

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

In re:

YANETH Z. RIVERA,

Case No. 6:09-bk-00340-ABB

Chapter 13

Debtor.

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ORDER

This matter came before the Court on the Emergency Motion for Sanctions (Doc. No. 42) (“Motion”) filed by the Debtor Yaneth Z. Rivera (“Debtor”) against The Fairville Company, L.P. (“Fairville”) requesting an award of sanctions pursuant to 11 U.S.C. Section 362(k). An expedited hearing was held on August 13, 2009 and a continued hearing was held on August 18, 2009 at which the Debtor, counsel for the Debtor, and counsel for Fairville appeared.

The parties, pursuant to the Court’s directive, filed post-hearing briefs (Doc. Nos. 50, 51). The Motion is due to be denied. The Court makes the following findings and conclusions after reviewing the parties’ submissions, hearing live proffers and argument, and being otherwise fully advised in the premises.

Semi Truck and Trailer

The Debtor filed this case on January 12, 2009 (“Petition Date”) and is married to Luis F. Rivera (“Mr. Rivera”), who is a non-debtor. Mr. Rivera is employed as a truck driver with Pillado Trucking, Inc. He utilizes in his employment a 1992 Freightliner semi truck (VIN 1FUWDPYAONH498033), also known as a “tractor” (the “Semi Truck”), and a 2005 Warren Model WRDT2228-2AS 28 foot aluminum dump trailer (VIN 1W9AC45225P347445) (the “Trailer”).

The Debtor filed the Motion on an emergency basis asserting Fairville willfully violated the automatic stay by repossessing the Semi Truck and Trailer post-petition. The Debtor and her counsel represented in the Schedules (Doc. No. 41) and in open Court she has an ownership interest in the equipment. The Court proceeded with this matter understanding the Debtor had an interest in the equipment. Their representations were not accurate. They presented inaccurate and incomplete information and confused the issues, causing the Court to expend much effort in ascertaining the facts.

The Debtor has no ownership interest in the Trailer or the Semi Truck. The Certificates of Title presented by Fairville reflect Mr. Rivera owns the Semi Truck and Trailer individually (Doc. No. 50). The Semi Truck and Trailer are not property of the bankruptcy estate.

The Semi Truck is unencumbered and the Trailer is encumbered by a purchase money security interest held by Fairville pursuant to a Security Agreement executed by Mr. Rivera individually on March 25, 2005 (Doc. No. 50). The Security Agreement requires Mr. Rivera to repay Fairville its \$23,641.00 advance, plus interest, through forty-two monthly payments of \$762.76. Fairville is listed as a lien holder on the Trailer's Certificate of Title.

The Debtor has no primary responsibility for the Security Agreement debt. She has contingent liability for the debt pursuant to a Guaranty. She executed a Guaranty on March 25, 2005 guaranteeing payment of the Security Agreement indebtedness and all collection costs and expenses incurred by Fairville (Doc. No. 50, ¶¶1, 2).¹ Her obligation

¹ The copy of the Guaranty presented by Fairville is only partially legible due to the note pasted to page one which obscures Paragraphs 1 through 5.

to Fairville is contingent upon a default by Mr. Rivera and by demand by Fairville pursuant to the Guaranty.

Repossession and Motion for Sanctions

Mr. Rivera defaulted on his Security Agreement payments in September 2008 (Doc. No. 50, ¶4). Fairville repossessed the Trailer *and* Semi Truck on July 17, 2009 even though Fairville has no security interest in the Semi Truck. Fairville asserts: “Although the Note is collateralized by the trailer, the tractor was affixed to the trailer and could not be repossessed without taking possession of both units.”² Fairville transported the Semi Truck and Trailer to Tampa, Florida. It did not establish its authority or right to repossess the Semi Truck.

The Riveras believed the Semi Truck and Trailer had been stolen and filed a report with their local police department. Bankruptcy counsel contacted James Meyers, Fairville’s Bankruptcy Litigation Manager, by telephone on July 22, 2009 and they discussed the repossession. Non-bankruptcy counsel for the Riveras sent a letter to Fairville on July 30, 2009 asserting a civil theft claim pursuant to Fla. Stat. Section 772.11 and demanding the return of the Semi Tractor. The July 30, 2009 letter makes no mention of the Debtor’s bankruptcy case or the automatic stay.

