

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

)	CHAPTER 7
)	
IN RE:)	CASE NO. 02-60830
)	
LARRY F. EDWARDS,)	JUDGE RUSS KENDIG
)	
Debtor.)	
)	AMENDED MEMORANDUM
)	OPINION
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Now before the court is a motion to show cause filed by debtor, Larry F. Edwards (hereafter “Debtor”), and an application for attorney fees filed by Debtor’s counsel, Frank G. Avellone (hereafter “Counsel”). Creditor Beth Hodges dba Salter Services (hereafter “Creditor”), who appears pro se, filed responses opposing both the motion and the application for fees. A hearing on this matter was held September 9, 2002.

The court has jurisdiction over these matters pursuant to 28 U.S.C. § 1334(a) and the general order of reference entered in this district on July 16, 1984. The following constitute the court’s findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

Facts

Debtor filed a Chapter 7 petition on February 26, 2002. Creditor was listed on the matrix. Creditor had obtained a judgment in Wayne County Municipal Court and had initiated a garnishment action on January 23, 2002. On February 27, 2002, Debtor filed a notice of bankruptcy in the municipal court to stay the garnishment proceeding. The municipal court held a hearing on March 4, 2002. The municipal court held that the automatic stay imposed by Debtor’s bankruptcy filing stayed the garnishment proceeding and ordered that the clerk’s office turn over to Debtor \$69.56 that it was holding.

Creditor did not lodge an objection to Debtor’s discharge nor file a complaint to determine dischargeability of the debt owed Creditor. On June 27, 2002, Debtor received a discharge of his debts.

In the meantime, the Wayne County Municipal Clerk of Courts turned over the garnished funds of \$69.56 to Creditor in error. Upon learning of this mistake, Debtor sent Creditor a letter by certified mail on July 1, 2002 requesting that Creditor forward the funds to Debtor. After Creditor failed to forward the money to Debtor, Debtor faxed Creditor a letter requesting that Creditor turn over the money. Creditor again failed to turn over the money.

Arguments

Debtor filed his motion to show cause to request that the court hold Creditor in contempt for violating the discharge injunction because Creditor refused to return the \$69.56 to Debtor after the debt was discharged. At the hearing, Debtor argued that Creditor's 15 years of experience in managing rental housing and pro se appearances in common pleas and municipal court warranted the court's treatment of Creditor as a sophisticated creditor whose violation of the discharge injunction was knowing and willful. Besides the return of the \$69.56, Debtor requested punitive damages of \$208.00 for Creditor's willful violation of the discharge injunction. Counsel requested attorney fees of \$539.00 for his 5.39 hours of work in pursuing the contempt action.

Creditor argued that the money was garnished prepetition and not postpetition, and therefore, the garnishment action did not violate the discharge injunction. She also argued that Counsel was requesting an exorbitant amount of fees given the amount in dispute in this case.

Law and Analysis

Section 362 of the Bankruptcy Code imposes an automatic stay upon the filing of a bankruptcy case.¹ The importance of the automatic stay is reflected in the legislative history of 11 U.S.C. § 362:

The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It 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

¹Debtor frames the issue as being one of a violation of the discharge injunction rather than a violation of the automatic stay. The matter may be better analyzed as being one of a violation of the automatic stay depending upon the timing of various events. *See Summers v. Anderson (In re Summers)*, 213 B.R. 825 (Bankr. N.D. Ohio 1996) (creditor who attempted garnishment postpetition violated discharge injunction); *Braun v. Champion Credit Union (In re Braun)*, 152 B.R. 466 (N.D. Ohio 1993) (creditor who first sued after discharge granted violated discharge injunction). Any change in framing and difference in applicable code section is not prejudicial to Debtor or Creditor.

relieved of the financial pressures that drove him into bankruptcy.

H.R. Rep. No. 95-595, 95th Cong. 1st Sess. 340-342 (1977).

Once a bankruptcy petition is filed a creditor not only has a duty to stop those collection efforts he or she has engaged in but also has an affirmative duty to restore the status quo.

