

ENTERED

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

AUG 26 '02

U.S. Bankruptcy Court
Greensboro, NC
AJR

IN RE:)
)
TWS Enterprises, Inc.,) Case No. 01-10659C-7G
)
Debtor.)
_____)
)
Charles M. Ivey, III, Trustee)
for TWS Enterprises, Inc.,)
)
Plaintiff,)
)
v.) Adversary No. 01-2070
)
Ford Motor Credit Company,)
East Coast Recovery and)
Towing, Inc., and David)
Mitchell,)
)
Defendants.)
)

MEMORANDUM OPINION

This adversary proceeding came before the court on August 13, 2002, for hearing upon the plaintiff's motion for partial summary judgment. Joshua N. Levy appeared on behalf of the plaintiff and John A. Meadows appeared on behalf of East Coast Recovery and Towing, Inc. ("East Coast Recovery"). In the motion, the plaintiff seeks summary judgment against East Coast Recovery with respect to the conversion claim.

FACTS

TWS Enterprises, Inc. ("the debtor") filed for relief under Chapter 7 on March 13, 2001. Thereafter, Charles M. Ivey, III, the plaintiff in this adversary proceeding, qualified as Chapter 7

Trustee. At the time of the bankruptcy filing, the debtor was the owner of a 1999 Ford E-150 van that was at a storage facility located at 307 South Swing Road, Greensboro, North Carolina. After qualifying as trustee, the plaintiff notified the storage facility of the bankruptcy filing and made arrangements for the storage of the van at the storage facility on behalf of the bankruptcy estate.

Ford Motor Credit Company was listed in the debtor's schedules as a secured creditor with a lien on the 1999 Ford van and received notice and became aware of the debtor's Chapter 7 filing shortly after the case was filed. Notwithstanding such notice, Ford Motor Credit Company transmitted a request to East Coast Recovery that the 1999 Ford van be repossessed. East Coast Recovery, in turn, assigned the repossession to one of its employees, David Mitchell.

On April 30, 2001, approximately six weeks after the filing of the debtor's Chapter 7 case, Tommy Jackson, an employee of the storage facility at which the 1999 Ford van was stored, telephoned the plaintiff and informed him that David Mitchell was at the storage facility and had come there to take possession of the van. The plaintiff then spoke to Mr. Mitchell by telephone and identified himself as the Chapter 7 bankruptcy trustee for the debtor. Although Mr. Mitchell refused to identify his employer, he told the plaintiff that he had instructions from Ford Motor Credit Company to repossess the Ford van. The plaintiff instructed Mr. Mitchell not to remove the Ford van from the storage facility

and requested that he wait at the facility until the plaintiff could drive to the facility. Notwithstanding such request from the plaintiff, Mr. Mitchell immediately left the storage facility with the van. Mr. Mitchell took the van back to the premises of East Coast Recovery and reported the repossession to Ford Motor Credit Company. Thereafter, without notification to the plaintiff and without relief from the stay being granted, the 1999 Ford van was sold at public auction. The proceeds from the sale of the van were not turned over to the plaintiff.

ANALYSIS

The elements of a claim for conversion are (1) plaintiff's ownership or right to possession of the property at the time of the conversion; (2) defendant's taking of plaintiff's property by a wrongful act or disposition of plaintiff's property rights and (3) damages. See Peed v. Burleson's, Inc., 244 N.C. 437, 439, 94 S.E.2d 351, 353 (1956) (conversion is "an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another"); Gallimore v. Sink, 27 N.C. App. 65, 218 S.E.2d 181 (1975). The defendant must commit an intentional act, but a wrongful intent is not required. See Marlen C. Robb & Son Boatyard and Marina, Inc. v. Vessel Bristol, 893 F. Supp. 526, 543 (E.D.N.C. 1994). Each of these elements is established in the present case by facts that are not contested.

It is undisputed that the plaintiff was the Chapter 7 trustee

of the estate of the Debtor on April 30, 2001. The vehicle constituted property of the bankruptcy estate pursuant to § 541 of the Bankruptcy Code and pursuant to § 323 the plaintiff was the representative of the estate and entitled to possession of the van.

It likewise is undisputed that Mr. Mitchell intentionally took possession of the van, hauled it to an undisclosed location and thereby deprived the plaintiff of possession and control of the 1999 van. The deposition testimony of both Mr. Mitchell and Mr. Ingle, the president of East Coast Recovery, establish that when Mr. Mitchell took possession of the van, he was an employee of East Coast Recovery and was acting within the course and scope of such employment. Hence, his conduct is imputable to East Coast Recovery and East Coast Recovery is chargeable with any liability and damages arising out of such conduct.

