UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE: Kelvin Scott Jennings and Iris Workman Jennings, Debtors.	C/A No. 01-02330-W Adv. Pro. No. 01-80044-W
Kelvin Scott Jennings and Iris Workman Jennings, Plaintiffs, v. R & R Cars and Trucks, Defendant.	**JUDGMENT** Chapter 13

Based upon the Findings of Fact and Conclusions of Law as set forth in the attached Order of the Court, the Court orders judgment against R & R Cars and Trucks in the amount of $3,716.66.

John E Waites
UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
September 17, 2001.

CERTIFICATE OF MAILING

The undersigned deputy clerk of the United States Bankruptcy court for the District of South Carolina hereby certifies that a copy of the document on which this stamp appears was mailed on the date listed below to:

SEP 17 2001

BNC to serve:

DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE

DEBI GREEN
Deputy Clerk

WKS
Johnson / def
MOSS / plaintiff

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF SOUTH CAROLINA

IN RE: Kelvin Scott Jennings and Iris Workman Jennings, Debtors.	C/A No. 01-02330-W Adv. Pro. No. 01-80044-W
Kelvin Scott Jennings and Iris Workman Jennings, Plaintiffs, v. R & R Cars and Trucks, Defendant.	**ORDER** Chapter 13

THIS MATTER comes before the Court for a determination of damages after default to the Complaint by the Defendant, R & R Cars and Trucks ("R & R"). The Complaint requested the turnover of a car and damages for violation of the automatic stay. Both Kelvin S. Jennings and Iris W. Jennings ("Debtors") and R & R participated in the damages hearing. Based upon the evidence and arguments at the hearing, the Court makes the following Findings of Fact and Conclusions of Law.[1]

FINDINGS OF FACT

1. On or about March 3, 2001, R & R repossessed Debtors' 1985 Volvo automobile from

[1] The Court notes that to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such; and to the extend any Conclusions of Law constitute Findings of Fact, they are so adopted.

30

Brown Motor Works ("BMW"), a repair shop where Debtors had taken the car for repair.

2. On March 7, 2001, Debtors filed a joint petition for relief under Chapter 13 of the U.S. Bankruptcy Code.

3. On March 20, 2001, Debtors commenced an adversary proceeding against R & R by complaint which sought turnover of the 1985 Volvo, alleging (1) the car was property of the estate, (2) the car was necessary for Debtors' employment and reorganization under Chapter 13 and (3) R & R's interest in the car was adequately protected as a result of the Chapter 13 Plan, filed on March 6, 2001, which offered to pay R & R the full value of the car plus 10% interest, and Debtors' current payment of property taxes and insurance on the car. Debtors alleged that they gave notice of the bankruptcy to R & R and demanded turnover, but R & R failed to return the car. Debtors also alleged that R & R's failure to return the car violated the automatic stay pursuant to 11 U.S.C. §§105 and 362(h) and constituted contempt of court, for which Debtors sought turnover of the car, actual and punitive damages, including attorneys fees and costs.[2]

4. By separate Motion filed March 20, 2001, Debtors requested an emergency hearing on the turnover of the car, alleging irreparable harm to Debtors. By Order and Notice of Emergency Hearing entered March 21, 2001, the Court set a preliminary hearing on the Complaint for April 3, 2001 and required the Order and Complaint (if not previously served) to be served by hand delivery, overnight delivery, or telefax on R & R.

5. According to the Certificate of Service filed on March 22, 2001, the Summons, Complaint, Order and Notice of Emergency Hearing were served by facsimile on R & R. According to testimony taken in a prior hearing and an Amended Certificate of Service filed on

---

[2] Further references to the Bankruptcy Code shall be by section number only.

July 6, 2001, the Summons and Complaint and Order and Notice of Emergency Hearing were also served by U.S. Mail on R & R on March 23, 2001.

6. On March 28, 2001, as a result of the Clerk of Court's certification that Debtors failed to file the proper lists, schedules, and statements required by the Federal Bankruptcy Rules and according to Local Rule 1007-2, the Court dismissed Debtors' Chapter 13 case by an Order.

