

Dated: October 24, 2007
The following is ORDERED:



Jennie D. Latta

Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re
JACQUELINE D. BLACK,
Debtor.

Case No. 04-24318-L
Chapter 13

Jacqueline D. Black,
Plaintiff,
v.
Lee Nguyen a/k/a
Lee Nguyen d/b/a K's Auto Sales,
Defendant.

Adv. Proc. No. 06-00115

MEMORANDUM OPINION

THIS ADVERSARY PROCEEDING was commenced on March 2, 2006, by the Debtor, Jacqueline D. Black (“Debtor”), who filed a complaint to recover her 1993 Buick LeSabre automobile from the Defendant, Lee Nguyen a/k/a Lee Nguyen d/b/a K’s Auto Sales, Inc. The court conducted a series of hearings to determine whether Lee Nguyen or K’s Auto Sales, Inc. (“K’s Auto”) was responsible for taking the Debtor’s vehicle in violation of the automatic stay.

After a hearing on May 23, 2006, the court rendered judgment for K's Auto on the basis that the Debtor failed to prove that K's Auto had custody of the car or knew of the whereabouts of the car. This adversary proceeding was administratively closed following entry of judgment for the Defendant. On December 28, 2006, the Debtor recovered her car. The Debtor moved to reopen this adversary proceeding on March 12, 2007, on the basis that the car was recovered from property owned by the parents of her cousin, Johnny Knowles, who was alleged to have taken the car as the agent of Lee Nguyen and/or K's Auto. The Debtor seeks relief from the prior judgment and further requests a judgment in her favor against Lee Nguyen for damages she allegedly suffered. The court conducted an evidentiary hearing on May 17, 2007. After considering the testimony of the witnesses and the exhibits presented at that hearing, the court makes the following findings of fact and conclusions of law. This is a core proceeding. 28 U.S.C. § 157(b)(2)(E).

FACTS

The Debtor filed her Chapter 13 case on March 18, 2004. The Debtor's plan includes K's Auto for a 1993 Buick LeSabre with a value of \$1,500. K's Auto had notice of the Debtor's bankruptcy filing. On February 27, 2006, the Debtor's car was taken from the Debtor's workplace during the Debtor's bankruptcy case. The court has carefully reviewed the recordings of each of the prior hearings in this case. The court will rely on testimony from each of the prior hearings.

Hearing of March 7, 2006

On March 7, 2006, the court heard the Debtor's motion for a temporary restraining order against Lee Ngyuen and K's Auto.¹ At that hearing, the Debtor, Dan Nguyen,² and George Stevenson, the Chapter 13 trustee, testified as witnesses. The Debtor testified that her car, a gold 2003 Buick LeSabre, was taken from her place of employment, Cromwell Elementary School, on February 27, 2006. The Debtor further testified that, after she gave a report to the police, she checked with her manager at work and learned that a man had called for her at 9:45 that morning. The Debtor claimed that she was able to obtain the telephone number of the incoming call and that she "star-67'ed" that number (meaning that she called the number from her cell phone while blocking access to her number). The Debtor stated she did not speak to anyone, but that she recognized the voice of the person who answered and knew that the number was for a cell phone at K's Auto. The Debtor said she gave the number to the authorities.

The Debtor and K's Auto have a history of prior dealings. The Debtor testified about a prior attempt by K's Auto to repossess her car. According to the Debtor, K's Auto sent a tow truck from No Limits Towing to repossess her car in July 2005. The tow truck driver told the Debtor that he had been sent to repossess the car. The Debtor said she told him that the car was not due for repossession and refused to leave her vehicle. The Debtor testified that "they" broke out her back tail light and called her names, but she was able to drive away.

The Debtor admits that she did not see anyone take her car from the school on February 27, 2006. She said that she notified the authorities that her car was missing. She said the police advised

¹ The Debtor also sought a contempt order against K's Auto. At this hearing, the court heard only the motion for temporary restraining order.

