

In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

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| In the matter of: |) | |
| |) | Adversary Proceeding |
| JACQUELYN P. NEWTON |) | |
| (Chapter 13 Case <u>96-41369</u>) |) | Number <u>96-4131</u> |
| |) | |
| <i>Debtor</i> |) | |
| |) | |
| |) | |
| JACQUELYN P. NEWTON |) | |
| |) | |
| <i>Plaintiff</i> |) | |
| |) | |
| |) | |
| v. |) | |
| |) | |
| 275 MOTORS, INC. |) | |
| |) | |
| <i>Defendant</i> |) | |

MEMORANDUM AND ORDER

Plaintiff, Jacquelyn P. Newton (hereinafter "Debtor"), filed this complaint against Defendant, 275 Motors, Inc. (hereinafter "Defendant"), to recover damages pursuant to Section 362(h) for violation of the Section 362(a) automatic stay. Debtor claims that she is owed both actual and punitive damages and reasonable attorneys' fees for Defendant's

violation of the automatic stay. Defendant denies any willful violation of the stay and also asserts that if its actions are found to be willful punitive damages are clearly inappropriate. By virtue of 28 U.S.C. § 157(b)(2)(E), this matter is a core proceeding. Pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure, this Court held a trial on October 24, 1996, and makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

On November 10, 1995, Debtor purchased from Defendant a 1988 Dodge Dynasty for approximately \$7,043.85, including principal and interest to be paid to Defendant over a two-year period.¹ Debtor made regular payments over the course of the following six months until she filed for Chapter 13 bankruptcy protection on June 3, 1996. Just prior to filing for bankruptcy, Debtor's attorney advised her that because of her decision to file for Chapter 13 she should stop payment on the check dated May 10, 1996, which she recently had sent to Defendant. As instructed, Debtor stopped payment on the check; however, Debtor failed to notify Defendant of her intentions to file for bankruptcy. Through the normal course of its business, Defendant became aware that Plaintiff had stopped payment and as a result on May 31, 1996, commenced proceedings to repossess Debtor's automobile.

Apparently, Defendant hires an independent contractor to repossess

¹ Pursuant to the contract, Debtor made an \$800 down payment on November 10, 1995, and agreed to pay \$250 per month for the following twenty-four months. A final payment of \$243.85 was due on December 10, 1997.

automobiles from delinquent purchasers. On May 31, 1996, Defendant contracted for the return of the vehicle. Debtor filed bankruptcy on June 3, 1996. The vehicle was repossessed on June 13, 1996. At trial, Defendant demonstrated to this Court's satisfaction that the repossession efforts were commenced pre-petition and that the post-petition repossession was committed without actual knowledge of Debtor's bankruptcy. However, the testimony also revealed that subsequent to the repossession of the automobile Defendant was contacted on three different occasions by Debtor's counsel, notified of Debtor's bankruptcy, and in response failed to release the vehicle or take any action to rectify its continued violation of the automatic stay.

Specifically, on June 13, 1995, Cindy Maust, paralegal to Debtor's counsel, Thomas Cole, upon learning of the repossession, immediately telephoned 275 Motors leaving a detailed voice-mail message which stated that (1) Debtor previously had filed Chapter 13 bankruptcy, (2) that the automobile was property of the estate, and (3) that Defendant should provide for its immediate return. Later during that day, Ms. Maust again called Defendant at which time she spoke with John Pompey, Defendant's sales manager, and reiterated her prior message.

Accordingly, I find that Defendant received notice of the filing and its violation of the automatic stay not later than Thursday June 13, 1996. In response, Mr. Pompey stated that he did not have the authority to return the automobile and that he would

speak with the owner. On the following day, Friday June 14, 1996, Ms. Maust again contacted Mr. Pompey who stated that he informed the owner, Mrs. Yoko Hill, of the situation but that he was still without authority to release the vehicle. At that time, Ms. Maust explained to Mr. Pompey that the Debtor was considering filing an adversary proceeding to seek the return of the vehicle and monetary damages. She advised him to speak with someone who had authority to release the vehicle and that she would contact him on Monday June 17, 1996.

On Monday, Ms. Maust telephoned Mr. Pompey who once again reiterated that he had no authority to release the vehicle. At that time, Mr. Thomas Cole, counsel for the Debtor, spoke with Mr. Pompey and advised him of the legal and economic consequences that might result if Defendant, 275 Motors, did not return the vehicle. Mr. Pompey stated that he had notified Defendant's owner and that he had no authority to release the vehicle. Mr. Cole responded that if the Defendant would not release the vehicle by Friday June 21, 1996, he would file an adversary proceeding seeking the return of the vehicle and monetary damages. On Tuesday June 25, 1996, twelve days after Debtor filed her Chapter 13 petition, Debtor filed an adversary proceeding seeking the return of the vehicle. On July 12, 1996, this Court ordered the release of the vehicle to the Debtor, *instanter*.