7. R & R failed to appear at the emergency hearing on turnover on April 3, 2001, and, on April 5, 2001, the Court ordered R & R to return the 1985 Volvo to Debtors within five days of the date of the Order.[3] The Clerk of Court served this Order by mail upon R & R.

8. By Motion filed April 3, 2001, Debtors requested emergency reconsideration of the dismissal alleging that the failure to file one schedule in their case resulted from an administrative error on the part of Debtors' attorney. By Order and Notice of Emergency Hearing entered April 4, 2001, the Court set an emergency hearing on that Motion for April 17, 2001 and required service of the Motion and Order by U.S. Mail on the Chapter 13 Trustee and all creditors and parties in interest.

9. While the Trustee initially objected to reconsideration, no other creditor or party filed an objection or appeared at the hearing on April 17, 2001 to object to reconsideration. Therefore, by Order of April 18, 2001, the Court vacated the prior Order of dismissal of the bankruptcy case. Despite notice of that hearing, R & R did not object nor appear to object to the reconsideration of dismissal.

10. By Contempt Complaint filed May 2, 2001, Debtors requested the Court to hold R & R in

---

[3] The Court was not made aware by any party at the turnover hearing of the dismissal of the case or the motion to reconsider the dismissal by Debtors.

willful contempt for failing to comply with this Court's April 5, 2001 turnover Order. A Rule to Show Cause on the contempt request was issued by the Court on May 8, 2001 requiring R & R to appear at a hearing on May 29, 2001. The Rule to Show Cause was served by mail on R & R at 3440 Broad River Road, Columbia, South Carolina 29210 by the Clerk of Court.

11. On May 25, 2001, an attorney representing R & R filed a Notice of Appearance and Return to the Rule to Show Cause for Contempt. The Return alleged that R & R had made the car available to be picked up by Debtors since the Court's turnover Order of April 5, 2001.

12. As a result of the hearing on May 29, 2001, the Court found R & R in contempt for failing to deliver the car to Debtors and ordered R & R to immediately deliver the car to BMW. The Court subsequently entered a written Order to that effect on June 22, 2001.

13. On June 8, 2001, R & R filed a Motion for Relief from the Automatic Stay pursuant to §362(d)(1) and (2) alleging, among other things, a lack of adequate protection for its interest in the car. After Debtors' objection to this Motion, the parties settled the Motion by Consent Order entered by the Court on July 10, 2001. In that Order, Debtors agreed to maintain insurance coverage on the car as a means of adequately protecting R & R's interest. There is no evidence before the Court that Debtors have failed to insure the car since the filing of the bankruptcy case.

14. By separate Motion filed June 8, 2001, R & R requested the Court allow a late answer to the turnover Complaint. Debtors objected to that Motion on June 13, 2001.

15. After hearing and by Order entered July 3, 2001, the Court denied the Motion to allow late answer, and the Clerk entered default on July 3, 2001. A hearing on damages was noticed for August 7, 2001, at which both Debtors and R & R participated.

16. On July 26, 2001, Debtors' Chapter 13 Plan was confirmed without objection by R & R.

The Plan provides that Debtors would retain the car and pay R & R the value of the car of $2,525.00 at 10% interest.

CONCLUSIONS OF LAW

In order to determine default damages to be awarded Debtors pursuant to the Complaint, the Court shall address the following four issues:

I. What is the effect of the dismissal and reinstatement of the case on the automatic stay and the duty to turnover property of the estate and therefore damages assessable against R & R?

Debtors' bankruptcy case was dismissed on March 28, 2001, a date after Debtors orally demanded turnover of the car and served the Summons and Complaint and this Court's Order and Notice of Emergency Hearing in the adversary proceeding. No creditor objected to Debtors' emergency request to reconsider the dismissal; therefore, after the hearing, the Court vacated the dismissal on April 18, 2001. Vacating the dismissal has the effect of reinstating the automatic stay and the duty to turnover property of the estate.

