

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF KENTUCKY
LONDON DIVISION**

IN RE:

FRANKIE AND CAROLYN SWAFFORD

CASE NO. 12-61366

DEBTOR

ORDER DENYING MOTION FOR CONTEMPT

This matter is before the Court on the Debtors' Motion for Contempt [Doc. 11] against the Creditor Nissan Motor Acceptance ("Nissan") and Memoranda in support thereof [Docs. 16 and 31, respectively] (collectively, the "Motion for Contempt"). The Debtors allege that Nissan violated the automatic stay set forth in 11 U.S.C. § 362(a)(1) by causing the repossession of their only vehicle on February 24, 2013. Nissan filed a Response [Doc. 30] to Debtor's Motion for Contempt substantially confirming the Debtors' facts, but denying that Nissan violated the automatic stay. The Debtors and Nissan focus on 11 U.S.C. § 521(a)(6), and the Debtors also attempt to argue against termination of the stay pursuant to 11 U.S.C. §§ 521(a)(2) and 362(h)(1).

The Court held a hearing on the matter and the parties agreed that no facts are in dispute. The parties argued, and the Court agrees, that the matter is purely a legal issue to be determined by the Court. The parties submitted the matter on the record and the issue is now ripe for determination. For the reasons set forth below, the Court will deny the Debtors' Motion for Contempt.

FACTS

The Debtors filed their chapter 7 petition on November 8, 2012. On Schedule D the Debtors indicate Nissan has a lien on their 2005 Nissan Altima ("Vehicle") securing a claim of \$7,100.00, of which \$1,100.00 is unsecured. The Debtors also indicate on Schedule D that they "will surrender" the Vehicle. Consistent with that representation, the Debtors filed a Statement of Intention to surrender the Vehicle pursuant to § 521(a)(2). The first meeting of creditors was held on January 3, 2013. The Debtors did not surrender the Vehicle and on February 24, 2013, Nissan caused Appalachian Auto Recovery to repossess the Vehicle. Shortly thereafter, on February 28, 2013, the Debtors filed their Motion for Contempt.

DISCUSSION

1. Requirements for Proving Violation of the Automatic Stay.

A debtor asserting that a creditor has willfully violated the automatic stay bears the burden of proving the intentional stay violation. *See TranSouth Financial Corp. v. Sharon (In re Sharon)*, 234 B.R. 676, 687 (6th Cir. BAP 1999). To prevail, a debtor must prove: (1) the actions taken violated the automatic stay; (2) the violator knew of the existence of the stay; and (3) the violator's actions were willful. *See Young v. Repine (In re Repine)*, 536 F.3d 512, 519 (5th Cir. 2008) (*citing In re Chesnut*, 422 F.3d 298, 302 (5th Cir. 2005)). A willful violation does not require proof of a specific intent to violate the stay, but rather an intentional violation by a party aware of the bankruptcy filing. *In re Sharon*, 234 B.R. at 687; *see also Henderson v. AutoBarn*, Case No. 09-5114 (Bankr. E.D. Ky. February 7, 2011) [Doc. 154].

Nissan admits it knew of the Debtor's bankruptcy proceeding and intentionally caused repossession of the Vehicle. Nissan denies that its actions violated the automatic stay because the Debtors did not perform their stated intention to surrender the Vehicle and the stay

terminated in accordance with § 521(a)(6). Failure to perform the stated intention to surrender within 30 days of the first meeting of creditors could also automatically terminate the stay, although only the Debtors addressed this controlling issue. *See* 11 U.S.C. §§ 521(a)(2) and 362(h)(1).

2. The Automatic Stay Terminated When the Debtors Failed to Timely Perform their Stated Intention to Surrender the Vehicle.

a. The Debtors Were Required to and Did File a Statement of Intention.

