U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
ENTERED
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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

IN RE:	§	
	§	
RAYMOND DE LA GARZA	§	**Case No. 04-70323 HDH-13**
	§	
Debtor	§	

RAYMOND DE LA GARZA	§	
	§	
Plaintiff	§	
	§	
v.	§	**Adversary No. 04-7008**
	§	
CHKCO	§	
	§	
Defendant	§	

MEMORANDUM OPINION

The Debtor, Raymond De La Garza ("Plaintiff") has sued his automobile lienholder, CHKCO ("Defendant"), for violating the automatic stay of section 362. Before the adversary proceeding was filed, Defendant repossessed the vehicle. Over the course of a week, the Defendant refused repeated requests of Plaintiff's counsel to return the vehicle. The Defendant took the position that it could withhold returning the vehicle until proper evidence of insurance was furnished. During the time of possession, the Defendant obtained the advice of counsel and did not return the vehicle and did not file anything with this Court. While in the possession of the Defendant, the vehicle was vandalized and Plaintiff's property in and on the vehicle was stolen. The Defendant offered, after the vandalization, to return the damaged vehicle.

Plaintiff credibly testified. A representative from Plaintiff's counsel's office also credibly testified. A representative of the Defendant testified. Her testimony is given less weight because she apparently was out of the office when some of the events occurred. To the extent that the Defendant's witness' version conflicts with that of the Plaintiff, the Court finds that the Plaintiff's version was more credible and persuasive.

The issue before the Court is whether the stay was violated by the Defendant's refusal to return the vehicle. If so, the second issue presented is what remedy the Code provides for the stay violation.

This fact pattern is not a novel one. The most recent case on point is *Williams v. GMAC (In re Williams)*, 316 B.R. 534 (Bankr. E.D. Ark. 2004) (Evans, C.J.). In that case the court made clear that, once a bankruptcy case is filed, a creditor holding property of the estate has an affirmative duty to return such property to the debtor and may not use self help in the form of retaining possession until the creditor believes it is adequately protected. Such actions are an exercise of control over property of the estate and violate the automatic stay. *Id.* The Defendant's argument that it could withhold returning the vehicle until adequate protection was furnished has been used before in this District and has been found "unpersuasive." *Nissan Motor Acceptance Corp. v. Baker (In re Baker)*, 239 B.R. 484, 488 (N.D. Tex. 1999) (Kendall, J.); *see also, In re Zaber*, 223 B.R. 102 (Bankr. N.D. Tex. 1999) (McGuire, C.J.)

A willful violation of the automatic stay will entitle an individual debtor to actual damages, including costs and attorneys' fees, and, in appropriate circumstances, to punitive damages. *See*, 11 U.S.C. § 362(h). A wilful violation of the automatic stay does not require specific intent to violate the stay. *See, In re Zaber*, 223 B.R. at 107.

Plaintiff, as owner of his property, testified credibly as to its value. In addition, he was required to miss a day of work because of the Defendant's antics. The Court has reduced the values due to the age of the property, and awards $1,000 in actual damages. Attorneys' fees will be awarded in the amount of $3,500. The amount of attorneys' fees incurred is on the high side. Plaintiff's counsel and legal assistant spent quite a bit of time on this matter during the week in question, trying to get the vehicle released by consent. In addition, on several occasions Plaintiff's counsel has been required to reschedule the trial of this proceeding because the Defendant has changed counsel several times. Each time Plaintiff's counsel has graciously passed the trial to allow for the substitution of counsel. Thus, the larger attorneys' fee is due in no small part to the Defendant's actions. The Defendant acted with clear knowledge of the bankruptcy case and under apparent advice of counsel and therefore acted willfully. However, the Court will refrain from imposing punitive damages this time in the hopes that actual damages and attorneys' fees will be sufficient to avoid this situation in the future.

A more proper response, upon learning of the bankruptcy, would have been for the Defendant to seek emergency relief from this Court to condition the return of the vehicle upon the furnishing of evidence of insurance. Such action would not have excused altogether the violation of the stay, but would have prevented additional attorneys fees and minimized the possibility of sanctions and punitive damages.

As Judge Evans so eloquently stated:

> If creditors are asked to return collateral constituting estate property, it is insufficient to avoid a violation of the stay simply by filing a motion for relief and retaining possession of the collateral pending a hearing under § 362(d). Creditors who proceed in this manner risk damages for a violation of the automatic stay, even if such creditors ultimately prevail on their motions for relief from the stay based on a lack of adequate protection.

In re Williams, 316 B.R. at 544.

A separate judgment has been entered.

SIGNED: 12/1/04

Harlin D. Hale
United States Bankruptcy Judge