

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION**

In re:

CASE NO: 05-5811-3F7

**JAMES MARCUS FOREMAN, JR.
and JUDITH ELAINE FOREMAN,**

Debtors.

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

This case came before the Court upon Motion for Redemption (the "Motion") filed by Debtors and Response to Debtors' Motion to Redeem Personal Property filed by Allegacy Federal Credit Union ("Allegacy"). The Court conducted a hearing on the matter on February 15, 2006. The Court elected to take the matter under advisement. Upon the evidence and the arguments of the parties, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Debtors filed a Chapter 7 bankruptcy petition on June 1, 2005. Debtors own a 2003 Toyota Echo (the "Vehicle") in which Allegacy holds a security interest. On their Bankruptcy Schedule D, Creditors Holding Secured Claims, Debtors indicated the Vehicle had 51,900 miles on it. Debtors also indicated that the market value of the Vehicle was \$8,550.00 and that \$11,782.21 was owed on the Vehicle.

On December 1, 2005, Debtors filed the Motion with an attached affidavit indicating that the fair market value of the Vehicle was \$5,175.00. At the February 15, 2006 hearing on the Motion, Debtor Judith Foreman testified that as of that date the Vehicle had 64,000 miles on it. Mrs. Foreman opined that the wholesale value of the Vehicle as of that date was \$4,200.00. Allegacy introduced into evidence an N.A.D.A. Official Used Card Guide summary, which lists the trade-in (wholesale) value of the Vehicle in its July, 2005 Southeastern Used Car Guide at \$8,175.00. The summary was based upon a 2003 Toyota Echo with a mileage of 51,900.

CONCLUSIONS OF LAW

There are three issues before the Court. The first issue is whether collateral which is the subject of a motion to redeem is valued using wholesale value or fair market value. The court in In re Perez, 318 B.R. 742 (Bankr. M.D. Fla. 2005), specifically addressed that issue. There the court engaged in a thorough analysis of §§ 506 and 722 of the Bankruptcy Code and looked to the guidance provided by the U.S. Supreme Court in Associates Commercial Corp. v. Rash, 520 U.S. 953 (1997). The court held that the wholesale value is the appropriate value for purposes of a debtor's redemption of personal property under § 722. The court noted that it found comfort in the "apparent unanimity of all of the reported cases which have reached the same conclusion" Id. at 747.

Allegacy argues that the Eleventh Circuit Court of Appeals defined fair market value as the appropriate value for redemption purposes in In re Taylor, 3 F.3d 1512 (11th Cir. 1993). The issue in Taylor was whether 11 U.S.C. § 521(2) permits a chapter 7 debtor to retain property which secures a creditor's claim without reaffirming or redeeming if the debtor continues to perform according to the repayment provisions of the note and the underlying contract. Id. at 1514. In dicta the court noted that redemption "provides that a debtor may redeem personal property from a lien securing a dischargeable consumer debt by paying the secured lender the lesser of the fair market value of its collateral or the amount of the claim on the date the petition is filed". Id. The Court is not bound by dicta. See Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 379 (1994)(noting that "[i]t is to the holdings of our cases, rather than their dicta, that we must attend."); Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller, 957 F.2d 1575, 1578 (11th Cir. 1992)(explaining that dicta is "neither law of the case nor binding precedent"); McDonald's Corp. v. Robertson, 147 F.3d 1301, 1315 (11th Cir. 1998)(Carnes, J., concurring)(noting that "dicta in our opinions is not binding on anyone for any purpose.") The Court agrees with the well-reasoned analysis in Perez and holds that wholesale value is the appropriate value for purposes of a debtor's redemption of personal property under § 722.

The second issue before the Court is whether the collateral which is the subject of the redemption is to be determined on the date of the bankruptcy petition or the date of the hearing on a motion to redeem. Noting that valuing the collateral

as of the date of the petition would put a creditor in a better position than if the debtor had elected to surrender rather than redeem the collateral, the court in Perez held that the wholesale value is to be determined as of the date of the hearing. Perez, 318 B.R. at 748. Again, the Court finds the Perez reasoning convincing and holds that the wholesale value is to be determined as of the date of the hearing on a motion to redeem.

Finally, the Court must determine what the wholesale value of the Vehicle was as of February 15, 2006. Although the Court finds Allegacy's evidence of wholesale value more persuasive than Mrs. Foreman's opinion, the Court finds it appropriate to make a downward adjustment for the additional mileage and wear and tear on the vehicle since July, 2005. The Court finds that the wholesale value of the Vehicle as of February 15, 2006 was \$7,675.00. The Court will enter a separate order consistent with these Findings of Fact and Conclusions of Law.

DATED March 22, 2006 in Jacksonville, Florida.

/s/ Jerry A. Funk

JERRY A. FUNK

United States Bankruptcy Judge

Copies to:

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