UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re: Janet I. Parsons, Debtor.	Case No. 15-30263 Chapter 7

In re: Corky B. Ellison Debtor.	Case No. 15-30437 Chapter 7

Order Noticing a Hearing on June 18, 2015 to Consider the Imposition of Sanctions Against EZCR Financial, Inc. and Keeping the Automatic Stay in Place Until Further Court Order

Before the court are two identical motions brought on shortened notice by Five Star Bank ("Five Star" or "Bank") seeking turnover from EZCR Financial, Inc. ("ECZR") of a 2013 Nissan Altima which serves as collateral for its secured loan to the above Debtors. The matter was initially made returnable before the court on May 20, 2015, based upon the urgency of (i) an alleged $100 a day accruing storage fee being charged by EZCR from April 14, 2015, when EZCR first took possession of the car from Debtor Corky B. Ellison ("Debtor"), and (ii) EZCR's Notice of Lien and Sale announcing an intended sale of the car at a public auction to be conducted on May 25, 2015. At the initial hearing, at which David L. Rasmussen, Esq. appeared on behalf of the Bank and Theodore L. Araujo, Esq. appeared on behalf of EZCR, Mr. Araujo acknowledged the court's jurisdiction as to the vehicle and represented that his client would be willing to freeze the ongoing accrual of charges and take no further action with respect to the car until disposition of the matter by the court. As of May 20, 2015, at a rate of $100/day, the accruing storage charges sought were $3,600.

The court encouraged the parties to discuss the matter further among themselves with the expressed hope that they might reach an amicable settlement but reserved June 2, 2015 for an evidentiary hearing in the event the parties were unable to come to terms. When the parties reported that they could not reach agreement, the court proceeded to conduct an evidentiary hearing on June 2, 2015, at which both prior counsel appeared as did attorney William B. Schiller, as *amicus*.

Jurisdiction

The vehicle in question, which was not claimed as exempt and has not been abandoned, constitutes property of the estate.[1] Although the court normally would not exercise its jurisdiction when an asset is fully encumbered by a secured creditor's lien,[2] such that there is no equity value available for distribution to unsecured creditors, this case introduces a potential trend that (i) may undermine the general notice provisions that are part of any bankruptcy proceeding and (ii) affects a wide swath of creditors regularly appearing in bankruptcy cases who are unaware of its existence. In the interest of telegraphing the fact that third-party businesses may be targeting debtors to turn over cars to them that debtors intend to surrender—against which cars the businesses will assert garagemen's liens that can prime a secured creditor's lien—the court was prompted to exercise its jurisdiction. This inclination was further reinforced by the fact that since there will be no distribution to unsecured creditors in this case, the issues presented fall outside the watchful eye of the panel trustee and, therefore, the vigilant oversight

[1] Although the chapter 7 trustee in her report of no distribution filed on May 8 indicates "Assets Abandoned" and includes the value of the subject vehicle, her statement evinces an intent to abandon, which, absent notice and a hearing, does not effectuate an actual abandonment until the case is closed. *See* 11 U.S.C. § 554.

[2] On his filed schedules, Corky Ellison indicates a value for the vehicle of $21,875 and a loan balance of $26,508 owed to Five Star. Shane Duff, director of operations at EZCR, testified that the car had a value of between $12-13,000. In either case, there is no value above the existing lien available for distribution to unsecured creditors.

of the United States Trustee's Office which acts to protect the integrity of the bankruptcy process.

Jurisdiction is further asserted to address the issue of the Debtor's "surrender" of property within the meaning of Section 521[3] and the effect under Section 362 of the automatic stay on the actions of EZCR.

Background Facts

The essential facts are largely undisputed. Debtors filed separate chapter 7 bankruptcy petitions, respectively, on March 3, and March 30, 2015. Debtors are divorced and are jointly liable to Five Star on a car loan which is secured by a 2013 Nissan Altima. Debtor Corky Ellison, who had possession of the car, filed a statement indicating his intent to surrender the vehicle. His first meeting of creditors was scheduled for May 8. On April 17, 2015, the Bank moved for relief from the automatic stay to recover the vehicle, which motion has been noticed for a hearing on June 18, 2015, and has not yet come before the court.