Although this Court vacated the dismissal of Debtors' Chapter 13 case, this ruling did not retroactively reinstate the automatic stay during the period when the case was dismissed. See Nicholson v. Nagel (In re Nagel), 245 B.R. 657, 662 (D. Ariz. 1999) (reasoning that, because the automatic stay does not continue after a case is dismissed, it is inconsonant to allow a retroactive reinstatement of the automatic stay once the case is reinstated); Frank v. Gulf States Fin. Co. (In re Frank), 254 B.R. 368, 374 (Bankr. S.D. Tex. 2000) (holding that, when a dismissed case is reinstated, the automatic stay is not retroactively reinstated with respect to creditor activity that occurred between dismissal and reinstatement). However, by reinstating Debtors' case, the Court

simultaneously reimposed the automatic stay from the date of reinstatement. See Diviney v. NationsBank of Texas, N.A. (In re Diviney), 225 B.R. 762, 771 (BAP 10th Cir. 1998); In re Nail, 195 B.R. 922, 929 (Bankr. N.D. Ala. 1996).

From this rule, R & R is clearly responsible for damages from April 18, 2001, the date of reinstatement, and R & R does not dispute this point. However, R & R argues that it can not be liable for a failure to turn over or violation of stay prior to April 18, 2001. As a practical matter, while R & R implies that it did not return the car in reliance on the dismissal of the case, the record demonstrates that, as of March 21, 2001, R & R knew of the bankruptcy case, Debtors' demand for turnover and offer of adequate protection, and this Court's order setting a hearing on the turnover issue. Similarly, R & R had notice of this Court's Order to turnover the car as of April 8, 2001. If R & R had questions or objections regarding the turnover or the effect of the ongoing adversary proceeding in light of the dismissal of the case, it should have raised those to the Court. Therefore, R & R's duty to turn over existed for the period from at least March 21, 2001, the date it clearly received notice of the bankruptcy, a written demand for turnover and an offer of adequate protection which included proof of insurance, through March 28, 2001, the date of dismissal of the case, and as of April 8, 2001, the effective date of the Court's order to turnover.[4]

Considering the circumstances of this case, the Court finds the equities weigh in favor of imposing of damages during these periods. The evidence indicates that R & R had notice of the

---

[4] While there is an argument that the stay was not itself reinstated by the turnover order of April 5, 2001 and therefore damages may not arise for violation of the stay, by Order entered on June 22, 2001, this Court found R & R in civil contempt for the failure to timely turnover the car to Debtors since April 8, 2001. This Court finds that the expense of renting a replacement car is a proper sanction, in part, for such contempt.

adversary proceeding, this Court's Order setting the April 3, 2001 emergency hearing on the turnover of the car, and the April 5, 2001 Order to turn over, yet it failed to appear or otherwise respond. The dismissal of the bankruptcy case was a result of error on the part of Debtors' attorney who moved timely, within five days, for an emergency hearing on reconsideration of the dismissal. R & R also had notice of the Motion for Reconsideration and notice of hearing, but it did not voice an objection to reconsideration. Therefore, for these additional reasons, R & R is responsible for damages for the period between March 21-28, 2001 and after April 8, 2001.

II. In order to meet the requirements of turnover, must a creditor deliver property of the estate to the debtor or may it merely make it available for pickup?

In this case, R & R indicates that it complied with this Court's April 5, 2001 Order to turnover the car by orally notifying Debtors that the car was available to be picked up at R & R's place of business.

According to §542(a), an entity shall deliver to the Trustee[5] the property of the estate in its possession, custody or control unless the property is of inconsequential value to the estate. Courts examining this statutory language noted its proactive connotation and found that creditors have an "affirmative duty," "mandatory duty," or "obligation" to return estate property. California Employment Dev. Dep't v. Taxel (In re Del Mission Ltd.), 98 F.3d 1147, 1151 (9th Cir. 1996); Knaus v. Concordia Lumber Co., Inc. (In re Knaus), 889 F.2d 773, 775 (8th Cir. 1989); In re Berscheit, 223 B.R. 579, 581 (Bankr. D. Wyo. 1998). Indeed, "[t]o effectuate the

---

[5] The term "Trustee" herein is interpreted by most courts to include the debtor in a Chapter 13 case. See 1 Keith M. Lundin, Chapter 13 Bankruptcy 52-2 (3d ed. 2000) ("[T]here are a great many reported decisions in which Chapter 13 debtors have been awarded turnover of estate property pursuant to §542."). See also, Sanders v. Cooper (In re Sanders), 78 B.R. 444, 446 (Bankr. D.S.C. 1987).

purpose of the automatic stay, the onus to return estate property is placed upon the possessor; it does not fall on the debtor to pursue the possessor." Del Mission Ltd., 98 F.3d at 1151 (citing Abrams v. Southwest Leasing & Rental Inc. (In re Abrams), 127 B.R. 239, 243 (9th Cir. BAP 1991)).

