The court incorporates by reference in this paragraph and adopts as the findings and analysis of this court the document set forth below. This document has been entered electronically in the record of the United States Bankruptcy Court for the Northern District of Ohio.

Dated: June 26 2006

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No.: 05-75354
	)	
Stacy Duling,	)	Chapter 7
	)	
Debtor,	)	Adv. Pro. No. 06-3010
	)	
Stacy Duling,	)	Hon. Mary Ann Whipple
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
First Federal Bank of the Midwest,	)	
	)	
Defendant,	)	

MEMORANDUM OF DECISION

This adversary proceeding is before the court after trial on Plaintiff's complaint alleging a

willful violation of the automatic stay under 11 U.S.C. §362(h)[1] against First Federal Bank of the Midwest. The court has jurisdiction over this adversary proceeding under 28 U.S.C. §1334(b) and the general order of reference entered in this district. Proceedings to determine whether the automatic stay has been violated are core proceedings that this court may hear and determine. 28 U.S.C. §157(b)(1) and (b)(2); *see In re Bunting Bearings*, 302 B.R. 210, 213 (Bankr. N.D. Ohio 2003).

This Memorandum of Decision constitutes the court's findings of fact and conclusions of law under Fed. R. Civ. P. 52, made applicable to this adversary proceeding by Fed. R. Bankr. P. 7052. Regardless of whether specifically referred to in this Memorandum of Decision, the court has examined the submitted materials, weighed the credibility of the witnesses, considered all of the evidence, and reviewed the entire record of the case. Based upon that review, and for the reasons discussed below, Plaintiff is entitled to judgement in her favor in the amount of $750.

FINDINGS OF FACT

On September 24, 2003, Plaintiff entered into an agreement for a signature loan with Defendant for a principle balance of $8,751.84. [Pl. Ex. 1]. On October 14, 2005, Plaintiff filed a petition for relief under Chapter 7 of the Bankruptcy Code. On October 30, 2005, Defendant, First Federal Bank ("Bank"), was served notice of Plaintiff's bankruptcy by the Clerk of this court, via first class mail sent to P.O. Box 248, Defiance, OH 43512-0248. [Pl. Ex. 5]. Michael Mulford

[1]Section 362 was amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA" or "the Act"), effective October 17, 2005. However, Plaintiff's bankruptcy case was filed before the effective date of the Act. Therefore, all references to the Bankruptcy Code in this opinion are to the pre-BAPCPA version of the Code. *See* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Title XV, § 1501(b)(1) (stating that, unless otherwise provided, the amendments do not apply to cases commenced under Title 11 before the effective date of the Act).

("Mulford"), Senior Vice President for First Federal Bank, confirmed this address to be correct and testified that it serves as the centralized collections location for the bank.

Mulford testified that he requested that Roger Miller ("Miller"), an attorney, file a complaint in state court ("complaint") against Plaintiff for non-payment of her loan. The complaint was filed by Miller on November 30, 2005. [Pl. Ex. #2] Both Miller and Mulford testified that they were personally unaware of Plaintiff's bankruptcy status on November 30, 2005. Plaintiff testified that in December 2005, she received notice of the complaint and was also notified by a publication of the suit in the local newspaper. Subsequently, Plaintiff contacted her attorney's office regarding the complaint.

Miller testified that his office received a message from Plaintiff's attorney's office on December 20, 2005, regarding the "Duling case", but that this message did not mention anything about a bankruptcy proceeding. Miller was out of the office until December 29th, 2005 and did not return the call until after he received an answer to the complaint on January 3, 2006. Miller stated that the answer included a reference to a Bankruptcy Code section which prompted him to ask about Plaintiff's bankruptcy status. Mulford testified that Miller then contacted him inquiring if he was aware of Plaintiff's bankruptcy proceeding. Mulford testified that he checked Plaintiff's file and spoke with the collections department to see if they had received notice of the bankruptcy filing, but that he found no such evidence. Miller and Mulford then decided that if bankruptcy had been filed, the complaint should immediately be dismissed. On January 4, 2006, Miller called Plaintiff's attorney's office to get the bankruptcy case number. Miller testified that he told the person he spoke with that he would confirm the case number and then dismiss the complaint. Plaintiff filed this Adversary Proceeding on January 5, 2006. After confirming the case number, Miller dismissed the

state court collection lawsuit on January 9, 2006. Miller testified that efforts to settle this adversary proceeding were then made by Defendant, without success.

