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ADV. NUMBER: 94-1188

JUDGE: G. B. Kahn

PARTIES: Eugene Delloyd Mitchell, Audrey Francine Mitchell, Mobile Auto Pawn, Inc.

CHAPTER:

ATTORNEYS: A. P. Clarke, M. B. Smith

DATE: 1/12/95

KEY WORDS:

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UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

IN RE

EUGENE DELLOYD MITCHELL
AUDREY FRANCINE MITCHELL
Debtors

CASE NO. 94-11585

AUDREY FRANCINE MITCHELL
Plaintiff

vs.

ADV. NO. 94-1188

MOBILE AUTO PAWN, INC.

ORDER

At Mobile in said District on the 12th day of January, 1995, before Gordon B. Kahn,
Bankruptcy Judge:

This matter having come on for hearing upon the debtor's complaint for turnover of property and for damages for violation of the automatic stay; due notice of said hearing having been given; the debtor having appeared with her attorney, Arthur P. Clarke, and Michael B. Smith having appeared as attorney for Mobile Auto Pawn, Inc. ("MAP"); and testimony having been taken, evidence having been received, and arguments have been given, and the matter having been taken under submission, the Court now finds, concludes, and orders as follows:

FINDINGS OF FACT

1. On June 14, 1994, one of the debtors, Audrey Francine Mitchell (hereinafter, the "debtor"), entered into a pawn transaction with the defendant, MAP, wherein the debtor received the sum of \$400.00 in exchange for the Certificate of Title to her 1988 Nissan ("Nissan") and a duplicate key. The debtor was to make weekly payments of \$54.14 beginning on June 24, 1994 and every week thereafter until the sum of \$800.00 was paid. The document provided that "this

is a 30 days pawn agreement unless [the weekly] payments are made." A maturity date of July 15, 1994 was listed on the document evidencing the pawn transaction. That document further provides as follows:

Any personal property pledged to a pawnbroker with this state is subject to sale or disposal when there has been no payment made on the account for a period of 30 days past maturity date of the original contract, and no further notice is necessary.

2. The debtor made two payments; one on June 27, 1994 and one on July 5, 1994 for \$54.28 and \$59.28 respectively. No further payments were made. On August 9, 1994, the debtor filed a Chapter 13 petition under Title 11 of the United States Code and relief was granted. Her Nissan was repossessed by MAP on August 28, 1994. The instant complaint was filed on September 1, 1994.

3. The Nissan was valued at \$3,000.00 to \$4,000.00. There were no other liens on it. The debtor testified that her Nissan had "practically brand new" tires on it that cost her \$267.00. When the Nissan was returned, the tires that were on it were slick and too big for the car. She further testified that she had left a camcorder stand, purchased for \$49.95, in her Nissan at the time it was repossessed that was not in it at the time it was returned. She is employed at Vanity Fair in Robertsdale and lost "four to five days" from work when her Nissan was repossessed. She makes \$30.00 to \$35.00 per day.

4. MAP was listed in the debtors' schedules as an unsecured creditor in the amount of \$400.00, and was listed on the Matrix. Except for a mistake in the Zip Code, the address was otherwise correct. MAP claims it never received notice of the bankruptcy filing from the Court; however, the notice was not returned. The debtor testified that MAP was notified of the

bankruptcy by phone by the debtor on August 24 or 25, 1994. MAP does not recall if the debtor informed it of the bankruptcy, but does admit that a phone conversation took place on August 24, 1994. MAP admits that the debtor phoned on August 29, 1994 following the repossession to provide notice of the bankruptcy and request return of the Nissan. MAP was also notified by letter from the debtor's attorney dated August 30, 1994 seeking return of the Nissan. The Nissan was returned on October 5, 1994. The debtors' Chapter 13 Plan was confirmed on October 26, 1994 as a 100%, 60 month plan.

CONCLUSIONS OF LAW

Based upon the fact that the Nissan was returned to the debtor on October 5, 1994, the request for turnover is moot. However, this does not resolve the question of the violation of the automatic stay. MAP argues that the Nissan was not property of the estate at the time the repossession occurred; rather, it was property of MAP since title has passed due to the debtor's failure to redeem the property within the time provided by law. MAP claims the redemption period expired on July 14, 1994. Under the Alabama Pawnshop Act, "[p]ledged goods not redeemed within 30 days following the originally fixed maturity date shall be forfeited to the pawnbroker and absolute right, title, and interest in and to the goods shall vest in the pawnbroker." Ala. Code § 5-19A-6 (Supp. 1994). In the instant case, the originally fixed maturity date was July 14, 1994. Under the above quoted statute, the debtor had until 30 days after that date to redeem before MAP obtained absolute right, title, and interest in the Nissan. This would give the debtor until August 13, 1994 to redeem. Thus, at the time the debtor filed her Chapter 13 petition on August 9, 1994, she still held an equitable right of redemption in the

Nissan, making it property of the estate under the Bankruptcy Code protected by the automatic stay. See, In re Jackson, 133 B.R. 541 (Bankr.W.D. Okl.1991); 11 U.S.C. §§ 541(a) and 362(a)(3). Further, since the redemption period had not expired prior to the bankruptcy, section 108(b) of the Code extended the redemption period to 60 days after the date the petition was filed to October 8, 1994. 11 U.S.C. § 108(b). The Nissan was repossessed on August 28, 1994, a time during which it was protected by the automatic stay. Accordingly, the automatic stay was violated.

