NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF WASHINGTON

In Re: SHANE, TRAVIS W., Debtor(s).	No. 00-01645-W13 Adv. No. A00-00077-W13
TRAVIS W. SHANE, Plaintiff(s), vs. ELITE AUTO SALES and JEFF MADDEN, Defendant(s).	MEMORANDUM DECISION RE: PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER came on for hearing before the Honorable Patricia C. Williams on December 11, 2000 upon Plaintiff's Motion for Summary Judgment. Plaintiff was represented by Timothy Durkop and Defendants were represented by Charles Carroll. The court heard argument of counsel and was fully advised in the premises. The court now enters this Memorandum Decision.

This case involves an issue of bankruptcy law and one of state law:

1. Was the automatic stay violated and if so, did the violation give rise to punitive damages?

2. Did the pre-petition sale violate state consumer protection law and if so, should the actual damages be trebled and attorney fees awarded?

FILED
JAN 10 2001
T. S. McGREGOR, CLERK
U.S. BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

ENTERED
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VIOLATION OF THE STAY

A. Background.

This dispute involves an all too common scenario arising in consumer Chapter 13 proceedings. Typically, shortly before commencement of the bankruptcy, a creditor holding a security interest in a vehicle repossesses that vehicle for non-payment. The Chapter 13 is commenced and the debtor's counsel contacts the creditor and notifies it of the filing and demands return of the vehicle. At this point, the secured creditor reacts in a variety of ways. Some immediately make the vehicle available to the debtor, some make it available within 24 - 48 hours, others wait several days and some file emergency motions to lift the stay. At its most simplistic, this dispute asks the court to determine just how long is "too long" for a secured creditor to retain the vehicle and what is the remedy if it is indeed held "too long."

Here, the debtor filed Chapter 13 on March 14, 2000. On Wednesday, March 15, 2000, the debtor's counsel sent notice by facsimile of the bankruptcy proceeding to defendant Elite Auto Sales[1] which had repossessed the 1978 Chevy Nova pre-petition. This case differs slightly from the typical scenario in that the vehicle was impounded by the Spokane County Sheriff on March 7, 2000 for reasons unrelated to the default in payment. At some unknown date, the debtor and creditor agreed that the creditor would repossess from the Sheriff thus terminating the impound and saving the debtor significant storage and

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[1]Both Elite Auto Sales and its representative, Mr. Madden, are listed as defendants. It is uncertain at this time whether Elite Auto Sales is a legal entity. For purposes of this decision, the court will assume that Elite Auto Sales is a sole proprietorship and that there is only one defendant, Mr. Madden.

other charges arising from the impound. The debtor agreed to reimburse the creditor the costs of that repossession as well as cure the contract payment delinquency.

On March 8, 2000, the creditor paid costs of $114.04 associated with the impound and at a cost of $86.00 had the car towed to the creditor's used car lot. The defendant did not cure the delinquency, and on March 14, 2000 filed a Chapter 13 proceeding. Defendant, as a result of the March 15, 2000 letter from the debtor's counsel demanding release of the vehicle, contacted the Spokane County Sheriff and the Washington State Department of Licensing and was given advice to the effect that the vehicle did not have to be returned to the debtor. After March 15, 2000, conversations occurred between debtor's counsel and defendant whereby demand was made for the return of the vehicle and Mr. Madden was told he was violating the automatic stay. Mr. Madden was urged to contact an attorney to obtain legal advice. These communications culminated in a letter dated Tuesday, March 21, 2000 from debtor's counsel which stated that if the vehicle was not returned to the debtor within 24 hours, suit against the defendant would be commenced. Suit was filed March 22, 2000, and the vehicle finally returned on Friday, March 24, 2000. Plaintiff has now requested summary judgment determining that the defendant violated the automatic stay and is liable for actual and punitive damages, including attorney fees, in an amount to be determined later.

B1. <u>Was the Automatic Stay Violated</u>?

