THIS OPINION IS NOT INTENDED FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 02-19186
	)	
LINDA FAYE BRAGG,	)	Chapter 7
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	**MEMORANDUM OF OPINION**

The debtor Linda Bragg filed a motion to hold creditor Health Associates Credit Union in contempt for violating the automatic stay provision of 11 U.S.C. § 362 and the discharge injunction imposed by 11 U.S.C. § 524. She asks for compensatory and punitive damages, as well as attorney fees. Health Associates Credit Union denies the allegations and offers an alternative version of the events underlying this dispute.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered 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)(O).

THE HEARING

The court held a hearing on July 20, 2004. The debtor testified on her own behalf and also presented her case through the testimony of Joan Miller and Mary Koury. Health Associates Credit Union presented its case through the testimony of Edward Moran and Joseph Conley.

FACTS

I.

These findings of fact reflect the court's weighing of the evidence, including determining the credibility of the witnesses. In doing so, the court considered each witness's demeanor, the substance of the testimony, and the context in which the statements were made, recognizing that a transcript does not convey tone, attitude, body language or nuance of expression. *See* FED. R. BANKR. P. 7052, incorporating FED. R. CIV. P. 52 (applied to contested matters under FED. R. BANKR. P. 9014).

II.

Health Associates Credit Union (credit union) was a state-chartered entity run by a board of directors.[1] The debtor Linda Bragg started working at the credit union as the office manager in 1990. As part of her responsibilities, she attended the monthly board meetings. The board routinely authorized the credit union to make loans to "official family," defined as the board, all committee members, and credit union employees. As a beneficiary of this policy, the debtor entered into five loans with the credit union:

Loan number	Purpose of Loan	Type of Loan
#4807810-55	Purchase 1994 Ford Explorer	Secured
#4807810-60	Purchase 1966 Mustang	Secured
#4807810-61	Pay bills	Unsecured
#4807810-62	Refinance house	Secured
[not in evidence]	Purchase Dodge Shadow	Secured

[1] The credit union merged into Community Star Credit Union in 2003.

Additionally, the debtor's husband had two loans with the credit union and her son had three loans. The loans all had a history of being delinquent.

The credit union was audited periodically by the American Share Insurance auditing department and the Ohio division of financial institutions. They reported their findings to the board and, where appropriate, the auditors either recommended changes or required changes.

In March 2001, the board asked the debtor to bring her family's loans current. She did not do so. The July 2001 audit report to the board required these loans to be current. At the time of the March 31, 2002 follow-up audit, the loans were still delinquent.[2] The debtor's loans and those of her family continued to be the source of discussion between and among the debtor, the board, and the state. The state reviewed the credit union's performance every three months.

The board felt at some point the state had refinanced one or more of the debtor's loans. As of the hearing date, the parties agree that the state did not actually refinance any of these loans.

The debtor filed for protection under the bankruptcy laws on August 21, 2002, listing four secured loans and one unsecured loan from the credit union. On September 30, 2002, the debtor attended the meeting of creditors held under bankruptcy code § 341. At that meeting, she told the credit union's attorney that she would reaffirm two of the loans, but would not reaffirm the other three. The debtor and the credit union (acting through its attorney) then entered into

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[2] The credit union faced a number of other problems. The July 26, 2002 audit letter "disclose[d] significant weaknesses in the areas of preferential lending to and collection of official family accounts; weak capital adequacy, profitability, and loan quality; ineffective delinquent loan collection efforts; an inadequate Allowance for Loan and Lease Losses . . . ; and high delinquency and loan losses." (Credit union exh. A).

reaffirmation agreements for the two loans that were secured by a second mortgage on her house and the Dodge.

The parties agree that the debtor made payments on all five of her loans after her bankruptcy filing and after she received her discharge. The critical disputed question is why the debtor did this. The debtor testified she made the payments because the board told her she would lose her job if she did not. Two board members testified that the board did not make it a condition of continued employment that the debtor pay these loans. Instead, their recollection is that the debtor said she was paying the two reaffirmed loans as agreed and she was paying the other three loans "out of the goodness of her heart."

