

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK**

In Re

JUDY A. WARREN,

Debtor.

CASE NO. 93-21940

DECISION & ORDER

BACKGROUND

On August 25, 1993, the Debtor, Judy A. Warren (the "Debtor"), filed a petition initiating a Chapter 13 case and a list of creditors which showed Diamond Finance Company, Inc. ("Diamond Finance") at 50 Court Street, Suite 201, Brooklyn, New York, as having a secured claim in the amount of \$2100.00. On September 2, 1993, the Chapter 13 Trustee's Office filed a Certificate of Mailing with the Court which indicated that on August 30, 1993 it had mailed an Order For Meeting of Creditors, Combined With Notice Thereof And Of Automatic Stays (the "Stay Order") to all of the entities set forth on the Debtor's list of creditors, including Diamond Finance. The Stay Order stated: "As a result of the filing of the petition, certain acts and proceedings against the debtor and his property are stayed as provided in 11 U.S.C. §362(a) and against certain codebtors as provided in 11 U.S.C. §1301. Significant parts of these sections are reproduced on the reverse side of this notice." In fact substantially all of Section 362(a)¹ was reproduced on the back of the Stay Order.

¹ Section 362(a) provides in part:

Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), operates as a stay, applicable to all entities, of—

- (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

On September 15, 1993, the Debtor filed her schedules, statements and a Chapter 13 plan (the "Plan"). The Debtor's schedules indicated that she owned an automobile which she valued at \$2675.00 and that Diamond Finance had a \$1446.00 claim secured by the automobile. The Debtor also claimed the balance of her equity in the automobile as exempt. On her Section 521 Statement of Intention the Debtor indicated that she intended to retain the automobile in which Diamond Finance had a security interest.

The Plan proposed to pay: (1) the Trustee \$100.00 per month for a period of thirty-six (36) months and the proceeds of a disability award expected to be in the approximate amount of \$2200.00; (2) the secured claim of Diamond Finance in full with interest at 9%; and (3) all unsecured creditors 100% of their allowed claims.

The minute report of a Section 341 Meeting of Creditors held on September 27, 1993 showed that no creditors appeared at the meeting. At a October 18, 1993 hearing to confirm the Debtor's Plan, which was separately noticed to all creditors including Diamond Finance on September 22, 1993, there were no appearances other than by the Debtor, her attorney and the Chapter 13 Trustee.

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(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 . . .

On the Court's questionnaire which all debtors must complete at the hearing to confirm their Chapter 13 plans, the Debtor indicated that the reason she had filed her Chapter 13 case was to "get back repossessed motor vehicle." At the October 18, 1993 hearing, the Court approved the Plan, and on November 4, 1993, an Order Confirming the Plan was entered.

By motion (the "Contempt Motion") dated October 22, 1993 and made returnable November 3, 1993, the Debtor moved to have Diamond Finance and Tri-Star Exchange of 1740 Lyell Avenue, Rochester, New York held in contempt for violating the stay provided by Section 362 by their failure to return the Debtor's automobile after a demand for its return had been made and by their sale of the automobile. The Contempt Motion also requested that pursuant to Section 362(h)² the Court award the Debtor actual and punitive damages, including costs and attorney's fees.

The Contempt Motion alleged that: (1) on the evening of August 23, 1993 or the morning of August 24, 1993, prior to the filing of her petition, the Debtor's automobile had been repossessed by Diamond Finance or its agents; (2) on August 25, 1993 the Debtor's attorney's office telephoned Diamond Finance and Tri-Star Exchange to advise each of them of the bankruptcy filing on that date and to demand the return of the Debtor's automobile to her; (3) a letter confirming the August 25, 1993 telephone conversation had been sent to Diamond Finance which thereafter confirmed that it had received the letter; (4) by letter dated September 20, 1993, the Debtor was advised by Diamond Finance that her loan had been sold to Tri-Star Exchange; (5) on or about October 20, 1993 the Debtor's attorney's office was advised by Tri-Star Exchange that the Debtor's automobile had been

² Section 362(h) provides:

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.

sold; and (6) Tri-Star Exchange had advised the Debtor's attorney's office that it had never had the Debtor's automobile and was never notified of the bankruptcy filing.

