Appeal History:

aff'd in part, rev'd in part, No. C93-3007 (N.D. Iowa, October 7, 1994)(O'Brien, J.)

In the United States Bankruptcy Court

for the Northern District of Iowa

DONALD HAROLD COLBY
Debtor(s).

Bankruptcy No. X91-02277F
Chapter 7

ORDER RE: MOTION FOR NEW TRIAL

The matter before the court is a motion for new trial filed by debtor Donald Harold Colby (COLBY) and attorney Terry Guinan (GUINAN). Telephonic hearing on the motion was held October 9, 1992.

This contested matter proceeding involves the trustee's motion to obtain a turnover of property of the estate from the debtor and to obtain an award of damages from the debtor and his attorney for violation of the automatic stay. In a written decision issued June 8. 1992, the court found that Colby and his attorney, Guinan, had violated the automatic stay by collecting and attempting to collect rents from real estate owned **by Colby** and by Colby's refusing to turn over the rents to the trustee, James Cossitt. A separate hearing was held on damages to be awarded under 11 U.S.C. § 362(h). A memorandum decision on damages was issued August 17, 1992, and judgment was entered against Colby and Guinan the same day.

Colby and Guinan have moved for a new trial. As the bases for the motion, they argue: (1) that there was no violation of the stay because the rents were not property of the estate; (2) there was not willful violation of the stay because the debtor and his attorney reasonably relied on statutory and case authority in determining that the trustee had no rights to postpetition rents; (3) there were no actual damages because Colby used the money to pay expenses associated with the rental properties; (4) there was no causal relationship between the debtor's acts and the relief requested by the trustee; (5) that the property was inconsequential to the estate as the rental property was encumbered by a bank mortgage in excess of its value; and (6) that the trustee's request for relief should have been brought as an adversary proceeding and thus the proceeding was defective and should be dismissed.

The main thrust of the request for new trial is the first listed: there was no violation of the stay because the rents collected and sought to be collected by the debtor were not property of the estate. To support this proposition, Colby and Guinan cite several cases, including In re Lovitt, 757 F.2d 1035, 1041 (9th Cir. 1985) as amended on denial of rehearing (1985). This case states that "executory contracts and leases-unlike all other assets--do not vest in the trustee as of the date of the filing of the bankruptcy petition. They vest only upon the trustee's timely and affirmative act of assumption." id. at 1041. Lovitt, however, is a case under the Bankruptcy Act, not the Code. Under § 70a of the Act, the trustee of a bankrupt's estate was vested with title to the bankrupt's property. However, executory contracts, including unexpired leases, were treated differently. As stated in one treatise:

> [T]here was one feature of the law as applied to executory contracts that distinguished them from all other property that might or might not be burdensome. It was said that contrary to the usual rule, the title to the bankrupt's executory contracts or leases (which were included in that category) did not vest in the trustee as of the time prescribed in § 70a, but rather vested only upon the affirmative act of adoption, though with retroactive effect so that such adoption related back to the time specified in § 70a.

4A Collier on Bankruptcy, 70.43[l] at 520 (14th ed. 1978).

That statement has been republished verbatim in Collier's treatise on the Code in its discussion of pre-Code law on executory contracts and unexpired leases. 2 Collier on Bankruptcy, 365.01[l] (15th ed. 1992). However, it has also recognized the continued vitality of the earlier principle in discussing the Code's treatment of executory contracts and unexpired leases. Id. at 365.03[4]. This is so even though the treatise recognizes that the Code no longer makes provision for "vesting" when the bankruptcy estate is created, Id. 541.02[2] at 541-13, and that leases are property of the estate. Id. at 541.07[4].

The principle argued by Colby and Guinan finds some support in cases construing the Code. In re Moreggia & Sons, Inc., 852 F.2d 1179, 1185 (9th Cir. 1988); Matter of Tonry, 724 F.2d 467, 469 (5th Cir. 1984); In re Attorneys Office Management, Inc., 29 B.R. 96, 98 (Bankr. C.D. Cal. 1983)

On this point, I respectfully disagree with these cases. The range of property interests which become property of the estate upon the commencement of a case is broad. With some exceptions, it includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). Colby's rental real estate was clearly property of the estate, even though it was encumbered by mortgage debt which exceeded its value. The rents from such property were also property of the estate. 11 U.S.C. § 541(a)(6). In re Engstrom, 33 B.R. 369, 373 (Bankr. S.D. 1983); In re Ridgemont Apartment Associates, 105 B.R. 738, 740 (Bankr. N.D. Ga. 1989). The leases themselves were property of the estate. The only statutory exclusion from the estate for a debtor's interest in a lease is provided for in 11 U.S.C. 541(b)(2):

> "[p]roperty of the estate does not include . . . (2) any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease before the commencement of the case under this title, and ceases to include any interest of the debtor as a lessee under a lease of nonresidential real property that has terminated at the expiration of the stated term of such lease during the case.

