

**IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF ARKANSAS
JONESBORO DIVISION**

IN RE: DEDRICK D. BROWN

**3:02-bk-23056 E
CHAPTER 13**

DEDRICK D. BROWN

PLAINTIFF

v.

AP NO. 3-02-ap-1350

AMERICAN SAVINGS CREDIT UNION

DEFENDANT

**ORDER GRANTING MOTION FOR CONTEMPT
AND FOR TURNOVER**

Debtor's Motion for Contempt¹ and for Turnover came for hearing on March 4, 2003. Danyelle J. Walker, Esq. appeared for Debtor Dedrick D. Brown, and Chad Durrett, Jr., Esq. appeared for the Defendant, American Savings Credit Union ("American Savings"). Both parties were present. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(E), and the Court has jurisdiction to enter a final judgment in this case. The following constitutes findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052.

The issues before the Court were whether American Savings should be required to return a vehicle it had repossessed from the Debtor and whether American Savings should be liable for damages for willful violation of the automatic stay.² At the conclusion of the hearing, the Court found that American Savings

¹Although Debtor styled his motion as a motion for contempt, the Court treats it as a motion for damages rather than contempt because a statute has been violated rather than a court order. *See James v. Bank (In re James)*, 257 B.R. 673, 677-678 (B.A.P. 8th Cir. 2001).

²The Court also heard evidence without objection by Debtor's Counsel on American Savings' Objection to Confirmation of Plan. A separate order on this matter will be entered in the Debtor's

willfully violated the automatic stay and explained its reasoning. This finding and the facts to support it are a part of the record. The Court directed American Savings to return the vehicle to the Debtor and granted damages. The purpose of this order is to set forth the amount of damages to be awarded Debtor. A review of the facts follows.

Debtor had previously financed a vehicle through American Savings and was behind in payments. American Savings repossessed the vehicle at the beginning of November 2002. There was some damage to the vehicle at the time of repossession. Debtor testified that the vehicle had been broken into on two occasions: in 2000, and 3 months prior to the repossession in November 2002. Debtor testified that the damages to the vehicle 3 months prior to repossession constituted damage to the steering column and tears to the seats. However, he stated that he had the damage to the steering column repaired prior to American Savings' repossession in November 2002. Debtor paid \$300.00 to repair the damage to the steering column. Ms. Donna Caplener, an employee in American Savings' collection department, testified that, following repossession, American Savings made repairs to the vehicle in the amount of \$6,800.00 and introduced an invoice showing the cost of such repairs.³

Debtor and Ms. Caplener testified as to when notice of the bankruptcy proceeding was given and received. Debtor filed this Chapter 13 case on November 12, 2002. A Notice of Chapter 13 Bankruptcy, Meeting of Creditors and Deadlines was mailed to creditors on November 21, 2002. Debtor testified that he requested the return of the vehicle in advance of any repairs undertaken by American Savings, but

case-in-chief.

³ The Court notes that Ms. Caplener also testified regarding the amount owed by Debtor on the note, the value of Debtor's vehicle, the adequacy of the Debtor's filed Chapter 13 plan, and the amount American Savings paid to insure the vehicle.

American Savings did not return the vehicle. He also testified that because American Savings did not return the vehicle, he had to pay \$30.00 per week to have his children picked up from school, \$25.00 per week for transportation to and from his place of work, and \$200.00 for each of the three times he rented a vehicle. Ms. Caplener testified that American Savings received written notice of the bankruptcy on December 16, 2002. She also testified that American Savings had received telephonic notice of the bankruptcy filing from the office of Debtor's attorney "a couple of weeks" prior to the receipt of written notice.

To demonstrate the condition of the vehicle, American Savings introduced into evidence, in its case-in-chief, photographs which according to Ms. Caplener, depicted damages in existence at the time of repossession. Some photos showed cosmetic damage to the exterior of the vehicle and torn seats; other photos depicted more serious damage, such as a broken steering column and foam hanging from the ceiling. Ms. Caplener testified that she took these photographs around November 7th, a day or two after the vehicle was repossessed and that the photos accurately depicted the condition of the vehicle at the time of repossession. On cross-examination by Debtor's counsel, Ms. Caplener testified that she noticed that foam was hanging from the ceiling as was depicted in certain of the photos and reaffirmed that all photos were taken in November of 2002. Ms. Caplener also testified that the vehicle had never before been in the type of condition evidenced by the photos. The Court accepted these pictures into evidence as Defendant's Exhibit 1.

