

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

FILED
at O'clock & min AM
MAY 27 2003

DRENDIA K. ARGON, CLERK
United States Bankruptcy Court
Columbia, South Carolina (1)

IN RE:

Sherry Timms Evans,

Debtor.

C/A No. 02-14104-W

JUDGMENT

Chapter 13

ENTERED

MAY 27 2003

R. S. S.

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, the Motion filed by Sherry Timms Evans ("Debtor") seeking damages and sanctions against TranSouth Financial is denied.

Columbia, South Carolina,
May 27, 2003.


UNITED STATES BANKRUPTCY JUDGE

FILED

at ___ O'clock & ___ min ___ M

MAY 27 2003

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

BRENDA K. ARGOE, CLERK
United States Bankruptcy Court
Columbia, South Carolina (1)

IN RE:

Sherry Timms Evans,

Debtor.

C/A No. 02-14104-W

ORDER

Chapter 13

ENTERED

MAY 27 2003

R. S. S.

THIS MATTER comes before the Court upon the Motion for Damages and Sanctions (the "Motion") filed by Sherry Timms Evans ("Debtor") against TranSouth Financial ("TranSouth").¹ In the Motion, Debtor alleges that TranSouth's agent unlawfully repossessed her 1997 Dodge Daokta van postpetition and damaged it to such an extent that it is no longer in operable condition in willful violation of the automatic stay pursuant to 11 U.S.C. §362(h).² TranSouth admits that it hired Professional Recovery Services of Marion, South Carolina ("Professional Recovery") to repossess Debtor's vehicle; however, it asserts that it canceled the repossession order prior to Debtor's bankruptcy filing. TranSouth argues that it is not liable for willful violation of the automatic stay because it had no knowledge that Professional Recovery would act to repossess the vehicle and because no agency relationship existed when Professional Recovery performed the repossession. After considering the pleadings in the matter, the evidence presented, and counsel's arguments, the Court makes the following Findings of Fact and Conclusions of Law pursuant to Federal Rule of Civil Procedure 52, applicable in bankruptcy proceedings by Federal Rule of Bankruptcy Procedure

¹ Debtor filed an Amended Motion that adds Professional Recovery of Marion, South Carolina and seeks damages from it as well as Transouth. The Court entered an Order on April 23, 2003 that addresses Professional Recovery's liability.

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

FINDINGS OF FACT

1. By virtue of a retail installment contract Debtor entered on June 3, 2001, TranSouth is a lienholder on the vehicle.
2. Prior to Debtor filing her Voluntary Petition, TranSouth ordered the repossession of the vehicle, and it contracted with Professional Recovery to repossess the vehicle.
3. On November 4, 2002, TranSouth canceled the repossession order with Professional Recovery.
4. Professional Recovery received the cancellation notice from TranSouth; however, the cancellation notice was not properly documented in Professional Recovery's records. Professional Recovery did not cancel its repossession efforts on behalf of TranSouth.
5. On November 26, 2002, Debtor filed her Voluntary Petition seeking Chapter 13 bankruptcy relief.
6. In the early morning hours of January 10, 2003, Professional Recovery repossessed the vehicle. The vehicle was repossessed by one of Professional Recovery's drivers who ostensibly was acting upon TranSouth's request to repossess and who had not been advised of TranSouth's cancellation notice. Professional Recovery transported the vehicle from Debtor's residence in Pageland, South Carolina to Marion, South Carolina, a distance of approximately 120 miles.
7. Upon learning of the repossession, Debtor's counsel immediately contacted TranSouth. After initially denying it had the vehicle, TranSouth admitted it had the vehicle, and it instructed

³ 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 extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

Professional Recovery to return the vehicle to Debtor.

8. On January 10, 2003, Professional Recovery returned the vehicle to Debtor.

9. To tow the vehicle, Professional Recovery had removed the vehicle's drive shaft. When it returned the vehicle to Debtor, Debtor insisted that Professional Recovery take the vehicle to a qualified service facility and have the drive shaft reinstalled. Professional Recovery took the vehicle to a service facility, Woodberrys, in Marion, South Carolina and returned the vehicle with the drive shaft reinstalled to Debtor on January 11, 2003.

10. By January 19, 2003, the vehicle was not operating properly, and Debtor took the vehicle to the Bob Mayberry Chrysler dealership in Monroe, North Carolina for repairs.

