

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE: )  
 )  
JAMES SOWARD and ) Bankruptcy Case No. 97-30132  
VALERIE SOWARD, )  
 )  
Debtors. )  
 )  
JAMES SOWARD and )  
VALERIE SOWARD, )  
 )  
Plaintiffs, )  
 )  
vs. ) Adversary Case No. 97-3055  
 )  
ACTION AUTO SALES, )  
 )  
Defendant. )

OPINION

This matter having come before the Court for trial on a Motion for Turnover and Sanctions and a Motion for Relief from Stay; the Court, having heard sworn testimony and arguments of counsel and being otherwise fully advised in the premises, makes the following findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

Findings of Fact

The facts in this matter are not in serious dispute and are, in pertinent part, as follows. On December 11, 1996, the Debtors entered into a contract with the Defendant, Action Auto Sales, to purchase a 1991 Volkswagon automobile. The purchase price on the Volkswagon was \$6,995. The Debtors were allowed a trade-in of \$2,800 on a 1987 Honda vehicle. Additionally, the Debtors paid a \$500 cash down payment. The remainder of the purchase price was financed by Action Auto Sales, with the total amount being financed approximately \$4,058. Pursuant to the agreement between the parties, the Debtors were to pay the sum of \$200 per month beginning on January 15, 1997, until the entire sum financed was paid in full. Subsequent to the purchase of the 1991 Volkswagon, the

Debtors determined that they had financial difficulties which might require the filing of a bankruptcy. The Debtors consulted with an attorney, and the instant Chapter 13 bankruptcy case was filed on January 17, 1997. Upon the advice of counsel, the Debtors did not pay the initial \$200 payment due to Action Auto Sales, as the Debtors' Chapter 13 Plan contained provisions for the payment of the debt on the 1991 Volkswagon.

Upon the Debtors' failure to make the automobile payment due on January 15, 1997, they were contacted by Action Auto Sales, and, while the Debtors did not inform Action Auto Sales that a bankruptcy petition was to be filed, the Debtors did indicate that they were making provision to make the payments. As such, no action was taken as to the vehicle at that time. On February 14, 1997, some 28 days after the Debtors had filed for relief under Chapter 13 of the Bankruptcy Code, Action Auto Sales repossessed the 1991 Volkswagon from a parking lot while the Debtors were at work. Upon learning that the vehicle had been repossessed, the Debtors contacted their attorney. Their attorney then attempted to invoke the automatic stay under 11 U.S. C. § 362 and to convince Action Auto Sales to return the vehicle. The request by Debtors' counsel was refused, and the vehicle in question remains in the possession of Action Auto Sales to this day.

In defense of the allegation that the repossession of the 1991 Volkswagon was a willful violation of the automatic stay under 11 U.S.C. § 362(h), the Defendant testified that he was not aware of the bankruptcy at the time of the repossession. The Court finds that this testimony is not credible in that the Creditor, Action Auto Sales, is clearly listed in the Debtors' bankruptcy petition and on the mailing matrix attached to the Debtors' bankruptcy petition. In addition, there is a certificate of service in Debtors' bankruptcy file indicating that Action Auto Sales was served by mail at its current address with a notice of the Debtors' bankruptcy on January 27, 1997. The Defendant had no explanation for the failure to return the vehicle after he admits that he became aware that there was a bankruptcy proceeding.

To counter the instant Motion for Turnover and Sanctions, the Defendant has filed a Motion for Relief from Stay indicating that it is not adequately protected on the 1991 Volkswagon, in that no payments have been made to date, and the value of the vehicle will depreciate much more quickly than the amount

of equity that will be accumulated under the payments proposed in the Debtors' Chapter 13 Plan.

### Conclusions of Law

In the instant case, the Debtors have clearly shown that there was a willful violation of the automatic stay by the Defendant, Action Auto Sales. Title 11 U.S.C. § 362(h) provides 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.

