IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

NORTHERN DIVISION

In re:	:	
SHELLEY ANNE GIBBS ISAKSON,	:	Bankruptcy Number 90B-00604
	:	[Chapter 13]
Debtor.	:	

MEMORANDUM DECISION AND ORDER

John K. Rice, Esq. and Todd B. Nilsen, Esq. appeared on behalf of Shelley Ann Gibbs Isakson, Debtor.

Theodore Boyer, Jr. and James L. Warlaumont, Esq. of Clyde, Pratt & Snow, appeared on behalf of Lanier Business Products, Creditor.

This matter came before the court on April 25, 1990, upon this court's order requiring Lanier Business Products (Lanier) to show cause why it should not be held in contempt for violation of the automatic stay provided by 11 U.S.C. § 362.[1] Evidence was taken, argument was presented and the court has made an independent investigation of the applicable case law. Now, being fully informed and having weighed the evidence, the

[1] All future statutory references are to Title 11 of the United States Code unless noted.

court enters the following memorandum decision and order pursuant to Bankruptcy Rule 7052.

FACTS

Shelly Isakson (Isakson) filed a petition for relief under Chapter 13 on January 29, 1990.[2] At the time of filing she was self-employed operating a business known as Business Printing Plus. Isakson had been connected with the printing business for six years. She and her husband purchased a PIP franchise in 1984 and operated it until its demise in Chapter 7. She then opened and operated Business Printing Plus for approximately a year prior to the date of filing this petition. Seventy percent of the revenue generated by the business resulted from printing services with the balance generated from copying services. Isakson was dependent upon a copier, however, for 90% of her business because the copier was used to prepare work product for printing. The business was generally meeting its obligations in 1989, but fell behind in lease and rental payments in 1990 resulting in the instant filing.

When the business was created it was the intent of Isakson and her husband to incorporate the business and, to that end, they executed articles of incorporation and opened a bank account in the name of Business Printing Plus, Inc. No further action was

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[2] The confirmation hearing on the plan to be proposed by Isakson is scheduled for August 16, 1990.

taken towards incorporation though Isakson continued to use the preprinted checks. The business was operated at all times as a sole proprietorship.[3]

On November 16, 1989, Isakson entered into an equipment lease with Harris/3M (Lanier) for lease of a copier. Counsel for Lanier characterized the agreement as a true lease.[4] The customer listed on the lease is Business Printing Plus. Isakson did not fill out the equipment lease except for the name of her bank, its address, and the name of her business as Business Printing Plus. She informed Lanier that articles of incorporation had been signed but never filed. The balance of the lease was filled out by Lanier, including the election to denominate the business as a corporation. Isakson signed the lease under the business entity section but did not indicate any corporate capacity. All other references to the name of the business, both on the equipment lease and the sales order, fail to indicate a corporate entity. Isakson paid the down payment with a check drawn on the account of Business Printing Plus, Inc. The check bounced when presented for payment.

Gregory Wolfer (Wolfer), Lanier's District Manager, was contacted by Lanier's central office and notified that Isakson had fifteen days to make the bounced

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[3] Isakson's testimony more properly indicated the existence of a common law partnership between she and her husband. The distinction is unimportant for the purposes of this opinion. Her husband was present at the hearing and made no claim to any assets of this estate, nor did he contest Isakson's assertions that the business was operated as a sole proprietorship.

[4] The equipment lease requires surrender of the copier at the end of the term. The lease also provides that it and any sales order constitutes the entire agreement between the parties. The parties also executed a sales order on November 17, 1989, which states that the customer agrees to secure payment of the purchase price with the copier. It also states that the seller shall retain title to the goods and shall have a purchase money security interest in the goods until paid in full, at which time title will pass to the purchaser. The two documents are inconsistent when viewed together.

check good. He then contacted Isakson on February 1, 1990, to inform her that the bounced check would have to be made good or the copier would be repossessed. He drove to the business the next day, at which time Isakson informed Wolfer that she had filed Chapter 13 and that he should contact her attorney if he had further questions. She also gave him the name and telephone number of her attorney and placed the phone number in his file. Wolfer asked if Isakson's attorney was going to make the payments on the copier and Isakson responded that he was not. Wolfer then said that it would do no good to contact her attorney.

On February 5, 1990, Wolfer again contacted the business regarding the outstanding check but did not talk with Isakson. On February 6, 1990, while Isakson was out, Lanier removed the copier from the business premises.

