

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:)	Chapter 13 Case
)	Number <u>89-11717</u>
STEVEN SHAWVER)	
CYNTHIA SHAWVER)	
)	
Debtors)	
_____)	
)	
BOB RICHARDS CHEVROLET COMPANY,)	
INC.)	
)	
Movant)	FILED
)	at 4 O'clock & 25 min. P.M.
)	Date: 5-17-91
vs.)	
)	
STEVEN SHAWVER)	
CYNTHIA SHAWVER)	
)	
Respondents)	

ORDER

Bob Richards Chevrolet Company, Inc. ("Bob Richards") seeks relief from the automatic stay of 11 U.S.C. §362(a) in order to foreclose its security interest in debtors' 1984 Oldsmobile Cutlass Ciera, manufacturer's ID No. 1G3AJ19E9ED383622. Debtors oppose this relief. Based upon the evidence presented at hearing and stipulations of facts submitted I make the following findings of fact and conclusions of law.

Debtors filed for protection under Chapter 13 of Title 11 United States Code on November 6, 1989. The debtors' plan was

confirmed on March 26, 1990 and the debtors are making regular plan payments to the Chapter 13 trustee. On January 16, 1991 the debtor, Steven Shawver, was arrested by the Richmond County Sheriff's Department and charged with intent to purchase and possess crack cocaine. At the time of his arrest Mr. Shawver was driving his 1984 Oldsmobile Cutlass Ciera. The automobile was seized by the Sheriff's Department. As of the date of hearing Steven Shawver has not been indicted nor tried on these offenses.

Bob Richards has a perfected first in priority security interest in the subject automobile. Following seizure, the Richmond County Sheriff's Department turned over the automobile to Bob Richards. At the time of turnover, the Sheriff's Department informed Bob Richards that if Bob Richards returned the automobile to the debtors any subsequent seizure would result in the forfeiture of Bob Richards' lien interest. The security agreement between the debtors and Bob Richards provides that the debtors agree not to expose the automobile to "misuse or confiscation". Bob Richards asserts that the seizure of the automobile places its interest at risk of loss constituting misuse or confiscation thereby establishing a "for cause" basis for relief from the automatic stay of 11 U.S.C. §362(a) to allow it to foreclose its security interest. The debtors contend that Bob Richards' interest is adequately protected by the debtors compliance with the provisions of the confirmed plan and that the automobile is necessary for an effective

reorganization of the debtors as it is their only means transportation. The debtors also assert that there is no risk of forfeiture of Bob Richards' interest in the automobile.

Bob Richards seeks relief from stay in order to foreclose its security interest. Pursuant to §362(g), in a relief from stay proceeding the party opposing relief must carry the burden of proof on all issues other than the issue of debtors' equity in collateral. General Motors Acceptance Corporation v. Jackie Dean Bullock and Linda Dale Bullock, (In re: Bullock), Chpt. case No. 89-11537 (Bankr. S.D. Ga. Augusta Division, Dalis, J. April 18, 1990). Under a §362(d)(1) "for cause" theory for relief, debtors' equity is not at issue. Therefore, the debtors bear the full burden of proof in opposition to the relief as requested.

Bob Richards asserts that the seizure of the debtors' automobile by the Richmond County Sheriff's Department and threat of forfeiture of its security interest in any future seizure establishes a "for cause" basis for relief from stay. An automobile may be subject to forfeiture if the automobile is used or intended for use to transport, hold, conceal, or in any other manner to facilitate the transportation, for the purpose of sale or receipt of cocaine. O.C.G.A. §16-13-49(a)(1) & (4)¹; O.C.G.A.

¹ O.C.G.A. §16-13-49(a)(1) & (4) provides in pertinent part:

(a) The following are subject to forfeitures:

§16-13-26

Schedule II.² However, a forfeiture Or an automobile encumbered by a bona fide security interest is subject to the interest of the secured party if the secured party neither had knowledge of nor consented to the act or omission giving rise to forfeiture. O.C.G.A. §16-13-49(a)(4)(C). In this case no forfeiture occurred. O.C.G.A. §16-1349(e) provides in pertinent part:

When [a] . . . conveyance, or other property is seized under this article [O.C.G.A. §16-13-49], the sheriff, drug agent, or law enforcement officer seizing the same shall report the fact of seizure, within ten days

(1) all controlled substances and marijuana

which have been manufactured, distributed, dispensed, held, or acquired in violation of this article; . . .

(4) all conveyances, including vehicles, . . . which are used, or intended for use, to transport, hold, conceal, or in any manner to facilitate the transportation, for the purpose of sale or receipt, of property described in paragraph (1) . . . of this subsection

²O.C.G.A. §16-13-26 Schedule II provides in pertinent part:

The controlled substances listed in this Code section are included in Schedule II:

(1) any of the following substances . . . whether produced directly or indirectly by extraction . . .