An individual debtor in chapter 7 must file, in addition to its schedules and Statement of Financial Affairs, a Statement of Intention disclosing whether the debtor intends to surrender, redeem or reaffirm the debt related to secured property. 11 U.S.C. § 521. Section 521(a)(2) provides that the debtor shall:

(2) if an individual debtor's schedule of assets and liabilities includes debts which are secured by property of the estate--

(A) within thirty days after the date of the filing of a petition under chapter 7 of this title or on or before the date of the meeting of creditors, whichever is earlier, or within such additional time as the court, for cause, within such period fixes, file with the clerk a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property; and

(B) within 30 days after the first date set for the meeting of creditors under section 341(a), or within such additional time as the court, for cause, within such 30-day period fixes, perform his intention with respect to such property, as specified by subparagraph (A) of this paragraph;

except that nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under this title, except as provided in section 362(h);

11 U.S.C. § 521(a)(2).

As indicated, the Debtors filed a Statement of Intention declaring they would surrender the Vehicle in compliance with subparagraph (a)(2)(A). Therefore, consideration of other options, such as reaffirmation or redemption, is not necessary or relevant.

b. The Automatic Stay Terminates if the Debtors Do Not Perform their Stated Intention.

The stay automatically terminates if the Debtors fail to timely take the action set out in the statement of intention. 11 U.S.C. § 362(h). Section 362(h) provides:

(h)(1) In a case in which the debtor is an individual, the stay provided by subsection (a) is terminated with respect to personal property of the estate or of the debtor securing in whole or in part a claim, or subject to an unexpired lease, and such personal property shall no longer be property of the estate if the debtor fails within the applicable time set by section 521(a)(2)--

(A) to file timely any statement of intention required under section 521(a)(2) with respect to such personal property or to indicate in such statement that the debtor will either surrender such personal property or retain it and, if retaining such personal property, either redeem such personal property pursuant to section 722, enter into an agreement of the kind specified in section 524(c) applicable to the debt secured by such personal property, or assume such unexpired lease pursuant to section 365(p) if the trustee does not do so, as applicable; and

(B) to take timely the action specified in such statement, as it may be amended before expiration of the period for taking action, unless such statement specifies the debtor's intention to reaffirm such debt on the original contract terms and the creditor refuses to agree to the reaffirmation on such terms.

Id.

The Debtors filed their Statement of Intention, but have not shown they took action to surrender the vehicle or otherwise forestall surrender or termination of the stay. The Debtors are not required to actually surrender the Vehicle, but surrender does contemplate release of their rights and they should take no action to resist surrender. *See In re Cornejo*, 342 B.R. 834

(Bankr. M.D. Fla. 2005). The record confirms the stay terminated for failure to take timely action within the 30-day period in subparagraph (a)(2)(B) as required by § 362(h)(1)(B).

The Debtors filed their Affidavit in Support of Motion for Contempt [Doc. 15], which verifies the Vehicle was repossessed without any actionable resistance by the Debtors after the 30-day period passed. The only other information presented by the Debtors' Affidavit describes the hardship caused by the repossession. While unfortunate, the fact that the repossession caused difficulty for the Debtors does not prevent termination of the stay by the express terms of the statute.¹

Taken together and under the facts of this case, §§ 521(a)(2) and 362(h)(1) acted to terminate the automatic stay as to the Vehicle as a matter of law.

3. Section 521(a)(6) Does Not Prevent Termination of the Automatic Stay.

The Debtors focus on 11 U.S.C. § 521(a)(6), seeking its application instead of, or in addition to, §§ 521(a)(2) and 362(h)(1). Nissan merely asserts it has complied with § 521(a)(6) and does not address the other Code sections. Section 521(a)(6) provides:

The Debtor shall ...

(6) in a case under chapter 7 of this title in which the debtor is an individual, not retain possession of personal property **as to which a creditor has an allowed claim for the purchase price secured in whole or in part by an interest in such personal property** unless the debtor, not later than 45 days after the first meeting of creditors under section 341(a), either--

(A) enters into an agreement with the creditor pursuant to section 524(c) with respect to the claim secured by such property; or

(B) redeems such property from the security interest pursuant to section 722; ...