At trial, testimony revealed that Defendant is owned by Mrs. Yoko Hill, a

sixty-five year old woman who inherited the business from her husband.² Mrs. Hill maintains the company's business records and leaves the day-to-day management to her son, Steve Hill. Defendant also employs a salesman and a mechanic. Unfortunately, on May 22, 1996, Steve Hill, was arrested and confined to an Effingham County jail until September 27, 1996. As a result, Defendant's salesman, John Pompey, was elevated to the position of sales manger and Mrs. Hill who previously attended only to the business' bookkeeping became more active in Defendant's day-to-day affairs. Both Mrs. Hill and Mr. Pompey testified that they had no prior experience with repossessions in relation to bankruptcy filings. Testimony also revealed that Mr. Pompey had no authority to release the vehicle, but that he notified Mrs. Hill of Debtor's demand for return of the vehicle on at least two occasions. Mrs. Hill testified that she did not authorize Mr. Pompey to release the vehicle because she was concerned about her son's incarceration.

This is not the Defendant's first contact with Section 362. Wade Gustin, Savannah bankruptcy attorney, testified that he had previous dealings with Defendant, 275 Motors, in the case of Arnold Fyall No. 96-40018. Mr. Gustin testified that on January 3, 1996, he filed a bankruptcy petition on behalf of Mr. Fyall and that two days later Defendant repossessed Arnold Fyall's vehicle with the knowledge that Mr. Fyall had filed a bankruptcy petition. Mr Gustin also testified that upon demand Defendant, acting through Steve Hill, would not release the vehicle unless Mr. Fyall paid off the debt completely. Accordingly,

² Defendant, 275 Motors, is incorporated and wholly owned by Mrs. Hill.

Mr. Gastin filed an adversary proceeding on January 8, 1996, seeking the return of the vehicle. On January 10, 1996, Mr. Hill was served with the complaint. On January 15, 1996, the parties were able to enter into a consent agreement.

For reasons unknown to the Court, Debtor failed to appear at trial. Nevertheless, Debtor's counsel made a *prima facie* case that would support a finding of actual damages, including attorneys' fees and damages for loss of Debtor's vehicle. The matter was taken under advisement to consider all issues including an award of punitive damages in light of Defendant's repeated disregard of federal law.

Debtor contends that this Court should award actual damages for lost wages, interim transportation costs, and attorneys' fees, and punitive damages for Defendant's refusal to return the vehicle. Debtor asserts that these facts are particularly egregious in light of the multiple efforts to give notice to Defendant and its previous refusal to comply with 11 U.S.C. Section 362(a).

Defendant contends that its actions were not willful. Defendant claims that its day-to-day manager, Steve Hill, was incarcerated at the time and that these unusual circumstances led to Defendant's unintentional violation of the automatic stay. Defendant further contends that if a willful violation did occur punitive damages are inappropriate in this matter either because at the time its agents, Mr. Pompey and Mrs. Hill, were unfamiliar

with bankruptcy law, or because any wilful violation of the automatic stay was not so egregious as to support an award of punitive damages.

CONCLUSIONS OF LAW

In pertinent part, 11 U.S.C. Section 362(a)(3) provides,

(a) Except as provided in subsection (b) of this section, a petition filed . . . operates as a stay, applicable to all entities, of--

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

11 U.S.C. § 362(a)(3). A basic tenet of federal bankruptcy law is that 11 U.S.C. Section 362(a) imposes an automatic stay on creditors and instantly prohibits any kind of post-petition collection activity normally available under state law, including "any act to obtain possession of property of the estate." Any post-petition act of a creditor that seizes control of a debtor's property is in violation of the automatic stay and void ab initio. See In re Young, 193 B.R. 620, 623 n.5 (Bankr.D.C. 1996); In re Richardson, 135 B.R. 256 (Bankr.E.D.Tex. 1992). Although the creditor in this matter commenced its repossession activity pre-petition, Defendant, 275 Motors obtained possession of Debtor's vehicle post-petition. Thus, its actions were void and pursuant to 11 U.S.C. Section 542(a), Defendant was required to return the vehicle upon Debtor's demand. Because Defendant refused to return Debtor's automobile, it violated its duty under the Bankruptcy Code and became

liable for damages.

