IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In Re, JEFFREY R. SMITH and CHRISTIE M. SMITH, Debtors. JEFFREY R. SMITH and CHRISTIE M. SMITH,, Movant, CF CAPITAL FINANCE INC., Respondent.	Chapter 7 Case No. 04-03244-PHX-SSC MEMORANDUM DECISION

Preliminary Statement

At the request of the Debtors, Jeffrey and Christie Smith, this Court conducted a trial on whether sanctions should be assessed against CF Capital Finance ("CF Capital") for a willful violation of the stay. After the trial, the Court took the matter under advisement. The Court has set forth its findings of fact and conclusions and law pursuant to Rule 7052 of the Rules of Bankruptcy Procedure This is a core proceeding over which this Court has jurisdiction. 28 U.S.C. §§1334 and 157. (West 2004).

Discussion

On April 13, 2004, Mr. Smith filed a motion requesting sanctions because the Debtors believed that CF Capital had violated the automatic stay. The Motion states that on March 2, 2004, Ms. Smith, his wife, called CF Capital, told it that the Debtors had filed a

bankruptcy petition, and gave CF Capital the Debtors' case number. The Debtors had filed their Chapter 7 proceeding on March 1, 2004.

On March 7, 2004, CF Capital repossessed the 1995 Chevrolet Astro van which belonged to Ms. Smith. Mr. Smith then called CF Capital, accusing them of violating the stay by repossessing the vehicle.

In its Response, CF Capital does not dispute the repossession of the van; it states simply that it did so at the request of Ms. Smith.

On March 18, 2004, CF Capital filed a separate motion for relief from the automatic stay. In that Motion, CF Capital states that it entered into a secured transaction with the Debtors in March 2003 for the purchase of the subject van and that CF Capital has a perfected security interest thereon. The Debtors did not oppose this Motion, so the Court entered an order vacating the stay as to the van on April 14, 2004.

The sole remaining issue, therefore, is whether sanctions should now be assessed against CF Capital.

At the trial, Ms. Smith was a critical witness, since Mr. Smith and CF Capital agreed that she had the conversation with CF Capital shortly after the Debtors filed their bankruptcy petition. Ms. Smith testified that she called CF Capital on March 2, 2004, and stated that she did not want the van, that the Debtors would not reaffirm the obligation to CF Capital, and she gave the CF Capital representative the Debtors' case number. She insisted that she did not say anything else. On cross examination, she stated that she did not recall whether she completed the Declaration of Intent, which was a part of her Schedules, as to whether the van would be retained or surrendered. She conceded that she and her husband did not oppose the Motion for Relief from Stay filed by CF Capital.

Ms. Williams, on behalf of CF Capital, testified that she did collections for the creditor and that she kept contemporaneous notes of telephone conversations that she had with the Debtors in the ordinary course of business. In reviewing her notes, she stated that the

Debtors were 17 days overdue on March 2 or 3, 2004, when CF Capital had its first conversation with Ms. Smith.[1] She testified that Ms. Smith did give her the bankruptcy case number and that the Debtors had filed a Chapter 7 petition. She asked Ms. Smith what the Debtors' intentions were as to the retention of the van, and she testified that Ms. Smith told her that the Debtors did not want to keep the van and told Ms. Williams the address at which the van was located. Ms. Williams then stated that she received several calls from Ms. Smith. At first, Ms. Smith told her that the van could be picked up immediately. Then called back, stating that a recreational vehicle was blocking the van and that CF Capital should come the following Monday to repossess the van. CF Capital stated that the van was repossessed on March 9, 2004. As noted previously in this Decision, CF Capital did not filed its Motion for Relief from Stay until March 18, 2004. After the van was repossessed, CF Capital received messages from Mr. Smith who was trying to contact the manager at the creditor. Ms. Williams testified that when Mr. Smith reached the manager around March 15, 2004, he stated that he wanted the vehicle back.

