

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

IN RE:)
)
ANTHONY JOHN MERCEDE,) CASE NO. 08-22896 JPK
) Chapter 13
Debtor.)

ORDER CONCERNING DEBTOR'S MOTION FOR
CONTEMPT SANCTIONS FOR VIOLATION OF 11 U.S.C. § 362(a)

On June 8, 2009, the debtor, by counsel, filed a motion seeking turnover of property from, and sanctions against, Gehl Finance with respect to alleged violations of the automatic stay of 11 U.S.C. § 362.

11 U.S.C. § 362(k)(1) provides:

Except as provided in paragraph (2), an individual injured by any willful 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.

However, § 362 does not provide the mechanism by which this remedy is to be enforced. As stated in *In re Rimsat, Ltd*, 208 B.R. 910 (Bankr. N.D.Ind., Ft. Wayne Div. 1997), the United States Court of Appeals for the Seventh Circuit has consistently held that a civil contempt proceeding will lie only with respect to the violation of a court order.¹ The provisions of 11 U.S.C. § 362(a) do not constitute a court order, and thus a civil contempt proceeding, which may be initiated by a motion for rule to show cause, may not be addressed to an alleged violation of the automatic stay or be utilized as a mechanism to recover the elements of

¹As stated in *United States v. Dowell*, 257 F.3d 694, 699 (7th Cir. 2001):
"A court's civil contempt power rests in its inherent limited authority to enforce compliance with court orders and ensure judicial proceedings are conducted in an orderly manner." *Jones v. Lincoln Electric Co.*, 188 F.3d 709, 737 (7th Cir. 1999). For Morano to be held in civil contempt, he must have violated an order that sets forth in specific detail an unequivocal command from the court. See *id.* (quotations omitted).

damages specified in 11 U.S.C. § 362(k)(1).

As made clear by Fed.R.Bankr.P. 7001, only a Trustee's request for turnover of property from the debtor may be pursued by motion. Fed.R.Bankr.P. 7001 specifies certain proceedings which must be initiated as adversary proceedings, including "a proceeding to recover money or property" [Fed.R.Bankr.P. 7001(1)] and "a proceeding to obtain an injunction or other equitable relief" [Fed.R.Bankr.P. 7001(7)]. The above-designated motion by the debtor seeks both of the foregoing forms of relief. As a result, the matters sought to be addressed by the above-designated motion must be presented to the Court by means of an adversary proceeding pursuant to Fed.R.Bankr.P. 7001, and the procedures applicable to that form of action. *In re Rimsat, Ltd, supra.*; *In re Hunter*, 190 B.R. 118 (Bankr. Colo. 1995).

IT IS ORDERED that the above-designated motion is denied, without prejudice to the debtor seeking the remedies requested by that motion by means of an adversary proceeding in accordance with applicable law and rules.²

Dated at Hammond, Indiana on June 18, 2009.

/s/ J. Philip Klingeberger
J. Philip Klingeberger, Judge
United States Bankruptcy Court

Distribution:

Debtor, Attorney for Debtor
Trustee, US Trustee
Rev. 06/16/2009

² In the event an adversary proceeding is commenced and the debtor wishes to obtain some form of prompt hearing, the proper mechanism to do so is to include in the adversary complaint a separate count for emergency injunctive relief (e.g., a temporary restraining order/preliminary injunction), and to then file a motion for an emergency hearing with respect to the relief requested by that count. Upon the filing of the motion, the court will issue an order scheduling a hearing as promptly as the court's calendar permits and the requirements of due process regarding notice of the hearing allow; the order utilized by the court requires the debtor's counsel to take affirmative steps to notify the adverse party of the hearing and to assure the court at the hearing that actual notice of the hearing has been provided to the adverse party.