From the testimony of Debtor and that of his counsel, Peter Schaefer, Esq., the court finds that subsequent to the filing of his petition, Debtor was in contact with EZCR and spoke directly with its director of operations, Shane D. Duff. Previously, Debtor had been advised by Mr. Schaefer that the Debtor could arrange for EZCR to pick up his car and that he would not be charged anything. Debtor was advised that he could cancel the insurance on the vehicle and not be concerned further.[4] The Debtor made arrangements to meet EZCR's representative at a local office of the New York State Department of Motor Vehicles ("DMV"). The license plates were removed from the car and turned into the DMV. Debtor handed the car keys over to EZCR and canceled his insurance.

[3] All sectional references are to the Bankruptcy Code, Title 11 of the United States Code, 11 U.S.C. §§101 – 1532.
[4] Mr. Schaefer disclosed that he shares an office suite with Mr. Araujo and that their firms have an of counsel relationship.

Shane Duff testified that he personally met with the Debtor at the DMV on April 14, 2015. He had the Debtor execute a Property Surrender and Storage Agreement which was introduced into evidence as EZCR's Exhibit "A" ("Agreement"). The Agreement provides that the Debtor agree to certain terms and conditions regarding storage and disposition of the property. It recites that EZCR "maintains a number of Secure Storage Facility locations." It provides that the location will "not necessarily be known" to the Debtor and that the Company "retains the sole right to transport and relocate the Property at any time after surrender without notice to the customer." Under the Agreement the Debtor "agrees that the secure storage fee …is a minimum of One Hundred ($100) Dollars per day… Rates per Lot may be higher depending on local conditions, demand, necessity and length of storage." *See* Agreement, *Storage Fees*. The Agreement further provides that the Debtor cannot remove the property without paying all storage fees.[5] The Agreement also has a "Hold Harmless" clause that releases the Debtor from any and all fees, costs or charges related to storage of the property.

After Debtor's plates were removed from the car, Mr. Duff placed temporary plates on the vehicle and drove the vehicle to Cohoes, New York. Debtor's car was placed in a lot which EZCR does not own but in which it leases six parking spots for a total of $100 a month.

EZCR was formed in the Fall of 2012 and is based in Saratoga Springs, New York. It operates across the Northern District of New York and in the Poughkeepsie area of the Southern District. Since its founding, an estimated 50 cars have been handled on behalf of debtors in bankruptcy. It currently has two employees, Shane Duff, director of operations and a second employee who provides technical services out of the home office in Saratoga Springs. It advertises to debtors through the Debtors' Bar by suggesting in its literature that counsel refer

[5] EZCR was quick to point out, however, that it would never charge the Debtor for any storage fees and in two instances in which Debtors wanted to retrieve their cars, allowed Debtors to remove their vehicles at no charge.

their clients to get reports on the retail value, replacement value and auction values of a car to inform a decision as to what to do, which information is provided to debtor counsel for free. It also advertises that it has a discreet and convenient surrender policy by picking up vehicles according to debtors' preferences as to time and place.

Brett Sasso, founder of EZCR from Highland, New York, testified that the idea for the company arose from a void which he witnessed when debtors who wished to surrender a car were unable to get their lender to pick the car up, forcing debtors to maintain insurance on the vehicle and keep the car registered or face fines from the DMV. He stated that EZCR provides a needed service that would otherwise not be available for a debtor. An analogy was made to the homeowner who similarly wishes to surrender a property to the lienholder but remains responsible for upkeep and has potential liability exposure until title passes by acceptance of a deed in lieu or at a foreclosure sale.

On April 16, 2015, EZCR notified the Bank that it was in possession of its collateral and asserted daily storage fees beginning on April 14 in the amount of $100/day. Attached to the letter was a Notice of Lien and Sale, dated April 16, directed to the Debtor and the Bank ("Notice"). The Notice indicated that the collateral could be redeemed on or before May 2, 2015 or otherwise would be sold at public auction on May 25, 2015, by Shane Duff, (Auctioneer). The Notice was signed by Shane Duff.