Perhaps troubling from the Court's standpoint was the repossession of the van without first filing a motion for relief from stay or requesting other emergency relief and the lack of certainty of Ms. Williams as to what transpired although she reviewed, then testified from, her notes at the time of trial. At the time of trial, CF Capital set forth no emergency requiring that the van be repossessed before the filing of the Motion for Relief from Stay. No emergency motion requesting protective custody of the van for a lack of insurance or for other cause was filed either. As to the lack of certainty of Ms. Williams, she initially testified that she spoke with Ms. Smith on March 3, 2004, then conceded that it could have been March 2 or March 3. She also thought that Ms. Smith had called her first, then testified that CF Capital called the Debtors on March 1, 2004 concerning a payment default, the Debtors called back on

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1 Ms. Smith testified the conversation was March 2, 2004; Ms. Williams, March 2 or 3, 2004. The Court concludes that the conversation took place March 2, 2004.

March 2 or March 3, and that CF Capital had a further conversation with the Debtors on March 9 and 15, 2004.

Mr. Smith then testified. He agreed that the van was repossessed on March 9, 2004. He stated that he then tried to reach a manager on March 10, 2004, and on one other occasion. He believes he spoke with the manager around March 15. At that point, he was concerned with how CF Capital had proceeded, believing that some type of motion should have been filed with the Court, rather than having the creditor just come to his home and take the van. He conceded on cross examination that he did not wish to retain the vehicle and that he did not complete that portion of the petition stating his intention as to the vehicle.

Mr. Smith's father then testified that his truck was blocking the van at first, since the father was installing a fuel pump on his vehicle. He also testified that he was present when his son tried to place a call to CF Capital. He stated that his son called from his work phone, that his son told the individual during the conversation that a bankruptcy petition had been filed, that the Smiths were trying to work through the problems as to the van, and that his son had called around March 11, 2004, which was after the van had been repossessed.

Finally, the Vice President of Collections at CF Capital testified. She testified that the policy of CF Capital was to ask what type of bankruptcy a debtor had filed and then what were the debtor's intentions as to the vehicle. Of importance to the Court is the fact that after such a conversation, the normal course of business or procedure for this creditor was to forward the file to the attorney so that a motion for relief from stay could be filed, then CF Capital would pick up the vehicle. Thus, in this case, CF Capital did not follow its normal procedures. It repossessed the vehicle, then filed a motion for relief from stay. At the trial, counsel for the creditor noted that one of his staff had been extremely ill at this time in March 2004, so the motion for relief from stay had been filed later than the normal procedure. However, CF Capital provided no

evidence that it requested emergency relief from its counsel. Rather, it appears that CF Capital simply chose to take a course of action without consulting with its counsel. As to the CF Capital manager, she testified that she did not become involved in this matter until March 15, 2004, when she had a conversation with Mr. Smith. She described him as being irate. He did not want to reaffirm the debt, but he insisted that because of CF Capital's actions, the vehicle should be returned.

The Debtors presented no evidence of any actual damages other than a statement that Ms. Smith was inconvenienced for about two weeks at a cost of $1600. There were no invoices or other documents to support this damage award. The Court can conclude that the Debtors did have actual damages of approximately $5 to attend the hearing on the Motion for Sanctions, which would include the Debtors' parking costs or photocopying costs for their pleadings.

At closing argument, CF Capital argued that the security agreement/contract as to the purchase of the van allowed the creditor, if there was an event of default, the right to take immediate possession of the van. In this case, the Debtors were 17 days late in a payment, so the creditor could exercise its rights and remedies under the contract. The creditor also argued that the Debtors could voluntarily surrender the van which did not require any court action, at least not immediately.

In the Ninth Circuit, actions taken in violation of the stay are void, regardless of whether the creditor is aware of a debtor filing a bankruptcy petition. United States v. Schwartz (In re Schwartz), 954 F.2d 569, 571. (9th Cir. 1992). In the decision of Abrams v. Southwest Leasing & Rental, Inc. (In re Abrams), 127 B.R. 239 (9th Cir. BAP 1991), the Panel held that the creditor's post-petition repossession of a vehicle "while initially inadvertent, became a willful violation of the automatic stay when the [creditor] failed to take any reasonable steps to remedy [its] violation [of the stay] upon learning of the debtors' bankruptcy." 127 B.R. at 244. The Panel relied on four

critical points in its decision. First, the 1984 amendment to Section 362 (a)(3) clarified that a creditor's knowing retention of assets of the estate is a violation of the stay. Second, Section 362 (h) is a remedial provision for violating the provisions of Section 542 which require a turnover of property. Third, an entity holding property that is arguably property of the estate bears the burden of ensuring its post-petition return. Finally, Section 362 (h) does not require that liability be assessed against a creditor which violates the automatic stay because a creditor's duty to ensure the post-petition return of the property is subject to a reasonableness element. Id. at 243.

