United States Bankruptcy Court
Northern District of Illinois
Eastern Division

Transmittal Sheet for Opinions for Posting

Will this opinion be Published? No

Bankruptcy Caption: In re Linda Stamps

Bankruptcy No. 00 B 06684

Adversary Caption: N/A

Adversary No. N/A

Date of Issuance: November 14, 2000

Judge: John H. Squires

Appearance of Counsel:

Attorney for Movant: Pamela D. Tomczak, Esq., Bennett A. Kahn, Esq., 14 East Jackson, Suite 1200, Chicago, IL 60604

Attorney for Respondent: Kenneth B. Drost, Esq., Kenneth B. Drost, P.C., 101 Lions Drive, Suite 120, Barrington, IL 60010

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	Chapter 13
LINDA STAMPS,	)	Bankruptcy No. 00 B 06684
	)	Judge John H. Squires
Debtor.	)	

MEMORANDUM OPINION

This matter comes before the Court on the emergency motion for sanctions and for turnover of an automobile filed by Linda Stamps (the "Debtor") and on the response thereto filed by Long Beach Acceptance Corp. (the "Creditor"). At issue are the amounts of the Debtor's actual damages, punitive damages and attorneys' fees under 11 U.S.C. § 362(h). For the reasons set forth herein, the Court awards the Debtor a judgment pursuant to § 362(h) in the following sums: $1,238.81 for actual damages; $2,903.10 for attorneys' fees; and $4,800.00 for punitive damages, for a total award of $8,941.91 against the Creditor.

I. JURISDICTION AND PROCEDURE

The Court has jurisdiction to entertain this matter pursuant to 28 U.S.C. § 1334 and Internal Operating Procedure 15(a) of the United States District Court for the Northern District of Illinois. This matter constitutes a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (O).

II. FACTS AND BACKGROUND

The Debtor filed her first Chapter 13 bankruptcy petition on September 20, 1999. The Creditor sought relief from the automatic stay with regard to a 1997 Ford Taurus automobile (the "Vehicle") which was the subject of a security agreement and a security interest in favor of the Creditor. An order was entered in that case on December 8, 1999, which provided for relief from the stay in the event the Debtor failed to make the required plan payments. On February 23, 2000, the case was dismissed. The Creditor asserts that the Debtor defaulted, but before it could exercise its repossession rights in the Vehicle, the Debtor filed this second case on March 6, 2000. The Creditor received notice of this case, filed a claim, and was receiving payments and dividends disbursed from the Standing Chapter 13 Trustee.

The Creditor asserts that on July 18, 2000, it received a notice of a hearing on dismissal of this case for failure to pay the filing fee. The Creditor further argues that due to a clerical error, this notice was coded into its computer system as a notice of dismissal of the case. It is undisputed that on August 16, 2000, the Vehicle was repossessed at the direction of the Creditor. Thereafter, on several occasions, the Debtor placed numerous telephone calls to the Creditor, and was advised that the Creditor had not repossessed the Vehicle. Notwithstanding such denials, it is undisputed that on August 23, 2000, the Debtor received from the collection department of the Creditor a notice of the repossession; notice of the amount and time within which to redeem the Vehicle and reinstate the loan; and a notice of private sale by auction that was scheduled to occur after September 14, 2000. See Debtor's Exhibit No.1. The Debtor's attorney, likewise, made contact with the Creditor and

received similar communications. See Debtor's Exhibit No. 2.

Thereafter, on August 24, 2000, the Debtor filed the motion at bar seeking sanctions for violation of the automatic stay, unspecified damages and attorneys' fees, as well as turnover of the Vehicle. The Creditor responds that it learned of its "error" on August 25, 2000, after being contacted by the Debtor's counsel, and directed the Vehicle to be returned. The contents of the Vehicle, which consisted of various items of personal property, were not returned until several days later. The Creditor asserts that it committed a willful, albeit unintentional, violation of the automatic stay because it was aware of the filing of the bankruptcy case, but that it mistakenly believed that the case had been dismissed, and therefore took action to enforce its lien against the Vehicle. The Creditor has offered to pay any actual damages that the Debtor sustained. The Creditor asserts that its actions were a regrettable mistake, which do not warrant the imposition of punitive damages.

