

UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

In Re:

**FABIAN P. MOODIE, and
DEBRA A. MOODIE**

**Case #: 00-10501
Chapter 7**

Debtors.

**FABIAN P. MOODIE and
DEBRA A. MOODIE,**

Plaintiffs

v.

Adv.Proc. No. 00-01056 cab

**THRIFTY RENT-A-CAR
SYSTEM, INC., and
TAMARACK SERVICES OF
VERMONT, INC.**

Defendants.

Appearances of Counsel:

*Christopher O’C. Reis, Esq.
Randolph, VT
Attorney for Debtors/Plaintiffs*

*Jennifer Emens-Butler, Esq.
Bethel, VT
Attorney for Tamarack*

**MEMORANDUM OF DECISION
REGARDING TRIAL ON THE MERITS**

This cause came before the Court pursuant to the two-count Complaint filed by the debtor/plaintiffs, Fabian P. Moodie and Debra A. Moodie, against the defendant, Tamarack Services of Vermont, Inc. (“hereafter “Tamarack”). The Court has jurisdiction over this dispute pursuant to 28 U.S.C. §§ 157 and 1334. This Court having considered the evidence presented at the final hearing held on June 11, 2001, the record and applicable case law, the Court hereby denies the requested relief based upon the

following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

The Court makes the following findings of fact as determined based upon the record and the admissible evidence presented at the evidentiary hearing and the credible testimony of the witnesses:

1. The plaintiffs, Debra and Fabian Moodie, husband and wife, rented a car from Tamarack, d/b/a Thrifty Car Rental, on January 14, 2000.
2. The plaintiffs signed Rental Agreement Number N01887325 (hereafter “the Agreement.”).
3. Above the plaintiffs’ signatures, the Agreement states: “I authorize Thrifty to process or submit a charge to my credit, debit or charge card for the estimated charges for this rental upon my signing this rental statement and for all additional charges upon return of the vehicle.”
4. The Agreement also states: “I know that if I decline the option PDW [Physical Damage Waiver], I am responsible for all loss regardless of fault.”
5. On the Rental Agreement, next to the statement “I have declined PDW” and “I am responsible for all loss to the vehicle” are the initials “DM.”
6. Plaintiff, Debra A. Moodie, has acknowledged that she initialed the Agreement by affixing “DM” to the Agreement.
7. The plaintiffs returned the vehicle on February 8, 2000.
8. Upon the vehicle’s return, the plaintiffs’ provided to an agent of Tamarack a Police Report indicating that the vehicle had been hit by another driver.
9. The Police Report indicates damage to the rear door, caused by the driver who hit the rented vehicle.

10. Tamarack received payment from the insurance company that insured the driver who hit the rented vehicle to cover the damage sustained to the “right rear door area only,” as stated on the check.
11. Over three occasions, Tamarack caused the plaintiffs’ debit card to be charged, with the total charges being approximately \$752.00.
12. Police Officer [Eric] James Dodge of Morristown Police Department was called by the Plaintiffs as a witness and testified that he arrived at the accident scene on February 7, 2000 at approximately 11:10 a.m. in response to an accident call at Aames Plaza in Morristown, VT., that two vehicles were involved: the plaintiffs’ and a third party’s, and that the vehicles collided.
13. Officer Dodge does not recall walking around the subject leased vehicle that was operated by one of the Plaintiffs at the accident scene.
14. Officer Dodge did observe damage to the plaintiffs’ rear car door.
15. Heather West, a Tamarack employee, testified that she was directly involved in the car rental transaction with the plaintiffs and that the rental period commenced January 14, 2000 and concluded on February 8, 2000.
16. Shortly after the return of the vehicle by plaintiffs, Heather West inspected the vehicle and observed damage to the rear bumper and passenger door.
17. The Court finds that the damage to the rear vehicle door was caused while in the custody, use or control of the plaintiffs sometime after the commencement of the vehicle lease period and before the time when the vehicle was returned by plaintiffs to Tamarack.
18. The Plaintiff has requested and the Court has agreed to take judicial notice of the record regarding the returns of notice and certificates of service involved in the case and this adversary proceeding.
19. The Court finds that the Summonses and Complaints served in this action were served upon Thrifty

