

11 USC §362
FRCP 19

Collins v. Tonkin Honda Adv Proc 89-3422-S

In re Collins 389-35456-S7

3/16/90

DDS

unpublished

The debtor plaintiff and creditor defendant filed cross motions for partial summary judgment on the issue of who was entitled to possession of the vehicle which the creditor had repossessed from the debtor in violation of the automatic stay.

The debtor's motion was granted and the creditor's motion was denied. The creditor's refusal to return the vehicle was a continuing violation of the automatic stay. The creditor's argued that because it is confident it will be entitled to relief from the stay it should be able to retain possession. This position is untenable and flaunts the spirit of the automatic stay.

The trustee is a necessary party to the litigation regarding ownership of the car and who is entitled to any damages from the defendant for the violation of the stay.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case No.
) 389-35456-S7
MICHAEL ALAN COLLINS,)
) Adversary Proceeding No.
 Debtor,) 89-3422-S
)
MICHAEL ALAN COLLINS,) MEMORANDUM
)
 Plaintiff,)
)
 v.)
)
 TONKIN HONDA, dba Ron)
 Tonkin Honda,)
)
 Defendant.)

This action arose from defendant's post-petition repossession of a car that it sold to plaintiff. The parties filed cross motions for partial summary judgment. The debtor requests summary judgment on the issue that Tonkin Honda ("Tonkin") violated the automatic stay, and to require that possession of the vehicle be returned to the debtor. Tonkin seeks partial summary judgment that would permit it to retain possession of the car. For the following reasons, the

debtor's motions should be granted and Tonkin's motion denied.

Tonkin admits that it violated the automatic stay by repossessing the debtor's car and that it knew of the bankruptcy filing before the repossession. Despite knowledge of the petition, and the pendency of this adversary proceeding, Tonkin refuses to unconditionally relinquish possession of the car pending the outcome of this proceeding and Tonkin's motion for relief from stay. Tonkin supports its position by claiming that it will win the motion for relief from the automatic stay because the financing condition precedent to the sale of the vehicle was not satisfied, so the debtor was not entitled to retain the car.

This argument must fail. Tonkin's refusal to return the car is a continuing violation of the automatic stay, In re Knaus, 889 F.2d 773 (8th Cir. 1989). There are many issues which must be resolved before a final determination can be reached concerning the validity and extent of the parties' interest in the vehicle, and who may be entitled to punitive damages from Tonkin. From the record, it appears there are issues concerning the avoidability of the Seafirst security agreement, and Tonkin's possible status as an unsecured creditor if it is renouncing the contract. The trustee is an indispensable party to these proceedings, and must be joined to determine the ownership of the car, and whether the trustee or the debtor is entitled to recover any punitive damages

assessable against Tonkin. The Court may raise the absence of a necessary party sua sponte, Provident Tradesman Bank v. Patterson, 390 U.S. 102, 111, 88 S. Ct. 733 (1968). I will order the trustee to either voluntarily join these proceedings or be joined by the plaintiff.

A separate order will be entered.

DATED this _____ day of March, 1990.

DONAL D. SULLIVAN
Bankruptcy Judge

cc: Robert J. Vanden Bos
Edwin C. Perry
Alexander T. Bishop
U. S. Trustee

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case No.
) 389-35456-S7
MICHAEL ALAN COLLINS,)
) Adversary Proceeding No.
 Debtor,) 89-3422-S
)
MICHAEL ALAN COLLINS,) ORDER
)
 Plaintiff,)
)
 v.)
)
 TONKIN HONDA, dba Ron)
 Tonkin Honda,)
)
 Defendant.)

After a hearing on March 13, 1990 and based on a memorandum entered separately,

IT IS ORDERED that:

(1) The plaintiff's motions for partial summary judgment are granted and the defendant's motion for partial summary judgment is denied.

(2) The repossession on December 16, 1989 by defendant Ron Tonkin of the 1990 Honda Civic at issue was a knowing

PAGE 1 - ORDER

violation of the automatic stay.

(3) Defendant shall immediately restore possession of the 1990 Honda Civic to the debtor pending the final decision on the ownership of the vehicle.

(4) The debtor shall continue to make monthly contract payments into court until a decision is reached on the ownership of the vehicle.

(5) The trustee shall intervene as a party plaintiff and if he fails to do so within 10 days after a request by the debtor, the debtor shall join him as a defendant.

(6) A further status call is scheduled for Wednesday, April 4, 1990 at 9:30 a.m.

DATED this _____ day of March, 1990.

DONAL D. SULLIVAN
Bankruptcy Judge

cc: Robert J. Vanden Bos
Edwin C. Perry
Alexander T. Bishop
U. S. Trustee

PAGE 2 - ORDER