Isakson's business came to a standstill as a result of the removal of the copier. Isakson had no other on-site copier available. She could not service her walk in trade, prepare work for the printing press, nor meet established deadlines for her clientele. She attempted to use copy work performed at a competitor's premises, but found the logistics sufficiently inconvenient that continuation of the business was impossible.

A Motion for an Order to Show Cause was filed by Isakson on February 8, 1990, and executed by the court on February 9, 1990. A hearing on the Order to Show Cause was scheduled for March 14, 1990, but was continued to a longer block of time on the calendar by stipulation of the parties. At the time of the continuance on March 14,

1990, Lanier, through its counsel, offered to return the copier to Isakson upon receiving proof that Isakson could make future payments or if she brought the payments current. The terms and conditions of the offer were not placed on the record, but the copier was never returned.

Lanier did not contact the Bankruptcy Court or review the Chapter 13 Statement to see if the copier was listed as an asset or Lanier listed as a creditor. Lanier was, in fact, listed as a creditor and placed on the matrix, and the copier was listed as an asset. Nor did Lanier attempt to contact Isakson's attorney prior to removing the copier. Lanier also failed to confirm the existence of the corporate entity, Business Printing Plus, Inc. No evidence exists that Lanier took any action whatsoever in response to Isakson's information that she was under the protection of the court. Lanier stipulated, however, that it knew Isakson filed bankruptcy prior to its repossession of the copier.

Isakson represents that her business has been irreparably harmed because of lost work, and that she no longer wants the copier because her business has been terminated as a result of the delay in the return of the copier. She further asserts that she is entitled to damages for Lanier's willful violation of the automatic stay.

Wolfer alleged that he relied on his interpretation of the Equipment Lease and the bounced check which indicated to him that the customer in default was a corporate entity, thus Lanier was not effected by Isakson's personal filing. Based upon this analysis, Wolfer determined that he was free to exercise Lanier's rights against the property.

Isakson attempted to establish the damages sustained by her as a result of the repossession of the copier.[5] The business generated revenue, a portion of which Isakson drew as her income. Her draws totaled $11,412 for the year ending December 31, 1989. Isakson intended to fund her Chapter 13 plan from this income.

Isakson asserted the value of her business to be $65,000.[6] This is not consistent with the information listed on her Chapter 13 statement, even considering the potential existence of substantial good will not reflected on the Chapter 13 Statement. Unencumbered business assets listed on the Chapter 13 Statement were valued at $5,785. No accounts receivable or inventory were assets listed on the Chapter 13 statement.[7] An offset press and a computer were listed valued at $10,000 and $9,000 respectively. Both pieces of equipment were encumbered to the extend to their value. Xerox Corporation was listed as a creditor with a claim of $25,103.42 secured by a copier. The copier was not listed as an asset. Unsecured debt, primarily business related, totaled $12,318.72. In light of the value of the unencumbered hard assets, the court finds Isakson's valuation of her business to be inflated.

The business did, however, produce a revenue stream which could have been used to retire debt and fund ongoing operations. Whether any plan Isakson may have

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[5] Attorneys fees incurred in bringing this action were testified to at the hearing. Todd Nilsen's affidavit reflected $1,899.15 in fees and costs. John Rice's testimony indicated $927.00 in fees.

[6] She valued the business at $90,000 but discounted the value because of the Chapter 13 filing to $65,000.

[7] A December 31, 1989, balance sheet reflected accounts receivable and inventory of approximately $13,000.

proposed would have been acceptable to creditors, the Standing Chapter 13 Trustee or the court is unknown. Likewise, the evidence produced is inconclusive as to whether Isakson could have successfully consummated a plan.

JURISDICTION

The court has jurisdiction over the parties to this contested matter pursuant to 28 U.S.C. § 1334. This is a core matter as provided by 28 U.S.C. § 157 (b)(2)(A) and (O).

DISCUSSION

A. Property of the Estate

Lanier argues that the copier and any rights arising under the lease are not property of the estate. The facts are to the contrary. No corporation was ever formed and the Lease Agreement was executed by Isakson individually. Isakson's interest in the lease or in the copier is property of the estate as set forth in section 541(a). The cases cited by Lanier in an attempt to show that Isakson's interest is not property of the estate are not on point.[8]

B. Violation of the Automatic Stay

Section 362 operates as a stay to all entities of any act to exercise control over property of the estate. Section 362(h) states: "An individual injured by any willful

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[8] *Matter of Kaiser*, 791 F.2d 73 (7th Cir. 1986); *Gordon Car & Truck Rental v. Gordon, (In re Gordon Car & Truck Rental, Inc.)* 65 B.R. 371 (Bankr. N.D. N.Y. 1986), *Doran v. Treiling (In re Treiling)*, 21 B.R. 940 (Bankr. E.D. N.Y. 1982); and, *Willis v. City of Valdez*, 546 P.2d 570 (Alaska 1976).

