

NOT FOR COMMERCIAL PUBLICATION

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION



In re: ) Case No. 05-28784  
 )  
MELODY HAYNES, ) Chapter 13  
 )  
Debtor. ) Judge Pat E. Morgenstern-Clarren  
 )  
 ) **MEMORANDUM OF OPINION**

About one year after the debtor Melody Haynes filed her chapter 13 case, creditor Shabam “Bozz” Brahimaj dba E-Z Credit Auto Sales repossessed her car. The debtor filed this motion seeking return of the car and damages under 11 U.S.C. § 362(h).<sup>1</sup> At the evidentiary hearing, the court ordered Mr. Brahimaj to return the car immediately and took the damage issue under submission.

**JURISDICTION**

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (O).

**PROCEDURAL BACKGROUND**

On October 5, 2006, the debtor filed a motion for an order for E-Z Credit to appear and show cause why it should not be held in contempt for violating the automatic stay, with a request

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<sup>1</sup> This case was filed on October 9, 2005 and is governed by the pre-BAPCPA law in effect at that time. This written opinion is entered only to decide the issues presented in this case and is not intended for commercial publication in an official reporter, whether print or electronic.

for an expedited hearing.<sup>2</sup> The court granted the motion and issued an order directing E-Z Credit Auto to appear on October 24, 2006.<sup>3</sup> No one appeared on that date. On review, the court concluded it was possible that the court had not given appropriate notice and rescheduled the hearing, directing both E-Z Credit Auto and Bozz Brahimaj to appear on November 21, 2006.<sup>4</sup> Mr. Brahimaj appeared on that date and contested the motion. The court, therefore, set it for an evidentiary hearing on December 11, 2006.

At the hearing, the debtor presented her case through her testimony and the cross-examination of Shabam Brahimaj. Mr. Brahimaj, who does business as E-Z Credit Auto, represented himself. He presented his case through his testimony, cross-examination of the debtor, and Anita Vokic.

### **LEGAL STANDARD**

Bankruptcy code § 362 provides that the filing of a bankruptcy petition imposes a general stay against any collection activity related to prepetition debt. 11 U.S.C. § 362. Section 362 in its entirety “has been described as one of the fundamental debtor protections provided by the bankruptcy laws.” *Smith v. First Am. Bank N.A. (In re Smith)*, 876 F.2d 524, 525 (6<sup>th</sup> Cir. 1989) (quoting *Midlantic Nat’l Bank v. New Jersey Dept. of Env’tl. Protection*, 474 U.S. 494, 503 (1986)). The particular protection at issue here is found in § 362(a)(3), which provides that the filing of a bankruptcy petition operates as a stay of “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.”

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<sup>2</sup> Docket 23, 25, 26.

<sup>3</sup> Docket 27.

<sup>4</sup> Docket 29.

11 U.S.C. § 362(a)(3). Property of the estate includes all of the debtor’s legal and equitable interests in property as of the case filing, *see* 11 U.S.C § 541(a), which includes a car that is subject to a security interest, *see TranSouth Fin. Corp. v. Sharon (In re Sharon)*, 234 B.R. 676, 681 (B.A.P. 6<sup>th</sup> Cir. 1999) (discussing issue in context of a car that was seized prepetition). A postpetition repossession of a car is a violation of the automatic stay. *Hartleben v. Carsmart EZ Loan, LLC (In re Hartleben)*, 2006 WL 2089140 at \*2 (Bankr. E.D. Tenn. 2006). “A creditor who violates the automatic stay [by repossessing property postpetition] has an affirmative duty to return the property and to restore the status quo once it learns its actions violate the stay.” *In re Clark*, 60 B.R. 13, 14 (Bankr. N.D. Ohio 1986). A creditor who fails to do that converts an unknowing violation of the stay into a willful violation. *See In re Holman*, 92 B.R. 764, 768 (S.D. Ohio 1988); *see also In re Sharon*, 234 B.R. at 686.

A debtor 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). “To recover damages under § 362(h), the debtor must prove (1) that the violation of the stay was willful; and (2) that the individual seeking damages was actually injured by the violation of the stay.” *United States v. Mathews (In re Mathews)*, 209 B.R. 218, 220 (B.A.P. 6<sup>th</sup> Cir. 1997). The debtor is not required to show that the creditor specifically intended to violate the stay to prove willfulness. Instead, the violation can be willful when the creditor knew about the bankruptcy case and yet deliberately acted in a way that violated the automatic stay. *See In re Hartleben*, 2006 WL 2089140 at \*2-3; *In re Sharon*, 234 B.R. at 687. If the bankruptcy court finds that an award of actual damage is insufficient to deter “deliberate and repeated” violations of the stay, the court may award an appropriate amount of

punitive damages. *Archer v. Macomb County Bank*, 853 F.2d 497, 500 (6<sup>th</sup> Cir. 1988).

