

IT IS SO ORDERED.

Dated: March 23, 2015
11:42:38 AM


Kay Woods

Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

MARIANNA CAROLYN SAKKAS,

Debtor.

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CASE NUMBER 15-40162

CHAPTER 7

HONORABLE KAY WOODS

MEMORANDUM OPINION REGARDING
MOTION FOR ENTRY OF ORDER COMPELLING BREAKPOINT SALES
AND INVESTING TWO, INC. AND MICHAEL J. SKRIPAC
TO APPEAR AND SHOW CAUSE

This cause is before the Court on Motion for Entry of an Order Compelling Breakpoint Sales and Investing Two, Inc. and Michael J. Skripac to Appear and Show Cause as to Why They Each Should Not Be Held in Contempt of the Court for Willful Violation of the Automatic Stay Imposed by § 362 of the Bankruptcy Code, for Sanctions, Including an Award of Damages and Reasonable Attorney's Fees, and for Related Relief ("Motion for OSC") (Doc. 8) filed by

Debtor Marianna Carolyn Sakkas on March 6, 2015. On March 9, 2015, the Court set the Motion for OSC for a hearing to be held on March 19, 2015. On March 18, 2015, Breakpoint Sales and Investing Two, Inc. and Michael Skripac (collectively, "Skripac") filed Respondents Breakpoint Sales and Investing Two, Inc. and Michael Skripac's Reply to Debtor's Show Cause Motion ("Response") (Doc. 11). The Court held the scheduled hearing on March 19, 2015 ("Hearing"), at which appeared Rusty A. Payton, Esq. on behalf of the Debtor and Scott C. Essad, Esq. on behalf of Skripac.

At the conclusion of the Hearing, the Court orally granted the Motion for OSC, in part, and denied the Motion for OSC, in part. This Opinion and accompanying Order memorialize that ruling.¹

I. PROCEDURAL AND FACTUAL BACKGROUND

The Debtor filed a voluntary chapter 7 petition on February 6, 2015. In the Petition, the Debtor lists her residence as 8204 North Palmyra Road, Canfield, Ohio ("Residence"), which is the subject of a land contract between the Debtor, as vendee, and Skripac, as vendor.² The Debtor states that, pursuant to the terms of the land contract, she is obligated to pay Skripac \$3,392.77 on the first of each month ("Monthly Contractual Payment"). The

¹ To the extent the Court's oral ruling and this Opinion and accompanying Order are inconsistent, this Opinion and accompanying Order control.

² A copy of the land contract is attached to the Motion for OSC as Exhibit A.

Debtor acknowledges that she did not make the Monthly Contractual Payment to Skripac for February, which was due on February 1, 2015. The Debtor lists the land contract as an executory contract on Schedule G. (See Doc. 1 at 25.) She also indicates on Chapter 7 Individual Debtor's Statement of Intention that she (i) intends to "[r]etain [the Residence] and continue to pay on a month-to-month basis;" but (ii) she will not assume the "[l]ease" for the Residence pursuant to 11 U.S.C. § 365. (*Id.* at 40.)

In the Motion for OSC, the Debtor alleges that Skripac violated the automatic stay in 11 U.S.C. § 362 by (i) sending a text message to the Debtor on March 2, 2015 asking her how she was "looking this month for the payment" (Mot. for OSC ¶ 9); (ii) sending a text message to the Debtor on March 3, 2015 stating that she was 31 days late in making the February Monthly Contractual Payment and that, if the Debtor did not respond, he would assume that she was going to "follow our contract with regards to cancellation of it" (*id.* ¶ 10); (iii) sending an email to the Debtor on March 3, 2015 at approximately 6:37 p.m. demanding payment of \$10,525.54 and purporting to declare the land contract "null and void as of now" (*id.* ¶ 12); and (iv) appearing in person at the Residence on March 3, 2015 from approximately 6:50 to 7:00 p.m., pounding on the door repeatedly for approximately 10-15 minutes and posting a "Notice of Forfeiture" on the door before

leaving (*id.* ¶¶ 13-14).³ In the Notice of Forfeiture, Skripac demanded payment of the pre-petition February Monthly Contractual Payment. (*Id.* ¶ 14.)

