

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

In re:

JOSE EULOGIO CARRILLO,

Case No. 6:09-bk-09152-ABB

Chapter 7

Debtor.

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ORDER

This matter came before the Court on the Motion for Sanctions (Doc. No. 21) filed by the *pro se* Debtor Jose Eulogio Carrillo against Branch Banking & Trust (“BB&T”) and BB&T’s Motion for Summary Judgment (Doc. Nos. 24, 28). A hearing was held on December 9, 2009 at which the Debtor, the Debtor’s friend and interpreter Candido A. Peralta, Jr. (“Peralta”), and counsel for BB&T appeared. An Order was entered on December 10, 2009 (Doc. No. 37) directing the Debtor to file a response to BB&T’s Motion. The Debtor filed a response on December 22, 2009 (Doc. No. 37).

BB&T’s Motion for Summary Judgment is due to be granted and the Debtor’s Motion for Sanctions is due to be denied. The Court makes the following findings and conclusions after reviewing the pleadings and evidence, hearing proffers and argument, and being otherwise fully advised in the premises.

Case Events

The Debtor filed this case *pro se* on June 29, 2009 (“Petition Date”). His bankruptcy filing was caused by the loss of his employment as a groundskeeper for the Seminole County School District. He speaks Spanish and his English language skills are limited. He owned on the Petition Date a 2007 Chevy Aveo (“Vehicle”) in which BB&T holds a security interest. He listed BB&T as a creditor in his Schedules (Doc. No. 1) for

a debt of \$13,765.14 and BB&T received notice of the Debtor's bankruptcy filing on or about July 2, 2009 pursuant to the Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines (Doc. No. 9). The Debtor did not file a statement of intention indicating his intention with respect to his retention or surrender of the Vehicle pursuant to 11 U.S.C. Section 521(a)(2)(A).

A man appeared at Peralta's home located at 5312 Millenia Boulevard, Apartment 2102, Orlando, Florida 32839 with a tow truck at 11:00 p.m. on August 27, 2009 seeking to repossess the Vehicle. The Debtor and Peralta were present. The man was employed with Certified Investigation Recovery located in Miami, Florida with Florida State License Number R9000118 and acting as an agent for BB&T.

The Debtor represented:

- (i) The repossession agent told him the automatic stay of 11 U.S.C. Section 362(a) was no longer in effect because the Debtor had been granted a discharge pursuant to a final discharge order.
- (ii) The Debtor was threatened with arrest if he did not turn over the Vehicle.
- (iii) He requested the repossession agent provide documents substantiating his authority to repossess the Vehicle, but the agent refused to provide any documents, stating they were confidential, and repossessed the Vehicle.
- (iv) Peralta was present and witnessed the events.
- (v) The Debtor contacted BB&T by telephone on August 28, 2009 and a BB&T employee told him BB&T was authorized to repossess the Vehicle pursuant to a discharge order.

The statements made by BB&T's agents the Debtor had been granted a discharge were untrue. The Debtor's discharge was entered after the repossession on October 22, 2009 (Doc. No. 16).

The Debtor filed his Motion on October 21, 2009 through non-electronic means. The Motion is an untitled three-page hand-written letter in which the Debtor requests: “Please investigate and find out if [there] is a violation of State/Federal law.” Attached to the Motion is a BB&T account statement dated June 11, 2009 for the Vehicle and a copy of the repossession agent’s card. The Court entered the description “Motion for Sanctions for Violation of the Automatic Stay” as the descriptive CM/ECF docket entry and construes the Motion as a motion for sanctions pursuant to 11 U.S.C. Section 362(k).

The Debtor explained he did not immediately file the Motion because he did not understand the legal procedures. He continues to be unemployed, with no vehicle, and does not have the resources to engage counsel.

Motion for Summary Judgment

BB&T filed a Motion for Summary Judgment requesting the Debtor’s Motion be denied pursuant to Federal Rule of Civil Procedure 56 and Federal Rule of Bankruptcy Procedure 7056. BB&T asserts it was authorized to repossess the Vehicle on August 27, 2009, prior to discharge, because the Debtor did not file a statement of intention and the automatic stay expired by operation of law pursuant to 11 U.S.C. Section 362(h)(1). It contends the Vehicle loan was in default post-petition due to the Debtor’s failure to make the June 1, 2009 payment and all subsequent payments (Doc. No. 28). A principal balance of \$13,558.03 is owed and BB&T values the Vehicle at \$5,900.00.

