

The court incorporates by reference in this paragraph and adopts as the findings and analysis of this court the document set forth below. This document has been entered electronically in the record of the United States Bankruptcy Court for the Northern District of Ohio.



Dated: October 06 2006

A blue ink signature of Mary Ann Whipple, written in a cursive style.

Mary Ann Whipple
United States Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION**

| | | |
|------------------|---|-------------------------------|
| In Re |) | Case No. 05-76800 |
| |) | |
| Yvonne Reed |) | Chapter 7 |
| |) | |
| Debtor(s) |) | |
| |) | JUDGE MARY ANN WHIPPLE |

MEMORANDUM OF DECISION ON DEBTOR'S MOTION FOR CONTEMPT

This case is before the court for decision after an evidentiary hearing on Debtor's Motion Upon J.D.Byrider to Show Cause Why it Should Not be Held in Contempt of Court. [Doc. #27].

The matter was orally reported to the court as settled by JD Byrider's lawyer on the eve of the day of the hearing, and a notation to that effect was placed on the docket. [See Doc. #44]. However, at the time set for the hearing, Debtor, a witness and Debtor's lawyer appeared in person in court for the hearing. Believing the matter settled, there was no appearance by or on behalf of JD Byrider at that time. When contacted by telephone, JD Byrider's lawyer indicated again that he believed that he and Debtor's counsel had worked out an agreement for settlement of the motion. Debtors' counsel disputed that they had reached an agreement. This matter having already been continued at least three times on the motion of one or both parties and Debtor, the witness and Debtor's lawyer having traveled to Toledo from Sandusky and Cleveland respectively to attend the hearing, the court declined to continue it again and insisted that the evidentiary hearing proceed.

Counsel for JD Byrider was allowed to appear by telephone and argue JD Byrider's position on the motion, but not to question witnesses or introduce other evidence. Since the hearing date of July 13, 2006, no motion to enforce any settlement agreement has been filed by any party. Therefore, it is appropriate to render a decision on the merits of the motion based on the evidence at the hearing.

This court has jurisdiction over Debtor and Movant Yvonne Reed's Chapter 7 case pursuant to 28 U.S.C. § 1334(a). Her Chapter 7 case and all proceedings therein have been referred to this court for decision under the general order of reference entered in this district. *See* 28 U.S.C. § 157(a)(1). Proceedings relating to adjustment of the debtor-creditor relationship, such as motions to redeem property from liens, are core proceedings that this court may hear and determine. 28 U.S.C. § 157(b)(1) and (b)(2)(O).

This memorandum of decision constitutes the court's findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52, made applicable to this adversary proceeding by Fed. R. Bankr. P. 7052. Regardless of whether specifically referred to in this Memorandum of Decision, the court has examined the submitted materials, weighed the credibility of the witnesses, considered all of the evidence, and reviewed the entire docket and record of Debtor's Chapter 7 case. Based upon that review, and for the reasons discussed below, the court finds that JD Byrider is in civil contempt and that as sanctions for contempt it must pay Debtor \$1,500 plus reasonable attorney's fees to be determined.

Debtor alleges that JD Byrider should be held in contempt for violating an order of this court. The order in issue was the Agreed Order Resolving Debtor's Motion to Redeem Under 11 USC Section 722 [Doc. #19] entered by the court on December 23, 2005.

Debtor filed her petition for Chapter 7 bankruptcy relief on October 16, 2005.¹ At the time she commenced her case, Defendant had an interest in a 1997 Chevy Malibu car that she valued at \$563 [Doc. #8, Schedules B and C] and on which JD Byrider had a lien. [Doc. #8, Schedule D]. The car had been repossessed by JD Byrider shortly before she filed her bankruptcy case.

On November 30, 2005, Debtor filed with the court a motion to redeem the vehicle from the JD Byrider lien as provided by 11 U.S.C. § 722. [Doc. #13]. The proposed redemption price was \$563. The motion to redeem also stated that "[t]he car is in poor condition and needs new brakes and

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As Debtor's Chapter 7 bankruptcy Case No. 05-76800 was filed on October 16, 2005, the day before the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") went into effect on October 17, 2005, all citations to the Bankruptcy Code in this opinion are therefore to the pre-BAPCPA version of the code.

