

**IT IS SO ORDERED.**

**Dated: 01:01 PM March 29 2006**

  
MARILYN SHEA-STONUM *JS*  
U.S. Bankruptcy Judge  


**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

IN RE	)	CASE NO. 05-56605
	)	
NORA D. WILLIAMS	)	CHAPTER 7
	)	
	)	JUDGE MARILYN SHEA-STONUM
DEBTOR	)	
	)	

**MEMORANDUM OPINION**  
**GRANTING DEBTOR’S MOTION TO CITE FOR CONTEMPT AND  
AWARDING DAMAGES FOR VIOLATION OF THE AUTOMATIC STAY**

This matter came before the Court on a motion filed by debtor, Nora D. Williams (“Debtor”) on December 8, 2005 [docket #6] (the “Motion”), requesting that the Court find WFS Financial, Inc. (“WFS”) in contempt for an alleged violation of the automatic stay. A hearing on the Motion was scheduled for January 25, 2006. WFS did not object, otherwise

respond to the Motion, or appear at the scheduled hearing.<sup>1</sup>

The January 25, 2006 hearing was held as scheduled. Morris H. Laatsch, counsel for Debtor, presented his case without opposition from WFS. Through exhibits admitted into evidence at the hearing, Debtor established that prior to the bankruptcy filing, WFS repossessed her 1996 Jeep Grand Cherokee automobile (“Automobile”), which was titled to the Debtor and on which WFS held a lien, and then, sold it post-petition after receiving notice of Debtor’s bankruptcy petition.

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on July 16, 1984. This matter is a core proceeding pursuant to 28 U.S.C. §157(b)(2) over which this Court has jurisdiction pursuant to 28 U.S.C. §1334(b).

Based upon the record evidence, the argument of Debtors’ counsel during the January 25, 2006 hearing, and pleadings on the docket in this case, the Court makes the following findings of fact and conclusions of law.

## **I. FACTS**

On September 12, 2005 WFS delivered to Debtor a “Notice of Our Plan to Sell

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<sup>1</sup> The certificate of service attached to the Motion shows that a copy of the Motion was sent by Certified U.S. Mail to: WFS Financial, Inc., 6000 Freedom Square Drive, Suite 580, Independence, Ohio 44131. The Certified Mail receipt was signed and dated December 12, 2005. On December 17, 2005, the Bankruptcy Clerk of Court’s Office sent a notice of the January 25, 2006 hearing on the Motion to WFS at the same address. This notice was not returned to the Clerk’s office as undeliverable.

Property” (“Notice”) with respect to Debtor’s Automobile. The Notice indicated that the Automobile would be sold on October 13, 2005 at 8:30 A.M. at the Adesa Cleveland Auto Auction. The address for WFS set forth in this Notice was 6000 Freedom Square Drive, Suite 580, Independence Oh. 44131. On September 27, 2005, Debtor filed a chapter 7 bankruptcy petition [docket #1]. WFS was listed on Debtor’s Schedules as a secured creditor holding a Purchase Money Security Interest in the Automobile. On October 1, 2005, the Bankruptcy Clerk’s Office served the “Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines” on WFS [docket #5] at the address noted above.

On November 8, 2005, Debtor’s counsel delivered a notice to WFS seeking permission to inspect Debtor’s Automobile for purposes of appraisal, and apprising WFS of Debtor’s intention to file a Motion to Redeem the Automobile.<sup>2</sup> WFS thereafter advised Debtor’s counsel that the Automobile had been sold on October 13, 2005 pursuant to the Notice that is, after WFS is charged with notice of Debtor’s chapter 7 case and the

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<sup>2</sup> The Court notes that there is no evidence indicating that Debtor’s counsel contacted WFS between the time he received WFS’ September 12, 2005 Notice of Intent to Sell and the delivery of this letter dated November 8, 2005. The Court assumes that counsel for Debtor considered formal written notice of Debtor’s bankruptcy to constitute effective notice thereof for purposes of invoking the automatic stay. Further, the Court is well aware that Debtor’s counsel regularly represents debtors in bankruptcy cases before this and other courts, and was undoubtedly deluged with filings prior to the October 17, 2005 effective date of amendments to the Bankruptcy Code ( BAPCPA). We take further note that WFS did not appear at the January 25, 2006 hearing to contest the fact that the sale of Debtor’s automobile took place after the filing of her bankruptcy petition as scheduled in the Notice from WFS.

consequent operation of the automatic stay.