The Debtor alleges that she has been damaged as a result of Skripac's conduct, as set forth above, because (i) she has lived in fear that she and her children may be abruptly removed from the Residence; (ii) she has been embarrassed by Skripac's posting of the Notice of Forfeiture, which was "visible to her children, family and neighbors"; (iii) she has been "mentally distressed," unable to sleep well and "experienced headaches, nausea, and general discomfort"; (iv) she has felt personally threatened for her and her children's physical safety; (v) she has been prevented from devoting her full concentration to finding new employment; and (vi) her children have expressed fear, embarrassment and depression regarding the events. (*Id.* ¶ 20.) Attached to the Motion for OSC as Exhibit C is the Debtor's affidavit setting forth Skripac's conduct and the Debtor's alleged damages.

In addition to seeking an award of damages, the Motion for OSC seeks "reasonable attorney's fees." (*Id.* at 2.) Attached as Exhibit B to the Motion for OSC is the affidavit of the Debtor's

³ The Debtor also states that Skripac telephoned and sent emails to her counsel and that the Debtor was copied on such emails. (Mot. for OSC ¶¶ 11, 16 and 19.) All of these communications occurred after the Debtor provided Skripac with the contact information of her attorney and directed Skripac to contact her attorney directly. Under these circumstances, Skripac did not violate the automatic stay by copying the Debtor on his email communications with the Debtor's attorney.

attorney, Marc E. Dann, Esq., to which is attached "a detailed billing statement of the time incurred to date." (*Id.*, Ex. C, ¶ 11.) The billing statement shows time entries of 21 hours for the period March 3, 2015 through March 6, 2015, of which 19.55 hours are billed at \$395.00 per hour and 1.45 hours are billed at \$125.00 per hour. The total outstanding fees on this billing statement are \$7,903.50 ("Attorney Fees").

In the Response, Skripac admits that his conduct in contacting the Debtor by text, telephone and in person regarding the February Monthly Contractual Payment violated the automatic stay in § 362. Skripac argues, however, that his conduct was not "egregious, vindictive, malicious, or accompanied by bad faith." (Resp. at 1.) Skripac also apologizes for his actions. Although admitting the stay violation, Skripac argues that the Debtor did not incur any damages as a result of his conduct. He states that the Debtor has provided no evidence of any economic damages, arguing that (i) the Attorney Fees are not reasonable, but are "overblown" and excessive (*id.* at 3); and (ii) the Debtor has made no connection between Skripac's one appearance at the Residence and her inability to seek employment. Regarding the alleged non-economic damages, Skripac states that no damages could have resulted from the Debtor's family and neighbors seeing the Notice of Forfeiture because the Residence sits on five acres and the Notice was posted at dusk and promptly removed by the Debtor. He also notes that,

despite stating she lives in fear, the Debtor did not call the police or file a police report in connection with Skripac's appearance at the Residence. Skripac proposes waiver of the February Monthly Contractual Payment as appropriate damages for his violation of the automatic stay.

II. ARGUMENTS AND ANALYSIS

Mr. Payton stated that the Debtor filed the Motion for OSC to stop Skripac's conduct. Mr. Payton conceded that, after Mr. Skripac's appearance at the Residence and his text message to the Debtor immediately thereafter, there has been no further contact by Skripac to the Debtor individually. Mr. Essad assured Mr. Payton and the Court that Skripac will take no further action in violation of § 362.

The Court first notes that Skripac was selectively knowledgeable about the law. He knew Ohio law concerning eviction, but he professed ignorance about the effect of the Debtor's bankruptcy filing on his ability to proceed with posting the Notice of Forfeiture. (See Mot. for OSC ¶ 19; *id.*, Ex. B, ¶ 10.) Skripac had knowledge of the Debtor's bankruptcy filing and his actions were intentional. Thus, Skripac's conduct constituted a willful violation of the automatic stay. *Transouth Fin. Corp. v. Sharon (In re Sharon)*, 234 B.R. 676, 687 (B.A.P. 6th Cir. 1999) ("A violation of the automatic stay can be willful when the creditor knew of the stay and violated the stay by an intentional act.").

As a consequence, the only issue before the Court is determination of the Debtor's damages.