a new rotor. In addition, the front grill is damaged. The car has been in the shop repeatedly for service. Car is in possession of JD Byrider since it was repossessed on October 13th, 2005.” [Doc. #13, ¶3]. Debtor denominated the motion to redeem as an emergency and sought an expedited hearing, so the court scheduled a hearing to be held on December 9, 2005. The hearing did not go forward, as the parties reported that an agreed entry would be forthcoming. [Doc. #18]. The agreed entry was submitted and entered by the court on December 27, 2005. The court ordered the following:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that by agreement of the parties: 1) Debtor may redeem the collateral by paying Creditor, JD Byrider, \$700.00 within thirty (30) days or sooner from the date of entry of this Order. 2) Upon tendering the \$700.00 to JD Byrider, JD Byrider shall release the car that is still in their possession. 3) Car shall be in the same condition prior to JD Byrider’s repossession, i.e. with no further structural or mechanical damages resulting from the repossession. 4) In addition, JD Byrider shall have clear title prepared for Ms. Reed to pick up simultaneously with the car. 5) In the event Debtors [sic] fails to tender the agreed sum to JD Byrider, within 30 days of the entry of this Order, JD Byrider will be granted immediate relief from the automatic stay. IT IS SO ORDERED.

The part of the order in issue on Debtor’s motion for contempt is subpart three as to whether the car was in the same condition upon redemption by Debtor as it was prior to repossession by JD Byrider.

The bankruptcy court’s contempt powers flow from Bankruptcy Code § 105(a) and the inherent power of a court to enforce compliance with its lawful orders. 11 U.S.C. § 105(a); *see Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417, 423 n.1 (6th Cir. 2000). In addressing a contempt request, a court must consider three issues: (1) did the responding party receive appropriate notice of the alleged contempt; (2) did the acts or failures to act constitute contempt; and (3) if so, what is the appropriate consequence for that contempt. *In re Walker*, 257 B.R. 493, 496 (Bankr. N.D. Ohio 2001).

The first issue is whether JD Byrider received appropriate notice of the alleged contempt. JD Byrider was certainly aware of the court order in issue and its obligations under that order because it was an agreed order resulting from the stipulations of the parties resolving Debtor’s motion to redeem the car. Debtor’s motion for contempt was detailed in describing precisely the acts that she alleged to be in violation of the provision of the order requiring the car to be returned in the same condition as it was prior to repossession. Her motion included copies of photographs of the vehicle and the alleged changes to it. The motion for contempt was filed and served almost four months before the last date set for the evidentiary hearing. JD Byrider’s lawyer was given notice of the continued July 13, 2006, hearing date by court order entered on June 21, 2006, and appeared by

telephone due to the dispute between the two lawyers as to whether the contempt issue had been settled. The court therefore finds that JD Byrider and its authorized representatives had notice of the order in issue, of the acts alleged to constitute contempt and of the hearing on the motion, satisfying the first element of proof.

The second issue is whether JD Byrider's acts constitute civil contempt of court. "The primary purpose of a civil contempt order is to 'compel obedience to a court order and compensate for injuries caused by non-compliance'." *McMahan & Co. v. Po Folks, Inc.*, 206 F.3d 627, 634 (6th Cir. 2000)(quoting *TWM Manuf. Co. v. Dura Corp.*, 722 F.2d 1261, 1273 (6th Cir. 1983)). The party alleging contempt has the burden of establishing by clear and convincing evidence that the responding party violated a definite and specific order of the court requiring it to perform or refrain from performing a particular act or acts with knowledge of the order. *Rolex Watch U.S.A. v. Crowley*, 74 F.3d 716, 720 (6th Cir. 1996). As already noted above, JD Byrider indisputably had knowledge of the redemption order because it was an agreed order. The provision that states that the car must be returned in the same condition as it existed before repossession is definite and clear in meaning. The court construes the requirement of returning it in same condition and the "i.e." phrase added to it to mean that any damages or changes that occurred during JD Byrider's possession of the vehicle, whether accidental or intentional, had to be fixed before the vehicle was returned to Debtor upon payment of the agreed redemption price of \$700. There is nothing complex or unclear about this provision of the order. The basic issue of fact before the court is whether the evidence shows that this part of the order was violated.

Debtor and her boyfriend were both familiar with the car and its condition at the times relevant to the dispute. Both testified about the condition of the car before repossession and after it was returned to Debtor upon payment of the \$700 redemption amount. The court found their testimony credible in proving that changes were made to the vehicle after it was repossessed and before it was returned to Debtor, specifically the gearshift was changed out on the car and a different radio was installed. Although she had a chance to look at the car before it was returned, as she drove it to the BMV to get tags and stickers for the car and then home Debtor's hand now hit the dashboard upon using the gearshift. Plus, the radio jiggled and the controls were different. Their testimony was illustrated and confirmed by photographs that depicted the changes that were made. [Exs. 5,6 and 7]. Debtor admitted that she signed a document for JD Byrider accepting the car upon its return; that document is not in evidence. However, that act neither impacts the credibility in the court's view of Debtor's and Mr. Wright's testimony that changes had been made, nor absolves JD Byrider from its

obligation to comply with the agreed court order. Debtor was in a hurry to get to the BMV before it closed; she needed the car. And as time has shown, the issue ultimately was not resolvable without court intervention. The court therefore finds that Debtor has met her burden of showing by clear and convincing evidence that the car was not returned in the same condition it was in when it was repossessed and that JD Byrider therefore violated the court's December 27, 2005, order.

