

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

IN RE:	)	CASE NO. 05-57246
	)	
Kenneth H. Harmon and Debra A. Harmon,	)	CHAPTER 7
	)	
DEBTOR(S)	)	
	)	ADVERSARY NO. 06-5132
Kenneth H. Harmon, et al.,	)	
	)	JUDGE MARILYN SHEA-STONUM
PLAINTIFF(S),	)	
	)	
vs.	)	
	)	
JTH Tax, Inc., et al.	)	<b>ORDER RE: MOTIONS TO</b>
	)	<b>DISMISS</b> [Docket # 27, 33, 36, 38]
DEFENDANT(S).	)	

This matter is before the Court on the following: (A)(1) Joint Motion of Santa Barbara Bank & Trust (“SBBT”) and Pacific Capital Bank to Dismiss Complaint [docket #27], (2) Defendant JTH Tax, Inc.’s (“JTH”) Motion to Dismiss Plaintiffs’ Amended Complaint and Memorandum in Support [docket #33], (3) Motion of HSBC North America Holdings, Inc.

(“HNAH”) To Dismiss Amended Complaint [docket # 36] and (4) Motion of HSBC Taxpayer Financial Services, Inc. (“HSBC-TFS”) To Dismiss Amended Complaint [docket # 38]; (B) The responses of Kenneth H. Harmon and Debra A. Harmon (“Plaintiffs”) [docket ## 32, 39, 40, 45 and 46]; (C) the Joint Reply of SBBT and Pacific Capital Bank [docket # 34] and (D) (1) the Reply of HNAH [docket #40] and (2) the Reply of HSBC-TFS.

### **Jurisdiction**

This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O). This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 157(a) and (b)(1) and by the Standing Order of Reference entered in this District on July 16, 1984.

### **The Motions to Dismiss**

In the context of a motion to dismiss under Fed. R. Civ. P. 12(b)(6), as made applicable by Fed. R. Bankr. P. 7012, the court must view the allegations in the light most favorable to the nonmoving party. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). The issue that must be decided is not whether plaintiff will ultimately prevail but whether plaintiff is entitled to offer evidence to support the claims stated in his complaint. *Id.* Thus, a motion to dismiss for failure to state a claim will not be granted unless it appears *beyond doubt* that plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Id.* (emphasis added).

Section 362(h) provides that “[a]n individual injured by any willful violation of a stay . . . shall recover actual damages, including costs and attorneys fees, and, in appropriate circumstances, may recover punitive damages. 11 U.S.C. § 362. Ultimately, to establish a violation of the automatic stay, the plaintiff bears the burden of demonstrating by a

preponderance of the evidence that:

- (1) a bankruptcy petition was filed;
- (2) the defendants received notice of the petition;
- (3) the defendants' actions were in willful violation of the automatic stay;
- (4) the plaintiff is an "individual;" and
- (5) the plaintiff suffered damages as a consequence of the defendants violations of the automatic stay.

Flack, 239 B.R. 155, 163 (Bankr. N.D. Ohio 1999).

In the context of a Motion to Dismiss, the plaintiffs do not bear the burden of proving each and every element of their claim at the time of filing the Complaint. Rather, the Rules of Civil Procedure require "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8, as made applicable herein by Fed. R. Bankr. P. 7008. In this instance, the Plaintiffs have made factual allegations, which if true, state a claim for relief.

### **Discussion**

Elements 1 and 4 do not appear to be disputed by any of the parties. The Defendants raise issue with respect to elements 2, 3 and 5.

#### ***Element 2 - Notice***

The Plaintiffs allege that at least 4 entities related to HNAH were listed on the Plaintiffs' schedules in their bankruptcy case.<sup>1</sup> See Amended Complaint, ¶¶ 14, 16, 18, 20, 22.

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<sup>1</sup> There is a lack of clarity with respect to the entity with whom the collected debt originated which is not surprising given that it appears to be a debt that is over ten years old. In the Plaintiff's original complaint, the Plaintiffs allege that the debt is for an obligation owed to or held by Orchard Bank, an entity related to HNAH and listed on the Plaintiffs' bankruptcy schedules. See Complaint, ¶¶ 36 and 37. Footnote 1 of the initial Motion of HSBC Taxpayer Financial Services, Inc. To Dismiss Complaint [docket # 8] suggests that the debt collected was held by

The Plaintiffs further assert that those entities are affiliated with, wholly owned subsidiaries of and/or instrumentalities of HNAH. *See* Amended Complaint, ¶ 15, 17, 19, 21, 23, 24. In addition, Plaintiffs allege that as a result of such relationship and the business practices of the named defendants and the HNAH entities listed on the Plaintiffs' schedules, these entities should not be treated as distinct entities.<sup>2</sup> The Plaintiffs allege that as a result of the joint venture between certain HNAH entities and SBBT and JTH, notice of the Plaintiffs' bankruptcy filing can (and should) be imputed to SBBT and JTH. *See* Amended Complaint, ¶ 26, 27 and 35.

