

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

In re:

Case No. 6:08-bk-12510-ABB

VETON ZIJA KEPUSKA
ILIRIANE KEPUSKA,

Debtors.

Chapter 13

VETON ZIJA KEPUSKA
ILIRIANE KEPUSKA,

Plaintiffs,

vs.

Adv. No. 6:09-ap-604-PMG

NEWTEK SMALL BUSINESS
FINANCE, INC.,

Defendant.

**FINDINGS OF FACT, CONCLUSIONS OF LAW,
AND MEMORANDUM OPINION**

THIS CASE came before the Court for a final evidentiary hearing to consider the Amended Complaint for Violation of Stay, Turnover and Conversion filed by the Debtors, Veton Zija Kepuska and Iliriane Kepuska (the Kepuskas).

Newtek Small Business Finance, Inc. (Newtek) is a creditor of the Kepuskas. After the filing of the Kepuskas' bankruptcy petition, Newtek caused certain stock owned by the Kepuskas to be sold. In

their Complaint, the Kepuskas assert that the stock sale constituted a willful violation of the automatic stay, and that Newtek continued to violate the stay by failing to restore the status quo after receiving actual notice of their bankruptcy petition.

The Court finds that the initial violation of the stay was inadvertent. The Court also finds that Newtek's delay in returning the funds to the Kepuskas constituted a continuing violation of the stay, but that the continuing violation was not willful for purposes of §362 of the Bankruptcy Code. Finally, the Court finds that the Kepuskas did not act diligently to mitigate their damages, either in their efforts to notify Newtek of the bankruptcy, or in their response to Newtek's violation of the stay.

Under these circumstances, the Court will require Newtek to pay the Kepuskas the sum of \$3,627.00 as the total damages awarded in this case. The sum represents the capital gains tax paid by the Kepuskas on the sale of their stock, and the Court finds that reimbursement of this sum by Newtek to the Kepuskas is the appropriate resolution of this dispute.

Background

On January 20, 2004, Newtek loaned Kepuska Enterprises, Inc. the sum of \$200,000.00 pursuant to a Note and Security Agreement signed by Iliriane Kepuska as President of Kepuska Enterprises, Inc. dba KaBloom of Melbourne FL. (Debtors' Exhibits 1, 2). The loan was personally guaranteed by the Kepuskas. (Debtors' Exhibit 3).

Additionally, the Kepuskas individually signed a Collateral Account Control Agreement, which provided that "Client has granted Creditor a security interest in Merrill Lynch account 885-10333 ("Account") pursuant to a separate Security Agreement between Client and Creditor." (Debtors' Exhibit 4). The Merrill Lynch Account was opened in the name of "Iliriane Kepuska and Veton

Kepuska JTWROS Pledge Collateral to Newtek,” and contained 5,333 shares of Nuance Communications, Inc. (Newtek’s Exhibit 5). The Kepuskas intended to grant a security interest in the Account, but did not sign a separate Security Agreement identifying the Account as collateral.

Kepuska Enterprises, Inc. defaulted under the Note and Security Agreement in August of 2008. (Newtek’s Exhibits 6, 7).

On December 5, 2008, Newtek filed a Complaint against Kepuska Enterprises, Inc. and the Kepuskas individually in the Circuit Court for Brevard County, Florida. (Debtors’ Exhibit 31).

On December 29, 2008, the Kepuskas served Newtek’s attorney with a Motion for Extension of Time to respond to the Complaint in the State Court action. (Newtek’s Exhibit 11).

Two days later, on December 31, 2008, the Kepuskas filed a petition under Chapter 13 of the Bankruptcy Code. On their schedules, the Kepuskas listed Newtek as a secured creditor with a non-purchase money security interest in certain assets, including the Merrill Lynch Account. The only address provided by the Kepuskas for Newtek was P.O. Box 12086, Newark, New Jersey 07101.

