

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

IN RE:

In Proceedings
Under Chapter 7

KEVIN JAMES TRIMM

Case No. 97-30602

Debtor(s).

ALTONIZED FEDERAL CREDIT UNION

Plaintiff(s),

Adversary No. 98-3041

v.

KEVIN JAMES TRIMM

Defendant(s).

OPINION

The issue before the Court is whether a Chapter 7 debtor, in order to effectively "surrender" collateral, must deliver it to the creditor. The facts of this case are not in dispute. In October 1994, the debtor executed a promissory note and security agreement in favor of the plaintiff, Altonized Federal Credit Union, for purchase of a 1992 Ford Ranger pickup truck. The debtor subsequently sought protection under Chapter 13 of the Bankruptcy Code.¹ The credit union filed a proof of claim for \$8,147.07, and although the debtor originally objected to the amount of the claim, he later withdrew his objection and amended his Chapter 13 plan to provide for surrender of the vehicle.

¹Although this case was originally filed under Chapter 13, the debtor converted to Chapter 7 on January 27, 1998.

The Court granted the credit union relief from stay to recover its collateral. The credit union then learned that the vehicle, having been rendered nonoperational, was no longer in the debtor's possession but was in Kentucky. The credit union thereupon filed this turnover action, alleging that the debtor has failed to make the vehicle reasonably available and should be ordered to turn over the vehicle.

DISCUSSION

Section 521(2)(A) of the Bankruptcy Code² requires a Chapter 7 debtor who has scheduled consumer debts secured by property of the estate to file, within thirty days, a statement of intention regarding the retention or surrender of such collateral.³ Once

²Section 521(2) provides, in pertinent part, that:

if an individual debtor's schedule of assets and liabilities includes consumer debts which are secured by property of the estate-

(A) within thirty days after the date of the filing of a petition under chapter 7 of this title. . . the debtor shall file with the clerk a statement of his intention with respect to the retention or surrender of such property. . . ;

(B) within forty-five days after the filing of a notice of intent under this section. . . the debtor shall perform his intention with respect to such property as specified by subparagraph (A) of this paragraph. . . .

11 U.S.C. § 521(2)(A), (B).

³In the instant case, the debtor did not file a statement of intention upon conversion to a Chapter 7. However, his First Amended Chapter 13 plan does provide for surrender of the vehicle to the credit union.

the statement is filed, the debtor must then perform his or her stated intention as to the property within forty-five days. 11 U.S.C. §521(2)(B); In re Edwards, 901 F.2d 1383 (7th Cir. 1990).

While the provisions of § 521(2) requiring performance of an intent to surrender are clearly mandatory, Lowery Federal Credit Union v. West, 882 F.2d 1543, 1545 (10th Cir. 1989); In re Tameling, 173 B.R. 627, 628 (Bankr. W.D. Mich. 1994), the Code does not define the term "surrender." The credit union urges that an effective surrender requires delivery of the collateral to the creditor. However, the plain language of § 521(2) does not impose such an obligation. Had Congress intended the interpretation urged by the credit union, it could have included language requiring a debtor to deliver secured property to the creditor as a condition of surrender. In the absence of language requiring actual delivery to effectuate surrender, the Court adheres to the express language of the statute and holds that a debtor has no obligation to deliver surrendered property to the creditor in order to comply with § 521(2).

While case law is scant concerning what constitutes "surrender" under § 521(2)(A), those courts considering the question have reached a similar conclusion. The court in In re Bushey, 204 B.R. 661 (Bankr. N.D.N.Y. 1997), discussing the options available to Chapter 7 debtors regarding the disposition of secured property, noted that in order to effect surrender pursuant to

§ 521(2)(A), the debtor must merely make the property available to the secured creditor. In explaining this option, the Bushey court stated:

[I]f the debtor selects the surrender option, it must make the personalty available to the creditor or explain its absence. It does not have to pack up or deliver the collateral, merely make it available for pickup. In other words, be reasonable.

Bushey, 204 B.R. at 663 (emphasis added). Although Bushey is factually distinguishable from the case at bar,⁴ its interpretation of § 521(2)(A) is consistent with the language of the statute and is the position adopted by this Court.

In so holding, the Court rejects the cases cited by the credit union, which hold that a debtor must do more than merely make the collateral available in order to effectuate a surrender. In re Robertson, 72 B.R. 2 (Bankr. D. Colo. 1985); In re Smith, 207 B.R. 26 (Bankr. N.D. Ga. 1997). Those cases are distinguishable in that the debtors there actually sought to abandon rather than surrender the property in question because they did not have possession or control of the collateral.⁵

⁴In Bushey, the debtors failed to do anything with respect to the subject property. Therefore, the court's opinion in that case dealt with the mandatory nature of § 521(2) and the remedies available to a creditor when a debtor fails to comply with its provisions. In the instant case, the debtors have indicated their intention to surrender the collateral and have made the property available to the credit union.

⁵In Robertson, the debtor attempted to discharge an obligation imposed pursuant to a state court divorce decree, whereby he was ordered to maintain payments on his ex-wife's vehicle. Because the debtor did not know the location of the

Here, the debtor is not only capable of tendering control of the vehicle to the creditor but has, in fact, informed the credit union that it may take possession of the vehicle at any time. The Court finds that the debtor in this case has made the property available to the credit union for pickup and that such action on the part of the debtor is sufficient to effectuate a surrender in a Chapter 7 case. Therefore, for the reasons stated herein, the plaintiff's complaint for turnover is dismissed.

ENTERED: June 19, 1998

/s/ Kenneth J. Meyers
UNITED STATES BANKRUPTCY JUDGE

vehicle, nor did he have possession of it, the court concluded that the debtor was merely attempting to abandon his obligation and, therefore, had not effectuated a valid surrender. Robertson, 72 B.R. at 4.

Similarly, in Smith, the debtor attempted to surrender a vehicle that was being held by an automotive repair shop subject to a valid mechanic's lien. Although the debtor told the creditor where the vehicle was located, the court found the surrender to be invalid because the debtor could not tender actual possession or control to the credit union. Smith, 207 B.R. at 30.