

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT**



In re:

**JOHN COLEMAN,
Debtor**

**Case # 02-11603
Chapter 13**

Appearances: *For the Debtor:*
 Kathleen Walls, Esq.
 Middlebury, VT

For The First National Bank of Orwell:
James Foley, Jr., Esq., on the papers
Ebenezer Punderson, Esq.
Middlebury, VT

MEMORANDUM OF DECISION
ON DEBTOR'S MOTION FOR VIOLATION OF THE AUTOMATIC STAY

I. Introduction and Background

On December 12, 2002, the Court held a hearing on, *inter alia*, the Debtor's Motion for Violation of the Automatic Stay [doc. #5] and the Opposition filed by The First National Bank of Orwell (hereafter, the "Creditor") [doc. #14]. At the request of the Creditor, the hearing on the Motion for Violation was adjourned until January 9, 2003. However, upon consideration of the papers submitted, the Court found there were no material facts in dispute and the issue presented was a matter of law, and hence determined no hearing was necessary for the Court to make its ruling. Accordingly, the Court issued an Order [doc. #18] directing that the adjourned hearing be cancelled. Neither party has appealed that Order. Moreover, the Creditor has filed a Supplemental Memorandum [doc. #20] that, *inter alia*, acknowledging that this is an issue which is appropriate to decide on the papers. See Creditor's Supplemental Memorandum in Support of its Opposition to Motion for Violation of the Automatic Stay, "Introduction".

On January 9, 2003, the Court held a confirmation hearing on the Debtor's Second Amended Plan. At that hearing, the Court instructed the Debtor to file any supplemental papers, supporting his claim for damages (raised in his Motion for Violation of the Automatic Stay) by February 1, 2003. On January 29, 2003, Debtor filed a Memorandum of Law in Support of Stay Violation Damages. [Doc. #39]. The Creditor did not file any responsive papers to this memorandum.

This Court has jurisdiction over the subject motion pursuant to 28 U.S.C. §§157 and 1334.

II. Findings of Fact

Based on the papers submitted, the Court finds that no party in interest has raised any dispute or objection as to the following material facts:

1. Prior to November 9, 2002, the Debtor was delinquent in the auto loan payments due to the Creditor. See Creditor's Opposition ¶1.
2. On or about November 9, 2002, the Creditor lawfully repossessed the Debtor's 1995 Dodge Ram truck. See Debtor's Motion for Violation at ¶2; see also Creditor's Opposition at ¶3.
3. On November 12, 2002, the Debtor filed an emergency petition for relief under chapter 13 of the Bankruptcy Code. See Debtor's Motion for Violation at ¶ 1; see also Creditor's Opposition at ¶4.
4. Also on November 12, 2002, the Debtor requested that the Creditor return the 1995 Dodge Ram truck to the Debtor. See Debtor's Motion for Violation at ¶¶3, 4; see also Creditor's Opposition at ¶5.
5. The Creditor refused to return the truck absent an order from the Court authorizing and directing return. See Debtor's Motion for Violation at ¶4; see also Creditor's Opposition at ¶¶6, 7.
6. The Debtor has not alleged that the repossession of the 1995 Dodge Ram truck was improper or illegal under state or federal law.

III. Issue Presented

The issue before the Court is whether the Creditor's refusal to return the repossessed truck, upon the Debtor's filing for chapter 13 bankruptcy relief, is a violation of the automatic stay imposed by 11 U.S.C. § 362. This is a question of law. See, e.g., Manufacturers & Traders Trust Co. v. Alberto (In re Alberto), 271 B.R. 223, 226 (N.D.N.Y. 2001) ("Determination of whether the vehicle is property of the estate is a legal question . . . as is whether there was a willful violation of the automatic stay.").

IV. Legal Analysis

The automatic stay created by the Bankruptcy Code is codified at 11 U.S.C. § 362. It is a powerful tool which bars, *inter alia*:

- (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

11 U.S.C. § 362(a)(3). The purpose of the automatic stay is to preserve the bankruptcy estate as it exists as of the commencement of the case. See generally, HR Rep. No. 595, 95th Cong., 1st Sess. 340-41 (1977). The automatic stay protects all assets and interests of the debtor for the benefit of the debtor's creditors and freezes the *status quo* so that the trustee can identify, evaluate and administer those assets and interests in accordance with the mandates of the Bankruptcy Code. Thus, in order to determine whether the Creditor's conduct in this matter violated the stay, the Court must first determine whether the *res* at issue falls within the scope of the stay.

In this instance, the Court finds the vehicle was not property of the estate at the time of the repossession because the Debtor had not yet filed his bankruptcy petition. Hence, the Creditor's repossession of the vehicle clearly did not violate the stay.

