

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re

JASON KENT SCOTT,

Debtor.

Case No. 97-27282-L
Chapter 13

Jason Kent Scott,

Plaintiff,

v.

Adv. Pro. No. 97-0952

First Finance, Inc.,

Defendant.

**MEMORANDUM OPINION AND ORDER ON COMPLAINT TO COMPEL
TURNOVER AND MOTION TO SHOW CAUSE WHY DEFENDANT
SHOULD NOT BE HELD IN CONTEMPT**

Before the court is the complaint of the plaintiff-debtor, Jason Kent Scott, to compel turnover of a 1994 Chevrolet Camaro automobile and motion to show cause why the defendant, First Finance, Inc. ("First Finance"), of Hernando, Mississippi, should not be held in contempt for violation of the automatic stay. A hearing was scheduled on the complaint and motion on September 2, 1997. The defendant did not appear. For the reasons given below, the court finds that First Finance violated the automatic stay and/or the co-debtor stay when it repossessed the automobile after the filing of the debtor's petition, and must return the automobile to its owner, the debtor's wife. The court will schedule a second hearing to consider the appropriate sanction to be imposed upon the defendant. This memorandum shall constitute findings of fact and conclusions of law in accordance with FED. R. BANKR. P. 7052. This is a core proceeding. 28 U.S.C. § 157(b)(2)(A), (E), (G) and (O).

FINDINGS OF FACT

Based upon the testimony of the plaintiff-debtor, Jason Kent Scott (“Scott”), as well as the court’s review of its files, the court finds the following facts. On April 16, 1997, Scott and his wife, Brandi Scott, purchased a 1994 Chevrolet Camaro automobile from Autoplex Finance Center, Inc. Scott introduced as Exhibit 1 to his testimony the Retail Installment Contract which names his wife as buyer of the automobile and himself as co-buyer. The cash sales price was \$2,400, which the debtor and his wife agreed to pay together with interest at the rate of 28.75% per annum in equal monthly installments of \$175.00 beginning May 16, 1997, with a final installment of \$144.66 due September 16, 1998.

The name of the defendant, First Finance, appears on the contract as potentially receiving a “processing fee,” which in this case was \$0.00. The contract does not reveal the relationship, if any, between Autoplex Finance Center, Inc. and the defendant, First Finance.

On May 21, 1997, the debtor commenced his Chapter 13 case by filing a voluntary petition. The 1994 Chevrolet automobile is listed as an asset of the debtor valued at \$2,400. See Schedule B - Personal Property. The debtor claimed an exemption in the automobile in the amount of \$10 pursuant to Mississippi Code Annotated § 85-3-1. See Schedule C - Property Claimed as Exempt. The debtor listed First Finance as a secured creditor holding a claim in the amount of \$2,400. See Schedule D - Creditors Holding Secured Claims. The debtor’s proposed plan was confirmed by order entered August 4, 1997. The plan provides for the repayment of the claim of First Finance in

the amount of \$2,400 together with interest at the rate of 15% per annum in monthly installments of \$100. The debtor's plan payments are \$334 monthly and are to be made by payroll deduction.

Scott testified that the automobile was repossessed by First Finance after the filing of his bankruptcy petition and that First Finance refuses to return the automobile because it belongs to the debtor's wife, not to the debtor. Scott testified that while both he and his wife are obligated to pay for the automobile, only his wife's name appears on the title. The court was not provided with a copy of the title to the automobile, but notes that the Retail Installment Contract names the debtor as a co-buyer of the automobile, and further that the debtor listed the automobile as an asset of his bankruptcy estate when he prepared his schedules.

The debtor filed his "Motion for Show Cause" on July 24, 1997, alleging that First Finance repossessed the Camaro on or about July 18, 1997, in violation of "section 362(3) [sic] and section 1301, of the United States Bankruptcy Code." The motion was scheduled for hearing on August 19, 1997, at 9:30 a.m. Counsel for the debtor filed a certificate of service on August 6, 1997, indicating that a copy of the motion had been mailed "to all parties as stated in the 'Notice of Hearing' and evidenced by the mailing list additionally attached hereto." No mailing list is attached to the Certificate of Service, but a copy of the Order and Notice of Hearing naming First Finance, Inc. as an entity to be served is attached. The court's file also contains a copy of a letter from Mr. John T. Campbell, debtor's counsel, addressed to First Finance, Inc. at 1044 Getwell Rd. S., Hernando,

Mississippi, 38632, dated August 25, 1997, advising that the “motion for a show-cause” had been reset for 10:00 a.m., September 2, 1997.

