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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON

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

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?

MEMORANDUM DECISION RE: . . . - 1

ENTERED
JAN 11 2001 *JP*

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

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1 VIOLATION OF THE STAY

2 **A. Background.**

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

15 Here, the debtor filed Chapter 13 on March 14, 2000. On Wednesday,
16 March 15, 2000, the debtor's counsel sent notice by facsimile of the
17 bankruptcy proceeding to defendant Elite Auto Sales¹ which had
18 repossessed the 1978 Chevy Nova pre-petition. This case differs
19 slightly from the typical scenario in that the vehicle was impounded by
20 the Spokane County Sheriff on March 7, 2000 for reasons unrelated to the
21 default in payment. At some unknown date, the debtor and creditor
22 agreed that the creditor would repossess from the Sheriff thus
23 terminating the impound and saving the debtor significant storage and
24

25 ¹Both Elite Auto Sales and its representative, Mr. Madden, are
26 listed as defendants. It is uncertain at this time whether Elite Auto
27 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.

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

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

24 **B1. Was the Automatic Stay Violated?**

25 11 U.S.C. § 362(h) reads as follows:

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

1 circumstances, may recover punitive damages.

2 The actions of this defendant were willful as that term is used in
3 this provision of the Code. The term in this context does not require
4 an intent to harm the plaintiff but rather means that the defendant
5 took the action (or failed to act) knowing of the bankruptcy proceeding
6 and took the action deliberately rather than inadvertently. *Havelock v.*
7 *Taxel (In re Pace)*, 67 F.3d 187 (9th Cir. 1995). Even if the defendant
8 held a good faith, but mistaken belief it was acting lawfully, the act
9 is still "willful." *In re Pinkstaff*, 974 F.2d 113 (9th Cir. Or. 1992).
10 An action which may not be a willful violation of the stay when it
11 occurs due to the lack of knowledge of the bankruptcy proceeding may
12 become willful if the defendant does not rectify the situation when it
13 learns of the bankruptcy filing. In the context of a repossession of a
14 vehicle, creditors often act prior to imposition of the automatic stay
15 or prior to any knowledge of the bankruptcy proceeding. Once the stay
16 is imposed or the creditor learns of the bankruptcy proceeding, the
17 creditor has a duty to restore the status quo by making the vehicle
18 available to the debtor. A creditor is precluded from exercising
19 control over property of the estate. § 362(a)(3). Exercising control by
20 retaining the vehicle constitutes a violation of the automatic stay.
21 *California Empl. Dev. Dep't v. Taxel (In re Del Mission)*, 98 F.3d 1147
22 (9th Cir. 1996); *In re Knaus*, 889 F.2d 773 (8th Cir. Mo. 1989); *In re*
23 *Abrams*, 127 B.R. 239 (B.A.P. 9th Cir. Cal. 1991).

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

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

28 MEMORANDUM DECISION RE: . . . - 5

1 **B2. What Damages Are Appropriate?**

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

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

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

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

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

10 The determination of any punitive damages must also await trial.
11 Punitive damages are not available under § 362(h) unless actual damages
12 have been incurred. *McHenry, supra*. At least one Bankruptcy Court has
13 held that punitive damages are to be commensurate with the actual
14 damages although no fixed ratio or formula is required. *In re Sansone*,
15 99 B.R. 981 (Bankr. C.D. Cal. 1989). The purpose of punitive damages is
16 not to compensate the debtor but to punish egregious conduct or
17 malicious acts or to prevent future violations of the automatic stay.
18 Prior violations of the stay and the sophistication of the creditor may
19 be considered. A creditor's failure to voluntarily cure a violation of
20 stay after given an opportunity to do so may give rise to punitive
21 damages. *Barnett v. Edwards (In re Edwards)*, 214 B.R. 613 (B.A.P. 9th
22 Cir. Wash. 1997). Conduct which is not changed after repeated warnings
23 that the conduct violates the automatic stay may give rise to punitive
24 damages. *In re International Forex of Cal.*, 247 B.R. 284 (Bankr. S.D.
25 Cal. 2000).

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

1 argues that he reasonably relied upon that advice. Although not
2 relevant to whether the defendant willfully violated the stay, any such
3 reasonable reliance may be a mitigating factor in assessing punitive
4 damages. The defendant alleges that during the period between March 15,
5 2000 and March 24, 2000 he had conversations with the debtor in which
6 the debtor promised to make payment for the vehicle. Again, such
7 conversations are irrelevant to the violation of the stay. Depending
8 upon the content of such conversations, they may however constitute a
9 mitigating factor in awarding punitive damages. Until the court hears
10 the evidence presented at trial, the court cannot weigh the evidence and
11 exercise its discretion on an informed basis. It cannot now be
12 determined if the defendant acted in "callous disregard" of its legal
13 obligations or if sufficient mitigating factors exist to reduce or
14 prevent an award of punitive damages.