A recent decision from this Court's sister court in the Northern District of New York, see, Manufacturers & Traders Trust Co. v. Alberto (In re Alberto), 271 B.R. 223, 226 (N.D.N.Y. 2001), addresses this same issue in the context of facts similar to those of the instant matter. In In re Alberto, the creditor bank properly repossessed the debtor's vehicle just days prior to his filing for bankruptcy protection. 271 B.R. at 225. The debtor claimed the bank violated the automatic stay because it did not return the vehicle upon the debtor's filing for bankruptcy protection. The bankruptcy court, determining the vehicle was property of debtor's bankruptcy estate, found the bank violated the automatic stay. See id. at 226. It further found this violation injured the debtor and, therefore, assessed damages pursuant to 11 U.S.C. § 362(h). The bank appealed. See id. at 225.

Upon appeal, the Alberto district court reversed and remanded the case to the bankruptcy court. See id. at 228. It based its reasoning on state law. See id. at 225-26 ("Property interests are determined by state law.") (citing Butner v. United States, 440 U.S. 48, 55 (1979)). Under New York state law, the debtor lost his possessory interest in the vehicle when the vehicle was repossessed. Thus, the debtor had no possessory

interest in the vehicle on the filing date, which occurred a few days later. See id. at 226. The only interest in the vehicle the debtor retained at the time of his bankruptcy filing was his right to redeem the property; and that interest became property of his bankruptcy estate. See id. at 225, 226. The district court held that: (1) there was no stay in effect when the bank had acted to obtain possession and to exercise control of the vehicle; (2) since the bank lawfully possessed and controlled the vehicle when the stay went into effect, the vehicle did not belong to the debtor or his estate; and, hence, (3) there was no violation of the stay. See id. at 226. Relying on the reasoning and holding of United States v. Whiting Pools, Inc., 462 U.S. 198 (1983), the district court held that the property of the debtor's bankruptcy estate included "his right to redeem the vehicle but did not include a possessory interest in the vehicle." Id. at 227. Moreover, the district court instructed that "[i]n order to draw a possessory interest in the vehicle into the estate the debtor must have taken an affirmative step to do so, such as moving for a turnover order pursuant to § 542 or § 543." Id. (citing Whiting Pool, 462 U.S. at 206-07) (additional citations omitted).

V. The Instant Case

The instant case shares significant similarities with In re Alberto. Here, the Creditor properly repossessed the Debtor's 1995 Dodge Ram truck after the Debtor defaulted on his car loan payment obligation, but before he filed for bankruptcy protection. Similar to New York state law, under Vermont state law, a debtor retains only a redemptive right in a vehicle once it is lawfully repossessed. See 9A V.S.A. § 9-623. Thus, on November 12, 2002, when the Debtor filed for bankruptcy protection, the only interest he had in the 1995 Dodge Ram truck was his retained possessory interest.* At the time of the Debtor's filing, when the Bankruptcy Code's automatic stay went into effect, the Creditor had already gained lawful possession and control of the 1995 Dodge Ram truck. Thus, as in Alberto, the Creditor did not act to obtain possession, or

*The Court notes that, once the Debtor filed for bankruptcy and the automatic stay was instituted, any act that would fully terminate the Debtor's right in the vehicle (e.g., selling the vehicle) would require relief from stay before such termination could occur. See generally Canney v. Merchants Bank, 284 F.3d 362 (2d Cir. 2002); In re Stolz, 197 F.3d 625 (2d Cir. 1999).

to exercise control, of the vehicle in violation of the stay. As the Creditor has done nothing to violate the automatic stay with regard to the Debtor's remaining redemptive right, the Court finds the Creditor has not violated the Bankruptcy Code's automatic stay. See Alberto, 271 B.R. at 226; see also In re Fitch, 217 B.R. 286, 290 (Bankr. S.D. Cal. 1998) (finding no violation of automatic stay where secured creditor repossessed vehicle before stay became effective and retained vehicle after stay became effective).

The Court notes that the facts of this case diverge from the Alberto case in that the Debtor and Trustee in the instant case took the affirmative step of filing a Motion for Turnover [doc. #6]. After a hearing on the motion, the Court granted this motion and, pursuant to 11 U.S.C. § 542, the Court ordered the turnover of the 1995 Dodge Ram truck upon the Debtor's production of proof that the vehicle was properly insured.. See doc. #24. The Creditor has complied with said Order and the Debtor now has possession of the truck.

VI. Conclusion

Based on the undisputed facts of this case, the Court finds that The First National Bank of Orwell did not violate the automatic stay imposed by 11 U.S.C. §362(a) when it caused the Debtor's 1995 Dodge Ram truck to be repossessed just prior to the Debtor's filing for chapter 13 bankruptcy protection. Hence, the Debtor's Motion for Sanctions Based upon a Violation of the Automatic Stay is DENIED.

This Memorandum of Decision constitutes the Court's findings of fact and conclusions of law.

March 20, 2003
Rutland, Vermont



Colleen A. Brown
United States Bankruptcy Judge