An award of damages is mandatory under § 362(h) when a violation of the automatic stay is found to be "wilful." *In re Johnson*, 253 B.R. 857, 861 (Bankr. S.D. Ohio 2000). As used in § 362(h), "willful," unlike many other contexts, does not require any specific intent. *Fleet Mortgage Group, Inc. v. Kaneb*, 196 F.3d 265, 269 (1st Cir 1999).

In re Bivens, 324 B.R. 39, 42 (Bankr. N.D. Ohio 2004).

At the Hearing, Mr. Payton immediately requested an evidentiary hearing. It appears, however, from the two affidavits attached to the Motion for OSC that the Debtor's only economic damages are the Attorney Fees.⁴ Her non-economic damages are set forth in detail in her affidavit. Testimony about such damages would likely be repetitive of what is in the Debtor's affidavit; in addition, in light of the steep hourly rate charged by the Debtor's attorneys, the Debtor's economic damages could only escalate if the Court were to hold an additional hearing on the subject of damages. The Court concluded that damages could be ascertained based upon the Motion for OSC, the affidavits attached thereto and the representations of counsel.

The land contract between the Debtor and Skripac is an executory contract, which will be deemed rejected if it is not assumed by April 7, 2015 - *i.e.*, 60 days after the February 6,

⁴ At the Hearing, Mr. Payton stated that, in filing the affidavit of Mr. Dann, the Debtor was not asking for the total amount of the Attorney Fees as damages, but was only requesting reasonable attorney fees.

2015 petition date. See 11 U.S.C. § 365(d)(1) (2015). Although the Debtor's time to assume or reject the land contract has not yet expired, her decision regarding assumption or rejection could affect a damages award. In order to assume the land contract, the Debtor would have to cure all pre-petition defaults - *i.e.*, pay Skripac the February Monthly Contractual Payment - and provide adequate assurances of future performance - *i.e.*, pay all post-petition Monthly Contractual Payments when due, including the past due March Monthly Contractual Payment. See 11 U.S.C. § 365(b)(1). As a consequence, the Court asked Mr. Payton whether the Debtor was going to assume or reject the land contract.⁵ Mr. Payton stated that the Debtor was not currently employed, but that she had not yet determined whether to assume or reject the land contract.

The Court finds that the Attorney Fees are excessive and outside the ordinary and customary fees that this Court normally sees in connection with a motion concerning violation of the automatic stay, which are generally in the range of \$350.00 to \$1,000.00. Indeed, the Attorney Fees in the amount of nearly \$8,000.00 are out of line for the work involved with the Motion for OSC. Accordingly, the Court finds that reasonable attorney

⁵ The Debtor's Chapter 7 Individual Debtor's Statement of Intention sets forth inconsistent positions concerning the land contract. The Debtor states that she intends to "retain [the Residence] and continue to pay on a month-to-month basis," while indicating that she will not assume the lease for the Residence. (Doc. 1 at 40.)

fees in connection with the Motion for OSC would be approximately \$1,000.00.

The Court further finds that Debtor has suffered non-economic damages, which are difficult to quantify. The text messages and telephone calls from Skripac to the Debtor violated the automatic stay, but were not the kind of actions that should have caused the Debtor or her children to be fearful or feel threatened.⁶ Because these communications were private, they cannot be the source of public embarrassment or humiliation. Skripac's appearance at the Residence, however, is troubling. He pounded loudly on the door of the Residence for approximately 10 to 15 minutes while the Debtor and her three children were inside. He also posted the Notice of Forfeiture on the door of the Residence. These actions would or could cause a reasonable person to feel fear and distress. The Debtor apparently removed (or could have removed) the Notice of Forfeiture shortly after Skripac left the Residence (Mot. for OSC ¶ 14), so it is difficult to imagine that the Debtor or her children would have been embarrassed because her "family and neighbors" could have seen the Notice (*id.* ¶ 20).

In the Response, Skripac offers to waive the February Monthly Contractual Payment as damages to the Debtor. Despite having affirmatively stated that the Debtor has not yet determined if she

⁶ The Debtor's Schedule J lists two daughters, ages 9 and 13, and a son, age 18 (Doc. 1 at 29).

will assume or reject the land contract, Mr. Payton stated that this offer has no economic value to the Debtor because the pre-petition February Monthly Contractual Payment would be an unsecured claim in a no-asset chapter 7 case. When questioned by the Court concerning the inconsistency of this statement with his previous representations, Mr. Payton stated that it is doubtful that the Debtor will be able to assume the land contract.