The court can find no provision of the Code which excludes a lessor's interest in a lease from property of the estate until the unexpired lease is assumed by the trustee.

The court concludes, therefore, that the lease payments were property of the estate and that the trustee was entitled to them. The interference by debtor and his counsel in the trustee's administration of this asset violated the stay.

Colby and Guinan argue that there was no willful violation because the legal standards governing the entitlement to the rent were unclear. Section 362(h) of the Code requires a "willful" violation of the stay before damages may be awarded. The Eighth Circuit Court of Appeals has said that a "willful violation of the automatic stay occurs when the creditor acts deliberately with knowledge of the bankruptcy petition." In re Knaus, 889 F.2d 773, 775 (8th Cir. 1989). The court is shown no reason why the stay against acts to obtain possession of estate property should not apply to a debtor, as a debtor may also be an entity. 11 U.S.C. § § 362(a)(3) and 101(15).

Colby and Guinan cite In re Zunich for the proposition that a technical violation of the stay, if the litigant has acted in good faith, should not be sanctioned. In re Zunich, 88 B.R. 721, 725 (Bankr. W.D. Pa. 1988). It is also said that "[a] party should not be held in contempt unless a court first gives fair warning that certain acts are forbidden; any ambiguity in the law should be resolved in favor of the party charged with contempt. United States v. Norton, 717 F.2d 767, 774 (3rd Cir. 1983).

But there is more to the present case than a technical violation based on a view of the law that found some support in the case law. Despite finding cases under the Act which supported their view, Colby and Guinan should have desisted from attempting to obtain the post-petition rents once the trustee had made them aware of his claim. This is so in light of the language of 11 U.S.C. § 541(a) (6) under which rents from property of the estate are also property of the estate. Colby and especially Guinan should have realized that they had a dispute on their hands. The stay should have protected the estate's asserted interest in the rents until the dispute was resolved by the court. Merely because Colby and Guinan might take a different view of the law from the trustee on the property issue, did not give them the right to compete with

the trustee in the collection and possession of the rents. Given that Colby and Guinan knew that a dispute over the rents existed, Guinan, on behalf of Colby, should have filed a motion for relief from the stay to obtain a determination of the dispute. Instead, the debtor and his attorney chose to fight it out against the trustee, with debtor's agent, Deborah Busse, threatening the tenants to collect the rent. I can in no way find that the acts of the debtor and his attorney were not willful.

The other asserted grounds for new trial are no more persuasive. There were damages, and they followed from Colby and Guinan's actions. Colby collected rent from the estate property. And though it appears undisputed that he spent it on the rental property, I am unpersuaded that his so spending the money exonerates him or his counsel from their willful violation of the stay. It was not their prerogative to determine how or when such money should be spent. It was the trustees.

Finally, the court finds to be without merit the argument that this proceeding was improperly brought by motion. The debtor had an absolute duty to turn over any rent he collected. 11 U.S.C. § 521(4). To compel such surrender, the trustee is not required to bring an adversary proceeding against the debtor. Moreover, Guinan and Colby have cited no bankruptcy authority for the proposition that to enforce the provisions of 11 U.S.C. 5 362(h), the trustee or the debtor must bring an adversary proceeding. Last, the court considers that this argument is raised too late. It was first brought up in debtor's brief filed with the court on June 29, 1992, after trial and the issuance of the court's initial decision.

For the foregoing reasons, the court concludes that the motion for new trial should be denied. Accordingly,

IT IS ORDERED that the motion for new trial is denied.

SO ORDERED ON THIS **1st** DAY OF DECEMBER, 1992.

William L. Edmonds
Chief Bankruptcy Judge

In the United States District Court

for the Northern District of Iowa

Central Division

DONALD H. COLBY — No. C93-3007
Debtor. — Chapter 7

ORDER

The Debtor's appeal from the Bankruptcy Court's June 8, 1992 Order brings this case before the Court. A hearing was held in this matter. At the close of the hearing, the Court admonished both parties to attempt a settlement without Court intervention. In a June 28, 1994 letter from the Bankruptcy Trustee, the Court was informed that the Trustee and the Debtor's attorney "did discuss possible resolution of this matter on the telephone on 06/28/94, but were unable to come to a resolution. This matter will apparently be concluded by your decision and judgment." After careful consideration, it is the Order of this Court that the Debtor's appeal is denied in part and affirmed in part.

I. FACTS

In his Order, contested here, the United States Bankruptcy Judge concluded that Debtor Donald H. Colby (hereinafter the Debtor) must pay actual damages of $484 plus interest for postpetition rents received along with attorney fees and

costs. The Bankruptcy Judge further concluded that the Debtor was not obligated to pay to the Trustee punitive damages and pre-petition security deposits.

