

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF NORTH CAROLINA  
WINSTON-SALEM DIVISION

ENTERED

JUN 21 02

U.S. Bankruptcy Court  
Winston-Salem, NC  
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IN RE:

Donna Southard Collins,

Debtor.

Case Number: 02-50737

ORDER

THIS MATTER came on for hearing before the undersigned bankruptcy judge in Winston-Salem, North Carolina upon the Motion by Debtor that Consecro Finance Servicing Corporation be held in Contempt for violation of the automatic stay. Appearing at the hearing was Stafford R. Peebles, Jr., attorney for Donna Southard Collins (hereinafter "Debtor") and John A. Meadows, attorney for Consecro Finance Servicing Corporation (hereinafter "Consecro"). The Court, after receiving the testimony, considering all the exhibits and the file, makes the following findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

FACTS

The Debtor filed a Chapter 7 bankruptcy petition on Friday, March 22, 2002 at 9:16 a.m. At the time of filing, the Debtor listed Consecro as a secured creditor, with a security interest in the Debtor's 1999 Fleetwood single wide mobile home. At the time of filing, the Debtor was in default under the terms of the security agreement for refusing to pay the monthly installments. Ms. Collins had entered into a contract and security agreement to purchase the 1999 Fleetwood mobile home on June 15, 2000. The mobile home was delivered to Yadkin County and later moved to the Debtor's real property located in Wilkes County sometime in March 2001. Prior to

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the bankruptcy filing, Conseco had commenced foreclosure proceedings in Wilkes County, North Carolina, and the Debtor had filed a counterclaim disputing the amount owed to Conseco. An Order of Seizure in claim and delivery was issued in the state court action on January 28, 2002, directing the Sheriff of Wilkes County to seize the mobile home.

On March 22, 2002, immediately upon filing the bankruptcy petition, counsel for the Debtor faxed a letter to counsel for Conseco in the foreclosure proceeding and to the Sheriff's Department of Wilkes County advising of the bankruptcy and the automatic stay. On March 25, 2002, while the Debtor was at work, Conseco repossessed the Debtor's mobile home. Conseco had previously arranged for movers from a local mobile home company, Affordable Homes, to meet with a deputy sheriff, Diane Goodrum, on the morning of March 25. Since neither Deputy Sheriff Goodrum nor Affordable Homes had been contacted by Conseco,<sup>1</sup> the home was removed as scheduled between 3:00 and 4:00 that afternoon. When the Debtor returned from work, she found the mobile home gone, along with all of her personal belongings, the plumbing and wires cut, and the front porch and deck sawed off. On March 26, 2002, Debtor's counsel, by telephone to Conseco's counsel, demanded that the mobile home be returned. Conseco refused, and the Debtor's Motion for Contempt was filed on April 5, 2002.

Counsel for Conseco does not deny that he received notice of the bankruptcy on March 22, 2002 and provided evidence that Conseco received an email advising of the bankruptcy petition, including the case number and name of the Debtor's attorney, at 1:29 p.m. on March 22, 2002. Conseco's own records reflect that at 11:23 p.m. on March 25, 2002, notice of the Debtor's bankruptcy was entered into the Debtor's account on Conseco's computer system.

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<sup>1</sup>The letter faxed by the Debtor's attorney to the Wilkes County Sheriff's Department was not delivered by the department mail system to Deputy Sheriff Goodrum until after the repossession.

However, Mark McKnight, an inventory control manager with Conseco who was responsible for coordinating the repossession and storage of the Debtor's mobile home, testified that he did not become aware of the bankruptcy filing until March 26, 2002 since he had no reason to access the Debtor's account on March 25. Accordingly, while Conseco received notice of the Debtor's bankruptcy filing at 1:29 on March 22, Mr. McKnight, the individual at Conseco responsible for the Debtor's account, did not become aware of the bankruptcy until he spoke to the Wilkes County Sheriff's Department on March 26 regarding the Debtor's removal of her personal property from the mobile home.

### **DISCUSSION**

The issue before the Court is whether Conseco's post-petition repossession and retention of the Debtor's mobile home was a violation of the automatic stay such that Conseco is subject to actual damages and possible punitive damages under 11 U.S.C. § 362(h). The Debtor contends that Conseco should be held responsible for all actual damages caused to the Debtor's property and expenses incurred by the Debtor as a result of the repossession of the mobile home. Conseco contends that there are no damages, based upon the argument that the violation of the stay was a technical violation, and any damages caused by the repossession were not done maliciously, and would have been incurred in any ordinary repossession. Alternatively, Conseco contends that if any damages are awarded, the damages would be the actual cost of repair, such as to reconnect the utilities to the mobile and repair the deck and underpinning.