On November 1, 1993, the Affidavit of Elsie M. Negrin ("Negrin"), the General Manager of Diamond Finance, was filed with the Court in opposition to the Contempt Motion (the "Negrin Affidavit"). The Negrin Affidavit acknowledged that by letter dated August 27, 1993 the attorney for the Debtor had demanded that Diamond Finance return her automobile to the Debtor. The Negrin Affidavit, however, asserted that it was not Diamond Finance that repossessed the Debtor's automobile, but that it was Tri-Star Cars on Credit ("Tri-Star Cars"), the trade name of 1740 Lyell Avenue, Inc., which had repossessed the automobile prepetition on or about August 23, 1993 and at all times had possession of the automobile. The Negrin Affidavit also alleged that it was Tri-Star Cars that had sold the automobile to the Debtor in April, 1992 and had assigned its Retail Installment Contract and Security Agreement with the Debtor to Diamond Finance under a full recourse agreement, and that Diamond Finance "later re-assigned the installment contract and security agreement to TRI STAR." (Negrin Aff. at 2.) The Negrin Affidavit finally alleged that she had been advised that the automobile was sold by Tri-Star Cars to satisfy its lien on the automobile.

On November 3, 1993, the Affidavit of Ronald Grosser ("Grosser") was filed with the Court in opposition to the Contempt Motion (the "Grosser Affidavit"). The Grosser Affidavit indicated that Grosser was the President of Tri-Star Cars, which had sold the Debtor her automobile in April, 1992, at which time the Debtor had executed a Retail Installment Contract and Security Agreement which was thereafter assigned to Diamond Finance. The Grosser Affidavit alleged, "[u]pon information and belief, several years ago there was a company called 'Tri-Star Exchange', which is

no longer in business in Monroe County³." (Grosser Aff. at 2.) The Grosser Affidavit further indicated that the Retail Installment Contract and Security Agreement entered into with the Debtor was reassigned to Tri-Star Cars by Diamond Finance on September 20, 1993 as shown on the back of the contract, a copy of which was attached to the Affidavit.

The Grosser Affidavit at Paragraph 12 stated, "[w]hile 1740 Lyell Avenue Inc. d/b/a Tri Star Cars on Credit did not repossess this motor vehicle, if it is assumed that debtor's attorney is correct regarding the repossession then the repossession properly took place prior to the bankruptcy filing." (Grosser Aff. at 3.) At Paragraph 15 of the Grosser Affidavit it states "[p]rior to receipt of the Notice of Motion for Contempt, deponent never received any written or oral notice of any bankruptcy filing." (Grosser Aff. at 4.)

A cover letter to the Court by the attorney for Tri-Star Cars which accompanied the Grosser Affidavit stated that while Tri-Star Cars was not named in the Contempt Motion, "it seemed best to submit this Affidavit in Opposition, in essence as an amicus curiae affidavit." (Tri-Star Atty. Letter at ¶1.)

At the November 3, 1993 return date, the attorneys for the Debtor and Tri-Star Cars appeared, but Diamond Finance failed to appear. The matter was adjourned to the Court's November 17, 1993 Evidentiary Hearing Calendar to schedule a final hearing. At that time, the Court was assured that an officer of Tri-Star Cars would appear at the final hearing. The Court indicated to the attorney for the Debtor that it would issue an order, to be personally served upon Diamond Finance and its attorney, requiring that an officer of Diamond Finance appear at the final hearing or it would be held

³ The Court takes judicial notice of the Official 1992 Rochester Telephone Corporation Yellow Pages Directory which lists Tri-Star Exchange at 1740 Lyell Avenue with a phone number of 458-1100 and the Official 1993 Rochester Telephone Corporation Yellow Pages Directory which lists Tri-Star Cars on Credit at 1740 Lyell Avenue with a telephone number of 458-1100.

in contempt. The order was issued on November 23, 1993, and a final hearing on the Contempt Motion was conducted on December 29, 1993.