Prior to filing for bankruptcy, the Debtor owned a duplex at 2210 14th Avenue South in Fort Dodge, Iowa. The duplex was used as low-income rental property and rents were subsidized by the Municipal Housing Agency (MEA) of Fort Dodge. The amount of rents paid directly by the tenants to the Debtor varied monthly depending on their monthly income and the number of dependents in each household. According to page six of the Trustee's brief (Clerk's Memorandum of Papers #6), those rents, combined with the MHA subsidy, totalled $700 per month per residence paid to the Debtor. The duplex was managed by Deborah Busse[(1)]. One half of the duplex was rented by Kristine Plahn. The other half was rented by Kristine LaCaille.

Tenant Plahn moved into her rental unit on October 2, 1991 and gave the Debtor a $310 security deposit. Tenant LaCaille moved into her unit on October 1, 1991 with a security deposit of $181. Manager Busse testified that she used those security deposits for repairs to the units pursuant to oral agreements tenant.[(2)]

The Debtor filed for Bankruptcy on December 16, 1991. He received a debt discharge on April 7, 1992. Debtor listed the rental property on his Schedule A, but failed to list on the applicable schedules the leases with Tenants Plahn and LaCaille and the current, monthly rental income he was receiving from those tenants. Further, the Debtor did not notify the tenants that he had filed for bankruptcy. As a result, neither tenant found out about the bankruptcy until after February 5, 1992, when they received a letter from Bankruptcy Trustee, James Cossitt (hereinafter Trustee Cossitt) which informed them of the situation.

A meeting of creditors was held on January 27, 1992. At that meeting, Trustee Cossitt requested that the Debtor turn over all post-petition rents and security deposits. The Debtor refused to do so. The Debtor argued that the post-petition rents did not have to be turned over to Trustee Cossitt because Cossitt's rights in those rents had not "vested" as per a court order authorizing Cossitt to take possession of them. The Debtor also argued that the security deposits were already gone, as they had been used to pay for pre-petition repairs.

Meanwhile, Tenant Plahn paid $258 in January, 1992 rent to the Debtor and $150 in February, 1992 rent. As per an agreement with the MHA, Tenant LaCaille paid no rent to the Debtor in January, 1992, but paid the Debtor $76 in February, 1992 rent. once the tenants learned of the Bankruptcy filing, they ceased paying rent to the Debtor.

At trial, the Debtor asserted that the rental property was valueless over and above the encumbering mortgage, which Debtor intended to "reaffirm." The Debtor's attorney maintained that the Debtor intended to continue to operate the rental property after bankruptcy. He reasoned that the Debtor needed the rental income to continue paying utility bills for the rental units because he believed that failing to pay bills would adversely affect his ability to keep the duplex when his bankruptcy was complete.

The issue which concerns this appeal is whether the Debtor was obligated to pay to Trustee Cossitt a total of $484 in postpetition rents and $491 in pre-petition security deposits, plus interest. At the hearing in this Court, Trustee Cossitt argued that the security deposits and all post-petition rents should have gone to him upon request at the first creditors' meeting. Further, he asserted that the Debtor violated the automatic stay by continuing to collect those post-petition rents.

After Tenant Plahn received Trustee Cossitt's February 8, 1992 letter, she was approached LT Manager Busse about future rental payment obligations. According to Tenant Plahn's trial testimony, Manager Busse threatened to shut off Tenant Plahn's heat and hot water if Tenant Plahn did not continue making rental payments to her instead of Trustee Cossitt. Upon further investigation, Tenant Plahn learned that Manager Busse had, in fact, contacted the Fort Dodge Water Company and Iowa Illinois Gas & Electric Company about shutting off the heat and hot water. In response, Tenant Plahn contacted Trustee Cossitt and Cossitt prevented the shut-offs. Cossitt's contacts with the utility companies were the first notices those companies had received regarding the Debtor's filing for bankruptcy. The utility and water companies had not been listed on the Debtor's schedules.

Finally, Trustee Cossitt Attempted to obtain from the MRA all payments it regularly made to the Debtor. He was

prevented from doing so because the MHA deferred to a letter written to them by the Debtor's attorney, which stated that to do so would mean that they were "wrongfully holding payments that belong to (the Debtor]."

II. DISCUSSION

Bankruptcy Rule 8013 speaks to the disposition of appeals and the weight to be given a Bankruptcy Judgets factual findings. Rule 8013 provides:

> On an appeal, the district court or bankruptcy appellate panel may affirm, modify, or reverse a bankruptcy judge's judgment, order or decree or remand with instructions for further proceedings. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous and due regard should be given to the opportunity of the bankruptcy court to judge the credibility of witnesses.

Of course, conclusions of law are subject to de novo review. in re Camel, 723 F.2d 737, 739 (9th Cir. 1984). In this case, the Court will review the Bankruptcy Judge's legal conclusions de novo in an attempt to resolve these matters.

1. Whether the bankruptcy court had jurisdiction to rule?

The Debtor characterizes this case as a property custody dispute. He argues that the bankruptcy court lacked jurisdiction to hear this case. According to the Debtor, the action should have been brought under Rule 7001[(3)] of the Bankruptcy Rules and was not. Therefore, in the Debtor's view, the bankruptcy court only had jurisdiction to issue a nonbinding advisory opinion. Fletcher v. Surprise, 180 F.2d 669, 678 (7th Cir. 1950).

