car based upon Excellent Condition. Debtor's Exhibit 4 is the Kelley Blue Book Private Party Value for debtor's vehicle in Good Condition. The debtor rested her case in chief on the evidence represented by the four exhibits introduced. No evidence was taken from the witness stand as to the value of the vehicle.

DaimlerChrysler offered no evidence. Both counsel for the debtor and DaimlerChrysler argued the merits of the case.

Positions of the Parties:

Debtor's position is that the Kelley Blue Book Private Party Value should be used in establishing the value of her vehicle for purposes of redemption. Debtor's Exhibit 1 defines Private Party Value as follows: "Private party value is what a buyer can expect to pay when buying a used car from a private party." The debtor also relies on In Re De Anda, 359 B.R. 794 (B.A.P. 10th Cir. 2007).

DaimlerChrysler opposes use of the Private Party Value as defined by Kelley Blue Book and takes the position that Code of Virginia, § 8.01-419.1 establishes NADA yellow book value as the fair market value of the vehicle for redemption.

Law and Discussion:

The debtor proceeds under 11 U.S.C. § 722 which permits her to "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 of this Title or has been abandoned under section 554 of this Title, by paying the holder of such lien the amount of the allowed secured claim of such holder that is secured by such lien in full at the time

of redemption.”⁷ The debtor takes the position that the amount of the allowed secured claim of DaimlerChrysler is \$12,965.00. *See*, Debtor’s Exhibit 4. To get to that value, the debtor relies upon 11 U.S.C. § 506(a)(2):

If the debtor is an individual in a case under Chapter 7 . . . , such value with respect to personal property securing an allowed claim shall be determined based on the replacement value of such property as of the date of the filing of the petition without deduction for costs of sale or marketing. With respect to property acquired for personal, family, or household purposes, replacement value shall mean the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time the value is to be determined.

Clearly, the Kelley Blue Book for Private Party Value is defined in terms of the “price a retail merchant would charge for the property.” Rather, Private Party Value is what a buyer can expect to pay when buying a used car from a private party. The debtor relies on the decision in De Anda to support this position. A review of the De Anda opinion shows that the 10th Circuit B.A.P. affirmed the decision of the bankruptcy court by finding that the bankruptcy court judge’s determination that private party value, based upon the facts of the case, was not clearly erroneous. The BAP dismissed the argument of the secured creditor that Kelley Blue Book retail value was the appropriate benchmark for valuation with the following language:

Other than both containing the word ‘retail’, the Code and KBB definitions have little in common. The Bankruptcy Code’s definition of ‘retail’ includes an adjustment for the age and condition of the vehicle; KBB defines ‘retail’ as price for the vehicle that is in ‘excellent condition’ with the proviso that less than 5% of vehicles for sale qualify as ‘excellent.’ Clearly, these two are not equivalent and Midwest’s reliance on the KBB retail value is misplaced.

⁷ It is not disputed by the debtor that as of the date of the filing of the debtor’s bankruptcy petition, the payoff on the vehicle was \$22,816.45.

In a footnote to the above-referenced quote, the B.A.P. stated:

The court is not making a determination of the proper valuation procedure under revised Code section 506(a)(2). It is clear that the KBB retail value was not appropriate in this case but that does not mean that it is never appropriate.

De Anda recognizes that retail value may be an appropriate benchmark for determination of redemption value under 11 U.S.C. § 506(a)(2). It holds that the bankruptcy judge in the case before it had sufficiently stated findings of fact which would support a private party value in that particular case and that those findings were not clearly erroneous.

Each case for redemption value is fact driven as to the specific case. In the case at bar, debtor gave no factual reasons that Private Party Value is more appropriate for use than Suggested Retail Value other than to proffer through counsel that she could not afford to redeem at Suggested Retail Value but could afford to redeem at Private Party Value.⁸

There is no indication in the De Anda decision that Kansas (the situs of the bankruptcy court decision) has a statute similar to Code of Virginia, 8.01-419.1. This Code provision makes NADA book value (yellow or black) admissible as evidence of fair market value. However, the Virginia Code section does not make NADA value dispositive. Instead, it states:

The determination of value shall be subject to such other credible evidence as any party may offer to demonstrate that the value as set forth in the NADA publication or any vehicle valuation service utilized by another party fails to reflect the actual condition of the vehicle and that, therefore, the value may be greater or less than that shown by the NADA publication or any vehicle valuation

⁸ The Suggested Retail Value per NADA is \$16,225.00 and the Suggested Retail Value from KBB of a car in Excellent Condition is \$15,935.00; whereas the KBB Private Party Value of a vehicle in Good Condition is \$12,965.00. Thus, depending upon the values that one would select, the difference between what the debtor believes is redemption value and what DaimlerChrysler thinks is the redemption value is approximately \$3,000.00.

service.

