

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

In Re:	)	Case No. 01-34423
	)	
Harold & Katy Gammon	)	Chapter 7
	)	
Debtors.	)	Adv. Pro. No. 01-3260
	)	
Harold & Katy Gammon,	)	Hon. Mary Ann Whipple
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
Alltel	)	
	)	
Defendant.	)	

**MEMORANDUM OF DECISION**

This adversary proceeding is before the court upon Debtor-Plaintiffs’ “Complaint for Violation Automatic Stay Order” (“Complaint”) [Doc. #1]. On November 5, 2001 the court issued a summons and notice of pre-trial conference [Doc. #2]. The summons required an answer or other response to the Complaint to be filed by December 5, 2001. On December 13, 2001, the court held a pre-trial scheduling conference. Debtor-Plaintiffs’ counsel, Randy L. Reeves, appeared by telephone. There was no appearance by or on behalf of Defendant and no answer to Plaintiffs’ complaint had been served and filed. Plaintiffs were ordered to file a Motion for Default Judgment (“Motion”) [Doc. #5] and did so on December 18, 2001 [Doc. #6]. Accordingly, the court scheduled a hearing on the Motion and notice of this hearing was properly served on Defendant [Doc. #7]. On January 16, 2002, the court held a hearing on the Motion. Plaintiffs’ counsel appeared by telephone. There was no appearance by or on behalf of Defendant and a review of the record showed no answer to Plaintiffs’ Complaint or Motion had been

filed. Therefore, pursuant to Fed. R. Civ. P. 55, made applicable by Fed. R. Bankr. P. 7055, Plaintiffs' Motion for Default Judgment will be GRANTED in part and DENIED in part.

**Law**

Under the authority of 11 U.S.C. § 362(h), the bankruptcy court may award compensatory damages, attorney's fees, punitive damages, and costs for willful violations of the automatic stay. The plaintiff must show that 1) Defendant had notice of the bankruptcy; 2) Defendant took actions in violation of the stay; 3) Defendant's actions were deliberate and intentional (to obtain compensatory damages and costs); and 4) Defendant's actions were in bad faith (to obtain punitive damages). Smith v. GTE North Inc. (In re Smith), 170 B.R. 111 (Bankr. N.D. Ohio 1994) (compensatory damages, attorneys fees and punitive damages awarded for post-petition disconnection of telephone service). Similarly, under 11 U.S.C. § 366, a utility with notice of a bankruptcy case that willfully disconnects service is subject to being ordered to pay damages and attorney's fees. 3 Collier on Bankruptcy ¶ 366.06 (Lawrence P. King ed., 15<sup>th</sup> ed. rev. 2001).

**Findings of Fact:**

The court finds that notice, including the initial service of the summons and complaint pursuant to Fed.R.Civ.P. 4, made applicable through Fed. R. Bankr. P. 7004, has properly been served upon the Defendant at all stages of this adversary proceeding and in the underlying chapter 7 proceeding. In support, the court notes that no notices or mailings have been returned to senders, whether the court or Plaintiffs' counsel. Thus, the court finds that the Defendant has failed to appear, plead, or otherwise defend this action.

The court finds that the well-pleaded allegations of the complaint constitute a valid cause of action, and deems them as true. In the absence of evidence to the contrary, the court finds Defendant's

actions constitute a willful violation of both the automatic stay and 11 U.S.C. § 366. Plaintiffs listed Defendant as an unsecured creditor on an Amendment to the Bankruptcy petition filed with the court on August 29, 2001. [Doc. #1, Exhibit “B”]. On October 8, 2001, Defendant suspended telephone services to Plaintiffs. On October 10, 2001, Plaintiffs’ counsel first notified Defendant that its actions were in violation of 11 U.S.C. Section 366(a). [Doc. #1, Exhibit “C”]. Plaintiffs then filed the complaint on October 31, 2001 after services still had not been restored. [Doc. #1].

### **Conclusions**

At the hearing on January 16, 2002, Plaintiffs notified the court that service had been restored and is currently active. Nevertheless, Plaintiffs’ request that Defendant be enjoined from further violation of the automatic stay will be, and is GRANTED. Defendant’s failure to appear in this adversary proceeding prompts concern that a specific, separate order is necessary to obtain future compliance.

Plaintiffs’ request for attorney fees will be GRANTED in part and DENIED in part. In re Davis, 74 B.R. 406, 411 (Bankr. N.D. Ohio 1987) (award of attorney’s fees appropriate where an initial violation of stay followed by debtor having to resort to the courts to enforce his rights). Plaintiffs request attorney’s fees in the amount of \$612.50, however, that amount included travel time not actually incurred. Since Plaintiffs’ Attorney’s appearance at the January 16, 2002, hearing was telephonic, the request for “anticipated fees for travel to and from Toledo for attendance at Default hearing” in the amount of \$187.50 will be disallowed. [Doc #6, Exhibit “A”]. Thus, Plaintiffs are awarded reasonable and necessary attorney’s fees in the amount of \$425.00.

Plaintiffs’ request for punitive damages will be GRANTED in part and DENIED in part. Telephone service is a critical necessity of daily living. Attempts to resolve the disconnection without having to commence formal court action were unsuccessful. Service was reconnected only after the

Complaint was filed. Defendant has now ignored these proceedings altogether. There is no explanation offered for Defendant's actions, whether they occurred by unusual simple mistake or as a matter of routine corporate policy. The court has no way of knowing whether Defendant has corporate procedures in place to prevent problems like this. In the absence of any appearance or explanation for Defendant's conduct in terminating service and the delay in reconnecting, the only way to discourage such violations from arising again is by awarding punitive damages. In re Riddick, 231 B.R. 265, 268-69 (Bankr. N.D. Ohio 1999) (primary purpose of punitive damages is to cause a change in Defendant's behavior). Plaintiffs' request for \$5,000.00 in punitive damages "in the event Defendant does not pay the amount of the judgment within fifteen days," is DENIED as excessive in the absence of other evidence of compensatory damages; however, Plaintiffs' request for \$2,000.00 as punitive damages is GRANTED.

In reaching the foregoing conclusions, the court has considered all the evidence, exhibits, and arguments of counsel, regardless of whether or not they are specifically referred to in this opinion. A separate judgment in accordance with this Memorandum Opinion and Decision will be entered.

Dated:

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Mary Ann Whipple  
United States Bankruptcy Judge