Trustee Cossitt argues that the Debtor did not properly raise the jurisdictional issue below and that it was effectively waived and not preserved for appeal. He argues that a proceeding to compel the Debtor to turn over property of the estate to Trustee Cossitt is not included in Rule 7001 and therefore that Rule is inapplicable here. He also mentions in a footnote that no harm or prejudice was alleged by the Debtor and his attorney resulting from the bankruptcy court's ruling.

The Court disagrees that no harm was done to the Debtor. Rightly or wrongly, his attorney invested his own out-of-pocket money to pursue this litigation, presumably with interest accruing against the Debtor. Nonetheless, the Court is not persuaded that the Bankruptcy Court lacked jurisdiction to hear this case. Rule 7001 specifically includes within its scope proceedings to recover money. In this case, Trustee Cossitt seeks recovery of pre-petition security deposits and post-petition rents. This is money. To the extent that it is considered property, however, the Advisory Committee notes make clear, that as of 1987, "(a) trustee may proceed by motion to recover property from the debtor." Norton Bankr. Law and Practice 2d. 377 (1993-94 ed.). This case regards Trustee Cossitt is attempt to recover the post-petition rents, which this Court believes are either money or property recoverable under Rule 7001 and which is, under 11 U.S.C. Section 541, property of the estate. Therefore, the Court is persuaded that the Bankruptcy Court did not lack jurisdiction over this case.

2. Violation of the Automatic Stay

The commencement of a bankruptcy case creates a bankruptcy estate. 11 U.S.C. Section 541(a). The bankruptcy estate encompasses all legal and equitable interests in property, including ". . . rents, and or profits of or from property of the estate" and "(a)ny interest in property that the estate acquires after the commencement of the case." 11 U.S.C. Sections 541(a)(6) and (a)(7). At the commencement of a bankruptcy action, the debtor has certain duties, including the filing of a list of creditors and, "unless the court orders otherwise, a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs. 11 U.S.C. section 521(l).

The Bankruptcy Judge ruled that the rents at issue here were property of the estate. Having determined that the rents were property of the estate, the Bankruptcy Judge determined that they were subject to the automatic stay which prohibits "any act to obtain possession of property of the estate or of property from the estate. . ." by the Debtor. 11 U.S.C. Section 362 (a)(3). Accordingly, the Bankruptcy Judge ruled that Debtor, acting through Manager Busse, violated the automatic stay by refusing to turn over the post-petition rents. In re Knaus, 889 F.2d 773, 774-75 (8th Cir. 1989). Also, the Judge ruled that the Debtor's efforts to obtain post-petition rents from the tenants through Manager

Busse and from the MHA through the Debtor's attorney after Trustee Cossitt had contacted them were further violations of the automatic stay.

In his appeal brief, Debtor maintained that post-petition rents should not be considered property of the bankruptcy estate until such time as the Bankruptcy Trustee is permitted, upon approval of a motion to the Bankruptcy Court, to assume the lease. The Debtor's legal argument was as follows: Debtor needed to keep collecting the rents after filing his bankruptcy petition because he wanted to continue paying utility and repair bills for the leased property. Those bills, he argued, were executory contracts. Since those bills were paid with the rental proceeds, the Defendant claims that the rental proceeds were executory in nature and that under Section 365(a) Trustee Cossitt was required to obtain court approval prior to collecting them.

Citing one Eighth Circuit case and some from other jurisdictions, the Debtor argued that leases only become property of the estate under 11 U.S.C. Section 541(a)(7)[(4)] when they are assumed, and that the leases cannot be assumed without a court order. Matter of Steelship, 576 F.2d 128, 132 (8th Cir. 1978) ; in re Lovitt, 757 F.2d 1035, 1041 (9th Cir. 1985); In re Tonry, 724 F.2d 467, 469 (5th Cir. 1984); In re Matter of Whitcomb & Keller Mort. Co., Inc., 715 F.2d 375, 379 (9th Cir. 1983). He accordingly argued that because he received the rents and paid for the utilities, he assumed "executory burdens" and was required to keep the post-petition rental income and apply it to the payment of the utility bills. Steelship, 576 F.2d, at 132; Whitcomb & Keller, 715 F.2d, at 379.

Trustee Cossitt acknowledged that under the old Bankruptcy Act an order of the Court may have been required prior to the Trustee's rights "vesting" in property of the estate such as leases. However, Trustee Cossitt included with his June 28, 1994 letter to the Court a copy of Section 541.02(13) of the 1993 Collier Handbook for Trustees and Debtors in Possession, which states that under 11 U.S.C. Section 541, "(t)his concept of the vesting of title to the debtor's property in the trustee has been eliminated under the Code." According to Trustee Cossitt, Section 541(a)(6) (which includes ". . . rents, and or profits of or from property of the estate" as property of the estate) is evidence that Congress chose to expressly include rents as property of the estate without requiring vesting in the process.