### **THE POSITIONS OF THE PARTIES**

The debtor argues that she gave Mr. Brahimaj and E-Z Credit notice of her bankruptcy filing at the correct address and that Mr. Brahimaj violated the automatic stay by repossessing her car. She contends that the violation became willful when he refused to return it, thus causing her to lose hours at work, have to take two and sometimes three buses at night to get back and forth to work, find alternative transportation for her school age children, and incur legal fees.

Mr. Brahimaj argued that he did not initially get notice of the bankruptcy case and that once he got notice he immediately was ready to return the car. He did not do this, however, because a co-signer on the car note told him that he did not want the car anymore and was giving it up. Mr. Brahimaj argued that, even so, he would have returned the car but when the debtor's counsel claimed that the debtor's garage door was damaged during the repossession, Mr. Brahimaj decided to "let the court decide the whole thing." Finally, he contended that he could not afford legal counsel and did not know that he could or should have delivered the car to the debtor or made it available to her.

### **FACTS AND DISCUSSION**

#### **I.**

These findings of fact reflect the court's weighing of the evidence presented at the hearing, including determining the credibility of the witnesses. In doing so, the court considered each witness's demeanor, the substance of the testimony, and the context in which the statements were made, recognizing that a transcript does not convey tone, attitude, body language or nuance of expression. *See* FED. R. BANKR. P. 7052, incorporating FED. R. CIV. P. 52. When the court

finds that a witness's explanation was satisfactory or unsatisfactory, it is using this definition:

The word satisfactory 'may mean reasonable, or it may mean that the Court, after having heard the excuse, the explanation, has that mental attitude which finds contentment in saying that he believes the explanation—he believes what the [witness] says with reference to the [issue at hand]. He is satisfied. He no longer wonders. He is contented.'

*United States v. Trogden (In re Trogden)*, 111 B.R. 655, 659 (Bankr. N.D. Ohio 1990)

(discussing the issue in context of bankruptcy code § 727) (quoting *First Texas Savings Assoc., Inc. v. Reed*, 700 F.2d 986, 993 (5th Cir. 1983)).

## II.

Prepetition, the debtor and her “significant other”, John Bogan, purchased a 1994 Dodge from E-Z Credit Auto Sales (E-Z Credit). They signed a note secured by the car. The debtor filed her chapter 13 case on October 9, 2005, at which time she was behind on her note payments. She listed “E-Z Credit”, 14400 Euclid Avenue, Cleveland, Ohio as a secured creditor and also listed John Bogan as a co-debtor for this debt. The debtor's plan provides that payment will be made to E-Z Credit on this debt. E-Z Credit did not file a proof of claim and so did not receive any payments from the chapter 13 trustee.

E-Z Credit was served with the petition and plan at the correct address. Although Mr. Brahimaj testified that he did not receive notice of this filing, the court finds that the most likely explanation for this is that he did not pay appropriate attention to the mail. His employee and “silent partner” Anita Vokic testified that “they” would just leave a pile of papers and she would come in somewhere between once a week and twice a month to take care of financial and legal matters. While the court finds that Mr. Brahimaj did not have actual knowledge of the bankruptcy filing, it also finds that this was caused by Mr. Brahimaj's lax procedures with his

mail.

Mr. Brahimaj's agent repossessed the car on September 20, 2006. The debtor thought the car had been stolen from her driveway and reported it as such to the police. When the debtor and John Bogan found out what actually happened, Mr. Bogan went to E-Z Credit to get the car back. The parties' accounts differ at this point. Mr. Brahimaj testified that Mr. Bogan said he did not want the car any more and they could keep it. The debtor, on the other hand, testified that Mr. Brahimaj refused to return the car despite being told about the bankruptcy and Mr. Bogan ended up having to walk several miles back to their house.

The debtor testified further that the loss of the car caused severe hardship to her family. She had been using the car to get back and forth from her job in the catering department at Marriott in Beachwood, Ohio. Without the car, she had to take two and sometimes three buses to commute to work, a trip that took her 2 1/2 to 3 hours each way compared to a 30 minute car ride. She worked the 3 p.m. to midnight shift, but had to cut her hours to catch the last bus at 11:00 p.m. As a result, she lost 32 hours of work at about \$15.00 an hour.<sup>5</sup> The debtor also had to walk in the dark to get from Marriott to the bus at the end of her shift. Additionally, being without a car meant that the debtor had to buy bus passes for her children to get to school<sup>6</sup> and could not take her pregnant daughter to doctor appointments.

