

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

IN RE: IN PROCEEDINGS UNDER CHAPTER 13
CLIFFORD CARSON, CASE NO.: 04-16566
Debtor. JUDGE RANDOLPH BAXTER

MEMORANDUM OF OPINION AND ORDER

The matter before the Court is Clifford Carson's, *pro se*, motion for and certification of damages resulting from creditor Georgiann Butts' violation of the automatic stay imposed under 11 U.S.C. § 362(a). On October 8, 2004, the Court ruled that Butts violated the automatic stay when she wrongfully evicted Carson without seeking relief from the automatic stay pursuant to § 362(d). Subsequent to the stay violation, Carson's case was dismissed for lack of funding his Chapter 13 plan. Initially, the Court must determine whether it has jurisdiction to consider Carson's request for damages.

Several courts have opined that an action for damages for willful violation of an automatic stay, pursuant to 11 U.S.C. § 362(h), survives dismissal of the bankruptcy case. *See e.g., In re Javens*, 107 F.3d 359, 363, n. 2 (6th Cir. 1997); *Price v. Rochford*, 947 F.2d 829, 830-31 (7th Cir. 1991); *Martin-Trigona v. Champion Fed. Sav. & Loan Ass'n*, 892 F.2d 575, 577 (7th Cir. 1989). The Sixth Circuit has specifically ruled "since dismissal of an underlying bankruptcy case does not automatically strip a federal court of residual jurisdiction to dispose of matters after the underlying bankruptcy case has been dismissed, exercise of such jurisdiction is left to the sound discretion of the trial court. *In re Javens*, 107 F.3d at 364. In light of the above, this Court will exercise its discretion to consider the matter pursuant to 28 U.S.C. § 157(a) and (b),

28 U.S.C. § 1334, and General Order No. 84 of this District. The record reveals that no response was filed by Butts to Carson's motion.

The following findings are herein made after a duly-noticed hearing on Carson's request for damages:

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Carson asserts that he is entitled to an amount of \$175,120.00 due to the wrongful eviction of him. Carson demands restitution for loss of revenue and income, and personal property. His motion includes an estimate of loss attributable to his inability to enroll students in the Initiative for Academic Achievement program (the "Program"), in which Carson serves as Executive Director. Carson states that because he had to appear in court to prosecute the stay violation allegation, he missed scheduled student provider fairs in Columbus and Akron.

The fairs were, according to Carson, for the purpose of meeting parents who may enroll their children in the program. He contends that his program signs up ten parents per hour during these fairs with each student amounting to approximately \$1,800.00 for the program. He further contends that 20 students would likely have been signed at the fairs, plus he believes he would have received referrals from parents for other prospective students. Carson estimates that the total loss amounts to \$72,000.00 for his inability to perform his job duties and attend and enroll parents in Columbus. He also asserts that the total loss from his inability to attend the Akron Public Schools' provider fair is \$98,120.00.

Carson also requests restitution for damages to certain personal property. He estimates that \$5,000.00 worth of personal property was either damaged or lost, inclusive of kitchen glasses, dishes, records, receipts, a telephone recording device, armrest and pillow, and toiletries, among others. His total request for damages is \$175,120.00 (Columbus Fair loss + Akron Fair

Loss + Personal Property).

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The dispositive issue is whether Carson has met his burden of proving damages resulting from the stay violation.

Under 11 U.S.C. § 362(h), 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." *John E. Green Plumbing & Heating Co. v. Turner Construction Co.*, 742 F.2d 965, 968 (6th Cir. 1984), *cert. denied* 471 U.S. 1102, 105 S.Ct. 2328, 85 L.Ed.2d 845 (1985). Generally speaking, a violation will be found "willful" if the creditor's conduct was intentional (as distinguished from inadvertent), and committed with knowledge of the pendency of the bankruptcy case. *See Fleet Mortgage Group, Inc. v. Kaneb*, 196 F.3d 265, 268-69 (1st Cir. 1999). Once the Court has found a willful stay violation, the debtor still must establish actual damages. *In re Johnson*, 253 B.R. 857 (Bankr. S. D. Ohio 2000).

There is no dispute that the automatic stay was violated willfully by Butts. Therefore, Carson has the burden of proving damages. *In re Estep*, 173 B.R. 126 (Bankr. N.D. Ohio 1994). A damage award must not be based on 'mere speculation, guess, or conjecture.' " *John E. Green Plumbing & Heating Co. v. Turner Construction Co.*, 742 F.2d at 968. (quoting *Zivin Laboratories Int v. Mead-Johnson & Co.* 208 F.Supp. 633 (E.D. Mich. 1962). Under Ohio law, the amount of damages must be based upon evidence of the actual loss suffered by the aggrieved party, *Ross v. Meyers*, 883 F.2d 486, 491 (6th Cir.1989) or may demonstrated with reasonable certainty. *Gahanna v. Eastgate Properties, Inc.*, 36 Ohio St.3d 65, 521 N.E.2d 814 (1988)(the

amount of lost revenue must be demonstrated with reasonable certainty). Damages may be established with reasonable certainty with the aid of expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises, or other similar evidence. *Thomasville Furniture Indus. v. Elder-Beerman Stores*, 250 B.R. 609, 629 (S.D. Ohio 1998); *Archer v. Macomb County Bank*, 853 F.2d 497, 499 (6th Cir. 1988)(the law does not require impossibilities when it comes to proof of damages, ... it does require whatever degree of certainty that the nature of the case admits).

Herein, Carson provided no evidence of actual loss or loss by a reasonable certainty as required to support either his damages request for the loss of revenue, or the purported damages to and loss of his personal property. Accordingly, Carson's request for damages in the amount of \$175,120.00 is hereby denied. Each party is to bear its respective costs.

IT IS SO ORDERED.

Dated, this 24th day
November, 2004

/s/ Randolph Baxter

RANDOLPH BAXTER
CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT

