

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED
02 JUL -2 AM 10:59
UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

In re:) Case No. 02-11107
)
JAMES SUMMERVILLE and) Chapter 7
CARLA SUMMERVILLE,)
) Judge Pat E. Morgenstern-Clarren
Debtors.)
) **MEMORANDUM OF OPINION**

The Debtors James and Carla Summerville filed a Motion for Sanctions in which they allege that Sam Trizzino¹ or Advanced Wizard's Landscaping (sometimes collectively the "Creditor") violated the automatic stay provisions of 11 U.S.C. § 362 by removing trees, lighting, and a fuse box from their residence while they were attending a court-ordered meeting and that the Creditor did so with malice and through chicanery. (Docket 11). The Creditor opposed the motion on the ground that the Debtors had consented to the removal. (Docket 21).

An evidentiary hearing was held on June 26, 2002. The Debtors and Sarah Summerville, Mr. Summerville's mother, testified. The Creditor presented its case through cross-examination.

JURISDICTION

Jurisdiction exists under 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 under 28 U.S.C. § 157(b)(2)(A) and (O).

FACTS

The Debtors filed their Chapter 7 petition on February 6, 2002. Among their secured creditors, they listed "Advanced Wizard's c/o Sam Terizzino" as the holder of a \$5,450.00

¹ This name is also spelled Terizzino in the file.

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

mechanics lien on their home at 6658 Ayleshire Drive, Solon, Ohio. The lien arises out of landscaping services provided by the Creditor, including planting trees and installing lights and a fuse box (the “Landscaping”).²

The Debtors’ Meeting of Creditors³ was scheduled for March 18, 2002 at 9:30 a.m. in the BP America Building in downtown Cleveland. The Court served all creditors, including the Creditor, with notice of this hearing so that they might attend and protect their interests if they chose to do so. (Docket 2). The notice states that it is sent by Kenneth J. Hirz, Clerk of the Bankruptcy Court for the Northern District of Ohio.

The Debtors arrived at the creditors meeting with one of their attorneys, Holly Scherf. Although there was no direct testimony that Mr. Trizzino also attended the meeting, both counsel referenced this fact in their statements, making it uncontested. When the Chapter 7 Trustee called the Debtors for examination, he found that Mr. Summerville did not have the required identification and so the Trustee continued the meeting to April 1, 2002. The Debtors got in their car and headed for their suburban home.

At about 10:00 a.m., when they were part-way home, Ms. Summerville’s cell phone rang and she answered it. A man on the other end identified himself as Ken Hirz from the Bankruptcy Court. “Real stern . . . like we’d done something wrong by leaving,” he told her that they had failed to sign papers giving notice to creditors of the new hearing date and they were required to return immediately to the BP Building. The Debtors were confused and puzzled as to why their

² The evidence did not establish the exact relationship between Wizard and Sam Trizzino, but both parties assumed that Trizzino is at least an agent or representative of Wizard.

³ See 11 U.S.C. § 341.

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

attorney let them leave without signing these papers, but nevertheless they turned around and drove back downtown.

When they arrived at the BP Building, they waited about 30 minutes before they could speak with Ms. Scherf, who was with another client. Ms. Scherf was also puzzled by the telephone call they described and so she checked with the Trustee. The Trustee confirmed that there was no reason for the Debtors to have returned to the meeting of creditors.

Mr. Summerville's suspicions were raised and he called home to speak to his mother, Sarah Summerville, who was babysitting for their three-year-old twins, Anna and Christopher, while the Debtors attended the meeting of creditors. He asked if anyone from the court had called. Sarah Summerville responded no, but wanted to tell him about something else that had happened. She recounted that Anna had come running to her earlier, saying that "a man is out here taking our trees." Sarah Summerville had then looked outside, where she saw a Wizard truck in the driveway and a man in the yard. She recognized the man as someone who "worked for Sam with Wizard Landscaping" because she had seen him when Wizard put the Landscaping in. Observing that he had already taken out two trees from either side of the porch, she opened the door and told him that the Summervilles were not home. He answered "I know . . . the attorney told me to be here . . ." ⁴ He told her that he was mad at her son because he "wanted the money for all the work." Moving quickly, and turning red in the face, he removed the Landscaping in about twenty minutes. When Sarah Summerville finished relaying this information to Mr. Summerville, he told her that Wizard was not supposed to do that and he would deal with the situation when he got home.