11 U.S.C. § 362(h) reads as follows:

> (h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate

circumstances, may recover punitive damages.

The actions of this defendant were willful as that term is used in this provision of the Code. The term in this context does not require an intent to harm the plaintiff but rather means that the defendant took the action (or failed to act) knowing of the bankruptcy proceeding and took the action deliberately rather than inadvertently. *Havelock v. Taxel (In re Pace)*, 67 F.3d 187 (9th Cir. 1995). Even if the defendant held a good faith, but mistaken belief it was acting lawfully, the act is still "willful." *In re Pinkstaff*, 974 F.2d 113 (9th Cir. Or. 1992). An action which may not be a willful violation of the stay when it occurs due to the lack of knowledge of the bankruptcy proceeding may become willful if the defendant does not rectify the situation when it learns of the bankruptcy filing. In the context of a repossession of a vehicle, creditors often act prior to imposition of the automatic stay or prior to any knowledge of the bankruptcy proceeding. Once the stay is imposed or the creditor learns of the bankruptcy proceeding, the creditor has a duty to restore the status quo by making the vehicle available to the debtor. A creditor is precluded from exercising control over property of the estate. § 362(a)(3). Exercising control by retaining the vehicle constitutes a violation of the automatic stay. *California Empl. Dev. Dep't v. Taxel (In re Del Mission)*, 98 F.3d 1147 (9th Cir. 1996); *In re Knaus*, 889 F.2d 773 (8th Cir. Mo. 1989); *In re Abrams*, 127 B.R. 239 (B.A.P. 9th Cir. Cal. 1991).

Here, the creditor refused to return the vehicle for 10 days after several communications from the attorney regarding the violation of the automatic stay. Undoubtedly, a creditor which receives notice of a bankruptcy filing and is informed it is holding property of the estate

in violation of the stay needs some minimal time to react to such information. The creditor must, however, make the vehicle available to the debtor within a reasonable amount of time. Failure to do so constitutes a willful violation of the stay. That reasonable period of time may vary depending on the facts of the case. A small unsophisticated creditor such as this defendant who may not have training or experience or ready access to information concerning such matters may need one or two business days. If the information given to the creditor is vague or insufficient to allow the creditor to knowingly assess the situation, the creditor may need more than two business days. Notice to a creditor through knowledgeable bankruptcy counsel who has already appeared in the case, may shorten the time in which a creditor should reasonably be expected to return the vehicle. Absent extraordinary circumstances, none of which appear to be present here, 10 days is too long. It is unreasonable. The vehicle was not returned until not only had the debtor's counsel threatened suit, but actually instituted suit. Although *Abrams, supra,* concerned a post-petition repossession, the creditor repossessed on December 22, 1989, received three communications regarding the bankruptcy stay and had not returned the vehicle by the time suit was instituted on January 4, 1990 or indeed by the time the matter was heard. The court held that this was more than a reasonable length of time. In this situation, the creditor received more than sufficient warning of the consequences of the continued retention of the vehicle and failed to return the vehicle within a reasonable period of time. The failure to voluntarily and promptly return the vehicle after receipt of notice of the bankruptcy filing constitutes a violation of the stay.

B2. **What Damages Are Appropriate?**

Actual damages both by statute and case law are mandatory once it has been determined that the stay has been violated. *Beard v. Walsh (In re Walsh)*, 219 B.R. 873 (B.A.P. 9th Cir. Cal. 1998). 11 U.S.C. § 362(h) provides that debtors "shall recover actual damages, including costs and attorneys' fees." Thus, actual damages include a debtor's attorney fees incurred as a result of the violation of the stay.

The creditor's failure to voluntarily and promptly return the vehicle deprived the debtor of one of the most important benefits of commencing a bankruptcy proceeding. That failure endangered the debtor's successful Chapter 13 organization by depriving the debtor of his vehicle when it was clearly the debtor's intent and desire to retain the vehicle. The creditor's failure to comply with the Bankruptcy Code necessitated significant involvement of the debtor's counsel in order for the debtor to receive the benefit of the automatic stay and terminate the continuing violation of the stay.

