Dated: July 09 2010

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No.: 06-32488
	)	
Robert A. McCormick and Priscilla L. McCormick,	)	Chapter 13
	)	
	)	Adv. Pro. No. 10-3024
Debtors.	)	
	)	Hon. Mary Ann Whipple
Robert A. McCormick,	)	
	)	
Plaintiff,	)	
v.	)	
	)	
Rengel Law Office,	)	
	)	
Defendant.	)	

MEMORANDUM OF DECISION AND ORDER

This adversary proceeding is before the court on the parties' cross motions for summary judgment [Doc. ## 8 & 9], and their respective oppositions [Doc. ## 10 & 11]. Plaintiff and his wife are the Debtors in the underlying Chapter 13 case. In his complaint, Plaintiff seeks injunctive relief and damages under 11 U.S.C. § 362(k) for Defendant's alleged willful violation of the automatic stay in refusing to return funds garnished from Plaintiff's bank account during the pendency of his Chapter 13 bankruptcy case.

The district court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §1334(b) as a civil proceeding arising under title 11 and arising in a case under Title 11. This proceeding has been

referred to this court by the district court under its general order of reference. 28 U.S.C. § 157(a); General Order 84-1 of the United States District Court for the Northern District of Ohio. Proceedings to determine whether the automatic stay has been violated are core proceedings that the court may hear and determine. 28 U.S.C. § 157(b)(1) and (b)(2)(G) and (O); *In re Bunting Bearings,* 302 B.R. 210, 213 (Bankr. N. D. Ohio 2003). For the reasons that follow, the court finds that Plaintiff may not invoke the protections of the automatic stay with respect to Defendant's actions. The court will, therefore, grant Defendant's motion and deny Plaintiff's motion for summary judgment.

FACTUAL BACKGROUND

The following facts are not in dispute. Plaintiff and his wife ("Debtors") filed a joint petition for relief under Chapter 13 of the Bankruptcy Code on September 14, 2006. Defendant is not included as a creditor on their bankruptcy schedules. [Doc. # 8, Ex. A, Plf. Aff. ¶ 5]. On December 14, 2006, the court entered an order confirming Debtors' Chapter 13 plan, which provides for payment of not less than 100% of the claims of unsecured creditors. [*See* Case No. 06-32488, Doc. ## 2 & 20].[1] The deadline for filing a proof of claim in the underlying bankruptcy case for creditors that are not a governmental unit was January 16, 2007. [*Id.*, Doc. # 7]. Defendant did not file a proof of claim as it did not receive timely notice of the bankruptcy case. The Chapter 13 Trustee's Interim Report filed on October 17, 2007, in Plaintiff's bankruptcy case shows that unsecured creditors had already begun receiving disbursements from plan payments by that date. [*See id.*, Doc. ## 22 & 29].

Between February 7 and June 6, 2006, Plaintiff received representation regarding a legal matter by Thomas Lucas, an attorney at the Defendant law firm. [Doc. # 9, Ex. A, Lucas Aff., ¶¶ 1-4]. Throughout that time and thereafter, Defendant sent regular monthly billing statements to Plaintiff for thirty-one months. [*Id.* at ¶ 5]. Plaintiff never responded to those mailings and never made any payments to or payment arrangements with Defendant. [*Id.* at ¶ 7]. Eventually, on March 26, 2009, Lucas filed a complaint in the Sandusky Municipal Court against Plaintiff for the unpaid legal bill. The Sandusky Municipal Court's docket shows that the complaint was served on Plaintiff by certified mail that was signed for by Plaintiff. [*Id.* at ¶ 8 and attached Ex. E]. The case was set for hearing on May 4, 2009; however, Plaintiff did not appear and Defendant obtained a default judgment in the amount of $2,510.14. [*Id.* at ¶ 9].