at its offices in Tulsa, Oklahoma and upon Tamarack at an address in Colchester, Vermont. Regarding the notice of commencement of the case and the discharge notice, the record shows that the address for Tamarack has an incorrect zip code on the service or mailing list of record. The zip code listed is "05401". The actual correct zip code, as apparently changed and corrected by the Bankruptcy Noticing Center, is "05403-6428."

20. Tamarack commenced debiting the plaintiffs' account for the estimated cost to repair the damage to the rear bumper of the vehicle in mid-March, 2000.
21. Various telephone conversations involving each plaintiff and representatives of Tamarack and Thrifty Rent-A-Car Systems, Inc. regarding the rear bumper damage to the vehicle commenced in mid-March, 2000 and proceeded through early April, 2000.
22. On May 1, 2000, a voluntary petition for bankruptcy relief was filed by the debtors, Fabian P. and Debra A. Moodie, under chapter 7 of title 11 U.S.C. ("the Bankruptcy Code").
23. Tamarack filed a claim in state small claims court against the plaintiffs for damage to its vehicle on or about July 22, 2000.
24. On September 5, 2000, this adversary proceeding was commenced by the debtors against Thrifty and Tamarack.
25. Mr. Tory, Manager of the Thrifty Car Rental location in Burlington, VT, testified credibly that Tamarack did not receive a copy of the notice of bankruptcy proceedings when issued by the Clerk's Office and was not aware of the Debtors' existing bankruptcy case at the time it commenced the small claims action.
26. Mr. Tory testified credibly that he first became aware of the plaintiffs' pending bankruptcy case when he received a copy of the notice of discharge on or about July 17, 2000.

27. Upon being informed of the plaintiffs' pending bankruptcy, Mr. Tory directed that Tamarack immediately discontinue the small claims action.
28. While Tamarack admittedly received a copy of the notice of discharge, no credible evidence was presented to show that Tamarack had received any notice prior thereto of the filing for bankruptcy relief by plaintiffs.
29. Based upon the demeanor and testimony of the various witnesses and the other corroborating evidence, the Court finds as a fact that Tamarack was not aware of the bankruptcy case until after it filed the small claims action.
30. Based upon the demeanor and testimony of the various witnesses and the other corroborating evidence, Tamarack promptly discontinued pursuit of its small claims case against plaintiffs upon being informed of the pending bankruptcy case.
31. Based upon the demeanor and testimony of the various witnesses and the other corroborating evidence, plaintiffs have not presented evidence sufficient to show a misrepresentation, omission, or deceptive practice likely to mislead the plaintiffs in this instance regarding the subject rental transaction or damage assessment and collection procedures.
32. While plaintiffs have complained regarding the tone or style of their treatment by various representatives of Tamarack after returning the subject vehicle, the plaintiffs have failed to demonstrate sufficient evidence of mistreatment or abusive conduct to reasonably constitute a deceptive act or unfair practice.
33. Based upon the demeanor and testimony of the various witnesses and the other corroborating evidence, plaintiffs have presented evidence sufficient to demonstrate that Tamarack violated the automatic stay when it filed and pursued the small claims case against plaintiffs.

