

UNITED STATES BANKRUPTCY COURT  
For the Southern District of Iowa

In the Matter of

TERRY, FORD, LINCOLN,  
MERCURY, INC.,

Case No. 87-491-C

Chapter 11

Debtor

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ORDER

On July 22, 1987 an application for order to show cause filed on behalf of the debtor, a resistance thereto filed on behalf of Jerry R. Fouch and Fouch-Murdock Funeral Home, Inc., and a motion to dismiss filed on behalf of Dallas County, Iowa came on for hearing before this court in Des Moines, Iowa. Michael P. Mallaney and William Byers appeared on behalf of the debtor. John C. Powell appeared on behalf of Jerry R. Fouch and Fouch-Murdock Funeral Homes, Inc. Mr. Fouch was not present at the hearing. David J. Welu and F. Montgomery Brown appeared on behalf of Dallas County, Iowa. At the time of the hearing the attorney for Dallas County questioned whether Dallas County was a proper party and whether the Dallas County Attorney was the proper representative of the county. The court gave the parties ten days in which to file briefs addressing the issue raised. After a determination of that issue the court will

address the merits of the debtor's application and consider the necessity for a further evidentiary hearing. The matter was considered fully submitted on August 3, 1987.

#### Background

On February 25, 1987 the debtor filed a Chapter 11 petition in bankruptcy. The debtor is engaged in the business of selling automobiles including service and repair. Prior to filing the petition, the debtor and Fouch-Murdock Funeral Home entered into a Motor Vehicle Purchase Agreement for the sale of two 1987 Ford Aerostar vans. The agreement provided for a used vehicle trade in and/or other credits in the amount of \$9,000.00. On or about January 28, 1987 Fouch-Murdock Funeral Home delivered to the debtor a 1985 Toyota Forerunner motor vehicle. On January 29, 1987 the debtor ordered two Ford Aerostar vans from Ford Motor Company and on January 30, 1987 sold the Toyota Forerunner vehicle for \$9,400.00.

In the debtor's bankruptcy schedules filed on March 24, 1987, \$9,000.00 is listed as "Property Not Otherwise Scheduled" and described as a deposit on a new van for Fouch-Murdock Funeral Home, Perry, Iowa. The debtor asserts that subsequent to the filing of the petition, Fouch-Murdock Funeral Home advised the debtor that it would not honor the terms of the Motor Vehicle Purchase Agreement and demanded payment of \$9,000.00 for the sale of the Toyota. Fouch-Murdock Funeral Home and Jerry Fouch assert that the debtor stated that it

could not obtain delivery of any new automobiles.

Nonetheless, the debtor issued from its cash collateral account a check made payable to the order of Jerry Fouch in the amount of \$9,000.00 in exchange for the certificate of title to the Toyota vehicle. The check was returned not paid by the Brenton National Bank, Perry, Iowa.

On or about April 21, 1987 Jerry Fouch made notice and demand upon the debtor for payment of \$9,000.00 and thereafter caused to be filed a criminal action against the debtor in the Iowa District Court for Dallas County. A complaint charging the debtor with theft in the first degree in violation of sections 714.1 and 714.2(1) of the Iowa Code was filed on May 7, 1987. In conjunction with the criminal complaint an application for writ of attachment was filed by the Dallas County Attorney. On May 7, 1987 a writ authorizing the attachment of property satisfy the sum of \$10,000.00 was issued by the clerk of the court in Dallas County. Pursuant to that writ the Dallas County Sheriff levied on two automobiles and proceeds from the sale of the debtor's assets. On June 3, 1987 a trial information was filed in the Iowa District Court for Dallas County accusing the debtor of the crime of first degree theft in violation of the Iowa Code section 714.1 and 703.5.

#### Analysis

In its application for order to show cause the debtor asserts that the actions of Jerry Fouch, Fouch-Murdock

Funeral Home, Inc. and Dallas County, Iowa are in violation of the automatic stay as they are in essence attempts to collect on a prepetition obligation. In a resistance filed on behalf of Jerry Fouch as president of Fouch-Murdock Funeral Home, Inc., Mr. Fouch asserts that Fouch-Murdock Funeral Home had no knowledge of the debtor's bankruptcy filing. In a second resistance filed on behalf of Jerry Fouch and Fouch-Murdock Funeral Home, Inc., the creditors assert that the proceeds from the sale of the Toyota vehicle were held in trust for the creditors and do not constitute property of the estate. Therefore, they contend that the delivery of the check by the debtor did not constitute payment of a prepetition debt but rather constituted payment of proceeds held in trust. The creditors further assert that the commencement or continuation of a criminal action is excepted from the effect of the automatic stay by virtue of 11 U.S.C. section 362(b)(1).

The motion to dismiss filed on behalf of Dallas County, Iowa asserts that all proceedings initiated in the Iowa District Court have been taken on behalf of the State of Iowa by and through the Dallas County Attorney's office pursuant to Iowa Code section 331.756(1). At the July 22, 1987 hearing the county attorney alleged that the State of Iowa, not Dallas County, is the proper party for purposes of the debtor's application for order to show cause. In its brief in support of the motion to dismiss the county attorney

asserts that all actions taken were on behalf of the State of Iowa and therefore the county or state should be immune for damages under the Iowa Tort Claims Act. The debtor's brief does not address the issue of damages but rather asserts that the county and the county attorney are the proper parties to the action before this court. The issues identified in the motion to dismiss require some analysis.

