

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

In re:

MICHELLE L. GHOLSTON,

Case No. 6:11-bk-17200-ABB

Chapter 7

Debtor.

_____ /

ORDER

This matter came before the Court on the Emergency Motion for Sanctions (Doc. No. 9) filed by the Debtor Michelle L. Gholston against EZ Auto Van Rentals (“EZ Auto”). An evidentiary hearing was held on February 13, 2012 at which the Debtor, her counsel, and D’Angelo Holmes (“Mr. Holmes”), the Vice President of EZ Auto Van Rentals, appeared. The Debtor’s Emergency Motion is due to be granted for the reasons set forth herein.

Event Chronology

The Debtor filed the above-captioned bankruptcy case on November 14, 2011 and the automatic stay of 11 U.S.C. Section 362(a) arose by operation of law. EZ Auto holds an interest in a Chevy Impala, VIN 2G1WT58K3389232722 (“Vehicle”), leased by the Debtor from EZ Auto. The Debtor listed EZ Auto as a creditor in Schedule G and her creditor matrix (Doc. No. 1).

Notice of the Debtor’s bankruptcy case was issued by the Court to EZ Auto at its business address of 1019 Sinfony Isles Boulevard, Apollo Beach, Florida 33572 on November 18, 2011 (Doc. Nos. 5, 7). This address is the same address for EZ Auto as contained in the lease agreement for the Vehicle. EZ Auto, taking into account mail

delivery time, would have received the Notice of the Debtor's bankruptcy case on or about November 21, 2011.

The Notice advised EZ Auto of the existence of the automatic stay of 11 U.S.C. Section 362(a), which prevents the Debtor's creditors from taking any action to enforce a prepetition lien against property of the Debtor or to collect, assess, or recover a prepetition claim against the Debtor. The automatic stay remains in effect, pursuant to 11 U.S.C. Section 362(c), until the earliest of: (i) the time the case is closed; (ii) the time the case is dismissed; or (iii) the Debtor is granted a discharge.

Section 362(k) of the Bankruptcy Code allows for the imposition of sanctions, including actual damages and punitive damages, where an individual debtor suffers injury from a creditor's willful violation of the stay. EZ Auto did not file a motion pursuant to 11 U.S.C. Section 362(d) seeking relief from the automatic stay. The automatic stay remains in full force and effect in this case.

EZ Auto repossessed the Vehicle on November 28, 2011. The Debtor was present when the Vehicle was repossessed. The repossession agent knew the Debtor had filed for bankruptcy and discussed the existence of the Debtor's case with her. The Vehicle was insured, with EZ Auto named as the loss payee, when it was repossessed.

Debtor's counsel contacted EZ Auto by telephone shortly after the repossession and spoke with an employee of EZ Auto. Counsel advised the employee of the Debtor's pending bankruptcy case and the existence of the automatic stay and requested return of the Vehicle. EZ Auto failed to return the Vehicle to the Debtor.

Motion for Sanctions and Hearings

The Debtor filed her Emergency Motion for Sanctions against EZ Auto on December 2, 2011 asserting EZ Auto's actions constitute violations of the automatic stay. She seeks the imposition of sanctions, including reasonable attorney's fees, pursuant to 11 U.S.C. Section 362(k).

The Court issued a Notice of Evidentiary Hearing and entered an Interim Order on December 7, 2011 (Doc. Nos. 10, 11): (i) enjoining EZ Auto from taking any further action to enforce any rights in the Vehicle or to recover a claim against the Debtor; and (ii) setting an expedited evidentiary hearing for December 9, 2011 to determine whether any violation of the automatic stay occurred for which sanctions may be imposed.

The Court telephoned EZ Auto on December 7, 2011 and spoke with an employee informing him of the upcoming hearing and the entry of the Interim Order. The Court transmitted the Interim Order and Notice of Evidentiary Hearing to Mr. Holmes via facsimile on December 7, 2011.

The Court conducted an evidentiary hearing on December 9, 2011 at which the Debtor, her counsel, and Mr. Holmes appeared. EZ Auto continued to have possession of the Vehicle at the time of the hearing and made no attempt to return it to the Debtor. Mr. Holmes asserted EZ Auto did not have knowledge of the Debtor's bankruptcy case when it repossessed the Vehicle and EZ Auto had the right to repossess the Vehicle. The Debtor stated she was two weeks behind in her payments to EZ Auto and the insurance coverage for the Vehicle was due to expire on December 10, 2011.

