

UNITED STATES BANKRUPTCY COURT  
Eastern District of Tennessee  
Southern Division

In re

KEITH W. FELTON  
Debtor

Bankruptcy Case  
No. 95-14425

KEITH W. FELTON  
Plaintiff

Adversary Proceeding  
No. 96-1222

v.

PEOPLES FINANCE &  
MICHAEL SHOFNER, individually  
& d/b/a Peoples Finance  
Defendants

MEMORANDUM

Appearances: Floyd D. Davis & John R. Colvin, Winchester, Tennessee,  
Attorneys for the Plaintiff  
James D. Lane, II, Ray, Van Cleave & Jackson, Tullahoma,  
Tennessee, Attorneys for Defendants

R. THOMAS STINNETT, UNITED STATES BANKRUPTCY JUDGE

The debtor in bankruptcy, Keith W. Felton, brought this action against Peoples Finance and its president, Michael Shofner, to recover damages for a willful violation of the automatic stay. 11 U.S.C. § 362(a) & (h). Mr. Shofner has filed a motion for summary judgment. The debtor has filed a response. The following evidence comes from the supporting documents and the court's records.

The debtor filed a chapter 13 bankruptcy case on October 23, 1995. The proposed chapter 13 plan split the claim of Peoples Finance into a secured claim of \$4,335 and an unsecured claim of \$3,313. The collateral for the secured claim was a 1988 Dodge Caravan. The plan proposed to pay 9% interest on the secured claim and to pay the claim at the rate of \$90 per month. At or after the meeting of creditors, the plan was amended to pay 12.5% interest and \$97 per month.

On May 22, 1996, the chapter 13 trustee filed a motion to dismiss the debtor's chapter 13 case. The motion was set for hearing June 17, 1996, at 9 a.m. in Winchester, Tennessee. On June 14, 1996, the debtor filed a modified chapter 13 plan. The motion to dismiss came up for hearing on June 17 as scheduled. The meeting of creditors on the modified plan was set for July 15, 1996, and the motion to dismiss was passed to July 22, 1996, at 9 a.m. At the meeting on July 15, 1996, someone (apparently the debtor's lawyer) announced the debtor's intention to convert the case to a chapter 7 case. When the motion to dismiss came up on July 22, 1996, the court announced that it would allow the debtor ten days to convert the case to chapter 7 or the case would be dismissed. The debtor filed a motion to convert on July 25, 1996. On July 31, 1996, the

court entered an order treating the motion as a notice of conversion. The notice of the meeting of creditors in the chapter 7 case was mailed and stamped filed on August 22, 1996. The meeting was set for September 16, 1996.

On August 8, 1996, Peoples Finance had repossessed the 1988 Dodge Caravan from the debtor's residence. The repossession agent, Mr. Sain, states in his affidavit that the debtor cooperated in turning the van over to him.

Peoples Finance also relies on the affidavit of an account representative, Pam McKinney. Ms. McKinney states that she called the office of the chapter 13 trustee on July 15, 1996, to check on the status of the Mr. Felton's chapter 13 case. She was told a motion to dismiss would be heard on July 22, 1996. On July 22, 1996, at 11:26 a.m. , she called the chapter 13 trustee's office and was told the case had been dismissed. Peoples Finance then proceeded to repossess the vehicle. She sent Mr. Felton a notice of sale. The notice is attached to her affidavit. It is dated August 8, 1996 and gives notice of a sale on August 19, 1996. After the sale she sent Mr. Felton a notice that the vehicle had been sold and that he should contact Peoples Finance about paying the deficiency. At the time she believed the case had been dismissed. Not until later did Peoples Finance receive the notice that the case had been converted to chapter 7. The notice shows a mailing date of August 22, 1996. Ms. McKinney states that she would not have pursued the repossession and foreclosure if she had known the case had been converted instead of dismissed.

Mr. Shofner made the following statements in his deposition testimony. He is president of Peoples Finance in Tullahoma, Tennessee and Mid-State Finance in Shelbyville, Tennessee. His duties include loan decisions, policy, viewing bank lines of credit, use of the lines of credit, and insurance negotiations. As to bankruptcies, he attends the meetings of creditors in Winchester, Tennessee. He attends the meetings so that Peoples Finance can avoid hiring a lawyer unless it needs to file an objection. Generally (95% of the time) he reviews the files at the office of Peoples Finance with the vice-president and manager, Wallace Rowland. Usually he will be involved in two to seven cases per meeting docket, though there may be as few as one or as many as nine. Two to four cases for each company on each docket is normal. He gets prepared as to the values of collateral, who the makers are, and who the co-signers are, if any; then he goes to the meeting and tries to make the best deal he can for Peoples Finance. He does not keep up with the file or do anything to close it out. Those tasks are handled by someone else. Pam McKinney handled Mr. Felton's file. Linda Templeton handles bankruptcies with Mr. Wallace, the manager of Peoples Finance. Mr. Shofner does not specifically recall his involvement with Mr. Felton's case. He attended the original meeting of creditors in December 1995. His only record from that meeting is a note on the front of the file; it describes how the chapter 13 plan will treat the claim of Peoples Finance. He does not recall whether he attended the meeting of creditors on the amended plan on July 15, 1996. He was probably there. On the front of the file is a notation "Meeting of creditors July 15, '96" and underneath that "motion to convert." He made no further notes on the file after

July 15, 1996. He did not recall making any orders regarding Mr. Felton's case or being involved with the repossession or the sale of the vehicle. He was not personally aware of the actions taken after July 15, 1996.

## DISCUSSION

The court can grant summary judgment only if the moving party proves that there is no genuine issue of material fact, and based on the undisputed facts, the law entitles him to judgment in his favor. Fed. R. Bankr. P. 7056(c); Fed. R. Civ. P. 56(c).