After weighing all the evidence, including credibility of the witnesses, the court finds the debtor's version of the evidence to be more credible, noting that it is supported by several documents and is internally consistent. This, then, is the debtor's story, which the court accepts as true: The debtor informed the board of her bankruptcy filing shortly after it was made and stated she was reaffirming the debts secured by her house and the Dodge. She offered to return the Explorer and the Mustang to the credit union for sale. Board members responded that she had to pay all the loans or she could not work there. They told the same thing to another employee with delinquent loans. Because the debtor needed her job, she continued to make payments. As part of her responsibilities, she continued to assist the auditors and she told them about her bankruptcy filing as well.

At the November 18, 2002 board meeting, the board accepted a supervisory agreement with the state addressing a number of performance deficiencies at the credit union. One topic

was the debtor. The agreement specified that for the debtor to keep her job, she had to meet these standards:

> Account will be brought current and payroll deduction shall be used, to make required payments on [the debtor's] loans and loans held by [her husband];
>
> No new loans will be made to the [debtor] or the spouse of the [debtor], without advanced approval from the Division and Insurer;
>
> No share account(s) of the [debtor] or the spouse of the [debtor] will be overdrawn; and
>
> The Audit Committee [appointed by the board] shall review all employee loan and share account activity, on a monthly basis.

(Debtor exh. 2).

The debtor received her bankruptcy discharge on December 6, 2002 and the credit union received notice of it. Although the credit union policy was to write off loans that had been discharged, the credit union did not charge off the non-reaffirmed loans at this time.

The December 30, 2002 board minutes state: "manager's [i.e. debtor's] loans still delinquent, but will be brought current by the end of January." At the January 20, 2003 board meeting, the board declined to give the debtor a raise because of her loan delinquencies.

In January 2003, the chapter 7 trustee filed a complaint against the credit union for the return of $2,403.00 paid to it by the debtor in the 90 days before her bankruptcy filing.[3] The board instructed the debtor to try to negotiate a lower amount, which she did. The credit union eventually paid $1,000.00 in full settlement.

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[3] *See* 11 U.S.C. § 547.

The April 21, 2003 board minutes reflect another discussion about the debtor's four delinquent loans. A new treasurer, Joseph Conley, joined the board in May 2003. He asked why the debtor's loans had not been written off in light of her bankruptcy discharge and the board president replied that if the board charged off the loans, the debtor could not continue to work there.

Another series of events ran parallel in time to the delinquency issue. The credit union had an informal overdraft policy which permitted a member to write a check on her account the day before payroll checks were deposited, even though the account had insufficient funds at the time to cover the check. The debtor and others benefitted from this policy. CUMIS (the bonding company that issued employee performance bonds to the credit union) objected to the policy and instructed the board to change it. The board failed to do so. A June 2003 audit required the board to alter the policy.

In the summer of 2003, a risk manager for CUMIS did another review. The debtor told this examiner that the board was harassing her to pay the discharged loans. The August 25, 2003 board minutes state that the board discussed the debtor's bankruptcy, specifically the debtor's contention that she had only reaffirmed two of her loans, and continue: "Because of the bankruptcy laws, it was questioned whether the credit union would have to reimburse her in case of job loss." (Debtor's exh. 22).

In September 2003, the board learned that CUMIS would no longer provide a bond for the debtor, apparently linked to the overdraft situation. The debtor, with the board's support, appealed the decision. The board decided, however, that if CUMIS denied the appeal the board

would not try to find an alternative bonding source. CUMIS did deny the appeal and the board fired the debtor effective September 13, 2003.[4]

In September 2003, October 2003, and January 2004, the credit union sent dunning letters to the debtor about the loans she had not reaffirmed. The credit union eventually wrote off the loans in January 2004.

DISCUSSION

The debtor asks for a finding that the credit union violated the § 362 automatic stay and the § 524 discharge injunction. She requests an award of compensatory damages, punitive damages, and attorney fees.