On August 21, 1997, the debtor filed a Complaint to Compel Turnover of Certain Property of Defendant requesting that First Finance be directed to turn over the Camaro pursuant to 11 U.S.C. section 542(a). A hearing concerning the complaint was also scheduled for September 2, 1997, at 10:00 a.m. In the Western District of Tennessee, hearings on complaints to compel turnover are set for hearing on an expedited basis. A pre-printed form is used as the complaint which contains a “NOTICE OF EXPEDITED HEARING RE ABOVE COMPLAINT OF PLAINTIFF-DEBTOR SEEKING TURNOVER OF CERTAIN PROPERTY COMBINED WITH RELATED NOTICES.” After a complaint to compel turnover is filed, the notice portion of the form is completed by the bankruptcy judge’s courtroom deputy and returned to the debtor’s attorney for service. The attorney for the plaintiff-debtor is directed to “provide immediate telephonic notice of the time and place of the expedited hearing and also transmit a copy of this Complaint and Notice of Expedited Hearing to the defendant-creditor, the plaintiff-debtor and the Chapter 13 trustee.” A Certificate of Service was filed by the attorney for the debtor on August 27, 1997, indicating that “copies of the attached pleading and notice of hearing on such pleading” was mailed to “all parties as stated in the ‘Notice of Hearing’ and evidenced by the mailing list additionally attached hereto.” Again no mailing list is attached to the certificate of service, but a copy of the combined Complaint and Notice of Expedited Hearing is attached.

DISCUSSION

I.

The commencement of a case under title 11 of the United States Code operates as a stay, applicable to all entities, of, *inter alia*:

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title.

11 U.S.C. §362(a)(3) and (6).

“The automatic stay is effective immediately upon the filing of the petition, whether voluntary, involuntary or joint. Formal service of process is not required.” 3 COLLIER ON BANKRUPTCY ¶ 362.11 (15th ed. rev. 1997). Pursuant to the United States Code, the district court, and thus by reference, the bankruptcy court, has original and exclusive jurisdiction of all cases under title 11 and exclusive jurisdiction of all property, wherever located, of the debtor as of the commencement of the case and of property of the estate. 28 U.S.C. § 1334(a) and (e); 28 U.S.C. § 151. Actions taken in violation of the automatic stay generally are void, even if the creditor had no notice of the stay. *Smith v. First America Bank (In re Smith)*, 876 F.2d 524, 526 (6th Cir. 1989).

In addition, in a case under Chapter 13 of title 11, certain actions against co-debtors are automatically stayed:

(a) Except as provided in subsections (b) and (c) of this section, after the order for relief under this chapter, a creditor may not act, or commence or continue any civil action, to collect all or any part of a consumer debt of the debtor from any individual that is liable on such debt with the debtor, or that secured such debt, unless--

(1) such individual became liable on or secured such debt in the ordinary course of such individual's business; or

(2) the case is closed, dismissed, or converted to a case under title 7 or 11 of this title.

11 U.S.C. § 1301(a). There are only two exceptions to the co-debtor stay, provided at subsections (b) and (c) of section 1301(a). Subsection (b) permits the presentation of a negotiable instrument and the giving of notice of dishonor. Subsection (c) permits relief from the co-debtor stay where the debtor's plan does not propose to pay the claim in full or the creditor's interest would be irreparably harmed by the continuation of the co-debtor stay, but requires that the court affirmatively grant relief to the creditor after notice and an opportunity for hearing. Neither of these exceptions to the co-debtor stay applies to this case.

Based upon the Retail Installment Contract introduced as Exhibit 1 by the debtor, the court concludes that the debtor's obligation to First Finance is a consumer debt. A consumer debt is defined at section 101(8) as a "debt incurred by an individual primarily for personal, family, or household purposes." 11 U.S.C. § 101(8).