LAW AND ANALYSIS

Plaintiff alleges that Defendant violated the automatic stay by continuing to pursue collection of the loan through the suit in state court. Defendant counters that a violation of the stay did not occur because they were never notified of the bankruptcy filing, and in the alternative, if they were notified, the only action taken was filing of the complaint, which was dismissed once the bankruptcy was verified.

I. Notification

The Supreme Court has stated that once mailed to the correct address, a letter is presumed to be received. *Hagner v. United States*, 285 U.S. 427, 430 (1932); *Simpson v. Jefferson Standard Life Ins.*, 465 F.2d 1320, 1322 (6th Cir. 1972). In his testimony, Mulford verified that the bank's address to which notification of Plaintiff's bankruptcy was mailed was correct. That address served as the main office for collections operations, which would have handled the bankruptcy notification. As such, the burden was on Defendant to prove that the notification was not received. *Hagner*, 285 U.S. at 431. Defendant, however, presented no evidence that the notification was improperly mailed, or was not received. The court finds Mulford's testimony regarding the failure to find the notification insufficient to rebut the presumption that once mailed, receipt is established. The notification was not mailed to Mulford personally, thus, his testimony regarding non-receipt is not enough to overcome the presumption without additional evidence. It is therefore presumed assumed that since the notification was sent to the correct address, as verified by Mulford, the notification was received by Defendant.

II. Willful Violation of the Automatic Stay

A statutory automatic stay arises upon the filing of a bankruptcy petition. 11 U.S.C. §362(a). To enforce creditor compliance with the automatic stay, the Bankruptcy Code provides that "[a]n individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorney's fees, and, in appropriate circumstances, may recover punitive damages." 11 U.S.C. § 362(h). In order to prevail on a § 362(h) claim, a plaintiff must prove, by a preponderance of the evidence, that the stay imposed under § 362 was violated, that the violation was committed willfully, and that Plaintiff was injured by the violation. *In re Skeen*, 248 B.R. 312, 316 (Bankr. E.D. Tenn 2000). Defendant does not contest that it violated the automatic stay, *see* 11 U.S.C. § 362(a)(1),(6), but disputes that the violation was willful.

Defendant claims that if it received the notice, it was mishandled, and thus, the violation of the automatic stay was not willful. The overwhelming weight of authority, which this court finds persuasive, embraces a broad construction of the term "willful" and holds that a willful violation occurs when a party acts deliberately with knowledge of the debtor's bankruptcy petition. *E.g.*, *Fleet Mortg. Group, Inc. v. Kaneb*, 196 F.3d 265, 269 (1st Cir. 1999); *Crysen/Montenay Energy Co. v. Esselen Assoc., Inc. (In re Crysen/Montenay Energy Co.)*, 902 F.2d 1098, 1105 (2d Cir. 1990); *Lansdale Family Rest., Inc. v. Weis Food Serv. (In re Lansdale Family Rest., Inc.)*, 977 F.2d 826, 829 (3d Cir. 1992); *Knaus v. Concordia Lumber Co. (In re Knaus)*, 889 F.2d 773, 775 (8th Cir. 1989); *Eskanos & Adler, P.C. v. Leetien*, 309 F.3d 1210, 1215 (9th Cir. 2002); *Hardy v. United States (In re Hardy)*, 97 F.3d 1384, 1390 (11th Cir. 1996); *TransSouth Fin'l Corp. v. Sharon (In re Sharon)*, 234 B.R. 676, 687 (B.A.P. 6th Cir. 1999); *Davis v. Conrad Family Ltd. P'ship (In re Davis*), 247 B.R. 690, 698 (Bankr. N.D. Ohio 1999); *In re Johnson*, 253 B.R. 857, 861 (Bankr. S.D.

Ohio 2000); *In re Sielaff*, 164 B.R. 560, 568-69 (Bankr. W.D. Mich. 1994); *In re Gagliardi*, 290 B.R. 808, 818 (Bankr. D. Colo. 2003). *But see Kolberg v. Agricredit Acceptance Corp. (In re Kolberg)*, 199 B.R. 929, 933 (W.D. Mich. 1996) (stating that "most courts have held that a willful violation requires proof that the creditor demonstrated 'egregious, intentional misconduct'" but citing only cases applying that standard to punitive damages). Willfulness does not require that the creditor intend to violate the automatic stay provision, *Kaneb*, 196 F.3d at 269, rather it requires that acts which violate the stay be intentional, *Lansdale Family Rest., Inc.*, 977 F.2d at 829; *Skeen*, 248 B.R. at 317. A willful violation thus occurs "when the creditor knew of the stay and violated the stay by an intentional act." *Sharon* , 234 B.R. at 687. Indeed, "where the creditor received actual notice of the automatic stay, courts must presume that the violation was deliberate." *Kaneb*, 196 F.3d at 269.