At the December 29, 1993 final hearing on the Contempt Motion, the Court received various documents into evidence and heard the testimony of the Debtor, Sarah L. McCurdy ("McCurdy"), a legal secretary employed by the Debtor's attorney, Negrin and Brian Kavanagh ("Kavanagh"), the individual who repossessed the Debtor's automobile.

DISCUSSION

Willful Violation of the Stay (Section 362(h))

In the Second Circuit, the standard used to determine whether there has been a willful violation of the stay within the meaning and intent of Section 362(h) is "any deliberate act taken in violation of a stay, which the violator knows to be in existence, justifies an award of actual damages." *In re Crysen/Montenay Energy Co.*, 902 F.2d 1098, 1105 (2d Cir. 1990).

The post-petition sale of a Chapter 13 debtor's automobile by a secured creditor without obtaining relief from the automatic stay provided by Section 362, clearly violates the stay provisions of Sections 362(a)(3), 362(a)(4), 362(a)(5) and 362(a)(6).

Notwithstanding the finger-pointing, half-truths shell game which the respondents Diamond Finance and Tri-Star Cars have attempted to play out before the Court, it is clear to the Court that both Diamond Finance and Tri-Star Cars, at a time when they were aware that the Debtor had filed a Chapter 13 case, a stay was in effect and a demand had been made for the return of her repossessed automobile: (1) failed to return or cause the automobile to be returned to the Debtor; (2) exercised possession and control over the automobile or allowed the other party or its agents to exercise possession and control over the automobile; and (3) sold, allowed to be sold or participated, directly or indirectly, in the sale of the Debtor's automobile. These deliberate actions and omissions

constitute a willful violation of the automatic stay within the meaning and intent of Section 362(h) and the standard established in *Crysen/Montenay*.

Admitted into evidence at the final hearing on the Contempt Motion as Debtor's Exhibit 3 was a Notice from Diamond Finance to the Debtor (the "Repossession Notice") which indicated that her automobile had been repossessed on August 24, 1993. The Notice stated "[s]ince you have not made your payment, we have taken your vehicle. It is to be held in our possession at least until **4:00 P.M. on 9/3/93**. It will be sold at a private sale at any time after that. . . . **** CONTACT US TO GET YOUR VEHICLE BACK. ****" (Debtor's Ex. 3 at ¶1.)

Notwithstanding the clear language of the Repossession Notice, at the final hearing on the Contempt Motion, Negrin testified that, although on August 23 and August 24 when the Debtor's automobile was repossessed Diamond Finance was the holder of the Retail Installment Contract and Security Agreement, in its regular course of its dealings with Tri-Star Cars when there was a default under such a recourse agreement, Tri-Star Cars had the blanket authority to repossess and sell the vehicles in question. Negrin further testified that it was Tri-Star Cars, not Diamond Finance, which arranged for the repossession of the Debtor's vehicle. Negrin also testified that she did speak with the Debtor's attorney on August 25, 1993 and that he had advised her of the Debtor's bankruptcy filing and assured her that he would provide her with proof of the filing. Negrin further acknowledged, in her testimony, receipt by fax from the Debtor's attorney's office of an August 27, 1993 letter which was admitted into evidence as Debtor's Exhibit 5. This letter from the Debtor's attorney stated, "[p]lease be advised that this office represents Judy Warren who filed for a Chapter 13 Bankruptcy under BK# 93-21940. This letter will serve to notify you that you have 24 hours to advise the location of the car and to release the car to Ms. Warren. If you fail to do so, Ms. Warren will have no choice but to file a Motion for Contempt of Court and to seek legal fees, expenses and

