

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION**

IN RE

John Primrose,

Case No. 01-10906

Debtor.

Chapter 13

John Primrose,

Plaintiff,

v.

Adv. Pro. No. 01-5110

TM Financial,

Defendant.

**MEMORANDUM OPINION AND ORDER RE
COMPLAINT TO COMPEL TURNOVER OF A 1998 DODGE DAKOTA**

The Court conducted a trial in this matter on April 12, 2001. FED. R. BANKR. P. 7001. Pursuant to 28 U.S.C. § 157(b)(2), this is a core proceeding. After reviewing the testimony from the trial and the record as a whole, the Court makes the following findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

I. FINDINGS OF FACT

On May 30, 2000, McNairy County General Sessions Court awarded TM Financial a civil judgment against the debtor, John Primrose, ("Primrose") in the amount of \$12,409.57. On January 13, 2001, a Writ of Execution in the amount of \$12,513.07 was issued by the same court against the "goods and chattels, lands and tenements" of Primrose. McNairy County Constable

Perry Price executed the writ on January 16, 2001, by impounding Primrose's 1998 Dodge Dakota pickup. The "[i]temized list of personal property executed on by officer" on the back of the writ reads as follows: "#98 Dodge Dakota Extended Cab (Red) #1B7GL22X6WS570920."

A short time after the execution of the writ, Primrose went to the impound lot and, without permission, regained possession of his pickup. A criminal warrant was then issued against Primrose and he was arrested three days later for auto theft. Since his arrest, the McNairy County Constable has re-impounded the pickup.

Primrose filed his bankruptcy case on February 28, 2001. In his Chapter 13 petition, Primrose listed his 1998 Dodge Dakota's value at \$9,000.00. Home Banking has a lien on the vehicle in the amount of \$5,200.00. On March 29, 2001, Primrose filed the instant adversary proceeding seeking turnover of the pickup from TM Financial and the McNairy County Constable.

Primrose alleges that Constable Price did not serve him with a copy of the writ of execution at the time of impounding his pickup and, therefore, the execution was void; however, Primrose testified at the turnover hearing that he spoke with Constable Price when he came to pick up the 1998 Dodge and that he voluntarily surrendered the vehicle to the constable.

Primrose's attorney asserts that because the execution was not served upon Primrose, McNairy County did not properly seize the vehicle and, as a result, did not have a proper security interest in the vehicle at the time Primrose's Chapter 13 case was filed.

II. CONCLUSIONS OF LAW

Under Tennessee law, a money judgment can be enforced through a writ of execution.

T.C.A. § 26-1-103. The writ of execution is "an order directing the sheriff to levy upon and sell the judgment debtor's property identified in the writ that is not statutorily exempt." *Keep Fresh Filters, Inc., v. Reguli*, 888 S.W.2d 437, 554 (Tenn. Ct. Ap. 1994). Pursuant to T.C.A. § 26-1-104, the sheriff or other enforcing officer may levy upon the personal property of a debtor in order to satisfy the writ. The sheriff or other officer to whom an execution is issued has 30 days to perform the levy and return the writ. T.C.A. § 26-1-401 (Supp. 1993). "Tennessee law plainly requires that '[a] description of the property levied on, with the date of the levy, shall be endorsed upon or appended to the execution.'" *Municipal Equipment Mfg., Inc., v. Newport (In re Hockaday)*, 169 B.R. 640, 642 (Bankr. M.D.Tenn. 1994) (citing T.C.A. § 26-3-108).

The requirements of due process mandate that the debtor upon whose property the writ is being executed have notice of the levy. So long as a defendant has had service "reasonably calculated to give him actual notice of the proceedings," the requirements of due process are satisfied. *Milliken v. Meyer*, 311 U.S. 457, 61 S.Ct. 339, 343, 85 L.Ed. 278 (1940). In the case at bar, the debtor has alleged that the constable did not serve him with a copy of the writ of execution; however, Primrose testified under oath that he spoke with Constable Price when he came to pick up the Dodge Dakota and that he understood why the constable was levying on his truck. Primrose also testified that he voluntarily surrendered the vehicle to Constable Price at that time. Based on this conversation and voluntary surrender, the Court finds that Primrose had

actual notice of the proceedings and that his claim of lack of service is without merit.

In the case of *Skinner v. First Union Nat'l. Bank (In re Skinner)*, 213 B.R. 335 (Bankr. W.D.Tenn. 1997), Bankruptcy Judge Jennie D. Latta found that a law enforcement officer charged with levying on property pursuant to a writ of execution is a "custodian" for purposes of the Bankruptcy Code. Section 542(a) of the Bankruptcy Code provides for the turnover of property from "an entity, *other than a custodian*." 11 U.S.C. § 542(a) (emphasis added). As a result, the Court finds that the debtor's Complaint to Compel Turnover must be denied.

III. ORDER

It is therefore **ORDERED** that the Complaint to Compel Turnover of a 1998 Dodge Dakota is **DENIED**.

IT IS SO ORDERED.

By the Court,

G. Harvey Boswell
United States Bankruptcy Judge

Date: April 30, 2001