On October 25, 2000, the Court conducted an evidentiary hearing on the damages sought by the Debtor. The Debtor testified that she is employed as a security guard at various sites and uses the Vehicle to get to and from work. The Debtor stated that the Vehicle was repossessed on August 16, 2000. She called the Creditor the next morning, but was advised that the Vehicle had not been repossessed. Contrary to the Creditor's denials, the Debtor received a notice of repossession on August 23, 2000 from the collection department of the Creditor. See Debtor's Exhibit No. 1. According to the Debtor, when the Vehicle was finally returned on August 29, 2000, it was not in the same condition as when it was repossessed. Initially, the Vehicle was returned without any keys. Later, when the Debtor received the keys, they did not fit all of the locks. She further testified that various

items of personal property which were in the Vehicle when it was repossessed were missing. Moreover, when the Vehicle was returned to her, she testified that it was not in a safe-driving condition. Specifically, it was not running smoothly; the front wheels were shaky; the car was dirty; it had hammer marks on the right rear door; and the rear interior panel and license plates were missing.

The Debtor produced receipts for the various parts purchased for and repairs made to the Vehicle, which she contends totals $327.91. See Debtor's Exhibit Nos. 3, 4, 5, 6 and 7. The Debtor testified that she rented a substitute vehicle for the period from August 16, 2000 to October 3, 2000 and incurred charges of $1,945.48. See Debtor's Exhibit No. 8. The Debtor further testified she missed three days of work as a result of the repossession (12-16 hours a day at $8.00 per hour). The Debtor also stated that she did not receive any of the personal property back that was in the Vehicle until September 1, 2000, and that not all of the items were subsequently returned. The Debtor claims that she was missing the following items: (1) her driver's license and other identification cards, which cost approximately $15.00 to replace; (2) two used television sets, one black and white and one color set with a cassette recorder and VCR for which she had paid respectively $100.00-$300.00 and; (3) a cellular telephone valued at $80.00, plus prepaid time aggregating an additional $25.00-$35.00. The Debtor further stated that her designer eyeglasses, valued at $550.00, sustained damage. In addition, she incurred attorneys' fees in the sum of $2,903.10. The Court finds the Debtor's testimony credible, though uncorroborated by any other witness.

No one testified as an employee of the Creditor. Rather, two employees of Equitable

Services, Inc. ("Equitable"), a repossession firm with which the Creditor contracted to effectuate repossession of the Vehicle, testified. The principal witness from Equitable was Lawrence Macik. Mr. Macik repossessed the Vehicle on August 16, 2000 by towing it away from the Debtor's home. According to Mr. Macik, the Vehicle was in poor condition at that time, and he did not damage the Vehicle in any way when he towed it. He had his associate prepare a condition report for the Vehicle, which depicted it in fair to poor condition. See Respondent's Exhibit A. According to Mr. Macik, the Vehicle was dented and damaged on the exterior, and its interior condition was that of a "roach coach."

Mr. Macik also inventoried the contents of the Vehicle. See Respondent's Exhibit B. He testified that he placed the contents of the Vehicle into sealed plastic bags. The contents of the Vehicle filled two large plastic bags which were placed into Equitable's locked storage room and remained there until they were returned to the Debtor. He stated that the Vehicle did not contain electronic items, such as television sets, or a cellular telephone, nor did it contain a wallet or purse. Further, he testified that all papers in the glove compartment were put into the sealed bags. He towed the Vehicle to Arena Auction in Bolingbrook, Illinois where it was stored, pending the scheduled auction. He was the individual from Equitable who returned it to the Debtor on August 29, 2000. Mr. Macik admitted that the auction firm changed the locks on the Vehicle.

Raymond Lozzano, also employed by Equitable, testified. He returned the Vehicle's bagged contents on September 1, 2000 to the Debtor. He saw her examine the contents of the bags and she advised him that items were missing.