Debtor contends in her Motion that the conduct of WFS in selling the vehicle post-petition after receiving notice of her chapter 7 Bankruptcy is a willful violation of the automatic stay provision in 11 U.S.C. § 362, therefore depriving her of the opportunity to redeem the Automobile. Debtor requests an order from this Court finding WFS in contempt and awarding her compensatory damages in the sum of \$5,000; punitive damages in the sum of \$1,000; and \$1,500 in attorney fees.

## **II. DISCUSSION**

The automatic stay provisions of the Bankruptcy Code stop virtually all collection activity related to a debtor's prepetition debt. 11 U.S.C. § 362(a).<sup>3</sup> The automatic stay becomes effective at the moment a debtor's bankruptcy petition is filed. 11 U.S.C. § 362(a). Once effective, the automatic stay applies to "all entities" and prohibits, *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;
- (4) any act to create, perfect, or enforce any lien against property of the estate;
- (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
- (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)-(6). Unless otherwise ordered by the bankruptcy court, as relevant to this matter, the automatic stay continues until the debtor's interest in personal property

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<sup>3</sup> All references in this opinion to 11 U.S.C. § 362 refer to the Bankruptcy Code prior to the October 17, 2005 amendments pursuant to BAPCPA.

has been abandoned by the trustee, and generally, in chapter 7 cases terminates when a discharge is granted or denied. *See* 11 U.S.C. § 362(c) and (d).

The stay “extends to virtually all formal and informal actions against property of the bankruptcy estate.” *Smith v. First America Bank, N.A. (In re Smith)*, 876 F. 2d 524, 525-25 (6th Cir. 1989). Property of the estate includes all legal or equitable interests of the debtor in property as of the commencement of the case. 11 U.S.C. § 541(a)(1). The Debtor retained an interest in the Automobile despite WFS’ pre-petition repossession. *See In re Nowell*, 232 B.R. 370, 373 (Bankr. S.D. Ohio 1999) (finding that under Ohio law the debtor’s right to redeem a repossessed vehicle continued until the vehicle was sold and that the debtor continued to have an interest in the vehicle as long as it was titled in the debtor’s name). Therefore, the Automobile was property of the Debtor’s bankruptcy estate as of the commencement of the case.

“Withholding possession of property of the bankruptcy estate constitutes ‘the exercise [of] control over property of the estate’ for purposes of the automatic stay in 11 U.S.C. § 362(a)(3).” *TranSouth Fin. Corp. v. Sharon (In re Sharon)*, 234 B.R. 676, 682 (B.A.P. 6<sup>th</sup> Cir. 1999). A creditor who learns that it is holding property in violation of the automatic stay has an obligation to return the property or, if necessary to assure adequate protection, seek emergency relief in the form of an expedited motion for relief from stay pursuant to 11 U.S.C. § 362. *See In re Sharon*, 234 B.R. at 682; *See also*, 11 U.S.C. §

362(f).<sup>4</sup>

Pursuant to §362(h), a person shall recover actual damages, including costs and attorney fees, and, in some circumstances, punitive damages, when that person is injured by a “willful” violation. *See* 11 U.S.C. §362(h). The term “willful,” while not defined in the Bankruptcy Code, has been interpreted to simply mean acting intentionally and deliberately while knowing of a pending bankruptcy. *See, e.g., Cuffee v. Atlantic Business & Community Dev. Corp. (In re Atlantic Business & Community Dev. Corp.)*, 901 F.2d 325, 329 (3<sup>rd</sup> Cir. 1990); *Knaus v. Concordia Lumber Co., Inc. (In re Knaus)*, 889 F.2d 773, 775 (8<sup>th</sup> Cir. 1989); *In re Bloom*, 875 F.2d 224, 227 (9<sup>th</sup> Cir. 1989); *C.I.T. Financial Services, Inc. v. Posta (In re Posta)*, 866 F.2d 364, 367 (10<sup>th</sup> Cir. 1989). The debtor has the burden of proving damages. *See Archer v. Macomb County Bank*, 853 F.2d 497, 499-500 (6<sup>th</sup> Cir. 1988).