The court heard the testimony of Suzanne Elmo, who is the Recovery Supervisor at Five Star who deals with losses on loans. As a local Bank, she testified that the Bank is actively engaged in working with debtors to recover its vehicles and arranges pick-ups at a debtor's convenience. The Bank has a contract with Extreme Auction in Syracuse and pays a flat fee of $150 for each car that is picked up on a voluntary surrender, with no additional storage fees

charged to the Bank. Because of the automatic stay, Ms. Elmo testified that the Bank may await the closing of a case to recover a surrendered car absent an order specifically granting relief from stay to avoid any potential violation.[6] Ms. Elmo clearly felt that the Bank was being "shaken down" for fees and moved quickly before the court after she became aware of the April 16 Notice sent by EZCR.

Discussion

As indicated previously, the court heard this matter to learn more about a relatively new business that directly impacts the bankruptcy process. The storage fees charged by EZCR seem to be arbitrary and capricious. EZCR's counsel alerted the court to a recent case heard by my judicial colleague, Honorable Robert E. Littlefield, Jr., on May 7, 2015. In that case, *In re Ogilvie*, Case No. 15-10485 pending in the Albany Division of the Northern District of New York, a creditor moved for relief from stay to recover a vehicle of which EZCR had taken possession (Doc. 9 in Case No. 15-10485). Attached as Exhibit G to that motion was a similar letter sent out by EZCR that also included a Notice of Lien and Sale. That Notice sought daily storage charges of $75/day from March 14, 2015, the date EZCR took possession. One month later, EZCR is charging the Bank in this case $100/day for storage.

Shane Duff testified that if the Debtor as owner of the car agrees to storage charges of $100, then the secured lienholder is bound to pay the $100/day charge. When asked, "if the Debtor agreed to a $500/day storage charge, would the secured creditor also be required to pay $500/day," Mr. Duff answered, "Yes." But the reality is that the Debtor is never going to have to pay any of those storage charges and, therefore, the court questions whether there can be any true "agreement" by the Debtor that could be binding as to the cost of storage. Brett Sasso admitted

[6] The court notes that given the active, local practice of pursuing Section 362(k) sanctions for any act that violates the automatic stay, which can include the recovery of attorney fees, the Bank's practice is well-advised.

that there had been a lower range of storage fees that the company was initially quoting but that the banks had not been paying any attention until the $100/day storage fee was implemented. It appears that the accruing storage fees quoted are merely the starting point for a negotiation to recover as much as a secured lender is willing to pay EZCR. The court infers that apart from EZCR's own profit motive, whatever benefit the alleged service provided by EZCR ostensibly confers upon a debtor and debtor's counsel, it offers little to no benefit to a secured creditor who could otherwise recover its surrendered collateral at a far lower and more reasonable price.

Section 521

Pursuant to the requirements of Section 521, the Debtor was required with respect to debts secured by property of the estate to state his intention as to what he would do with the property, and Debtor indicated his intent to surrender the car. "Surrender" is not a defined term in either Section 521 nor Section 101 and, as has been noted, the word "deliver" is not used in Section 521(a)(2)(A). Accordingly, some courts have held that surrender does not require a transfer or physical delivery of the property, and that in order to comply with the statute, all that the debtor is required to do is to make the secured collateral available to the creditor, and give up the right to possession. *Pratt v. GMAC (In re Pratt),* 462 F.3d 14, 18-19 (1st Cir. 2006). Another court has stated it as follows: "the debtor cannot impede the creditor's efforts to take possession of its collateral by available legal means." *In re Plummer,* 513 B.R. 135, 144 (Bankr. M.D. Fla. 2014). By physically delivering the collateral to EZCR—which physically relocated the vehicle to a distant county—and agreeing to storage charges of $100/day, the Debtor's commitment to follow through on his statement of intention to make the collateral available to Five Star might be questioned. It could be argued that the Debtor, albeit acting innocently on the advice of counsel, interfered with the creditor's rights as set forth in Section 521.

The court recognizes that there is often a void for means of effectuating a debtor's intention to surrender personal property. Too often, the creditor will either wait for an extended period of time before repossessing what the debtor intends to surrender or will choose not to repossess the property at all. In the interim, the debtor is burdened with the costs of maintaining the property and uncertainty and stress that can hinder a debtor's fresh start.

