UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO

In Re:	)	
	)	**JUDGE RICHARD L. SPEER**
Wallace/Barbara Damask	)	
	)	Case No. 12-3018
Debtor(s)	)	
	)	(Related Case: 11-36490)
Wallace Damask, et al	)	
	)	
Plaintiff(s)	)	
	)	
v.	)	
	)	
RDJS Property, et al	)	
	)	
Defendant(s)	)	

DECISION AND ORDER

This cause comes before the Court on the Parties' Cross Motions for Summary Judgment. The action underlying these motions concerns the Plaintiffs' Complaint for a Violation of the Automatic Stay, 11 U.S.C. § 362. (Doc. No. 1). Regarding their respective positions on the matter, both of the Parties filed supporting written arguments and documentation. The Court has now had the opportunity to review the evidence and arguments submitted by the Parties, as well as the entire record in this case. Based upon this review, the Court finds, for the reasons set forth in this Decision, that the Plaintiffs' Motion for Summary Judgment should be Denied; and that the Defendants' Motion for Summary Judgment should be Granted.

FACTS

For a number of years, the Plaintiffs, Wallace and Barbara Damask, owned and operated two hair salons. The first of these businesses was operated as a partnership under the name of Highlight Family Hair Center. The Plaintiffs, along with other persons who contributed capital to the business, were the partners of this business. The second of these businesses was a limited liability company,

and operated under the name of Highlights, LLC. The Plaintiffs were the sole members of this company.

The individual named as a Defendant in this proceeding is Ramy Eidi. Mr. Eidi is a principal and owner of the other businesses named as Defendants in this matter (hereinafter referred to collectively as the "Defendants").[1] The Defendants' business operation involves the lease of commercial property.

In 2006, the Defendants entered into an agreement to lease to the Plaintiffs two commercial spaces from which the Plaintiffs would operate their hair salon businesses. The first space is located on Secor Road in Lambertville, Michigan (hereinafter the "Secor property"). The second property is located on Lewis Avenue in Temperance, Michigan. (hereinafter the "Lewis property"). The lease for these two properties was set to expire in 2014.

At the Secor property, the Plaintiffs operated their partnership, the Highlight Family Hair Center. From the Lewis property, the Plaintiffs ran the business operations of Highlights, LLC. The Plaintiffs, in their personal capacity, were liable for the lease of the Secor property. For the Lewis property, however, only the Plaintiffs' company, Highlights, LLC, was named as a lessee.

On December 6, 2011, the Plaintiffs filed a petition in this Court for relief under Chapter 7 of the United States Bankruptcy Code. Within days of filing for bankruptcy relief, the Defendants received actual notice of the Plaintiffs' bankruptcy case. At the time their bankruptcy case was commenced, the Plaintiffs were not in default on their monthly monetary obligation to the Defendants, having just paid the rent on the two leases for the month of December. In the statement of intention filed with their bankruptcy petition, however, the Plaintiffs set forth that they did not intend to assume their lease obligations with the Defendants.

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[1] The other Defendants in this matter are: RDJS Property Management; Clock Tower Plaza, LLC; Fire Creek Plaza, LLC; and Eidi Properties.

Just after filing for bankruptcy relief, the Plaintiffs were contacted by the Defendant, Mr. Eidi, concerning a "lease termination agreement." Under this proposed agreement, the Defendants would release the Plaintiffs from any liability concerning postpetition rent; in return, the Plaintiffs were to quit the leased properties and leave the Defendants with the permanent fixtures in the properties such as sinks and mirrors. Ultimately, and despite Mr. Eidi's urging, the Plaintiffs, citing to the bankruptcy trustee's interest in their leased properties and their desire to completely terminate their relationship with the Defendants, did not enter into a termination agreement with the Defendants. The Plaintiffs communicated this information to Mr. Eidi.

During this same time, Mr. Eidi also undertook certain actions to secure his properties. Initially, this action took the form of frequently contacting Mrs. Damask, both in person and via telephone, urging that she vacate the leased properties. During his contact with Mrs. Damask, Mr. Eidi also placed a "for lease" sign at the Secor property. Ultimately, Mr. Eidi took physical possession of the leased properties by changing the locks on the properties. Afterwards, the Secor property was leased to another hair salon which operated under the name of "The New Highlights."