² Dan Nguyen and Lee Nguyen are brothers and are both officers of K's Auto, a corporation.

her that there was no record of her car being reported as repossessed by a repossession agent. The Debtor said that she had been told by Johnny Knowles that Lee Nguyen made a set of keys to her car and was going to retrieve the vehicle as retaliation against people who file bankruptcy. Mr. Knowles occasionally did repair work for K's Auto. He did not testify at this hearing.

Dan Nguyen, the president and a shareholder of K's Auto, testified that his company did not have possession of the Debtor's car, that he never ordered its repossession, and that he had nothing to do with the recovery of the car. Mr. Nguyen denied that he had a set of keys for the car. He explained that the 2005 repossession attempt occurred because the bankruptcy paperwork had been sent to the wrong address. According to Mr. Nguyen, when he received information about the bankruptcy, K's Auto filed a proof of claim. Mr. Stevenson testified that his office had not received a proof of claim from K's Auto.

At the close of the proof, the court concluded that although there was strong circumstantial evidence that K's Auto had been involved in the taking of the Debtor's car, it was not conclusive. The court directed the entry of a temporary restraining order directing the owners, officers, directors, shareholders, agents, and employees of K's Auto to return the car if it was in their possession, custody, or control. With the acquiescence of K's Auto, the court scheduled a hearing to consider the entry of a preliminary injunction and the imposition of sanctions for March 28, 2006. The court directed Mr. Andrew Bender, attorney for the Debtor, to prepare a written restraining order. The docket in this case, however, indicates that no written order was ever submitted for entry. A consent order was entered continuing the date of the hearing on preliminary injunction to April 18, 2006.

Hearing of April 18, 2006

At the hearing on April 18, 2006, the Debtor presented her own testimony and the testimony of Paul Freeman, an insurance investigator for Direct Insurance, the Debtor's insurer. K's Auto was represented by counsel, who announced that Lee Nguyen could not be present because his child was sick, but consented to have the hearing go forward.

The Debtor testified that she asked her cousin, Johnny Knowles, to assist her in getting her 1990 Toyota Camry repaired when it developed transmission trouble sometime in 2003. The Debtor said that Mr. Knowles suggested that instead of repairing the transmission, she purchase a different vehicle. Mr. Knowles showed the Debtor a gold 2003 Buick LeSabre with a broken windshield that was parked at his house. K's Auto owned the vehicle. The Debtor agreed to purchase the LeSabre from K's Auto for a purchase price of around \$3,000. She transferred her Camry to K's Auto as a down-payment on the LeSabre, and made payments of \$75 twice per month from the day she purchased the car sometime in 2003 until several months later. She filed a Chapter 13 petition on March 18, 2004, and said that the day before she filed, she let K's Auto know that she was filing the petition. The Debtor said that she was told (by whom is not clear) not to make any more payments because payments would be coming from the Chapter 13 plan.

The Debtor further testified that at some point after she filed her Chapter 13 petition, she received a telephone call from another cousin, Ruby Thomas. According to the Debtor, Ms. Thomas told her that there was a warrant for the Debtor's arrest because she had not paid for the car. The Debtor said that Ms. Thomas read off personal information about her over the telephone. The Debtor explained that Ms. Thomas claimed that she was reading the Debtor's information from an open file on the desk of Johnny Knowles in the office of K's Auto. Ms. Thomas stated, according to the Debtor's testimony, that if the Debtor would bring the car to her, she would take it to "Lee,"

indicating Lee Nguyen, who would take care of everything. The Debtor testified again about the previous repossession attempt in July of 2005. This time, however, the Debtor added that shortly after the 2005 repossession attempt, she spoke with her mother who had received a troubling telephone call from Ms. Thomas. The Debtor testified that her mother said that Ms. Thomas called and told her that the Debtor had been in a terrible accident. That the Debtor was in a terrible accident was false. The Debtor reassured her mother that she did not get into an accident but told her mother that “they” had tried to steal her car. The Debtor’s mother did not testify at this hearing.

The Debtor testified that she did not hear from K’s Auto or from her cousins concerning the car during the months prior to its disappearance, but that she was told by Johnny Knowles that “Lee” was going to get his car back. The Debtor admitted that Lee Nguyen had never personally threatened to take her car.

