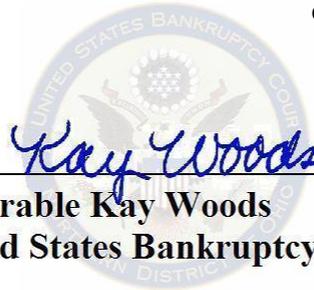


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CLERK U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
YOUNGSTOWN

IT IS SO ORDERED.



Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

KATRINA F. MONTERO and
JOSE L. MONTERO,

Debtors.

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* CASE NUMBER 08-43019
*
* CHAPTER 7
*
* HONORABLE KAY WOODS
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MEMORANDUM OPINION REGARDING MOTION
FOR ISSUANCE OF ORDER TO SHOW CAUSE

This cause is before the Court on Motion for Issuance of Order to Show Cause ("Show Cause Motion") (Doc. # 8), which was filed by Debtors Katrina F. Montero and Jose L. Montero ("Debtors") on October 21, 2008. The Show Cause Motion requests this Court to issue an Order requiring the Youngstown Water Department ("Water Department") to appear and show cause why it should not be held in civil contempt for violation of 11 U.S.C. § 366. On October 22, 2008, the Court entered Order (i) Setting Hearing on Motion for

Issuance of Order to Show Cause and (ii) Requiring Representative of Youngstown Water Department to Appear at Hearing (Doc. # 9).

The Court held a preliminary hearing on October 30, 2008, at 9:30 a.m. Appearing at the preliminary hearing were Debtors, counsel for Debtors, counsel for the Water Department, and two representatives from the Water Department. It appearing to the Court that the issue(s) to be resolved required an evidentiary hearing, the Court set the matter for further hearing ("Hearing") on November 3, 2008, at 9:30 a.m.

At the Hearing, Debtors were present and represented by Rick Pluma. The Water Department was represented by Dan T. Pribich, Deputy Law Director for City of Youngstown. The Court received testimony from both Debtors and five witnesses for the Water Department. The Court also admitted into evidence, without objection, three exhibits offered by the Water Department.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the general order of reference (General Order No. 84) entered in this district pursuant to 28 U.S.C. § 157(a). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(1) and (b)(2)(A). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052. This Opinion is based upon the testimony of the witnesses, the admitted exhibits, representations and arguments of counsel at the Hearing, and the entire docketed record in this case, whether or not specifically referenced herein.

I. ISSUE TO BE DETERMINED

The only issue for the Court to determine is whether any action taken by the Water Department violated the automatic stay in 11 U.S.C. § 362. If the Court finds a violation, the next inquiry is whether such action was willful.

II. FINDINGS OF FACT

The following relevant facts come from the testimony of the seven witnesses at the Hearing.

1. Debtors currently live at 560 Detroit Avenue, Youngstown, Ohio ("Residence"), which is where they have resided for approximately eight years.
2. Since January 2008, Debtors have been delinquent in paying the Water Department for use of city water. Debtors concede that they received notices at the bottom of billing statements that water service to the Residence could be disconnected for failure to pay the past due balance.
3. The Water Department terminated water service to the Residence on October 17, 2008. There was disputed testimony about whether this was the first time the Water Department terminated service at the Residence. Debtors insist that the October 17 shutoff was the first time water service was terminated, but William Harris, Turnkey for the Water Department, testified that he shut off water at the Residence on January 8, 2008, and that the City never re-established service thereafter.

4. Mrs. Montero testified that a "final notice"¹ had been placed on the front door to the Residence on September 26, 2008. A second notice was left on September 29, 2008, which stated the Water Department had been out with the police and that prosecution² could result.
5. Debtors filed their voluntary chapter 7 bankruptcy petition on October 20, 2008, at 10:37 a.m. ("Petition Date").
6. Mrs. Montero testified that her attorney faxed notice of Debtors' bankruptcy to the Water Department at approximately 10:47 a.m. on the Petition Date.³
7. Two of the witnesses for the Water Department - John Casciano, Commissioner of Water, and Candace Norwood, Turnkey Supervisor - testified that the Water Department did not receive any fax notification concerning Debtors' bankruptcy. Mr. Casciano testified that the Water Department first received notice of Debtors' bankruptcy on October 21, 2008, at approximately 2:30 p.m.

