IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

IN RE:	§	
	§	
AMERICAN PEAK PRODUCTION, LLC	§	Case No. 13-41116
	§	(Chapter 7)
Debtor.	§	
_____	§	
IPFS CORPORATION,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Adv. Proc. No. 14-4080
	§	
MICHELLE CHOW, CHAPTER 7 TRUSTEE,	§	
	§	
Defendant.	§	

MEMORANDUM OPINION AND ORDER
GRANTING MOTION FOR PARTIAL SUMMARY JUDGMENT

This matter is before the Court on a motion for partial summary judgment filed by IPFS Corporation ("IPFS"). IPFS seeks a summary judgment denying a counterclaim asserted by Michelle Chow, as the chapter 7 trustee for the bankruptcy estate, that IPFS violated the automatic stay imposed by 11 U.S.C. § 362(a)(3). The trustee opposes the motion. The Court exercises its core jurisdiction over this matter, *see* 28 U.S.C. §§ 157(b) and 1334, and makes the following findings of fact and conclusions of law.

STANDARD OF REVIEW

IPFS brings its motion for partial summary judgment in this adversary proceeding pursuant to Federal Rule of Bankruptcy Procedure 7056. Bankruptcy Rule 7056 incorporates Federal Rule of Civil Procedure 56, which provides that summary judgment shall be rendered "if the movant shows that there is no genuine issue as to any material fact and the movant is

entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). "The purpose of summary judgment is to isolate and dispose of factually unsupported claims or defenses." *Chishty v. Texas Dept. of Aging and Disability Services,* 562 F.Supp.2d 790, 800 (E.D. Tex. 2006).

The party seeking summary judgment always bears the initial responsibility of informing the Court of the basis for its motion and identifying those portions of the "pleadings, depositions, answers to interrogatories, and affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). The manner in which this showing can be made depends upon which party will bear the burden of persuasion at trial. If, as in this case, the burden of persuasion is on the non-moving party, then the party moving for summary judgment bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex v. Catrett,* 477 U.S. 317, 323 (1986). The non-movant must then present specific facts showing there is a genuine issue for trial. FED. R. CIV. P. 56(e).

The parties have essentially stipulated in their pleadings that there is no factual dispute in need of resolution with respect to the alleged violation of the automatic stay and have presented opposing arguments based upon the application of appropriate law. For cases in which the unresolved issues are primarily legal rather than factual, summary judgment is particularly appropriate. *See Mansker v. TMG Life Ins. Co.*, 54 F.3d 1322, 1326 (8th Cir. 1995). *See also, e.g., Thompson Everett, Inc. v. National Cable Advertising, L.P.*, 57 F.3d 1317, 1323 (4th Cir. 1995) ("A federal court may resolve the legal questions between the parties as a matter of law and enter judgment accordingly."). Here, IPFS's motion and the chapter 7 trustee's response set forth the following body of uncontested facts.

UNDISPUTED FACTS

The debtor, American Peak Production, Inc., is an oil field services business. The debtor bought insurance policies for general liability, workers compensation, and other insurable risks from West Texas Insurance Exchange Inc. (the "Agent"), agent of Berkley National Insurance Company and Berkley Regional Insurance Company (the "Insurers"). The debtor entered into a Premium Finance Agreement ("Finance Agreement") with IPFS in which IPFS would provide $925,010 in financing for the insurance policies. The debtor agreed to pay IPFS a down payment of $92,501, a finance charge of $17,795.05, and 11 monthly installments equaling $850,304.07.

The Texas Insurance Code regulates the contents of premium finance agreements. *See* TEX. INS. CODE §§ 651.151 *et seq*. In addition to various required contents, "[a] premium finance agreement may contain a power of attorney that enables the insurance premium finance company to cancel any or all of the insurance contracts listed in the agreement as provided by Section 651.161." TEX. INS. CODE § 651.160. Section 651.161 regulates the manner in which a premium finance company may cancel a contract and, in the event of cancellation, § 651.162 regulates the return of unearned premiums and commissions if the premium finance agreement contains an assignment or power of attorney for the benefit of the insurance premium finance company.