The Court entered an Order on December 9, 2011 (Doc. No. 13) finding EZ Auto's repossession and retention of the Vehicle constitute violations of the automatic

stay of 11 U.S.C. Section 362(a). The Court withheld ruling on the issue of sanctions. The Court directed the Debtor to bring her Vehicle payments current and to provide EZ Auto proof of continuing insurance for the Vehicle. EZ Auto was directed to return the Vehicle to the Debtor upon receipt of the payments and proof of insurance.

The Debtor filed a Notice of Compliance (Doc. No. 18) confirming she had complied with the December 9, 2011 Order and EZ Auto had returned the Vehicle. The Court entered an Order on December 22, 2011 (Doc. No. 20) waiving any repossession fee for the Vehicle and setting an evidentiary hearing on the sanctions issue for February 6, 2012. The February 6, 2012 hearing was re-scheduled for February 13, 2012.

Mr. Holmes, at the February 13, 2012 hearing, asserted, as he had at the December 9, 2011 hearing, EZ Auto had the right to repossess the Vehicle. He contests EZ Auto violated the automatic stay. No counsel has appeared for EZ Auto as required by the Local Rules of this Court.¹

The Debtor has suffered actual damages as a result of EZ Auto's repossession of the Vehicle, including emotional distress, which is readily apparent, lost wages, attorney's fees, and car rental fees (Doc. No. 26).

Sanctions

Section 362(k) of the Bankruptcy Code provides for the impositions of sanctions where a creditor willfully violates the automatic stay:

[A]n 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.

¹ Local Bankr. R. 1074-1; *Palazzo v. Gulf Oil Corp.*, 764 F.2d 1381, 1385 (11th Cir. 1985) ("The rule is well established that a corporation is an artificial entity that can act only through agents, cannot appear *pro se*, and must be represented by counsel.").

11 U.S.C. § 362(k)(1). A “willful violation” of the automatic stay occurs when the creditor “(1) knew the automatic stay was invoked and (2) intended the actions which violated the stay.” Jove Eng’g, Inc. v. I.R.S. (In re Jove Eng’g, Inc.), 92 F.3d 1539, 1545 (11th Cir. 1996). The Debtor has the burden to establish a violation of the automatic stay occurred and such violation was willful, as defined by the Eleventh Circuit. Hardy v. I.R.S. (In re Hardy), 97 F.3d 1384, 1390 (11th Cir. 1996).

EZ Auto should have received the Notice of the Debtor’s bankruptcy filing on or about November 21, 2011. Upon receipt of the Notice EZ Auto knew the automatic stay of Section 362(a) was in effect. EZ Auto knew the Debtor was in bankruptcy and the automatic stay was in effect when it repossessed the Vehicle on November 28, 2011 as established by the statements of the individual who repossessed the Vehicle, who is an agent of EZ Auto and acted at EZ Auto’s direction.

EZ Auto, despite Debtor’s counsel’s communications to EZ Auto’s employees informing them of the automatic stay and requesting turnover of the Vehicle, retained the Vehicle knowing the stay was in effect. EZ Auto continued to retain the Vehicle and made no attempt to return it to the Debtor after the Court issued the Notice of the December 9, 2011 hearing.

EZ Auto had actual knowledge of the existence of the automatic stay when it repossessed the Vehicle. It repossessed the Vehicle and continued to retain the Vehicle with actual knowledge of the stay. EZ Auto, despite Debtor’s counsel’s communications and the Court’s issuance of a Notice of Hearing setting the December 9, 2011 hearing, took no action to correct the situation.

EZ Auto is a prepetition creditor of the Debtor pursuant to the Vehicle lease agreement. EZ Auto's repossession of the car was an attempt to collect its prepetition debt and enforce its lien rights. It violated the automatic stay by repossessing the Vehicle. EZ Auto's continued retention of the Vehicle constitutes a continuing violation of the stay.