In this case, the court has determined that Defendant received actual notice of the commencement of the case and the resulting imposition of the automatic stay because the court's notice of Plaintiff's bankruptcy was mailed to the correct address. When Mulford requested that Miller file a complaint against Plaintiff, that act was intentional on the part of Defendant. The violation of the automatic stay, therefore, was a willful violation.

III. Damages

Having found the Defendant's violation of the stay to be willful, § 362(h) mandates the award of actual damages, including as an express statutory element thereof costs and attorney's fees, caused by the violation. *In re Daniels*, 316 B.R. 342, 354 (Bankr. D. Idaho 2004). The Code also states that "in appropriate circumstances, [the Plaintiff] may recover punitive damages." 11 U.S.C. § 362(h). As the party seeking recovery, Plaintiff has the burden of proving entitlement to damages.

Sharon, 234 B.R. at 687.

In this case, Plaintiff seeks both actual damages and punitive damages. The only actual damages she proved at trial were attorney's fees incurred in responding to the state court action after the December 20, 2005, call from her lawyer's office to Miller did not get returned before it was necessary to answer the complaint. Plaintiff did not identify any other monetary injury that she incurred as a result of the violation.

Plaintiff testified that she was embarrassed to be sued and then have notice of the suit show up in the local newspaper. The case law conflicts on whether emotional distress damages are recoverable under § 362(h). *Compare Aiello v. Providian Fin. Corp.*, 239 F.3d 876, 879-80 (7th Cir. 2001) and *United States v. Harchar (In re Harchar)*, 331 B.R. 720, 728 (N.D. Ohio 2005)(emotional distress damages not allowed under § 362(h)) *with Dawson v. Wash. Mut. Bank (In re Dawson)*, 390 F.3d 1139 (9th Cir. 2004)(emotional distress damages allowed under § 362(h)). There is no binding Sixth Circuit precedent on this point. But the court need not decide that question here, because even if such damages are recoverable, Plaintiff has not sustained her burden of proving entitlement to damages for emotional distress in this case.

Even those courts that allow recovery of damages for emotional distress as actual damages under § 362(h) make it clear that not every willful violation of the stay merits an award of such damages. *See, e.g., Dawson,* 390 F.3d at 1149; *Kaneb*, 196 F.3d at 269; *In re Perviz,* 302 B.R. 357, 371 (Bankr. N.D. Ohio 2003); *Johnson*, 253 B.R. at 862; *United States v. Flynn (In re Flynn)*, 185 B.R. 89, 93 (S.D. Ga. 1995); *In re Briggs*, 143 B.R. 438, 463 (Bankr. E.D. Mich. 1992). The Ninth Circuit held that a plaintiff must "(1) suffer significant harm, (2) clearly establish the significant harm, and (3) demonstrate a causal connection between that significant harm and the

violation of the automatic stay..." *Dawson*, 390 F.3d at 1149. Medical evidence is not necessary to prove damages for emotional distress. *Kaneb*, 196 F.3d at 269-70; *Perviz*, 302 B.R. at 371; *Flynn*, 185 B.R. at 93. And as explained by the Ninth Circuit, emotional distress damages may be established in several different ways, including corroborating medical evidence, non-expert testimony by family members, friends or coworkers regarding manifestations of mental anguish or, in some cases, by the facts of the case where it is obvious that a reasonable person would suffer significant emotional harm. *Dawson*, 390 F.3d at 1149-50. In any case, something more than a plaintiff's own vague and conclusory testimony is necessary to sustain the burden of proving such damages. *Briggs*, 143 B.R. at 463. Plaintiff's testimony as to her embarrassment was conclusory and unpersuasive, showing at most some vague discomfort over having her name in the newspaper in a context suggesting that she was not paying her bills. However, she also admitted that her level of embarrassment was no different than the general embarrassment that she already felt in acknowledging that she really could not pay her bills and had to file bankruptcy. Plaintiff has not proved that she sustained damages arising from significant emotional distress.