Here, on page 1 of the Finance Agreement, the debtor assigned to IPFS a security interest in "all right, title and interest" to the policies, including, among other things, the right to receive any unearned premiums under each of the policies to secure payment of all amounts due and owing to IPFS under the Finance Agreement. Also on page 1 of the Finance Agreement, the debtor irrevocably appointed IPFS its attorney-in-fact with full power of substitution and full

authority upon default to cancel all the policies and to receive all sums assigned to it by debtor under the Finance Agreement. IPFS mailed notice of the Finance Agreement to the Insurers on January 28, 2013.

The debtor made the down payment but failed to pay the first installment due to IPFS. Based upon the debtor's failure to pay, IPFS sent a notice of intent to cancel the policies to the debtor. The debtor remained delinquent so IPFS sent the debtor and the Insurers a notice of cancellation of the policies, which directed the Insurers to pay IPFS the gross unearned premiums due under the policies, on or about March 22, 2013. The debtor subsequently filed a bankruptcy petition. As of May 1, 2013, the date the debtor filed for bankruptcy, the debtor owed IPFS $836,374.02 plus interest under the Finance Agreement.

IPFS contacted the chapter 7 trustee after the debtor filed for bankruptcy. IPFS discussed the Finance Agreement and the law governing the Finance Agreement with the trustee.

Roughly one month after the debtor filed for bankruptcy, the Agent refunded $329,398 of the unearned premiums directly to IPFS for the policies other than the workers compensation and general liability policies. The workers compensation policies and the general liability policy were subject to audit and post-term premium adjustment. On November 6, 2013 and April 22, 2014, this Court entered orders requiring, among other things, IPFS to promptly provide an accounting to the trustee if the audit resulted in IPFS receiving more than the amount of its claim. However, after the audit and adjustment, the unearned premiums totaled only $483,438 – which is less than the amount the debtor owed IPFS under the Finance Agreement.

After completing the audit, the Insurers transferred $399,974 in unearned premiums to the chapter 7 trustee. Additionally, the Agent transferred $48,612.73 in unearned commissions

to the trustee. IPFS initiated this adversary proceeding in September 2014 because the trustee had refused to pay these sums to IPFS. The chapter 7 trustee counterclaimed that IPFS had violated the automatic stay when it received the refund of $329,398 in unearned premiums directly from the Agent.

DISCUSSION

Section 362(a)(3) of the Bankruptcy Code provides that the filing of a bankruptcy petition "operates as a stay, applicable to all entities, of ... 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...." The debtor's estate is comprised of all the debtor's legal or equitable interests in property as of the commencement of the bankruptcy action. *In re MortgageAmerica,* 714 F.2d 1266, 1273-74 (5th Cir. 1983). *See also* 11 U.S.C. § 541(a)(1). In addition, in the Fifth Circuit, property that is "arguable property" of the estate is protected by the automatic stay from unilateral action by creditors. *Brown v. Chesnut (In re Chesnut),* 422 F.3d 298, 303–04 (5th Cir. 2005). In *Chesnut*, for example, a creditor foreclosed on real property post-petition despite its knowledge that the debtor had claimed the property as his community property under the protection of the automatic stay. *Id.* at 300—01.

A violation of the stay is punishable as contempt of court.[1] *See, e.g., Mountain Am. Credit Union v. Skinner (In re Skinner),* 917 F.2d 444 (10th Cir. 1990) (stay violations may be punishable as contempt under 11 U.S.C. § 105). Most courts will impose contempt sanctions for a knowing and willful violation of the automatic stay. Contempt sanctions generally are not warranted so long as the party acted without maliciousness and had a good faith argument and

[1] In addition, § 362(k) provides that a willful stay violation concerning an individual debtor mandates an assessment of damages against the violator. Though the Fifth Circuit has not ruled on the issue, the majority of circuits, along with lower courts within the Fifth Circuit, hold that corporate debtors (such as the debtor in this case) cannot recover under § 362(k). *See, e.g., In re San Angelo Pro Hockey Club, Inc.,* 292 B.R. 118, 124 (Bankr. N.D. Tex. 2003).