On June 16, 2009, Lucas sent a letter to Plaintiff regarding the judgment and requested that Plaintiff

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[1] The court takes judicial notice of the contents of its case docket. Fed. R. Bankr. P. 9017; Fed. R. Evid. 201(b)(2); *In re Calder*, 907 F.2d 953, 955 n.2 (10th Cir. 1990); *St. Louis Baptist Temple, Inc. v. Fed. Deposit Ins. Corp.*, 605 F.2d 1169, 1171-72 (6th Cir. 1979) (stating that judicial notice is particularly applicable to the court's own records of litigation closely related to the case before it).

contact him to work out payment arrangements. [*Id.* at ¶ 10]. Plaintiff did not respond to the letter and, on October 8, 2009, Lucas filed an affidavit for attachment of funds at First National Bank where Plaintiff had an account. [*Id.* at ¶ 11 and attached Ex. E]. Plaintiff was served with the affidavit but did not contest the attachment. [*See id.*]. As a result, $612.83 was garnished from Plaintiff's bank account, which amount was received by the Sandusky Municipal Court on October 23, 2009, and of which $606.83 was disbursed to Lucas. [*See* Doc. # 9, Ex. E].

According to Plaintiff, he did not become aware of the garnishment until October 20, 2009, when his wife was unable to make a purchase, presumably with a debit card. [Plf. Aff. at ¶ 10]. He then notified his bankruptcy attorney of the garnishment. [*Id.* at ¶ 11]. On October 26, 2009, Plaintiff's attorney contacted Defendant and informed it that Plaintiff had filed a bankruptcy petition in September 2006 and that he would take the steps necessary to include Defendant as a creditor in Plaintiff's Chapter 13 case. [Lucas Aff. at ¶¶ 13-14]. He did not do so and, on January 4, 2010, Defendant was contacted by Plaintiff's attorney requesting terms for returning the garnished funds. [*Id.* at ¶ 17]. It is undisputed that Defendant has not returned the funds. [Doc. # 1, Complaint ¶ 9; Doc. # 4, Answer ¶ 9]. According to Lucas, attorneys at the Defendant law firm questioned whether any violation had occurred given the nearly three-year delay in receiving notice of Plaintiff's bankruptcy and, "without specialized knowledge of the bankruptcy code, [Defendant] could not learn with absolute certainty whether the funds were properly returned to the bank, to [Plaintiff], to [Plaintiff's attorney], to the bankruptcy trustee, or to some other entity." [*Id.*].

Plaintiff, for his part, avers that the failure to notify Defendant of the imposition of the automatic stay "was a result of [his] desire to ultimately pay the Rengel Law Office for services that it performed for [him]." [Plf. Aff. at ¶ 6-7]. He further states that he suffers from Post-Traumatic Stress Disorder ("PTSD") as a result of working for the Sandusky Fire Department and that one of the effects of the PTSD is a "fear of the unknown, including correspondence sent to [him] in the mail." [*Id.* at ¶¶ 8-9].

LAW AND ANALYSIS

I. Summary Judgment Standard

Under Rule 56 of the Federal Rules of Civil Procedure, made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7056, summary judgment is proper only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In reviewing a motion for summary judgment, however, all inferences "must be viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-88 (1986). The party moving for summary judgment always bears the initial responsibility of

informing the court of the basis for its motion, "and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits if any' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the moving party has met its initial burden, the adverse party "may not rest upon the mere allegations or denials of his pleading but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue for trial exists if the evidence is such that a reasonable factfinder could find in favor of the nonmoving party. *Id.*

In cases such as this, where the parties have filed cross-motions for summary judgment, the court must consider each motion separately on its merits, since each party, as a movant for summary judgment, bears the burden to establish both the nonexistence of genuine issues of material fact and that party's entitlement to judgment as a matter of law. *Lansing Dairy v. Espy*, 39 F.3d 1339, 1347 (6th Cir. 1994); *Markowitz v. Campbell* (*In re Markowitz*), 190 F.3d 455, 463 n.6 (6th Cir. 1999). The fact that both parties simultaneously argue that there are no genuine factual issues does not in itself establish that a trial is unnecessary, and the fact that one party has failed to sustain its burden under Rule 56 does not automatically entitle the opposing party to summary judgment. *See* 10A Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, *Federal Practice and Procedure: Civil 3d* § 2720 (1998).

