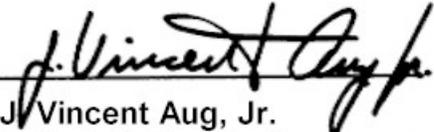


This document has been electronically entered in the records of the United States Bankruptcy Court for the Southern District of Ohio.

IT IS SO ORDERED.

Dated: August 15, 2005


J. Vincent Aug, Jr.
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT
WESTERN DIVISION

In re
Larry Scarce

Debtor

Case No. 05-11059
Chapter 13 (Judge Aug)

ORDER DENYING DEBTOR'S MOTION FOR CONTEMPT

This matter is before the Court on the Debtor's motion for contempt (Doc. 14) and Cinergy's reply (Doc. 26). A hearing was held on July 27, 2005.

The Debtor contends that Cinergy should be held in contempt for failing to re-establish utility service. Cinergy contends that the duties imposed upon it under 11 U.S.C. §366 do not apply where it is able to prove that tampering and/or unauthorized utility usage occurred at the Debtor's premises.

The subject property involved is 2866 Wilbrahan, a single family home. Since 1989, the property has been titled in the name of the Debtor and Cynthia Scarce, his now deceased wife. The Debtor was estranged from his wife for four or five years before her death and did not live in the house full time during that period. He did periodically return to the house, attempting to reconcile with his

wife. In his bankruptcy schedules, the Debtor lists 2866 Wilbrahan as his residence, although his schedules also indicate that he is currently living elsewhere. He testified at the hearing that he would like to return to Wilbrahan property to live once the electricity is back on.

Originally, the utility account at the property was in the name of Cynthia Searce. This account was turned off for nonpayment in April 1998.

In November 1998, a new account was established at the property in the name of Debbie Alcorn. It was explained at the hearing that Debbie Alcorn is the Debtor's daughter's sister-in-law. This account was disconnected for nonpayment in August 2003. This disconnection process involved sealing the electric meter located inside the property. At the hearing, Cinergy's senior representative for tampering and theft testified that sealing and unsealing an electric meter is very dangerous because it is "live."

In September 2003, a Cinergy employee noticed an air conditioner in operation at the property. Subsequently, Cinergy investigators were denied access to the property. Ultimately, on March 9, 2004, Cinergy cut off electric service to the property at the utility pole on the street.

At some point, an individual named Eric Mullins requested that service be restored at the property. He failed to comply with Cinergy's request to provide a copy of a lease or picture identification. It is Cinergy's policy to require such proof to prevent fraud. Therefore, service was never re-established at the property.

The Debtor filed his bankruptcy petition on February 18, 2005.

A utility may not refuse service to a debtor "solely" on the basis of an unpaid prepetition debt. 11 U.S.C. §366(a). The use of the word "solely" in the statute implies that there may be other grounds for the utility to refuse to furnish service. *E.g.*, *In re Webb*, 38 B.R. 541 (Bankr. E.D. Pa. 1984). Indeed, it is well-settled that a utility may refuse service to a debtor if the utility is able to prove that tampering and/or unauthorized utility usage took place on the debtor's property. *Id.* followed by *In re Morris*, 66 B.R. 28 (D. E.D. Mich. 1986) and *Memphis Light, Gas & Water Division v. Farley*, 135 B.R. 292 (D. W.D. Tenn. 1991). The rationale behind these decisions is based not only on economic factors but also on the safety factors involved and the risks posed to the public by those who tamper with utility equipment. *In re Webb*, 38 B.R. at 544.

The Debtor does not challenge Cinergy's contention regarding tampering and/or theft of services. Rather, the Debtor contends that he never knew of the theft of services and that he never benefitted from the theft of services. We find this to be unpersuasive.

First, it would be a rare instance where anyone would openly admit to a criminal act.

Second, as co-owner of the property, the Debtor assumed the benefits and burdens of such ownership. His house, the people living there with his permission, and his personal contents therein benefitted from the stolen utility services, regardless of whose name the account was in and regardless of whether the Debtor was there or not on a regular basis.

Third, the safety concerns exist, regardless of the Debtor's state of mind.

Accordingly, the Debtor's motion for contempt is hereby DENIED.

IT IS SO ORDERED.

Distribution list:

Debtor
Christine Hill, Esq.
Eric French, Esq.
Chapter 13 Trustee
U.S. Trustee

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