

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

In Re:)	Case No. 01-36152
)	
Thomas & Gwen Vojtusch)	Chapter 7
)	
Debtors.)	Adv. Pro. No. 01-3259
)	
Thomas & Gwen Vojtusch,)	Hon. Mary Ann Whipple
)	
Plaintiffs,)	
)	
v.)	
)	
Sprint)	
)	
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 file showed no answer or other response to Plaintiffs’ Complaint had been filed. Therefore, pursuant to Fed. R. Civ. P. 55 made applicable through to 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. Under 11 U.S.C. § 362(h), 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 that willfully disconnects service with notice of a bankruptcy case is subject to being ordered to pay damages and attorney's fees. 3 Collier on Bankruptcy § 366.06 (Lawrence P. King ed., 15th 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 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 Plaintiff's 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 averments 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 the automatic stay and Section 366. Plaintiffs listed Defendant as an unsecured creditor on the bankruptcy petition filed with the court on October 4, 2001. [Doc. #1, Exhibit "B"]. Subsequently, Defendant suspended utility services to Plaintiffs. On October 5, 2001,

Plaintiffs' counsel notified Defendant that its actions were in violation of 11 U.S.C. Section 366(a). [Doc. #1, Exhibit "C"]. At some point thereafter Defendant restored services to Plaintiffs; however, on October 30, 2001, service was again disconnected. Plaintiffs then filed the Complaint on October 31, 2001. [Doc. #1].

Conclusions

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 GRANTED. Defendant's failure to appear and defend in this adversary proceeding raises concern that a specific, separate order is necessary to obtain future compliance with the law and to prevent this from happening again to Plaintiffs or others in this district.

Plaintiffs' request for attorney's 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). The court finds that Plaintiffs' request for attorney's fees in the amount of \$764.50 includes some services not actually rendered. Since Plaintiffs' Attorney's appearance at the January 16, 2002, default 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 and "anticipated mileage" costs in the amount of \$50.00 were not incurred and will be disallowed. [Doc #6, Exhibit "A"]. Plaintiffs are therefore awarded reasonable attorney's fees in the amount of \$527.00.

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. Once reconnected, service was disconnected again after notice of the bankruptcy case had clearly been given to Defendant. Defendant has now ignored these proceedings altogether. There is no explanation offered for Defendant's actions, whether they

occurred by unusual mistake or as a matter of routine corporate policy. The court thus has no way of knowing whether Defendant has corporate procedures in place intended to prevent problems like this. In the absence of any appearance or explanation for Defendant's conduct in terminating service, reconnecting it, then terminating it again, the only way to discourage such violations and encourage prompt and serious attention to prevention 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 as reasonable under all of the circumstances yet still sufficient to produce the desired responsiveness to the problem.

In reaching the conclusions found herein, the court has considered all the evidence, exhibits, and arguments of counsel, regardless whether they are specifically referred to in this opinion. A separate judgment in accordance with this Memorandum of Decision will be entered by the Clerk.

Dated:

Mary Ann Whipple
United States Bankruptcy Judge