(D) cocaine, coca leaves, any salt, compound, derivative

thereof, to the district attorney of the judicial circuit having jurisdiction in the county where the seizure was made. Within 30 days from the date he receives notice of the seizure, the district attorney of

the judicial circuit, or the director on his behalf shall cause to be filed in the superior court of the county in which the property is seized or detained an action for condemnation of such property as provided for in this Code section. The proceedings shall be brought in the name of the state by the district attorney of the circuit in which the property was seized, and the action shall be verified by a duly authorized agent of the state in a manner required by the law of this state . . .

. At the expiration of 30 days after such filing, if no claimant has appeared to defend the action, the court shall order the disposition of the seized merchandise as provided for in this Code section. If the court determines that a claimant defending the action knew or by the exercise or ordinary care should have known that the merchandise was to be used for an unlawful purpose subjecting it to forfeiture under this chapter, the court shall order the disposition of the seized merchandise as provided herein and that claimant shall have no claim upon the merchandise or proceeds from the sale thereof

. . . .

No such action was instituted in the Superior Court of Georgia. In this case, the Richmond County Sheriff's Department merely turned over the automobile to Bob Richards, the holder of a first in priority security interest in the automobile. Bankruptcy Code §362(b)(5) provides that the automatic stay of §362(a) does not stay the commencement of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power. In a forfeiture action such as outlined under O.C.G.A. §16-13-49(e) the governmental unit's only interest is to prevent

further misuse of the property. State of Georgia v. Seawell, 155 Ga. App. 734, 172 S.E.2d 514 (1980). The action contemplated under O.C.G.A. §16-13

49(e) is such exercise of a governmental units police power. However, in this case, the Richmond County Sheriff's Department chose not to pursue forfeiture and the exception to the §362 automatic stay set forth in §362(b)(5) is not applicable. Bob Richards seeks relief from stay in order to foreclose its security interest and is not a governmental unit. The interests of the debtor could have been terminated through the enforcement of the State's police power, but the State chose not to do so. The debtor in this case is charged with criminal conduct, but as yet there has been no determination of guilt and is presumed not guilty. Walker v. State, 179 Ga. App. 782, 347 S.E.2d 711 (1986).

In this case, Bob Richards seeks relief from stay because it fears a future seizure of this automobile by the Richmond County Sheriff's Department will result in Bob Richards losing its property interest. A forfeiture of an automobile encumbered by a bona fide security interest is subject to the interest of the secured party if that party neither had knowledge of nor consented to the act or omission. O.C.G.A. §16-13-49(a)(4)(C). The law is clear, where there is no evidence that the secured party was aware that the automobile was used for illegal purposes the creditor's security interest may not be forfeited. State of Georgia v. Seawell, supra. The fact that Bob

Richards is required to surrender the automobile to the debtor pursuant to the turnover provisions of 11 U.S.C. §542(a) and §362(a)(3) [Blackmon v. M.F.C. Financial Services, (In re: Blackmon), Ch. 13 case #91-10089, Adv. #91-1009 (Bankr. S.D. Ga. Aug. Div., Dalis, J. March 22, 1991)] does not impute knowledge to or consent of Bob Richards to any future use of this automobile in any illegal activity.

Bob Richards' contention that the debtors have violated the provisions of its security agreement to wit: "You agree not to expose the vehicle to misuse or confiscation" thereby establishing a "for cause" basis for relief is without merit. Confiscation is defined as "[t]he seizure of private property by the government without compensation to the owner, . . ." Black's Law Dictionary p. 271 (5th ed. 1979). In order for confiscation to occur the State must conclude its forfeiture proceeding under O.C.G.A. §16-13-49(e). As no forfeiture proceeding was commenced, no confiscation can occur. "Misuse" is generally defined as "improper or incorrect use; to use incorrectly, or to mistreat or abuse." Webster's II New Riverside University Dictionary p. 759 (1984 ed.). The debtors have established that the automobile is necessary for their effective reorganization and the debtors are making payments under the terms of their Chapter 13 plan. There is no evidence of abuse of the automobile or lack of insurance coverage. The only allegation to support a determination of

"misuse" is the charge of criminal conduct levied against the debtor, Steven Shawver. The State took no forfeiture action against the automobile and to this point there has been no determination of guilt against this debtor. A charge

of criminal conduct without a State forfeiture action against the collateral is insufficient to establish "misuse" as a "for cause" basis for relief from the automatic stay of 11 U.S.C. §362(a) to allow Bob Richards to foreclose its security interest.

The debtors have established by a preponderance of the evidence that the automobile is necessary for an effective reorganization of the debtors and that the interest of this creditor is adequately protected by payments through the Chapter 13 plan. There is no confiscation by the State nor evidence of misuse to substantiate a for cause basis for relief from stay.

It is therefore ORDERED that the motion of Bob Richards Chevrolet, Inc. for relief from the automatic stay of 11 U.S.C. §362(a) is denied;

further ORDERED that Bob Richards Chevrolet, Inc. immediately turnover to the debtors their 1984 Oldsmobile Cutlass Ciera, manufacturer's ID No. 1G3AJ19E9ED383622.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 17th day of May, 1991.