McHenry v. Key Bank (In re McHenry), 179 B.R. 165 (B.A.P. 9th Cir. Wash. 1995) implies, but does not hold, that the right to recover attorney fees is dependent upon the existence of at least some harm, quantifiable or not, and the minimal inconvenience and annoyance of a creditor's brief telephone call to the debtor regarding surrender of a vehicle may not be sufficient to constitute actual damages. Although technically the telephone call violated the stay, the debtors in *McHenry* were not harmed as the call easily and quickly led to the debtors' obtaining their desire, i.e., the surrender of the vehicle to the creditor. Indeed it is difficult to see how a vehicle could be physically surrendered without some communication between the debtor and

creditor. Attorney fees, however, were not awarded as the debtor's counsel should not have engaged in the activities which gave rise to the claim for attorney fees.

As this matter was heard pursuant to a summary judgment motion, no evidence has yet been presented regarding the harm caused by the 10-day delay in returning the vehicle to the debtor. Consequently, the determination of actual damages must await trial at which time the debtor will have the burden of producing such evidence of any harm. Statutorily, attorney fees will be an element of the actual damages.

The determination of any punitive damages must also await trial. Punitive damages are not available under § 362(h) unless actual damages have been incurred. *McHenry, supra*. At least one Bankruptcy Court has held that punitive damages are to be commensurate with the actual damages although no fixed ratio or formula is required. *In re Sansone*, 99 B.R. 981 (Bankr. C.D. Cal. 1989). The purpose of punitive damages is not to compensate the debtor but to punish egregious conduct or malicious acts or to prevent future violations of the automatic stay. Prior violations of the stay and the sophistication of the creditor may be considered. A creditor's failure to voluntarily cure a violation of stay after given an opportunity to do so may give rise to punitive damages. *Barnett v. Edwards (In re Edwards)*, 214 B.R. 613 (B.A.P. 9th Cir. Wash. 1997). Conduct which is not changed after repeated warnings that the conduct violates the automatic stay may give rise to punitive damages. *In re International Forex of Cal.*, 247 B.R. 284 (Bankr. S.D. Cal. 2000).

In the instant case, defendant obtained advice from entities the defendant thought were knowledgeable of these types of situations and

argues that he reasonably relied upon that advice. Although not relevant to whether the defendant willfully violated the stay, any such reasonable reliance may be a mitigating factor in assessing punitive damages. The defendant alleges that during the period between March 15, 2000 and March 24, 2000 he had conversations with the debtor in which the debtor promised to make payment for the vehicle. Again, such conversations are irrelevant to the violation of the stay. Depending upon the content of such conversations, they may however constitute a mitigating factor in awarding punitive damages. Until the court hears the evidence presented at trial, the court cannot weigh the evidence and exercise its discretion on an informed basis. It cannot now be determined if the defendant acted in "callous disregard" of its legal obligations or if sufficient mitigating factors exist to reduce or prevent an award of punitive damages.

C1. Was the Washington State Consumer Protection Act Violated?

It is not disputed that during the week of October 1-7, 1999 the defendant advertised for sale the 1978 Nova at a price of $3,895. On October 8, 1999, defendant sold that vehicle to the defendant for a "cash price" of $4,395. Nor is there any dispute that the difference between the advertised price and the cash price arose from the fact that at the time of the sale of the 1978 Nova the defendant owed $2,000 to plaintiff arising from the previous purchase of a 1985 Camero from the plaintiff. That 1985 Camero is listed on the Conditional Sales Contract for the 1978 Nova as a "trade in" with a trade in allowance of $1,000 with zero as the net pay off on the 1985 Camero. It is not clear whether the 1985 Camero was actually returned to the plaintiff at the time of the purchase of the 1978 Nova or whether at that time a default

existed in the obligation secured by the Camero. Nor is there any evidence concerning the value of the Camero. Interpreting the facts most favorably to the non-moving party, at the time of the purchase the parties agreed that due to the $2,000 obligation on the Camero, the purchase price of the Nova would be increased by $500, $1,000 would be the trade-in allowance on the Camero and $500 of the balance on the Camero would be forgiven by the defendant. This resulted in the defendant paying sales tax on $4,395 rather than $3,895 and paying some increased interest on the balance due under the Conditional Sales Contract for the Nova.