Prior to the time the locks were changed, the Plaintiffs were able to recover some of their business assets at the Secor property such as tanning beds, desks and lamps. However, when the locks on the Lewis property were changed, the Plaintiffs had yet to recover some business property, including a ledger/customer list, currency and some tools of the trade such as scissors. At the same time, the Plaintiffs did not remove any items from the properties which they considered to be fixtures.

On December 29, 2011, the Defendants commenced separate legal actions in state court seeking to recover damages. The first action, concerning the Secor property, named the Plaintiffs, as well as the Plaintiffs' business partners, as defendants. Against the Plaintiffs, the Defendants' Complaint set forth that it demanded judgment against the Plaintiffs "jointly and severally, for post-petition rent in the sum of Two Thousand Five Hundred Seventy Eight Dollars and 83/100

($2,578.83) . . . ." The second legal action, concerning the Lewis property, named only the Plaintiffs' company, Highlights LLC, as a defendant, and demanded judgment in the amount of $6,938.63.

On January 17, 2012, the Plaintiffs' commenced this action, alleging that the Defendants actions constituted a violation of the automatic stay of 11 U.S.C. § 362(a). In their Complaint, the Plaintiffs asked that they be awarded actual damages, including attorneys' fees, plus punitive damages.

DISCUSSION

The matter brought by the Plaintiffs before the Court alleges a violation of the automatic stay of 11 U.S.C. § 362(a). Pursuant to 28 U.S.C. § 157, a determination regarding the applicability of the stay, including a violation thereof, is a "core proceeding." 28 U.S.C. § 157(b)(2)(G). Accordingly, as a "core proceeding," this Court has the jurisdictional authority to enter final orders and judgments in this matter. 28 U.S.C. § 157(b)(1).

Both the Plaintiffs and the Defendants have filed a Motion for Summary Judgment. The standard for summary judgment is set forth in Rule 56(a) of the Federal Rules of Civil Procedure, as made applicable to this Court by Bankruptcy Rule 7056. Under Rule 56(a), it is provided that the "court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." A genuine issue of fact exists "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

In making this assessment, all "inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 8 L.Ed.2d 176 (1962). Furthermore, in situations such as this, where the Parties have filed Cross Motions for Summary Judgment, the Court must consider each motion separately, since each party, as a movant for summary judgment, bears the burden of establishing the

nonexistence of genuine issues of material fact, and that party's entitlement to judgment as a matter of law. *Colonial Pacific Leasing v. Mayerson (In re Mayerson),* 254 B.R. 407, 411 (Bankr. N.D.Ohio 2000).

Upon the commencement of a bankruptcy case, an automatic stay arises as a matter of law; no formal notice or service of process is required for the stay to have effect. 11 U.S.C. § 362(a); *Smith v. First America Bank,* N.A., 876 F.2d 524, 526 (6th Cir.1989). The scope of the stay is broad and operates to enjoin essentially any act, whether the commencement or continuation thereof, by a creditor to collect on a prepetition claim. *In re Harchar,* 393 B.R. 160, 167 (Bankr. N.D.Ohio 2008). The purpose of the automatic stay is twofold: (1) to provide the debtor with some breathing room from creditor's collection efforts; and (2) to "ensure the orderly liquidation of the debtor's bankruptcy estate." *In re Perviz,* 302 B.R. 357, 365 (Bankr. N.D.Ohio 2003).

To carry forth its intended functions, the automatic stay generally proscribes three categories of collection activities: (1) acts against the debtor; (2) acts against the debtor's property; and (3) acts against property of the estate. These proscriptions are specified in paragraphs (1) through (8) of § 362(a). In this matter, the Plaintiffs, in their Motion for Summary Judgment and as the basis for their Complaint for a violation of the automatic stay, specifically cite to paragraphs (1), (3), (4), (5) and (6) of § 362(a). (Doc. No. 1, ¶ 20).

Respectively, the paragraphs cited by the Plaintiffs provide, in relevant 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–
>
> > (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
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> (4) any act to create, perfect, or enforce any lien against property of the estate;
>
> (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
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> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title[.]

Creditors who violate the stay are subject to sanctions. A sanction for a violation of the automatic stay may take the form of a citation for contempt. *In re Moore*, 410 B.R. 439, 441 (Bankr. E.D.Va.2009) As a part of a contempt citation, a court may award a debtor monetary damages. In addition, in the situation where a debtor is an individual, § 362(k)(1) makes the entry of an award of actual damages, including attorney fees, mandatory when its conditions are met. *Duby v. U.S. (In re Duby)*, 451 B.R. 664, 670 (1st Cir. B.A.P. 2011). The Plaintiffs, as the basis for an award of damages against the Defendants, tacitly rely on this provision.