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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." The application of section 362(h) is addressed by the district court in *Utah State Credit Union v. Skinner, (In re Skinner)*, 90 B.R. 470 (D. Utah 1988). For this court to apply section 362(h) it must first find that Lanier had knowledge of Isakson's bankruptcy filing and then find that any conduct taken by Lanier which violated the stay was willful or intentional.

C. Knowledge of the Filing

The court has previously found that Lanier had knowledge of Isakson's bankruptcy filing because Lanier was verbally informed prior to repossession of the copier. In addition, Lanier was served with the Order to Show Cause. Lanier defends by asserting that Isakson's filing was immaterial to it because it thought, in good faith, that the contract was with a corporate entity and therefore Isakson's individual filing would not invoke the automatic stay.

The court discounts this argument based on the documents placed in evidence as well as the testimony of Wolfer. The documents show only nominal reference to a corporate entity. In fact, the Lease Agreement fails to indicate a corporate status anywhere except by a check placed in the corporate box. The only remaining document is the bounced check which, by its nature, is inconclusive. The court further relies upon Isakson's testimony that she informed Lanier that no actual incorporation had taken place

at the time of entering into the lease. Wolfer, as agent of Lanier, is presumed to have knowledge of relevant information given to Lanier.

The court also considers the testimony of Wolfer not to be credible in light of the specific information given by Isakson to him in response to his threat of repossession. She informed him that he should contact her attorney if he had further questions. Wolfer's testimony supports the finding that he related Isakson's bankruptcy filing to the contract because he asked if Isakson's attorney was going to pay for the copier. Such an inquiry is inconsistent if Wolfer honestly thought Isakson's filing had no relation to the copier. The court finds that Wolfer's testimony lacks credibility and that the assertion that Lanier innocently proceeded in good faith is not supported by the evidence. To the contrary, Wolfer evidenced a cavalier attitude toward the information of Isakson's filing.

D. Willful

In order for Isakson to recover under section 362(h) the court must find that Lanier's conduct was willful. Willful in this context means that Lanier intended to act in violation of the automatic stay. *Skinner*, 90 B.R. at 474. Unlike the *Skinner* case, there is ample evidence on this record to conclude that Wolfer knew of Isakson's filing, of her relation to the business, and that the copier was necessary to her business. The documents relied upon by Lanier to support its position that it innocently acted without intent to violate the automatic stay are vague at best. The Lease Agreement is in the name of an entity which indicates no corporate status. It is signed by an individual with

no corporate title. The evidence indicates that it was Lanier which checked the box indicating corporate status.[9] The only other indication of corporate status is on the bounced check.

Reliance upon such inconclusive evidence of corporate status is not credible. Rather, it is more indicative of an after the fact attempt to justify improper conduct. Lanier completely disregarded Isakson's request that Lanier contact her attorney if any question arose. Once Lanier had knowledge of the filing, the burden is placed on the creditor to decide the parameters of permissible conduct against the debtor. *Skinner*, 90 B.R. at 480. Having made its unilateral decision to ignore Isakson's filing, Lanier took no action whatsoever to ascertain if its conclusions as to the corporate status of Business Printing Plus were in fact true. It did not contact the State of Utah to verify corporate status, took no action to inspect the bankruptcy file, and did not contact Isakson's counsel. Lanier deliberately and intentionally repossessed the copier with knowledge of Isakson's filing, knowledge of the legal status of the business, and with knowledge of the potential impact on her business.

E. Continuing Violation of the Stay and Contempt of Court

The willful nature of Lanier's conduct is further evidenced by its continued failure to return the copier. "When a creditor fails to restore the status quo, the creditor retains an improved position over other creditors. The retention of the benefits gained

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[9] The court notes the absence of any testimony to contradict Isakson's assertions that she did not fill out all of the Lease Agreement. Though a handwriting expert was not called to testify, the document does support Isakson's testimony that two difference writers contributed to the document.

by violating the stay is itself a continuing violation, and if done knowingly, is ground for contempt." *Skinner*, 90 B.R. at 480 (citing *In re Miller*, 10 B.R. 778, 780 (Bankr. D. Md. 1981)).