Debtor testified on rebuttal that certain pictures, including those depicting the greatest damages to the vehicle, such as foam hanging from the ceiling and damage to the steering column, were in fact taken in 2000 following the theft of the vehicle, not at the time of repossession by American Savings. Debtor

testified that these pictures were taken for insurance purposes and repairs stemming from the theft in 2000. He affirmed that these pictures were in the vehicle's glove compartment when American Savings repossessed the vehicle, that American Savings obtained these pictures from the glove compartment, and that American Savings was well aware that these pictures were not taken in November 2002. The Court then divided American Savings' Exhibit 1 into two groups, identifying the group Debtor stated were in the glove compartment at the time of repossession as Exhibit 1a.

When recalled to testify, Ms. Caplener recanted her prior testimony, admitting that she did not take some of the photographs in evidence. Ms. Caplener admitted that American Savings in fact found photos depicting damage to the vehicle in its glove compartment and that she did not take those photos. Debtor's Counsel pressed Ms. Caplener regarding her previous assertion that all of the photos had been taken at the time of repossession; Ms. Caplener responded that "most" of the pictures were taken when the vehicle was repossessed. Debtor's counsel asked Ms. Caplener why she would portray those photos as the ones she took at the time of repossession, knowing that they were a different set of photos. Ms. Caplener responded that the all pictures were given as group to her supervisor, who then passed them on to American Savings' counsel. Ms. Caplener stated she was unaware if their counsel was told exactly who took each set of photos. She also testified that she was not thinking about it at the time she transferred the pictures.

Debtor's testimony at the hearing was highly credible, in sharp contrast with that of Ms. Caplener. Ms. Caplener initially led the Court to believe that the photos entered into evidence demonstrated damages to the vehicle in existence at the time of repossession. However, as Ms. Caplener herself ultimately admitted, a number of the photos depicting the most serious damage were not taken by her or anyone at

American Savings, those photos falsely depicted the condition of the vehicle upon repossession, were obtained from the glove compartment of the vehicle, and were a number of years old.

That the photos were taken at different times is evident simply by comparing the two sets of photos themselves and the invoice. The repairs on the invoice introduced by American Savings do not match the damages contained in the November 2002 photos. Despite the sworn testimony of Ms. Caplener that there was foam hanging from the ceiling, none of the photos taken in November 2002 depict this damage, nor do they show damage to the steering column. This is consistent with Debtor's testimony that he had the steering column repaired prior to American Savings' repossession. Finally, the contents of the vehicle are different in the two sets of photos.

The Court found Ms. Caplener's testimony to be beyond simply contradictory. Rather, it is clear to this Court that she lied as to when the photos were taken in an attempt to intentionally exaggerate the amount of damage to the vehicle at the time of repossession. This taints the entire range of her testimony and the evidence presented through her, including the documentary evidence listing the damages to the vehicle.⁴ As the court stated in *In re WRT Energy Corp.*, 282 B.R. 343, 371 (Bankr. W.D. La 2001):

⁴ Although Ms. Caplener's testimony highlighted the money American Savings allegedly spent to repair the vehicle following repossession and served as the cornerstone of American Savings' argument that it lacked adequate protection, these facts are not necessarily relevant for determining turnover. "There is no 'exception' to 362(a)(3) that excuses [creditor's] refusal to deliver possession of the Debtor's car based on [creditor's] subjective opinion that adequate protection offered by the Debtor was not 'adequate.'" *Transouth Fin. Corp. v. Sharon (In re Sharon)*, 234 B.R. 676, 683 (B.A.P. 6th Cir. 1999) (citation omitted). "The 'congressionally established bankruptcy procedures' for asserting a lien creditor's right to adequate protection *do not* include the unilateral refusal to deliver possession." *Id.* (emphasis in original). Accordingly, American Savings should have sought relief from the automatic stay if it truly believed adequate protection was an issue. *See id.* at 684. If American Savings feared that the vehicle was in immediate jeopardy, it could have requested expedited relief under § 362(f). *See id.* at 685. This Court notes that the Bankruptcy Code does not offer American Savings the option of simply refusing possession when it fears inadequate protection of its lien. *See id.*

“[t]he court cannot trust the word of an expert witness who would brazenly lie about her credentials and then further lie when caught. If she would lie about her academic credentials, there is no reason to believe that she would not provide erroneous and/or misleading valuation testimony if she believed it would benefit her client. The court, therefore, will not ascribe any weight to the evidence supplied by [the witness].