Each of the Defendants, in its respective Motion to Dismiss, argues the ultimate issue

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HSBC-TFS and is the result of a Refund Anticipation Loan to Debra Harmon in 1995 made by a predecessor in interest to HSBC - TFS. HSBC- TFS is not one of the entities listed in the Plaintiffs' schedules. In the Amended Complaint, Plaintiffs name HSBC Taxpayer Financial Services, a division of HSBC Bank U.S.A, N.A., as a defendant and allege the collected debt was for an "HSBC account held under HSBC Taxpayer Services, Inc. and/or its affiliates and/or instrumentalities." *See* Amended Complaint ¶ 38. In the next paragraph of the Amended Complaint, Plaintiffs suggest that the collected debt was "included" in the Plaintiffs bankruptcy. Notwithstanding this confusion, at this most preliminary stage, there is sufficient allegation that after the Plaintiffs filed for relief under chapter 7 of the Bankruptcy Code, HNAH and/or one or more of its related entities worked in concert together with JTH and SBBT to collect a debt that was incurred by the Plaintiffs prior to the date the Plaintiffs filed their voluntary petition for relief under the Bankruptcy Code to state a potential claim for relief under § 362.

<sup>2</sup> The Plaintiffs are entitled to have the Court take the factual allegations in the Amended Complaint as true given that the matter before the Court is a motion to dismiss pursuant to Rule 12(b)(6). At this procedural juncture, the Defendants' factual assertions regarding the separateness of HNAH and the other Defendants in their motions and briefs are not entitled to the same treatment. Once the facts have been developed through discovery, there may be matters of law appropriately considered on motion for summary judgment. Consideration of those matters now is premature.

of the legal sufficiency of the notice given to the Defendants. Whether the Defendants had notice of the Plaintiffs' bankruptcy filing is initially a question of fact. *Manzanares v. State Farm Fire and Cas. Co.*, 345 B.R. 773 (Bankr. S.D. Fla. 2006) Depending on the facts, as they are developed through discovery, the notice provided to the Defendants may not be legally sufficient, but in the context of a motion to dismiss, the Court finds that the Plaintiffs have made sufficient allegations in their Amended Complaint with respect to "notice."

***Element 3 - The Defendants actions were willful***

In order for an act to be considered a "willful" violation of the automatic stay, the defendant must have taken an intentional and deliberate act with knowledge of the bankruptcy proceeding. "Such knowledge does not have to come through formal means, and even if not scheduled, a willful violation may be established were the creditor has sufficient facts to cause, . . . a reasonably prudent person to make further inquiry". *In re Flack*, 239 B.R. at 163; *In re Withrow*, 93 B.R. 436, 438 (Bankr.W.D.N.C.1988) (constructive notice was imputed to a creditor where the failure to receive actual notice was due primarily to creditor's distant and complex collection system); \*810 *In re Shealy*, 90 B.R. 176, 179 (Bankr.W.D.N.C.1988) (tax commission's failure to locate and flag the debtor's tax claim resulted in numerous notices being sent to Debtors in willful violation of the automatic stay); *Mallis v. Bankers Trust Co.*, 717 F.2d 683, 689 n. 1 (2d Cir.1983) ("It is a basic tenet of the law of agency that the knowledge of an agent, or for that matter a partner or joint venturer, is imputed to the principal."); *In re Withrow*, 93 B.R. at 438 (knowledge may be imputed to the creditor by notice to its apparent agents).

Each of the Defendants, in its respective Motion to Dismiss, again attempts to argue

the ultimate legal issue, of whether constructive knowledge can provide a basis for finding a willful violation of the automatic stay. Until the facts are more fully developed, through discovery, with respect to the notice provided to and received by the named Defendants, a determination of the ultimate legal issue in this case - was there a willful violation of the stay - is premature. In this instance, the question is not whether Plaintiffs will prevail, but whether Plaintiffs should be allowed to present evidence in support of their claim. The Court finds that Plaintiffs' have made sufficient allegations regarding the nature of the Defendants' actions to withstand the Defendants' Motions to Dismiss.

***Element 5 - Damages Suffered***

Again Plaintiffs have alleged that they were damaged and, in this context, the Court finds that, should a willful violation of the stay be proven, Plaintiffs should have an opportunity to demonstrate the extent of their damages. The Plaintiffs' allegations are sufficient to withstand the Defendants' Motions to Dismiss.

**Conclusion**

For the foregoing reasons, the Defendants' Motions to Dismiss are not well taken and they are denied. A further Pre-Trial Conference in this adversary proceeding shall be held on October 11, 2006 at 3:30 p.m.

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cc: Charles Carpenter  
Bruce Schrader/John Rutter  
Alan Lepene  
Susan Gray/ James MacDonald