The Creditor offered an apology in open court to the Debtor. It contends that the

Debtor should only be awarded actual damages in the sum of $526.90, which constitute the per diem cost of the rental car for the thirteen days the Vehicle was withheld, plus the Debtor's lost wages totaling $384.00. The Creditor further states that the Debtor should be awarded only $1,771.44 in reasonable attorneys' fees, rather than the total time expended by the Debtor's counsel, because the itemization of claimed damages was not provided, thereby allegedly prolonging the hearing and increasing the preparation time. The Creditor also argues there should be no imposition of punitive damages.

III. DISCUSSION

The Creditor admits that it violated the automatic stay of 11 U.S.C. § 362(a). The Debtor seeks her damages for that violation pursuant to § 362(h) which provides:

> (h) 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.

11 U.S.C. § 362(h).

A willful violation of the stay does not require that the creditor had the specific intent to violate the stay. In re Bloom, 875 F.2d 224, 227 (9th Cir. 1989). When a creditor engages in conduct which violates the automatic stay, with knowledge that a bankruptcy petition had been filed, it can be considered a willful violation of the stay subjecting the creditor to liability for damages under § 362(h). In re Roete, 936 F.2d 963, 965 (7th Cir. 1991). A violation is willful even if the creditor believed himself justified in taking the actions found violative of the stay. Taborski v. United States, 141 B.R. 959, 969 (N.D. Ill. 1992); In re Alberto, 119 B.R. 985, 993 (Bankr. N.D. Ill. 1990).

Actual damages for purposes of § 362(h) should only be awarded if there is evidence supporting the award of a definite amount which may not be predicated upon mere speculation. Once a party has proven that he has been damaged, he needs to show the amount of damages with reasonable certainty. See Doe v. United States, 976 F.2d 1071, 1085 (7th Cir. 1992). A party seeking damages must prove them using methodologies that need not be intellectually sophisticated. Schiller & Schmidt, Inc. v. Nordisco Corp., 969 F.2d 410, 415 (7th Cir. 1992). Still, a damage award cannot be based on mere speculation, guess or conjecture. Adams Apple Distr. Co. v. Papeleras Reunidas, S.A., 773 F.2d 925, 930 (7th Cir. 1985).

Lacking precise standards for the appropriate measure of actual damages awardable under § 362(h), the Court looks to Illinois law for assistance. Under Illinois law, the usual measure of damages for the total loss or destruction of personal property is its reasonable or market value at the time and place of the loss. See, e.g., H. K. Porter Co. v. Halperin, 297 F.2d 442, 445 (7th Cir. 1961). If the injury is reparable, the proper measure of damages is ordinarily the cost of making the repair, plus the value of the lost use of the property while the owner is necessary deprived of it by reason of the repair. See, e.g., Plesniak v. Wiegand, 31 Ill. App.3d 923, 932, 335 N.E.2d 131, 138 (1st Dist. 1975). There is case law that if the property is worth less after it is repaired than its value before the injury, the measure of the damage is the difference between the market value before the injury in its repaired condition, in addition to the reasonable costs of repairs. See People v. Tidwell, 33 Ill. App.3d 232, 237, 338 N.E.2d 113, 117 (1st Dist. 1975). The replacement cost or the original acquisition price of the used personal property is not the compensable standard or the measure of damages

under Illinois law.

Under the foregoing authorities, some of the actual damages claimed will be awarded, such as the $327.91 cost of repairs to the Vehicle, the Debtor's lost wages of $384.00 (16 hours per day @ $8.00 per hour for 3 days), and the prorated rental car charges of $526.90 for the thirteen days the Debtor was wrongfully deprived of the use of the Vehicle. The Court cannot properly award the estimated original or replacement costs of the damaged eyeglasses, the used television sets and cellular phone and license and other identification documents. The record is devoid of any evidence regarding the market value of these items at the time of their loss or the value of their lost use. Thus, the Court awards the Debtor actual damages in the sum of $1,238.81.