punitive damages." (Debtor's Ex. 5.) Negrin further testified that upon receipt of the August 27, 1993 letter from the Debtor's attorney that she advised Debtor's attorney's office to contact the dealer, Tri-Star Cars, which had repossessed the car and that she gave that office the phone number of Tri-Star Cars. Negrin also testified that when she received the original of the August 27, 1993 letter, she contacted Rick Grosser at Tri-Star Cars about the letter and that she made a copy of the letter and mailed it to him at Tri-Star Cars. Negrin testified that after August 27, 1993 she spoke on several occasions with Rick Grosser at Tri-Star Cars by telephone and that she suggested to him that he get legal advice in connection with his concern as to whether he could sell the Debtor's automobile. Finally, Negrin testified that on or about September 20, 1993, at the request of Rick Grosser, Diamond Finance assigned its security documents, including the Retail Installment Contract and Security Agreement, to Tri-Star Cars and that on or about October 15, 1993 she re-did the assignment papers at the request of Rick Grosser. On cross-examination by the attorney for Tri-Star Cars, Negrin acknowledged that the assignment papers included a bill of sale for the automobile.

Therefore, in the case of Diamond Finance, it is presumed that it received the properly mailed and addressed Stay Order which was not returned to the Chapter 13 Trustee's Office, and which fully advised it regarding the stay provided by Section 362(a). It is acknowledged that Diamond Finance was aware from conversations with the Debtor's attorney and the letter sent by the Debtor's attorney to it on August 27, 1993 that there had been a Chapter 13 filing and that a motion for contempt would be made if the Debtor's automobile was not returned.

In the case of Tri-Star Cars, although the Debtor and the Debtor's attorney were less than precise in notifying Tri-Star Cars and documenting its telephonic and written notices to it that the Debtor had filed a bankruptcy case and demanded the return of her automobile, it is nevertheless clear from the testimony of Negrin at the final hearing, which the Court finds extremely credible on this point, that prior to its obtaining a reassignment of the security interest documents from Diamond

Finance, including a bill of sale, and otherwise disposing of the Debtor's automobile to a third party, Tri-Star Cars in fact was aware that the Debtor had filed a Chapter 13 case and had made a demand for the return of her automobile.

Actual Damages (Section 362(h))

In furtherance of the Debtor's request for an award of actual damages pursuant to Section 362(h), testimony and evidence were presented as to: (1) the value of the Debtor's automobile which had been repossessed and sold; (2) personal property which the Debtor alleged was in the automobile when it was repossessed and was not returned to her, consisting of a car radio and a gym bag which belonged to the Debtor's brother; (3) medical expenses incurred as a result of the Debtor's attempt to commit suicide; and (4) attorney's fees and expenses incurred in connection with the Chapter 13 case, efforts to regain possession of the Debtor's automobile and the prosecution of the Contempt Motion.

With respect to the value of the Debtor's automobile, a 1982 Cadillac, Respondent's Exhibit A, a copy of the Diamond Finance Retail Installment Contract and Security Agreement, showed that the automobile was purchased by the Debtor from Tri-Star Cars on or about April 5, 1992 for a total purchase price of \$4079.42, which included sales taxes. In addition to the Debtor's testimony regarding the condition of the automobile, at the final hearing the parties stipulated that the N.A.D.A. book values for the Debtor's automobile were \$2675.00 average retail, \$1425.00 average trade-in and \$1300.00 average loan value. It was further established by the Debtor's testimony that there was unrepaired damage to the left front of the automobile for which the Debtor had received insurance proceeds of \$432.00. Also, Respondent's Exhibit B, a Vehicle Condition Report prepared by Kavanagh, dated August 23, 1993, listed various deficiencies in connection with the automobile as well as general assessments of its condition.

Based on the evidence presented at the final hearing, the Court finds that for the purposes of

determining actual damages pursuant to Section 362(h), the Debtor's automobile, which the Court believes should be valued at replacement value, had a value of at least \$2675.00 at the time of its repossession. The Court concludes that the actual purchase price for the vehicle in April, 1992, exclusive of sales taxes and license and registration fees was approximately \$3700.00. Even after deducting the \$432.00 acknowledged unrepaired damage and a 15% factor for the dealer profit built into the purchase price and the possible depreciation in value for the approximately 16 months since the automobile was purchased (it seems doubtful that a ten year-old car depreciates much over the following 16 months), the result is a value in excess of the \$2675.00 N.A.D.A. average retail value, which is the value claimed by the Debtor.