On January 8, 2009, Notice of the Debtors’ Chapter 13 Case was mailed to Newtek at the Post Office Box in New Jersey. (Main Case, Doc. 11).

On January 12, 2009, Gary M. Golden (Golden), as Newtek’s Vice President, wrote Merrill Lynch a letter regarding “Pledged Collateral Account #885-10333,” and stated that Newtek “requires that Merrill Lynch liquidate said Account, making a check payable to Newtek Small Business Finance, Inc. and forwarding all proceeds to Newtek” at its office in New York. (Debtors’ Exhibit 12).

On January 13, 2009, the stock in the Account was sold pursuant to Newtek’s instructions. (Debtors’ Exhibit 20).

On January 14, 2009, Newtek received the Notice of Chapter 13 Case that had been forwarded to its New York office from the Post Office Box in New Jersey. On the same date, January 14, 2009, Golden asked Newtek's attorney to contact the Kepuskas' attorney for instructions regarding how the Kepuskas preferred to handle the stock sale.

On January 21, 2009, Merrill Lynch issued a check to Newtek in the amount of \$49,673.63, representing the proceeds of the stock sale. (Debtors' Exhibit 21). Newtek did not deposit or cash the check.

On February 5, 2009, the Kepuskas' attorney wrote a letter to Newtek's attorney demanding the "return of the converted stocks" within ten days of the letter. (Newtek's Exhibit 13).

On February 12 and February 13, 2009, Newtek's attorney corresponded with the Kepuskas' attorney indicating Newtek's willingness to re-acquire the stock for the Kepuskas' account. (Newtek's Exhibits 14, 15, 16).

On February 20, 2009, the Kepuskas agreed to a resolution of the alleged violation of the stay if Newtek (1) deposited the proceeds of the Merrill Lynch check into the Merrill Lynch Account to purchase 5,333 shares of Nuance stock; (2) applied any surplus funds to the loan; and (3) provided an accounting of the funds. (Newtek's Exhibits 17, 18).

On February 24, 2009, Golden wrote the Kepuskas' attorney that Newtek had been advised by Merrill Lynch that Account #885-10333 was closed, and that any new accounts at Merrill Lynch must contain a minimum of \$500,000.00. According to Golden, one option was for the Kepuskas "to locate a new broker to house the account." (Newtek's Exhibit 19).

On February 27, 2009, the Kepuskas' attorney advised Newtek that he was attempting to open a replacement account at Morgan Stanley to receive the funds and stock. (Newtek's Exhibit 20). The parties thereafter exchanged additional correspondence regarding the form of the collateral agreement for the replacement account. (Newtek's Exhibits 22, 23).

On March 26, 2009, Newtek's attorney summarized the parties' positions in an email to the Kepuskas' attorney:

We have requested to apply the funds against the debt balance and you have repeatedly indicated your clients wished to have the funds reinvested into the same shares of stock and then held subject to the bank's lien. You have been unable to obtain a location for the account and all pledge documents will need to be reviewed and approved by NEWTEK.

(Debtors' Exhibit 11). On the same date, March 26, 2009, the Kepuskas' attorney replied that the Kepuskas "wishe[d] the return of the exact number of shares taken in violation of the stay," and that the Kepuskas had "an account for deposit of the shares and the brokerage company has indicated they can arrange those shares be pledged as security to NEWTEK." (Newtek's Exhibit 23). The correspondence did not contain any identifying information regarding a new account.

The following day, March 27, 2009, the Kepuskas filed a Complaint against Newtek in the Bankruptcy Court for violation of the automatic stay. (Doc. 1).

On May 29, 2009, Newtek's attorney informed the Kepuskas' attorney that Newtek remained willing to comply with the Kepuskas' instructions, and had understood that the Kepuskas were opening a replacement account and finalizing the pledge documents prior to filing an adversary proceeding against Newtek. (Debtors' Exhibit 15).