Bankruptcy Code § 362(k)(1) provides that "an 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(k)(1). Consistent, then, with this provision, an individual seeking damages for a violation of the stay has the burden of establishing three elements: (1) the actions taken were in violation of the automatic stay; (2) the violation was willful; and (3) the violation caused actual damages. *In re Barclay*, 337 B.R. 728 (6th Cir. 2006). Each of these elements must be satisfied by a preponderance of the evidence. *Id.*

As applied to these requirements, the Defendants do not dispute that, within a very short time after it was commenced, they received notice of the Plaintiffs' pending bankruptcy case. Consequently, it can be assumed that, consistent with the second requirement, any violation of the

stay found to exist in this matter will qualify as "willful" for purposes of § 362(k)(1). In this regard, "willful" as applied to § 362(k) has been interpreted to mean any intentional and deliberate act undertaken with knowledge – whether obtained through formal notice or otherwise – of the pending bankruptcy. *In re Webb*, 472 B.R. 665 (6th Cir. B.A.P. 2012). No specific intent to violate the stay is required. *In re Johnson*, 501 F.3d 1163, 1172 (10th Cir. 2007).

The Court now turns to address the salient issue in this case: Whether, consistent with the first element of § 362(k), a stay violation, in fact, exists? In support of their burden, the Plaintiffs called attention to a number of activities undertaken by the Defendants which they contend constitute violations of the automatic stay. After reviewing their Complaint and Motion for Summary Judgment, the Court finds that the activities for which the Plaintiffs complain may be grouped as follows:

> Mr. Eidi's commencement of two suits to recover damages for a breach of the lease agreements involving the Secor and Lewis properties. Related to this matter, the Plaintiffs also called attention to the Defendants' suit involving the Lewis property wherein, relying upon the lease agreement, the Defendants asserted a "lien against any furniture, chattels or trade fixtures located at the Premises as security for unpaid rent . . . ." (Doc. No. 1, Ex F. ¶ 14).
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> Mr. Eidi's personal contacts with the Plaintiffs, whether in person or by telephone, during which time the Plaintiffs were pressured to cease and vacate their business operations at the leased properties. Of note, the Plaintiffs called attention to the lease termination agreement presented by Mr. Eidi to the Plaintiffs.
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> Mr. Eidi's act of unilaterally locking the leased properties, thereby depriving the Plaintiffs of some of their business assets – *e.g.*, tools of the trade, money and a customer list.

Each of these circumstances will now be addressed in order.

FIRST ALLEGED STAY VIOLATION

The first type of activity the Plaintiffs contend involves a violation of the automatic stay centers on the two legal actions commenced by the Defendants in state court; in these actions, the Defendants sought to recover damages for a violation of the terms of the leases on the Secor and Lewis properties. Concerning those above provisions of § 362(a) cited by the Plaintiffs, the Defendants' pursuit of damages for a breach of the lease agreement necessarily implicates paragraphs (1), (5) and (6) of the statute. In short, these provisions respectively proscribe the pursuit of any legal action against the debtor, any act to encumber the debtor's property and any act enforce a claim against a debtor.

Considering first the Defendants' Lewis property, a fundamental flaw exists with the Plaintiffs' allegation of a stay violation: The Defendants' state-court action for a breach of the lease agreement named only the Plaintiffs' company, Highlights, LLC, as a defendant; it did not name the Plaintiffs, in their personal capacities, as party defendants. This distinction is critical.

The Plaintiffs' business, Highlights, LCC, as an Ohio limited liability company, is a separate legal entity, distinct from its owners. *Disciplinary Counsel v. Kafele*, 108 Ohio St.3d 283, 287 843 N.E.2d 169, 173 (Ohio 2006), *citing* O.R.C. 1705.01(D)(2)(e). By its explicit terms, however, the automatic stay of § 362(a) only applies to protect a debtor, which is defined in the Bankruptcy Code to mean only a "person . . . concerning which a case under this title has been commenced." For this purpose, the Plaintiffs' business, Highlights, LCC, although eligible for bankruptcy relief, has not commenced a case before the Court, and thus does not qualify as a debtor for purposes of the Bankruptcy Code. Consequently, this business, being a distinct legal entity, is not afforded the protections of § 362(a), notwithstanding the fact that the Plaintiffs, who are before the Court, are the sole members/owners of the business.

