UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA

IN RE:	)	
	)	
LONNIE RAY YOUNG	)	**No. B-98-51142**
	)	
Debtor.	)	

ORDER GRANTING DEBTOR'S MOTION FOR MONETARY DAMAGES, ATTORNEY FEES AND SANCTIONS

THIS MATTER came on for hearing after due and proper notice before the undersigned Bankruptcy Judge on April 19, 2000, in Winston-Salem, North Carolina on the motion of the Debtor to hold Union Acceptance Corporation ("Union Acceptance") in Contempt of Court and for Monetary Damages and Attorney Fees. Robert Lefkowitz appeared on behalf of Lonnie Ray Young ("the Debtor"), James Langdon appeared on behalf of Union Acceptance and Kathryn L. Bringle appeared as Trustee.

This 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)(G) which this Court may hear and determine.

Based upon a review of the record and upon testimony given and the exhibits presented into evidence at trial, the Court makes the following findings of fact and conclusions of law pursuant to Bankruptcy Rule 7052.

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FINDINGS OF FACT

1. The Debtor filed a Chapter 13 bankruptcy petition on June 26, 1998.

2. The order confirming the Debtor's Chapter 13 plan provides that Union Acceptance shall have a secured claim, secured by an interest in a 1997 Chevrolet, in the amount of $14,310.00 with interest to be paid at 11% and an unsecured claim in the amount of $7,243.86. Union Acceptance shall be paid the sum of $270.00 per month increasing to $370.00 per month on the secured claim with payments to be made by the Chapter 13 Trustee.

3. On or about October 23, 1999, the Debtor suffered a total loss of his vehicle. At that time, the balance remaining due on the Union Acceptance secured claim was approximately $11,800.00.

4. The Debtor had insurance on the vehicle and Union Acceptance was listed as the loss payee on the policy. Rather than submit the insurance proceeds to Union Acceptance, the Debtor requested that he be allowed to use the insurance proceeds to purchase a replacement automobile and that Union Acceptance be granted a security interest in the replacement vehicle.

5. Immediately after the accident, counsel for the Debtor contacted Union Acceptance about a substitution of collateral. No response was forthcoming.

6. On or about November 19, 1999, the Chapter 13 Office sent a request to Union Acceptance that a substitution of the collateral take place. Again, no response was forthcoming.

7. The Debtor furnished to Union Acceptance information on several possible substitutions and when Union Acceptance did not follow through with any of the vehicles, the Debtor, on December 10, 1999, filed a motion to compel Union Acceptance to substitute collateral. Notice of the hearing was transmitted to all parties and a hearing was held on January 5, 2000. Union Acceptance did not object to the Debtor's motion nor did anyone appear at the

hearing on behalf of Union Acceptance.

8. On January 5, 2000, the Court ruled in open court and memorialized its ruling by order dated February 4, 2000, that Union Acceptance was to permit the Debtor to substitute collateral and the Debtor was authorized to purchase a replacement vehicle with a value of approximately $11,800.00. Union Acceptance was granted a lien on the replacement vehicle and the classification and payment of the claims of Union Acceptance remained as provided in the Order Confirming the Plan. Union Acceptance did not appeal the Order of February 4, 2000.

9. After the entry of the Court's Order of February 4, 2000, at least two vehicles were submitted to Union Acceptance for consideration for substitution. Counsel for the Debtor submitted a possible substitution on February 16, 2000, and no response was forthcoming. Counsel testified that he was later informed that the substitution was rejected as the value of the vehicle was deficient. Again, on March 2, 2000, information for another vehicle was sent to Union Acceptance and no response was received from Union Acceptance.

10. On March 10, 2000, after waiting more than one week for Union Acceptance to respond, counsel for the Debtor filed this motion requesting that Union Acceptance be held in contempt of court and be required to pay the Debtor actual and punitive damages and attorney fees.

11. Prior to this hearing, on or about March 23, 2000, Union Acceptance approved a vehicle for substitution. Union Acceptance did not present any evidence as to why they had failed to respond to the previous offers of substitution.

12. The Debtor was without a vehicle from October until March 2000. The Debtor lives approximately fourteen miles from work and had to pay friends to transport him to and from work. The Debtor also expended time and money in looking for a replacement vehicle. Counsel

for the Debtor expended approximately six hours trying to effectuate the replacement of the vehicle. Additional counsel was required to represent the Debtor as it was necessary for the Debtor's original attorney to testify in this matter.[1] New counsel expended five and one half hours in this matter.

13. The parties stipulate that the insurance proceeds are property of the estate.

DISCUSSION

The issue before the Court is whether Union Acceptance has violated the automatic stay and is therefore subject to actual damages and possible punitive damages under 11 U.S.C. § 362(h). The Debtor contends that Union Acceptance should be held accountable for all actual damages since the date the vehicle was wrecked and that the delay in cooperating with the Debtor for such an extended period of time is cause to impose punitive damages. Union Acceptance contends that it had no obligation to respond to the Debtor until such time as the Court approved the substitution of collateral and that it acted in a reasonable manner once the Court approved the substitution of collateral and sanctions are not warranted.

