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FOR PUBLICATION
UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED

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NORTHERN DISTRICT OF OHIO
CLEVELAND

In re:) Case No. 95-15150 *ok*
)
DAVID S. HENDERSON,) Chapter 13
)
Debtor.) Judge Pat E. Morgenstern-Clarren
)
) **MEMORANDUM OF OPINION**
) **AND ORDER IMPOSING**
) **SANCTIONS FOR VIOLATION**
) **OF SECTION 362 STAY**

This case initially came on for hearing on January 23, 1996 on this Court's Order on the Internal Revenue Service ("IRS") to appear and show cause why it should not be held in contempt for violating the automatic stay provisions of 11 U.S.C. § 362. At that hearing, counsel for the IRS agreed it had committed a technical violation of the automatic stay by its levies of Debtor's paycheck. She asserted, however, that no funds had been received and that an award of attorneys' fees was inappropriate. The matter was adjourned to February 13, 1996, to permit the IRS to brief the issue of a fee award. At the February 13, 1996 hearing, the case was argued and submitted to the Court for decision.

This Court has jurisdiction to hear this matter pursuant to 28 U.S.C. § 1334 and General Order No. 84 entered on July 16, 1984 by the United States District Court for the Northern District of Ohio. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(O).

FACTS

The relevant facts are not disputed by the parties and are set forth in the United States' Brief and Declaration in Support filed on behalf of the IRS on February 1, 1996 and the letters attached

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to Debtor's Emergency Motion to Appear and Show Cause filed January 19, 1996, as follows:

1. Debtor filed a Chapter 13 petition on November 21, 1995.
2. On November 28, 1995, the IRS issued a Notice of Levy to Cuyahoga County, one of Debtor's employers, for wages due.
3. On December 19, 1995, the IRS received a notice of commencement of the Chapter 13 case.
4. The IRS's computer system was down from December 24, 1995 until January 13, 1996 to allow the updating of files. This period is known as a dead cycle and prevents input of information such as the freeze code which prevents collection action during the automatic stay period.
5. The imposition of the dead cycle prevented the freeze code from being posted to Debtor's account until after January 13, 1996.
6. The IRS issued a second levy to the Cleveland Board of Education on January 2, 1996 for wages due Debtor.
7. Both the first and second levy resulted in Debtor's wages being withheld from him and turned over to the IRS.
8. Debtor's attorney sent letters to the IRS with a copy to the U.S. Attorney's office on January 3, 1996 and on January 15, 1996 to advise the IRS and its attorney of the first and second levy, respectively, and to request return of the levy proceeds. Both of these letters were received.
9. The IRS issued levy releases to the employers on January 19, 1996.
10. Levy proceeds totaling \$607.56 had not been returned by the IRS to Debtor as of February 1, 1996.

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FOR DISCUSSION

The IRS admits it violated the automatic stay provisions of the Bankruptcy Code when it issued wage levies on Debtor's employers following the filing of the petition. The IRS contends, however, that the violations were technical rather than willful, in which case damages are not available to the Debtor.

11 U.S.C. § 362(h) provides that:

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.

A willful violation of the automatic stay is "an intentional or deliberate act done with knowledge that the act is in violation of the stay." *In re Atlantic Business and Community Corp.*, 901 F.2d 325, 328 (3d Cir. 1990). A willful violation does not require a specific intent to violate the stay, but merely knowledge of the stay followed by intentional actions in violation of it. *In re Bloom*, 875 F.2d 224 (9th Cir. 1989).

In the present case, the first levy was done without knowledge of the Chapter 13 filing and was simply a technical violation of the stay that does not warrant the imposition of sanctions. The second levy is, however, different. The IRS issued the second levy after receiving notice of the bankruptcy filing. That notice of bankruptcy was intentionally not entered into the IRS computer system until January 13, 1996 because of the IRS's own practice of imposing a dead cycle. This failure to input resulted in issuance of a second levy by the IRS under which the Debtor's wages were attached.

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The IRS attempts to characterize this violation as a technical violation in a computer-oriented world and cites *In re Hamrick*, 175 B.R. 890 (Distr. Ct. W.D.N.C. 1994), in support. There, the IRS initially followed its own procedures and placed a bankruptcy code on the debtor's account to prevent computerized notices from being sent out. An untrained clerk later removed the code to apply a payment to the account, but failed to take the appropriate steps to reinstitute the bankruptcy code. The computer then issued a demand notice to the debtor. The court found that this action did not amount to a willful violation of the stay because it was an "innocent clerical error." *Id.* at 893.

This is not a situation as in *Hamrick* in which a new employee innocently failed to follow established procedures, causing an unintended result. This is instead a case in which the IRS elected to adopt a procedure which, when correctly followed, resulted in a violation of the automatic stay provisions. By intentionally implementing a three-week dead cycle, while at the same time causing wage levies to issue, the IRS created the risk that violations of the automatic stay would occur during that time frame. The second wage levy was, therefore, willful within the meaning of 11 U.S.C. §362(h).

A debtor is entitled to sanctions for violation of this statute only when there has been an actual injury. *Archer v. Macomb County Bank*, 853 F.2d 497 (6th Cir. 1988). Here, Debtor's wages were attached by the IRS in violation of the stay and, as of February 1, 1996, the IRS still had not returned the funds. This is sufficient to establish that Debtor was injured by the violation. *Compare, In re Brock Utilities & Gratings, Inc.*, 185 B.R. 719 (Bankr. E.D. N.C. 1995) (one IRS computer-generated notice of intention to levy, without an actual levy, did not constitute "injury").

The IRS claims, without elaboration, that granting fees in this case would result in a windfall to Debtor's attorney. This contention is without merit. Counsel alerted the IRS and its attorney to

the problem on two separate occasions before filing his Emergency Motion to Appear and Show Cause, indicating an attempt to resolve the matter amicably rather than rushing to the courthouse. Under these circumstances, an award of attorneys' fees under 11 U.S.C. § 362(h) is appropriate and does not amount to a windfall. The Court will assess reasonable attorneys' fees and costs upon application by Debtor's counsel.

IT IS, THEREFORE, ORDERED that:

1. The IRS is directed to return to Debtor any funds still being held from the wage levies within 7 days of the date of this Order; and
2. Debtor is entitled to recover reasonable attorneys' fees and costs. Counsel for Debtor is to submit a fee application within 10 days of the date of this Order. The IRS shall have 10 days thereafter to respond to the application. The Court will then determine the amount of attorneys' fees and costs to be awarded.

Date: 4 March 1996

Pat E. Morgenstern-Clarren
Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

cc: MEW
DEBTOR
DEBTOR ATTY
IRS