⁴ The Creditor was represented at the hearing by Attorney Gary Cook. The attorneys stipulated that Mr. Cook did not participate in any way in these events.

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

Upon arriving home at about 11:30 a.m., Mr. Summerville checked his other cell phone and found a message on it that came in that morning from a man who also identified himself as Ken Hirz from the Bankruptcy Court and instructed the Debtors to return promptly to the BP Building to sign papers. The Debtors had given Sam Trizzino their cell phone numbers at the time they entered into the Landscaping contract with Wizard.

Sam Trizzino attended the continued 341 hearing on April 1, 2002, again as the representative of Wizard's. Mr. Trizzino exchanged words with Mr. Summerville; Mr. Trizzino denied having removed the Landscaping and told Mr. Summerville that he knew where he worked and would do anything he could to get him fired. Twice after that day, Mr. Summerville was called into a supervisor's office and told that Mr. Trizzino had approached the supervisor. The supervisors, however, reassured Mr. Summerville that his job was "ok".

Both Mr. and Mrs. Summerville denied giving the Creditor permission to remove the Landscaping. The Court found their testimony, and that of Sarah Summerville, to be credible in all respects.

DISCUSSION

The filing of a bankruptcy petition has an immediate effect: it prohibits a creditor from acting to obtain possession of property of the estate, enforce any lien against property of the estate, and collect a claim that arose before the case was filed, among other acts. 11 U.S.C. § 362(a)(3),(5), and (6). This automatic stay "gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy." S. Rep. No. 989, 95th Cong., 2d Sess. 54 (1978) *reprinted in* 1978 U.S.C.C.A.N. 5787, 5840; H. Rep. No. 595, 95th Cong., 1st Sess. 340 (1977)

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

reprinted in 1978 U.S.C.C.A.N. 5963, 6296 (1978); See also *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417 (6th Cir. 2000).

A debtor who is injured by a willful violation of the stay is entitled to recover “actual damages, including costs and attorneys’ fees” and may also recover punitive damages in appropriate circumstances. 11 U.S.C. § 362(h); *United States v. Mathews (In re Mathews)*, 209 B.R. 218, 220 (B.A.P. 6th Cir. 1997). A willful violation of the automatic stay:

does not require a specific intent to violate the automatic stay. Rather, the statute provides for damages upon a finding that the [creditor] knew of the automatic stay and that the [creditor’s] actions which violated the stay were intentional. Whether the party believes in good faith that it had a right to the property is not relevant to whether the act was ‘willful’ or whether compensation must be awarded.

Goichman v. Bloom (In re Bloom), 875 F.2d 224, 227 (9th Cir. 1989), quoting *INSLAW, Inc. v. United States (In re INSLAW, Inc.)*, 83 B.R. 89, 165 (Bankr. D.D.C. 1988).

In addition to awarding actual damages, a court may impose punitive damages if the court finds that “the amount of such actual damages is insufficient to deter the kind of deliberate and repeated violations of the automatic stay . . .” at issue. *Archer v. Macomb County Bank*, 853 F.2d 497, 500 (6th Cir. 1988). An award of punitive damages is appropriate “if a [creditor’s] conduct was malicious, wanton, or oppressive.” *Ramirez v. Fuselier (In re Ramirez)*, 183 B.R. 583, 590 (B.A.P. 9th Cir. 1995).

In this case, the Debtors owed the Creditor a prepetition debt secured by a lien on the Debtors’ residence. The residence was property of the Chapter 7 estate. The Creditor had actual knowledge of the bankruptcy filing and of the 341 meetings. Removal of the Landscaping was an intentional act. The Creditor first denied having removed the Landscaping and then admitted through its response to this motion that it had done so, but claimed the Debtors gave consent.

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

The Debtors, however, proved that they did not consent. As a result, the Debtors proved that the Creditor willfully violated the automatic stay and they are entitled to recover their actual damages.

