

FILED
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF IOWA

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF IOWA

JUL 25 1995

In re: CHAPTER 7
BARBARA A. EVERLY, CLERK
MARK ALAN FRENCH, Bankruptcy No. 95-20770KD

Debtor.

JUDGMENT

This proceeding having come on for trial or hearing before the court, the Honorable Paul J. Kilburg, United States Bankruptcy Judge, presiding, and the issues having been duly tried or heard and a decision having been rendered,

IT IS ORDERED AND ADJUDGED that Debtor's Petition for Violation of Automatic Stay is GRANTED.

IT IS FURTHER ORDERED that the Court finds that Lois Nelson and The Store violated the automatic stay, § 362(a)(6), and are subject to sanctions pursuant to § 362(h).

IT IS FURTHER ORDERED that judgment shall enter in favor of Debtor Mark Alan French and against Lois Nelson and The Store in the amount of \$100 of actual damages and \$100 of punitive damages for a total judgment of \$200.

IT IS FURTHER ORDERED that judgment shall be enforceable by the Chapter 7 Trustee and payment shall be made to the Chapter 7 Trustee. See *In re Sechuan City*, 96 B.R. 37, 45 (Bankr. E.D. Pa. 1989).



[Seal of the U.S. Bankruptcy Court]
Date of Issuance: July 25, 1995

BARBARA A. EVERLY
Clerk of Bankruptcy Court

By: *Julie Hubbell*
Deputy Clerk

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF IOWA

JUL 25 1995

IN RE:)
) Chapter 7 BARBARA A. EVERLY, CLERK
MARK ALAN FRENCH,)
) Bankruptcy No. 95-20770KD
Debtor.)

**ORDER RE DEBTOR'S PETITION FOR
VIOLATION OF AUTOMATIC STAY**

On June 7, 1995, the above-captioned matter came on for hearing pursuant to assignment in Dubuque, Iowa. Debtor Mark Alan French appeared pro se. Also appearing was Lois Nelson, co-owner of a business establishment known as The Store in Elkader, Iowa. The matter before the Court is Debtor's Petition for Violation of Automatic Stay.

STATEMENT OF THE CASE

Debtor filed his Chapter 7 Petition on May 15, 1995. The Store is listed as an unsecured creditor with a claim in the amount of \$1,443.21. On May 26, 1995, Debtor filed a document requesting relief from the Court because of The Store's alleged violation of the automatic stay. He states that this creditor posted the notice of commencement of this bankruptcy case in the store window. He asserts that this violated the automatic stay and was intended to embarrass and discriminate against him based upon his Chapter 7 filing.

At the time of hearing, the Court placed both Debtor and Lois Nelson under oath. Debtor testified that he became aware of the location of this document in the store window through a friend. The friend asked Mrs. Nelson's daughter, who was working at the store at the time, why the sign was in the store window. Creditor's daughter replied that it was because of the debt owed by Debtor to The Store based on bad checks. Debtor took a series of pictures which reflect where the copy of the petition was located in the store window.

Mrs. Nelson testified that she is one of the co-owners of this business establishment with her husband. It is a convenience store which sells gas and some grocery items. According to Mrs. Nelson, Debtor did business there and had a substantial account for gas and other items. The claim of \$1,400 is approximately accurate. Mrs. Nelson indicated that Debtor had written a series of bad checks in conjunction with his obligations. She testified that apparently the copy of Debtor's bankruptcy petition was posted in the store window but she indicated, under oath, that she had no personal knowledge of it. She stated that she does go to the store every day and

works there. However, she denied knowledge of the document's presence in the window. Mrs. Nelson disclaimed any knowledge of whether her husband put it up. She stated that he was not present at the hearing because he was busy with other things on this date and was unable to attend. The notice sent out did not specifically require that he be here as it was addressed only to Mrs. Nelson.

The Store has only one window which is of picture window proportions. It is located next to the entrance door. The copy of the petition was displayed prominently in the window.

Mrs. Nelson testified, confirmed by Debtor, that shortly after this matter was set for hearing, the sign was taken down. Mrs. Nelson indicated that she took the sign down after she was made aware of its existence by the notice setting hearing. The Court indicated to Mrs. Nelson that the copy of the petition was not to be put back up in the window. The Court then took the matter under advisement to resolve these issues as to any possible sanctions.