The court finds that Mr. Brahimaj's testimony that Mr. Bogan told him to keep the car is not credible for several reasons. First, it would not make any sense for the debtor and her family to give up the car knowing the transportation difficulties they would face. Second, it is unlikely

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<sup>5</sup> Debtor's exhibit C; direct testimony of the debtor.

<sup>6</sup> The debtor did not testify as to the amount she spent on the bus passes.

that Mr. Bogan would walk a considerable distance from his home to E-Z Credit just to tell Mr. Brahimaj that he did not want the car any more, when he could have accomplished the same result either by doing nothing or by making a telephone call. It is, instead, far more likely that Mr. Bogan walked there to tell Mr. Brahimaj about the bankruptcy, get the car back, and drive home. And third, the debtor and her counsel vigorously pursued this matter for several weeks before the evidentiary hearing, a clear statement that the debtor was invoking the protection of the bankruptcy code. Mr. Brahimaj unquestionably violated the automatic stay by repossessing the car postpetition. The violation became willful when Mr. Brahimaj refused to return the car, first to Mr. Bogan and then to the debtor's counsel.

Mr. Brahimaj offers as an excuse that he was willing to return the car as soon as Anita Vokic looked at a letter from the debtor's attorney on this issue, at which point she told him that the car had to be returned. Along these lines, Ms. Vokic testified that she called the debtor's attorney's office and spoke to someone who told her that the repossessing agent had damaged the debtor's garage door. Ms. Vokic described that as "ridiculous" and decided to "let it go to court." Mr. Brahimaj said he did not know that he could have delivered the car to the debtor's house and let other issues be decided later, and Ms. Vokic said that they could not afford an attorney. There was no evidence that Mr. Brahimaj did not have the funds to consult an attorney and, even if that is true, Mr. Brahimaj has not cited any law to show that it is a defense to an automatic stay violation. *See In re Holman*, 92 B.R. at 768 (creditor committed a willful violation of the stay when it unreasonably delayed returning the debtor's property allegedly so that it could consult with an attorney).


The debtor is entitled to recover damages because she proved that Mr. Brahimaj willfully

violated the stay by refusing to return the car. She proved actual damages of \$480.00 in the form of lost wages and also attorney fees in the amount of \$1,510.00.<sup>7</sup> The remaining question is whether the court should award punitive damages. Mr. Brahimaj's actions caused the debtor to miss work when she could least afford to lose wages, devote *five to six hours* each day commuting to and from work, and have to make alternative arrangements for her children's transportation to school and medical appointments. Mr. Brahimaj could easily have prevented this by complying immediately with the demands of Mr. Bogan and the debtor's counsel that he return the car. He did not, choosing instead to wait to see what the court would do and electing not to consult an attorney. This inaction shows a repeated callous disregard for the debtor's rights and warrants the imposition of punitive damages to insure that such a situation does not recur. The court finds that a punitive damage award in the same amount as the debtor's actual damages, or \$480.00, will serve this purpose.

### **CONCLUSION**

For the reasons stated, the court finds that Mr. Brahimaj willfully violated the automatic stay and that the debtor is entitled to recover \$480.00 in actual damages, \$1,510.00 in attorney fees, and \$480.00 in punitive damages.

A separate order will be entered reflecting this decision.



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Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

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<sup>7</sup> Debtor's exhibit B; docket 34.



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In re: ) Case No. 05-28784  
MELODY HAYNES, )  
Debtor. ) Chapter 13  
 ) Judge Pat E. Morgenstern-Clarren  
 )  
 ) **ORDER**

For the reasons stated in the memorandum of opinion filed this same date, creditor Shabam “Bozz” Brahimaaj dba E-Z Credit Auto Sales is found to have willfully violated the automatic stay provisions of 11 U.S.C. § 362 and the debtor Melody Haynes is awarded \$480.00 in actual damages, \$1,510.00 in attorney fees, and \$480.00 in punitive damages under 11 U.S.C. § 362(h) (as it existed before October 17, 2005).

IT IS SO ORDERED.

  
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Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

To be served by the clerk’s office by regular U.S. mail on:  
Shabam “Bozz” Brahimaaj  
E-Z Credit Auto Sales  
both at 14400 Euclid Avenue, Cleveland, Ohio 44112

and on the debtor’s counsel by ECF