Having determined the car was necessary to Debtors' employment and therefore the Chapter 13 Plan, the Court ordered R & R to return it. To comply with the Order, R & R should have delivered the car to Debtors or returned it to BMW, the site of repossession where Debtors chose to repair the car. If R & R had questions regarding its turnover obligations or issues regarding repossession or redelivery costs, it was incumbent upon it to affirmatively raise such issues with the Court. Therefore, R & R is responsible for damages during the period it failed to take affirmative steps to deliver the car to Debtors or to BMW.

III. When is turnover required?

According to the majority of courts, debtors are entitled to the turnover of their property pursuant to §542 simply by filing a bankruptcy case. See Del Mission Ltd., 98 F.3d at 1151; Knaus, 889 F.2d at 775; Carr v. Sec. Sav. & Loan Ass'n, 130 B.R. 434, 438 (D.N.J. 1991). Along similar lines, other courts require turnover pursuant to §542 when creditors are notified of the bankruptcy petition. See Expeditors Int'l of Washington, Inc. v. Colortran, Inc., 210 B.R. 823, 827 (BAP 9th Cir. 1997), aff'd in part, rev'd on other grounds, 165 F.3d 35 (9th Cir.); Berscheit, 223 B.R. at 581; In re Cepero, 226 B.R. 595, 598 (Bankr. S.D. Ohio 1998); Kirk v. Shawmut Bank (In re Kirk), 199 B.R. 70, 72 (Bankr. N.D. Ga. 1996). In contrast, other courts have ruled that turnover is not automatic and that debtors must first provide adequate protection to creditors. Otherwise, the creditor can retain the property and passively maintain the status quo

in property lawfully possessed prepetition without violation of the automatic stay. See Nash v. Ford Motor Credit Co. (In re Nash), 228 B.R. 669, 673-74 (Bankr. N.D. Ill. 1999); In re Fitch, 217 B.R. 286, 291 (Bankr. S.D. Cal. 1998); Brown v. Joe Addison, Inc. (Matter of Brown), 210 B.R. 878, 884 (Bankr. S.D. Ga. 1997). Indeed, a dichotomy exists concerning this issue and it is succinctly described in the following passage:

> A majority of courts have held that a debtor is entitled to the return of a vehicle post-petition simply upon filing a bankruptcy case. The trend and growing minority, however, has held that a creditor does not have an affirmative duty to return property seized pre-petition but instead that the debtor must first provide the creditor with adequate protection. Brown v. Town & Country Sales & Serv., Inc. (In re Brown), 237 B.R. 316, 319 (Bankr. E.D. Va. 1999) (citing several cases supporting either the majority or the minority position).

The issue of turnover has not only sparked different results on the national level, but it has also produced varying results in this District. In previous cases, this Court has distinguished cases in which secured creditors properly repossessed property of the estate prepetition from situations where repossession occurred postpetition. The Court has not always awarded stay violation damages due to the failure to immediately turnover the property of the estate to a debtor if the repossession was proper and occurred prepetition. For example, In re Leverette, the Court ordered turnover but declined to award damages for contempt [of the automatic stay] because there was "no showing of malice or bad faith on the part of the defendant [creditor], nor has the defendant acted willfully in refusing to return the automobile and contempt is not warranted." 118 B.R. 407, 409 (Bankr. D.S.C. 1990).