Moreover, when a willful violation of the stay is found, the Code provides for the Debtor to recover damages, including attorneys' fees and costs necessarily and reasonably incurred by reason thereof. In re Fridge, 239 B.R. 182, 190 (Bankr. N.D. Ill. 1999). The evidence is undisputed that the Debtor incurred $2,903.10 in attorneys' fees. The Court finds that these fees were reasonably and necessarily incurred and should be awarded to make the Debtor whole. The Court rejects the Creditor's argument that only $1,771.44 should be awarded because the itemization of time expended was not provided until trial, thus somehow prolonging the hearing and increasing the preparation time. The actual trial time was less than two hours and the time expended for preparation was not excessive. The Creditor has not demonstrated that the work performed by the Debtor's counsel either prolonged the hearing or increased the time required to prepare therefor. Thus, the Court awards the Debtor the sum of $2,903.10 in attorneys' fees.

Finally, if the violation of the stay is particularly egregious, punitive damages may be awarded. In re Atlantic Bus. and Cmty. Corp., 901 F.2d 325 (3d Cir. 1990). Relevant factors which may be considered in determining whether punitive damages are appropriate for a creditor's violation of the automatic stay are: (1) the nature of the creditor's conduct; (2) the creditor's ability to pay damages; (3) the motive of the creditor; and (4) any provocation by the debtor. In re M.J. Shoearama, Inc., 137 B.R. 182, 190 (Bankr. W.D. Pa. 1992). All of those factors have been considered here. Court awards for punitive damages vary. In BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996), the Supreme Court refused to establish a mathematical formula for determining punitive damages. Id. at 582-83. Instead, the Court stated that "a general concern of reasonableness . . . properly enters into the constitutional calculus." Id. at 583 (citations omitted). However, the court suggested that an award of four to ten times the amount of compensatory damages may be appropriate depending upon the circumstances in each case. Id. at 580-81.

Considering all of the evidence, the Court concludes that an award of punitive damages is proper here to appropriately penalize the Creditor for its willful and continued violation of the automatic stay, and to deter it and other creditors who may be similarly inclined in other cases from future similar conduct. The Creditor is familiar with bankruptcy practice and procedure. Rather than take immediate corrective action, the Creditor waited four days to return the Vehicle and an additional week to return its contents to the Debtor. Consequently, using the Debtor's proven actual damages of approximately $1,200.00 as a logical starting point, and considering that the Creditor acted somewhat promptly in returning the Vehicle within a week after learning of its claimed "error," and that it has at

all times offered to pay the Debtor's actual damages and reasonable attorneys' fees, the Court concludes that the lower end of the range is more appropriate in this case, or approximately four times the amount of the actual damages to serve as the appropriate punitive sanction. The Court rejects the argument that because some agents of the Creditor were unaware of the wrongful repossession, that no punitive damages should be awarded. Thus, the Court awards the Debtor the additional sum of $4,800.00 as punitive damages.

IV. CONCLUSION

Accordingly, the Court awards the Debtor a judgment under § 362(h) for her actual damages in the amount of $1,238.81, reasonable attorneys' fees in the sum of $2,903.10 and punitive damages in the sum of $4,800.00 for a total award of $8,941.91 against the Creditor.

This Opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. A separate order shall be entered pursuant to Federal Rule of Bankruptcy Procedure 9021.

ENTERED:

DATE: _____ _____

John H. Squires
United States Bankruptcy Judge

cc: See attached Service List

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	Chapter 13
LINDA STAMPS,	)	Bankruptcy No. 00 B 06684
	)	Judge John H. Squires
Debtor.	)	

O R D E R

For the reasons set forth in a Memorandum Opinion dated the 14th day of November, 2000, the Court awards Linda Stamps a judgment pursuant to 11 U.S.C. § 362(h) in the following sums: $1,238.81 for actual damages; $2,903.10 for attorneys' fees; and $4,800.00 for punitive damages, for a total award of $8,941.91 against Long Beach Acceptance Corp. for its willful violation of the automatic stay.

ENTERED:

DATE: _____

_____
John H. Squires
United States Bankruptcy Judge

cc: See attached Service List