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UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

IN RE:

Brenda Ann Ellis

Debtor.

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Case No. 99-51589 C-13

ORDER

THIS MATTER came on for hearing before the undersigned bankruptcy judge on September 27, 2000, in Winston-Salem, North Carolina upon the Debtor's Motion for Turnover of Vehicle and Sanctions for Violation of Automatic Stay. William V. Bost appeared on behalf of the Debtor, Jewel Ann Farlow appeared on behalf of Consumer Finance Corporation (the "Creditor"), and Vernon Cahoon appeared on behalf of the Chapter 13 Trustee.

JURISDICTION

The court has jurisdiction over the subject matter of this proceeding pursuant to 28 U.S.C. §§ 151, 157 and 1334 and the general Order of Reference entered by the United States District Court for the Middle District of North Carolina on August 15, 1984. This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(A), (E), and (G) which this court may hear and determine. Budget Serv. Co. v. Better Homes of Va., Inc., 804 F.2d 289, 292 (4th cir. 1986).

Although an adversary proceeding is required under Bankruptcy Rule 7001 to recover property, the parties have consented to hearing the request for turnover by motion¹

Having fully considered the file in this proceeding, the testimony and demeanor of the witness at trial, the applicable law and the arguments of counsel, the court makes the following findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052.

FINDINGS OF FACT

1. On or about May 22, 1999, the Debtor's husband, Herbert Eugene Ellis ("Mr. Ellis"), executed a Retail Installment contract and Security Agreement with the Creditor secured by a 1997 Nissan Altima, Serial Number 1N4BU31DXVC117953, ("the vehicle").
2. A Certificate of Title for the vehicle was issued on June 25, 1999 which noted Mr. Ellis as the owner of the vehicle and the Creditor as first lienholder.

¹Creditor's counsel would agree to hearing by motion if Debtor would not seek sanctions or attorney fees. Debtor agreed to this demand in order to expedite the hearing.

3. The Debtor and Mr. Ellis filed a joint petition under Chapter 13 on September 9, 1999.
4. The vehicle was listed in the schedules filed by the Debtor and Mr. Ellis in the joint case. The schedules also reflected that the Debtors also owned a 1985 Dodge and a 1990 Chevrolet Cavalier.
5. A notice of a proposed Chapter 13 plan was sent to all creditors. The proposed plan provided the following treatment to Consumer Finance Corporation:

Lien on a 1997 Nissan. The value of the vehicle is \$9,765.00. This value reflects the deduction of \$975.00 for high mileage. The claim will be allowed as secured in the amount of \$9,765.00 and the balance of the claim will be allowed as unsecured. Post-petition interest will be allowed on the secured claim at the annual rate of 10%.

If the creditor disputes the value placed on the collateral, the creditor will be allowed a period of 60 days following the date on which this case is confirmed in which to file a formal objection to valuation with the Bankruptcy Court. Upon timely filing of an objection, a hearing will be scheduled. Failure to file a timely objection will result in the value being deemed allowed as provided herein.

The Trustee will disburse payments to the creditor at the rate of \$225.00 per month until September 2000, at which time payments will increase to \$325.00 per month.

It appears the creditor's lien is avoidable as a preference pursuant to §547 of the Bankruptcy Code. The funds scheduled for disbursement to this creditor will be held by the Trustee in anticipation that the lien will be avoided. However, if the case is dismissed or the Trustee determines that the lien is not avoidable, the funds being held will be disbursed to the creditor.

Confirmation of this Plan is without res judicata effect on any action to avoid the lien.

6. The plan was confirmed without objection by order of the court on December 9, 1999. The Debtors were complying with the terms of the plan.
7. Mr. Ellis died intestate in an automobile accident on June 14, 2000. He was driving the 1990 Cavalier which was a total loss. The Debtor is the sole beneficiary of her husband's estate.