On June 4, 2009, the Kepuskas' attorney asked Newtek's attorney to review a form Third Party Account Control Agreement for a proposed replacement account at Wells Fargo, and stated that "if adequate the account will be established and we can move forward." (Debtors' Exhibit 24).

On August 11, 2009, Merrill Lynch re-issued a check in the amount of \$49,673.63 to Newtek to replace the prior check that had not been cashed. (Debtors' Exhibit 49).

On November 12, 2009, Newtek delivered a signed Account Control Agreement to Wells Fargo, together with the endorsed Merrill Lynch check for deposit into the Kepuskas' replacement brokerage account at Wells Fargo. (Newtek Exhibit 27). The funds were deposited into the account and made available to the Kepuskas on November 19 or November 20, 2009. (Debtors' Exhibit 46).

Discussion

In their Complaint, the Kepuskas assert that the sale of stock on January 13, 2009, constituted a willful violation of the automatic stay, and that Newtek continued to violate the stay by failing to restore the status quo after receiving actual notice of their bankruptcy petition.

I. The initial violation

Section 362(a) of the Bankruptcy Code provides that the filing of a bankruptcy petition operates as a stay of all actions to recover a claim against the debtor, and of any act to exercise control over property of the estate. 11 U.S.C. §362(a)(1), (3). "The automatic stay is effective against the world regardless of whether a party had notice of the bankruptcy filing or of the automatic stay." In re Newgent Golf, Inc., 402 B.R. 424, 433 (Bankr. M.D. Fla. 2009)(citing In re Peralta, 317 B.R. 381, 389 (9th Cir. BAP 2004)).

In this case, the Debtors filed their petition under Chapter 13 of the Bankruptcy Code on December 31, 2008. On the petition date, the Debtors were the owners of Merrill Lynch Account Number 885-10333, and listed the Account on their bankruptcy schedules. On January 12, 2009, Newtek instructed Merrill Lynch to “liquidate said Account” and send the proceeds to Newtek. The stock in the Account was sold on January 13, 2009. Newtek’s conduct was a violation of the automatic stay provided by §362(a) of the Bankruptcy Code.

The Court finds, however, that the violation was not a “willful” violation as alleged in the Kepuskas’ Complaint. For purposes of §362 of the Bankruptcy Code, a violation of the automatic stay is “willful” if (1) the creditor knew that the stay was invoked, and (2) intended the act that constituted the violation. In re Comoletti, 2009 WL 4267343, at *5 (Bankr. M.D. Fla.); In re Boczar, 2007 WL 4707269, at *3 (Bankr. M.D. Fla).

In this case, Newtek did not know that the stay had been invoked at the time that it caused the stock to be sold, because (1) notice of the Kepuskas’ bankruptcy had been sent to a post office box that was maintained by Newtek’s lender to process loan payments, and (2) Newtek did not receive the notice until after the stock sale had occurred.

On January 20, 2004, when the loan agreement between Newtek and Kepuska Enterprises, Inc. was entered, Newtek’s address was 462 Seventh Avenue, 14th Floor, New York, New York. The Security Agreement entered on that day provides that any notices given under the Agreement must be served on Newtek at the New York address. (Newtek’s Exhibit 3). As of 2007, Newtek’s principal place of business was 1440 Broadway, 17th Floor, New York, New York. The New York location was also its mailing address. (Debtors’ Exhibits 28, 29). The Broadway address in New York also appears

on the Delinquent Payment Statements sent to Kepuska Enterprises in 2008, as the office to contact in the event of any questions regarding the Statement. (Newtek's Exhibit 8).

The Notice of the Kepuskas' bankruptcy case, however, was sent to P.O. Box 12086, Newark, New Jersey 07101-2086. The New Jersey Post Office box appears on the Delinquent Payment Statements as the "payment processing" address. Gary Golden, the senior vice president of Newtek, testified that the Post Office box was a lockbox that belonged to Newtek's lender. If mail other than a loan payment was sent to the Post Office box, Golden testified that the lender would forward the item to Newtek by regular mail.