¹ There was no testimony concerning the content of the final notice.

² There was no testimony concerning the content of this second notice. Nor was there any testimony concerning the offence for which Debtors could be prosecuted. Mrs. Montero's testimony concerning potential prosecution, however, gives credence to the Water Department's contention that water service to Debtors' Residence had been illegally turned on after disconnection by the City in January 2008.

³ Although there was no objection to this testimony as hearsay, it does not appear that Mrs. Montero had actual knowledge about whether notice of Debtors' bankruptcy was sent to the Water Department by fax. Debtors presented no evidence that a fax was sent in the form of a confirmation sheet or testimony of the person who sent the fax.

Exhibit 2, which is the Water Department's file regarding Debtors' account, shows an entry was made on October 21, 2008, at 3:48 p.m. that Debtors filed a chapter 7 case on October 20, 2008.

8. Mrs. Montero testified that she called the Water Department the afternoon of October 20, 2008, and was told that the Water Department had not received "anything to reconnect water" to Debtors' residence. She called again the morning of October 21, 2008, and was told that the Water Department still had not received any information.
9. On the afternoon of October 21, 2008, after she became aware that the Water Department was at the Residence with a bulldozer, Mrs. Montero went to her attorney's office, obtained the necessary paperwork and hand delivered it to the Water Department.
10. Mrs. Montero stated that, when she was at the Water Department on the afternoon of October 21, she was given several different reasons why she had to pay a fee in excess of \$700. One of those reasons was that there was lead in the water line to Debtors' Residence. Debtor was also told that the water was being used illegally because service had been shut off by the Water Department and turned on without authorization.
11. Mrs. Montero testified that she was directed to call the construction department, which informed her that the

water line had been crimped to shut off the water and that water service could not be restored until Debtors paid a fee of \$758.00.

12. On Wednesday, October 22, 2008, Mrs. Montero delivered \$820.00 to the Water Department to restore water service to the Residence. She was told at the time that it could take a few weeks to reconnect service.
13. The Water Department restored water service to the Residence on Monday, October 27, 2008.
14. Both Debtors testified that they had never turned on water service to their Residence and that they had never given access to anyone else to do so.
15. The City of Youngstown has published and set rates for water service. (See Ex. 3.) Mr. Casciano testified that Debtors were charged the applicable rates to reconnect water service and that no fee was imposed to collect any past due water bill. The fee to connect service within the city limits for a 3/4" line is \$780.00 (Ex. 3 at 3) and the "turn on/activation fee" for a city residence is \$40.00 (Ex. 3 at 5). The total amount of these fees is \$820.00.
16. Mr. Casciano testified that the City of Youngstown uniformly imposes fees from the published schedule and that anyone in the city would be required to pay the applicable fee in the fee schedule to have water service reconnected.

17. Exhibit 2 shows that water service to Debtors' Residence was disconnected on January 8, 2008, but consumption at Debtors' meter continued subsequent to that date. Mr. Casciano testified that this indicated someone illegally turned on water service to the Residence after it was disconnected by the City.
18. On October 21, 2008, Ryan Velk, Construction Foreman for the Water Department, went to the Residence, pursuant to a work order he had received that morning from his supervisor, Joe Dunlap. Mr. Velk testified that he saw evidence of tampering with the buried curb box for the water line to the Residence because the rod used to turn water service on and off was missing. Pursuant to the work order, he clamped the water line to terminate service to the Residence.
19. Mr. Velk returned to the Water Department after completing termination of water service at the Residence on October 21, 2008. Mr. Velk was in the office of Mr. Casciano at approximately 2:30 p.m. when Mr. Casciano received a telephone call that Debtors were at the Water Department with notice of their bankruptcy filing.
20. Joseph Dunlap, superintendent of construction, testified that the water line to the Residence had been clamped prior to receipt of information concerning Debtors' bankruptcy filing.