Accordingly, Trustee Cossitt asserted that his entitlement to the post-petition rents received by the Debtor vested immediately at the time the Debtor filed for bankruptcy. Therefore, Trustee Cossitt argued that the Debtor violated his duty under Section 11 U.S.C. Section 521(1)[(5)] and Bankruptcy Rule 1007(b)(1)[(6)] to fully and completely disclose all assets when the Debtor failed to disclose the existence of the leases and the rental income he was receiving when he filed his bankruptcy petition. Trustee Cossitt further asserted that the Debtor exacerbated the situation by failing to surrender the rents after Cossitt had contacted him. This, according to Trustee Cossitt, was a violation of the Debtor's duty under 11 U.S.C. Sections 521(3) and (4)[(7)]

, as well as Bankruptcy Rules 4002(3)[(8)] and 4002(4)[(9)].

The Court has read the Debtor's cases, along with 11 U.S.C. Section 541 and the Colliers analysis of that statute. The Court is persuaded that 11 U.S.C. Section 541(a) is the result of the Bankruptcy Reform Act of 1978, which repealed several sections of the old Bankruptcy Act of 1898. Editor's Notes in Norton's Bankr. Law and Practice 2d, Bankruptcy Code 491 (1993-94 ed.). Therefore, cases decided under the Bankruptcy Act as it existed prior to the enactment of the 1978 amendments which concern the vesting of a Trustee's rights in property of the estate have no bearing on this case.

Accordingly, the Court makes the following findings regarding each of the Debtor's cases. The Steelship case involved a bankruptcy which was filed in 1976 and is therefore inapplicable. Steelship, 576 F.2d, at 130-31 ("Steelship filed its voluntary petition in bankruptcy on June 8, 1976; Mr. Paul Lewey was appointed receiver for the corporation on June 15"). Similarly, In re Lovitt cannot be considered. Lovitt, 757 F.2d, at 1040, n. 3 ("Because the Lovitt bankruptcy petition was filed in 1973, this appeal is governed by the former Bankruptcy Act of 1898 as amended, 11 U.S.C. Section 1 et seq. and the Bankruptcy Rules thereunder, which were in effect at the time of such filing").

The Whitcomb & Keller case involved a Chapter 11 bankruptcy which was filed in 1980. Whitcomb & Keller, 715 F.2d, at 376. In that case, the Seventh Circuit quoted with approval a case it had decided in 1970 -- well in advance of the 1978 Bankruptcy Reform Act. The Court noted that 11 U.S.C. Section 365(a) allows a trustee to assume or reject executory contracts "subject to the court's approval." The Seventh Circuit noted that in a decision called In re American

National Trust, 426 F.2d 1059 (7th Cir. 1970) it was faced with a statute similar to Section 365(a), namely the former 11 U.S.C. Section 516(l)[(10)]. Comparing the two statutes, the Whitcomb & Keller court stated that

> Interpreting similar language in In re American National Trust, supra, 426 F.2d, at 1064 this court declared: "'Assumption or adoption of the contract can only be effected through an express order of the judge.'" (quoting 6 Collier on Bankruptcy 476-80 (14th ed.)). Neither the bankruptcy court nor Whitcomb & Keller exhibited any intention of assuming the contract when the court enjoined Data-Link's termination of services.

Whitcomb & Keller, 715 F.2d, at 380 (footnotes omitted). The Court notes that the Whitcomb & Keller case involved a contract for services between a debtor mortgage banker and a computer company whereby the computer company was to update and maintain mortgage service customer accounts. Whitcomb & Keller, 715 F.2d, at 376-77. It did not involve leases of real property and payments of utility bills. Therefore, it is not clearly applicable to our case.

In Tonry, another of the cases cited by the Debtor to support his position that court approval is required prior to the Trustee's assuming contractual obligations of the Debtors, the Fifth Circuit stated the following:

> Section 365(a) provides that "the trustee, subject to the court's approval, may assume or reject any executory contract." Until the trustee assumes an executory contract, it does not become part of the bankruptcy estate. Unlike other assets of the debtor, the interest in an executory contract does not automatically vest in the bankruptcy estate at the time of filing. That status only attaches upon the trustee's assumption of the executory contract. 2 Collier on Bankruptcy Section 365.01 (1983).

Tonry, 724 F.2d, at 468.

Like the Whitcomb & Keller case, Tonry did not involve leases of real property and the payment of utility bills. It involved a contingent fee contract between a client and his attorney which the court concluded "is executory if further legal services must be performed by the attorney before the matter may be brought to a conclusion" Tonry, 724 F.2d, at 468. The Tonry court concluded that rights to a contingent fee contract did not vest in the trustee without court approval. Tonry, 724 F.2d, at 468-69.