The record shows that the Notice of the Kepuskas' bankruptcy was mailed to the Post Office box on January 8, 2009. Golden testified that the lender forwarded the Notice, and that Newtek received the Notice in its New York office on January 14, 2009. Golden's testimony was credible and consistent with the documentation presented in this case.

Under these circumstances, the Court finds that Newtek did not receive notice of the Kepuskas' bankruptcy petition until January 14, 2009, and that Newtek did not know that the stay had been invoked when it instructed Merrill Lynch to liquidate the Account on January 12, 2009, or when the stock was actually sold on January 13, 2009. The initial violation of the stay was not a "willful" violation of the stay under §362 of the Bankruptcy Code.

II. A creditor's duty to restore the status quo

Once a creditor learns that it has violated the automatic stay, it is under an obligation to take affirmative action to correct the violation. In re Combs, 2006 WL 6591825, at *2 (Bankr. N.D. Ga.).

"A creditor has an affirmative duty to return the property and restore the status quo once it learns its

actions violated the stay.” In re Wariner, 16 B.R. 216, 218 (Bankr. N.D. Texas 1981)(quoted in In re Combs, 2006 WL 6591825, at *2). A creditor in possession of property of the estate has a duty under §362 to return the property and “re-establish the status quo as of the day of the filing of the petition.” In re Belcher, 189 B.R. 16, 18 (Bankr. S.D. Fla. 1995). “The failure to remedy or undo a stay violation after receiving notice of a bankruptcy case constitutes a willful violation.” In re Comoletti, 2009 WL 4267343, at *5.

In complying with its duty to restore the status quo, however, a creditor is entitled to a reasonable time within which to respond to the violation. In re Belcher, 189 B.R. at 18-19. A creditor should address an inadvertent stay violation with “reasonable promptness.” In re Combs, 2006 WL 6591825, at *3.

In this case, the Court finds that Newtek acted with reasonable promptness once it learned of the Kepuskas’ bankruptcy petition. It did not cash or deposit the check from Merrill Lynch, or take any other action to dispose of the funds. Instead, Newtek held the check while it attempted to resolve the matter with the Kepuskas.

Perhaps more importantly, Newtek was pro-active in its initial efforts to correct the violation. Golden testified that he received Notice of the Kepuskas’ bankruptcy on January 14, 2009, and that he asked Newtek’s attorney to contact the Kepuskas’ attorney on the same date. On February 12, 2009, after the Kepuskas had asked if the sale could be reversed, Newtek’s attorney advised the Kepuskas’ attorney that Newtek was “in the process of contacting [Merrill Lynch] to re acquire the stock which had been liquidated,” and that it “is the intent the shares will be replaced and the status quo restored.”

(Newtek's Exhibits 14, 15). At that time, the parties had been communicating for several weeks about the relative positions of the parties. (Newtek's Exhibit 16).

This is not a situation in which a creditor was cavalier in its regard for the automatic stay, or in which the creditor was unwilling to return the repossessed property to the debtor. Newtek initially acted with reasonable promptness to address its inadvertent violation of the stay.

Despite Newtek's initial efforts to cure the violation, however, the proceeds of the stock sale were not returned to the Kepuskas until November 12, 2009, ten months after the Account was liquidated. On that date, Newtek delivered a signed Account Control Agreement to Wells Fargo, together with the endorsed Merrill Lynch check for deposit into the Kepuskas' brokerage account at Wells Fargo. (Newtek Exhibit 27).

The ten-month delay in returning the funds is significant, and constitutes a continuing violation of the automatic stay. Under the specific circumstances of this case, however, the Court finds that the continuing violation was not "willful" within the meaning of §362 of the Bankruptcy Code.

Newtek's delay in returning the funds was not a "willful" violation for at least three reasons.