WASH. REV. CODE § 19.86.020 provides that unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful. Under WASH. REV. CODE § 19.86.090 any person injured by an unfair or deceptive trade practice may bring a civil suit for damages and in the court's discretion, damages may be trebled and attorney fees awarded. Contrary to WASH. REV. CODE § 19.86.020 which relates to all or nearly all commerce in the State of Washington, WASH. REV. CODE § 46.70 governs the commerce of motor vehicle dealers such as the defendant. WASH. REV. CODE § 46.70.180 declares certain specific acts or practices unlawful including advertising the sale of any vehicle in a false or misleading or deceptive manner. That broad statutory language is the basis for the enactment of WASH. ADMIN. CODE § 308-66-152 which gives particular examples of unlawful practices regarding the sales of motor vehicles by dealers. Subsection (4)(j) of that administrative rule reads as follows:

> (4) Examples of false, deceptive or misleading, and thereby unlawful statements or representations within the meaning of R.C.W. 46.70.180(1) include, but are not limited to:
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> . . .

(j) Selling a particular vehicle at a higher price than advertised, regardless of trade-in allowance;

. . .

The two statutory schemes, WASH. REV. CODE § 46.70 regarding motor vehicle dealers and WASH. REV. CODE § 19.86, the Consumer Protection Act, are tied together by WASH. REV. CODE § 46.70.310 which states "Any violation of this Chapter is deemed to effect the public interest and constitutes a violation of Chapter 19.86 R.C.W."

The plaintiff argues that defendant's sale of the 1978 Nova for $4,395 rather than the advertised price of $3,895 violated the Consumer Protection Act and actual damages can be calculated and should be trebled and attorney fees awarded. State law must be examined to determine if plaintiff should prevail.

Henery v. Robinson, 67 Wash. App. 277 (1992), *rev. den.* 120 Wash. 2d 1024 (1993) sets forth the five elements which must be established to prove a violation of the Consumer Protection Act. The plaintiff must prove that the defendant's act was (1) unfair or deceptive; (2) occurred in the conduct of trade or commerce; (3) effects the public interest; and that the act (4) caused (5) injury to the plaintiff's business or property. If there exists an express statute or administrative regulation which declares an act unfair or deceptive, the first element is met. In this instance, WASH. ADMIN. CODE § 308-66-152 specifically states that the sale of a motor vehicle for more than the advertised price is deceptive and violates WASH. REV. CODE § 46.70.180. Consequently, the first element of the test has been satisfied. As to the second element, there is no dispute that the defendant is engaged in commerce as a motor vehicle dealer and is regulated by WASH. REV. CODE § 46.70. The third element of the test is satisfied by WASH. REV. CODE §

46.70.310 which specifically provides that any violation of WASH. REV. CODE § 46.70 affects the public interest and also violates WASH. REV. CODE § 19.86.

The undisputed facts give rise to a per se violation of the Consumer Protection Act as that term is commonly used. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash. 2d 778 (1986). A plaintiff must still, however, meet the remaining two elements of the test in order to prevail. Actual injury must have been caused by the violation. *Demopolis v. Galvin*, 57 Wash. App. 47 (1990), *rev. den.* 115 Wash. 2d 1006 (1990). Here, the additional sales tax which had to be paid by plaintiff to the State of Washington due to the increase of the purchase price constitutes actual injury. The increase in price of $500 multiplied by the tax rate of .081 reflects that the plaintiff paid an unnecessary $40.50. This satisfies the requirement of actual injury and was clearly caused by the violation, i.e., the increase in the purchase price to $500 above the advertised price. Additional injury may exist in the form of increased interest paid on the $4,395 which would not have been paid if the price had remained at $3,895 as advertised. Any damage arising from increased interest cannot currently be calculated.[2]