The standard for summary judgment — “no genuine issue of material fact” — can be misleading as to summary judgment motions by defendants. The defendant can obtain summary judgment by disproving one fact that is essential to the plaintiff's right to recover. Mr. Shofner's motion fits that pattern. Mr. Shofner contends, somewhat vaguely, that he can be personally liable only if he was personally involved in or responsible for the acts that violated the stay.

The debtor has not submitted any evidence to contradict the statements in the affidavits of Ms. McKinney, the account representative for Peoples Finance, or Mr. Sain, the repossession agent. The debtor also has not submitted any evidence challenging their credibility, and the court has not found any internal problems with their statements that call them into doubt. Thus, their statements can be taken as undisputed. *Compare United States v. Krieger*, 773 F.Supp. 580 (S.D.N.Y. 1991) and *F & J Enterprises, Inc. v.*

*Columbia Broadcasting Systems, Inc.*, 373 F. Supp. 292 (N. D. Ohio 1974); see generally 10A Charles A. Wright, et al., *Federal Practice and Procedure* § 2726 (2d ed. 1985).

An officer or employee of a secured creditor may be responsible for starting or continuing the collection process by acting or by failing to act. He may take some action that he knows will start the process. Knowing the process has already started or is about to start, he may fail to take some action that is required to stop it. If the officer or employee does either when he knows the automatic stay is in effect, then he may have willfully violated the stay.

Mr. Shofner had notice of the bankruptcy and the automatic stay, but the undisputed evidence shows that Mr. Shofner was not responsible for starting or continuing the collection process by Peoples Finance. He did not do anything, or refrain from doing anything, so that the process would begin or continue.

The debtor apparently contends Mr. Shofner is responsible because he failed to act. The argument goes as follows. First, Mr. Shofner attended the meeting of creditors in July 1996. Second, he heard the announcement that the debtor intended to convert the case to chapter 7. Third, he failed to notify the employees of Peoples Finance to treat the case as converted to chapter 7, or at least, to expect a notice of conversion. Fourth, Peoples Finance violated the automatic stay as a result of Mr. Shofner's failure to communicate, and therefore, he is responsible for the violation.

Mr. Shofner generally was not involved with bankruptcy cases after the meeting of creditors. He attended the July 1996 meeting and made the note on the file that the case would be converted to chapter 7. He did what was normal for him in the circumstances. The debtor in effect contends Mr. Shofner should have done more. In this respect, the debtor's argument assumes Mr. Shofner had reason to expect the employees of Peoples Finance to violate the stay if he did not make a special effort to warn them the case would be converted to chapter 7. The undisputed facts do not show this. Indeed, Ms. McKinney says in her affidavit that she would not have taken any steps to repossess and foreclose if she had known the case was converted instead of dismissed. No other evidence suggests Mr. Shofner should have done more than he did to be sure Peoples Finance did not violate the stay.

The debtor attempts to make this argument stronger by asserting that the case was converted at the meeting of creditors in July 1996 when Mr. Shofner was present. According to the debtor, the announcement that the case would be converted was a motion to convert made in open court. No motion to convert was necessary — only a notice of conversion. But the notice must be filed with the court in order for the case to be converted. 11 U.S.C. § 1307(a); Fed. R. Bankr. P. 1017(d); Local Bankr. Rule 13(i). The motion to convert was not filed until ten days later. Furthermore, the debtor's lawyer was not "in open court" where a motion to convert might be given effect. It was a meeting of creditors with no judge present. 11 U.S.C. § 341(c). Thus, when Mr. Shofner left the meeting of creditors in July 1996, he did not know the case had been converted or would

necessarily be converted. Mr. Shofner knew only that the debtor, as of July 15, 1996, intended to convert the case, and he noted that on the file.

In summary, the court sees no ground for Mr. Shofner to be liable for a violation of the automatic stay. He was not involved in the acts that violated the stay. He was not responsible for setting them in motion. There is no evidence he failed to stop the violation when he learned of it; the undisputed facts reveal that he did not know the facts until after the deficiency letter was mailed. *Compare Sechuan City, Inc. v. North American Motor Inns, Inc.*, 96 B.R. 37 (Bankr. E. D. Pa. 1989); *In re Timbs*, 178 B.R. 989 (Bankr. E. D. Tenn. 1994).

The debtor apparently contends Mr. Shofner is liable simply because he knew of Mr. Felton's bankruptcy, knew of the automatic stay, and was the representative of Peoples Finance when the stay violations occurred. This argument assumes Peoples Finance is liable, an issue not yet decided by the court. Even if Peoples Finance is liable, the court is not aware of any rule that would make Mr. Shofner liable solely because he was the president of Peoples Finance at the time, without regard to his involvement in or responsibility for the stay violation.

The court concludes there is no genuine issue of material fact as to Mr. Shofner's lack of involvement in or responsibility for the acts of Peoples Finance. As a result the law entitles him to summary judgment. The court will enter summary judgment for Mr. Shofner.

This memorandum constitutes the court's findings of fact and conclusions of law. Fed. R. Bankr. P. 7052.

At Chattanooga, Tennessee.

BY THE COURT

[entered 2/20/1997]

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R. THOMAS STINNETT  
UNITED STATES BANKRUPTCY JUDGE

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Defendants

**ORDER**

For the reasons stated in a Memorandum filed contemporaneously herewith,

It is ORDERED that the Motion for Summary Judgment filed by the defendant, Michael Shofner, is GRANTED.

ENTER:

BY THE COURT

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R. THOMAS STINNETT  
U.S. BANKRUPTCY JUDGE