At the Hearing, counsel for Skripac further offered to waive the March Monthly Contractual Payment as damages to the Debtor. The Debtor and her children continue to reside at the Residence and owe Skripac the March Monthly Contractual Payment for such use and occupancy post-petition. Thus, waiver of the post-petition March Monthly Contractual Payment is of economic value to the Debtor, whether or not she assumes the land contract.

Based on all of the pleadings in this case, including the affidavits of the Debtor and Mr. Dann, and the representations of counsel for the Debtor and counsel for Skripac, this Court finds that waiver of the pre-petition February Monthly Contractual Payment and the post-petition March Monthly Contractual Payment constitutes real economic value to the Debtor and equals the damages she has suffered as a result of Skripac's violation of the automatic stay. If the Debtor rejects the land contract, she will receive an economic value of \$3,392.77 - *i.e.*, the March Monthly Contractual Payment. The Court finds that this amount adequately

compensates the Debtor for her economic and non-economic damages resulting from Skripac's violation of the automatic stay. If the Debtor assumes the land contract, she would owe Skripac \$3,392.77 as the cure amount for the February Monthly Contractual Payment and \$3,392.77 as an administrative expense claim for the March 2015 Monthly Contractual Payment, for a total of \$6,785.54, which amount will more than compensate the Debtor for her damages.

III. CONCLUSION

Skripac's intentional conduct in contacting the Debtor to collect the February Monthly Contractual Payment violated the automatic stay in § 362. The Debtor has been damaged by such conduct, which damages include reasonable attorney fees and non-economic damages. The Debtor will be adequately compensated for such damages by Skripac's waiver of collection of the pre-petition February 2015 and post-petition March 2015 Monthly Contractual Payments. The Court orders Skripac to (i) cease all contact with the Debtor regarding payment of the February Monthly Contractual Payment, which is hereby waived by Skripac and/or disallowed by the Court; and (ii) waive collection of the March Monthly Contractual Payment, which is hereby disallowed by the Court as an administrative expense claim.

For the reasons set forth above, the Court will grant the Motion for OSC, in part, and deny the Motion for OSC, in part.

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IT IS SO ORDERED.

Dated: March 23, 2015
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United States Bankruptcy Judge

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NORTHERN DISTRICT OF OHIO

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MARIANNA CAROLYN SAKKAS,

Debtor.

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HONORABLE KAY WOODS

ORDER GRANTING, IN PART, AND DENYING, IN PART,
MOTION FOR ENTRY OF ORDER COMPELLING BREAKPOINT SALES
AND INVESTING TWO, INC. AND MICHAEL J. SKRIPAC
TO APPEAR AND SHOW CAUSE

This cause is before the Court on Motion for Entry of an Order Compelling Breakpoint Sales and Investing Two, Inc. and Michael J. Skripac to Appear and Show Cause as to Why They Each Should Not Be Held in Contempt of the Court for Willful Violation of the Automatic Stay Imposed by § 362 of the Bankruptcy Code, for Sanctions, Including an Award of Damages and Reasonable Attorney's Fees, and for Related Relief ("Motion for OSC") (Doc. 8) filed by

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For the reasons set forth in this Court's accompanying Memorandum Opinion entered on this date, the Court hereby:

1. Finds that Skripac willfully violated the automatic stay in 11 U.S.C. § 362;

2. Finds that the Debtor suffered actual damages as a result of Skripac's violation of the automatic stay;

3. Finds that waiver of the pre-petition February Monthly Contractual Payment and the post-petition March Monthly Contractual Payment constitutes real economic value to the Debtor and equals the damages she has suffered as a result of Skripac's violation of the automatic stay;

4. Orders Skripac to cease all contact with the Debtor regarding collection of the February Monthly Contractual Payment;

5. Waives and/or disallows the February Monthly Contractual Payment;

6. Waives and/or disallows the March Monthly Contractual Payment; and

7. Grants, in part, and denies, in part, the Motion for OSC.

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