Dated: October 15 2010

Mary Ann Whipple
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

In Re:	)	Case No. 10-31639
	)	
Sharon Cox,	)	Chapter 7
	)	
Debtor.	)	Adv. Pro. No. 10-3191
	)	
Sharon Cox,	)	Hon. Mary Ann Whipple
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
PNC Financial Group, Inc.,	)	
	)	
Defendant.	)	

MEMORANDUM OF DECISION AND ORDER GRANTING MOTION FOR DEFAULT JUDGMENT

This adversary proceeding is before the court on Plaintiff's Motion for Default Judgment ("Motion"). [Doc. # 4]. Plaintiff is the Debtor in voluntary Chapter 7 Case No. 10-31639. In her Complaint, Plaintiff alleges a continuing violation of the automatic stay. [Doc. #1].

On July 2, 2010, the Clerk issued a Summons and Notice of Pre-Trial Conference [Doc. # 2]. The return on service [Doc. # 3] shows that the Summons and Complaint were duly and properly served on Defendant, sent by certified mail to the President of PNC Financial Group, Inc. The summons required an answer or other response to the Complaint to be filed by August 2, 2010, and scheduled a pretrial

conference. On August 24, 2010, the court held the scheduled pre-trial conference. There was no appearance by or on behalf of Defendant and no answer or other response to Plaintiff's Complaint had been served and filed. The Clerk entered Defendant's default [Doc. # 9] and Plaintiff accordingly filed her Motion for Default Judgment. The court scheduled a hearing, including to address damages, on the Motion, and notice of the hearing was duly and properly served on Defendant. [Doc. ## 5 & 6]. On September 21, 2010, the court held the hearing on the Motion. [Doc. # 12]. There was no appearance on behalf of Defendant and a review of the record shows no answer or other response to either the Complaint or to the Motion has been filed. Therefore, pursuant to Fed. R. Civ. P. 55, made applicable by Fed. R. Bankr. P. 7055, Plaintiff's Motion for Default Judgment will be granted.

The district court has jurisdiction over Plaintiff's underlying Chapter 7 bankruptcy case and this adversary proceeding as a civil proceeding arising under Title 11. 28 U.S.C. § 1334(a), (b). Plaintiff's Chapter 7 case and all proceedings arising under Title 11 or related to a case under Title 11, including this adversary proceeding, have been referred to this court for decision. 28 U.S.C. § 157(a) and General Order No. 84-1 entered on July 16, 1984, by the United States District Court for the Northern District of Ohio. This matter is a core proceeding that this court may hear and determine because it involves enforcement of the automatic stay pursuant to a cause of action stated in 11 U.S.C. § 362(k). 28 U.S.C. § 157(b)(2)(G) and (O).

Law:

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(k). In order to prevail on a § 362(k) 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. *See In re Skeen*, 248 B.R. 312, 316 (Bankr. E.D. Tenn 2000)(decided under § 362(h), which was renumbered as § 362(k) in 2005 and amended in ways not relevant in this adversary proceeding).

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.

Findings of Fact:

The court finds that notice, including the service of the Summons and Complaint and of the hearing on the Motion, has properly been given to Defendant. Service of the Summons and Complaint was duly and properly effected under Fed. R. Bankr. P. 7004(h). In further support that actual notice of these proceedings have been received by Defendant, the court notes that no notices or mailings to Defendant from the court have been returned to the Clerk. Thus, the court finds that Defendant has failed to appear, plead, or otherwise defend this action as required by the applicable rules of procedure.

The court finds that the well-pleaded factual allegations of the Complaint constitute a valid cause of action against Defendant under § 362(k). All of the facts properly alleged in the complaint are taken as true as a result of the default. Also, the court takes judicial notice of the docket and the case file in the underlying Chapter 7 case, which confirms that Defendant was properly served by first class United States mail sent on March 20, 2009, with notice of the commencement of Plaintiff's underlying Chapter 7 case and of the automatic stay. [Case No. 10-31639, Doc. # 7].

