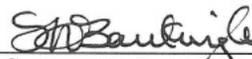




SO ORDERED.
SIGNED this 27th day of July, 2015

THIS ORDER HAS BEEN ENTERED ON THE DOCKET.
PLEASE SEE DOCKET FOR ENTRY DATE.


Suzanne H. Bauknicht
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 3:14-bk-33980-SHB

ASHLEY STARR TUCKER

Debtor

MEMORANDUM & OPINION

Before the court is the Motion for Contempt, Motion for Turnover & Motion for Expedited Hearing (Motion) filed by Debtor on December 22, 2014. The Motion seeks turnover of a 2004 Envoy that was repossessed by Cash Express, LLC (Cash Express) on December 14, 2014, and contempt against Cash Express for failing to return the vehicle.

The court held an evidentiary hearing on the Motion on May 6, 2015. Post-trial briefs were filed by Cash Express on May 20, 2015, and by Debtor on June 8, 2015. On consideration of the parties' post-trial arguments, the exhibits entered into the record, and the testimony of Debtor, Monica Foster, and James Darter, pursuant to Rule 52(a) of the Federal Rules of Civil

Procedure, made applicable to contested matters by Rules 9014(c) and 7052 of the Federal Rules of Bankruptcy Procedure, the court issues the following findings of fact and conclusions of law.

Debtor filed her bankruptcy case on December 18, 2014. The following day, Debtor's attorney notified Cash Express of the bankruptcy filing by fax, enclosed a copy of Debtor's plan with proposed treatment for Cash Express's claim, and requested return of the Envoy. After Cash Express refused to return the vehicle without proof of insurance, on December 22, 2014, Debtor's attorney faxed a copy of Debtor's insurance binder; however, Cash Express again refused to return the Envoy because the insurance binder showed only liability coverage (instead of full coverage).

Because Cash Express would not return the Envoy, Debtor filed the Motion, to which Cash Express replied on January 6, 2015, by filing its Response combined with procedurally deficient requests for adequate protection and relief from the automatic stay, which were denied. On January 7, 2015, Debtor provided Cash Express with proof of full coverage on the Envoy, and Cash Express released the vehicle on January 8, 2015.

An act "to exercise control over property of the estate" is a violation of the automatic stay. 11 U.S.C. § 362(a)(3). Although a creditor may lawfully possess a debtor's property before bankruptcy, that property becomes part of the bankruptcy estate upon filing of the petition, and the protections of the automatic stay extend to possession of the vehicle. *See TransSouth Fin. Corp. v. Sharon (In re Sharon)*, 234 B.R. 676, 681 (B.A.P. 6th Cir. 1999). A secured creditor is entitled to adequate protection of its interests in the property, but the creditor must use bankruptcy court procedure to obtain adequate protection by requesting relief from the stay. *See id.* at 683. "When a creditor fears that 'adequate protection' is in immediate jeopardy if

possession is delivered consistent with § 542(a), the ‘congressionally established bankruptcy procedure’ is expedited relief under § 362(f).” *Id.* at 685.

The facts in *Sharon* are remarkably similar to those here. As here, the creditor refused to return a vehicle repossessed pre-petition because it determined that it was not adequately protected, and the court found retention of the repossessed car was a violation of the automatic stay. *See id.* at 688. A creditor’s genuinely held belief that it is not adequately protected is not an exception to § 362. *See id.* at 683.

Because the Envoy became property of the bankruptcy estate when the case was filed, Cash Express was required to return it to Debtor immediately after receiving notice of the bankruptcy filing on December 19, 2014. To ensure its interest was adequately protected, Cash Express could have filed a § 362(f) motion seeking adequate protection (which it improperly attempted to do in its Response to Debtor’s Motion filed on January 6, 2015).

The court does not need proof of intent to violate the automatic stay in order to find that a willful violation has occurred. *See id.* at 687. Because Cash Express had actual notice of the bankruptcy filing and continued to retain possession of the Envoy for nearly three weeks after receiving such notice, the court finds that Cash Express willfully violated § 362(a)(3).