8. On August 4, 2000, the court entered an Order dismissing the case of Herbert Eugene Ellis because of his death and further ordering that the case of the Debtor, Brenda Ann Dalton Ellis, continue to remain in effect.
9. Following the dismissal, Mr. Ellis' case was assigned a new case number, 00-59033; the Debtor's case number remained 99-51589.
10. A Notice of Order Dismissing Case #00-50933C-13 was entered on August 4, 2000. A copy of the Notice was received by the Creditor.
11. On or about August 15, 2000, after receiving the Notice of Order Dismissing Case, the Creditor, through its agents, proceeded with repossession of the vehicle.
12. The Debtor was present when the Creditor's agents repossessed the vehicle. The Debtor informed the Creditor's agents that Mr. Ellis was deceased and that she was in a Chapter 13 case. The Creditor's agents nevertheless proceeded with the repossession.
13. On or about August 16, 2000, the day after the repossession, the Debtor telephoned the Creditor and requested that the Creditor contact the Chapter 13 office about the vehicle.
14. On August 21, 2000, the Chapter 13 Trustee telephoned the Creditor's counsel and informed counsel that Mr. Ellis was deceased, that the vehicle was property of the Debtor's Chapter 13 estate and that the Creditor had violated the automatic stay.
15. The Creditor retained the vehicle after receiving notice that it had violated the automatic stay and is still in possession of the vehicle.
16. The vehicle was the Debtor's only source of transportation. Since the repossession, it has been necessary for the Debtor to rent a vehicle in order to travel between her home and her work. As of the date of the hearing, September 27, 2000, the Debtor has incurred rental expenses of \$1,000.00.
17. At the hearing, the court was informed by counsel for the Debtor and counsel for the Creditor that the Creditor agreed to allow the Debtor's motion to compel turnover the vehicle to be heard by motion, rather than through the filing of an adversary proceeding, if the Debtor agreed to waive the request for attorneys' fees and sanctions.
18. The creditor contends there was no violation of the automatic stay since the case of Herbert Eugene Ellis was dismissed.

DISCUSSION

The automatic stay enjoins any act to take possession or exercise control over property of the estate. 11 U.S.C. § 362(a)(3). There can be no violation of the stay if the vehicle is not property of the estate.

The bankruptcy estate consists of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541. Courts have determined that § 541(a) property is "broad and all embracing." In re Cordova, 73 F.3d 38, 42 (4th Cir. 1996). As the wife of Mr. Ellis, the Debtor, in all likelihood, had some legal or equitable interest in the vehicle at the time of the filing of the bankruptcy. Clearly, the confirmed Chapter 13 plan continued to govern the treatment of the Creditor's claim after Mr. Ellis' death. Property of the estate in a Chapter 13 is much broader than property of the estate as defined under § 541. Pursuant to 11 U.S.C. § 1306, property of the estate includes all property specified in 11 U.S.C. § 541 and in addition:

(1) all property of the kind specified in such section that the debtor acquires after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first; and

(2) earnings from services performed by the debtor after the commencement of the case but before the case is closed, dismissed, or converted to a case under chapter 7, 11, or 12 of this title, whichever occurs first.

(b) Except as provided in a confirmed plan or order confirming a plan, the debtor shall remain in possession of all property of the estate.

The law of the state in which the property is located determines whether the debtor has an interest in the property. Barnhill v. Johnson, 503 U.S. 393, 398 (1992); Butner v. United States, 440 U.S. 48, 54 (1979). "Once a bankruptcy court makes a determination concerning whether a debtor has any legal or equitable interest in property based upon applicable state law, whether the property will come into the estate is a question of federal bankruptcy law." In re Visiting Nurse Ass'n v. Bowen, 143 B.R. 633, 641 (W.D. Pa. 1992).

The Debtor testified that her husband died intestate. The sworn schedules filed by Mr. and Mrs. Ellis reflect total assets of less than \$17,000.00. Pursuant to § 29-14 (b) of the North Carolina General Statutes, when a decedent dies intestate and is survived by one or more children, the surviving spouse is entitled to all personal property when the net personal property does not exceed \$30,000.00. N.C. Gen. Stat. § 29-14 (b). Thus, pursuant to North Carolina law, the Debtor is entitled to all of Mr. Ellis' personal property, including the vehicle in question.

The Debtor acquired an interest in the vehicle after the commencement of the case but before the case was closed, dismissed or converted. While Mr. Ellis' subsequent dismissal from the Chapter 13 case did eliminate any potential preference avoidance, it did not affect the

treatment of the vehicle as property of the Debtor's estate.