The courts have been quick to realize that creditor inaction can often be as disruptive to the debtor as affirmative collection efforts. *E.g. In re Elder*, 12 B.R. 491, 494 (Bankr. M.D. Ga. 1981) (“No action is unacceptable; no action is action to thwart the effectiveness of the automatic stay.”) In recognition of this problem, creditors have been required, when necessary, to take affirmative steps to restore the status quo at the time of the filing of the petition for relief. . . . To place the onus on the debtor . . . to take affirmative legal steps to recover property seized in violation of the stay would subject the debtor to the financial pressures the automatic stay was designed to temporarily abate, and render the contemplated breathing spell from his creditors illusory.

In re Miller, 22 B.R. 479, 481 (D. Md. 1982) (citations omitted); *accord In re Dungey*, 99 B.R. 814 (S.D. Ohio 1989). The rationale underlying the creditor’s duty was articulated by the court in Elder v. City of Thomasville, Georgia (In re Elder), 12 B.R. 491 (Bankr. M.D. Ga. 1981):

Part of what is stayed in 11 U.S.C. s. 362 is “continuation.” Garnishment involves a creditor, a garnishee, and a court. Creditor sets in motion the process. Creditor is in the driver’s seat and very much controls what is done thereafter if it chooses. If the “continuation” is to be stayed, it cannot choose to do nothing and pass the buck to the garnishee or the court in which the garnishment is filed to effectuate the stay. Positive action on the part of the creditor is necessary so that “continuation” may be stayed.

Elder, 12 B.R. at 494-95.

A recent case from within this circuit is right on point with the facts in the case at bar. In In re McCall-Pruitt, 281 B.R. 910 (Bankr. E.D. Mich. 2002), the debtor filed a contempt action against creditors who accepted funds postpetition from the state pursuant to a prepetition garnishment action filed against the debtor’s income tax refund. Id. at 910-11. The court concluded that it was the creditors’ duty to stop all collection proceedings once the debtor filed

bankruptcy. Id. at 912. Their failure to do so and their acceptance of the garnished funds from the state violated the automatic stay, even though they had taken no affirmative action to enforce the garnishment. Id.

Likewise, in the case at bar Debtor's bankruptcy filing imposed the automatic stay against any collection efforts by Debtor's creditors. This includes the pending garnishment proceeding initiated by Creditor. Creditor was on notice of the bankruptcy filing and took no effort to stop the garnishment. At the state court hearing, the court found that the automatic stay was in effect and ordered the money being held by its clerk's office returned to Debtor. Creditor flagrantly disregarded the automatic stay and thwarted its purpose by refusing to return the garnished funds she received in error. The court finds Creditor violated the automatic stay.

The question now is to what damages is Debtor entitled for Creditor's violation of the automatic stay. A violation of § 362 results in damages compensable to a debtor:

[A]n 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.

11 U.S.C. § 362(h). In order to recover actual damages, the debtor must prove that the stay violation was willful and that he or she suffered actual damages therefrom. United States v. Mathews (In re Mathews), 209 B.R. 218, 220 (6th Cir. B.A.P. 1997) (citing Archer v. Macomb County Bank, 853 F.2d 497, 499-500 (6th Cir. 1988) (§ 362(h) "requires a finding of actual injury")). "A 'willful violation' does not require a specific intent to violate the automatic stay." Meis-Nachtrab v. Griffin (In re Meis-Nachtrab), 109 B.R. 302, 306 (Bankr. N.D. Ohio 1995) (quoting INSLAW, Inc. v. United States (In re INSLAW, Inc.), 83 B.R. 89, 165 (Bankr. D.D.C. 1998)); Ledford v. Fidelity Financial Serv. (In re Hill), 174 B.R. 949, 954 (Bankr. S.D. Ohio 1994) (citations omitted).

Creditor's actions were certainly willful as she knew that the automatic stay was in effect and that the garnished money was to be returned to Debtor when she refused to comply with the state court's order. Debtor was injured by Creditor's violation of the stay when he was without the use of the \$69.56 which was to have been returned to him. Debtor has proven he incurred actual damages of \$69.56, and therefore, the court awards him \$69.56 as actual damages for his injury.