The co-debtor stay in Chapter 13 cases is designed to prevent "indirect pressure [on the debtor] to pay certain creditors in full immediately." 5 NORTON BANKRUPTCY LAW AND PRACTICE 2d § 118:4 (1994) (quoting H.R. Rep. No. 595, 95th Cong., 1st Sess. 1231, 122 (1977)). Like the

automatic stay of section 362(a), the co-debtor stay is “automatic,” without the necessity of notice or a separate court order. *Id.*

Whether the Camaro automobile is titled in the names of both the debtor and his wife, and thus is itself property of the debtor’s bankruptcy estate, or is titled only in the name of the debtor’s wife, the repossession of the automobile after the filing of the debtor’s Chapter 13 bankruptcy petition violated one or both of the stays that became effective upon the filing of the petition. The repossession of collateral is an act to collect or recover a claim against the debtor, which is specifically prohibited by sections 362(a)(6) and 1301(a) of the Bankruptcy Code. First Finance must immediately return the Camaro automobile to the debtor’s wife.

II.

A violation of the automatic stay may be punished as a contempt of court. 3 COLLIER ON BANKRUPTCY ¶ 362.11[2](15th ed. rev. 1997). Indeed, an individual injured by a willful violation of the automatic stay is entitled to recover actual damages, including costs and attorneys fees, and in appropriate circumstances may recover punitive damages. 11 U.S.C. § 362(h).

In this case, because the creditor chose not to appear at the scheduled hearing, it is difficult to determine what the creditor may have been thinking when it repossessed the automobile some forty-five days after the bankruptcy case was commenced. Counsel for the debtor suggested that First Finance was under the mistaken impression that it was free to repossess the automobile because it belonged to the debtor’s wife, not to the debtor. Counsel did not suggest that the creditor claimed it

had no knowledge of the bankruptcy case. First Finance is a named creditor in the debtor's schedules and appears on the mailing matrix. In the ordinary course, it would have received a copy of the notice of the commencement of the case sent to all creditors. Further, counsel for the debtor has filed certificates of service and a copy of a letter he sent to First Finance informing it of this proceeding and the motion for show cause order. It appears that First Finance simply ignored these notices, but the court will not finally make that determination at this time.

It is not difficult for the court to imagine that the creditor felt aggrieved by the filing of this bankruptcy petition so soon after the debtor and his wife purchased the automobile from First Finance. Nevertheless, the creditor may not simply ignore the bankruptcy case and take matters into its own hands. If in fact the creditor believes that the automobile is not property of the bankruptcy estate, and that it otherwise has grounds for seeking relief from the automatic stay and co-debtor stay, sections 362(d) and 1301(d) provide procedures for obtaining such relief.

The protections of the automatic stay and co-debtor stay are intended to insure the orderly administration of bankruptcy cases, and prevent the sort of self-help remedy employed by the defendant in this case. Creditors must request relief from the automatic stay and co-debtor stay in the appropriate forum, the bankruptcy court. In order to protect the jurisdiction of the bankruptcy court, sanctions may be imposed upon creditors who ignore the stays imposed by the Bankruptcy Code.

First Finance will be ordered to appear and show cause why it should not be held in willful contempt of this court as the result of its repossession of the Camaro automobile after the filing of the debtor's bankruptcy petition. At the scheduled hearing, the debtor should be prepared to present proof of damages he suffered as the result of the creditor's actions, including any attorneys' fees and costs incurred. The court will also consider whether the imposition of punitive damages is appropriate in this case.

ORDER

Based upon the foregoing, it is ORDERED:

1. That First Finance shall immediately return the 1994 Camaro automobile, VIN 2G1FP22S1R2207680, to the debtor's wife; and
2. First Finance, Inc. shall appear on **Tuesday, September 23, 1997, at 1:30 p.m.**, Courtroom 645, 200 Jefferson Avenue, Memphis, Tennessee, to show cause, if any, why it should not be held in willful contempt of the orders of this court, and for a determination of damages, which may include punitive damages, to be awarded to the plaintiff-debtor.

BY THE COURT

JENNIE D. LATTA
United States Bankruptcy Judge

Date: September 9, 1997

cc: Jason Kent Scott
6420 Riverdale Cove
Horn Lake, MS 38637

John T. Campbell
Attorney for the Debtor
3286 Commercial Parkway
Memphis, TN 38116

First Finance, Inc.
P.O. Box 1417
Southaven, MS 38671

George W. Stevenson
Chapter 13 Trustee
200 Jefferson Ave., Suite 1113
Memphis, TN 38103