

11-20-06

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION**

IN THE MATTER OF:	:	CASE NUMBER
	:	
TIANA ROCHELLE COMBS,	:	BANKRUPTCY CASE
	:	NO. 06-10872-WHD
	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 13 OF THE
Debtor.	:	BANKRUPTCY CODE

ORDER

Tiana Rochelle Combs (hereinafter the "Debtor") seeks sanctions against Danco Financial, Inc. (hereinafter "Danco") pursuant to section 362(k) of the Bankruptcy Code. The Debtor contends that Danco willfully violated the automatic stay when it repossessed the Debtor's vehicle post-petition and then refused to turn over the vehicle. Danco opposes the imposition of sanctions, arguing that it did not receive proper notice of the bankruptcy filing to permit an award of damages under section 362(k). Following a hearing on July 27, 2006, the Court took the matter under advisement. This matter constitutes a core proceeding, over which this Court has subject matter jurisdiction. *See* 28 U.S.C. § 1334; *MBNA America Bank, N.A. v. Hill*, 436 F.3d 104 (2d Cir. 2006) (action under section 362(h) is core proceeding because it derived directly from the Bankruptcy Code and can be brought only in the context of a bankruptcy proceeding).¹

¹ The dismissal of the Debtor's Chapter 13 bankruptcy case has not rendered the issue of damages moot and does not deprive the Court of subject matter jurisdiction. *See Price v. Rochford*, 947 F.2d 829 (7th Cir. 1991) (claim for damages under section 362(h) survives the termination of the underlying bankruptcy); *see also Justice Cometh, Ltd. v.*

FINDINGS OF FACT

The Debtor filed a voluntary petition under Chapter 13 of the Code on June 1, 2006. At the time of the filing, the Debtor owned a 2000 Chevrolet Malibu (hereinafter the "Vehicle"), which she purchased and finance from Danco on February 17, 2006. The Debtor listed Danco as a creditor on Schedule D as follows: Daniel Coleman Financial DANCO; P.O. Box 1616, Smyrna, Georgia 30081. Although the Debtor obtained this address from a credit report prepared on June 1, 2006 by Equifax, Danco has not received mail at this address for seven years. Danco's correct mailing address is P.O. Box 888, Mableton, Georgia and its correct physical address is 4280 Atlanta Road, Smyrna, Georgia 30080. Prior to the filing, the Debtor received correspondence from Danco that included Danco's correct physical address, to which she mailed a form and at least one payment.

Danco repossessed the Debtor's vehicle on June 12, 2006. Danco first received notice of the bankruptcy filing through a telephone call and later through facsimiles from the Debtor's attorney, which were first received by an employee of Danco at approximately 10:14am on June 13, 2006. On June 14, 2006, Danco informed the Debtor that she could pick up the Vehicle at its holding lot in Mableton, Georgia. The Debtor traveled 60 miles one way to Mableton, Georgia, to pick up the vehicle. To do so, she had to take time off from work at a loss of \$94 and obtain a ride from a friend, for which she paid \$40.

Lambert, 426 F.3d 1342 (11th Cir. 2005) (district court had original jurisdiction to consider former debtor's claim for damages under section 362(h) where alleged stay violation occurred while the automatic stay was in place).

On June 20, 2006, the Debtor filed the instant motion in which she seeks a finding that Danco has violated the automatic stay and that Danco is liable for damages pursuant to section 362(k). Danco filed a motion for relief from the automatic stay on June 28, 2006, which the Debtor did not oppose, and an order granting relief from the stay was entered on July 28, 2006. The Debtor's Chapter 13 case was dismissed on August 16, 2006.

DISCUSSION

The commencement of a bankruptcy case, upon the filing of a voluntary petition, creates a bankruptcy estate. 11 U.S.C. § 541(a). If the debtor commences a case by filing a petition under Chapter 13, "property of the estate" includes, among other interests, those property interests specified in section 541 of the Code. *See* 11 U.S.C. § 1306. Such property interests include "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). Accordingly, the debtor's interest in a vehicle owned at the time of the filing of the petition becomes property of the estate.

The commencement of a bankruptcy case also triggers an automatic stay that prevents creditors from taking "any action to obtain possession of property of the estate . . . or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3). The automatic stay comes into effect immediately upon the commencement of the bankruptcy case and is "good against the world, regardless" of whether a party has notice of the stay or the bankruptcy filing. *In re Peralta*, 317 B.R. 381 (9th Cir. BAP 2004); *see also In re Smith*,

180 B.R. 311 n.17 (Bankr. N.D. Ga. 1995) (Murphy, J.). Actions taken in violation of the automatic stay are void and without effect. *See In re Albany Partners, Ltd.*, 749 F.2d 670, 675 (11th Cir.1984).