This conclusion simply follows well-established precedent. For example, the Sixth Circuit Court of Appeals, in addressing the reach of § 362(a) to non-debtor third parties, stated:

> it is noted that said provision facially stays proceedings "against the debtor" and fails to intimate, even tangentially, that the stay could be interpreted as including any defendant other than the debtor:
>
> . . . .
>
> It is universally acknowledged that an automatic stay of proceeding accorded by § 362 may not be invoked by entities such as sureties, guarantors, co-obligors, or others with a similar legal or factual nexus to the Chapter 11 debtor.

Lynch v. Johns–Manville Sales Corp., 710 F.2d 1194, 1196 (6th Cir.1983). *See also Matter of Johnson*, 209 B.R. 499, 500 (Bankr. D. Neb. 1997) (creditor did not violate automatic stay by levying against nondebtor corporation's property, though debtor was sole owner of corporation).

This is not to say that in the type of situation before the Court – where there is a close nexus between a debtor and a nondebtor, third-party – that a creditor has an absolute right to pursue the nondebtor. In such a situation, where there exists a close identity of interest, the Sixth Circuit has recognized that creditors may be enjoined from pursuing their action against the nondebtor third party in "unusual circumstances." *Parry v. Mohawk Motors of Michigan, Inc.*, 236 F.3d 299, 314 (6th Cir 2000); *In re Eagle-Picher Indus., Inc.*, 963 F.2d 855, 861 (6th Cir.1992). The bankruptcy court's authority to impose such an injunction is founded upon § 105(a)[2] of the Bankruptcy Code. *Id*. at 860.

At the same time, the existence of such relief will not be presumed so that a party seeking to enjoin a creditor from pursuing their legal remedies against a third party must come before the Court and obtain an injunction. *See* FED.R.BANKR.P. 7001(7) (a proceeding to obtain an injunction or other equitable relief requires the commencement of an adversary proceeding). No such action, however, was taken in this case. As such, the Defendants were not enjoined from pursuing their claim against

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[2] This provision provides: "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."

the Plaintiffs' business, Highlights, LCC. This same reasoning would also appear to extend to the Secor property.

In the state-court action to recover damages for a breach of the lease at the Secor property, the Defendants brought suit against the Plaintiffs, as well as the Plaintiffs' business partners. This aspect of the suit, by naming the Plaintiffs' business partners, indicates that the breadth of the Defendants' suit was directed at the Plaintiffs' partnership and did not extend to the Plaintiffs in their personal capacities. *Ungerleider v. Ewers*, 20 Ohio App. 79, 153 N.E. 191 (8th Dist. 1925) (an action against an individual may be converted into one against a partnership). Such a distinction is, again, critical. Under Ohio law, a partnership, like a limited liability company, is considered "an entity distinct from its partners." O.R.C. § 1776.21(A). It is, moreover, noted that the Plaintiffs considered their business at the Secor property to be a partnership, having characterized it as such in their bankruptcy schedules.

In any event, the Plaintiffs' action for a violation of the automatic stay regarding the Secor property is deficient in a more fundamental way. As pointed out earlier, § 362(a) operates to enjoin acts against both a debtor and a debtor's property, as well as acts taken against property of the estate. For those provisions under § 362(a) involving the debtor and the debtor's property,[3] their scope is limited to acts taken to enforce claims that "arose before the commencement of the case." (see statutory language, *supra*). The state-court suit brought by the Defendants against the Plaintiffs regarding the Secor property does not meet this necessary requirement to establish a stay violation.

In the state-court action regarding the Secor property, the Defendants specifically limited their request for relief to "*post-petition rent*." *See Campbell v. Countrywide Home Loans, Inc.*, 545 F.3d 348, 353 (5th Cir. 2008) (automatic stay prohibits collection of any pre-petition debt, but does not apply to claims that arise post-petition). The Defendants' suit, thus, cannot be said to involve the collection or enforcement of a claim that, within the meaning of § 362(a), "arose before the

[3] Of the eight types of acts enjoined by the automatic, those acts involving the debtor and the debtor's property are set forth in paragraphs (1), (2), (5), (6) and (7) of § 362(a).

commencement of the case." 11 U.S.C. § 301(a) ("A voluntary case under a chapter of this title is commenced by the filing with the bankruptcy court of a petition under such chapter by an entity that may be a debtor under such chapter.").