However, a subsequent Ninth Circuit decision in the case of California Employment Devel. Dept. v. Taxel (In re Del Mission Ltd.), 98 F.3d 1147 (9th Cir. 1996) makes it clear that a creditor's post-petition failure to turn over immediately property of the estate, whether repossessed pre-petition or post-petition, is a violation of Section 362 (a)(3) irrespective of any pending adequate protection issue. Moreover, the creditor could be penalized for a continuing violation of the stay by merely retaining the property of the estate.

Finally, on the issue of a willful violation of the stay, the Ninth Circuit has stated "[a] 'willful violation' does not require a specific intent to violate the automatic stay. Rather, the statute provides for damages upon a finding that the [creditor] knew of the automatic stay and the [creditor's] actions which violated the stay were intentional. Whether the party believes in good faith that it had a right to the property is not relevant to whether the act was 'willful' or whether compensation must be awarded." In re Bloom, 875 F.2d 224, 227 (9th Cir. 1989).

The Court concludes that Ms. Smith advised CF Capital that the Debtors did not wish to retain the van and that the Debtors would not reaffirm the debt. CF Capital then inquired as to the location of the van, and Ms. Smith gave the creditor the address. CF Capital interpreted this information as a voluntary surrender of the

vehicle, although the Court concludes that CF Capital asserted pressure on the Debtors to return the vehicle once there was a default and the Debtors expressed no interest in curing the default in a reaffirmation agreement. However, the Court concludes on these facts that there was no voluntary surrender of the vehicle by the Debtors. Of further concern to the Court is that CF Capital's usual procedure would have been to file a motion for relief from stay to ensure that the Chapter 7 trustee, among others, had no objection to the stay being vacated and the van being sold in a commercially reasonable manner pursuant to Arizona law. It did not adhere to that procedure. Because of a problem at the offices of CF Capital's lawyer, the motion for relief from stay was not filed immediately, and CF Capital decided to take matters into its own hands. CF Capital, without waiting for a Court Order, repossessed the van. CF Capital held the van in storage, and awaited the Court Order vacating the stay, which occurred in Mid-April, 2004.

If the Debtors had provided the Court with evidence that they had been forced to rent a car, had incurred attorneys' fees and costs, or had other actual damages, other than the nominal amount of $5 already determined by the Court, based upon Ninth Circuit law, the Court would have awarded those actual or compensatory damages, since CF Capital violated the stay, and it was a willful. However, the Debtors' statement that they incurred $1600 in damages was speculative and not supported by the record. The Court is concerned with the creditor's repossessing a vehicle post-petition, with no Court Order. The Court also concludes that the Debtors did not voluntarily surrender the vehicle. Given the actions of the creditor, and the fact that the creditor did not follow its own procedures, the Court believes that it must send a message that such post-petition conduct by a creditor is not acceptable. No debtor or bankruptcy estate should be placed in a position of trying to ascertain why property of the estate was repossessed and whether the estate or creditors have suffered damages as a result of such action. If there

is an emergency, the creditor may file a motion, prior to taking the vehicle, requesting emergency relief, such as immediate protective custody of the vehicle pending a hearing on the matter. Therefore, the Court will award the Debtors the amount of $5 for the actual damages that they incurred in filing the Motion, and the sum of $500 as punitive damages for CF Capital's willful violation of the stay.

Conclusion

Based upon the evidence presented to this Court, and based upon CF Capital Finance, Inc.'s repossession of the Debtors' Chevrolet van post-petition, with no Court Order, and not in a manner which was consistent with its own procedures, the Court concludes that CF Capital willfully violated the stay for which it will pay the Debtors $5 in actual damages and $500 in punitive damages. The Debtors' Motion for Sanctions is Granted. The Court will execute a separate order incorporating this Decision.

DATED this 27th day of September, 2004.

HONORABLE SARAH SHARER CURLEY
Chief U. S. Bankruptcy Judge

COPIES of the foregoing mailed this 28 day of Sept, to:

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