At the final hearing, the Debtor testified that she was despondent over the loss of her employment and her automobile and as a result on September 12, 1993 attempted suicide by overdose, was admitted to Park Ridge Hospital and incurred a medical bill of \$981.60, a copy of which was admitted as Debtor's Exhibit 4. From the testimony presented at the final hearing on the Contempt Motion, the Court finds that the Debtor's attempt to commit suicide and resulting medical bills were not proximately caused by the repossession and failure to return her automobile, but were the result of accumulated personal problems experienced by the Debtor for several years.

At the final hearing on the Contempt Motion, the Debtor testified that there was a \$500.00 car radio and a \$100.00 gym bag, owned by her brother, in her automobile at the time it was repossessed which were never returned to her. From the testimony presented to the Court at the final hearing, the Court does not feel that sufficient evidence was presented as to the value of these alleged missing items to justify an award of damages pursuant to Section 362(h).

The Court has reviewed in detail the Affidavit of Service provided by the attorney for the Debtor in connection with his attempts to obtain the return of the Debtor's automobile and the prosecution of the Contempt Motion and believes that the reasonable value of the necessary services

provided and expenses incurred is \$1970.00.

Therefore, the Court finds that the Debtor, an individual, has incurred actual damages of \$3199.00, representing the \$2675.00 value of her lost automobile less the \$1446.00 loan balance due on the automobile, plus \$1970.00 in attorneys fees and expenses incurred, and is entitled to an award in this amount since there has been a willful violation of the automatic stay.

Punitive Damages (Section 362(h))

In the Second Circuit, in order to make an award of punitive damages pursuant to Section 362(h), the Court must make "an additional finding of maliciousness or bad faith on the part of the offending creditor. . ." *In re Crysen/Montenay Energy Co.*, 902 F.2d 1098, 1105 (2d Cir. 1990); *In re Baker*, 140 B.R. 88, 91 (D.Vt. 1992).

This Court cannot imagine a more egregious willful violation of the automatic stay than has taken place in this case by the combined actions and omissions of Diamond Finance and Tri-Star Cars and concludes that the only explanation for such deliberate actions and omissions is that they were done with malice and bad faith. *See In re Baker*, 140 B.R. 88, 91 (D.Vt. 1992). Therefore, an award of punitive damages is appropriate.

CONCLUSION

The Court finds Diamond Finance and Tri-Star Cars jointly and severally liable to pay to the Debtor, as actual damages, the sum of \$1229.00, representing the difference between the value of the Debtor's automobile as determined by the Court (\$2675.00) less the amount due at the time of the repossession on the Retail Installment Contract and Security Agreement (\$1446.00).

The Court finds Diamond Finance and Tri-Star Cars jointly and severally liable to pay to the Debtor, as additional actual damages pursuant to Section 362(h), the sum of \$1970.00, representing attorneys fees and expenses incurred.

The above amount of \$1229.00 is to be paid to the Debtor and the amount of \$1970.00 to the Debtor's attorney within twenty (20) days of the date of the entry of this Order, or a joint and several judgment for such amounts in favor of the Debtor shall be prepared and presented to the Court and thereafter entered.

The Court awards the Debtor \$1000.00 to be paid by Diamond Finance and \$1000.00 to be paid by Tri-Star Cars as punitive damages pursuant to Section 362(h). Should such punitive damage awards not be paid to the Debtor within twenty (20) days of the date of the entry of this Order, appropriate separate judgments shall be prepared and presented to the Court and thereafter entered.

Nothing in this Decision and Order shall be deemed a determination as to any rights which the Debtor may have to commence an action in a New York state court or any other appropriate forum to recover from any party, including Diamond Finance and Tri-Star Cars, damages for the car radio and gym bag alleged to have been in her repossessed automobile and not returned.

IT IS SO ORDERED.

/s/

HON. JOHN C. NINFO, II
U.S. BANKRUPTCY COURT JUDGE

Dated: February 4, 1994