Debtor has also provided evidence that he incurred damages in the form of attorney fees for the pursuit of this matter. As the court stated in Price v. Pediatric Academic Ass'n, Inc., 175 B.R. 219 (S.D. Ohio 1994):

[w]here a willful violation exists, an award of damages, including

attorneys' fees, is mandatory. However, the fees must be reasonable and necessary. The [c]ourt should closely scrutinize the fees requested by attorneys for unnecessary and excessive charges.

Price, 175 B.R. at 221 (citations omitted). Here, Counsel requests fees in the amount of \$539.00 for 5.39 hours at a rate of \$100.00 per hour. He details his attempts at resolving this matter short of court intervention. The hourly rate and amount of time spent are not unreasonable, even given the amount in dispute, contrary to Creditor's assertion, and therefore, Counsel is entitled to an award of attorney fees in the amount of \$539.00 for Creditor's violation of § 362.

Finally, Debtor requests punitive damages against Creditor in the amount of \$208.00. The factors to consider in awarding punitive damages are the creditor's conduct, the creditor's ability to pay, the creditor's motives, and the debtor's provocation, if any. In re Johnson, 253 B.R. 857, 862 (Bankr. S.D. Ohio 2000). The court has previously found that Creditor willfully violated the automatic stay. After Creditor received notice of the bankruptcy, she did nothing to stop the pending garnishment. She allowed the state court to resolve the matter. Even then, she hindered the stay's effect by acquiescing in the error committed by the state court clerk's office. Her conduct was egregious, her motives were suspect, and Debtor did not provoke Creditor's actions. The court finds the punitive damages of \$208.00 requested by Debtor are financially reasonable and factually appropriate, and therefore, Debtor is awarded punitive damages against Creditor in the amount of \$208.00. *See, e.g., In re Timbs*, 178 B.R.989, 997-99 (Bankr. E.D. Tenn. 1994) (finding punitive damages of \$5,000.00 warranted where collection agency's attorney refused to terminate prepetition garnishment action against debtor); Smith v. GTE North, Inc. (In re Smith), 170 B.R. 111, 118 (Bankr. N.D. Ohio 1994) (finding that creditor's failure to return funds collected in violation of the automatic stay warranted an award of \$1,000.00 in punitive damages); In re Dungey, 99 B.R. at 818 (finding award of \$100.00 in punitive damages warranted based on creditor's failure to restore to debtor wages garnished postpetition).

Conclusion

Creditor's actions violated the automatic stay imposed by 11 U.S.C. § 362 and Debtor is awarded actual damages, attorney's fees, and punitive damages for Creditor's violation. Creditor is ordered to pay to Debtor \$69.56 for actual damages and \$208.00 for punitive damages. Creditor is ordered to pay to Counsel \$539.00 for Debtor's attorney's fees.

RUSS KENDIG
U.S. BANKRUPTCY JUDGE

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of this Amended Memorandum Opinion and accompanying Amended Order was mailed, via regular United States Mail, to the following on the ____ day of December 2002.

Frank G. Avellone
Wooster-Wayne Legal Aid Society, Inc.
121 West North Street, Suite 100
Wooster, Ohio 44691

Beth L. Hodges
dba Salter Services
2973 Cleveland Road
Wooster, Ohio 44691

Deputy Clerk

**UNITED STATES BANKRUPTCY COURT
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Debtor.)	AMENDED ORDER
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Debtor Larry F. Edwards filed a motion for contempt against Creditor Beth Hodges dba Salter Services for Creditor's refusal to return \$69.56 in funds she received postpetition from a prepetition garnishment action. Debtor requested both actual and punitive damages. Counsel for Debtor filed an accompanying application for compensation. Creditor opposed both requests. A hearing on this matter was held on September 9, 2002, and the court took the matter under advisement.

For the reasons set forth in the accompanying memorandum opinion, the court hereby **GRANTS** Debtor's motion for contempt and finds Creditor in contempt for violating the automatic stay imposed by 11 U.S.C. § 362. The court hereby **ORDERS** Creditor to pay Debtor **\$277.56** for actual and punitive damages and **ORDERS** Creditor to pay Counsel **\$539.00** for Debtor's attorney fees.

It is so ordered.

RUSS KENDIG
U.S. BANKRUPTCY JUDGE