11. Daniel Thom, Service Manager for Bob Mayberry Chrysler, testified that Debtor's vehicle required transmission repairs totaling \$3,466.55 (including his charges for testifying) as a result of having no lubricants or fluids. Mr. Thom attributed the lack of fluids to Professional Recovery's repossession and towing.

12. Debtor is unable to pay this repair bill, and the Chrysler dealership has been charging Debtor storage fees of \$5.00 per day since March 1, 2003.

13. Debtor missed three days of work as a result of the repossession and these hearings. Her total lost wages are \$182.16.

14. To prosecute this action, Debtor has incurred attorney's fees and costs of \$5,356.75.

15. Debtor also rented an automobile as an alternative means of transportation. This cost is \$74.65.

CONCLUSIONS OF LAW

In this case, Debtor seeks to hold TranSouth liable for willful violation of the automatic stay

due to the unlawful repossession and resulting damage caused by its repossession agent. TranSouth, however, argues that any liability depends upon the extent of its relationship with Professional Recovery. A party who is not controlled or subject to the control of another in the performance of a task but only as to the result may be an independent contractor. See Martin C. McWilliams, Jr., “Agency §5,” South Carolina Jurisprudence (Aleta M. Pillick, ed., S.C. Bar 1994) (citing Springs Cotton Mills v. Machinecraft, Inc., 156 F.Supp. 372, 378 (D. S.C. 1957)). Traditionally, an employer is not liable for the acts of its independent contractor because the employer has no control over the acts and work of the independent contractor. See Craig v. Andrew Aaron & Associates, Inc., 947 F.Supp. 208, 212 (D. S.C. 1996); Osbourne v. Adams, 525 S.E.2d 268, 271 (S.C. Ct. App. 1999) rev’d on other grounds by 550 S.E.2d 319 (S.C. 2001). In contrast, in a principal-agent relationship where the principal intends for the agent to act on the principal’s behalf and the agent intends to accept the authority of the principal, the principal can be liable to third persons in a civil suit for frauds, deceits, concealments, misrepresentations, negligences, and other malfeasances and misfeasances and omissions of duty of its agent in the course of employment even though the principal did not authorize or justify or participate in such misconduct. See McWilliams, “Agency §80.” However, a principal is generally not liable for agent’s acts when the agent is acting for his own independent purposes, wholly disconnected from the furtherance of his employer’s business. See id. (citing E.A. Prince & Son, Inc. v. Selective Ins. Co. of Southeast, 818 F.Supp. 910 (D. S.C. 1993)).

In this case, the evidence is meager to indicate what type of relationship TranSouth and Professional Recovery shared, and the party asserting agency as a basis of liability has the burden of proving the existence of agency. See McWilliams, “Agency §9.” Moreover, the facts indicate

that TranSouth terminated the parties' relationship prepetition and apparently did not believe Professional Recovery would still act on the repossession order. In this case, both of the primary actions taken by TranSouth in hiring Professional Recovery and then cancelling the employment occurred prepetition. Consequently, it appears that any violation of the automatic stay by repossession caused by Professional Recovery was unintended by TranSouth. See Budget Serv. Co. v. Better Homes of Virginia, Inc., 804 F.2d 289, 293 (4th Cir. 1986) (defining a willful violation of the automatic stay as occurring when a creditor knows of the pending bankruptcy petition and intentionally attempts to continue collection procedures in spite of it). The moving party bears the burden of proof in an action for violation of the automatic stay and must prove the violation by clear and convincing evidence. See Bolen v. Mercedes Benz, Inc. (In re Bolen), C/A No. 01-13028-W, Adv. Pro. No. 01-80333-W, slip op. at 6 (Bankr. D. S.C. Jun. 21, 2002) (citing Brockington v. Citizens & S. Nat'l Bank of South Carolina (In re Brockington), 129 B.R. 68, 70 (Bankr. D. S.C. 1991)). In addition, while Professional Recovery admitted repossessing the vehicle without authorization from TranSouth, TranSouth denies any wrongful taking or conversion of estate property. In sum, Debtor presented insufficient proof of facts to demonstrate TranSouth's liability for unlawful repossession and damage in willful violation of the automatic stay.⁴

CONCLUSION

For the reasons stated above, it is, therefore

ORDERED that the aspect of Debtor's Motion seeking damages and sanctions against TranSouth is denied.

⁴ Debtor may have other causes of action against TranSouth in either this Court or the state court system that were not alleged in the instant action.

AND IT IS SO ORDERED.

Columbia, South Carolina,
May 27, 2003.


UNITED STATES BANKRUPTCY JUDGE