The court is not convinced by the county attorney's assertion that the State of Iowa is the proper party to this proceeding. The debtor's application for order to show cause challenges the commencement and continuation of a criminal case which is under the control of the county attorney until the Supreme Court acquires jurisdiction. See State v. Gill, 143 N.W.2d 331, 332 (Iowa 1966). Moreover, it is the duty of the county attorney to "[c]ommence, prosecute, and defend all actions and proceedings in which... the county is interested or a party." Iowa Code (§ 331.756(6)(1987) (emphasis added). Accordingly, Dallas County is a proper party and the Dallas County Attorney is the proper representative of the county in this court.

There remains a question as to an appropriate remedy against a county or a county attorney in the context of a contempt action in the bankruptcy forum. The debtor's application seeks to find Dallas County (and other defendants) in contempt of the automatic stay and to recover actual damages caused by the action. Counties and county

attorneys, however, are immune from civil liability arising out of decisions to initiate criminal prosecution. Burr v. City of Cedar Rapids, 286 N.W.2d 393, 394-95 (Iowa 1979); Gartin v. Jefferson County, 281 N.W.2d 25, 31 (Iowa App. 1979). Accordingly, an award of damages against Dallas County would be inappropriate. Moreover, since the debtor has not sought to enjoin the pending criminal proceeding the only available remedy upon a finding of a violation of the automatic stay would be the voidance of the state court proceedings taken. Browning v. Navario, 37 B.R. 201, 210 (N.D. Texas 1983).

Given the above considerations the court now turns to the merits of the debtor's application. The debtor seeks to hold Jerry Fouch, Fouch-Murdock Funeral Home, Inc. and Dallas County in contempt of the stay provisions of 11 U.S.C. section 362. The provisions of the automatic stay contained in 11 U.S.C. section 362(a) encompass a broad range of actions stayed by the filing of a petition in bankruptcy. Section 362(b) contains delineated exceptions to this stay provision by providing in part:

(b) the filing of a petition under section 301, 302 or 303 of this title ... does not operate as a stay--

(1) Under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(4) Under subsection (a)(1) of

this section of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) Under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

The debtor disputes the application of the above exceptions to the automatic stay under the present circumstances and asserts that the actions of Jerry Fouch, Fouch-Murdock Funeral Home, Inc., and Dallas County are in reality an attempt to collect a money judgment to satisfy a prepetition obligation.

A criminal prosecution of the debtor, although excepted from the operation of the stay by section 362(b)(1), may be a violation of the stay if it is part of an "aggressive campaign" to collect a debt. Matter of Butler, 74 B.R. 106, 107 (W.D. Mo. 1985); In re Delay, 48 B.R. 282, 285 (W.D. Mo. 1984). The bankruptcy court must consider whether the state criminal action was instituted to further a public policy and protect the public welfare, see In re Richardello, 28 B.R. 344, 347 (Bankr. D. Mass. 1983), or was merely a pretext for collecting the amount of an insufficient funds check. See Matter of Butler, 74 B.R. 106, 107 (W.D. Mo. 1985).

Moreover, while subsections 362(b)(4) and (5) except from the operation of the automatic stay, the commencement or continuation of actions by governmental units to enforce their police powers, subsection 362(b)(5) creates an "exception to the exemption" in that actions to enforce money judgments are affected by the automatic stay. In re Wheeling-Pittsburg Steel Corp., 63 B.R. 641, 643 (Bankr. W.D. Pa. 1986); In re Blair, 62 B.R. 650, 652 (Bankr. N.D. Ala. 1986). It has been recognized that some actions may not facially resemble an enforcement of a money judgment and yet in substance be an action to obtain and to enforce such a judgment. Penn. Terra Ltd. v. Dept. of Environ. Resources, 733 F.2d 267, 275 (3rd Cir. 1984). In those situations it is necessary to look beyond the form of such actions and determine whether the governmental unit is attempting to achieve in actuality what a money judgment was intended to accomplish. Id. at 277-78. An important factor in identifying a proceeding as one to enforce a money judgment is whether the remedy would compensate for past wrongful acts or protect against potential future harm. Id. at 276-77.

Based on the allegations in the pleadings and those made by counsel on July 22, 1987, the court questions whether the instant criminal prosecution was a guise for a collection effort and whether the attachment procedure was an effort to collect a money judgment. It is clear from the criminal complaint and information that Jerry Fouch, presi-



dent of Fouch-Murdock Funeral Home, was the moving force behind the criminal prosecution. At a minimum the notice and demand letter sent by Fouch on April 21, 1987 seeking \$9,000.00 from the debtor violated the provisions of section 362(a) and falls within no exception enumerated in section 362(b). Mr. Jerry Fouch, however, did not attend the July 21, 1987 hearing at which he personally and in his capacity as president of Fouch-Murdock Funeral Home was ordered to appear and to show cause why he should not be held in contempt. While the court does not countenance such disregard of its orders, a hearing will be rescheduled on the debtor's application for order to show cause and Jerry Fouch, Fouch-Murdock Funeral Home, Inc., and Dallas County will again be directed to appear and address the concerns noted by this court. After such hearing the court will consider the appropriate remedy for any violation of the automatic stay.

WHEREFORE, based on the foregoing analysis, the court hereby finds that Dallas County, Iowa is a proper party to this action and the Dallas County Attorney is the proper representative of the county in this court.

THEREFORE, the motion to dismiss filed on behalf of Dallas County is hereby denied.

IT IS FURTHER ORDERED that a hearing on the debtor's application for order to show cause shall be rescheduled as

the court's calendar permits for the purpose of addressing the issues identified in this opinion.

Signed and filed this 16th day of December, 1987.

LEE M. JACKWIG

U.S. BANKRUPTCY JUDGE