

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEBRASKA

IN THE MATTER OF)	
)	
KENNETH WILLIAM HILL,)	
LINDA ANNE HILL,)	CASE NO. BK92-82086
)	A
DEBTOR(S))	CH. 13
)	Filing No. 3, 14,
)	15 & 17

MEMORANDUM

This memorandum contains finding 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 28 U.S.C. § 157(b)(2)(A) and (E). Appearing on behalf of the debtor was Howard Duncan of Omaha, Nebraska. Appearing on behalf of Fifth Avenue Auto Center was John P. Steichen, of Fellman, Moylan, Brown, Natvig & Steichen, Omaha, Nebraska.

These debtors filed a Chapter 13 bankruptcy on December 4, 1992. The debtors were concerned that a particular creditor, Fifth Avenue Auto Center of Council Bluffs, Iowa, would attempt to repossess an automobile purchased by the debtors from the creditor. Therefore, counsel for the debtors notified the creditor by telephone that the bankruptcy filing had taken place.

The creditor took no action to repossess the vehicle until approximately December 17, 1992, when the management of the creditor decided, since no written documents had been received from the Bankruptcy Court, that there actually was no bankruptcy filing. Management, therefore, employed the services of another entity to repossess the vehicle. The vehicle was repossessed.

Counsel for the debtors, upon learning of the repossession, immediately called the creditor and requested a return of the vehicle which was refused. Counsel then provided the creditor with a copy of a motion for sanctions and case law from the Eighth Circuit and the Bankruptcy Court concerning the obligation of the creditor to turnover the property and the opportunity to have sanctions imposed if the property were not turned over immediately.

The creditor refused to turnover the property without a court order.

A hearing was held on December 23, 1992, at which the creditor, although it had notice, did not appear. The Court ordered turnover of the vehicle and, shortly after the order was received by the creditor, the vehicle was turned over.

A hearing was held on January 12, 1993, to determine whether the automatic stay had been violated, whether the creditor should have attorney fees and punitive damages imposed as sanctions, in addition to actual damages.

The Court ruled from the bench at the end of the trial that the automatic stay of Section 362 had been violated and that the violation was willful. Counsel for the debtor was given the opportunity to supplement his attorney fee application to include the time spent at trial and to brief the punitive damage issue. Counsel for the creditor was given the opportunity to respond to the attorney fee supplement and to present legal authority with regard to the punitive damage issue.

The Bankruptcy Code at 11 U.S.C. § 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".

The debtors presented evidence that Mrs. Hill had lost \$82.00 in pay as a result of not having the automobile to get her back and forth to work. In addition, the debtors had actual out-of-pocket costs of \$45.00.

Counsel for the debtor presented affidavit evidence and an itemized statement of fees showing 12 hours at \$125.00 per hour plus \$51.02 of out-of-pocket expenses for a total of \$1,551.02. That fee application included 3.8 hours reviewing the tapes of the hearing on January 12, reviewing case law and preparing a brief in support of the punitive damage claim. The amount also includes \$45.00 for a copy of the tapes.

The creditor has objected to the inclusion of the 3.8 hours and \$45.00 concerning the post-hearing attorney fees and expenses. That objection is without merit because both counsel were given the opportunity to provide the Court with legal authority and arguments concerning punitive damages in light of the facts of this case as they came out in the evidence at trial. A review of the tapes and a preparation of a brief was helpful to

the Court and was necessary to comply with the request of the Court.

As mentioned above, the Court found from the evidence presented at trial that the repossession of the automobile by the creditor and the refusal to return the automobile until receiving a court order was a willful violation of the automatic stay. Therefore, the debtors have a right to reimbursement of actual damages, including costs and attorney fees.

With regard to the request for punitive damages, the Court is required to determine not only that there was a willful violation of the automatic stay but also make a finding of whether or not "appropriate circumstances" exist for the imposition of punitive damages. The Eighth Circuit Court of Appeals in In re Ketelsen, 880 F.2d 990, 993 (8th Cir. 1989), has instructed the Bankruptcy Court that "appropriate circumstances" should be found only when egregious, intentional misconduct by the violator is determined. Ketelsen at 993.

In the case before this Court, the evidence is uncontroverted that the creditor did not obtain legal advice once it was informed that a bankruptcy had been filed. It did not contact the Clerk of the Bankruptcy Court. It did not consider either the telephone notice or the written notice from counsel for the debtors as sufficient for it to return the vehicle. It considered the correspondence from counsel for the debtor and copies of the relevant circuit court and bankruptcy court cases to be simply the opinion of counsel for the debtor and not an opinion binding upon the creditor.

During the trial, the manager of the creditor testified to certain discussions he had with the owner with regard to returning the vehicle. He testified that he and the owner decided that it was not appropriate to return the vehicle until receiving a court order. The owner, who was in court during the testimony of the manager, testified that he didn't recall the discussions nor did he listen to the testimony of the manager.

From the testimony of the manager and the owner of the creditor, the Court finds a total disregard of the Bankruptcy Code. This creditor is a "buy here, pay here" retailer of used automobiles. Such a business is subject to the federal bankruptcy statute just as all other businesses are. That statute prohibits actions against property of the debtor after a bankruptcy petition is filed. It does not require any notice by the debtor or court order. The injunction of Section 362 of the Bankruptcy Code is automatic. In re Knaus, 889 F.2d 773, 775 (8th Cir. 1989).

The actions of this creditor amount to intentional misconduct and, under the circumstances of this case, the intentional misconduct is egregious. These debtors obviously have very little money. They live more than thirty miles from their place of employment. They had one automobile. That automobile was taken from them after the bankruptcy petition was filed and the working spouse was unable to get to work for several days. Inability to put in hours at work caused actual damages in the form of loss of wages. They were required to pay others to haul them around while they awaited a return of their vehicle. This creditor kept control of the vehicle notwithstanding the fact that it had received information, including a copy of an Eighth Circuit case, In re Knaus, which directed a return of property seized post petition. The creditor did not consult an attorney but simply let the debtors stew until this Court, at a hearing scheduled on an emergency basis, specifically ordered the turnover of the property.

The actions of this creditor are "appropriate circumstances" under which punitive damages can and should be assessed.

There is no evidence before the Court of the financial ability of the creditor to pay punitive damages. Scheduling another hearing at which the creditor could show its financial circumstances seems to be a waste of time and money. Nonetheless, a sanction in the form of an order of punitive damages should be and will be entered in this case. The amount of the punitive damages due from the creditor to the debtor is \$500.00. Such amount should be sufficient to bring to the attention of this creditor and others similarly situated that the Court takes very seriously the requirement of turnover and the far-reaching effect of Section 362 of the Bankruptcy Code.

Therefore, a judgment shall be entered in favor of the debtor and against Fifth Avenue Auto Center, its employee Thomas Cowan, and its owner Thomas Otts, jointly and severally, in the amount of \$127.00 representing lost wages and out-of-pocket costs, \$1,551.02 representing attorney fees and expenses and \$500.00 representing punitive damages.

DATED: February 24, 1993.

BY THE COURT:

/s/ Timothy J. Mahoney
Chief Judge

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KENNETH WILLIAM HILL,)
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DEBTOR) CH. 13

JUDGMENT

Judgment is entered in favor of the debtor and against Fifth Avenue Auto Center, its employee Thomas Cowan, and its owner Thomas Otts, jointly and severally in the amount of \$127.00 representing lost wages and out-of-pocket costs, \$1,551.02 representing attorney fees and expenses and \$500.00 representing punitive damages. See memorandum entered contemporaneously herein.

DATED: February 24, 1993.

BY THE COURT:

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

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