In an analogous situation, it has been recognized that homeowner-association fees assessed after the filing of a voluntary petition in bankruptcy are postpetition debts, not prepetition debts. As such, a homeowner association does not need to obtain relief from the automatic stay to demand payment for any unpaid postpetition fees. *Montclair Prop. Owners Ass'n v. Reynard (In re Reynard)*, 250 B.R. 241, 244 (Bankr. E.D.Va. 2000).

Moreover, allowing the Defendants to pursue their collection activities for postpetition rent does not, as the Plaintiffs argue, interfere with the fresh-start policy of the Bankruptcy Code. After the commencement of a Chapter 7 case, there is often the need for a debtor to obtain credit, particularly for ordinary course transactions. However, if a creditor extending such credit were enjoined by the automatic stay from enforcing their claim, such a creditor would likely be reluctant to enter into any transaction with the debtor, making it difficult for the debtor to obtain postpetition credit. Therefore, contrary to the Plaintiffs' position, the temporal limitation imposed by § 362(a) – that it only enjoins acts taken against a debtor that "arose before the commencement of the case" – is meant to assist a debtor in obtaining a fresh start.

This is not to say that the Defendants' efforts to collect postpetition rent for the Secor property could not run afoul with the stay of § 362(a). For acts concerning estate property, as opposed to the debtor, the automatic stay remains in effect "until such property is no longer property of the estate[.]" 11 U.S.C. § 362(c)(1). Recourse for a creditor holding a postpetition claim is, thus, limited to property that is not property of the estate – meaning that any creditor seeking to satisfy its postpetition claim by levying on estate property would be subject to sanctions for a violation of the automatic stay. *In re Reynard*, 250 B.R. at 245. Yet, regardless of the Plaintiffs' protestations to the contrary, the specific issue of whether, concerning the Secor property, the Defendants are seeking to enforce a claim against estate property is not an issue properly before the Court at this time.

Instead, based upon the Bankruptcy Code's structure, such a matter is within the sole province of the Chapter 7 trustee.

At the commencement of a bankruptcy case, an estate is created comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a). The Bankruptcy Code deems a trustee to be a representative of the estate, with the capacity to sue and be sued on behalf of the estate. 11 U.S.C. § 323. Moreover, unlike under other Chapters of the Bankruptcy Code, where a debtor seeks to reorganize their financial affairs by formulating a plan to repay their creditors, in a Chapter 7 case a debtor is not afforded with any authority to "use, sell or lease" estate property. *See* 11 U.S.C. § 1303 (conferring debtor with many of those powers afforded to trustee under § 363).

In a Chapter 7 case, therefore, based on a debtor's limited interest in estate property, it is generally recognized that only the trustee has standing to assert claims for a violation of the stay concerning property of the estate. As recently stated in the case of *Zavala and Catbagan v. Wells Fargo Bank, N.A. (In re Zavala and Catbagan)*:

> While a debtor may seek recovery of damages when the automatic stay is violated as to that debtor, such a remedy does not grant the debtor "co-trustee" like powers to control property of the estate. The Debtors may not assert rights of the bankruptcy estate against third-parties, such as the alleged claim for violating the automatic stay as it applies to property of the estate. The Debtors do not have standing to assert the violation of the automatic stay alleged in the Complaint.

444 B.R. 181, 191 (Bankr. E.D.Cal. 2011).

The reasoning for finding that a debtor does not have standing to assert a violation for the stay with respect to estate property was further explained as follows:

> In a chapter 7 proceeding, the debtor, upon filing, is automatically divested of virtually all property interests held as of the commencement of the case and, in turn, these interests immediately vest in the estate. As a result, the debtor loses title to and is prohibited from using estate assets for any purpose.

> Title to estate property does not revest in the debtor until, for example, the property is either properly claimed and allowed as exempt, or abandoned by the trustee. Therefore, when debtor filed his chapter 7 petition, the funds on deposit with [the creditor] became property of the estate subject to the control of the chapter 7 trustee. Accordingly, the only party with standing to raise a violation of § 362(a)(3) [regarding estate property] is the trustee.

In re Laux, 181 B.R. 60, 61 (Bankr. S.D.Ill.1995) (internal quotations and citations omitted).

Where a debtor has asserted an exemption in estate property, some courts have tempered this restriction on standing, and allowed a debtor to pursue a claim for damages for a stay violation. *See In re Mwangi*, 432 B.R. 812, 822–23 (9th Cir. B.A.P. 2010) (§ 522's right to claim exemption in property of the estate bestows standing on debtors for purposes of § 362(k) as the debtor has an inchoate interest in the estate property pending allowance or disallowance of the claim of exemption). However, whatever the merits of this approach, the Court is not faced with this type of situation as the Plaintiffs did not make a claim of exemption in their leases with the Defendants.