Similarly, the Court in the instant case finds that it cannot trust Ms. Caplener’s word and will not ascribe any weight to the evidence provided by Ms. Caplener.

It is appalling that Ms. Caplener would deliberately attempt to deceive this Court through her sworn testimony. Her actions are insulting and strike at the heart of the judicial process. The Court will enter a separate Order to Show Cause why sanctions should not be imposed under 11 U.S.C. § 105(a) given the reprehensible conduct by American Savings at this hearing. The Order to Show Cause will also be issued for the purpose of determining whether American Savings’ counsel had knowledge of the source of Exhibit 1a prior to its introduction into evidence.

Following presentation of evidence, the Court ruled orally for Debtor on the issue of turnover. The duty to turn over property arises upon filing of the bankruptcy petition. A willful violation of the automatic stay occurs when the creditor acts deliberately with knowledge of the bankruptcy petition. *In re Knaus*, 889 F.2d 773, 775 (8th Cir. 1989). When the debtor informs the creditor of the bankruptcy petition, requests turnover, but the creditor fails to comply, this constitutes a willful violation of the automatic stay. *Id.*

Ms. Caplener herself admitted that following the repossession American Savings was aware of the filing of the Debtor’s bankruptcy petition some weeks prior to receipt of written notice in December 2002. In short, American Savings knew there was a bankruptcy, but displayed a willful disregard for the automatic stay. “The failure to fulfill [the duty to turnover property], regardless of whether the original

seizure was lawful, constitutes a prohibited attempt to ‘exercise control over the property of the estate’ in violation of the automatic stay.” *Id.* American Savings’ willful violation of the automatic stay and refusal to return the vehicle to Debtor warrants damages, including costs and attorneys’ fees. 11 U.S.C. § 362(h); *see In re Rhodes*, 147 B.R. 492, 494 (Bankr. W.D. Ark. 1992); *In re NAFX, Inc.*, 81 B.R. 500, 503-505 (Bankr. W.D. Ark. 1987); *see also* 11 U.S.C. § 105(a).

The burden is on the debtor to prove his damages. *Lovett v. Honeywell, Inc.*, 930 F.2d 625, 628 (8th Cir. 1991). The Court finds the Debtor adequately proved his damages through his uncontroverted testimony. The time between the filing of the bankruptcy petition and the hearing was sixteen weeks. The monetary damages suffered by Debtor during that period were \$30.00 per week to have his children picked up from school, \$25.00 per week for transportation to and from his place of work, and \$200.00 for each of the three times he rented a vehicle. Therefore, the Court awards compensatory damages to Debtor in the amount of \$1,480.00, plus costs and attorneys’ fees. Accordingly, it is hereby

ORDERED that Debtor’s Motion for Turnover is **GRANTED**; it is further

ORDERED that Debtor’s Motion for Contempt, which this Court treats as a Motion for Damages, is **GRANTED**; and it is further

ORDERED that Debtor’s attorney shall have thirty (30) days from the entry of this Order to file an affidavit with the Court attesting to the legal fees and costs incurred to defend the motions at issue in this Order; itemized statements detailing the legal costs and fees incurred shall be attached to such affidavit, and the Court will review such affidavit and itemized statements and make a determination of the amount of costs and attorneys’ fees to be entered against American Savings.

IT IS SO ORDERED.



HONORABLE AUDREY R. EVANS
UNITED STATES BANKRUPTCY JUDGE

DATED: April 30, 2003

cc: Ms. Danyelle J. Walker, Esq. for Debtor
Mr. Chad L. Durrett, Jr., Esq. for American Savings
Mr. David D. Coop, Chapter 13 Trustee
U.S. Trustee