15 **C1. Was the Washington State Consumer Protection Act Violated?**

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

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

11 WASH. REV. CODE § 19.86.020 provides that unfair or deceptive acts or
12 practices in the conduct of any trade or commerce are unlawful. Under
13 WASH. REV. CODE § 19.86.090 any person injured by an unfair or deceptive
14 trade practice may bring a civil suit for damages and in the court's
15 discretion, damages may be trebled and attorney fees awarded. Contrary
16 to WASH. REV. CODE § 19.86.020 which relates to all or nearly all commerce
17 in the State of Washington, WASH. REV. CODE § 46.70 governs the commerce
18 of motor vehicle dealers such as the defendant. WASH. REV. CODE
19 § 46.70.180 declares certain specific acts or practices unlawful
20 including advertising the sale of any vehicle in a false or misleading
21 or deceptive manner. That broad statutory language is the basis for the
22 enactment of WASH. ADMIN. CODE § 308-66-152 which gives particular examples
23 of unlawful practices regarding the sales of motor vehicles by dealers.
24 Subsection (4)(j) of that administrative rule reads as follows:

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

27 . . .

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

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

8 The plaintiff argues that defendant's sale of the 1978 Nova for
9 \$4,395 rather than the advertised price of \$3,895 violated the Consumer
10 Protection Act and actual damages can be calculated and should be
11 trebled and attorney fees awarded. State law must be examined to
12 determine if plaintiff should prevail.

13 *Henery v. Robinson*, 67 Wash. App. 277 (1992), rev. den. 120
14 Wash. 2d 1024 (1993) sets forth the five elements which must be
15 established to prove a violation of the Consumer Protection Act. The
16 plaintiff must prove that the defendant's act was (1) unfair or
17 deceptive; (2) occurred in the conduct of trade or commerce; (3) effects
18 the public interest; and that the act (4) caused (5) injury to the
19 plaintiff's business or property. If there exists an express statute or
20 administrative regulation which declares an act unfair or deceptive, the
21 first element is met. In this instance, WASH. ADMIN. CODE § 308-66-152
22 specifically states that the sale of a motor vehicle for more than the
23 advertised price is deceptive and violates WASH. REV. CODE § 46.70.180.
24 Consequently, the first element of the test has been satisfied. As to
25 the second element, there is no dispute that the defendant is engaged in
26 commerce as a motor vehicle dealer and is regulated by WASH. REV. CODE §
27 46.70. The third element of the test is satisfied by WASH. REV. CODE §

1 46.70.310 which specifically provides that any violation of WASH. REV.
2 CODE § 46.70 affects the public interest and also violates WASH. REV. CODE
3 § 19.86.

4 The undisputed facts give rise to a per se violation of the
5 Consumer Protection Act as that term is commonly used. *Hangman Ridge*
6 *Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash. 2d 778
7 (1986). A plaintiff must still, however, meet the remaining two
8 elements of the test in order to prevail. Actual injury must have been
9 caused by the violation. *Demopolis v. Galvin*, 57 Wash. App. 47 (1990),
10 rev. den. 115 Wash. 2d 1006 (1990). Here, the additional sales tax
11 which had to be paid by plaintiff to the State of Washington due to the
12 increase of the purchase price constitutes actual injury. The increase
13 in price of \$500 multiplied by the tax rate of .081 reflects that the
14 plaintiff paid an unnecessary \$40.50. This satisfies the requirement of
15 actual injury and was clearly caused by the violation, i.e., the
16 increase in the purchase price to \$500 above the advertised price.
17 Additional injury may exist in the form of increased interest paid on
18 the \$4,395 which would not have been paid if the price had remained at
19 \$3,895 as advertised. Any damage arising from increased interest cannot
20 currently be calculated.²

21 Defendant's position that the difference in the purchase price
22 arose from the outstanding balance on the Camero is only a factor to be
23

24 ²Any Chapter 13 plan would only require the plaintiff to pay the
25 value of the vehicle as of the date of filing plus interest on that
26 value. This value may be less than either the advertised price or the
27 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.

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

10 **C2. Should Damages Be Trebled and Attorney Fees Awarded?**

11 Contrary to the language of 11 U.S.C. § 362(h), WASH. REV. CODE §
12 19.86.090 does not make an award of attorney fees mandatory and they are
13 not an element of actual damage. *Demopolis v. Galvin, supra*, and *Sign-*
14 *O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wash. App. 553
15 (1992), *rev. den.* 120 Wash. 2d 1002 (1992). The amount of attorney fees
16 to be awarded is not necessarily related to the amount of actual damages
17 but must be limited to attorney fees incurred in the prosecution and
18 recovery of the Consumer Protection Act claim and not fees relating to
19 other claims which may have been brought in the litigation. The
20 reasonableness of the fees and their award is dependent upon the
21 circumstances of the case. *Sign-O-Lite Signs, supra*. Nor is the
22 trebling of actual damages mandatory. Like an award of attorney fees,
23 the trebling of damages is within the discretion of the trial court. In
24 this particular case, the actual damages are not yet quantifiable but
25 are certainly a minimal amount.

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

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

13 **CONCLUSION**

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

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

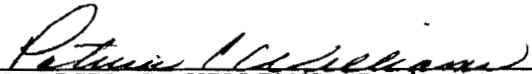
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28 MEMORANDUM DECISION RE: . . . - 13

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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
" / Deskop

Joyce J. Peters

Deputy Clerk JOYCE J PETERS

JAN 11 2001

Date