Consequently, even if the Defendants have violated the stay as it concerns estate property, the Plaintiffs are not the proper parties to assert such a claim. The same is true and applies to the Plaintiffs' position regarding the liens claimed by the Defendants. In their state-court complaints, the Defendants asserted a "lien against any furniture, chattels or trade fixtures located at the Premises as security for unpaid rent . . . ." The automatic stay clearly forbids the creation of such a lien, both as it regards a debtor's property and as it regards property of the estate. 11 U.S.C. § 362(a)(4)/(5).

However, as without those other acts concerning a debtor, the stay only enjoins acts taken against a debtor's property to the extent that the claim securing the lien "arose before the commencement of the case . . . ." For the Plaintiffs, this temporal restriction has not been satisfied considering that the Plaintiffs were current on their rent at both the Secor and Lewis properties at the time they filed for bankruptcy relief. The lien asserted by the Plaintiffs was, therefore, clearly aimed against estate property, not the debtor's property, making the trustee in the Plaintiffs' bankruptcy case the proper party to assert any violation of the stay.

In summation, the Court comes to these conclusions. First, for the state-court actions initiated by the Defendants to recover damages for the Plaintiffs' breach of the leases at the Lewis and Secor properties no stay violation exists insofar as it concerns the protections afforded by the automatic stay to a debtor and the debtor's property. Second, to the extent that the Defendants' actions to recover damages for a breach of the leases can be construed as an attempt to exercise control over estate property, the Plaintiffs do not have standing to assert such a claim. The same is also true for any lien asserted by the Defendants. Accordingly, the Court now turns to address the second type of conduct for which the Plaintiffs allege constitutes a violation of the automatic stay.

SECOND ALLEGED STAY VIOLATION

In their arguments to the Court, the Plaintiffs called attention to the lease termination agreement presented to them by Mr. Eidi. According to the Plaintiffs, Mr. Eidi's unsuccessful attempt to have them execute this agreement, as well as other personal contacts made by him, both in person and by telephone, constitutes a violation of the automatic stay. The Court disagrees.

First, as it concerns the Plaintiff, Mr. Damask, there is no evidence that any personal contact occurred between him and Mr. Eidi on a postpetition basis. In particular, the deposition testimony presented to the Court shows as follows:

> Question to Mr. Damask: Your Complaint says, "Petitioners were contacted directly by Defendants, namely by Defendant Eidi, concerning their desire to enter into lease 'termination agreements.'" In terms of contact with you, what contact was made by Mr. Eidi?
>
> Answer by Mr. Damask: With me personally?
>
> Question to Mr. Damask: Yes
>
> Answer by Mr. Damask: I don't believe I made contact with him personally.

(Doc. No. 15, Attachment 1, pg. 93-94). Further in the deposition testimony of Mr. Damask it was then stated:

> Question to Mr. Damask: Well, I want to be precise here. I'm asking you whether you got direct contact from Mr. Eidi to you personally, not through your attorney.
>
> Answer by Mr. Damask: Concerning the signing of this agreement?
>
> Question to Mr. Damask: Yeah, or anything that you complained of after your bankruptcy being filed.
>
> Answer by Mr. Damask: Nothing stands out in my memory.

Id. at pg. 95.

As it pertains to the Plaintiff, Mrs. Damask, the evidence in this case does show that Mr. Eidi did initiate a number of postpetition contacts with Mrs. Damask, both in person and via telephone. Such contact included visiting Mrs. Damask at her place of business, during business hours, so as to pressure the Plaintiffs to vacate the Secor and Lewis properties. According to Mrs. Damask, she found Mr. Eidi's actions intimidating, particularly with respect to his personal visits to the leased properties. (Doc. 16, Ex. A).

Section 362(a)(6) specifically enjoins "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case . . . ." The legislative history of this provision shows that it was directed at the type of conduct for which the Plaintiffs complain – that of preventing creditor harassment. Sen.Rep. No. 989 at 50-51, reprinted in 1978 U.S.Code Cong. & Ad. News at 5836-37; H.Rep. No. 595 at 125-26, 342, reprinted in 1978 U.S.Code Cong. & Ad.News at 6086-87, 6298.