III. ANALYSIS

Section 362 of the Bankruptcy Code provides for an automatic stay when a bankruptcy petition is filed. With certain exceptions, this stay, is "applicable to all entities, of . . . (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title[.]" 11 U.S.C. § 362(a)(6) (West 2008). As the title to this section states, the stay imposed by § 362 is "automatic." The stay in § 362 comes into being and applies to the enumerated acts therein even if a creditor does not have notice of the bankruptcy filing.

The automatic stay extends to virtually all formal and informal actions against property of the bankruptcy estate. It is intended to "stop[] all collection efforts, all harassment, and all foreclosure actions." S. Rep. No. 989, 95th Cong., 2d Sess. 54, reprinted in 1978 U.S. Code Cong. & Admin. News 5787, 5840. The automatic stay "is effective upon the date of the filing of the petition. . . and formal service of process will not be required." 2 Collier on Bankruptcy ¶ 362.03 (15th ed. 1988) (footnotes omitted). Actions taken in violation of the automatic stay generally are void, even if the creditor had no notice of the stay. See, e.g., *In re Clark*, 60 B.R. 13, 14 (Bankr. N.D. Ohio 1986) (Creditor "had not known of Debtor's filing at the time of repossession but . . . it was, nonetheless, required to return the vehicle to Debtor."); *In re Advent Corp.*, 24 B.R. 612 (1st Cir. 1982) (acts in violation of automatic stay are void regardless of lack of knowledge); Collier, *supra*, ¶ 362.03 ("In general, actions taken in violation of the stay will be void even where there was no actual notice of the existence of the stay.").

Smith v. First Am. Bank, N.A. (In re Smith), 876 F.2d 524, 525-26 (6th Cir. 1989) (emphasis added). As a consequence, when the Water Department acquired notice of Debtors' bankruptcy filing does not

affect whether an act constitutes a violation of the stay. Notice, however, is important in determining if a violation of the stay was willful.

When Debtors filed their chapter 7 petition on October 20, 2008, the automatic stay took effect. As a consequence, the Water Department,⁴ as well as all of Debtors' other creditors, were required to refrain from taking any action that would violate the terms of § 362(a). Debtors assert that the Water Department violated the automatic stay by refusing to reconnect water service to the Residence after the Petition Date unless Debtors made an "immediate payment of \$700.00 as a reconnection fee." (Show Cause Motion ¶ 4.) The Water Department argues that the fees charged to Debtors subsequent to the Petition Date consisted of only those charges in the City's published rate schedule applicable for reconnection of the water line and activation of water service. The Water Department asserts that it took no action to collect any prepetition debt and that it did not discriminate against Debtors in requiring payment of \$820.00 (\$780.00 reconnection fee plus \$40.00 activation fee) prior to reconnecting water service to the Residence. Although there was no testimony about the amount of prepetition debt Debtors owe to the Water Department, Schedule F to Debtors' petition lists the Water Department as an unsecured

⁴The exceptions in § 362(b)(4) are not applicable even though the Water Department is a governmental unit. The conduct in question here is not encompassed within the exception of "commencement or continuation of an action or proceeding by a governmental unit. . . to enforce such governmental unit's or organization's police and regulatory power. . . ." 11 U.S.C. § 362(b) (West 2008).

creditor in the amount of \$ 758.82.⁵

As set forth below, based on the record in this case, the Court finds that the Water Department did not take any action that violated the automatic stay.

It is undisputed that the Water Department turned off water service to the Residence on October 17, 2008. Although there may be additional and/or other reasons why the Water Department terminated water service at the Residence, this Court finds that such termination constituted an act to collect on the past due and unpaid balance for use of water at the Residence. Termination of water service at the Residence, however, occurred prior to the Petition Date. As a consequence, termination of water service to the Residence on October 17, 2008, did not and could not constitute a violation of the automatic stay, because the stay was not then in effect.

