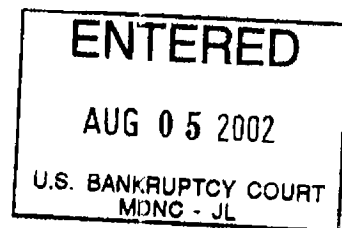


UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION



IN RE:

Rosalind Graham

Debtor.

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Case Number: 02-51191

ORDER

This matter came on for hearing before the undersigned bankruptcy judge on the Motion by Debtor for Sanctions against Frank Myers Auto Sales for violation of the automatic stay, for Attorney Compensation and for Costs. Appearing before the Court was A. Carl Penney, counsel for the Debtor and Kathryn L. Bringle, Standing Trustee. Frank Myers was not represented by counsel but did send an officer of the company to the hearing. The Court, after reviewing the file and hearing the evidence, makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

In September 2000, the Debtor and Elwood Self (hereinafter "Self") entered into a contract with Frank Myers Auto Sales (hereinafter "Myers") for the purchase of a 1991 Oldsmobile. The Certificate of Title was issued in the name of the Debtor and Self. Myers has a lien that is reflected on the Certificate of Title. The contract called for monthly payments of \$214.14 per month. The Debtor and Self have had a spotty payment history and the vehicle had been repossessed and returned in 2001. In March 2002, the Debtor started having problems with the brakes on the car and she elected to stop driving the car. She did not make any payments on the car from March forward and she ceased to have insurance on the car in March.

On or about May 4, 2002, Myers directed that the vehicle be repossessed for non-payment. The Debtor filed a voluntary petition for relief under Chapter 13 on May 7, 2002.

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Myers was listed as a secured creditor in the bankruptcy schedules and served with notice of the Chapter 13 filing. On or about May 14, Bronda Tucker, the Vice President of Myers contacted the Chapter 13 office and was aware that the Debtor had filed for bankruptcy. On or about May 18, 2002 the vehicle was repossessed. At the time of the filing of the petition and at the time of the repossession of the vehicle, the Debtor did not have insurance on the vehicle. Ms. Tucker testified that it was her belief that if the repossession order was issued prior to the filing of the bankruptcy, the company was allowed to repossess the vehicle post petition as the automatic stay did not apply. Ms. Tucker has been with the company for 11 years.

On May 31, 2002 the Debtor filed this motion for sanctions against Myers for violation of the automatic stay. As of the date of the hearing, Myers had not requested relief from the automatic stay nor had it returned the vehicle to the Debtor. The Debtor is current with her Chapter 13 plan payments and is prepared to obtain insurance on the vehicle if it is returned to her. The Debtor is employed and has been getting rides to and from work from friends and family members. The Debtor seeks sanctions against Myers for violations of the automatic stay of Section 362 and Section 1301 of the United States Bankruptcy Code.

DISCUSSION

The stay issued upon the filing of a bankruptcy petition is automatic inasmuch as it arises when the petition is filed and no additional act is required. In re Brisley, 258 B.R. 473-77 (Bankr. M.D. Ala. 2001). The stay is effective regardless of whether a creditor has notice of the filing of the petition. If a creditor commits an act which is in violation of the automatic stay without knowledge of the bankruptcy, it is still a violation, but the violation is not willful. In re Clayton 235 B.R. 801, 807 (Bankr. M.D.N.C. 1998). Pursuant to 11 U.S.C. §362(a), the stay prohibits a creditor from:

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) 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;

Myers, knowing of the bankruptcy filing, continued in the issuance of judicial process to seize the vehicle and exercised control over property of the estate. A creditor who retains a debtor's automobile, and refuses turnover, even after an offer of adequate protection, wilfully violates the automatic stay. In re Sharon, 234 B.R. 676 (6th Cir. B.A.P. 1999).

Section 362(h) provides that an individual injured by any willful violation of the stay shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages. A willful act is a deliberate act with knowledge of the bankruptcy petition. In re Banks, 253 B.R. 25 (Bankr. E.D.Mich. 2000). The Debtor is not required to make a showing of malice or reckless disregard. Myers' violation of the automatic stay was a deliberate act with knowledge of the bankruptcy petition. Myers committed a willful violation. That Myers thought the stay did not apply is not relevant to the issue of whether there was a willful violation. In re Atlantic Bus. & Community Dev. Corp., 901 F.2d 325, 327 (3rd Cir. 1990).

The Debtor has been forced to obtain a ride to and from work and church because Myers had her vehicle. The Debtor has been forced to incur attorneys' fees to file this motion for sanctions since Myers had been asked to return the vehicle and refused to do so. Myers has included the sum of \$250.00 in its proof of claim for expenses incurred in repossessing the vehicle after the filing of the bankruptcy petition. The Court finds that the Debtor has incurred

actual damages and that punitive damages are appropriate.

Myers was aware that the Debtor had filed a bankruptcy petition at the time of repossession. Myers refused to turn the vehicle over to the Debtor after being requested to do so. Myers is in the business of selling used cars and its officers should be aware of the terms of the automatic stay or seek the advise of legal counsel. The Debtor's car was taken on May 18, 2002 and this hearing was held two months later such that the Debtor was without the use of the vehicle for two months. At no time after seizing the vehicle did Myers file a motion for relief from stay. Myers' retention of the vehicle for a period of two months is a willful violation that entitled the Debtor to actual as well as punitive damages. See In re Belcher, 189 B.R. 16 (Bankr. S.D.Fla. 1995).

Based on the forgoing, it is ORDERED ADJUDGED AND DECREED that Myers shall remit the sum of \$1,000.00 to the Debtor for payment of actual damages; Myers shall remit the sum of \$750.00 to Carl Penney as payment for attorney fees; Myers shall remit the sum of \$1,000.00 to the Chapter 13 Trustee as payment of punitive damages and Myers' proof of claim shall be reduced by the sum of \$250.00.

It is further ORDERED that payment of all monies due shall be made within 10 days of the entry of this Order.

This the 5 day of August 2002.

CATHARINE R. CARRUTHERS

Catharine R. Carruthers
United States Bankruptcy Judge