The Debtor again testified that when she arrived at school the day her car was taken, she was told by a co-worker that she had received a telephone call. The Debtor was puzzled because she did not believe that anyone had her work telephone number. The Debtor said that when she left work at approximately 12:15 p.m., she discovered that her car was missing. As previously stated, she called the police to give them her report. The Debtor said that after she finished speaking with the police, she obtained the number of the caller from the school office and called this number on her cell phone. She recognized the voice of the person who answered as one of the Nguyen brothers. No one from Cromwell Elementary School testified at this hearing.

Paul Freeman, insurance investigator for Direct Insurance, also testified. He said that he had been asked to look into the disappearance of the Debtor’s car. He said that he went to the business

premises located at the address given by the Debtor for K's Auto, and asked to speak to the owner or manager. He was introduced to Dan Nguyen, who showed him a car that resembled the missing car but was not the missing car. Mr. Freeman testified that while he was at the business, he dialed the number given to him by the Debtor and that Dan Nguyen answered from his cell phone while he was in the presence of Mr. Freeman. Mr. Freeman said that he had checked with the Memphis Police Department to see whether the car had been recovered, but that it had not. Mr. Freeman further stated that the car had been listed in a national registry of stolen cars. Finally, Mr. Freeman said that he did a records search to determine the owner of K's Auto and discovered that the owner was listed as Dan Nguyen.

At the close of the second hearing, the court found that the evidence was still insufficient for the court to conclude that K's Auto was in possession of the car. The court directed the entry of a preliminary injunction, again directing K's Auto, its officers, directors, shareholders, agents, and employees to return the car, if it was in their possession, custody, or control, and set the matter for final hearing on May 23, 2006.

Hearing of May 23, 2006

At the third hearing on May 23, 2006, the Debtor presented the testimony of Phylanise Pugh, Johnny Knowles, and herself. K's Auto offered no proof and the car had still not been recovered.

Ms. Pugh testified that she was employed by Cromwell Elementary School and that she took the call for the Debtor the morning that the Debtor's car disappeared. Ms. Pugh, who works in the school's kitchen along with the Debtor, said that she talked with the Debtor after she arrived at school about fifteen minutes after the telephone call. Ms. Pugh explained that the call had been transferred from the front office. According to Ms. Pugh, the Debtor was concerned about who had

called her but proceeded with her work. Ms. Pugh said that the caller did not leave his name or a message. On cross examination, Ms. Pugh indicated that she had seen the Debtor's car in the parking lot on the day that it was taken. Ms. Pugh said that the Debtor did not usually get calls at school, but said that there was no policy about receiving calls at school. Ms. Pugh said she was unable to get a name from the caller because the caller indicated he would call back later. Ms. Pugh did not know the number of the caller.

Johnny Knowles, the Debtor's cousin, testified that he occasionally did work for K's Auto, but he was not employed by the Nguyen brothers. Mr. Knowles said that he was considering purchasing a car from K's Auto when the Debtor asked him to assist her in finding a car. He suggested that she take over the purchase of the car that he had been driving, the 1993 Buick that is the subject of these proceedings.

Mr. Knowles denied any knowledge of the attempt to repossess the car in July 2005. He denied that he called the Debtor to ask her to return the car. He denied that he was asked by K'S Auto to recover the car. Mr. Knowles claimed that all he did was take the Debtor to see the 1993 Buick LeSabre, but had nothing to do with the business deal. He said that he did not talk with the Debtor again about the car, except one time because of a problem with the fuel pump. On cross-examination, Mr. Knowles again denied that he had anything to do with the business aspects of K's Auto. Mr. Knowles denied that he ever made threatening calls on behalf of the dealership. He denied calling the Debtor's mother or her boss concerning the car. Mr. Knowles testified that the Debtor never called him concerning the repossession of her car. He said that he may have heard about the repossession from his mother. Mr. Knowles explained that he is not close to his cousin, the Debtor, and that he had not talked to her about the car. Mr. Knowles was not specifically asked

by anyone whether he took the car from Cromwell Elementary School or whether he knew the car's location.