¹ It is worth recognizing the Debtors are substantially responsible for the hardships described in the Affidavit, although this does not affect the decision. The Debtors voluntarily committed to surrender the Vehicle in their Statement of Intention filed on the petition date (November 8, 2012). Once committed, the Debtors had almost three months until the stay terminated on the 30th day after the § 341 meeting (February 2, 2013) before the relevant statutes allowed creditor action. Once forced to act, finding a new vehicle took only approximately one week.

If the debtor fails to so act within the 45-day period referred to in paragraph (6), the stay under section 362(a) is terminated with respect to the personal property of the estate or of the debtor which is affected, such property shall no longer be property of the estate, and the creditor may take whatever action as to such property as is permitted by applicable nonbankruptcy law. . . .

11 U.S.C. § 521(a)(6) (emphasis supplied).

Section 521(a)(6) contains its own stay termination provision, so the statute resembles the combined effect of §§ 521(a)(2) and 362(h)(1). But the two provisions are not identical, causing confusion in their application to different situations. *See, e.g., In re DeSalvo*, No. 09–21056, 2009 WL 5322428, at *2 (Bankr. S.D. Ga. Nov. 16, 2009) (referring to these sections as “two seemingly contradictory provisions”); *see also* 4 Collier on Bankruptcy ¶ 521.10[4] (15th ed. Rev. 2006) (describing several issues when considering application of § 521(a)(2) and § 521(a)(6)).

Relying on *Coastal Federal Credit Union v. Hardiman*, 398 B.R. 161 (E.D.N.C. 2008), the Debtors argue that § 521(a)(6) requires that a creditor seeking self-help repossession have an “allowed claim for the purchase price” secured in whole or part by the subject collateral for the stay to terminate by operation of law.² Nissan does not hold an “allowed” claim because it has not filed a proof of claim.³ According to Debtors, therefore, Nissan has not complied with the statute, the stay did not terminate and Nissan should have sought relief before repossession.

Coastal Federal represents only one side of a split of authority on the meaning of “allowed claim” in § 521(a)(6). While some courts, including *Coastal Federal*, have held that §

² The Debtors did not raise the portion of the statute that involves the purchase price as an issue, so it is assumed there is no dispute regarding this provision. Regardless, reaching a conclusion on this subject is not required to resolve this matter.

³ Claims are primarily allowed if a proof of claim is filed without objection, or any objection is overruled, although the court may also estimate a claim pursuant to 11 U.S.C. § 502(c). *See In re Rowe*, 342 B.R. 341, 348-49 (Bankr. D. Kan. 2006) (citing 4 *Collier on Bankruptcy* ¶ 502.01 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. Rev. 2006)).

521(a)(6) requires creditors to file a proof of claim before the statute would apply,⁴ other courts have held that requiring creditors to file a proof of claim would lead to absurd results in no-asset Chapter 7 cases and is in tension with the legislative history.⁵ This Court need not decide which side of that split is correct in this case because the stay terminated pursuant to §§ 521(a)(2) and 362(h)(1), which apply separate and distinct from § 521(a)(6).

Coastal Federal addressed these Code sections as part of the court's discussion of the "ride-through" concept, *i.e.* whether a debtor may retain an asset subject to a security interest and not reaffirm the debt or redeem the asset. *Coastal Federal*, 398 B.R. at 165. Under the ride-through option, the debtor would not effectively reaffirm or redeem, but would still retain the asset and continue to make the contract payments due. A discussion of § 521(a)(6) is relevant in *Coastal Federal* because the statute addresses compliance with certain conditions when the debtor retains personal property. Here, the Debtors specifically agreed to surrender the property, so § 521(a)(6) does not apply and any discussion involving retention of an asset through reaffirmation, redemption or ride-through is irrelevant.