In Butler v. Vanderbilt Mortgage & Finance, Inc. (In re Daniel), Judge Bishop appears to adopt the requirement of adequate protection and a hearing prior to the triggering of a creditor's

duty to turn over and stated:

> A creditor in lawful possession of its collateral pre-petition is justified in continuing possession post-petition until a turnover motion brought by the debtor is heard. A creditor, faced with the possibility of surrendering is collateral, is entitled to raise the issue of adequate protection. Also, such creditor is entitled to provide for a right to relief in the event of default in providing adequate protection so that pre-petition steps of possession do not have to be duplicated again. The creditor is in a better position to deal with these issues if it has possession. It should be noted that even through a creditor that obtains possession of collateral pre-petition may be entitled to possession of the collateral post petition without being in violation of the bankruptcy code, the creditor may still be liable for any pre-petition state law violation that may have occurred in obtaining possession of the collateral.
>
> As to a creditor in possession pre-petition, the automatic stay does attach to prevent waste, destruction, or depreciation on the part of the creditor. It requires the creditor to maintain the status quo and to discontinue any further steps of liquidation. No. 91-03082, Adv. No. C91-8134, at 19-20 (Bankr. D.S.C. Aug. 30, 1991)

Additionally, in Gatling v. First Financial Corporation (In re Gatling), Judge Davis, in citing Daniel and Leverette, declined to find contempt or award damages or attorneys fees, despite granting the turnover request. See, No. 93-74984, Adv. No. 93-8301, at 6 (Bankr. D.S.C. Mar. 11, 1994).

However, in Matthews v. World Omni Financial Corporation (In re Matthews), Judge Bishop ordered turnover upon the showing of proof of insurance by the debtor and ordered damages by way of attorney's fees of $250.00 to be paid by the creditor to debtor's attorney. See 118 B.R. 398, 399 (Bankr. D.S.C. 1989). In Green v. Wachovia Bank of South Carolina (In re Green), I granted immediate turnover upon debtor's demonstration of proof of insurance to protect creditor's interest; however, the Court did not address the damages issue because the

debtor did not seek damages for the delay in turnover. See, No. 94-73849, Adv. No. 94-8200, at 4 (Bankr. D.S.C. Jan. 27, 1995).

After a review of these authorities, I believe the better practice is that expressed by the results of Matthews and Green; that is, a debtor is entitled to an immediate turnover upon demand and proof of insurance coverage. To the extent that Daniel or Gatling indicates that a secured creditor has no affirmative duty to return property of the estate and can maintain possession despite a demand and proof of insurance by a debtor, I will depart from and disagree with those authorities.[6]

In my view, a creditor's duty to turn over estate property is triggered upon a debtor's notification to the creditor of the filing of a bankruptcy case accompanied by a written demand for turnover and proof of insurance covering the creditor's interest in the property. In the event a turnover demand is made, the duty to timely raise adequate protection issues or other circumstances that might defeat the turnover demand lies with the creditor. Even if repossession is proper prepetition, a secured creditor should not rely on the status quo and delay turnover based upon a dispute concerning, or a failure of, adequate protection unless it has simultaneously made an appropriate expedited request before the Court. See Colortran, 210 B.R. at 827. In my view, this is a practical approach which reconciles those decisions which place an immediate duty on the creditor to turnover upon the filing of the bankruptcy case and those cases which allow the creditor to wait until a court orders adequate protection. It also better reconciles with the Supreme Court's ruling in United States v. Whiting Pools, Inc.: "Section 542(a) simply

---

[6] Section 542(a) does not expressly indicate that a creditor may delay or deny turnover based upon a lack of adequate protection.

requires the [creditor] to seek protection of its interest according to the congressionally established bankruptcy procedures, rather than by withholding the seized property from the debtor's efforts to reorganize." 462 U.S. 198, 212 (1983).

This "middle-of-the-road approach" requires a debtor to initiate the turnover request and offer the most essential means of adequately protecting the creditor's interest, insurance, while leaving an affirmative burden on the creditor to respond immediately to the turnover demand, either on debtors' terms or accompanied by an expedited request to the Court for adequate protection or other relief.[7]

In the case before the Court, Debtors submit that they orally demanded turnover (but have not specified the date) and subsequently made a written demand and offer of adequate protection, including insurance, by commencing the adversary proceeding on March 20, 2001 and by service on R & R on March 21, 2001. There is no evidence that R & R offered any response to the demand. It did not assert a lack of adequate protection or other circumstances that would defeat the turnover request. R & R simply chose not to respect the demand for turnover. Under these circumstances, R & R had a duty to turn over the car beginning on March 21, 2001 through the date of dismissal and continuing as of April 8, 2001, the date the Court required turnover.