Following this hearing, the court entered judgment for K's Auto because there was insufficient evidence to connect the disappearance of the car to K's Auto. Specifically, the court noted that no disinterested witness had given the number that was later linked by Mr. Freeman to Dan Nguyen. An order was entered dismissing the adversary proceeding on July 18, 2006, and the adversary proceeding was administratively closed on August 4, 2006.

Hearing of May 17, 2007

On March 12, 2007, at the request of the Debtor, the case was reopened. The Debtor filed a motion for relief from the prior judgment and a motion to show cause why K's Auto should not be held in contempt. In the motion, the Debtor indicated that her car had been discovered on property located in Somerville, Tennessee.

At the hearing on May 17, 2007, the Debtor testified that she received a telephone call on December 28, 2006, from her cousin, Ruby Thomas, indicating where the car was located. The Debtor testified that she drove to the location on that day after first going by the office of the Fayette County police.³ She discovered her car toward the back of the property. The Debtor indicated that she had gotten a couple of tips before and had asked the police to look for the car. The Debtor indicated that she thought that the police had only looked for the car at night. The Debtor testified that the property was the home of William and Debbie Knowles, and that they are the parents of her

³ Even though the Debtor testified that she went by the office of the "Fayette County police," the court takes note that there is no police department for Fayette County, Tennessee. There is a police department for the City of Somerville, Tennessee, and a sheriff's department for Fayette County, Tennessee.

cousin, Johnny Knowles, who also lived at that location. The Debtor had the car towed by Somerville Auto Sales to her residence on South Third in Memphis. She said that the car was not in working order, and that there were a number of personal items missing from the car. She estimated that the value of the car prior to its taking was \$2,500 and that its value in its current condition is \$100-150. She said that a mechanic told her that the repairs would exceed \$2,500, but no repair estimate was offered. The Debtor further said that during the period she did not have transportation, she paid friends and co-workers to transport her at a cost of about \$200 per month for five months. Finally, she said that the cost of having the car towed to Memphis was \$92.86, and she submitted a copy of a repair order in this amount from Somerville Auto Sales and Service.

The Debtor also presented the testimony of Ruby Thomas, the person who had been identified in previous hearings as the cousin of the Debtor and Mr. Knowles. Ms. Thomas testified to a number of things. She said that Johnny Knowles called her on February 27, 2006 (the day the car was taken from the Debtor's workplace) and that Ms. Thomas called her aunt (the Debtor's mother) and then called the Debtor, leaving a message for the Debtor that the car was at the home of Johnny Knowles' mother and brother. Ms. Thomas said that she had a cousin go out that evening to look for the car, who told her that the car was covered up behind the barn. Ms. Thomas further testified that Johnny Knowles had previously come to her house with the title to the car and the keys and told her that, "Lee was going to pay someone \$250 to steal this car." Ms. Thomas' testimony regarding statements made by Mr. Knowles were allowed over the objection of counsel for K's Auto.

On cross-examination, Ms. Thomas had little explanation for why it took almost a year for the Debtor to recover the car, except that the car would not have been visible from the street because

it was behind the barn. Ms. Thomas believed that “Debbie and Barry” (Mr. Knowles’ mother and brother) got the \$250, but admitted that she did not see any money change hands. Ms. Thomas said that Mr. Knowles had been put out of his mother’s house and that Ms. Thomas thought he was living in a duplex owned by Lee Nguyen. According to Ms. Thomas, the car was never taken to Lee Nguyen because of the prior court order and that Mr. Nguyen probably did not want the car in his possession. She also said that Mr. Nguyen was a good friend of Johnny Knowles’ mother and brother, but not of his father. She characterized Mr. Knowles’ mother as a “gangster.” Ms. Thomas further said that she had received a telephone call from Mr. Knowles the morning of the hearing, and that she told him that he was going to jail.

Mr. Knowles was not present and did not testify at this hearing, but Lee Nguyen did. He testified that he is the vice-president of K’s Auto. He said that Johnny Knowles sometimes works for him, but that he does not use him to repossess cars because Mr. Nguyen uses persons who are licensed and bonded to do repossessions. Mr. Nguyen said that he did not know where the Debtor’s car has been for the past year. He denied that he knows Mr. Knowles’ family from Fayette County. According to Mr. Nguyen, he still has title to the car, but would assign it to the Debtor if that would mean that he did not have to come to court again. He said that he would not pay someone to steal his own car. Mr. Nguyen denied sending anyone to take the car from the school where the Debtor worked. He also denied that Mr. Knowles lives in property owned by him.