The wording of the Virginia Code section demonstrates that NADA value is one valuation starting point in Virginia and that it can be subject to adjustment up or down based on evidence that the starting point value “fails to reflect the actual condition of the vehicle.”

The debtor’s position ignores the plain language of 11 U.S.C. § 506(a)(2) which defines replacement value to mean the price a retail merchant would charge for property of that kind considering the age and condition of the property at the time value is determined. This Bankruptcy Code language dovetails with the Code of Virginia, § 8.01-419.1, which permits evidence of actual condition of the vehicle to be introduced in order to establish a value higher or lower than either the NADA publication or any other vehicle valuation publication.

The debtor’s total reliance on Private Party Value of Kelley Blue Book is misplaced. The definition by Kelley Blue Book of Private Party Value does not take into account retail merchant price for the property. Instead, it focuses on private party transactions. To select Private Party Value without consideration of retail merchant price would be inconsistent with the plain language of 11 U.S.C. § 506(a)(2). Further, to accept Private Party Value without any consideration of NADA value and any evidence offered as to the actual condition of the vehicle which would have an impact on NADA value would be inconsistent with the current law in the State of Virginia as to the appropriate method for valuation of motor vehicles. This court does not believe it should totally ignore the plain language of section 8.01-419.1 in considering motions for redemption, especially when it is consistent with section 506(a)(2).

In the case at bar, the debtor provided no evidence as to the condition of her

vehicle.⁹ This court holds that in redemption motions under 11 U.S.C. § 722 of the Bankruptcy Code, movants must adhere to the plain language of 11 U.S.C. § 506(a)(2) and offer evidence as to replacement value as defined therein. Further, movants must take into consideration Code of Virginia, § 8.01-419.1, which is consistent with the definition of replacement value in 11 U.S.C. § 506(a)(2). Under section 8.01-419.1, it appears that movants can use either NADA Yellow or Black Book value or “any vehicle valuation service regularly used and recognized in the automobile industry that is in effect on the relevant date,”. . . . In short, the debtor could use Kelley Blue Book value as a proposed benchmark for valuation but 11 U.S.C. § 506(a)(2) would indicate that the valuation reflective of the price that a retail merchant would charge for the vehicle would be the proper benchmark as opposed to Private Party Value. Consistent with both 11 U.S.C. § 506(a)(2) and Code of Virginia, § 8.01-419.1, the movant would also be permitted to introduce into evidence factors which would show that “the value may be greater or less than that shown by the NADA publication or any vehicle valuation service.” Likewise, the language in 11 U.S.C. § 506(a)(2) “considering the age and condition of the property at the time value is determined”, would permit introduction of evidence to demonstrate a higher or lower value than called for by the publication selected by the movant for use.

In the final analysis, the debtor elected to ignore plain language in 11 U.S.C. § 506(a)(2) which clearly shows that Congress intended retail value to be used as a starting point for valuation. Instead, the debtor elected to advocate a Private Party Value which, according to Kelley Blue Book, is lower than retail valuation. This court holds that the Private Party Value

⁹ Her counsel in arguing her position that Private Party Value is the proper measure for valuation in this case, stated that debtor “conceded that her car was in good condition.” However, because no evidence was offered from the witness stand by the debtor, DaimlerChrysler had no opportunity to test that statement by way of cross examination.

definition by Kelley Blue Book as a starting valuation point is inconsistent with 11 U.S.C. § 506(a)(2). Movants are not precluded from using Kelley Blue Book as a starting point for valuation but, in order to be consistent with 11 U.S.C. § 506(a)(2) retail value must be the starting point for any valuation in section 722 redemption proceedings. Consistent with 11 U.S.C. § 506(a)(2) and section 8.01-419.1 of the Code of Virginia, retail value may be increased or decreased based upon the actual condition of the vehicle. Once evidence is introduced which would indicate that an increase or decrease in valuation is warranted, value can be accurately assessed.¹⁰

Conclusion:

For the foregoing reasons, this court holds that the debtor failed to sustain her burden as to the valuation of the vehicle for purposes of redemption. Accordingly, it is

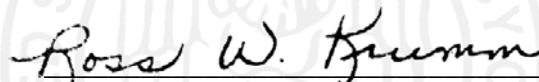
ORDERED:

That the debtor's motion to redeem be, and it hereby is **DENIED**.

Copies of this order are directed to be sent to Douglas W. Harold, Jr., Esquire,

¹⁰ It may well be that after all evidence is introduced Private Party Value would be most indicative of valuation for redemption purposes. It simply cannot be used as both a starting point and an ending point in redemption proceedings.

counsel for the debtor; and to Steven L. Higgs, Esquire, counsel for DaimlerChrysler Services North America, LLC.



Ross W. Krumm

Ross W. Krumm
U. S. Bankruptcy Judge