

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF:) CASE NO. BK97-80017
) CH. 13
DENNIS & STEPHANIE GRIGER,)
) Filing No. 14, 15, 17 (3-9)

DEBTOR(S))

MEMORANDUM

Hearing was held on March 17, 1997, on Motion for Turnover of Property and for Sanctions filed by the Debtors. Appearances: Ronald A. Hunter for the debtor and Mark Quandahl for Nissan Motor Acceptance Corporation. This memorandum contains findings of fact and conclusions of law required by Fed. Bankr. R. 7052 and Fed. R. Civ. P. 52. This is a core proceeding as defined by 11 U.S.C. § 157(b)(2)(E).

Facts

The following facts are not in dispute:

The debtors, Dennis and Stephanie Griger, filed a petition for relief under Chapter 13 on January 6, 1997. One week prior to that date, on December 31, 1996, Double Eagle Auto Recovery (Double Eagle) repossessed the debtors' vehicle at the behest of Nissan Motor Acceptance Corporation (Nissan), which held a security interest in the vehicle. On the date of the petition, counsel for the debtors, Ronald Hunter, faxed and mailed a letter to Nissan giving notice of the bankruptcy and requesting a return of the vehicle. Nissan did not respond to the letter.

On January 8, 1997 Hunter phoned Nissan. Nissan informed him that it required a copy of the debtors' bankruptcy petition before it would release the vehicle to the debtors and that the debtors would be required to pay for the costs of repossessing the vehicle. Hunter then sent another letter to Nissan requesting turnover of the vehicle.

Hunter mailed another letter to Nissan on January 9, 1997 providing proof of insurance on the vehicle. Hunter also phoned Nissan, and an employee of Nissan, Sandra Jones,

informed him that she would get back to him the next day. She did not.

Hunter again phoned Nissan on January 14, 1997 after failing to hear from Nissan, but was unable to speak with Jones. Jones returned his call on January 15, 1997, and indicated to Hunter that the debtors could pick up the vehicle at Double Eagle and that she would fax a release of the vehicle to them.

The debtors phoned Double Eagle on the following day, January 16, 1997, but were informed that the vehicle was in the Kansas City, Missouri area. Hunter phoned Jones on January 17, 1997, and was informed by her that the vehicle was at Metro Auto Auction, Inc. in Lee's Summit, Missouri, that Nissan refused to arrange for the transportation of the vehicle back to the Omaha area, and that the debtors would have to arrange to have the car transported. When Hunter explained that it was his opinion that Nissan was required by the bankruptcy code to arrange for the transportation of the vehicle, she reiterated her statement that the debtors would have to arrange for transportation back to Omaha. Hunter then sent another letter to Nissan requesting turnover of the vehicle.

On January 21, 1997, Hunter again contacted Nissan, but Jones stated to him that she did not have a response as to the status of the debtors' vehicle. However, on that date Jones faxed a request to Metro to arrange for the transportation of the vehicle and faxed a release to Double Eagle.

The debtors' vehicle was scheduled to be transported back to the Omaha area on January 24, 1997. Bad weather on both January 24 and 25, 1997 forced a postponement of the transportation. The vehicle arrived in Omaha on January 27, 1997 and was picked up by the debtors thereafter.

Prior to the vehicle's transportation back to Omaha, the debtors filed a motion for turnover of property and for sanctions on January 23, 1997. The debtors provided notice of the hearing to Nissan, and Hunter also phoned Jones and notified her of the hearing. A hearing on the motion was held on January 27, 1997, but no one appeared on behalf of Nissan.

This court, by journal entry dated January 27, 1997, ordered the debtors' vehicle to be made available to them, and

granted Hunter 10 days to submit affidavit evidence as to the actual damages incurred by the debtors, including attorneys fees and costs. Nissan was granted 10 days thereafter to file an objection to the requested amount and to present affidavit evidence.

The debtors incurred actual damages and attorney fees in the amount of \$662.50 as a result of the failure of Nissan to take immediate action to turnover the vehicle to the debtors. This amount includes no charges for notifying Nissan of the bankruptcy filing nor any time preparing the affidavit concerning the fees. The damage amount does not include a request for damages for the debtors' inconvenience of being without a car for 21 days after the petition date.

On February 18, 1997, Nissan requested a hearing on the matter, and filed an objection to the debtors' motion on February 21, 1997. A hearing was held March 17, 1997.

