



IT IS ORDERED as set forth below:

Date: June 12, 2009

James E. Massey

James E. Massey
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:		CASE NO. 09-68357
Elletta Lynnette Denson,		
		CHAPTER 13
Debtor.		JUDGE MASSEY

Elletta Lynnette Denson,		
Plaintiff,		
v.		ADVERSARY NO. 09-6206
Mercedes Benz Credit Corp.,		
Defendant.		

ORDER GRANTING IN PART PLAINTIFF'S MOTION FOR DEFAULT JUDGMENT

Plaintiff and Debtor Elletta Lynnette Denson brings this adversary proceeding to recover damages for a willful violation of the automatic stay, alleging that after Plaintiff filed this case, Defendant repossessed and refused to return to Plaintiff a 2002 Mercedes automobile,

notwithstanding that Defendant had actual knowledge of the pendency of Plaintiff's bankruptcy case. The certificate of service of the summons and complaint filed by Plaintiff's counsel on April 9, 2009 describes effective service pursuant to Bankruptcy Rule 7004.

On May 19, 2009, the Clerk entered a default based on Defendant's failure to file a response to the complaint. Plaintiff filed on May 20, 2009 an "Amended Request for Entry of Default Judgment." Rule 55 of the Federal Rules of Civil Procedure, made applicable here by Rule 55 of the Federal Rules of Bankruptcy Procedure, provides for entry of default judgments by clerks under certain circumstances. Otherwise, the plaintiff may "apply" for entry of a default judgment by the court. The amended request, which is in effect a motion, is supported by an affidavit of Plaintiff's counsel stating that Defendant did not file an answer and counsel had not received one.

Plaintiff filed on June 8, 2009 a document entitled "Objection to Debtor Complaint For Turnover And Damages." That document, which for benefit of Defendant's counsel is known in our trade as an "answer," responded to the complaint, admitting and denying various factual allegations. The answer was not timely. Defendant has neither moved to open its default nor responded to the amended request for entry of a default judgment. Under these circumstances, Plaintiff is entitled to a default judgment.

The effect of failing to file a timely response to a complaint in federal court is that the well-pleaded allegations of fact are deemed admitted. *Nishimatsu Contr. Co., Ltd. v. Houston Nat'l Bank*, 515 F.2d 1200, 1206 (5th Cir. 1975) ("The [defaulting] defendant is not held to admit facts that are not well-pleaded or to admit conclusions of law."). Hence, Defendant has admitted the facts alleged in paragraphs 3 through 17 of the complaint. (The portion of the complaint

following paragraph 17 is a brief and should not have been included in the complaint; the time to file a brief is when a motion is filed.)

Based on the foregoing, Plaintiff is entitled to a partial judgment determining that Defendant is liable to Plaintiff for deliberately violating 11 U.S.C. §362(a) with the amount of damages, if any, and amount of attorney's fees to be determined after trial pursuant to 11 U.S.C. § 362(k). Plaintiff is further entitled to a judgment directing the immediate turnover of the vehicle.

Accordingly, Plaintiff's request for a default judgment is GRANTED except as to the amount of her actual damages, the amount of punitive damages, and the amount of attorney's fees. The Court will enter a separate judgment finding liability and directing Defendant to turn over the vehicle to Plaintiff and will enter a separate notice of trial.

END OF ORDER