First, the property involved in this case is publicly-traded stock, and its value fluctuated from day to day. Newtek claimed that the sale of the Nuance stock could not be reversed, and that it could not re-purchase the same shares that had been sold. Additionally, the price of the stock had increased after the sale. Accordingly, Newtek contended that the proceeds of the sale would not purchase the same number of shares that were sold on January 13, 2009. As their remedy for Newtek's violation, however, the Kepuskas sought to recover the exact number of shares of stock that they owned on the petition date, regardless of its value. That is, the Kepuskas requested the return of 5,333 shares of

Nuance stock. (Newtek's Exhibits 13, 18, 23). Consequently, Newtek could not cure its violation in accordance with the Kepuskas' wishes by simply turning over the stock or its proceeds.

Second, on the date that the bankruptcy petition was filed, Newtek asserted a security interest in the Kepuskas' Merrill Lynch Account. Consequently, Newtek contends that it was not required to deliver the sale proceeds to the Kepuskas for deposit into an unencumbered account, because such a deposit would result in the surrender of its security interest in the property. In order to restore the parties to the status quo as of the petition date, Newtek contends that it was only required to return the funds to an account that was subject to Newtek's security interest. In other words, restoration of the status quo depended on the existence of a pledged account established by the Kepuskas.

Finally, on February 20, 2009, the Kepuskas' attorney advised Newtek's attorney that the Kepuskas agreed to resolve the matter, provided Newtek deposited "the necessary funds into my clients' account with Merrill Lynch to purchase 5,333 shares of Nuance Stock." (Newtek's Exhibit 18). Newtek generally accepted the offer, but was informed that the Kepuskas' Merrill Lynch account had been closed, and that a new account would need to be established at another brokerage to receive the funds. (Newtek's Exhibit 19). On February 27, 2009, the Kepuskas' attorney wrote that he was "talking with Morgan Stanley about setting up the new account needed," and Newtek's attorney replied with information regarding the pledge form for the new account. (Newtek's Exhibits 20, 22). Based on these exchanges, Golden testified that he believed the matter was resolved as of February 27, 2009, and that Newtek was simply awaiting the new account information from the Kepuskas.

The new account was not immediately established, and the parties communicated intermittently over the spring, summer, and early fall of 2009. (Newtek's Exhibits 23, 24, 25, and 26). Consequently,

even though Newtek did not immediately turn over the stock proceeds to the Kepuskas, it appears that much of the delay occurred while the parties discussed the location and documentation for the new account. The funds were ultimately delivered to the Kepuskas' new account at Wells Fargo in November of 2009.

Based on the foregoing, the Court finds that Newtek acted with reasonable promptness to cure its inadvertent violation of the automatic stay. Despite its initial efforts, however, Newtek did not return the funds to the Kepuskas for approximately ten months after the violation occurred. The delay in returning the funds constituted a continuing violation of the stay. Under the circumstances of this case, however, the Court finds that the continuing violation was not a "willful" violation under §362 of the Bankruptcy Code, because of the fluctuation in the stock's value after the sale, the status of Newtek's claimed security interest in the Account, and the parties' ongoing negotiations to resolve the matter.

III. A debtor's duty to mitigate damages

Newtek inadvertently violated the automatic stay by causing the Kepuskas' stock to be sold, and Newtek's delay in returning the stock or its proceeds to the Kepuskas constituted a continuing, but not a "willful," violation of the stay. The Kepuskas have requested damages based on Newtek's violations.

Under §362 of the Bankruptcy Code, "debtors have a duty to mitigate the damages that may arise due to a creditor's violation of the automatic stay." In re Beasley, 2007 WL 7022206, at *4 (Bankr. S.D. Ga). "The filing of a bankruptcy petition does not empower a debtor with unlimited rights and free debtor of all obligations while eliminating all rights of creditors." In re Belcher, 189 B.R. at 18.

In cases involving automatic stay violations, in which debtors frequently file motions for contempt or for damages under 11 U.S.C. §362(h), courts have overwhelming[ly] held that debtors have an obligation to attempt to mitigate damages prior to seeking court intervention.