Punitive damages may be awarded when a creditor has acted: (1) with actual knowledge or reckless disregard that it is violating the automatic stay; (2) with malice or bad faith; or (3) in clear defiance of a debtor’s rights. *See In re Dunning*, 269 B.R. 357, 363 (Bankr. N.D. Ohio 2001). *See also, Archer*, 853 F. 2d at 500.

By selling the Automobile after receiving notice of Debtor’s bankruptcy petition, WFS was exercising control over property of the estate in an attempt to collect on a claim

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<sup>4</sup> The record in this case reflects that at no time prior to or during this case did WFS move for relief from the automatic stay provision pursuant to 11 U.S.C. §362(d).

against Debtor that arose before the commencement of her bankruptcy case. Because this took place after the filing of Debtor's bankruptcy petition and without having obtained relief from the stay or abandonment of the estate's interest in the Automobile, WFS clearly violated the automatic stay. The question now remains as to whether this act was a "willful" violation.

On the facts of this case as previously discussed, WFS is charged with having received notice of Debtor's bankruptcy prior to the sale of the Automobile. The 341 Notice of the Meeting of Creditors was mailed on October 1, 2005 to the address stated on WFS' September 12, 2005 Notice. The sale apparently took place on October 13, 2005.<sup>5</sup> In this Court's view, twelve calendar days is sufficient time for U.S. mail to travel from Akron to Independence and should have provided adequate opportunity for WFS to receive formal notice of Debtor's bankruptcy filing and stop the sale of the Automobile. Accordingly, this Court finds that WFS' failure to take timely action to stop the sale of the Automobile as well as the actual sale of the Automobile after receiving notice of Debtor's bankruptcy petition constitutes willful action that was in violation of the automatic stay.

Based on the foregoing and WFS' failure to appear or otherwise defend against

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<sup>5</sup> Again, neither counsel nor or a representative of WFS appeared at the hearing to refute this fact. Further, although the Trustee's No Asset Report was entered on the docket December 13, 2005(docket #8), this took place well after the sale of Debtor's Automobile and does not serve to cure or otherwise nullify WFS' action in violation of the automatic stay.

Debtor's Motion, the entry of default relief in favor of Debtor and against WFS for willful violation of the automatic stay and the awarding of compensatory damages, i.e., reasonable attorney's fees and costs attendant to the Motion, is appropriate. That said, the award of damages will be based only on a detailed itemization by way of affidavit setting forth the actual damages that she incurred. Such an affidavit or affidavits must be submitted to the Court by not later than April 10, 2006.

It is imperative that large organizations which handle collection on accounts receivable internally develop efficient and reliable procedures to ensure that, once informed of a bankruptcy filing, all collection efforts against a debtor stop until the automatic stay has been modified or terminated. Otherwise, such organizations assume the risk of violating 11 U.S.C. §362(a). Ignoring the automatic stay and then ignoring the court proceedings to enforce those stay provisions is not a wise business course. *See In re Riddick*, 231 B.R. 265, 268-69 (Bankr. N.D. Ohio 1999).

The primary purpose of punitive damages is to cause change in the respondent's behavior and the prospect of such change is relevant to the amount in which punitive damages ought to be granted. This Court will accordingly award punitive damages in this case in a nuanced manner.

### **III. CONCLUSION:**

Based upon the foregoing the Court finds that WFS willfully violated the automatic stay imposed by 11 U.S.C. §362(a). Additionally, the Court finds that due to such willful



violation, Debtor is entitled to recover both compensatory and punitive damages from WFS.

**THEREFORE, IT IS HEREBY ORDERED:**

1. That the Debtor and her counsel submit affidavits addressing actual damages by not later than April 7, 2006.
2. Subject to decretal paragraphs 3 and 4 below, Debtor is awarded \$1,000 in punitive damages.
3. That by not later than April 10, 2006, WFS may file with the Court an affidavit attaching any written policies and procedures in effect as of September, 2005 with respect to compliance with the automatic stay provisions of the Bankruptcy Code.
4. If such documentation is filed, the Court will consider the substance of such documentation and consider purging WFS of 50 percent of the punitive damage award. The Court will undertake to enter a final judgment in this matter by not later than April 28, 2006.
5. No further hearing will be conducted in this matter unless the Court determines that a hearing is necessary to its further consideration of these matters.

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cc: (via electronic mail) Morris H. Laatsch, counsel for Debtor  
Harold A. Corzin, Trustee

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Suite 580  
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