The Automatic Stay

Bankruptcy code § 362 provides for an automatic stay which stops virtually all collection activity related to a debtor's prepetition debt. *See* 11 U.S.C. § 362(a). "The stay provision 'gives the debtor a breathing spell' and 'stops all collection efforts, all harassment, and all foreclosure actions'." *Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417, 423 (6th Cir. 2000) (quoting *Javens v. City of Hazel Park*, 107 F.3d 359, 363 (6th Cir. 1997)). Section 362(a)(6) specifically provides for a stay of "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case[.]" 11 U.S.C. § 362(a)(6). "[A] course of conduct violates § 362(a)(6) if it '(1) could reasonably be expected to have a significant impact on the debtor's determination as to whether to repay, and (2) is contrary to what a reasonable person would

[4] The credit union presented evidence that employees, including the debtor, entered into cell phone contracts that were questionable. This was not, however, the basis for the debtor's termination and so it need not be discussed further.

consider to be fair under the circumstances'." *Pertuso*, 233 F.3d at 423 (quoting *In re Briggs*, 143 B.R. 438, 453 (Bankr. E.D. Mich. 1992)).

A debtor who has been injured by a willful violation of the automatic stay is entitled to recover "actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." 11 U.S.C. § 362(h). To recover damages, a debtor must prove that the violation was willful and that she was actually injured by the violation. *See United States v. Mathews (In re Mathews)*, 209 B.R. 218, 220 (B.A.P. 6th Cir. 1997). A specific intent to violate the automatic stay is not required. *See Fleet Mortgage Group, Inc. v. Kaneb*, 196 F.3d 265, 269 (1st Cir. 1999). "A violation of the automatic stay can be willful when the creditor knew of the stay and violated the stay by an intentional act." *TranSouth Fin. Corp. v. Sharon (In re Sharon)*, 234 B.R. 676, 687 (B.A.P. 6th Cir. 1999). The debtor is required to prove damages. *See Archer v. Macomb County Bank*, 853 F.2d 497, 499-500 (6th Cir. 1988).

The Discharge Injunction

Chapter 7 debtors are granted a discharge under bankruptcy code § 727. *See* 11 U.S.C. § 727(a). Section 524 assures the effectiveness of that discharge by imposing a discharge injunction which:

> operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived[.]

11 U.S.C. § 524(a)(2).[5] The protection provided by the discharge injunction "furthers one of the primary purposes of the Bankruptcy Code – that the debtor have the opportunity to make a

[5] The automatic stay of acts to recover prepetition claims against a debtor terminates when a chapter 7 discharge is granted. *See* 11 U.S.C. § 362(c)(2)(C).

'financial fresh start'." *Green v. Welsh*, 956 F.2d 30, 33 (2d Cir. 1992) (quoting *In re Jet Florida Sys., Inc.*, 883 F.2d 970, 972 (11th Cir. 1989)).

Alleged violations of the discharge injunction are addressed through contempt proceedings. *See Pertuso*, 233 F.3d at 421-22 (holding that there is no private right of action for violation of the § 524 discharge injunction). Contempt in this context means the knowing violation of the discharge injunction (a specific court order) and it must be established by clear and convincing evidence. *See In re Walker*, 257 B.R. 493, 497-98 (Bankr. N.D. Ohio 2001) (discussing civil contempt in the Sixth Circuit). A number of different sanctions are available to deal with a creditor's knowing violation of a debtor's discharge. *Id.* (discussing appropriate contempt sanctions). A debtor who is injured by a willful violation of the discharge injunction may be awarded actual damages including attorney fees as a contempt sanction. *See In re Miller*, 247 B.R. 224, 228 (Bankr. E.D. Mich. 2000), *aff'd* 282 F.3d 874 (6th Cir 2002). The imposition of punitive damages may also be appropriate. *See In re Perviz*, 302 B.R. 357, 372 (Bankr. N.D. Ohio 2003).