The Public Record

The court takes judicial notice of certain information contained in the Debtor's bankruptcy file. The bankruptcy schedules filed by the Debtor on March 18, 2004, indicate that the value of the car at the time of filing was \$1,500, and that the Debtor owed \$1,500 secured by the car. The confirmed plan included payment of \$1,500 to K's Auto. The Debtor testified that K's Auto never filed a proof of claim. No proof of claim was placed in the record.

The court also takes judicial notice that, according to the Secretary of the State of Tennessee, K's Auto Sales, Inc., is a corporation doing business in Memphis, Tennessee, and the registered agent for service of process is Nguyet Thanh Nguyen. The court assumes that this person is "Dan" Nguyen. The point, however, is that Lee Nguyen is not the proprietor of K's Auto. K's Auto is a corporation. The complaint that commenced this adversary proceeding does not name a corporate defendant. The adversary proceeding cover sheet lists the defendant as Lee Nguyen a/k/a Lee Nguyen d/b/a K's Auto Sales. The court record reflects that the original complaint, which was one for contempt and for temporary restraining order, was mailed to Lee Nguyen and K's Auto, both at the same address. The answer that was filed in this case by attorney Ted I. Jones names the defendant as Lee Nguyen, individually and d/b/a K's Auto Sales, and lists Mr. Jones as appearing for the "Defendant." The Defendant could only be Lee Nguyen.

At the first hearing, Mr. Dan Nguyen testified that K's Auto is a corporation. The pleadings were never amended to reflect this. At the beginning of the most recent hearing, the court asked for clarification about who was the target of the pending motions, indicating that the defendant was K's Auto, a corporation. No one disagreed. In other words, the parties stipulated that the Defendant, and thus the target of the motion for contempt, is K's Auto, a corporation, and not any of the various

individuals who have been involved in this unfortunate series of events. Notwithstanding the court's confusion, the only named defendant in this case is Lee Nguyen, an individual.

ANALYSIS

The Debtor has asked the court to vacate its prior judgment for the Defendant, K's Auto. The Debtor's motion indicates that she seeks relief from the judgment on the basis of newly discovered evidence that could not have been discovered in time to ask for a new trial and based upon the fraud, misrepresentation, and other misconduct of K's Auto and Johnny Knowles. Although the motion does not specify the rule relied upon by the Debtor, the court presumes that the Debtor relies upon Federal Rule of Bankruptcy Procedure 9024, which incorporates Rule 60 of the Federal Rules of Civil Procedure. Newly discovered evidence and fraud are bases for obtaining relief from a judgement. Fed. R. Civ. Proc. 60(b)(2) and (3).

The Sixth Circuit holds that, “[a]s a prerequisite to relief under Rule 60(b), a party must establish that the facts of its case are within one of the enumerated reasons contained in Rule 60(b) that warrant relief from judgment.” *Lewis v. Alexander*, 987 F.2d 392, 396 (6th Cir. 1993) (citing *In re Salem Mortgage Co.*, 791 F.2d 456, 459 (6th Cir. 1986)). It is within the court's discretion to grant relief under Rule 60(b). See *Jinks v. Allied Signal, Inc.*, 250 F.3d 381, 385 (6th Cir. 2001) (reviewing a district court's decision to deny a Rule 60(b) motion for abuse of discretion). The court is mindful that “[m]otions for a new trial based upon newly discovered evidence are disfavored and should be granted with caution.” *United States v. Turns*, 198 F.3d 584, 586 (6th Cir. 2000) (citing *United States v. Seago*, 930 F.2d 482, 488 (6th Cir. 1991).