Section 362(a) (3) of the Bankruptcy Code provides that the filing of a voluntary petition under Chapter 13 operates as a stay of "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3). Since the vehicle remained property of the Debtor's estate following Mr. Ellis' death, and the automatic stay was not affected by Mr. Ellis' dismissal, the Creditor's repossession of the vehicle was a violation of the automatic stay.

The repossession was initially only a technical violation. In re Esposito, II, 154 B.R. 1011, 1014 (Bankr. N.D. Ga. 1995) (a technical violation occurs when a creditor violates § 362(a) without knowledge of the existence of an active bankruptcy). No evidence was presented at the hearing to indicate that the Creditor was aware of Mr. Ellis' death or the procedural implications of Mr. Ellis' dismissal from the bankruptcy case when the repossession was initiated. However, the evidence showed that during the repossession, the Debtor informed the Creditor's agents that Mr. Ellis was deceased and that the Debtor was in a Chapter 13 bankruptcy. The day after the repossession, the Debtor telephoned the Creditor and requested that the Creditor contact the Chapter 13 office and their counsel about the vehicle. Then, on August 21, 2000, the Chapter 13 Trustee's office notified the Creditor that the vehicle remained property of the bankruptcy estate and that the Creditor was in violation of the automatic stay. Despite these communications, the Creditor retained the property, forcing the Debtor to rent a vehicle for which she incurred expenses of \$1,000.00. The Creditor's continued violation of the automatic stay was willful and intentional. In re Atl. Bus. and Community Corp., 901 F.2d 325, 329 (3rd Cir. 1990; In re Sharon, 200 B.R. 181, 200 (Bankr. S.D. Ohio 1996) (to prove a willful violation of the stay, it is not necessary to show that creditor had specific intent to violate the stay; it is sufficient to show that the party knew of the existence of the bankruptcy case and that the creditor's actions were intentional).

The consequences of a willful violation of the automatic stay are set forth in 11 U.S.C. § 362(h) which provides that:

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.

Imposing sanctions under § 362(h) for violation of the automatic stay requires a showing that (1) the actions taken were in violation of the automatic stay; (2) the violation was willful; and (3) the debtor was injured as a result of the violation. Hamrick v. United States (In re Hamrick), 175 B.R. 890, 893 (Bankr. W.D.N.C. 1994); see also, In re Clayton, 235 B.R. 801 (Bankr. M.D.N.D. 1998).

The Creditor's continued violation of the automatic stay was willful and caused injury to the Debtor; therefore, an award of sanctions pursuant to §362(h) is appropriate. The court acknowledges that the Debtor agreed to waive its request for sanctions and attorneys fees in order to allow the matter to be heard by motion rather than through the filing of an adversary proceeding. However, the court finds the circumstances in this case to warrant sanctions and in

its discretion awards such as set forth below.

CONCLUSION

The court finds that the vehicle became property of the joint Chapter 13 estate when the petition was filed pursuant to §541(a) and that the property continued to be property of the Debtor's Chapter 13 estate pursuant to §1306(a) following the death of Mr. Ellis. The Creditor's retention of the vehicle after receiving notice from the Debtor and the Chapter 13 Trustee that Mr. Ellis had died and that the vehicle was property of the Debtor's Chapter 13 estate was a willful violation of the automatic stay pursuant to §362(h). Therefore, the Debtor is entitled to recover actual damages in the amount of \$1,000.00.

The court further finds that the retention of the vehicle after notification of the death of Mr. Ellis and the refusal to abide by the terms of the existing Chapter 13 plan warrant the imposition of sanctions. Pursuant to 11 U.S.C. § 542, the Creditor is required to turnover the vehicle to the Debtor.

Therefore, IT IS ORDERED, ADJUDGED AND DECREED that Consumer Finance is ordered to turnover the vehicle to the Debtor and is required to pay monetary damages in the amount of \$1,000.00 and sanctions in the amount of \$500.00 to the Debtor, Brenda Ann Ellis, and it is further ordered that payment shall be made within ten (10) days after the entry of this order.

This the 4 day of October, 2000.

CATHARINE R. CARRUTHERS

Catharine R. Carruthers
United States Bankruptcy Judge