MAP claims that it did not have notice of the bankruptcy filing at the time of the repossession and that therefore, any violation was not willful. This Court has consistently held that it is incumbent upon creditors and their agents to check with the clerk's office of the Bankruptcy Court in order to determine if a bankruptcy petition has been filed prior to foreclosing on or repossessing property belonging to or in the possession of a debtor and has awarded damages where a failure to do so has resulted in the stay being violated. See, e.g., Harden v. Mack Financial Corporation, No. 87-01833, Adv. 88-0035 (Bankr.S.D.Ala., Sept. 15, 1989); Franklin v. New Car Brokers, Inc., No. 89-00570, Adv. 89-0045 (Bankr.S.D.Ala., Aug. 31, 1989). Even assuming that MAP did not receive the notice of bankruptcy sent by the Bankruptcy Court, the debtor testified that she told the defendant of the bankruptcy filing on August 24 or 25, 1994, three to four days prior to the repossession. While the defendant did not recall being informed of the bankruptcy at that time, it did admit that a phone conversation with the debtor took place on August 24, 1994. MAP admitted that the debtor called on Monday, August 29, 1994 following the repossession, to inform it of the bankruptcy filing and request

return of the Nissan. The debtor filed the instant complaint on September 1, 1994. MAP refused to return the Nissan until over one month later on October 5, 1994. During all of this time, the debtor retained an equitable right of redemption in the Nissan which was property of her bankruptcy estate protected by the automatic stay. The violation of the automatic stay became willful on August 29, 1994 and continued until the Nissan was returned. As such, the debtor is entitled to recover damages, costs, and attorney's fee. 11 U.S.C. § 362(h).

Based upon the evidence described above, the debtor's actual damages for lost or destroyed tires and camcorder in the amount of \$316.95 and lost wages in the amount of \$175.00 total \$491.95. Additionally, the debtor's attorney is entitled to have his fees paid by MAP which the Court determines to be \$300.00. Because of the willfulness of the violation and the length of the continued willful violation, the Court concludes that punitive damages in the amount of \$600.00 are necessary to deter MAP from acting in such a manner in the future.

In addition to being protected by the automatic stay, when the redemption period has not expired prior to the bankruptcy filing, the debtor may dispose of the debt in the bankruptcy and may seek to cure or modify the pawn contract under section 1322. In re Dunlap, 158 B.R. 724, 728 (M.D.Tenn.1993); 11 U.S.C. § 1322(b)(2) & (3). While the debtor's schedules mischaracterized MAP's debt as unsecured, it was nevertheless provided for in the debtor's Chapter 13 plan. Based upon MAP's contract with the debtor, it is entitled to a secured claim in the amount of \$686.44 plus post-petition interest of 25% per month of the original pawn amount of \$400.00 or \$100.00 per month. See, 11 U.S.C. § 506(b); Ala. Code §§ 5-19A-2(3) and 5-19A-10(a). The Court will allow the debtor to reduce this claim by the amount of actual and

punitive damages awarded above. This leaves a balance of \$94.49, which MAP is entitled to receive in full satisfaction of its claim, said amount to be paid by the Trustee in one lump sum payment within 10 days of the date of this Order. Upon receipt of this amount, MAP shall return to the debtor, in care of her attorney, the original Certificate of Title to her Nissan. Now, therefore, it is

ORDER

ORDERED, that the debtor's complaint for turnover be, and it hereby is, MOOT; and it is further

ORDERED, that Mobile Auto Pawn, Inc. be, and it hereby is, found to be in CONTEMPT of Court for violating the automatic stay imposed by 11 U.S.C. § 362(a) and damages are hereby ASSESSED in the amount of \$491.95 actual damages and \$600.00 punitive damages; and it is further

ORDERED, that Mobile Auto Pawn, Inc. pay an attorney's fee in the amount of \$300.00 to the debtor's attorney, Arthur P. Clarke, within ten (10) days of the date of this Order; and it is further

ORDERED, that the Chapter 13 Trustee on behalf of the debtor pay to Mobile Auto Pawn, Inc. the sum of \$94.49 within ten (10) days of the date of this Order in full satisfaction of its claim against the debtor; and it is further

ORDERED, that upon receipt of the \$94.49 payment from the Chapter 13 Trustee described above, Mobile Auto Pawn, Inc shall return to the debtor the original Certificate of Title to her Nissan by mailing same to her attorney, Arthur P. Clarke, at P.O. Box 1666, Mobile,

Alabama 36633-1666, by certified mail, return receipt requested.

CHIEF U.S. BANKRUPTCY JUDGE