The legislative history of 11 U.S.C. Section 365(a) indicates that "(t)hough there is no precise definition of what contracts are executory, it generally includes contracts on which performance remains due to some extent on both sides." Norton Bankr. Law and Practice 2d. Bankruptcy Code, at p. 288. The Court is persuaded that utility payments are, under this definition, executory contracts because they require the production of electric, gas and water by the company and payment by another party to the utility companies for those services. Therefore, the Court is persuaded that there was at least some legal basis for the Debtors conclusion that even after the Bankruptcy Code was revised court approval was required before the Trustee could assume utility payments.

Nonetheless, the Court is persuaded that the rents were property of the estate all along under 11 U.S.C. Section 541(a)(6) and vesting was not required. The Court is so persuaded by the language in Colliers, supra, at Section 541.07(l), which states that:

> . . . The provision of section 541(a)(1) that the debtor's state shall include 'all legal or equitable interests of the debtor in property as of the commencement of the case' is extremely broad and includes any such rights and interests of the debtor in real property.'

The debtor's interests in real property were governed under the Bankruptcy Act by Section 70a(5) which provided for vesting in the trustee of the debtor's title to 'property including rights of action,' which prior to the filing of the petition he could 'by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered. . . As discussed previously, the requirement of Section 70a(5) of the Act that the debtor be able to transfer the interest or his creditors by some means reach it, has been eliminated under the Code pursuant to section 541(a)(1).

The Court is aware that the Debtor's attorney spent a considerable amount of out-of-pocket money pursuing this case on

the theory that his client was not obligated to turn over the post-petition rents until Trustee Cossitt's rights vested. As stated above, the Court also agrees that there is some case law which was written after the Bankruptcy Act was revised which supports the Debtor's position (at least insofar as the vesting of rights in executory contracts, generally). However, the case law cited by the Debtor referred either to pre-1978 bankruptcies or to executory contracts which did not involve real property. The Court has therefore made a de novo review of the legal issues in this case and is persuaded that the Bankruptcy Court did not err in determining that the leases and their proceeds were property of the estate which should have been immediately turned over to Trustee Cossitt, who automatically assumed title to the property under 11 U.S.C. Section 541(a).

3. Damages for unpaid rents

Under 11 U.S.C. Section 362(h), "(a)n individual injured by any willful violation of a stay provided by [11 U.S.C. Section 362] shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." Trustee Cossitt argues that he was injured by the Debtor to the extent of the total of the post-petition rents, or $484. He therefore seeks the full panoply of damages available under Section 362(h).

In his decision, the Bankruptcy Judge evaluated this case under Section 362(h) by applying a two-part test: whether the violation was willful and whether the bankruptcy trustee was actually injured. Lovett v. Honeywell, Inc., 930 F.2d 625, 628 (8th Cir. 1991). The Judge determined that the Debtor's refusal to turn the post-petition rents over to Trustee Cossitt amounted to a willful violation of the bankruptcy code. He also determined that Trustee Cossitt was injured to the extent of the $484 in rents which were "wrongfully appropriated" by the Debtor. The Bankruptcy Judge therefore determined that actual damages totalling $484 were due to Trustee Cossitt, as well as attorney fees and expenses[(11)]. Because an accounting of attorney fees and expenses had not been made prior to the ruling, the Bankruptcy Court gave Trustee Cossitt 10 days to file an accounting and gave the Debtor seven days from receipt of Cossitt's figures to respond[(12)]

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In his Brief, Trustee Cossitt agreed with the Bankruptcy Judge's finding of willfulness. Trustee Cossitt asserted that the Debtor and his attorney effectively challenged him to incur legal expenses in order to prove then wrong. Trustee Cossitt contended that the proper tack for the Debtor to have taken was to get an adjudication on the merits of his executory contract claim from the Bankruptcy Court before insisting on commencing this litigation. In re Gray, 97 B.R. 930, 936 (Bankr. N.D. Ill. 1989). Because the Debtor instead decided to commence this case without such an adjudication, Trustee Cossitt argued that the Debtor must now pay what he owes. Gray, 97 B.R., at 936.

In his appeal brief, the Debtor maintained that because he honestly believed that he had a right to collect the rents and pay utility bills on the rental properties, his actions cannot be characterized as willful violations of the bankruptcy code. Citing cases from other jurisdictions, the Debtor argues that there can be no willful violation of 11 U.S.C. Section 362(h) where there is legal precedent supporting what the Debtor did. U.S. v. Norton, 717 F.2d 767, 774 (3d Cir. 1983); In re University Medical Center, 973 F. 2d 1065, 1088 (3d Cir. 1992); In re Zunich, 88 B.R. 721, 726 (W.C. Pa. 1988) (". . . if we, as the supposed experts in this area, had difficulty reaching our decision, we cannot expect laymen, or even practiced counsel, to know with any certainty the impropriety of their actions") . The Debtor further argues that where there are ambiguities in the law, they must be resolved in favor of the accused. Morton, 717 F.2d, at 774.