Although, Defendant's representative testified that the Defendant had no knowledge of the Debtors' bankruptcy filing on January 17, 1997, the record of Debtors' bankruptcy proceeding suggests to the contrary. As noted above, the Defendant, Action Auto Sales, is clearly scheduled as a creditor in the Debtors' bankruptcy petition and is listed at its present address on the bankruptcy mailing matrix. Furthermore, there is a Certificate of Service indicating that Action Auto Sales was served with a copy of the notice of the commencement of the case by mail on January 27, 1997. The testimony of Defendant's representative in this regard was not credible, and, where it can be found that one violates the automatic stay with knowledge of the bankruptcy petition, said violation is willful and punishable pursuant to the provisions of 11 U.S.C. § 362(h). In re Sumpter, 171 B.R. 835 (Bankr. N.D. Ill. 1994); In re Flynn, 169 B.R. 1007 (Bankr. S.D. Ga. 1994), *aff'd in pertinent part* at 185 B. R. 89 (S.D. Ga. 1995). Defendant's representative testified that it was necessary to repossess the car in question because the Defendant is unable to continue in purchase agreements where it is not paid based upon the fact that the Defendant self-finances these deals. This explanation for the Defendant's conduct does not constitute a legally recognizable excuse for willfully violating the automatic stay. A creditor's violation of the automatic stay may be "willful" even though a creditor believes itself justified in taking the challenged action. In re Alberto, 119 B.R. 985 (Bankr. N.D. Ill. 1990), *reconsideration denied* at 121 B.R. 527 (N.D. Ill. 1990); In re Gray, 97 B.R. 930 (Bankr. N.D. Ill. 1989).

Notwithstanding the fact that the Court has already found that there was a clear violation of the automatic stay at the point when the vehicle in question was repossessed, the Court further finds that the Defendant willfully violated the automatic stay when it retained possession of the vehicle after clearly being

informed of the Debtors' bankruptcy. The law is clear that there is an affirmative duty on the part of one who violates the automatic stay to undo the violation without unreasonable delay or to face sanctions as a consequence. In re Taylor, 190 B.R. 459, at 461 (Bankr. S.D. Fla. 1995); In re Belcher, 189 B.R. 16 (Bankr. S.D. Fla. 1995); In re Behm, 44 B.R. 11 (Bankr. W.D. Wisc. 1984); In re Endres, 12 B.R. 404 (Bankr. E.D. Wisc. 1981); and In re Skaggs, Bankruptcy Case No. 96-72313 (Bankr. C.D. Ill. 1996).

In order for a Bankruptcy Court to award damages, the debtor needs to show the amount of damages with some reasonable certainty. In re Alberto, Supra. Actual damages for a willful violation of the automatic stay should only be awarded if there is evidence supporting an award of a definite amount which may not be predicated upon mere speculation. See: In re Sumpter, supra. In examining the testimony as to damages, the Court finds that, in addition to holding the 1991 Volkswagon, the Defendant holds a trade-in having the value of \$2,800 and a \$500 down payment, for a total sum of \$3,300. Additionally, the Court also finds that the Debtors should be awarded attorney's fees in the amount of \$1,000, based upon their need to bring this action against the Defendant. As such, the Court finds it necessary to enter a judgment order in favor of the Debtors and against Action Auto Sales in the amount of \$3,300, plus \$1,000 in attorney's fees, for a total judgment in the amount of \$4,300.

Having disposed of the issue of sanctions under 11 U.S.C. § 362(h), the Court now turns to the issue of whether the automatic stay should be lifted allowing Action Auto Sales to retain possession of the 1991 Volkswagon, or whether said vehicle should be turned over to the Debtors and retained by them pursuant to their Chapter 13 Plan. In considering this question, the Court finds that the Debtors are far better off without the 1991 Volkswagon than they are with it. It is apparent that the vehicle in question is probably worth no more than what the Debtors presently owe. Based upon the high mileage on the vehicle, it will depreciate at a very quick rate. The Court further finds that the Debtors do not have insurance on the vehicle at this time, and this, together with the fact that the vehicle is depreciating quickly, leads the Court to find that the Creditor is not adequately protected under the provisions of 11 U.S.C. § 362(d)(1). Under the facts of this case, the Court finds no basis to support enforcement of a continuing relationship between these parties. As such, the Motion for Relief from Stay will be allowed, and the Defendant will

be entitled to retain possession, control, and ownership of the 1991 Volkswagon.

ENTERED: June 10, 1997.

/s/ GERALD D. FINES  
United States Bankruptcy Judge