* * * * *

In this case, the credit union knew that the debtor had filed for protection under the bankruptcy laws and that she had reaffirmed only two of her five loans. Nevertheless, the board continued to demand that the debtor pay the prepetition loans that she had not reaffirmed. The demands continued even after the debtor received her discharge and the credit union had been notified of that fact. All of the demands were tied to a threat that the debtor would lose her job if she did not make the payments. Through these actions, the credit union violated both the automatic stay and the discharge injunction. The credit union, therefore, is found to have

willfully violated the automatic stay and is found to be in contempt of the discharge order. Based on these findings, an award of damages under § 362(h) and the imposition of a contempt sanction are appropriate.

The debtor is entitled to damages caused by the credit union's actions. She asks for actual damages of $6,582.38, punitive damages, and attorney's fees. The credit union did not challenge the $6,582.38 calculation, which is the amount the debtor paid postpetition on the debts she did not reaffirm. That amount will be awarded as actual damages. The debtor did not introduce any evidence of her attorney's fees and no award will be made based on the lack of evidence.

The remaining issue is whether punitive damages should also be awarded. Punitive damages may be appropriate when a creditor has acted: (1) with actual knowledge or reckless disregard that it is violating the automatic stay; (2) with maliciousness or bad faith; or (3) in clear defiance of a debtor's rights. *See In re Dunning*, 269 B.R. 357, 363 (Bankr. N.D. Ohio 2001) (discussing a line of cases concluding that punitive damages are appropriate in such circumstances). *See also, Archer v. Macomb County Bank*, 853 F.2d 497, 500 (6th Cir. 1988) ("If the bankruptcy court believes that the amount of such actual damages is insufficient to deter the kind of deliberate and repeated violations of the automatic stay which are evident in this case, the bankruptcy court is free to impose an appropriate amount of punitive damages."). These additional considerations have been applied to determine whether punitive damages should be awarded: (1) the degree of reprehensibility of the creditor's conduct; (2) the ratio between the actual damages and the punitive damage award; and (3) the civil penalties authorized or imposed for comparable conduct. *See Varela v. Ocasio (In re Ocasio)*, 272 B.R.815, 825 (B.A.P. 1st Cir.

2002) (applying the guideposts regarding punitive damage awards provided by the Supreme Court in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996) in the context of an award under § 362(h) of the bankruptcy code); and *Perviz*, 302 B.R. at 374 (applying the same considerations in the context of an award of punitive damages as a sanction for contempt of the discharge injunction).

In analyzing the issue of punitive damages, the court considers these facts to be particularly relevant: Despite actual knowledge of the debtor's bankruptcy filing, the board made repeated demands over a series of months that the debtor repay loans she had not reaffirmed; it denied the debtor the peace of mind that the automatic stay and the discharge injunction are intended to give to a person who legitimately invokes protection under the bankruptcy laws; although the credit union had bankruptcy counsel, it apparently did not ask the attorney's advice about how to proceed in this situation, and the credit union did not follow its own procedures in writing off loans after a member files for bankruptcy. These circumstances warrant an award of punitive damages equal to the amount of actual damages, or $6,582.38.

CONCLUSION

For the reasons stated, the debtor's motion is granted and Health Associates Credit Union is found to have willfully violated the automatic stay and to be in contempt of court for violating the discharge injunction. The debtor is awarded $6,582.38 in actual damages and $6,582.38 in punitive damages. A separate order will be entered reflecting this decision.

Date: 9 September 2004

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

Served by clerk's office email and the Bankruptcy Noticing Center on:

Joseph McCafferty, Esq.
Julie Juergens, Esq.

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 02-19186
	)	
LINDA FAYE BRAGG,	)	Chapter 7
	)	
Debtor.	)	Judge Pat E. Morgenstern-Clarren
	)	
	)	**ORDER**

For the reasons stated in the memorandum of opinion issued this same date, the debtor's motion to find creditor Health Associates Credit Union in contempt of court for violating both the automatic stay and the discharge injunction is granted. (Docket 42). The debtor is awarded $6,582.38 in actual damages and $6,582.38 in punitive damages.

IT IS SO ORDERED.

Date: 9 September 04

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

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