Fairville, despite its communications with counsel, did not return the Semi Truck or Trailer and made payment demands. Mr. Rivera or the Debtor deposited \$4,517.52 into Fairville’s Wachovia Bank account and Mr. Rivera paid \$800.00 cash to Fairville’s repossession agent Certified Recovery Specialist on July 31, 2009 for alleged storage and inventory costs (Doc. No. 42, Ex. A). Fairville released the Semi Truck to the Riveras on

² Doc. No. 50, ¶4; Meyers’ Affidavit.

July 31, 2009 in Tampa, Florida, but refused to release the Trailer unless an additional \$800.00 was paid and the Riveras signed a waiver and release of rights.

The Debtor filed the Motion for Sanctions on August 7, 2009 asserting Fairville's actions constitute willful violations of the automatic stay and seeking an award of actual damages and punitive damages. The Court, at the August 13, 2009 hearing based upon the Debtor's representations, directed Fairville to return the Trailer to the Riveras by 5:00 p.m. on August 13, 2009. Fairville released the Trailer and the Riveras retrieved the Trailer from Tampa, Florida. The parties confirmed at the August 18, 2009 hearing the Riveras were in possession of the Semi Truck and Trailer.

Fairville asserts: (i) the debt is a business debt and the co-debtor stay of 11 U.S.C. Section 1301(a) does not protect Mr. Rivera; (ii) the Debtor has no ownership interest in the Semi Truck or Trailer; (iii) Fairville had no notice of any alleged stay violation; (iv) it made "immediate efforts to resolve the situation upon [receipt] of the Debtor's motion"; and (v) the Debtor suffered no damages.

Automatic Stay

The Debtor has the burden of proof to establish Fairville violated the automatic stay and its violation was willful. Hardy v. I.R.S. (In re Hardy), 97 F.3d 1384, 1390 (11th Cir. 1996). The automatic stay of 11 U.S.C. Section 362(a) arose on the Petition Date by operation of law enjoining all entities from:

- (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

...

- (4) any act to create, perfect, or enforce any lien against property of the estate;
- ...
- (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title.

11 U.S.C. §§ 362(a)(1), 362(a)(4), 362(a)(6). A “claim” is broadly defined to mean “right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.” 11 U.S.C. § 101(5)(A).

Fairville, pursuant to the Guaranty, holds a prepetition claim against the Debtor as defined by Section 101(8). She listed Fairville as a creditor in Schedule F for a general unsecured debt of \$2,380.76 (Doc. No. 1). Notice of the Debtor’s bankruptcy filing and the existence of the automatic stay was issued to Fairville on January 17, 2009 (Doc. No. 11). Fairville has not sought stay relief. The automatic stay of Section 362(a) continues to be in full force and effect.

The automatic stay barred Fairville from taking any action to enforce its lien against property of the estate or to collect its prepetition claim against the Debtor. It was not barred from taking collection action against Mr. Rivera. Mr. Rivera is not protected by the co-debtor stay of Section 1301(a). The Security Agreement debt constitutes a commercial debt and not a consumer debt pursuant to the plain and unambiguous language of the Security Agreement (Doc. No. 50, p. 3). The Debtor acknowledged in Schedule F (Doc. No. 1) the indebtedness is a “business expense.”

This matter does not implicate 11 U.S.C. Section 362(a)(4). Fairville did not take any action against property of the estate. The Semi Truck and Trailer are the property of Mr. Rivera and not property of the Debtor. The Debtor did not establish Fairville

violated Section 362(a)(1) or 362(a)(6). She did not establish Fairville made any collection demands against her. She presented no demand letters or other evidence of collection actions directed against her. Her Motion for Sanctions is due to be denied.

Fairville, if it made a payment demand upon the Debtor post-petition, could be found to be in violation of the stay. Fairville had notice of the Debtor's bankruptcy case from its onset. It is a sophisticated commercial lender and should have obtained relief from the automatic stay if it intended to take any action against the Debtor.

Accordingly, it is

ORDERED, ADJUDGED and DECREED that the Debtor's Motion for Sanctions (Doc. No. 42) is hereby **DENIED**.

Dated this 5th day of November, 2009.

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