Plaintiff's exhibits show that she incurred attorney's fees in the amount of $2,318.75 through March 29, 2006. [Pl. Ex. 4]. Courts making fee awards under § 362(h), while there is little statutory guidance, have traditionally applied a reasonableness standard. *See, e.g., Eskanos & Adler, P.C. v. Roman (In re Roman)*, 283 B.R. 1, 11 (B.A.P. 9th Cir. 2002) ("Section 362(h) provides little guidance regarding the applicable standards for awarding actual damages. Nonetheless, most courts apply a reasonableness analysis.") When determining if the amount requested for attorney's fees is reasonable, the court will apply the "lodestar" method of calculation that is endorsed by the Supreme Court and the Sixth Circuit under numerous other federal fee shifting statutes. *See Reed v. Rhodes*,

179 F.3d 453, 471 (6th Cir. 1999) (citing *Hensley v. Eckerhart,* 461 U.S. 424, 432 (1983) and employing the lodestar method in determining an award of attorney fees in a civil rights case). In this instance, it is not the method or hourly rate used in determining the attorney's fees that is unreasonable, but rather the extent of the charges that is unreasonable. On January 4, 2006, the day before this adversary proceeding was filed, Plaintiff's attorney's office was notified that the complaint would be dismissed as soon as the bankruptcy case was verified. Courts have ruled in a manner that requires the debtor to mitigate damages in order for attorney's fees to be reasonable, in fact "courts especially scrutinize cases where the debtor's only injuries are those incurred in litigating the motion for sanctions, and where there exist no circumstances warranting punitive damages." *Roman,* 283 B.R. at 12. In this case, there was an opportunity to mitigate damages after Plaintiff's attorney was notified that the bankruptcy case would be verified and the complaint would be dismissed. Only fees incurred up to that date, January 4, 2006, were reasonably incurred. Attorney's fees up to January 4, 2006, total $750, which is the amount Plaintiff will be awarded. [Pl. Ex. 4].

Plaintiff also requests, and § 362(h) gives the court discretionary authority to award, punitive damages. Punitive damages are not automatically awarded for every § 362(h) violation, but may be awarded "in appropriate circumstances." 11 U.S.C. § 362(h). Many courts have adopted the standard in *Wagner v. Ivory (In re Wagner),* 74 B.R. 898 (Bankr. E.D. Pa. 1987), to determine when appropriate circumstances exist:

> Punitive damages are awarded in response to particularly egregious conduct for both punitive and deterrent purposes. Such awards are 'reserved... for cases in which the defendant's conduct amounts to something more than a bare violation justifying compensatory damages or injunctive relief.' To recover punitive damages, the defendant must have acted with actual knowledge that he was violating the federally protected right or with reckless disregard of whether he was doing so.

Wagner, 74 B.R. at 903 (quoting *Cochetti v. Desmond*, 572 F.2d 102, 106 (3d Cir. 1978)). Other cases have required "an arrogant defiance of the federal law demonstrated." *Matter of Mullarkey*, 81 B.R. 280, 284 (Bankr. D.N.J. 1987). Bankruptcy courts in this circuit have not awarded punitive damages without exacerbated circumstances. *Johnson*, 253 B.R. at 861-62; *In re Flack* ,239 B.R. 155, 163 (Bankr. S.D. Ohio 1999); *In re Seal*, 192 B.R. 442, 456 (Bankr. W.D. Mich. 1996).

This court finds that punitive damages are not appropriate in this case. Plaintiff did not meet her burden of proving that Defendant acted out of "egregious conduct" rather than a simple mistake involving a mishandled notice of bankruptcy. Mulford's testimony showed that the Bank is cognizant of the import of the automatic stay and has procedures for handling notices of bankruptcy filings in place. Those procedures did not work in this case, but that hardly amounts to an egregious or reckless disregard of the automatic stay on these facts. When counsel realized the mistake, it was promptly rectified and efforts to compensate Plaintiff attempted. These circumstances do not add up to punitive damages.

CONCLUSION

For the foregoing reasons, the court finds that Plaintiff is entitled to judgement on the complaint in her favor and against First Federal Bank of the Midwest in the amount of $750. The court will enter a separate judgement in accordance with this Memorandum of Decision.