Rule 60(b) requires the moving party to “demonstrate (1) that it exercised due diligence in obtaining the information and (2) [that] ‘the evidence is material and controlling and clearly would

have produced a different result if presented before the original judgment.” *Good v. Ohio Edison Co.*, 149 F.3d 413, 423 (6th Cir. 1998) (quoting *N.H. Ins. Co. v. Martech U.S.A., Inc.*, 993 F.2d 1195, 1200-01 (5th Cir. 1993)) (alteration in the original). Speculative or merely impeaching evidence is insufficient to warrant relief from judgment. *Good*, 149 F.3d at 423 (citing *Yachts Am., Inc v. United States*, 779 656, 662 (Fed. Cir. 1985)). The moving party is required to bring the motion within a reasonable time, and for reasons of mistake, newly discovered evidence and fraud, not more than one year after the entry of the judgment. Fed. R. Civ. Proc. 60(b).

A corporation must be named and served in its corporate capacity by service upon an officer, managing agent, or agent registered for service. Fed. R. Civ. Proc. 4(c)(2)(C)(I) and (d), and incorporated in Fed. R. Bankr. Proc. 7004(b)(3). In order to hold a corporation liable, a plaintiff must show that the corporation acted through its employees and agents. *See In re Rader*, 61 B.R. 73, 75 (Bankr. S.D. Ohio 1986). A corporation can act only through the authorized acts of its corporate directors, officers, and other employees and agents, and thus the acts of the corporation’s agents are attributed to the corporation itself. *Trau-Med of Am., Inc v. Allstate Ins. Co.*, 71 S.W.3d 691, 704 (Tenn. 2002) (citing *Forrester v. Stockstill*, 869 S.W.2d 328, 334-35 (Tenn. 1994)). As long as the agent is acting within the scope of his or her authority, the agent and the corporation are not separate entities” *Trau-Med. of Am., Inc.*, 71 S.W.3d at 704.

For the Debtor to hold K’s Auto liable for the wrongful repossession of her car, the Debtor must prove that an agent of K’s Auto acted to repossess the car. The Debtor failed to prove this in any of the prior hearings, but reopened the case due to allegedly newly discovered evidence. The newly discovered evidence offered in this case is the apparent fact that the Debtor located her car on property reportedly owned by her aunt and uncle, William and Debbie Knowles. William and

Debbie Knowles are said to be the parents of Johnny Knowles, a witness in this case. Other than that, very little has changed. The Debtor's new evidence does not reflect that Johnny Knowles, or any member of the Knowles family, is an agent of K's Auto or of the Defendant, Lee Nguyen. The court will review the more troubling aspects of this case.

The only evidence identifying the telephone number of Dan Nguyen with the call received at Cromwell Elementary School was the testimony of the Debtor. No independent witness reported that the number was recorded at the time of the call. In fact, the testimony of Ms. Pugh was to the effect that no message was taken and that the caller did not identify himself. Ms. Pugh had no knowledge of the caller's phone number and said that the call was transferred to Ms. Pugh from the main office. The Debtor testified that she retrieved the number from the main office which had a record of the number as a result of a caller ID system. The Debtor did not present the corroborating testimony of any employee of Cromwell Elementary School to the effect that the number was recorded or recoverable. The Debtor stated that she recognized the number, meaning that she knew the number independently of this incident. In fact, the Debtor still knew the number more than one year later when she testified in court. No one testified that Cromwell Elementary School keeps a record of the telephone numbers of incoming calls. The fact that no independent witness identified the telephone number of the call received at Cromwell Elementary School remains unchanged following the most recent hearing.

It is true, however, that Dan Nguyen denied in the initial hearing that the number was his. This was contradicted by the testimony of the Direct Insurance investigator, Mr. Freeman, who testified that Mr. Nguyen answered his cell phone in Mr. Freeman's presence when he called the number provided to him by the Debtor. The Debtor gave Mr. Freeman that number, the alleged

number of the individual who called the Debtor at Cromwell Elementary School. As we have seen, however, the Debtor appears to have had independent knowledge of this telephone number.