IV. Damages:

Debtors claim the following actual damages as a result of R & R's failure to turn over and

---

[7] In my view, a debtor should make the initial written demand by letter or other writing and allow the creditor a reasonable opportunity to respond, rather than to rely upon a complaint to serve as the written demand. In most cases, turnover issues can be settled without the filing of a complaint and request for an emergency hearing. However, when they are not settled, the Court typically undertakes an emergency hearing on the turnover request which also provides the secured creditor an opportunity to raise adequate protection or other issues which might effect the Court's determination of turnover.

violation of stay:

(1) rental of replacement car: $2,882.58;

(2) attorneys fees: $1,000.00;

(3) lost wages: $280.00;

(4) emotional distress; and

(5) cost of insurance paid by Debtors without use of car.

(1) Rental car:

Debtors offered evidence indicating they rented a replacement car from Rent-a-Wreck for $29.99 per day for 37 days from May 8, 2001 to June 13, 2001 for a total of $1,109.63 plus tax of $110.96 for a grand total of $1,220.59. Debtors also rented a replacement car from June 13, 2001 to June 26, 2001, a period of 13 days, for a total of $536.99.

Debtors testified that prior to renting from Rent-a-Wreck, they rented a car from a friend for $125 per week for 9 weeks for a total of $1,125.00. That period appears to have begun on or about March 6, 2001, the day before Debtors filed bankruptcy. As indicated above, Debtors did not make written demand for turnover until March 21, 2001; therefore, R & R is not responsible for rental expenses prior to that date.[8]

Therefore, the Court finds rental expenses of $125.00 per week from March 21-28, 2001 and April 8, 2001 to May 7, 2001 prorated to $678.68 and expenses of $1,757.98 from May 8,

---

[8] While some courts in such cases have found damages due to violation of stay beginning at the petition date, in the instance where a debtor seeks the turnover of a car, it is reasonable to require a debtor to notify the possessing creditor of (1) the filing of the bankruptcy case, (2) the debtor's desire to have the property returned, and (3) the debtor having insurance covering the creditor's interest in the car. Otherwise, the creditor may be under a nearly impossible burden to locate the debtor, inquire whether the debtor wants the property, or return the property even if the debtor does not want it.

2001 to June 26, 2001.

(2)&(3) Attorney fees and lost wages:

Based upon the record in this proceeding which indicates the number of pleadings filed and hearings that required Debtors' attendance in connection with the Complaint and based upon the testimony of Debtors, the Court finds R & R liable for attorney's fees incurred by Debtors in the amount of $1,000.00 and lost wages in the amount of $280.00.

(4) Emotional Distress:

Debtors indicated they were upset because of R & R's failure to turn over the car, but they failed to support a claim of actual injury or other damages by specific corroborating testimony or medical evidence. Therefore, the Court awards no damages for emotional distress.

(5) Cost of Insurance:

Debtors testified they continued to pay for automobile insurance during the time period when R & R retained possession of the car and deprived them of its use. Debtors seek $200.00 as actual damages for this expense.

However, Debtors' Complaint alleged the continuation of insurance as one means of adequately protecting R & R's interest in the car, and, of course, Debtors' further protected their own interest in the car by maintaining insurance. Therefore, the Court awards no actual damages for this expense.

Finally, the Court notes that Debtors did not request nor offer sufficient evidence at the hearing to justify an award of punitive damages.

Based upon the above stated Findings and Conclusions of Law, the Court finds damages in the amount of $3,716.66 and orders Judgment in that amount against R & R Cars and Trucks.

AND IT IS SO ORDERED.

UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
September 17, 2001.

CERTIFICATE OF MAILING

The undersigned deputy clerk of the United States Bankruptcy court for the District of South Carolina hereby certifies that a copy of the document on which this stamp appears was mailed on the date listed below to:

SEP 17 2001

BNC to serve:

DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE

DEBI GREEN
Deputy Clerk

WKS
Johnson / def
MOSS / plaintiff