In assessing whether, as applied to § 362(a)(6), Mr. Eidi's personal contacts with Mrs. Damask give rise to a stay violation, it is evident to the Court that Mr. Eidi charted a course fraught with peril. There is simply no way to sugarcoat Mr. Eidi's conduct, with it being readily discernable that Mr. Eidi's actions were undertaken toward one end: To pressure the Plaintiffs into expeditiously vacating their leased properties. At the same time, the Court, although finding that Mr. Eidi's conduct

approached the edge, is not persuaded that his actions crossed the line so as to constitute a violation of the automatic stay.

The provisions of § 362(a), paragraph (a)(6) included, do not enjoin all creditor activity, but rather center on creditors seeking to collect and/or enforce any claim they hold against the debtor. The automatic stay of § 362(a), thus, while broad in its reach, does not absolutely bar all postpetition contact between a creditor and a debtor. For example, it would stand to reason that a secured creditor, even after a bankruptcy petition is filed, would not violate the stay and would be well within their rights to inspect their collateral, even if doing so meant some that personal contact with the debtor would occur. In this regard, § 362(a)(6), as with the other provisions of § 362(a), is aimed at preventing creditors from collecting/enforcing any claim they hold against the debtor; it is not meant at preventing creditors from exercising other valid legal rights.

This limitation on the breadth of § 362(a) was recognized by the Sixth Circuit Court of Appeals in *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417, 423 (6th Cir.2000), when it held that a creditor does not necessarily violate the automatic stay by approaching a debtor regarding entering into a reaffirmation agreement. For this purpose, the Court looked to the reasonableness of the creditor's conduct, asking whether the creditor's actions could reasonably be expected to have a significant impact on the debtor's determination to repay a debt, and whether the creditor's actions were contrary to what a reasonable person would consider to be fair under the circumstances. *Id*.

It stands to reasons, therefore, that where postpetition contact between a creditor and a debtor occurs, the determination of whether a stay violation exists must take into account the reasonableness of the contact and whether that contact can be construed as an attempt to collect and/or enforce against a debtor a prepetition debt. As stated slightly differently by another bankruptcy court: "determining whether a violation of the automatic stay occurs can be complicated and depends on such specifics as what type of communication was sent to the debtor and whether the communication had a purpose other than collection of the debt outside the scheme contemplated by the Bankruptcy Code." *Cousins v. CitiFinancial Mortg. Co. (In re Cousins),* 404 B.R. 281, 287 (Bankr. S.D.Ohio

2009). *See also In re Ebadi*, 448 B.R. 308, 315 fn.9 (Bankr. E.D.N.Y.2011) ("not every act that can be a step in a chain that eventually might lead to collection of a prepetition debt from a debtor is a stay violation . . . .").

When placed within this context, the Court cannot construe the contact between Mr. Eidi and Mrs. Damask as rising to the level to constitute a stay violation. First, the Plaintiffs held themselves out to be the principals and managers of the respective businesses located at the Secor and Lewis properties. (Doc. No. 15, attached deposition, pgs. 5-41). When operating within these roles, the automatic stay would not protect the Plaintiffs from Mr. Eidi's contact so long as his contact concerned the operation of the Plaintiffs' businesses, and not the enforcement of a claim against them personally.

In this regard, the principals and officers of a business entity cannot shirk their fiduciary duties to a business by hiding behind automatic stay. To hold otherwise would effectively allow a debtor, acting in the capacity of a principal or officer, to extend the automatic stay to a business entity without having to come before the court to show that, consistent with Sixth Circuit precedent, *supra*, "unusual circumstances" exist.

When assessing the factual circumstances presented to the Court, it is obvious that most of the contact between Mr. Eidi and Mrs. Damask involved the lease termination agreement or similar matters such as the placing of a "for lease" sign at the Secor property. Thus, the picture presented in this matter is that the personal contact between Mr. Eidi and Mrs. Damask centered not upon the collection of a prepetition claim against the Plaintiffs personally, but upon the Plaintiffs' business operations. Specifically, the impetus behind the contact between Mr. Eidi and Mrs. Damask was to have Mrs. Damask, in her role as a principal and manager of the businesses at the Secor and Lewis properties, vacate her business operations from the leased properties in an expeditious manner so as to allow Mr. Eidi to re-let the properties.

Additionally, it did not go unnoticed to the Court that, in their bankruptcy filing, the Plaintiffs disclosed that they did not intend to continue with their lease agreements with the Defendants. Any lessor receiving such a notice would be well within their rights to take reasonable measures to ensure that their leased property is secure and that no waste occurs to the property. For this reason, it is not unexpected that some contact would occur between Mr. Eidi and Mrs. Damask.