The Debtor's offer of the testimony of Ms. Thomas was surprising given the fact that the Debtor identified Ms. Thomas in a prior hearing as the person who had called her and told her that she would go to jail if she did not return the car. (This is consistent, of course, with Ms. Thomas' admitted conduct with respect to Mr. Knowles, telling him that he was going to jail when she had no reason to believe that this was true.). The Debtor said that Ms. Thomas told her that she was in the offices of K's Auto when she called, standing at Johnny Knowles' desk. Significantly, Ms. Thomas did not testify about this incident. Both Johnny Knowles and Lee Nguyen agreed, however, that Johnny Knowles was not an employee of K's Auto, but that Mr. Knowles occasionally did work for K's Auto on a cash basis. Dan Nguyen testified that Mr. Knowles occasionally repaired cars, not that Mr. Knowles assisted in the sale of cars. There would be no reason for Mr. Knowles to have a desk at K's Auto and no independent witness testified that he did.

Over the objection of Mr. Jones, counsel for K's Auto, the court heard testimony from Ms. Thomas about statements made by Johnny Knowles. The court permitted this testimony because the Debtor's counsel, Mr. Bender, indicated that prior evidence demonstrated that Mr. Knowles was the agent of K's Auto in these matters and that the telephone call to the school linked them. Mr. Bender indicated that Ms. Thomas' testimony about statements Mr. Knowles made to her would link his acts to the company. In fact, the most damaging thing that Ms. Thomas testified about was that Johnny Knowles came to her house and told her that Lee Nguyen would pay \$250 to someone for stealing the Debtor's car. Ms. Thomas admitted that if anyone was paid that money, it was Mr. Knowles' mother, Debbie Knowles. Ms. Thomas also testified that Debbie Knowles told her, after

the car had been recovered, that Mr. Knowles had brought the car to her home. In other words, Ms. Thomas' own testimony was conflicting about who was responsible for taking the Debtor's car to the property in Fayette County.

After carefully reviewing the prior record, it seems clear that there was not sufficient evidence for the court to conclude that Mr. Knowles was an agent of the corporation. In fact, the evidence was to the contrary. In hindsight, the court should not have permitted Ms. Thomas to testify about Mr. Knowles' statements to her. This appears to have been harmless error, however. Even if the court were to consider Ms. Thomas' statements, the Debtor's case hinges on the court taking as true the statement reported to have been made by Lee Nguyen to the effect that he would pay someone \$250 to steal the Debtor's car. The statement was reported to the court third hand. Lee Nguyen flatly contradicted the statement. No one with first hand knowledge of the statement or the supposed transaction appeared. Further, no evidence was placed into the record concerning any benefit received by Lee Nguyen or K's Auto resulting from the taking of this car. It is possible that an insurance claim was paid, but the court was not presented with evidence of that fact.

Ms. Thomas' testimony is interesting for another reason. She testified that she knew that the car was at the home of William and Debbie Knowles from the very first day that it was taken, both because Mr. Knowles told her that and because she had another cousin to look for the car. Ms. Thomas testified that she communicated this both to the Debtor and to the Debtor's mother on the same day the car was taken. Notwithstanding this testimony offered by one of the Debtor's own witnesses, the Debtor provided no explanation for why it took ten months for her to go and look for her car at William and Debbie Knowles' house.

Further, the Debtor's testimony concerning her damages is contradicted by her own sworn statements. At the hearing on May 23, 2006, the Debtor testified that she did not know how much the car was worth before it was taken. At the hearing on May 17, 2007, however, she stated positively that the car was worth \$2,500. Her bankruptcy schedules, filed March 18, 2004, stated that the car was worth only \$1,500 and that it was fully encumbered. George Stevenson, the Chapter 13 trustee, testified that K's Auto did not file a proof of claim, so it is reasonable for the court to conclude that K's Auto was not paid anything on account of its claim through the bankruptcy plan. The court can conceive of no circumstance under which the value of this car increased during the pendency of the bankruptcy case, and thus finds that at the time of its taking, it was worth no more than \$1,500, and was fully encumbered. The Debtor testified about her damages for loss of use of the car for five months before her sister gave her a car, but if the court credits Ms. Thomas' testimony, the Debtor was informed about the location of the car on the very night that it was taken. The Debtor appears not to have attempted to mitigate her damages.

