IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
Eastern Division

In Re:	**In Proceedings Under Chapter 7**
CAROL P. BRYANT,	**Case No.: 08-17873**
Debtor.	
CAROL P. BRYANT,	**Adv. Proc. No. 08-1372**
Plaintiff,	**JUDGE RANDOLPH BAXTER**
v.	
IMMERMAN AND TOBIN CO., L.P.A.,	
Defendant.	

MEMORANDUM OF OPINION AND ORDER

In this Chapter 7 adversary proceeding, Carol P. Bryant (Debtor) alleges that a willful violation of the automatic stay provisions of § 362(a) and (k) was committed by the defendant Immerman and Tobin Co., L.P.A. This adversary proceeding is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(O), with jurisdiction further conferred under 28 U.S.C. § 1334 and General Order No. 84 of this District. After the conclusion of Plaintiff's case at a duly noticed trial proceeding, the Court rendered judgment as a matter of law in favor of Immerman and Tobin. The following Memorandum of Opinion and Order is issued consistent with this Court's bench ruling:

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The Debtor filed a voluntary Chapter 7 petition on October 14, 2008. She filed the this adversary proceeding on December 10, 2008 alleging violations of the automatic stay against Capital One Bank and Immeran and Tobin Co., L.P.A. On July 2, 2009, the Debtor stipulated to dismiss Capital One from the proceeding and the case proceeded to trial against Immerman and Tobin. At trial, the Debtor testified that on December 7, 2008 she received a summons and complaint from Cleveland Municipal Court involving a lawsuit filed by Capital One. She further testified that the receipt of the summons and complaint was upsetting. She did not state that the Defendant, Immerman and Tobin, was involved in the lawsuit. The Debtor was the only witness in her case in chief and she did not seek admission of any exhibits into evidence. After the Debtor rested, Immerman and Tobin moved for judgment as a matter of law, alleging that the Debtor had failed to make a *prima facie* case of a willful violation of the automatic stay.

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The issue for the Court is whether the Debtor made a *prima facie* case for willful violation of the automatic stay against Immeran and Tobin where, at trial, she testified only that she received a notice of a lawsuit filed by Capital One and failed to introduce any exhibits into evidence.

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Section 362 provides in pertinent part:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302 or 303 of this title . . . operates as a stay, applicable to all entities, of . . .
>
> > (6) any act to collect, assess or recover a claim against the debtor that arose before the commencement of the case under this title . . .
>
> (k) 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.

The stay provisions of § 362 are "automatic and self-operating and those who have knowledge of a bankruptcy action and stay are bound to honor the stay unless and until it is properly lifted." *NLT Computer Services Corporation v. Capital Computer Systems, Inc.*, 755 F.2d 1253, 1258 (6th Cir. 1985). "The legislative history makes clear that [§ 362(a)(6)] was intended to prevent creditors from harassing debtors after a petition is filed." *Id.* at 1257.

To establish a willful violation, it must be shown that the party knew of the bankruptcy filing and took some action that violated the stay. *Fleet Mortgage Group, Inc., v. Kaneb*, 196 F.3d 265 (1st Cir. 1999); *In re Sharon*, 234 B.R. 676, 687-88 (BAP 6th Cir. 1999). A willful violation does not require "proof of a specific intent to violate the stay, but rather an intentional violation by a party aware of the bankruptcy filing." *Id.* at 687. The debtor bears the burden of proving a willful violation by a preponderance of the evidence. *Id.*

In a non-jury trial, if a party with the burden of proving a claim or defense fails to establish his *prima facie* claim or defense during his direct case, the court may enter judgment against the party pursuant to Fed.R.Civ.P. 52(c). *In re Teligent, Inc.* 315 B.R. 308, 315 (Bankr. S.D.N.Y. 2004).

Rule 7052(c) provides:

> (c) Judgment on Partial Findings. If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule.

Awarding a defendant judgment as a matter of law pursuant to Fed.R.Civ.P. 52(c) "is appropriate where the plaintiff has failed to make out a prima facie case or where the plaintiff has made out a prima facie case but the court determines that a preponderance of the evidence goes against the plaintiff's claim," *Stokes v. Perry,* 1997 WL 782131, *8 (S.D.N.Y.1997), citing 9A Charles Alan Wright & Arthur R. Miller, Federal Practice And Procedure § 2573.1 (2d ed.1994). Unlike motions for summary judgment, when a court considers a Fed.R.Civ.P. 52(c) motion, the nonmoving party is not entitled to any special inferences nor is the court to consider the evidence in a light most favorable to that party. See *Regency Holdings (Cayman), Inc. v. The Microcap Fund, Inc. (In re Regency Holdings (Cayman), Inc.),* 216 B.R. 371, 374 (Bankr.S.D.N.Y.1998) (citations omitted). "Instead, the court acts as both judge and jury, weighing the evidence, resolving any conflicts, and deciding where the preponderance of evidence lies." *Id.* at 374. A judgment pursuant to Fed.R.Civ.P. 52(c) "operates as a decision on the merits in favor of the moving party." *Id.*

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Herein, the Debtor failed, through her testimony, to establish that Immerman and Tobin willfully violated the automatic stay provisions of § 362. She testified only that she was upset when she received a summons and complaint from Cleveland Municipal Court regarding a lawsuit filed by Capital One Bank. This testimony does not establish a willful violation of the automatic stay by Immerman and Tobin. Nor did the Debtor move for the admission of any exhibits into evidence that would demonstrate a willful violation by Immerman and Tobin.

Accordingly, Immerman and Tobin's oral Motion for Judgment as a Matter of Law is well premised and is hereby granted. Judgment is entered in favor of the Defendant, Immerman and Tobin, and the Debtor's adversary proceeding is hereby dismissed. Each party is to bear its respective costs.

IT IS SO ORDERED.

JUDGE RANDOLPH BAXTER
UNITED STATES BANKRUPTCY COURT

Dated, this 8th day of October, 2009.