Application of §§ 521(a)(2) and 362(h)(1) in the context of a stated intent to surrender, as in this case, is straight forward. *See supra* at Section 2. Like the automatic application of the stay upon filing a petition, termination of the stay under §§ 521(a)(2) and 362(h)(1) is automatic if a debtor does not perform its stated intention within 30 days after the first date set for the meeting of creditors under §341(a).⁶ This conclusion does not harm a debtor that has committed to surrendering an asset, and protects a secured creditor from forced extension of the risk of loss.

⁴ *See Coastal Federal*, 398 B.R. at 178-180 (E.D.N.C. 2008); *In re Miller*, 443 B.R. 54, 57 (Bankr. D. Del. 2011); *In re Hinson*, 352 B.R. 48, 51-52 (Bankr. E.D.N.C. 2006); *In re Anderson*, 348 B.R. 652, 657 (Bankr. D. Del. 2006); *In re Donald*, 343 B.R. 524, 535-36 (Bankr. E.D. N.C. 2006).

⁵ *See In re DeSalvo*, No. 09-21056, 2009 WL 5322428, at *3-4 (Bankr. S.D. Ga. Nov. 16, 2009); *In re Steinhaus*, 349 B.R. 694, 704-06 (Bankr. D. Idaho 2006); *In re Rowe*, 342 B.R. 341, 347-49 (Bankr. D. Kan. 2006).

⁶ No extension of time to comply was requested or granted as allowed by § 521(2)(A).

The Debtors attempt to skirt this uncomplicated application of the law by arguing that §§ 521(a)(2) and 362(h)(1) “must be read in conjunction with § 521(a)(6) and cannot operate as an independent ground for relief from stay being automatically granted to a creditor such as Nissan in this case.” Motion for Contempt, Doc. 31 at p. 3. This argument is not supported by *Coastal Federal* or other cases addressing § 521(a)(6), which apply these Code sections independently.

The Court in *Coastal Federal* provided: “Under BAPCPA, termination of the automatic stay may occur through either of two independent provisions: section 521(a)(6) or the combination of sections 521(a)(2)(C) and 362(h). These provisions use some similar terminology, but differ in important respects.” *Coastal Federal*, 398 B.R. at 172. The court also summarized: “In other words, if a debtor fails to comply with whichever automatic-stay-termination regime applies, the automatic stay is terminated... .” *Id.* at 176.

Further, even absent an “allowed claim,” *Coastal Federal* and other cases enforcing the plain meaning of “allowed claim” in § 521(a)(6) still would separately apply § 521(a)(2), if applicable. *Id.*; see also *In re Miller*, 443 B.R. at 57 (holding that “section 521(a)(6) is unavailable to creditors . . . that have not filed a proof of claim,” and applying §§ 521(a)(2) and 362(h)); *In re Donald*, 343 B.R. at 538 (holding that “521(a)(6) [wa]s not applicable in this case” because the creditor did “not have an ‘allowed claim,’” and applying § 521(a)(2)); *In re Hinson*, 352 B.R. at 52 (holding that “[i]n this case, § 521(a)(6) [wa]s not applicable” because the creditor did not have an allowed claim, and applying § 521(a)(2) instead).

CONCLUSION

For the foregoing reasons, Nissan repossessed the vehicle after the stay terminated pursuant to 11 U.S.C. §§ 521(a)(2) and 362(h)(1). Therefore, Nissan did not violate the automatic stay and the Debtors' Motion for Contempt [Doc. 11] is DENIED.

~~~~~  
***The affixing of this Court's electronic seal below is proof this document has been signed by the Judge and electronically entered by the Clerk in the official record of this case.***



**Signed By:**  
**Gregory R. Schaaf**  
**Bankruptcy Judge**  
**Dated: Wednesday, May 08, 2013**  
**(grs)**