Based upon the foregoing Findings of Fact, the Court makes the following conclusions of law:

It has long been the practice in this district to permit a debtor to substitute collateral in the event a vehicle has been declared a total loss and the vehicle was covered by insurance. Typically, the insurance proceeds check is made payable to the debtor, the owner of the policy, and the creditor, the loss payee under the policy. The debtor is permitted to use the insurance

[1] Wendell Schollander is counsel of record for the Debtor in the Chapter 13 case. Mr. Lefkowitz represents the Debtor for the purpose of this proceeding only and for no other purposes.

proceeds to obtain a replacement vehicle and the creditor is given a replacement lien. The treatment afforded the creditor under the plan is unchanged. These transactions usually occur on an informal basis without court intervention. The parties have agreed that the insurance proceeds constitute property of the estate. *See Bradt v. Woodlawn Auto Workers, F.C.U. (In re Bradt)*, 757 F.2d 512 (2nd Cir. 1985); *In re Arkell*, 165 B.R. 432 (M.D. Tenn. 1994); *In re Woods*, 97 B.R. 850 (Bankr. W.D. Va. 1989).

The issue before the Court is not whether the insurance proceeds are property of the estate, but whether Union Acceptance violated the stay in delaying the substitution of collateral. A creditor has the right to the protections set out in 11 U.S.C. § 363(c)(2). This section governs the rights and powers of the Trustee (Debtor) with respect to the use, sale or lease of property and the rights of other parties that have an interest in the property involved. A motion to substitute collateral should be treated as a motion to use cash collateral and absent consent of the creditor, notice and a hearing are required. The Court adopts the position of *In re Coker*, 216 B.R. 843, 847 (Bankr. W.D. Ala. 1997):

> [A] motion to substitute collateral is actually a motion to use the creditor's "cash collateral" (insurance proceeds in which the creditor holds a lien) to replace a wrecked vehicle with a new vehicle pursuant to 11 U.S.C.§§ 363(b)(1), 363(c)(2) and 363(e). Section 363(a) defines cash collateral to include "cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest. Section 363(b)(1) provides that the "trustee" (generally synonymous with "debtor" in the reorganization chapter) may use property of the estate, including § 363(a) "cash collateral." . . . Section 363(e) requires that an objecting creditor's security interest must be adequately protected.

Adequate protection is defined in 11 U.S.C. § 361. When adequate protection is required under § 363, it can be provided by granting a replacement lien. *See* 11 U.S.C. § 361(2).

Clearly, Union Acceptance had not given consent to use the cash collateral and,

therefore, the Debtor was required to file the motion to substitute collateral. Under § 363(b) the court cannot authorize the use of cash collateral unless, after notice and hearing, the court determines that the creditor is provided adequate protection. *See Carey v. General Motors Acceptance Corp. (In re Carey)*, 202 B.R. 796 (Bankr. M.D. Ga. 1996). At the hearing in January 2000, the Court determined that the Debtor was allowed to use cash collateral to substitute collateral even without the consent of Union Acceptance.[2] In allowing the substitution of collateral the Court found that Union Acceptance would be adequately protected as required under § 361 by: (1) having the Debtor obtain a vehicle with the approximate value of the remaining secured debt of Union Acceptance; (2) granting a lien on the replacement vehicle in favor of Union Acceptance; and (3) providing that the claims of Union Acceptance shall remain as provided in the Order Confirming the Plan.

No evidence was presented to the Court that the Debtor failed to comply with the adequate protection order of the Court. Former counsel for the Debtor stated that he could not get Union Acceptance to comply with this Court's order. There is no evidence before this Court that the refusal by Union Acceptance to take a substitute vehicle was warranted. Replacing the vehicle was necessary for the success of the Chapter 13 plan. The Debtor needed transportation to and from work so he could continue to make payments to the Chapter 13 plan. The refusal of Union Acceptance to comply with this Court's order of February 4, 2000, violates the automatic stay as it is an act to exercise control over property of the estate in violation of § 362(a)(3). The February 4, 2000 Order directed the Debtor to purchase a substitute vehicle and that adequate protection be afforded Union Acceptance. Union Acceptance put forth no evidence that the

[2]Union Acceptance did not file an objection or attend the hearing.

Debtor had failed to present vehicles that complied with the Court's order. The testimony of Mr. Schollander illustrates numerous replacement vehicles were submitted to Union Acceptance without appropriate response. There is no testimony from Union Acceptance of how or if a car was properly evaluated. The creditor may not argue deficient value when it has failed to put any evidence of evaluation before the Court. The Debtor has presented evidence that he submitted a replacement vehicle having a sales price of $11,999.00.

