UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO

In Re	)	
	)	**JUDGE RICHARD L. SPEER**
Jerome Rozek, Jr.	)	
	)	Case No. 02-3026
Debtor(s)	)	
	)	(Related Case: 02-30142)
Jerome Rozek, Jr.	)	
	)	
Plaintiff(s)	)	
	)	
v.	)	
	)	
GMAC	)	
	)	
Defendant(s)	)	

MEMORANDUM OPINION AND DECISION

This cause comes before the Court upon two related Motions: (1) the Defendant's Motion for Attorney Fees; and (2) the Plaintiff's Motion for Summary Judgment. In support of their respective positions on these Motions, each Party submitted Memoranda detailing their arguments. The Court has now had the opportunity to review the arguments presented by the Parties, as well as the entire record of the case. Based upon that review, and for the following reasons, the Court finds that the Defendant's Motion for Attorney Fees should be Granted, and that the Plaintiff's Motion for Summary Judgment should be Denied.

FACTS

In July of 2001, the Defendant/Creditor, General Motors Acceptance Corporation, North America (hereinafter "GMAC"), contracted with the Plaintiff/Debtor, Jerome Rozek Jr. (hereinafter

"Rozek") to lease, on a monthly fee arrangement, a 2001 Chevy Blazer. In December of 2001, however, GMAC was forced to repossess the automobile after Rozek failed to make the required payments. After repossession, GMAC provided Rozek with information as to how he could bring his account current and regain possession of the automobile. In addition, Rozek was informed at this time that if the default could not be cured, the automobile was set to be sold at auction on January 15, 2002.

On January 10, 2002, Rozek filed a petition in this Court for relief under Chapter 13 of the United States Bankruptcy Code. The following day, notice of this petition, according to Rozek's attorney, was provided to GMAC, as well as a third-party who manages GMAC's accounts and also to the auctioneer charged with the sale of the Rozek's automobile. Notwithstanding, on January 15, 2002, Rozek's automobile was sold at auction. As a result of the sale, Rozek commenced the instant adversary proceeding on January 30, 2002, asserting that the sale of the automobile was a willful violation of the automatic stay. Rozek's Complaint demanded the return of the automobile as well as punitive damages in the amount of Ten Thousand Dollars ($10,000.00). GMAC, however, denies that it received notice of the Rozek's bankruptcy filing in time to stop the sale of the vehicle.

On August 22, 2002, during the course of discovery in this case, GMAC served upon Rozek a First Set of Interrogatories, requiring a response to be submitted thirty within (30) days. Although no objection was filed against this set of interrogatories, Rozek failed to answer within the prescribed period. As a result, counsel for GMAC asserts that on two separate occasions – October 24, 2002, and November 6, 2002 – messages were left with Rozek's legal counsel regarding the unanswered interrogatories. These messages, however, failed to produce any response to the interrogatories. This lack of response, according to counsel for GMAC, then necessitated the filing of a motion to compel pursuant to Bankruptcy Rule 7037. In this Motion, which was filed on November 19, 2002, GMAC certified that as is required under paragraph (a)(2)(B) it had, in good faith, attempted to confer with Rozek's legal counsel regarding the requested interrogatories. (Doc. 20, pg. 3).

On November 8, 2002, the Court granted GMAC's Motion to Compel, giving Rozek until November 18, 2002, to answer the interrogatories propounded by GMAC. However, by this specified date, neither GMAC nor the Court had received a response to the interrogatories. This lack of response then prompted the instant Motion for Attorney Fees, which was filed with the Court on November 19, 2002. In this Motion, GMAC seeks to recover Eight Hundred Forty-two and 62/100 dollar ($842.62) in fees and expenses it claims it incurred as a direct result of Rozek's failure to provide the requested and mandated interrogatory answers.

On December 17, 2002, Rozek, for the first time, submitted the required interrogatories along with his Memorandum in Opposition to the Defendant's Request for Attorney Fees ("Response to Motion for Fees"). At the same time, Rozek also filed the instant Motion for Summary Judgment on the Complaint for violation of the automatic stay. A hearing regarding both Motions was held on December 19.

DISCUSSION

Determinations concerning violations of the automatic stay are core proceedings pursuant to 28 U.S.C. §157(b)(2). Thus, this case is a core proceeding.

Two separate matters will be addressed in this Decision: (1) whether, as a sanction for failing to comply with GMAC's discovery request, Rozek's legal counsel should be required to pay the legal expenses incurred by GMAC in pursuing this matter; and (2) whether, under the summary judgment standard, damages may be awarded to Rozek for GMAC's violation of the automatic stay as set forth in 11 U.S.C. § 362(a). The Court will begin this analysis with the first issue.