Defendant's position that the difference in the purchase price arose from the outstanding balance on the Camero is only a factor to be

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[2]Any Chapter 13 plan would only require the plaintiff to pay the value of the vehicle as of the date of filing plus interest on that value. This value may be less than either the advertised price or the amount still due. However, the underlying Chapter 13 proceeding has been dismissed and it is not known whether the debtor still has the vehicle or what payments were made on it.

considered in determining whether to award treble damages or attorney fees. It does not affect the determination that violation of the Consumer Protection Act occurred. The defendant could have structured the purchase of the Nova and the modification of the obligation on the Camero in a manner which would not have effected the purchase price of the Nova. By choosing to structure the transaction in this manner, the defendant sold the Nova for more than the advertised price which violated the clear specific language of the administrative rules which govern the defendant's business.

C2. Should Damages Be Trebled and Attorney Fees Awarded?

Contrary to the language of 11 U.S.C. § 362(h), WASH. REV. CODE § 19.86.090 does not make an award of attorney fees mandatory and they are not an element of actual damage. *Demopolis v. Galvin, supra,* and *Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.,* 64 Wash. App. 553 (1992), *rev. den.* 120 Wash. 2d 1002 (1992). The amount of attorney fees to be awarded is not necessarily related to the amount of actual damages but must be limited to attorney fees incurred in the prosecution and recovery of the Consumer Protection Act claim and not fees relating to other claims which may have been brought in the litigation. The reasonableness of the fees and their award is dependent upon the circumstances of the case. *Sign-O-Lite Signs, supra.* Nor is the trebling of actual damages mandatory. Like an award of attorney fees, the trebling of damages is within the discretion of the trial court. In this particular case, the actual damages are not yet quantifiable but are certainly a minimal amount.

Plaintiff is entitled to an award of reasonable attorney fees as a form of actual damages for the violation of the automatic stay. As

addressed above, more evidence is necessary to determine whether punitive damages under 11 U.S.C. § 362(h) are appropriate. A review of state decisions considering attorney fees and the trebling of actual damages under the Consumer Protection Act indicate that the state courts rely upon many of the factors and circumstances which in this case are relevant to the Bankruptcy Court's determination of punitive damages under 11 U.S.C. § 362(h). Much of the evidence presented at trial, as is true as to some of the evidence presented for the summary judgment motion, will be relevant to the imposition of punitive damages under the Bankruptcy Code and the trebling of actual damages and an award of attorney fees under state law. Such issues cannot be determined until trial.

CONCLUSION

The defendant's failure to return the vehicle for 10 days after notice of the bankruptcy proceeding was a willful violation of the stay. The debtor has the burden of producing evidence at trial of any harm from the failure to return, although the harm need not be readily quantifiable nor monetary in nature. Assuming such evidence is introduced, reasonable attorney fees will be an element of actual damages. The imposition of punitive damages is discretionary and must await trial.

The defendant's sale of the vehicle for more than the listed price was a violation of the Washington State Consumer Protection Act WASH. REV. CODE § 19.86. At a minimum, actual damages of $40.50 resulted. The trebling of those [and any other damages shown] as well as an award of attorney fees is discretionary and must await trial.

The Clerk of Court is directed to file this Memorandum Decision and provide copies to counsel.

DATED this 10th day of January, 2001.

PATRICIA C. WILLIAMS, Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

CERTIFICATE OF SERVICE

The undersigned deputy clerk of the United States Bankruptcy Court for the Eastern District of Washington hereby certifies that a copy of the document, of which this is attached, was mailed this date to the following parties as required by the Bankruptcy Code and Federal Rules of Bankruptcy Procedure.

Atty Carroll
" Dunkop

Joyce J. Peters
Deputy Clerk JOYCE J PETERS

JAN 11 2001
Date

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