

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

In the Matter of:	:	Chapter 13
	:	
WILLIAM S. CHRISTIAN and	:	
PATSY B. CHRISTIAN,	:	
	:	
Debtors	:	Case No. 99-50632 RFH
	:	
	:	
WILLIAM S. CHRISTIAN and	:	
PATSY B. CHRISTIAN,	:	
	:	
Movants	:	
	:	
	:	
vs.	:	
	:	
	:	
FORD MOTOR CREDIT COMPANY,	:	
	:	
Respondent	:	

BEFORE

ROBERT F. HERSHNER, JR.
CHIEF UNITED STATES BANKRUPTCY JUDGE

COUNSEL:

For Movants:

JOHN K. JAMES
1109 Russell Parkway, Suite #2
Warner Robins, Georgia 31088

For Respondent:

MOLLY L. MCCOLLUM
560 First Street
Macon, Georgia 31201

STEPHEN H. BLOCK
2270 Resurgens Plaza
945 East Paces Ferry Road
Atlanta, Georgia 30326

For Chapter 13 Trustee:

LAURA D. WILSON
Post Office Box 954
Macon, Georgia 31202

MEMORANDUM OPINION

William S. Christian and Patsy B. Christian, Movants, filed on December 20, 1999 a Motion for Modification of Plan After Confirmation. Ford Motor Credit Company, Respondent, filed an objection on December 27, 1999. A hearing was held on February 14, 2000. The Court, having considered the evidence presented and the arguments of counsel, now publishes this memorandum opinion.

Mr. Christian was in the business of operating a backhoe service. Mr. Christian leased from Respondent a new 1999 Ford F-350 truck. The truck was used in Mr. Christian's business. Mr. Christian signed a Motor Vehicle Lease Agreement in August 1998. The term of the lease is three years. Monthly lease payments are \$468.30. The value of the truck at the beginning of the lease was \$31,000. Mr. Christian made an initial payment of \$4,782.30.¹ The residual value of the truck at the end of the lease was agreed to be \$19,374.30. The allowed mileage over the three-year term of the lease was 36,189 miles. The lease provides, in part, as follows:

Early Termination. You may have to pay a substantial charge if You end this lease

¹ This amount included a "cost reduction payment" of \$4,050, the first month's lease payment of \$468.30 and certain taxes and fees.

early. The charge may be up to several thousand dollars. The actual charge will depend on when the lease is terminated. The earlier You end the lease, the greater this charge is likely to be.

Movants suffered financial problems and filed a joint petition under Chapter 13 of the Bankruptcy Code on February 16, 1999. The Court entered an order on July 7, 1999, confirming Movants' Chapter 13 plan. The confirmed plan provides that Movants will make their monthly lease payments to Respondent outside of their Chapter 13 plan.

Mr. Christian later suffered serious health problems and will be unable to return to work. Movants filed a motion to modify their Chapter 13 plan after confirmation. Movants propose to surrender the truck to Respondent and to reject the balance of the lease. Movants propose to classify any deficiency under the lease as an unsecured claim.

The Chapter 13 Trustee urges the Court to approve Movants' proposed modification. Respondent objects to the proposed modification.

The Court entered an order on December 22, 1999, allowing Respondent to take possession of and liquidate the truck. Mr. Christian surrendered the truck in January 2000. Movants were current on their lease payments when the truck was surrendered.

Mr. Christian's truck, at surrender, was in good condition with about 26,000 miles. Mrs. Christian testified

that the NADA trade-in value of the truck was \$26,500 and the retail value was \$28,925. Mrs. Christian testified that these would be fair values for the truck.²

Section 365(g)(1) of the Bankruptcy Code³ provides that the rejection of an unexpired lease that has not been assumed constitutes a breach of the lease immediately before the date of the filing of the bankruptcy petition. This section provides as follows:

§ 365. Executory contracts and unexpired leases

. . . .

(g) Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease—

(1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title, immediately before the date of the filing of the petition; or

11 U.S.C.A. § 365(g)(1) (West 1993).

The Court is not persuaded that the lease on Mr. Christian's truck was assumed by Movants. Movants did not move the Court to approve an assumption of the lease. See 11

² Mr. Christian was unable to attend the hearing because of his health problems.

³ 11 U.S.C.A. § 365(g)(1) (West 1993).

U.S.C.A. § 365(a) (West 1993) (except as otherwise provided "the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor"); Fed. R. Bankr. P. 6006(a); 9014 (proceeding to assume or reject an unexpired lease, other than as part of a plan, is a contested matter which shall be made by motion). See generally In re Brewer, 233 B.R. 825, 828 (Bankr. E.D. Ark. 1999) (chapter 13 debtor, as well as the trustee, entitled to assume or reject unexpired lease).

The Court is not persuaded that Movants assumed the lease in their confirmed Chapter 13 plan. Movants confirmed plan simply provides that their lease payments would be made outside of their Chapter 13 plan. See generally 3 Collier on Bankruptcy ¶ 365.04[2][d] (15th ed. rev. 2000) ("If the debtor fails either to assume or reject [an unexpired lease] by separate order or in its plan, it appears that the [lease] would continue in existence").

Movants, in their motion to modify their confirmed Chapter 13 plan, propose to reject the lease on Mr. Christian's truck. Respondent's damages "stemming from rejection are treated as general unsecured claims." NLRB v. Bildisco and Bildisco, 465 U.S. 513, 540, 104 S. Ct. 1188, 1204 n.8, 79 L. Ed. 2d 482 (1984) (dissent); see also In re Scott, 209 B.R. 777, 784-85 (Bankr. S.D. Ga. 1997) (Walker, J.); 3 Collier on Bankruptcy ¶ 365.09[1] (15th ed. rev. 2000).

The Court is persuaded that it should grant Movants' motion to modify their confirmed Chapter 13 plan.

An order in accordance with this memorandum opinion will be entered this date.

DATED the 8th day of May, 2000.

ROBERT F. HERSHNER, JR.
Chief Judge
United States Bankruptcy Court