As stated earlier in this Order, the Court acknowledges that there was some case law to support the contention that executory contracts still cannot be assumed by a Trustee without court approval. And, since some portion of the post-petition rents were used to pay for utilities (and because utility service contracts are, arguably, executory contracts) there is some basis for arguing that assuming the rents would effectively mean assuming executory contracts. Because there is some legal basis for that theory, the Court is persuaded that the Debtor did not willfully withhold the money from the Trustee in any surreptitious manner and that the Debtor truly believed he was authorized to do so. Therefore, under Norton, supra, the Court is persuaded that the Debtor is not liable to the Trustee for actual damages.

Nonetheless, the Court is persuaded that the Debtor is liable to the Trustee for the outstanding rental payments, which total $484 plus interest. He therefore must still pay the $484 plus interest, but as an outstanding debt owed and not as actual damages.

4. Punitive damages re: unpaid rents

On the issue of punitive damages, the Bankruptcy Court stated that such damages are only appropriate where there has been a showing of "egregious, intentional misconduct." Lovett, 930 F.2d, at 628. The Bankruptcy Judge ruled that the Trustee had not made such a showing. Instead, the Judge ruled that the Debtor mistakenly relied on the advice of his attorney, believing it was common practice for debtors to continue to operate property which had no value or benefit to the Estate. United States V. Ketelsen (In re Ketelson), 880 F.2d 990, 993 (8th Cir. 1989). The Bankruptcy Judge ruled that the Debtor and his attorney "foolishly" pursued their position, and should have submitted to Trustee Cossitt's requests. According to the Judge, this "foolishness" did not rise to the level of malice which is needed to show the appropriateness of punitive damages.

The Court, as stated previously, is persuaded that since there was some case law supporting the Debtor's position, that position had some merit. Therefore, the Court is not persuaded that this case stems from "foolishness" on anyone's part. In all other respects, however, the Court agrees with the Bankruptcy court that punitive damages are not appropriate in this case.

5. Whether the rental deposits are owed?

Having decided that the Debtor owed the post-petition rent amounts, plus interest, the Bankruptcy Court turned its attention to whether the pre-petition security deposits were property of the estate and therefore subject to Trustee Cossitt's possession. The scope of rights between debtors and trustees to tenant security deposits is determined by state law. Butner v. United States, 440 U.S. 48, 54 (1979). In Iowa, landlord rights to security deposits are found in Iowa Code Section 562A.12.

Section 562A. 12 (2) states, in pertinent part, that

> All rental deposits shall be held by the landlord for the tenant. . . in a bank or savings and loan association or credit union which is insured by an agency of the federal government. Rental deposits shall not be commingled with the personal funds of the landlord.

Section 562A.12(3) states that "within thirty days of termination of the tenancy and receipt of the tenant's mailing address," the landlord must turn over to the tenant the amount of the security deposit unless there are repairs to be made. And, where repairs must be made, Section 562A.12(3) requires that the landlord "furnish to the tenant a written statement showing the specific reason for withholding of the rental deposit or any portion thereof." Further, Iowa Code Section 562A.12(5) requires that

> Upon termination of the landlord's interest in the dwelling unit, the landlord or an agent of the landlord shall, within a reasonable time, transfer the rental deposit, or any remainder after any lawful deductions, to the landlord's successor in interest and notify the tenant of the transfer and of the transferee's name and address or return the deposit, or any remainder after any lawful deductions, to the tenant.

Applying these Iowa Code sections to the facts of this case, the Bankruptcy Judge determined that Section 562A "contemplates that the landlord will hold the deposit and make use of it, as allowed by law, only after the termination of the tenancy" (DR. 22). Accordingly, the Judge ruled that the Debtor, through his agent, Manager Busse, violated the Iowa Code by using the security money to pay for repairs prior to the tenants' vacating the premises.

Nonetheless, the Judge determined that Manager Busse used all of that money for repairs prior to the bankruptcy (DR. 22) and therefore the Debtor was not obligated to transfer the security deposit amounts to Trustee Cossitt. The Bankruptcy Judge noted that the tenants might have a cause of action against the Debtor for the return of the security deposits under Iowa Code Section 562A.13, but as to the Trustee, "there being no remaining deposits at the time of filing, there was nothing which (Debtor) Colby had in his possession which he was obligated to or could transfer. For that reason, trustee's motion seeking turnover of the deposits must fail" (DR. 22).

The Court finds nothing erroneous about the Bankruptcy Court's conclusions regarding the security deposits. The Iowa Code does seem to say that Manager Busse should not have used the security deposit money to make repairs on the

rental property. Nonetheless, that was money collected, used and disposed of prior to the Debtor's bankruptcy filing and there has been no showing that the use of those funds for repairs in any way violated the Bankruptcy Code's proscription against preferential transfers. Therefore, the Court is persuaded that there was nothing erroneous about the Bankruptcy Court's determination that the Debtor does not owe the security deposit money to the Trustee.

IT IS THEREFORE ORDERED that the Debtor's appeal of the Bankruptcy Court's Order is denied insofar as his responsibility

to pay $484. He must pay that amount, not as willful damages to Trustee Cossitt, but instead as an outstanding debt owed for post-petition rents due to the bankruptcy trustee.