Once the contempt is proven, the final issue to be addressed is the appropriate consequence to the contemnor. There are two kinds of fines that may be imposed for civil contempt at the court's discretion. See *Redken Lab. v. Levin*, 843 F.2d 226, 229-30 (6th Cir. 1988) (trial court's sanction was not an abuse of discretion). The first is intended to compensate for damages caused by the responding party's noncompliance and must be based on evidence of actual loss. *United States v. Bayshore Assocs.*, 934 F.2d 1391 (6th Cir. 1991). The second is a coercive fine payable to the court, with the responding party able to avoid paying the fine by performing the act required by the court's order. *Id.* The changes to the car having been made, there is no evidence in the record that suggests to the court the possibility of undoing them and putting the former gearshift and radio back in. The second kind of compensatory fine is thus not supported by the record in this case to compel compliance by JD Byrider. The court will instead focus on the propriety of compensation to Debtor for damages caused by JD Byrider's noncompliance with the agreed condition of the order that the vehicle be returned in the same condition as it was repossessed.

Debtor testified that she did not have the gear shift and car fixed because she was unable to afford the costs of repair out of pocket, however, her investigation demonstrated that it would require from \$1,500 to \$2,000 for a mechanic who had familiarity with the car to fix it. Debtor's testimony in this regard was bolstered by a document that she stated came from that mechanic, which the court admitted for the limited purpose of confirming that she did such an investigation. [Ex. 3]. Another shop estimated repair at almost \$4,000. [Ex. 4]. The court wholly disregards the \$4,000 figure. Debtor's testimony on this point offered no explanation of what was to be included in this figure and why it was so much more than the other estimate. The confirmatory document is likewise conclusory and says nothing about what work the estimate would cover. Moreover, the court declines to render a compensatory award more than five times the \$700 stipulated value of the car. The court will therefore award Debtor \$1,500 for the cost of repair. There is no evidence as to the variables that go into the range of the estimate, and since Debtor has the burden of proof the record supports only the lowest end of the range. The lower end of the estimate is also appropriate given that this is a \$700 car described by Debtor as being in very poor condition in her schedules and in her motion to redeem

even before the repossession issues arose.

Debtor's motion also requests as sanctions for contempt punitive damages and an award of attorney's fees. Sanctions for civil contempt are intended either to compensate a party for loss due to noncompliance with a court order or to coerce compliance. *McMahan & Co.*, 206 F.3d at 634. Punitive damages, however, are intended to punish conduct. *Memphis Comm. Sch. Dist. v. Stachura*, 477 U.S.299, 307 n. 9, 106 S. Ct. 2537, 2543, 91 L.Ed. 2d 249 (1986). Punitive damages are therefore not available as a sanction for civil contempt. *Costa v. Welch (In re Costa)*, 172 B.R. 954, 964 (Bankr. E.D. Ca. 1994); *see Downey v. Clauder*, 30 F.3d 681 (6th Cir. 1994)(explaining differences between civil contempt and criminal contempt); *but cf. In re Perviz*, 302 B.R. 357, 372-73 (Bankr. N. D. Ohio 2003)(awards punitive damages on contempt for violation of the discharge injunction). Moreover, even if punitive damages are legally available as a sanction for civil contempt, they may be awarded only on a factual showing of malevolent conduct that demonstrates a complete and utter disrespect for the bankruptcy process. *Perviz*, 302 B.R. at 372-73. The court cannot find from the evidence in the record that JD Byrider's conduct in changing out the radio and the gearshift rises to the level of exacerbated conduct that justifies punitive damages.

The Sixth Circuit authorizes an award of attorney's fees as a sanction for civil contempt where court orders have been violated. *McMahan & Co.*, 206 F.3d at 634. In this case, Debtor testified that after she determined that the gear shift and radio had been changed, she immediately contacted JD Byrider by telephone about it. That contact obviously did not produce any resolution of the issue, leading to the necessity of involvement of counsel and commencement of contempt proceedings to address the matter. *Id.* The court will therefore include as a sanction for JD Byrider's contempt an award of attorney's fees to attorney for Debtor for litigating the motion.

A separate court order in accordance with this memorandum of decision will be entered by the court.