Danco exercised control over property of the estate after the filing of the petition. Accordingly, there is no question that Danco's post-petition repossession of the Debtor's vehicle violated the automatic stay. Additionally, once Danco learned that it had repossessed the Vehicle in violation of the automatic stay, it had an obligation to "take affirmative action to undo an innocent violation of the automatic stay" and its failure to do so "may constitute a willful violation." *In re Smith*, 180 B.R. 311 (Bankr. N.D. Ga. 1995) (Murphy, J.) (failure to vacate judgment entered post-petition constituted a willful violation of the automatic stay); *see also Commercial Credit Corp. v. Reed*, 154 B.R. 471, 476 (E.D. Tex. 1993) ("[A] creditor must act *immediately* to restore the status quo once it learns that it has violated the stay."); *In re Wariner*, 16 B.R. 216 (Bankr. D. Tex. 1981) ("A creditor has an affirmative duty to return the property and restore the *status quo* once it learns its actions violated the stay."); *In re Miller*, 10 B.R. 778 (Bankr. D. Md. 1981) (creditor has an affirmative obligation to return vehicle repossessed post-petition; failure to do so constituted a willful stay violation and supported an award of damages).

"[A]n 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." 11 U.S.C. § 362(k)(1).² A violation of the automatic stay is "willful" if the party "(1) knew the automatic stay was invoked and (2) intended the actions which violated the stay." *In re Jove Engineering, Inc.*, 92 F.3d 1539, 1554 (11th Cir. 1996). Therefore, to establish entitlement to an award of damages under section 362(k)(1), an individual must show that the party violated the automatic stay with knowledge of the bankruptcy filing.

Here, the Court has determined, as a matter of fact, that Danco did not have knowledge of the existence of the automatic stay at the time it caused the repossession of the Vehicle. The notice sent to Danco did not reach Danco because it was addressed to a post office box address that Danco had not used in over seven years. *See In re Preston*, 333 B.R. 346 (Bankr. M.D.N.C. 2005) (mailing notice to an incorrect address does not give rise to the presumption that it was received by the person to whom it is addressed). Accordingly, Danco's repossession of the Vehicle, while clearly resulting in a violation of the automatic stay, was not "willful" within the meaning of section 362(k) and cannot support an award of damages.

That being said, the Debtor also contends that Danco's failure to immediately return

² Prior to the amendments made by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, this provision was found in section 362(h). If the violation of the stay "is based on an action taken by an entity in the good faith belief that" the automatic stay has terminated with regard to the debtor due to the debtor's failure to file a statement of intention or to perform the statement of intention, any damages for a stay violation must be limited to actual damages. 11 U.S.C. § 362(k)(2).

the vehicle upon receiving actual notice by telephone and by fax of the bankruptcy filing constituted a willful violation of the automatic stay. Because Danco caused the Vehicle to be repossessed after the filing of the bankruptcy petition, it had an affirmative obligation to restore the situation to the *status quo*. Failure to do so constituted a continuing violation of section 362(a)(3). Merely making the Vehicle available to the Debtor for pick up at a location 60 miles away from the place from which it was repossessed did not restore the situation to the *status quo* as it existed at the time of the filing of the Debtor's bankruptcy petition. *See In re Belcher*, 189 B.R. 16 (Bankr. S.D. Fla. 1995) (creditor's failure to return vehicle, which was repossessed post-petition without knowledge of the bankruptcy, to the place from which it was taken constituted a continuing violation of the automatic stay); *In re Brooks*, 207 B.R. 738 (Bankr. N.D. Fla. 1997) ("This court finds that a willful violation occurred--not when the vehicle was originally repossessed--but when, after defendant had knowledge of the bankruptcy, the vehicle was not returned to the debtors' possession where it was repossessed but, instead, was made available for the debtors' retrieval."); *In re Davis*, 265 B.R. 453 (Bankr. N.D. Fla. 2001).

The Court does not take issue with the speed with which Danco acted to make the Vehicle available to the Debtor under the circumstances. If Danco had returned the Vehicle to the place from which it was repossessed with such alacrity, the Court would certainly find that Danco acted with reasonable promptness to address its inadvertent stay violation. Instead, Danco chose to simply make the Vehicle available to the Debtor, which required

the Debtor to take time off from work and to pay a friend to take her to Mableton, Georgia. As a result of this decision, the Debtor suffered actual damages of \$94 as a result of lost wages and \$40 for the cost of traveling to Mableton. This continuing violation was "willful" within the meaning of section 362(k)(1) because, when Danco made the decision to require the Debtor to pick up the Vehicle, it had knowledge of the existence of the automatic stay and the fact that the initial repossession violated the automatic stay. Under the circumstances of this case, the Court finds that, assuming an award of damages is appropriate under section 342(g), the Court must award the Debtor her actual damages as required by section 362(k)(1). *See* 11 U.S.C. § 362(k)(1) (an individual injured by any willful violation of the stay "shall" recover actual damages).