Section 362(h) provides a remedy for any willful violation and provides:

(h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

In this case, there is no question that on Thursday June 13, 1996, Defendant received notification of its duty to return estate property and that it refused to comply with federal law. I agree that the repossession itself was not actionable because no actual knowledge of the filing had been received. However, Defendant was provided with notice after the repossession and intentionally chose to ignore its duty when repeatedly advised. The requirement that a stay violation be "willful" does not mean that an entity needs to possess "specific intent" when violating the automatic stay. *See In re Kirk*, 199 B.R. 70, 72 (Bankr.N.D.Ga. 1996). To the contrary, for purposes of Section 362(h), "willful" is satisfied when an entity acts in a deliberate manner with the knowledge that the debtor has filed a petition in bankruptcy. *See Matter of Flynn*, 169 B.R. 1007, 1013 (Bankr.S.D.Ga. 1994). "[W]here there is actual notice of the bankruptcy it must be presumed that the violation was deliberate or intentional." *Homer Nat'l Bank v. Namie*, 96 B.R. 652, 654 (W.D.La. 1989). Mrs. Hill admitted that she received notice of Debtor's demand and at the time she was too concerned with her son's incarceration. While that may be true, her decision not to permit

the vehicle's release was both deliberate and willful. Accordingly, I hold that through its owner, Mrs. Hill, Defendant received sufficient notice beginning on June 13, 1996, and willfully violated the automatic stay when she chose to ignore Debtor's demand for the return of the vehicle.

As previously set forth, section 362(h) provides that an individual debtor injured by a willful stay violation "*shall recover* actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." 11 U.S.C. Section 362(h) (emphasis added). Thus, upon a finding of a willful stay violation, the statute requires that a court award actual damages and further provides for an award of punitive damages within the discretion of the court. See Davis v. IRS, 136 B.R. 414, 423 n. 20 (E.D.Va. 1992); Matter of Mullarkey, 81 B.R. 280, 284 (Bankr.D.N.J. 1987). Notwithstanding the mandatory tone of Section 362(h), Debtor still retains the burden of proving his or her actual damages. See Matter of Flynn, 169 B.R. at 1021. Debtor did not testify at trial. Thus, the Court has no basis to award actual damages for lost wages or emotional distress. However, Debtor's counsel testified that attorneys' fees were incurred and have submitted an amended ledger documenting their costs in the amount of \$1,987.50. Accordingly, Plaintiff is entitled actual damages of attorneys' fees in the amount of \$1,987.50.

Additionally, on July 12, 1996, I ordered the return of Debtor's vehicle

instanter. Taking judicial notice of the July 12, 1996 Order, I find that Plaintiff has proven loss of a vehicle's use for a one-month period. Although it is difficult to quantify the loss of a vehicle's use, I find that the best available evidence is the contract payment rate of \$250 per month. Arguably, this amount is different than the rental value of a replacement vehicle; however, Plaintiff failed to prove any other measure of damages at trial. Therefore, Plaintiff is entitled to additional actual damages of \$250 for the loss of her vehicle's use.

Finally, as to punitive damages, a number of courts have adopted the standard set forth in In re Wagner, 74 B.R. 898 (Bankr.E.D.Pa. 1987), for determining when "appropriate circumstances" exist for an award of such damages under section 362(h):

Punitive damages are awarded in response to particularly egregious conduct for both punitive and deterrent purposes. Such awards are reserved for cases in which the defendant's conduct amounts to something more than a bare violation justifying compensatory damages or injunctive relief. To recover punitive damages, the defendant must have acted with actual knowledge that he was violating the federally protected right or with reckless disregard of whether he or she was doing so.

Id. at 903 (*quoting in part* Cochetti v. Desmond, 572 F.2d 102, 106 (3rd Cir. 1978)).

Considering the facts, I hold that the circumstances of this case warrant an award of punitive damages. First and foremost, Mrs. Hill's decision to ignore the demands of Debtor's counsel displays an unacceptable indifference towards federal law. *See* Matter of Flynn, 169 B.R.

at 1024 (I.R.S.'s recalcitrance and indifference supported an award of punitive damages in the amount of \$10,000). She made no attempt to contact Debtor's counsel and instead only communicated through her sales manager to whom she granted no authority to release the car. In fact, Mrs. Hill elected to ignore all requests and demands until she received an Order from this Court requiring turnover approximately one month after the repossession. Defendant contends that its actions should be excused because of Mrs. Hill's unfamiliarity with the Bankruptcy Code and the incarceration of its day-to-day manager. However, Steve Hill's previous refusal to turnover property of the estate only six months earlier supports an inference that the stay violation would not have been remedied by his presence. More importantly, the Defendant in this case is 275 Motors. In January 1996, 275 Motors through its agents refused to turnover property of the estate upon an appropriate demand unless Debtor paid off the lien on the car. In June 1996, 275 Motors through its agents again refused to turnover property of the estate until ordered by this Court. Considering the short time period between these events and the Defendant's course of dealing with Debtors and estate property, I hold that an award of punitive damages is necessary to punish Defendant, 275 Motors, for its prior actions and deter similar future conduct. Thus, Plaintiff is entitled to an award of punitive damages in the amount of \$1,000.00.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the Clerk enter judgment in favor of the Plaintiff,

Jacquelyn P. Newton, for actual damages in the amount of \$250.00 and attorney's fees in the amount of \$1,987.50.

IT IS FURTHER THE ORDER OF THIS COURT that the Clerk enter judgment in favor of the Plaintiff, Jacquelyn P. Newton, for punitive damages in the amount of \$1,000.00.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of December, 1996.