The Debtors request an award of two kinds of actual damages. First, they ask that the Creditor's lien on their residence be cancelled, which would relegate the claim to an unsecured claim. Given that the Creditor already has possession of the property that gave rise to the lien, this is certainly an appropriate consequence for the Creditor's actions. The Debtors also ask for attorneys' fees as part of their actual damages. Having proven that the Creditor willfully violated the automatic stay, they are entitled to recover those fees. The Debtors are to file an affidavit establishing their fees on or before **July 15, 2002**. The Creditor will then have ten days in which to request an evidentiary hearing on the amount to be awarded. If the Creditor does not file anything by that date, the Court will decide the issue based on the affidavit.

The Debtors additionally argue that this is an appropriate case for punitive damages. The Court agrees. The only entity with a motive for surreptitiously tearing out the Landscaping is the Creditor who installed it in the first place. The most logical and convincing interpretation of the evidence viewed as a whole is that Sam Trizzino, knowing that the Debtors would be downtown at the 341 meeting on March 18, 2002, instructed a Wizard worker to remove the Landscaping from the Debtors' home while they were away. This scheme was almost thwarted when the Trustee unexpectedly cut the 341 hearing short. To buy more time, either Mr. Trizzino or someone acting on his behalf called Ms. Summerville on her cell phone, impersonated Ken Hirz, the Clerk of the Bankruptcy Court (whose name appeared on the notice sent to the Creditor), and

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

convinced the Debtors to turn back to the BP Building.⁵ This diversion bought enough time for the Wizard worker to take the Landscaping before the Debtors got home.

When Sarah Summerville confronted the Wizard worker and told him that he did not have permission to take the Landscaping, he could have done the right thing and left. Instead, he just moved faster. This shows that the worker knew he was under time pressure to complete his work, which further shows that the Creditor knew it should not be engaging in this kind of self-help. Moreover, not content with ripping out the Landscaping, Sam Trizzino then tried to interfere with Mr. Summerville's employment.

No one expects a creditor to be happy on learning that a debt cannot be collected, but the actions of Sam Trizzino and Wizard went well beyond understandable unhappiness. The Creditor's actions were calculated, malicious, and intended to harm the Debtors in retaliation for filing for protection under the Bankruptcy Code. No one from the Creditor appeared at either of the two hearings held on this motion to testify in opposition to the Debtors' recounting of events and/or to offer an explanation in mitigation. This supports the Court's conclusion that a punitive damage award is necessary to get the Creditor's attention, to impress upon the Creditor the gravity of its actions, and to prevent the Creditor from doing such a thing at any future time. To accomplish that goal, the Court will award the Debtors punitive damages in the amount of \$1,000.00.

⁵ In reaching this conclusion, the Court is not relying on the tape recording of the message left on Mr. Summerville's cell phone.

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

A separate judgment will be entered reflecting this decision.

Date: 2 July 2002

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

Served by mail on:

Gary Cook, Esq.

Debra Booher, Esq.

By: Joyce L. Gordon, Secretary

Date: 7/2/02

THIS OPINION IS NOT INTENDED
FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

FILED
24 JUL -2 AM 11:00
UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
CLEVELAND

In re:) Case No. 02-11107
)
JAMES SUMMERVILLE and) Chapter 7
CARLA SUMMERVILLE,)
) Judge Pat E. Morgenstern-Clarren
Debtors.)
) **JUDGMENT**

For the reasons stated in the Memorandum of Opinion filed this same date, IT IS, THEREFORE, ORDERED that the Debtors' Motion for Sanctions, treated as a motion for damages under 11 U.S.C. § 362(h), is granted. These damages are awarded, jointly and severally, against Sam Trizzino and Advanced Wizard's Landscaping:

- (1) The mechanics lien placed on the Debtors' property located at 6658 Ayleshire Drive, Solon, Ohio 44139 is cancelled and the Clerk of Court is directed to release the lien upon presentation of this Judgment;
- (2) The Debtors are awarded \$1,000.00 in punitive damages; and
- (3) The Debtors are awarded attorneys' fees. They are to file an affidavit with time records that establish those fees on or before **July 15, 2002**. Sam Trizzino and Advanced Wizard's Landscaping shall have until **July 25, 2002** in which to request an evidentiary hearing on the amount of fees requested. If a hearing is not requested, the Court will decide the issue based on the affidavit.

IT IS SO ORDERED.

Date: 2 July 2002

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

Served by mail on:
Gary Cook, Esq.
Debra Booher, Esq.

By: Joyce L. Gordon, Secretary
Date: 7/2/02