Pursuant to § 362(a) of the Bankruptcy Code, the automatic stay is effective upon filing of the petition. Specifically, § 362(a)(3) prohibits "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." Section 362(h) provides that an individual debtor injured by a willful violation of the automatic

stay "shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." The Debtor is not required to prove that the creditor had the specific intent to violate the stay. In re Clayton, 235 B.R. 801, 806 (Bankr. M.D.N.C. 1998). Conduct by a creditor which violates the automatic stay when the creditor has notice of the bankruptcy constitutes a willful violation of the automatic stay for purposes § 362(h). In re Wills, 226 B.R. 369, 376 (Bankr. E.D.Va. 1998). Furthermore, a creditor's continued retention of estate property after notice of a bankruptcy filing is a continuing violation of the stay. In re LaTempa, 58 B.R. 538 (Bankr. W.D.Va. 1986); In re Miller, 10 B.R. 778 (Bankr. D. Md. 1981); In the Miller case, the court reasoned "[i]t is implied in § 362 that a creditor is under an obligation to maintain the status quo as of the moment of the filing of the petition and to take whatever affirmative action is necessary to do so." In re Miller, 10 B.R. at 780.

In this case, Conseco received an email from its own attorney advising of the Debtor's bankruptcy filing at 1:29 p.m. on March 22, 2002. The individual at Conseco who first received this notice made no immediate effort to stop the repossession, despite the fact that the Debtor's account indicated that there was a pending Order of Seizure. Upon the realization that the mobile home had been repossessed post-petition, Conseco did not return the mobile home, despite demand, nor did it file a motion to lift the stay and to resolve the dispute regarding whether Conseco was obligated to return the mobile home. This court finds a willful violation of the automatic stay. Accordingly, the court finds that the Debtor is entitled to recover damages under § 362(h).

Section 362(h) requires that a debtor injured by a willful violation of the automatic stay recover damages including attorney fees and costs. The debtor has the burden of proving

damages, and must show the amount of damages with reasonable certainty. In re Matthew, 184 B.R. 594 (Bankr. S.D.Ala. 1995).

The Debtor submitted an affidavit listed her actual damages and later clarified those damages through her testimony. The Debtor asserts that her actual damages are as follows:

1. \$1,250 to repair the electrical meter and breaker box.
2. \$500 for the gutter and down spout purchased by the Debtor and taken by Consec.
3. \$700 for the underpinning purchased by the Debtor and taken by Consec.
4. \$600 to reconnect the plumbing.
5. \$170 for destroyed satellite dish and system.
6. \$160 to replace a destroyed kerosene heater.
7. \$4,200 for destroyed independently constructed deck and porch.
8. \$2,000 for damaged air conditioning condensers purchased by the Debtor.
9. \$400 for landscaping the rutted yard.
10. \$300 for replacement of two trees destroyed.
11. \$195 for storage of her belongings at \$65/mo.
12. \$80 for the U-Haul trailer to retrieve her belongings from the mobile home.
13. \$200 for stepping stones destroyed.
14. \$200 for a destroyed antenna.
15. \$100 for replacement of foundation blocks.

The Debtor further testified that she had obtained a \$10,000 loan secured by her real property which she used in part to pay for the expenses associated with setting up the mobile home, including the deck and porch, underpinnings, stepping stones and the installation of utilities. The Debtor's payments on that loan are current.

The Court finds that the Debtor's actual damages do not include the cost to repair the electrical meter and breaker box, or to reconnect the plumbing, since those expenses were not and will not be actually incurred by the Debtor because the home will not be reconnected.<sup>2</sup> Additionally, neither a kerosene heater nor a satellite dish was listed on the Debtor's petition. Therefore, the Court will not award any damages for the loss of those items. Excluding those

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<sup>2</sup>While the Debtor initially demanded the return of the mobile home and, at the time of filing, her attorney seemed to believe that it might be possible for the Debtor to reach an agreement with Consec to reaffirm, the Debtor will surrender the mobile home.

items, the amount of damages totals \$8,875. While Consecos contends that the actual damages should not be nearly as large as requested by the Debtor, it offered no evidence to support this claim. Absent any evidence to the contrary, the Court sets the Debtor's actual damages at \$8,875. In addition, the Court finds that the Debtor's attorney is entitled to reasonable fees to be paid by Consecos. Punitive damages against Consecos are not warranted and are disallowed.

Therefore, IT IS ORDERED, ADJUDGED AND DECREED that the Consecos's actions constitute a willful violation of the automatic stay under § 362(h), the Debtor is awarded actual damages of \$8,875 and attorney's fees in the amount of \$1,000.00.

This the 21 day of June 2002.

**CATHARINE R. CARRUTHERS**

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Catharine R. Carruthers  
United States Bankruptcy Judge