The Debtor's pre-petition insurance policy becomes property of the estate upon the filing of the bankruptcy petition. *See American Bankers Ins. Co. of Fla. v. Maness*, 101 F.3d 358, 362 (4th Cir. 1996). An insured loss generates proceeds that become property of the estate. *See id.* at 364. The unexplained delay in permitting the Debtor to use the proceeds to obtain a replacement vehicle constitutes a violation of the automatic stay. *See Chugach Timber Corp. v. Northern Stevedoring & Handling Corp. (In re Chugach Forest Prods. Inc.)*, 23 F.3d 241 (9th Cir. 1994)(a creditor's knowing retention of property of the estate constitutes a violation of § 362(a)(3)). The violation is willful in that Union Acceptance refused to cooperate with the Debtor in obtaining a replacement vehicle. In the Fourth Circuit,

> [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 defendant knew of the automatic stay and that the defendant'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.

Bulldog Trucking, Inc. v. Shaw Express, Inc. (In re Bulldog Trucking, Inc.), 1995 WL 613043,**3 (4th Cir. 1995)(unpublished decision)(citing *In re Atlantic Business & Community Corp.*, 901 F.2d 325, 329 (3d Cir.1990)). The award of actual damages is mandatory upon a finding of a willful violation of § 362. *See Davis v. Internal Revenue Service (In re Davis)*, 136

B.R. 414, 423 (E.D. Va. 1992).

As a consequence of the violation of the automatic stay pursuant to § 362(h), if the Debtor was injured then he shall recover actual damages, including cost and attorney fees, and, in appropriate circumstances, punitive damages. The Debtor carried his burden of proof on damages and damages in this instance shall be computed from the entry of the February 4, 2000 Order. The evidence before the Court reflects out of pocket expenses for the Debtor in the amount of $250.00. The evidence further reflects that the Debtor has used the services of two attorneys. The Court finds that the time expended and the rates requested by both attorneys are fair and reasonable and, therefore, the Court will award actual damages in the amount of $250.00 to the Debtor, $400.00 to Wendell Schollander and $900.00 to Robert Lefkowitz.

The Court next addresses the request for sanctions. Unlike an award of actual damages, an award of punitive damages is in the discretion of the Court and should only be awarded in those instances in which the creditor has demonstrated egregious, vindictive or intentional misconduct. *See McHenry v. Key Bank (In re McHenry)*, 179 B.R.165, 168 (9th Cir. B.A.P. 1995); *Clayton v. King (In Re Clayton)*, 235 B.R. 801, 811 (Bankr. M.D.N.C. 1998). The Court finds that the conduct of Union Acceptance in failing to respond to the Debtor's request to consider substitution of collateral after the entry of the Order of February 4, 2000, constitutes intentional misconduct. For months the Debtor and the creditor had been unable to resolve the issue of substitution of collateral. As evidence, the Debtor presented letters from Debtor's counsel and the Chapter 13 office to Union Acceptance which were ignored. This resulted in the Debtor filing a motion to compel Union Acceptance to substitute collateral. The creditor did not file an objection nor did they attend the hearing. This Court's Order of February 4, 2000, specifically mandated that Union Acceptance was to assist the Debtor in effectuating the

substitution of the vehicle. The failure to respond to such a request after the entry of the Court's order constitutes an intentional act of misconduct. The unrefuted evidence before the Court is that information on possible substitute vehicles was sent to Union Acceptance after the entry of the February 4, 2000 Order and Union Acceptance failed to respond. The failure of Union Acceptance to respond resulted in the filing of a motion to hold Union Acceptance in Contempt of Court. Only after the filing of this motion did Union Acceptance attempt to comply with the Court's order. The inaction of Union Acceptance put this Chapter 13 case in jeopardy. The Debtor has been employed by R.J. Reynolds for more than twenty years and his plan payments are in excess of $1,000.00 per month. Reliable transportation is essential to being able to maintain a job and the refusal of Union Acceptance to cooperate with the Debtor or his counsel warrants sanctions. The purpose of sanctions is to deter repetition of similar conduct by others similarly situated. The amount should be the minimum amount necessary to achieve the desired purpose of deterring similar action by other litigants. *See Diviney v. Nationsbank of Texas, N.A. (In re Diviney)*, 225 B.R. 762, 777 (10th Cir. B.A.P. 1998); *In re International Forex of California, Inc.*, 247 B.R. 284, 292 (Bankr. S.D. Cal. 2000); *Robeson Defense Committee v. Britt (In re Kunstler)*, 914 F.2d 505, 524 (4th Cir. 1990)(the court applied the same policy to determine sanctions award under Fed. R. Civ. P. 11). Based on the foregoing, Union Acceptance is sanctioned in the amount of $1,000.00.

CONCLUSION

This Court has determined that Union Acceptance violated the automatic stay and said violation resulted in actual damages to the Debtor and that the circumstances warrant the recovery of punitive damages.

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that

1. Union Acceptance shall pay actual damages to the Debtor in the amount of $250.00;

2. Union Acceptance shall pay actual damages to Wendell Schollander in the amount of $400.00;

3. Union Acceptance shall pay actual damages to Robert Lefkowitz in the amount of $900.00; and

4. Union Acceptance shall pay punitive damages in the amount of $1,000.00 to the Debtor.

IT IS FURTHER ORDERED that all payments shall be made within ten business days of the entry of this Order.

This the 21 day of June, 2000.

CATHARINE R. CARRUTHERS

Catharine R. Carruthers
United States Bankruptcy Judge