All this is not to say, as the Plaintiffs point out, that Mr. Eidi's actions did not run afoul with the rights of the Chapter 7 trustee in their case. Pursuant to Bankruptcy Code § 365(a), a Chapter 7 trustee is afforded the right to assume or reject an unexpired lease. Therefore, by seeking unilaterally to re-let the Secor and Lewis properties, Mr. Eidi's actions were not likely valid insofar as it concerns the trustee in the Plaintiffs' Chapter 7 bankruptcy case. Yet, as before, the Plaintiffs cannot assert a claim on behalf of the trustee.

Under § 365(a), the right to assume an unexpired lease is specifically limited to a trustee, with this provision providing, in relevant part: ". . . *the trustee*, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." (emphasis added). Under such a circumstance, where the Bankruptcy Code specifies a trustee as the relevant party, the United States Supreme Court has held that the only party entitled to bring an action under the statute is the trustee. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 120 S.Ct. 1942, 147 L.Ed.2d 1 (2000) (interpreting Bankruptcy Code § 506(c)). Accordingly, as with a violation of the automatic stay involving property of the estate, a trustee is the only party accorded with standing to bring a claim where a lessor has violated the provisions of § 365.

THIRD ALLEGED STAY VIOLATION

The final set of circumstances alleged by the Plaintiffs to constitute a violation of stay involves Mr. Eidi unilaterally locking out the Plaintiffs from the Secor and Lewis properties, causing them to be deprived of some of their business assets – *e.g.*, tools of the trade, money and a customer

list. In this particular matter, however, this position, as put by the Plaintiffs, has two fatal weaknesses.

First, most, if not all of the personal property the Plaintiffs' claim was improperly withheld by the Defendants was located at the Lewis property. For personal property located at the Lewis location, however, the Plaintiffs acknowledged in their deposition testimony that such property was generally treated as belonging to their limited liability company, Highlights, LLC. (Doc. No. 15, Attachment 1, pg. 18-28). Thus, such property was not subject to the automatic stay, as the property was neither the Plaintiffs' property nor property of estate.

Second, the Plaintiffs' allegations, regarding the loss of some of their personal property, is not supported by the Plaintiffs' own statements. Specifically, Mr. Damask testified that he and his wife ultimately gained possession of all their personal property from each of the leased properties. (Doc. No. 15, Attachment 1, pg. 68-70). Moreover, while this statement was later qualified, the substance of the situation did not change.

To begin with, Mr. Damask acknowledged that he never saw any ledger, containing a customer list, prior to the time the Plaintiffs were locked out of the leased properties. (Doc. No. 15, Attachment 1, pg. 86). In addition, Damask acknowledged that some tools of the trade, which she considered fixtures, were intentionally not removed. (Doc. No. 15, Attachment 1, pg. 86). Finally, the Plaintiffs' position, that a stay violation exists because the Defendants deprived them of their personal asset, seems contrived given that any damages arising from a stay violation (exclusive of attorney fees) are nonexistent or *de minimis*. (Doc. No. 15, Attachment 2, pg. 133-137). Of note, Mrs. Damask testified that she had no concrete plans concerning the reopening of a hair salon after her bankruptcy filing.(Doc. No. 15, Attachment 1, pg. 72-73).

For these reasons, even when looking at the matter in a light most favorable to the Plaintiffs, there is simply nothing to support the Plaintiffs' premise: That, in effort to collect/enforce a claim against the Plaintiffs, the Defendants misappropriated property belonging to the Plaintiffs.

CONCLUSION

Based upon the discussion herein, the Court, while finding that the acts of Mr. Eidi in all likelihood violated the automatic stay as it pertains to the bankruptcy trustee, is not persuaded that any violation of the stay occurred vis-a-vis the Plaintiffs. As such, summary judgment must be rendered in favor of the Defendants and against the Plaintiffs. 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 Decision.

Accordingly, it is

ORDERED that the Motion of the Plaintiffs for Summary Judgment, be, and is hereby, DENIED.

IT IS FURTHER ORDERED that the Motion of the Defendants for Summary Judgment, be, and is hereby, GRANTED.

IT IS FURTHER ORDERED that the Plaintiffs' Complaint is hereby DISMISSED.

Dated: August 29, 2012

Richard L. Speer
United States
Bankruptcy Judge