Section 342(g)(2) provides that "[a] monetary penalty may not be imposed on a creditor for a violation of a stay in effect under section 362(a) (including a monetary penalty imposed under section 362(k)) . . . unless the conduct that is the basis of such violation . . . occurs *after such creditor receives notice effective under this section of the order for relief.*" 11 U.S.C. § 342(g)(2) (emphasis added). Under section 342(g)(1), "[n]otice provided to a creditor by the debtor or the court other than in accordance with [section 342] shall not be effective notice until such notice is brought to the attention of such creditor." 11 U.S.C. § 342(g)(1). Section 342(g)(1) further provides "[i]f such creditor designates a person or an organizational subdivision of such creditor to be responsible for receiving notices under this title and establishes reasonable procedures so

that such notices receivable by such creditor are to be delivered to such person or such subdivision, then a notice provided to such creditor other than in accordance with this section (excluding this subsection) shall not be considered to have been brought to the attention of such creditor until such notice is received by such person or such subdivision."

11 U.S.C. § 342(g)(1).

Therefore, the Court cannot assess monetary sanctions under section 362(k), unless the Court finds that notice of the Debtor's bankruptcy filing, which was a notice provided by the Court, either complies with the requirements of section 342 or was "brought to the attention of" Danco. In this case, the Court need not determine whether the notice of the Debtor's bankruptcy filing complied with each aspect of section 342 because the Court concludes that the notice was "brought to the attention" of Danco prior to the conduct that violated the automatic stay.³

Section 342 does not specify the exact means by which notice is "brought to the attention of" a creditor, other than the provision in section 342(g)(1) that requires notice to be "received by" a particular person or subdivision if such a person or subdivision has been designated by the creditor to receive such notices. There is no evidence in the record that Danco has designated a particular person or organizational subdivision to be responsible

³ The requirements of section 342 include the requirement that a creditor receive "appropriate notice" of the order for relief, 11 U.S.C. § 342(a), and that the creditor receive notice of the order for relief provided by the clerk's office at a particular address if the creditor has designated such an address. *See* 11 U.S.C. § 342(e).

for receiving notices of bankruptcy filings.⁴ Accordingly, this provision of section 342(g)(1) does not apply in this case, and the Court is not required to make a finding that notice of the order for relief was received by a particular person or subdivision of Danco. In any event, personally apprising Daniel Coleman, the president of Danco, of the bankruptcy filing by phone and by faxing a copy of the order for relief was reasonably calculated to apprise Danco of the bankruptcy filing and therefore, constitutes bringing notice of the bankruptcy filing to Danco's attention within the meaning of section 342(g)(1).

After the Debtor brought to Danco's attention notice of the bankruptcy filing, Danco made the decision to require the Debtor to travel to Mableton to retrieve the Vehicle. Therefore, the Court concludes that Danco willfully violated the automatic stay within the meaning of section 362(k) and that section 342(g) does not prohibit an award of actual damages for this violation.

That being said, the Debtor's actual damages must have arisen from Danco's willful violation of the stay, and the Court must also recognize that a debtor has a duty to mitigate her actual damages, including attorney's fees. *See In re Belcher*, 189 B.R. 16 (Bankr. S.D.

⁴ Although Danco makes the statement in its brief that Danco has designated Daniel Coleman as the person to make all decisions with regard to bankruptcy matters, such a statement does not constitute evidence, and no other evidence was presented during the hearing to support this statement. Even assuming Daniel Coleman was designated as a person to receive notices of bankruptcy filings, Daniel Coleman did receive actual notice of the order for relief, through his receipt of the facsimile sent by the Debtor's attorney and through his telephone discussions with the Debtor's attorney, prior to the time he made the decision on behalf of Danco to require the Debtor to drive to Mableton to retrieve the Vehicle. Accordingly, section 342(g)(1), if applicable, has been satisfied.

Fla. 1995); *In re Esposito*, 154 B.R. 1011 (Bankr. N.D. Ga. 1993) (Murphy, J.). The costs incurred by the Debtor in retrieving the Vehicle clearly arose as a result of Danco's failure to deliver the Vehicle to the Debtor or to the place from which it was repossessed. Additionally, having reviewed the Debtor's attorney's time record and having considered the fact that the Debtor could possibly have avoided the repossession of the Vehicle in the first instance by conducting a more diligent investigation as to the proper address to which notice should have been mailed to Danco, the Court finds that \$400 of the fees requested were reasonably necessitated by Danco's willful violation of the automatic stay. Much of the time spent by the Debtor's attorney would have been required even if Danco had returned the Vehicle to the location from which it was repossessed.

CONCLUSION

For the reasons stated above, the Debtor's Motion for Sanctions for Willful Violation of the Automatic Stay is **GRANTED**. Danco shall compensate the Debtor \$188 for two days' missed wages and \$40 paid for travel to Mableton. Danco shall also remit \$400 to the Debtor's counsel, James N. Stanley, Jr., for attorney's fees.

IT IS SO ORDERED.

At Newnan, Georgia, this 20th day of November, 2006.



W. HOMER DRAKE, JR.
UNITED STATES BANKRUPTCY JUDGE