Decision

The actions of Nissan Motor Acceptance Corporation amount to a willful violation of the automatic stay. Accordingly, the debtors are entitled to actual damages, including attorneys fees and costs, pursuant to 11 U.S.C. § 362(h), in the amount of \$662.50.

Discussion

The debtor has filed a motion seeking turnover of property and sanctions pursuant to 11 U.S.C. § 362(h). The vehicle has already been turned over to the debtors' control, so the sole remaining issue is damages. Section 362(h) provides:

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.

11 U.S.C. § 362(h). "A willful violation of the automatic stay occurs when the creditor acts deliberately with knowledge of the bankruptcy petition." Knaus v. Concordia Lumber Co. (In re Knaus), 889 F.2d 773, 775 (8th Cir. 1989). "The creditor need not intend to violate the automatic stay, but only to do

the act which is in violation of the automatic stay; a creditor's good faith belief that it has a right to the property in question is irrelevant." Mueller v. Nelson (In re Mueller), Neb. Bkr. 94:320, 345 (Bankr. D. Neb. 1994) (Minahan, J.).

The actions of Nissan in this case show a lack of regard for the bankruptcy code and the rights of the bankruptcy estate. This particular creditor does business on a nationwide scale, and should be familiar with its obligations with respect to property of a bankruptcy estate. However, Nissan informed counsel for the debtors on separate occasions that the debtors would be required to pay for the costs of the repossession of the vehicle and that the debtors would be responsible for arranging for and paying for transportation of the vehicle from Lee's Summit, Missouri to Omaha, Nebraska. Both statements are contrary to Nissan's obligations under the bankruptcy code.

In addition, there was a delay of three weeks from the date of the petition in returning the vehicle to the debtors, all of the delay being attributable to Nissan or its agents. (Bad weather in Missouri for two days does not account for a three week delay in the return of the vehicle.) A willful violation of the automatic stay is not only triggered by malfeasance; nonfeasance on the part of a creditor may also be considered a willful violation of the stay under appropriate circumstances. Cf. In re Sandra Mae Hoyle, Neb. Bkr. 96:701 (Bankr. D. Neb. 1996) (Mahoney, J.) (A judgment creditor must take affirmative action to obtain release of garnished funds). While a creditor is not under a time limit in returning property, a creditor must return the property within a reasonable period of time. See, Seta Corp. of Boca, Inc. v. Atlantic Computer Sys. (In re Atlantic Computer Sys.), 173 B.R. 858 (S.D.N.Y. 1994); United States v. Fernandez (In re Fernandez), 132 B.R. 775 (M.D. Fla. 1991); Carlsen v. Internal Revenue Service (In re Carlsen), 63 B.R. 706 (Bankr. C.D. Cal. 1986).

In this case, the time period was clearly unreasonable and amounted to willfulness. The initial delay was intentional and the delay for the next two weeks resulted from inattention and lax in-house policies and ineffective mechanisms for responding to a turnover request. Accordingly, the debtors are awarded the requested sum of \$662.50 pursuant

to 11 U.S.C. § 362(h) for Nissan's willful violation of the automatic stay.

Separate journal entry to be filed.

DATED: April 8, 1997

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

Copies faxed by the Court to:

*Mark Quandahl/Margaret McDevitt 554-0339

Copies mailed by the Court to:

Ronald Hunter
Chapter 13 Trustee
United States Trustee

Movant (*) is responsible for giving notice of this journal entry to all other parties (that are not listed above) if required by rule or statute.

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JOURNAL ENTRY

Before a United States Bankruptcy Judge for the District of Nebraska regarding Motion for Hearing on Motion for Turnover of Property and for Sanctions filed by the Debtors; Motion for Extension of Time filed by Nissan Motor Acceptance Corporation; and Objection.

APPEARANCES

Ronald A. Hunter: Debtor
Mark Quandahl: Nissan Motor Acceptance Corporation

IT IS ORDERED:

The motion of Debtors is granted. Nissan Motor Acceptance Corporation is ordered to pay damages to debtors in the amount of \$602.50 for willful violation of the automatic stay of 11 U.S.C. § 263(a).

See Memorandum filed this date.

BY THE COURT:

/s/ Timothy J. Mahoney
Timothy J. Mahoney
Chief Judge

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