The affidavit of the plaintiff, together with the deposition of Mr. Mitchell, establish without dispute that Mr. Mitchell acted wrongfully in taking possession of the vehicle. After Mr. Mitchell arrived at the storage facility, Mr. Jackson requested that he not take the van. When Mr. Mitchell persisted in his efforts to do so, Mr. Jackson called the plaintiff who then talked by telephone with Mr. Mitchell. During that telephone conversation, the plaintiff identified himself as the bankruptcy trustee and instructed Mr. Mitchell not to remove the vehicle. The plaintiff also requested that Mr. Mitchell remain at the storage facility until

the plaintiff could drive to the facility. Mr. Mitchell ignored the conversations with Mr. Jackson and the plaintiff and left the storage facility immediately after talking with the Trustee, taking the van with him. In doing so, he violated the automatic stay which was in effect pursuant to § 362 of the Bankruptcy Code. Additionally, Mr. Ingle admitted during his deposition that he was aware of the debtor's bankruptcy filing and also was aware of the ramifications and consequences of repossessing a vehicle involved in a bankruptcy case. The taking and retention of the van therefore was wrongful and amounted to a conversion of the van.

Where a bankruptcy filing is not involved, a secured creditor in North Carolina may repossess collateral without judicial process if the repossession can be accomplished without breach of the peace. However, the undisputed facts reflect that Mr. Mitchell's actions in the present case do not qualify as such a repossession. In the first instance, the evidence submitted by the plaintiff reflects that there was a confrontation prior to the repossession in that both Mr. Jackson and the plaintiff instructed Mr. Mitchell not to take possession of the vehicle. Further, even absent the element of confrontation, Mr. Mitchell's actions do not qualify as a repossession without a breach of the peace under the test adopted by the North Carolina Court of Appeals in Giles v. First Virginia Credit Services, Inc., 149 N.C. App. 89, 560 S.E.2d 557 (2002). In Giles, the court enumerated five relevant factors to be considered

in determining whether a repossession is reasonable and proper: (1) where the repossession took place, (2) whether the creditor had express or constructive consent, (3) the reactions of third parties, (4) the type of premises entered, and (5) the creditor's use of deception. These factors weigh in favor of the plaintiff in the present case. See id. at 100, 560 S.E.2d at 565. The repossession took place after Mr. Mitchell entered the fenced premises of a storage facility where a bankruptcy trustee was storing property. There was no express or constructive consent by the plaintiff, the party who was in lawful possession and control of the van. To the contrary, the plaintiff expressly instructed Mr. Mitchell not to remove the vehicle. The only third party involved in the incident was the attendant at the storage facility who also told Mr. Mitchell not to remove the van. Finally, there was a degree of deception associated with Mr. Mitchell leaving the premises with the vehicle. As he was leaving the premises, Mr. Mitchell was stopped by a police officer who had been called. Without disclosing to the police officer that he had just talked with the bankruptcy trustee and that the trustee had instructed him not to remove the vehicle, Mr. Mitchell created the false impression that a routine, unopposed repossession was involved. As a result, even without the automatic stay, Mr. Mitchell's actions constituted a wrongful taking of the van.

The final element of a conversion claim is that the plaintiff suffer some damages as a result of the wrongful taking. The evidence offered by the plaintiff and not disputed by the defendants established that the 1999 van was never returned to the plaintiff and that the plaintiff has been permanently deprived of the vehicle. This evidence is sufficient to establish that the plaintiff has sustained some damages as a result of the conversion of the van, although it does not establish the amount of the damages thereby sustained.

Based upon the foregoing, the court concludes that the plaintiff is entitled to partial summary judgment against East Coast Recovery and Towing, Inc. adjudging that East Coast Recovery and Towing, Inc. is liable to the plaintiff for the conversion of the 1999 van referred to in plaintiff's complaint. The amount of the damages to be recovered by the plaintiff must be determined after an evidentiary hearing at which both parties will have the opportunity to offer evidence on that issue. An order so providing will be entered contemporaneously with the filing of this memorandum opinion.

This 23rd day of August, 2002.

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

ENTERED

AUG 26 '02

U.S. Bankruptcy Court
Greensboro, NC
AJR

IN RE:)
)
TWS Enterprises, Inc.,) Case No. 01-10659C-7G
)
Debtor.)
_____)
)
Charles M. Ivey, III, Trustee)
for TWS Enterprises, Inc.,)
)
Plaintiff,)
)
v.) Adversary No. 01-2070
)
Ford Motor Credit Company,)
East Coast Recovery and)
Towing, Inc., and David)
Mitchell,)
)
Defendants.)
)

ORDER

For the reasons stated in the memorandum opinion filed contemporaneously with this order, plaintiff's motion for summary judgment against East Coast Recovery and Towing, Inc. as to the claim for conversion is granted and it is ORDERED, ADJUDGED AND DECREED that East Coast Recovery and Towing, Inc. is liable to the plaintiff for conversion of the van referred to in the complaint in this adversary proceeding.

This 23rd day of August, 2002.

William L. Stocks

WILLIAM L. STOCKS
United States Bankruptcy Judge