Bankruptcy Rule 7037, which incorporates in full Civil Procedure Rule 37, governs the awarding of sanctions when a party fails to comply with a request for discovery. In a situation such as

this, where the lack of a response to an interrogatory is at issue, Rule 7037(a)(2)(B) governs by providing, in relevant part, that:

> if . . . a party fails to answer an interrogatory submitted under Rule 33 . . . the discovering party may move for an order compelling answer . . . in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action.

As for the circumstances when expenses should be awarded, subparagraph (a)(4)(A) of Rule 7037 then goes on to provide, in pertinent part, that:

> If the motion is granted or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party . . . whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure . . . was substantially justified, or that other circumstances make an award of expenses unjust.

To restate these rules in simpler terms, if a party fails to comply with a discovery request, Rule 37(a)(2)(B) allows the discovering party to file a motion for an order compelling an answer. In this motion, the requesting party must include a certification that they, in good faith, did or at least attempted to resolve the discovery issue without court intervention. If upon compliance with this requirement, an order to compel is thereafter entered, the express language of subparagraph (a)(4)(A), then directs that the court "shall" award reasonable expenses, including attorney fees, unless one of the three exceptions set forth under this subparagraph is met: (1) the movant did not actually make a good faith effort to obtain the needed discovery without court action; (2) the nondisclosure was substantially justified; or (3) other circumstances make an award of expenses unjust. *Youn v. Track, Inc.*, 324 F.3d 409 (6th Cir. 2003).

As the above rules pertain to this case, two facts are not in dispute: (1) Rozek did not respond to GMAC's interrogatories until after GMAC had filed its motion to compel; and (2) GMAC filed a certification with its motion to compel stating that, before taking court action, it had made a good faith effort to confer with Rozek's legal counsel regarding the lack of a response on the interrogatories. Accordingly, given these facts, the preliminary requirements of subparagraph (a)(2)(B) of Rule 7037 have been met; the issue thus before the Court is whether, under subparagraph (a)(4)(A), any one of the three defenses against awarding expenses is applicable. The Court begins with the first defense – whether GMAC made a good faith effort to resolve the discovery issue without Court intervention.

Good faith, although an intangible and abstract quality, may generally be taken to mean an honest intention combined with the lack of any wrongful design. BLACKS LAW DICTIONARY 693 (6th Ed.). As applied to this case, it is not disputed that counsel for GMAC made at least two attempts, before filing its motion to compel, to contact Rozek's legal counsel regarding the unanswered interrogatories. In addition, after last being contacted, GMAC waited approximately two weeks to file the instant motion for attorney fees. It also does not go unnoticed to the Court that Rozek, having initiated this action, should be especially accessible in complying with discovery requests so as to ensure that this case proceeds in an expeditious manner. Thus, on whole, GMAC's actions in attempting to resolve this matter without court intervention comport with the notion of good faith under Bankruptcy Rule 7037.

Rozek, however, on a legal grounds, seeks to counter this finding, arguing that no good faith effort to resolve the matter may be found to exist, when, as is the situation here, no actual discussions took place between the parties. Specifically, it was stated to the Court, GMAC "failed to comply with Local Bankruptcy Rule 7036 by failing to arrange a 'personal consultation' and failing to make 'sincere attempts to resolve difference. . .'" (Doc. No. 28, at pg. 5). Furthermore, Rozek stated that "the only time Plaintiff heard from [GMAC]'s counsel was subsequent to the draft and transmission of the Stipulation of Voluntary Dismissal, to which [GMAC] objected to." *Id*.

The weakness, however, with Rozek's position is that neither Bankruptcy Rule 7037 nor Local Bankruptcy 7036[1] actually require that any personal consultation take place between opposing counsel. Instead, both of these Rules simply require that the movant's attorney demonstrate that actions were made which were reasonably certain to impart to the opposing party the need to comply with the discovery request. This may be done, as occurred in this case, by leaving messages at the opposing party's law office. To hold otherwise, would enable a noncooperating party to cause unnecessary delay and expense by simply ignoring the other party's attempts at contact. In addition, this position also comports with the related certification requirement of subparagraph (a)(2)(B) of Rule 7037 which, instead of requiring actual discussions between the parties, simply uses the phrase "attempted to confer" when referring to the concept of good faith in resolving a discovery issue without court intervention. Accordingly, for these reasons, Rozek may not rely on the good faith defense set forth in Bankruptcy Rule 7037(a)(4)(A).