In re Oskentowicz, 324 B.R. 628, 630 (Bankr. E.D. Michigan 2005). In Oskentowicz, the Court indicated that the reason for the duty is to prevent the “unnecessary escalation” of matters that could be resolved without litigation. In re Oskentowicz, 324 B.R. at 630-31.

In this case, the Kepuskas failed to mitigate their damages in two respects.

First, the Kepuskas did not use reasonable efforts to notify Newtek when they filed their bankruptcy petition. The Kepuskas listed only one address for Newtek on their bankruptcy schedules. The address was a Post Office Box in New Jersey, which appeared on Newtek’s Payment Statements as the address for Payment Processing.

Additional information was available to the Kepuskas, however, which indicated that Newtek’s address for effective service was at its office in New York City. The Payment Statements used by the Kepuskas, for example, provided that any questions regarding the loan were to be directed to Newtek at 1440 Broadway – 17th Floor, New York City. (Newtek’s Exhibit 8). Also, the Security Agreement between Newtek and Kepuska Enterprises, Inc., which was signed by Iliriane Kepuska, states that Newtek’s principal office is in New York City, and that any notices under the Agreement were to be provided to Newtek at its office in New York City. (Newtek’s Exhibit 3).

It is also significant that Newtek had retained an attorney in Florida, and filed a lawsuit against the Kepuskas in State Court on December 5, 2008. On December 29, 2008, two days before the bankruptcy petition was filed, the Kepuskas served Newtek’s Florida attorney with a Motion for Extension of Time to respond to the State Court Complaint. (Newtek’s Exhibit 11).

The Kepuskas did not list Newtek’s address in New York City on their bankruptcy schedules, however, even though documentation in their possession indicated that Newtek’s office was located in

New York. Further, the Kepuskas did not list Newtek's attorney on their bankruptcy schedules, for notice purposes, even though they knew that the attorney represented Newtek in its claim against them.

Under these circumstances, the Court finds that the Kepuskas did not use reasonable efforts to notify Newtek when they filed their bankruptcy petition. The Kepuskas could have avoided the inadvertent stay violation by applying a reasonable level of care when furnishing Newtek's address on their bankruptcy schedules. In re Combs, 2006 WL 6591825, at *4 (The debtor "could possibly have avoided the repossession of the Vehicle in the first instance by conducting a more diligent investigation as to the proper address to which notice should have been mailed to" the creditor.); In re Belcher, 189 B.R. at *19 (The "entire fiasco" could have been prevented by a simple notice to the creditor).

Second, the Kepuskas failed to mitigate their damages by not acting diligently to reduce or eliminate their loss when they learned of the stay violation. As their remedy for the violation, the Kepuskas requested the return of either the stock, or of an amount sufficient to repurchase the exact number of shares that had been sold. (Newtek's Exhibits 13, 18).

On February 20, 2009, the Kepuskas indicated that the price of Nuance stock at that time permitted both parties "to be unharmed" by the situation, and on February 27, 2009, the Kepuskas represented that they were obtaining a replacement brokerage account for the deposit of the funds. (Newtek's Exhibits 17, 20). As of September 28, 2009, however, the Kepuskas had not yet provided Newtek with the identifying information for the new account, and Newtek's attorney continued to ask for the account information so that it could make the deposit. (Newtek's Exhibit 26).

The Kepuskas did not act diligently to reduce or prevent the loss caused by the sale of the stock. They knew of the sale shortly after it occurred, and they knew that the price of Nuance stock fluctuated

on a daily basis. Nevertheless, the Kepuskas did not act with reasonable diligence to establish an account for the return of the stock or its proceeds by Newtek, at a time when they knew that the return would leave both parties “unharmmed.”

In summary, debtors have a duty to mitigate the damages caused by a creditor’s inadvertent violation of the stay. In this case, the Kepuskas failed to mitigate their damages (1) by failing to use reasonable efforts to notify Newtek of their bankruptcy petition, and (2) by failing to act with reasonable diligence to establish an account to accept the return of the funds.