IT IS FURTHER ORDERED that the Debtor shall prevail on hit appeal regarding attorney fees and costs, and the ruling of the Bankruptcy Court as per attorney fees and costs is reversed. The Debtor and his attorney are not obligated to pay those fees and costs.

IT IS FURTHER ORDERED that the Debtor is not obligated to pay to Trustee Cossitt the amounts he received as security deposits prior to filing for bankruptcy.

October 7, 1994.

Donald E. O'Brien, Senior Judge
UNITED STATES DISTRICT COURT

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1. The Bankruptcy Judge determined that as a manager of the duplex, Busse acted as the Debtor's agent. An agency is a consensual relationship in which one person acts on behalf of another and is subject to the other's control. Miller v, Chatsworth Sav. Bank, 203 Iowa 411, 212 N.W. 722, 723 (Iowa 1927). The relationship may be express or implied. Andrew v Farmers Sav. Bank, 239 N.W. 551, 552 (Iowa 1931). The in-court testimony of an agent is admissible to prove his or her agency. Shama v. United States, 94 F.2d 1, 5 (8th Cir. 1938). At trial, Manager Busse testified under oath that she acted as the Debtor's agent. The Bankruptcy Court noted that at the time Manager Busse testified, the Debtor was present in the courtroom, but did nothing to deny the existence of an agency relationship between himself and Manager Busse. Manager Busse also testified that she acted as manager pursuant to an oral agreement whereby she would manage the duplex for an indefinite period, interviewing potential tenants, collecting rents, paying bills, making repairs (and hiring third parties to make repairs) and dealing with the MHA. Manager Busse's unrefuted testimony regarding agency led the Bankruptcy Court to conclude that Manager Busse was the Debtor's agent.

2. Tenant Plahn testified at the bankruptcy proceeding that she had never made such an agreement with Manager Busse and had never been told that her security deposit would be so used.

3. Rule 7001 reads, in pertinent part, as follows:

Rule 7001. Scope of Rules of Part VII.

> An adversary proceeding is governed by the rules of this Part VII. It is a proceeding (1) to recover money or property, except a proceeding to compel the debtor to deliver property to the trustee. . . (emphasis added).

4. 11 U.S.C. Section 541(a)(7) states the following:

Section 541. Property of the estate.

> a. The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
> 7. Any interest in property that the estate acquires after the commencement of the case.

5. 11 U.S.C. Section 521(l) states the following:

Section 521. Debtors duties.

The debtor shall --

1. file a list of creditors, and unless the court orders otherwise, a schedule of assets and liabilities, a schedule of current income and current expenditures, and a statement of the debtor's financial affairs.

6. Bankruptcy Rule 1007(b)(1) states the following:

b. Schedules and Statements Required.
   1. Except in a chapter 9 municipality case, the debtor, unless the court orders otherwise, shall file schedules of assets and liabilities, a schedule of current income and expenditures, a schedule of executory contracts and unexpired leases, and a statement of financial affairs, prepared as prescribed by the appropriate Official Forms.

7. 11 U.S.C. Sections 521(3) and (4) state the following:

Section 521. Debtors duties.

3. if a trustee is serving in the case, cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties under this title;
4. if a trustee is serving in the case, surrender to the trustee all property of the estate and any recorded information, including books, documents, records, and papers, relating to property of the estate, whether or not immunity is granted under section 344 of this title.

8. Bankruptcy Rule 4002(3) reads as follows:

Rule 4002. Duties of Debtor.

> In addition to performing other duties prescribed by the Code and rules, the debtor shall . . . (3) inform the trustee immediately in writing as to the location of real property in which the debtor has an interest and the name and address of every person holding money or property subject to the debtor's withdrawal or order if a schedule of property has not yet been filed pursuant to Rule 1007;

9. Bankruptcy Rule 4002(4) reads as follows:

Rule 4002. Duties of Debtor.

> In addition to performing other duties prescribed by the Code and rules, the debtor shall (4) cooperate with the trustee in the preparation of an inventory, the examination of proofs of claim, and the administration of the estate;

10. Section 516(1) had stated that "upon approval of a petition, the judge may. . .(1) permit the rejection of executory contracts of the debtor. . ." Whitcomb, 715 F.2d, at 380 n. 6.

11. This $484 amount encompassed the rents due and was therefore not added on top of the $484 already due and owing.

12. The Bankruptcy Court later received Trustee Cossitt's damages request, which totalled $3,426.50, broken down as follows: attorney fees totalling 32.9 hours of work at a rate of $100/hour ($3,290) and expenses totalling $136.50. The Court determined that Trustee Cossitt was entitled to $2,510 in fees and $130.50 in expenses, or a total of $2,646.50. The Bankruptcy Court determined that because Trustee Cossitt was also acting as an attorney in this case, some of the matters listed in his request were mandated by his role as trustee and therefore not to be assessed against the Debtor in this action. That is why the request was reduced by approximately $800.

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