The next issue raised in this matter concerns whether the failure to timely answer the interrogatories propounded by GMAC was, within the meaning of Bankruptcy Rule 7037(a)(4)(A), "substantially justified." In support of his compliance with this standard, Rozek raises what are essentially two different, but related arguments. First, it is asserted that all but one of the questions propounded in GMAC's interrogatory requests were irrelevant, and thus not within the proper scope of discovery under Bankruptcy Rule 7026(b)(1). (Doc. 28, at pg. 2). Second, Rozek asserts that he was under the belief that GMAC was going to consent to the dismissal of this case, thereby "alleviating the need for any further action by either party." *Id*.

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This rule states, in relevant part, "[t]o curtail undue delay in the administration of justice, no discovery procedure filed under Fed. R. Civ. P. 26 through 37 to which objection or opposition is made by the responding party shall be taken under consideration by the Court unless the party seeking discovery shall first advise the Court in writing that, after personal consultation and sincere attempts to resolve differences, the parties are unable to reach an accord."

For purposes of Bankruptcy Rule 7037(a)(4)(A), there is no bright-line standard as for when substantial justification will be found to exist. Thus, in looking to whether there exists substantial justification for failing to comply with a discovery request, courts have looked to the purpose of the Rule which is to deter the abuse implicit in carrying or forcing discovery disputes into court needlessly. *Willemijn Houdstermaatschaapij BV v. Apollo Computer Inc.*, 707 F.Supp. 1429, 1449 (D.Del.1989). In taking the purpose of this Rule into account, this Court finds the parameters set forth *Alvarez v. Wallace* particularly persuasive where, in addressing the substantially justified standard, it was stated:

> . . . some justification will not suffice, as competent counsel can always offer some justification. Rather, the Courts focus must be on the quality of the justification and the genuineness of the dispute; where an impartial observer would agree that a party had good reason to withhold discovery, then such a justification is substantial.

107 F.R.D. 658, 662 (D.C. Tex 1985) (internal quotations omitted).

Based upon the above parameters, the Court simply cannot come to the conclusion that there is any substantial justification for Rozek's attorney failing to timely comply with GMAC's discovery request. To begin with, if it was felt that some of the questions propounded in the submitted interrogatories were not discoverable, there was ample opportunity to discuss this matter, and thereafter work out some sort of resolution with GMAC. Of equal importance, if a discovery issue cannot be resolved by the parties, various mechanisms exists under the Bankruptcy Rules by which the contested matter may be brought before the Court. *See*, *e.g.*, 7026(c). No such action, however, of this type was undertaken by counsel for Rozek.

In addition, the argument made by Rozek's counsel, which relies on the potential early dismissal of this case as a basis for not timely complying with GMAC's discovery request, does not

carry weight with this Court. This is because the facts of this case clearly show that not only was GMAC forced to bring its Motion to Compel – which alone is a sufficient basis to award expenses – but that Rozek thereafter failed to timely comply with this Court's Order to Compel. Thus, it is hard for this Court to believe that Rozek was not on notice that, notwithstanding the potential dismissal of this case, GMAC was in need of the answers to its interrogatories. In fact, it is entirely possible that discussions regarding a stipulated dismissal of this case could have been expedited had the interrogatories been completed in a prompt manner. Of even greater importance, given the failure of Rozek to abide by this Court's order, despite being given an ample amount of time, Rozek's failure to submit the requested interrogatories was more that just a mere technical breach of the Rules of Discovery.

The final defense under Bankruptcy Rule 7037(a)(4)(a) is a catchall provision whereby expenses to the movant may be denied if "other circumstances make an award of expenses unjust." However, from this Court's observations regarding the overall progression of this case, and for the reasons already stated in this Decision, the Court simply has no basis to conclude that this provision is applicable. Consequently, GMAC is entitled to expenses from Rozek's legal counsel. As for the amount of expenses, the Court, after reviewing the itemized list of legal fees and expenses GMAC incurred in pursuing this matter, finds that the Eight Hundred Forty-two and 62/100 dollar ($842.62) asked for is reasonable. Accordingly, pursuant to Bankruptcy Rule 7037, Rozek's legal counsel is hereby sanctioned in this amount.