The issue in this case is whether Lee Nguyen, the only Defendant in the case, is responsible for taking the Debtor's car. The court concluded at the end of the hearing on May 23, 2006, that the Debtor had failed to carry her burden to establish that connection. The Debtor now asks for relief from the judgment on the basis of newly discovered evidence, but the Debtor has offered no additional proof tending to show that Johnny Knowles or anyone in his family took the car at the direction of one or both of the Nguyens, other than the testimony of Ms. Thomas, whose testimony included hearsay within hearsay and was contradicted by Lee Nguyen. Further, the Debtor offered proof through the testimony of Ms. Thomas that the location of the car was reported to the Debtor

on the evening of the day the car went missing. The Debtor failed to explain or contradict this testimony, calling into question whether the Debtor's motion was brought within a reasonable time.

In all the swirling accusations by and among the family members of the Debtor in this case, it is difficult for the court to grasp any solid evidence linking these activities to Lee Nguyen or K's Auto. The Debtor insists that persons have made false statements to the court. Specifically, the Debtor stated in an affidavit in support of her motion to reopen the adversary proceeding that, "Johnny Knowles, . . . was a witness for K's Auto and . . . testified under oath that he had no knowledge about the whereabouts of my vehicle and that he and K's Auto had nothing to do with the disappearance of my 1993 Buick LeSabre vehicle from my place of business on February 27, 2006." The court has carefully reviewed the prior testimony of Mr. Knowles. Mr. Knowles was offered as a witness by the Debtor, not by K's Auto. Mr. Knowles was never asked whether he had knowledge about the whereabouts of the Debtor's car, nor was he asked whether he had anything to do with its disappearance. Accordingly, Mr. Knowles made no false statement concerning those matters. Mr. Knowles denied making threatening calls on behalf of K's Auto and denied asking the Debtor to return the car. This testimony, however, was given in response to questions about the prior repossession attempt in July of 2005. Mr. Knowles denied having any knowledge of that matter. The Debtor has offered no proof that any of those statements was false. Mr. Knowles testified that he was not employed by K's Auto but that he occasionally purchased cars from them and did repair work for them. This testimony was corroborated by testimony of both Dan Nguyen and Lee Nguyen. The Debtor offered no proof to contradict this testimony.

The most troubling evidence placed in the record was Mr. Freeman's testimony that Dan Nguyen answered a cell phone when he called the telephone number given to him by the Debtor.

Both Dan Nguyen and Lee Nguyen denied recognizing this telephone number. The court credits Mr. Freeman's testimony because he is one of the few disinterested witnesses in this case. This without more, however, gives the court little to go on in light of the Debtor's failure to provide a witness to explain how this telephone number was recorded. The witness provided by the Debtor indicated that she did not record the number.

In sum, the Debtor's newly discovered evidence, that the car was found on Knowles' family property, does not establish the necessary link between Johnny Knowles and Lee Nguyen. In order for Lee Nguyen to be liable, the Debtor has to show that an agent of Mr. Nguyen repossessed the car. The Debtor's newly discovered evidence has failed to demonstrate that Johnny Knowles, or any member of his family, is an agent of Lee Nguyen or K's Auto, or that an agent of Lee Nguyen or the corporation took the car. Moreover, the Debtor's proof demonstrated that the Debtor was told the location of the vehicle ten months before the Debtor retrieved the vehicle from the Knowles' property. This uncontradicted testimony shows that the Debtor failed to exercise due diligence in obtaining her "newly discovered evidence." In addition, the Debtor failed to show that her newly discovered evidence would produce a different result from the prior ruling. The newly discovered evidence does not establish that Johnny Knowles or any member of the Knowles family took the Debtor's car at the direction of Lee Nguyen or K's Auto. Consequently, the Debtor's request for relief from judgment should be **DENIED**, and the request for sanctions against Lee Nguyen or K's Auto Sales, Inc., should be **DENIED**.

CONCLUSION

The court will enter a separate order consistent with its conclusion herein.

cc: Debtor/Plaintiff
Attorney for Debtor/Plaintiff
Defendant
Attorney for Defendant
Chapter 13 Trustee