Every debtor is required to file, within thirty days of the petition date, a statement of intention setting forth his intention as to the retention or surrender of property encumbered by secured debt. 11 U.S.C. § 521(a)(2)(A); FED. R. BANKR. P. 1007(b)(2). Section 362(h)(1) of the Bankruptcy Code provides:

In a case in which the debtor is an individual, the stay provided by subsection (a) is terminated with respect to personal property of the estate or of the debtor securing in whole or in part a claim, or subject to an unexpired lease, and such personal property shall no longer be property of the estate if the debtor fails within the applicable time set by section 521(a)(2)—

(A) to file timely any statement of intention required under section 521(a)(2) with respect to such personal property or to indicate such statement that the debtor will either surrender such personal property or retain it

11 U.S.C. § 362(h)(1).

The Debtor has not filed a statement of intention. The automatic stay of 11 U.S.C. Section 362(a) arose on the Petition Date, but terminated by operation of law on July 29, 2009, thirty days after the Petition Date, due to the Debtor's failure to file a statement of intention. 11 U.S.C. §§ 521(a)(2)(A), 362(h)(1).

The Debtor did not realize or understand he was required to file a statement of intention. The Court, pursuant to the Court's administrative protocol, issues a Notice of Incomplete and/or Deficient Filing and Opportunity to Cure Deficiencies (Form 6ndf1007) within five days or less of a bankruptcy filing where the debtor did not file a statement of intention with his petition. The Notice provides: "The Statement of Intentions was not filed. The debtor(s) is directed to file a Statement of Intentions no later than 30 days from the petition file date." Failure to comply with a deficiency notice may result in dismissal of the case, pursuant to the Notice's opening paragraph.¹

The Court did not issue a deficiency notice to the Debtor informing him he was required to file a statement of intention. The Court is not mandated to issue deficiency

¹ The failure to file a statement of intention does not require automatic dismissal of a case pursuant to 11 U.S.C. Section 521(i)(1).

notices in such situations. The Bankruptcy Court for the Middle District of Florida created the deficiency notice protocol to assist case administrators with tracking filing deficiencies and to provide debtors with an opportunity to remedy filing deficiencies. The Debtor may have acted had the Court issued a deficiency notice, but, despite the non-issuance of a deficiency notice, the Debtor had a statutory duty to file a statement of intention.

BB&T, based upon the technicalities of the Bankruptcy Code, as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, is correct the automatic stay was no longer in effect when the Vehicle was repossessed on August 27, 2009. BB&T's actions, while technically within the parameters of Section 362(h)(1), were not prudent. It, knowing the Debtor is *pro se* and unlikely to understand the technicalities of Section 362(h), took aggressive action and repossessed the Vehicle. It did not wait for the entry of the discharge order, file a precautionary motion, or communicate with the Debtor.

The more prudent course of action would have been to file a motion requesting relief from the automatic stay pursuant to 11 U.S.C. Section 362(d), or a motion to confirm termination of the automatic stay pursuant to 11 U.S.C. Section 362(j), which is the customary practice of secured lenders in this Court. The cases cited by BB&T reflect secured lenders routinely file Section 362(j) motions before repossessing vehicles.²

BB&T does not have clean hands. Its agents made material misrepresentations to the Debtor regarding BB&T's basis to repossess the Vehicle and threatened the Debtor with arrest. Such actions may constitute violations of consumer protection laws.

² In re Haselton, No. 6:08-bk-05745-ABB, 2008 WL 5636565 (Bankr. M.D. Fla. Oct. 22, 2008); In re Espey, 347 B.R. 785 (Bankr. M.D. Fla. 2006); In re Record, 347 B.R. 450 (Bankr. M.D. Fla. 2006).

The Debtor has not established BB&T committed a willful violation of the automatic stay pursuant to 11 U.S.C. Section 362(k). The automatic stay terminated by operation of law due to the Debtor's failure to file a statement of intention and was not in effect when BB&T repossessed the Vehicle. BB&T did not commit a willful violation of the automatic stay, but its actions do not comport with available procedures. Its Motion for Summary Judgment is due to be granted and the Debtor's Motion is due to be denied.

While BB&T was entitled to exercise its self-help remedies due to the termination of the automatic stay, it did not act prudently. The Debtor was provided no notice of the intended repossession and no order had been entered by the Court regarding the status of the automatic stay. Where a debtor is *pro se* and English is not his first language, such aggressive action by a secured lender could result in an unnecessarily provocative or dangerous situation.

Accordingly, it is

ORDERED, ADJUDGED and DECREED that BB&T's Motion for Summary Judgment (Doc. No. 24) is hereby **GRANTED** and the Debtor's Motion for Sanctions (Doc. No. 21) is **DENIED**.

Dated this 8th day of January, 2010.

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