belief that its actions did not violate the stay. *See, e.g., In re Crysen/Montenay Energy Co.*, 902 F.2d 1098, 1104 (2nd Cir. 1990). However, even an unintentional or technical violation of the automatic stay may be considered willful and sanctioned as contempt if the creditor fails to cure the violation within a reasonable time. *See, e.g., In re Talsma*, 468 B.R. 809, 817 (Bankr. N.D. Tex. 2012) ("As a general rule, prompt cure of its contempt by a party that has unintentionally violated the automatic stay will constitute sufficient cure to satisfy the court.").

In this adversary proceeding, the trustee characterizes the unearned premiums as the collateral of IPFS. The trustee asserts the unearned premiums were property of the debtor's bankruptcy estate on the petition date and IPFS violated the automatic stay by accepting a refund of the unearned premiums without first seeking relief from the automatic stay. The trustee also complains IPFS failed to account to the estate for the unearned premiums it received in June 2013. In her counterclaim, the trustee requests an award of actual damages, punitive damages, and attorneys' fees based on the alleged violation of the stay.

The trustee has not identified any right the debtor had to the funds held by the Agent or Insurers to which the automatic stay applied on the petition date. The undisputed summary judgment evidence establishes IPFS provided funds for the debtor to purchase insurance pursuant to the Finance Agreement, and when the debtor failed to make payments to IPFS as required by the Finance Agreement, IPFS canceled the polices as the debtor's "attorney-in-fact." The undisputed summary judgment evidence also establishes that the debtor assigned the right to receive unearned premiums after default to IPFS, the debtor defaulted, and IPFS performed all the conditions precedent to obtain a refund of the premiums prior to bankruptcy.

The Bankruptcy Code allows debtors to retain certain previously held interests in property -- it does not allow them to create new ones. *See, e.g., In re Threats*, 159 B.R. 241, 243

(Bankr. N.D. Ill. 1993); *In re Martin*, 176 B.R. 675, 677 (Bankr. D. Conn. 1995). The refunded premiums IPFS received in June 2013 were not property of the estate because the debtor and the bankruptcy estate could exert no legal control over them. IPFS foreclosed the future debtor's interest in the unearned premiums prior to bankruptcy to the extent necessary to pay its claim, and the Texas statutory scheme required the Insurers to pay the unearned premiums to IPFS. *See* TEX. INS. CODE § 651.162(b) ("If an insurance contract listed in a premium finance agreement is canceled, the insurer **shall** return all unearned premiums that are due under the contract directly to the insurance premium finance company before the 61st day after the cancellation date.") (emphasis added). Texas law provides a borrower with a right to unearned premiums only to the extent the amount paid to a lender exceeds the amount of the debt. *See* TEX. INS. CODE § 651.162(g) ("If the crediting of return premiums to the account of an insured results in a surplus over the amount due from the insured, the insurance premium finance company shall refund the excess to the insured."). Here, the amount the Insurers paid to IPFS in June 2013 did not exceed the amount of the debt to IPFS, even arguably, and no portion of the payment was property of the debtor's bankruptcy estate.

In her opposition to the motion for summary judgment, the trustee asserts that IPFS concealed the refund of unearned premiums it received in June 2013. The trustee failed to present any evidence to raise a genuine issue of fact regarding whether IPFS concealed the post-petition payment from the trustee. To the contrary, IPFS was candid with both the trustee and this Court regarding the Finance Agreement, its pre- and post-petition conduct, and its legal position. Further, the trustee is misreading this Court's orders and Texas law to the extent the trustee seeks an accounting from IPFS for the refund of unearned premiums in which the debtor and the debtor's estate have no interest.

IT IS THEREFORE ORDERED that the IPFS Corporation's Motion for Summary Judgment Regarding Counterclaim (Doc. No. 23) is **GRANTED** as set forth herein**.**

Signed on 6/5/2015

Brenda T. Rhoades SR

HONORABLE BRENDA T. RHOADES,
UNITED STATES BANKRUPTCY JUDGE