EZCR promises debtors that it will store and maintain insurance on their "surrendered" vehicles and deal directly with the secured creditor, relieving debtors from any further responsibility related to their surrendered collateral. However, EZCR has debtors sign the Agreement for ongoing storage charges prior to turning over their vehicles. The Agreement holds debtors harmless and releases debtors from any and all fees related to the storage of their vehicles, providing absolutely no incentive to debtors to negotiate the price. EZCR then asserts a lien under New York Lien Law § 184 and sends notice to the secured creditor in an attempt to enforce its exorbitant[7] storage fees against the collateral held by the lending institutions.

Ultimately, the calculus as to whether the business model of EZCR fulfills a needed function in the bankruptcy process will be determined by members of the respective Debtor and Creditor Bar who may or may not utilize its service and may embrace or oppose its mission. That determination awaits a future date.

At the close of the evidence, the court announced that it would be inclined to grant relief from the stay and urge members of the respective Bars to address, through their bar associations, the underlying issues raised by these proceedings. EZCR's counsel, however, suggested that after five hours of testimony, it would be helpful if the court wrote on the subject to provide some further guidance. Upon further reflection, the court's oral ruling was premature and, as

[7] The court takes judicial notice of the fact that the rate charged of $100/day is $40 more than the average rate charged to garage a car in a secure garage in New York City, which has the highest rates in the State.

discussed below, Section 362—which was initially overlooked—furnishes some needed guidance.

Section 362

> In pertinent part, Section 362 (a) provides as follows:
>
> …a petition filed under…this title…operates as a stay, applicable to all entities, of—
>
> (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;

On April 14, 2015, when Corky Ellison's case had been pending for 16 days, EZCR proceeded to (i) pick up the Debtor's car, (ii) replace the Debtor's license plate tags, (iii) drive the car across the District to an unidentified location in Albany County and (iv) assert accruing charges as a lien against the car. As previously noted, the car was and remains property of the estate. Under the aforesaid circumstances, the court finds that ECZR acted in violation of the automatic stay to obtain possession of property of the estate and exercise control over property of the estate, which it has continued to do from April 14, 2015, right up and continuing to the present day. Furthermore, the court finds the violation of the stay to be willful, in that with knowledge of the debtor's bankruptcy, EZCR intended the acts which are violative of the stay. *Landsdale Family Rests., Inc. v. Weis Food Serv. (In re Lansdale Family Rests., Inc.),* 977 F.2d 826, 829 (3d Cir. 1992); *see Crysen/Montenay Energy Co. v. Esselen Assocs., Inc. (In re Crysen/Montenay Energy Co.),* 902 F.2d 1098, 1105 (2d Cir. 1990).

Prior to taking any such action, EZCR was required to obtain an order from this court based upon written motion after notice and a hearing. Fed. R. Bank. P. 9013, 9014. Had such a motion been filed, the court would have directed that all interested parties be served with the motion in accordance with Fed. R. Bank. P. 7004, which would have necessarily required service

upon the secured creditor which holds the lien against the vehicle. This would have adequately put the Bank on advance notice of the intended action by EZCR, which was acting in concert with the Debtor and Debtor's counsel.

The court further finds that the Notice sent by EZCR on April 16 constitutes a further violation of the automatic stay pursuant to Section 362(a)(3). It is the ultimate exercise of control to purport to notice a sale of estate property in an attempt to satisfy one's lien. The court finds that all the aforesaid actions taken by EZCR with respect to the car are in violation of the stay and subject to sanctions by this court.

Notice is hereby given that the court shall hold a hearing on June 18, 2015 at 10:00 o'clock in the morning, or as soon thereafter as the matter may be called, at the United States Bankruptcy Court, James M. Hanley U.S. Courthouse and Federal Building, 100 South Clinton Street, 2nd floor, Syracuse, New York, at which time the court shall consider the imposition of sanctions in the amount of $100 per day against EZCR, for each day from April 14, 2015 to the present that EZCR remains in violation of the stay, and will entertain any proposals on that date by EZCR as to how it might purge itself of sanctions.

In the interim, the automatic stay shall remain in effect until further court order.

So Ordered.

/s/Margaret Cangilos-Ruiz
Margaret Cangilos-Ruiz
Chief United States Bankruptcy Judge

Dated: June 5, 2015
Syracuse, New York