IV. Damages

In their Complaint, the Kepuskas seek an award of actual damages, punitive damages, costs and attorney's fees.

Section 362(k)(1) of the Bankruptcy Code provides:

§ 362. Automatic Stay

...

(k)(1) Except as provided in paragraph (2), an 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.

11 U.S.C. §362(k)(1)(Emphasis supplied). "In order to recover damages under [§362(k)] a debtor must show that there was a willful violation of the automatic stay and that he or she was injured by the violation." In re Zajni, 403 B.R. 891, 895 (Bankr. M.D. Fla. 2008). "While any violation of the stay is prohibited under §362, damages are only awarded where the violation is 'willful.'" In re White, 410 B.R. 322, 326 (Bankr. M.D. Fla. 2009).

In this case, the Court has determined that Newtek's initial violation of the stay was inadvertent, and that its continuing postpetition violation was not "willful" for purposes of §362 of the Bankruptcy Code. Accordingly, §362(k) generally does not provide for an award of either actual or punitive damages in favor of the Kepuskas.

The Kepuskas assert, however, that they incurred and paid a capital gains tax on the sale of the stock in the amount of \$3,627.00. An unresolved issue exists as to whether the tax was properly due, since the sale of the stock was not a voluntary sale by the Kepuskas. Even if the tax was not properly

claimed by the Internal Revenue Service, however, Ms. Kepuska testified that the amount was actually paid in April of 2010.

The Court finds that Newtek should pay the Kepuskas the sum of \$3,627.00 as reimbursement for the capital gains tax that they incurred and paid on the sale of the Nuance stock. The tax was incurred as a direct violation of the stay, and is a liability that the Kepuskas would not have paid if the violation had not occurred.

As shown above, a creditor has an affirmative duty to correct an inadvertent violation of the stay once it learns of the bankruptcy case. In re Combs, 2006 WL 6591825, at 2. The purpose of this affirmative duty is to protect the debtor from the burden and financial pressure of restoring the situation that existed before the violation. In re Dungey, 99 B.R. 814, 816 (Bankr. S.D. Ohio 1989). In order to protect the Kepuskas from bearing an expense that was directly attributable to the violation, therefore, the Court finds that reimbursement of the capital gains tax to the Kepuskas is the appropriate resolution of the dispute.

Conclusion

After the filing of the bankruptcy petition, Newtek caused certain stock owned by the Kepuskas to be sold. In their Complaint, the Kepuskas assert that the stock sale constituted a willful violation of the automatic stay, and that Newtek continued to violate the stay by failing to restore the status quo after receiving actual notice of the petition.

The Court finds that the initial violation of the stay was inadvertent. The Court also finds that Newtek's delay in returning the funds postpetition constituted a continuing violation of the stay, but that the continuing violation was not willful for purposes of §362 of the Bankruptcy Code. Finally, the

Court finds that the Kepuskas did not act diligently to mitigate their damages, either at the time that the case was filed or after the stock had been sold.

Under the specific circumstances of this case, the Court will require Newtek to pay the Kepuskas the sum of \$3,627.00 as the total damages awarded in this case. The sum represents the capital gains tax paid by the Kepuskas on the sale of their stock, and the Court finds that reimbursement of this sum by Newtek to the Kepuskas is the appropriate resolution of this dispute.

Accordingly:

IT IS ORDERED that:

1. The Defendant, Newtek Small Business Finance, Inc., shall pay the sum of \$3,627.00 to the Debtors, Veton Zija Kepuska and Iliriane Kepuska, as the total damages awarded in this case.
2. A separate Final Judgment shall be entered consistent with this Opinion.

DATED this 17 day of November, 2011.

BY THE COURT

Paul M. Glenn

PAUL M. GLENN
United States Bankruptcy Judge