The next issue to address concerns Rozek's entitlement to Summary Judgment on his Complaint for Violation of the Automatic Stay. The standard for summary judgment is set forth in Fed.R.Civ.P.56, which is made applicable to this proceeding by Bankruptcy Rule 7056, and provides for in pertinent part: A movant will prevail on a motion for summary judgment if, "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show

that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In order to prevail, the movant must demonstrate all the elements of the cause of action. *R.E. Cruise, Inc. v. Bruggeman*, 508 F.2d 415, 416 (6th Cir.1975). Thereafter, upon the movant meeting this burden, the opposing party may not merely rest upon their pleading, but must instead set forth specific facts showing that there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). Inferences drawn from the underlying facts must be viewed in a light most favorable to the party opposing the motion. *Matsushita v. Zenith Radio Corp.*, 475 U.S. 574, 586-88, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

The automatic stay, which is set forth in 11 U.S.C. § 362(a), generally prohibits any action by a creditor to collect on a prepetition debt. *In re Armstrong*, 96 B.R. 55, (Bankr. E.D.N.C.1989). Knowledge as to the applicability of the stay is immaterial; thus regardless of whether the actor received notice of the stay, any action taken in violation thereof is void. *In re Smith*, 876 F.2d 524, 525-26 (6th Cir.1989). However, merely because the stay is violated does not automatically entitle the debtor to damages. Instead, § 362(h) limits the ability of a debtor to collect damages to those situations in which the violation of the stay is "willful." *Jones v. United States (In re Jones)*, 212 B.R. 680, 682 (Bankr.M.D.Ala.1997), *aff'd*, 230 B.R. 875 (M.D.Ala.1999).

In this case, there is not a dispute that GMAC violated the stay of § 362(a); the question is rather, was the violation "willful" under the standard set forth above? To establish a willful stay violation, it must be shown that, with knowledge of the bankruptcy filing, the party took some action in violation of the stay. *In re Davis*, 247 B.R. 690, 698 (Bankr. N.D.Ohio 1999). It does not matter, however, whether the party had the specific intent to violate the stay, or acted in good faith based upon a mistake of law or legal dispute regarding its rights. Instead, when notice of the bankruptcy filing is received, it becomes a creditor's responsibility to ensure that it does not take any action which is in

violation of the stay, or if actions have already been taken in violation of the stay, to reverse such actions through affirmative measures. *In re Johnson*, 253 B.R. 857, 861 (Bankr. S.D.Ohio 2000).

In support of his position that GMAC's violation of the stay was willful, Rozek submitted to the Court an affidavit whereby a person employed by Rozek's legal counsel stated that GMAC was contacted about the bankruptcy filing prior to the sale of the automobile. GMAC, however, has raised a number of points in opposition. First, as called to the Court's attention by GMAC, there are some weaknesses with the affirmations made in Rozek's supporting affidavit. For example, the name of the contact person is lacking. Second, GMAC submitted an opposing affidavit whereby many of the substantive affirmations made in Rozek's supporting affidavit are denied. Third, GMAC contends that internal policy would dictate that if it had been contacted prior to Rozek's bankruptcy filing, a record of this communication would have been made. No such record, however, according to GMAC exists. Accordingly, given that these points of opposition clearly call into question Rozek's position that GMAC learned of his bankruptcy petition prior to the sale of the automobile, there exists a genuine dispute as to whether GMAC's actions meet the willful standard of § 362(h) as set forth above. As such, this matter is not appropriate for summary judgment.

In reaching the conclusions found herein, the Court has considered all of the evidence, exhibits and arguments of counsel, regardless of whether or not they are specifically referred to in this Opinion.

Accordingly, it is

ORDERED that the Motion of the Plaintiff, Jerome Rozek, Jr., for Summary Judgment be, and is hereby, DENIED.

It is ***FURTHER ORDERED*** that, pursuant to Bankruptcy Rule 7037, Plaintiff's attorney, Jerry Purcel, pay as a sanction the expenses of Defendant's attorney, Erik J. Wineland. The amount of these expenses is hereby set at Eight Hundred Forty-two and 62/100 dollars ($842.62).

It is ***FURTHER ORDERED*** that this matter be, and is hereby, set for a Trial on Monday, June 9, 2003, at 1:30 P.M., in Courtroom No. 1, Room 119, United States Courthouse, 1716 Spielbusch Avenue, Toledo.

It is ***FURTHER ORDERED*** that on, or before Monday, June 2, 2003, the Parties exchange and file with the Court pre-trial memoranda, lists of witnesses, lists of exhibits, and stipulations.

It is ***FURTHER ORDERED*** that the failure to file any of the above items may result in the Trial being continued, witnesses or exhibits not being introduced into Trial, or sanctions being imposed by the Court.

Dated:

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Richard L. Speer
United States
Bankruptcy Judge