Without question, the automatic stay was in effect on October 21, 2008 - the day after the Petition Date. Section 362 imposes the automatic stay when the debtor files a bankruptcy petition. 11 U.S.C. § 362 (West 2008). The stay, which is extremely broad, prevents any attempt to collect pre-petition debts. *Id.*; *In re Knaus*, 889 F.2d 773, 774 (8th Cir. 1989); *In re Goodfellow*, 298 B.R. 358, 361 (Bankr. N.D. Iowa 2003). Assuming, *arguendo*, that the Water Department did not have notice of Debtors' bankruptcy until

⁵Mrs. Montero testified that she was originally told by the Water Department that the reconnection fee would be \$758.00. This testimony differs from the amount alleged in the Show Cause Motion. It appears merely coincidental to the Court that Debtors' prepetition debt and the published fee to reconnect water service are similar in amounts.

the afternoon of October 21, 2008, it was still bound by the terms of the automatic stay as of the Petition Date. The next question is whether action by the Water Department in clamping the water line on October 21, 2008, violated the automatic stay.

There is no dispute that the City of Youngstown lawfully terminated water service to Debtors' Residence on October 17, 2008. Witnesses for the Water Department testified that clamping a water line is a last resort taken when water usage continues at a location without authorization after the Water Department turns off service to such location. The Water Department witnesses testified that tampering with the curb box had occurred at Debtors' Residence. Mr. Velk testified that he saw the rod to the curb box had been broken off, indicating that someone had tampered with the curb box to restore water service. The testimony of Mr. Harris and the Water Department's records both reflect that Mr. Harris terminated water service at the Residence on January 8, 2008. Despite the Water Department's termination of water service in January 2008, (i) Debtors testified that their water service had not been shut off prior to October 17, 2008, and (ii) the Water Department's records reflect use of water at the Residence after January 8, 2008. Although Debtors insist that neither they nor anyone at their direction illegally turned on water service at the Residence, their continued access to water after the Water Department terminated service in January 2008 was not explained.

The Court does not need to decide who may have tampered with Debtors' curb box. The Court finds that the Water Department did

terminate water service to Debtors' Residence on January 8, 2008, and that use thereafter was not authorized by a lawful connection from the Water Department. As a consequence, the Court further finds that the Water Department's clamping the water line on October 21, 2008, was not an act to collect a prepetition debt, but was, instead, an act to stop the unauthorized use of water at Debtors' Residence. Having clamped the water line to the Residence for reasons other than an attempt to collect a prepetition debt, the Water Department required Debtors to pay the applicable fees from the published fee schedule to reconnect and re-establish water service at the Residence. Nothing in § 362 prohibits the Water Department from collecting fees post petition for post petition services, such as reconnection of water service to the Residence. The Court find that the Water Department's requirement for Debtors to pay the \$780.00 reconnection fee and the \$40.00 activation fee, prior to re-establishing water service at the Residence, was not an attempt to collect a prepetition debt. The Court further finds that the fees were not imposed because of Debtors' bankruptcy case and that the Water Department would have required the same fees from anyone in the City of Youngstown for reconnection and activation of water service.

As set forth above, this Court finds and holds that the Water Department did not violate the automatic stay in 11 U.S.C. § 362 when it (i) clamped the water line to Debtors' Residence on October 21, 2008; and/or (ii) required Debtors to pay \$820.00 in fees to re-establish water service to the Residence. Accordingly, the Show

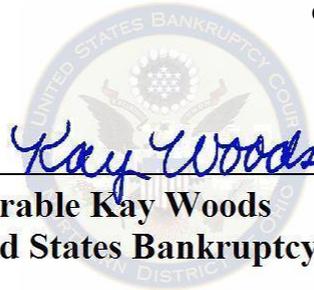
Cause Motion is denied. An appropriate Order will follow.

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CLERK U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
YOUNGSTOWN

IT IS SO ORDERED.



Honorable Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

KATRINA F. MONTERO and
JOSE L. MONTERO,

Debtors.

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*
* CASE NUMBER 08-43019
*
* CHAPTER 7
*
* HONORABLE KAY WOODS
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AMENDED ORDER FINDING NO VIOLATION OF THE AUTOMATIC STAY

For the reasons set forth in this Court's Memorandum Opinion entered on this date, the Court hereby finds that the City of Youngstown did not violate the automatic stay in 11 U.S.C. § 362 by clamping Debtors' water line on October 21, 2008 or by charging them a \$820.00 in fees for reconnection and reactivation of water service.

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