II. Plaintiff Is Not Entitled to the Protections of the Automatic Stay

Under § 362(a), the filing of a voluntary bankruptcy petition operates as a stay of the commencement or continuation of a judicial proceeding against the debtor to recover a claim against the debtor that arose before commencement of the bankruptcy case and any act to collect a claim against the debtor that arose before the commencement of the case. 11 U.S.C. § 362(a)(1) and (6). In a Chapter 13 case the automatic stay of collection actions against the debtor relating to claims that arose before the commencement of the case continues until a discharge is granted or denied. 11 U.S.C. § 362(c)(1)(C).

The purpose of the stay is "to provide the debtor a 'breathing spell' from collection efforts and to shield individual creditors from the effects of a 'race to the courthouse,' thereby promoting the equal treatment of creditors." *In re Printup*, 264 B.R. 169, 173 (Bankr. E.D. Tenn. 2001). The stay applies whether or not a creditor has notice of the bankruptcy case. *In re Halas*, 249 B.R. 182, 191 (Bankr. N.D. Ill. 2000). Thus, when the creditor receives actual notice, it is the creditor's affirmative duty to reverse action taken that violated the stay before such notice was received. *In re Johnson*, 253 B.R. 857, 861 (Bankr. S.D. Ohio 2000); *In re Bennett*, 135 B.R. 72, 76 (Bankr. S.D. Ohio 1992)("a creditor who has violated the stay without knowledge of the bankruptcy has an affirmative duty to restore the status quo without the debtor having to apply to the court for relief").

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 attorneys' fees, and, in appropriate circumstances, may recover punitive damages." 11 U.S.C. § 362(k)(1).[2] While knowledge of the stay is irrelevant to a determination of whether a violation of the stay has occurred, a willful violation only occurs "when the creditor knew of the stay and violated the stay by an intentional act." *Sharon v. TranSouth Fin. Corp. (In re Sharon)*, 234 B.R. 676, 687 (B.A.P. 6th Cir. 1999).

In this case, Defendant did not willfully violate the automatic stay when it sent invoices to Plaintiff, when it commenced the collection action in Sandusky Municipal Court, when it took a default judgment against Plaintiff for the amount of the debt owed it by Plaintiff, or when it attached Plaintiff's bank account to collect the debt owed it. It is undisputed that Defendant did not have notice of Plaintiff's bankruptcy case when any of those events occurred. Although after it did receive notice, Defendant properly took steps to stop any further garnishments, it has failed to return the funds to Plaintiff that it received when the bank account was initially garnished. This failure is arguably a willful violation of the stay. *See In re Dungey,* 99 B.R. 814 (Bankr. S.D. Ohio 1989) (finding that creditor's refusal to return wages garnished postpetition represented a violation of the automatic stay).

Nevertheless, finding actions taken in violation of the stay to be voidable rather than void, the Sixth Circuit has adopted the view that the protections of § 362(a) are unavailable to a debtor "where the debtor unreasonably withholds notice of the stay and the creditor would be prejudiced if the debtor is able to raise the stay as a defense or where the debtor is attempting to use the stay unfairly as a shield to avoid an unfavorable result." *Easley v. Pettibone Mich. Corp.*, 990 F.2d 905, 911 (6th Cir. 1993); *see also In re Smith*, 876 F.2d 524 (6th Cir. 1989). In *Easley*, the court cautioned, however, that these "equitable exceptions" must be "applied sparingly." *Id.*