In the Complaint and exhibits attached thereto, Plaintiff alleged, and thus established, willful violations of the automatic stay that occurred after notice of the commencement of and during her Chapter 7 case through intentional continued collection efforts against Plaintiff with respect to pre-petition debt. Specifically, Plaintiff has a checking, savings and VISA credit card account at the Bank. On April 5, 2010, after the Bank received notice of Plaintiff's bankruptcy case and after the automatic stay was in effect, *see* 11 U.S.C. § 362(c), the Bank debited $237.00 from Plaintiff's checking account and applied it to the balance owed on her VISA account, triggering two "non-sufficient funds fees" of $34.00 each. The Bank has continued to debit amounts from Plaintiff's checking account each month thereafter, applying the funds to the balance owed on the VISA account, and intends to continue to do so until the VISA account is paid in full. [Doc. # 1, Complaint, ¶¶ 2, 4, 6-7]. On April 16, 2010, and again on May 14, 2010, Plaintiff's attorney sent letters to the Bank demanding that it cease all collection activity and return to Plaintiff the money it had already improperly collected. [*Id.* at ¶ 8]. Neither Plaintiff nor her attorney have received any response to those letters. [*Id.*].

Having found the Bank's violation of the stay to be willful, § 362(k) 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 Bankruptcy Code also states that "in appropriate circumstances, [the plaintiff] may recover punitive damages." 11 U.S.C. § 362(k). 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. In determining damages, the court credits Plaintiff's testimony offered at the hearing that the Bank has continued to debit her checking account on a monthly basis, applying the amounts debited to the balance owed to the Bank on Plaintiff's VISA account. Plaintiff testified that between April 5, 2010, and September 7, 2010, the Bank withdrew from her checking account the following amounts:

April 5, 2010	$237.00	
May 4, 2010	$234.00	[*See* Hrg. Ex. 2]
June 5, 2010	$236.00	
July 6, 2010	$227.00	
August 6, 2010	$227.00	
September 7, 2010	$224.00	[*See* Hrg. Ex. 1]
Total	$1,385.00	

These amounts were withdrawn from Plaintiff's account notwithstanding Plaintiff's telephone calls and her

attorney's letters to the Bank in an attempt to correct the situation. In addition, the Bank's April 5, 2010, withdrawal caused Plaintiff to incur overdraft fees in the amount of $68.00. At the hearing, Plaintiff also offered her attorney's affidavit concerning his fees and showing attorney fees incurred in responding to the Bank's stay violation in the total amount of $1,330.00. [Hrg. Ex. 3]. The court finds both the time expended to address the Bank's violation and the hourly rate of $175.00 upon which the fee calculation is based to be reasonable. *See, 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."); *Reed v. Rhodes*, 179 F.3d 453, 471 (6th Cir. 1999). Thus, the court finds from the testimony and documentary evidence offered at the hearing that the Bank's willful violation of the automatic stay has caused Plaintiff actual damages, including attorney fees, in the total amount of $2,783.00.

Plaintiff's Complaint also requests, and § 362(k) gives the court discretionary authority to award, punitive damages. Punitive damages are not automatically awarded for every § 362(k) violation, but may be awarded "in appropriate circumstances." 11 U.S.C. § 362(k). 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." *In re 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).

In this case, the Bank has continued to violate the automatic stay despite communications attempting to rectify the violation made directly by Plaintiff and by her attorney. The Bank is a large, sophisticated financial institution that is a creditor in many bankruptcy cases. It is troubling that this institution has not complied with one of the most fundamental protections provided to debtors under the Bankruptcy Code. It is also troubling because an individual who has sought the protection of the Bankruptcy Code is

particularly vulnerable to any financial misdeed. Most troubling, however, is the fact that the Bank has refused to rectify the violations even after the violations have been brought to its attention by both Plaintiff and her attorney. The court finds the Bank's continued violation constitutes, at a minimum, a reckless disregard as to the protection of the automatic stay. These facts, and the Bank's failure to respond either formally or informally to the letters of Plaintiff's attorney, lead the court to the conclusion that an award of punitive damages is not only appropriate but necessary in order to get this creditor's attention so as to correct this mater and to put adequate procedures in place to prevent further violations. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003) (stating that "[t]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct" and that whether the target of the conduct had "financial vulnerability" and whether the conduct involved repeated actions are factors to be considered in that determination). Plaintiff as the target of the conduct in this case is vulnerable because, and Bank appears to be taking advantage of the fact that, she also maintains bank accounts with it. The conduct involved is repeated and unexplained, and has caused material actual damages to Plaintiff. The court finds an award of punitive damages equal to three times the actual damages awarded, or $8,349.00, is an appropriate sanction to achieve both punishment as well as deterrence. *See id.* at 425 (stating that single-digit multipliers of four or less are "more likely to comport with due process," while still achieving the goals of deterrence and retribution).

THEREFORE, for the foregoing reasons, good cause appearing,

IT IS ORDERED that Plaintiff's Motion for Default Judgment [Doc. # 4] be, and hereby is **GRANTED**. A separate final judgment against Defendant in the total amount of $11,132 will be entered in accordance with this Memorandum of Decision.