EZ Auto took these actions while the automatic stay was in effect and with actual knowledge the Debtor had filed for bankruptcy protection. Its actions were knowing and intentional. EZ Auto intended the actions which violated the stay. It repossessed and retained the Vehicle in willful and intentional violation of the automatic stay. EZ Auto willfully violated the automatic stay of 11 U.S.C. Section 362(a). Jove Eng'g, Inc. v. I.R.S., 92 F.3d at 1555.

The Debtor has suffered actual damages as a result of EZ Auto's willful, intentional and continuing violations of the automatic stay, including emotional distress, which is readily apparent, attorney's fees, and car rental fees (Doc. No. 26). The Debtor is entitled to an award of actual damages of \$1,500.00, consisting of attorney's fees of \$500.00, car rental fees of \$441.13, and \$558.87 for emotional distress. These damages were directly caused by EZ Auto's willful, intentional and continuing violations of the automatic stay.

Attorney's fees of \$500.00 are reasonable pursuant to the First Colonial and Johnson factors.² Debtor's counsel's fee award is limited to \$500.00 and counsel is not entitled to receive a portion of any of the other damages awarded.

² The reasonableness of attorney's fees and costs is determined through an examination of the criteria enunciated by the Fifth Circuit Court of Appeals in In the Matter of First Colonial Corp. of Am., 544 F.2d 1291 (5th Cir. 1977) and Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). The twelve factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions involved;

Given the egregiousness of EZ Auto's actions, an award of actual and punitive damages is appropriate pursuant to 11 U.S.C. Section 362(k). In re Nibbelink, 403 B.R. 113, 120-21 (Bankr. M.D. Fla. 2009).³ The Debtor is entitled to an award of punitive damages of \$500.00 pursuant to 11 U.S.C. Section 362(k). The Court shall retain jurisdiction to enforce the provisions of this Order and to assess whether the imposition of additional sanctions may be appropriate.

Accordingly, it is

ORDERED, ADJUDGED and DECREED that EZ Auto committed intentional, willful and ongoing violations of the automatic stay of 11 U.S.C. Section 362(a) and an award of actual and punitive damages is appropriate pursuant to 11 U.S.C. Section 362(k); and it is further

ORDERED, ADJUDGED and DECREED that the Debtor's Emergency Motion (Doc. No. 9) is hereby **GRANTED** and the Debtor is awarded damages of \$2,000.00 against EZ Auto pursuant to 11 U.S.C. Section 362(k) and EZ Auto shall immediately pay \$2,000.00 to Debtor's counsel Barry Brumer whose address is Law Center of Barry Brumer, 2323 South Washington Avenue, Suite 216, Titusville, Florida 32780; and it is further

(3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and the length of the professional relationship with the client; (12) awards in similar cases. Johnson, 488 F.2d at 714.

³ The Court, at the February 13, 2012 hearing, issued an oral ruling in which it awarded the Debtor actual damages of \$1,500.00. The Court, pursuant to the Order entered on February 17, 2012 (Doc. No. 28), withdrew its oral ruling because, upon further review of this matter, it determined a punitive damage award is warranted pursuant to 11 U.S.C. Section 362(k). The oral ruling is not controlling; a written order is controlling. Barger v. City of Cartersville, Ga., 348 F.3d 1289, 1293 (11th Cir. 2003) ("A court's decision does not become an entry of judgment until the date it is entered as a written order."); *see* FED. R. CIV. P. 58 (requiring every judgment to be set out in a written document); FED. R. BANKR. P. 9021 ("A judgment or order is effective when entered under Rule 5003.").

ORDERED, ADJUDGED and DECREED that EZ Auto is hereby enjoined pursuant to 11 U.S.C. Sections 362(a) and 105(a) from taking any further collection or lien enforcement actions against the Debtor; and it is further

ORDERED, ADJUDGED and DECREED that the Court hereby retains jurisdiction over this matter to enforce the provisions of this Order and to assess whether the imposition of additional sanctions may be appropriate.

A separate Judgment consistent with these findings and rulings shall be entered contemporaneously.

Dated this 27th day of February, 2012.

/s/ Arthur B. Briskman
ARTHUR B. BRISKMAN
United States Bankruptcy Judge