Lanier asserts that it attempted to negotiate the return of the copier upon Isakson's proof of ability to pay or if she brought the payments current. If the Lease Agreement is an executory contract, as indicated by counsel's assertion that it is a true lease, section 365(d)(2) provides that the debtor has until the confirmation of a plan to assume and cure a lease of personal property. Only on request of a party to the contract may the court order the trustee or debtor to determine whether to assume or reject such a contract within a shorter period of time.

In spite of these provisions of the statute, Lanier refused to return the property without further consideration. This conduct continued even after receiving Isakson's pleading asserting that no corporate entity existed and even after Lanier's counsel had attempted to no avail to verify the corporate status of Business Printing Plus. Based upon the refusal to restore the status quo, coupled with the prior actions of Lanier, the court finds these acts to be further indication of Lanier's willful conduct. It also constitutes civil contempt independent of the initial violation of the automatic stay.

F. Sanctions

A finding of willful violation of the automatic stay requires the court to allow Isakson to recover actual damages, including costs and attorneys' fees. If

appropriate, the court may award punitive damages. A finding of civil contempt also authorizes the imposition of sanctions under section 105(a) and Bankruptcy Rule 9020.

The recovery of actual damages is compensatory in nature. Isakson has provided an estimate of lost earnings. She computed her revenue for 33 years including an inflation rate of 4% and then reduced the total to a present value of $216,683. The court finds the estimate of damages asserted by such projections to be impermissively speculative.

The estimate presumes the business would have continued to function and produce revenue to Isakson of $11,000 a year for 33 years. The court disagrees. It is altogether possible that the business may not have survived past the hearing on confirmation of Isakson's plan.[10] The court could give Isakson the benefit of the doubt in that she could propose a confirmable plan which would be successfully consummated, but there is simply insufficient support in the record to presume the extension of revenue of the business for 33 years.

Isakson further testified that she valued her business at $65,000 as of the day of filing. The court considers this allegation more seriously because if the value is correct, the estate and its creditors have lost significant value whether the case is a chapter 7 or a chapter 13. Isakson's Chapter 13 statement however, contradicts her valuation. No asset is listed for inventory, accounts receivable, or good will, and unencumbered business assets are valued at only $5,785. Isakson's valuation appears to

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[10] No plan has yet been filed, pending outcome of this hearing.

be based upon her familiarity with the purchase price of similar businesses, on the expected income stream, and on the total value of all the business' assets. No consideration was given for the difference between the value of assets and the encumbrances thereon. There is insufficient evidence to support Isakson's conclusions. Therefore, the court rejects the assertion that damages should be awarded in the amount of $65,000.

The evidence does support that the income stream which existed at filing, and which would have been available to pay creditors, has been lost as a result of Lanier's actions. Absent Lanier's interference, it is entirely appropriate to presume that the income stream would have continued until at least the hearing on confirmation. Therefore, the court will grant compensatory damages in the amount of $6,003.02.[11] Further awards of lost revenue are too speculative to be considered.

Isakson is also entitled to attorneys' fees and costs for bringing this action. The fees testified to at trial were $1,899.75 for Todd B. Nilsen, Esq. and $927 for John K. Rice, Esq. for a total of $2,826.75. The court finds the fees and costs to be sufficiently documented, reasonable, and necessarily incurred for the preservation of the estate.

The court may also award punitive damages in circumstances of egregious conduct under section 362(h) and under section 105(a). In this case, not only did Lanier ignore the automatic stay and repossess the copier to the detriment of all creditors, but,

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[11] The annual revenue was $11,412 divided by 365 days equaling $31.26 per day. There are 192 days between the date of repossession and the date of confirmation. Therefore, $31.26 per day times 192 days equals $6,003.02.

upon learning of the clear violation it committed, failed to restore the status quo and return the copier. That failure put the nails in the coffin of hope for rehabilitation for Isakson and recovery for other creditors. Lanier's selfish conduct has damaged not only Isakson's hopes for financial recovery, but has damaged the rights of other creditors to receive as large a recovery from this estate as possible. Such conduct cannot be condoned and the court awards Isakson $4,000 as punitive damages in the belief that such an award will serve to deter similar conduct in the future.

In light of the forgoing determination, it is hereby

ORDERED, that Lanier pay to Isakson, the amount of $6,003.02 as actual damages, and it is further

ORDERED, that Lanier pay to Barbara Richman, Standing Chapter 13 Trustee, the amount of $2,826.75 as allowed attorneys fees and costs for this action, and it is further

ORDERED, that Lanier pay to Isakson, the amount of $4,000.00 as punitive damages, said funds to be used in Isakson's good faith proposal of a plan.

DATED this 2 day of May, 1990.

JUDITH A. BOULDEN
United States Bankruptcy Judge