An individual injured by a willful violation of the stay can recover actual damages. 11 U.S.C. § 362(k)(1). An individual seeking damages for a violation of the stay has the burden of establishing three elements by a preponderance of the evidence: (1) the actions taken were in violation of the automatic stay; (2) the violation was willful; and (3) the violation caused actual damages. *Barclay v. Reimer & Lorber Co. LPA (In re Barclay)*, No. 05-8019, 2006 WL 238139, at *5 (B.A.P. 6th Cir. 2006) (table) (citing *In re Skeen*, 248 B.R. 312, 316 (Bankr. E.D. Tenn. 2000)).

Collett v. Lee Oil Co. (In re Collett), Nos. 13-8033, 12-61190, 2014 WL 2111309, at *4 (B.A.P. 6th Cir. May 21, 2014).

Debtor has met her burden on all three elements. Based upon the proof presented at the evidentiary hearing, the court finds that Debtor is entitled to actual damages of \$69.00 for the round trip mileage (120 miles) for her court appearance on May 6, 2015.¹ Debtor is also entitled to attorneys' fees and expenses incurred in the prosecution of the Motion.

Section 362(k)(1) provides that, in addition to recovery of actual damages, "in appropriate circumstances, [Debtor] may recover punitive damages." Such circumstances include when the conduct of the creditor was "egregious, vindictive, or intentionally malicious." *In re Bivens*, 324 B.R. 39, 42 (Bankr. N.D. Ohio 2004). Here, Cash Express deliberately refused to return Debtor's vehicle despite repeated communications by her attorney to demand return of the car. Cash Express continued to hold the car improperly, demanding proof of full coverage insurance even after Debtor provided proof of insurance on December 22, 2014. Indeed, Cash Express did not return the car until after an expedited hearing on Debtor's Motion. Accordingly, the court finds that Cash Express's continued possession of the vehicle for nearly three weeks after notice of the bankruptcy filing was egregious such that Debtor is entitled to punitive damages in the amount of \$1,000.00 (calculated at \$50.00 per day of illegal retention of the vehicle for 20 days). *See, e.g., Murphy v. Deal Auto (In re Murphy)*, No. 13-3058, 2014 WL 1089854 at *4, 2014 Bankr. LEXIS 1068, at *11 (Bankr. N.D. Ohio Mar. 19, 2014) (awarding punitive damages of \$100.00 for each day of continued possession of the debtor's vehicle after receiving notice of the bankruptcy filing).

¹ Debtor testified that friends drove her to her attorneys' office on at least two occasions, but she did not testify that she paid for any fuel expense for such trips, and she admitted that such meetings with counsel concerned the bankruptcy generally and not the return of her vehicle. Debtor also testified that her son missed school on several dates in December, but she could not state with any certainty exactly when he missed school or that such was caused by the failure of Cash Express to return the Envoy after she filed her bankruptcy petition. Although Debtor's post-trial brief referenced actual damages of parking cost and wages for missing work, Debtor failed to present evidence as to any such damages (and, in fact, she testified that she does not work), and the court will not award speculative damages. *See In re Gault*, 136 B.R. 736, 739 (Bankr. E.D. Tenn. 1991).

For the foregoing reasons, Debtor's Motion is GRANTED, and the court directs the following:

(1) Debtor is entitled to a judgment for actual and punitive damages against Cash Express, LLC for its contempt by the continued retention of the 2004 Envoy after receiving actual notice of Debtor's bankruptcy filing.

(2) No later than August 6, 2015, Debtor's attorney shall submit an affidavit of fees and expenses incurred in the prosecution of the Motion. Any objection by Cash Express to the requested fees or expenses shall be filed no later than August 13, 2015. At that time, the court will enter an order awarding the appropriate judgment without further notice or hearing.

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