The court finds that the facts of this case fall squarely under the exceptions set forth in *Easley*. The undisputed evidence shows that Plaintiff intentionally failed to include Defendant as a creditor in his bankruptcy schedules. Plaintiff's asserted reason for not including Defendant notwithstanding, he was not at liberty to pick and choose which creditors will be included in his bankruptcy schedules and plan. *See In re Vigil*, 414 B.R. 743, 750 (Bankr. D.N.M. 2009). Plaintiff not only prevented Defendant from receiving

[2] Former § 362(h) was amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") and redesignated § 362(k). That subsection, however, was not otherwise amended in any respect relevant to this proceeding. The court, therefore, finds the pre-BAPCPA caselaw cited herein interpreting § 362(h) to be relevant in applying post-BAPCPA § 362(k).

notice of his bankruptcy case through the normal bankruptcy notification process, but he also failed to provide notification for nearly three years after the case was filed. During that time, Plaintiff received numerous billing statements and letters requesting that he make payment arrangements and was ultimately served with a complaint in Defendant's collection action in state court. However, he did not defend or otherwise respond to any of Defendant's attempts to collect its debt nor did he contact Defendant at any time prior to the garnishment of his account in order to inform Defendant of his bankruptcy case. Defendant was not so informed until after Plaintiff's account had been garnished. Under these circumstances, Plaintiff's three-year delay in providing Defendant notification of his bankruptcy case is grossly unreasonable.

Plaintiff's averment in his affidavit that his PTSD causes him to fear the unknown, "including correspondence sent to [him] in the mail" does not create a factual dispute regarding the unreasonableness of his failure to act. He does not aver that he did not open his mail or have anyone else open it, nor does he aver that he had no knowledge of Defendant's state court collection action. Moreover, even if he had no knowledge of the collection action, it was unreasonable to intentionally exclude Defendant from his bankruptcy schedules in the first place and to wait nearly three years before providing it the required notice. *See Mitchell v. Home Echo Club, Inc.*, Case No. 2:06-cv-0525, 2009 WL 1597901, 2009 U.S. Dist. LEXIS 55732 (S.D. Ohio June 4, 2009) (applying *Easley* and finding that the debtor unreasonably withheld notice of the automatic stay by not listing plaintiff in her bankruptcy schedules and by failing to inform her creditor's attorney of her bankruptcy after receiving the creditor's demand letter).

In the meantime, Defendant not only expended time and money in attempting to collect the debt owed by Plaintiff that it would not have expended had it timely been made aware of Plaintiff's bankruptcy case and the imposition of the automatic stay, it also has been excluded from distributions to unsecured creditors already made and those to be made by the Trustee pursuant to Plaintiff's Chapter 13 plan. And the time for filing a proof of claim in Plaintiff's underlying Chapter 13 case has now long expired. On these undisputed facts, the court finds that Defendant would be prejudiced if Plaintiff is able to raise the stay, in effect, as a defense to the garnishment of his bank account.

The court further finds on these facts that Plaintiff is unfairly using the automatic stay as a shield to escape the unfavorable consequences of his own failure to act in a reasonable manner. *See In re Printup*, 264 B.R. at 175-76 (denying request for damages against creditor and finding that debtor was not entitled to the protections of the automatic stay where she was using it to escape the unfavorable consequences of her own deceitful conduct).

CONCLUSION

Having found on the undisputed facts that Plaintiff may not invoke the protections of the automatic stay with respect to Defendant's actions, the court will grant Defendant's motion for summary judgment and will deny Plaintiff's motion for summary judgment.

THEREFORE, for the foregoing reasons, good cause appearing,

IT IS ORDERED that Defendant's motion for summary judgment [Doc. # 9] be, and hereby is, **GRANTED**; and

IT IS FURTHER ORDERED that Plaintiff's motion for summary judgment [Doc. # 8] be, and hereby is **DENIED.** A separate judgment in accordance with this Memorandum of Decision will be entered.