34. Based upon the demeanor and testimony of the various witnesses and the other corroborating evidence, plaintiffs have failed to present evidence sufficient to demonstrate actual injury to the plaintiffs arising out of the violation of the automatic stay by Tamarack.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Court enters the following conclusions of law:

1. Count I of the Complaint seeks recovery of damages based upon allegations that the defendant has violated the automatic stay in effect in this case. Section 362(h) of the Bankruptcy Code states: “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”. An award of damages under section 362(h) must have a sufficient factual foundation. [*See Archer v. Macomb County Bank*, 853 F.2d 497 (6th Cir. 1988)].
2. The moving party has the burden of proof in order to prevail on an action for violation of the automatic stay.[*See Inre Hooker Investments, Inc.*, 116 B.R. 375, 381 (Bankr. S.D.N.Y. 1990); *see also In re Sammon*, 253 B.R. 672, 680 (Bankr. D.S.C. 2000)(and cases cited therein)].
3. The burden is on the party seeking to recover for an alleged violation of the automatic stay to prove the following elements: (1) that a bankruptcy petition was filed; (2) that the debtors are “individuals” under the automatic stay provisions; (3) that the creditors received notice of the petition, (4) that the creditor’s actions were in willful violation of the stay; and (5) that the debtors suffered damages. [*See In re Sammon*, 253 B.R. at 680; *In re Flack*, 239 B.R. 155, 162-63 (Bankr. S.D.Ohio 1999)].
4. Pursuant to the credible evidence presented during the final hearing, the debtors established that a bankruptcy petition was filed and that the debtors are “individuals” under the automatic stay

provisions. The plaintiffs did not present evidence sufficient to establish the remaining three elements necessary to recover for a claim of violation of the automatic stay.

5. Pursuant to the credible evidence presented during the final hearing, the plaintiffs failed to establish that the creditors received notice of the filing of their bankruptcy petition, that the creditor's actions were in willful violation of the stay, or that the debtors suffered actual damages.
6. Any violation by Tamarack in filing the small claims case against defendants was technical and does not subject the creditor to sanction. [*See In re Freunsch*, 53 B.R. 110 (Bankr. D.Vt. 1985)].
7. The evidence presented was conflicting and insufficient to warrant a finding that plaintiffs were contacted by representatives of Tamarack regarding the subject claim sometime in October or November, 2000. Pursuant to the credible evidence presented during the final hearing, the Court finds there was no related actual injury to plaintiffs even assuming that this contested post-petition contact occurred. [*See In re Freunsch*, 53 B.R. 110 (Bankr. D.Vt. 1985)].
8. Based upon the foregoing, plaintiffs have failed to provide sufficient credible evidence to warrant a finding of a compensable violation of the automatic stay as set forth in Count I of the Complaint.
9. Count II of the Complaint seeks recovery under the Vermont Consumer Fraud Act, 9 V.S.A. §§ 2451 *et seq.* To establish a "deceptive act or practice" under the Act a consumer must prove three elements: (1) there must be a representation, omission, or practice likely to mislead consumers; (2) the consumer must be interpreting the message reasonably under the circumstances; and (3) the misleading effects must be material, that is, likely to affect the consumer's conduct or decision regarding the product. [*Carter v. Gugliuzzi*, 716 A.2d 17, 23, 168 Vt. 48 (1998)].
10. Based upon the foregoing factual findings, plaintiffs have failed to provide sufficient credible evidence of a material or deceptive act or procedure committed by or on behalf of Tamarack, or

acts or procedures having the capacity or tendency to deceive, regarding the subject transaction or damage assessment and collection procedures, and are not entitled to recover pursuant to the Vermont Consumer Fraud Act as set forth in Count II of the Complaint. [*See Kessler v. Loftus*, 994 F.Supp. 240 (D.Vt. 1997); *Carter v. Gugliuzzi*, 716 A.2d 17, 168 Vt. 48 (1998)].

11. All exhibits formally introduced into evidence by the parties have been admitted into evidence and considered by the Court, including Plaintiffs' proffered Exhibit 17 pursuant to FRE 803(5), and given appropriate weight consistent with the credible testimony of the witnesses.

Based upon the foregoing, judgment is hereby rendered in favor of the defendant. Counsel for defendant shall submit a final judgment in conformity with this decision forthwith.

July 16, 2001
Rutland, Vermont

/s/ Colleen A. Brown
Colleen A. Brown
United States Bankruptcy Judge