CONCLUSIONS OF LAW

The automatic stay prohibits any entity from taking any action "to collect, assess, or recover a claim against the debtor that arose before the commencement of a case." 11 U.S.C. § 362(a)(6). The scope of the automatic stay is very broad. In re Knaus, 889 F.2d 773, 774 (8th Cir. 1989). Congress intended the automatic stay to stop "all collection efforts, all harassment, and all foreclosure actions" and "prevent creditors from attempting in any way to collect a prepetition debt." H.R. 595, 95th Cong., 1st Sess. § 340-42 (1977); In re Grau, 172 B.R. 686, 690 (Bankr. S.D. Fla. 1994).

Section 362(h) addresses sanctions for violations of the automatic stay. It provides as follows:

An 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.

A violation of the stay is "willful" where the violator's conduct is deliberate and done with knowledge of the bankruptcy filing. In re Dencklau, 158 B.R. 796, 800 (Bankr. N.D. Iowa 1993). "Appropriate circumstances" which would support an award of punitive damages include instances of egregious, intentional misconduct by the entity violating the stay. Knaus, 889 F.3d at 776.

One court has created a workable test to determine whether a creditor's actions constitute a violation of § 362(a)(6). In re Briggs, 143 B.R. 438, 453 (Bankr. E.D. Mich. 1992) (considering the issue in the context of the reaffirmation process). It states that creditor conduct violates § 362(a)(6)

only if the action (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 consider to be fair under the circumstances.

Id. The court noted that although it may have to contend with a slippery slope in applying the test, it is consoled in knowing it is at least on the right mountain. Id. n.23.

Based on the present facts, this Court has reviewed cases which consider whether conduct which harasses, embarrasses or shames a debtor violates the automatic stay. The Eighth Circuit noted in Knaus that a creditor's attempts to get a debtor excommunicated from his church might violate the stay of themselves but did not decide the issue because the parties had not addressed it. 889 F.2d at 776 n.2. In In re Sechuan City, Inc., 96 B.R. 37, 39 (Bankr. E.D. Pa. 1989), a hotel landlord posted the debtor's petition and other signs protesting the debtor's failure to pay rent in the hotel lobby which provided access to the debtor's restaurant business. Hotel employees testified that the postings were intended to shame and embarrass the debtor into paying prepetition rent. Id. The court concluded that posting such signs placed the debtor in the position of either paying the prepetition debt or losing business and violated § 362(a)(6) as an effort to coerce payment. Id. at 41. This Court in In re Olson, 38 B.R. 515, 518 (Bankr. N.D. Iowa 1984), held that a creditor's letter refusing to provide future medical services unless the debtor first paid prepetition debt likewise had no purpose other than collection of prepetition debt in violation of § 362(a)(6).

The court in Briggs demonstrated application of its test for finding a violation of § 362(a)(6) by stating that

any reasonable person would be offended by the notion that a creditor could, for example, make repeated late night phone calls to the debtor or threaten to place ads in the local newspaper calling the debtor a deadbeat as means of collecting a prepetition debt.

143 B.R. at 454. It stated that these examples constitute harassment or other forms of coercion that are unfair and violative of the automatic stay. Id. In In re Neal, 106 B.R. 90, 92 (Bankr. E.D.N.C. 1989), a creditor's husband crashed a

lawn party by driving a truck between the band and the guests for the purpose of humiliating the debtor in front of friends because of unpaid prepetition debts. The court held that even if the man did not voice a demand for payment, his conduct constituted harassment and intimidation to coerce payment in violation of the stay. *Id.*

Mrs. Nelson testified that she did not place the copy of the petition in her store window and had no knowledge of it being there until she got the notice of hearing. The Court can assess credibility based on the demeanor of the witness, the content of the testimony and the Court's own experience with the way people act. *In re Carrigan*, 109 B.R. 167, 170 (Bankr. W.D.N.C. 1989). This Court cannot accept Mrs. Nelson's version that she could work in The Store every day without noticing the sign in the window. Debtor's testimony that a friend, essentially a passerby, noticed the sign and elicited Mrs. Nelson's daughter's representation that the sign was placed in the window because of Debtor's bad checks is more credible. The Court concludes that Mrs. Nelson either placed the notice in the window or had knowledge that it was posted in The Store's window and is, therefore, responsible for its presence. This constitutes deliberate conduct with knowledge of the petition as defined in § 362(h).

Applying the *Briggs* test, the Court concludes that placing a copy of Debtor's petition in the store window would have a significant impact on Debtor's decision to repay the debt to The Store. Repaying the debt may well be the only action Debtor could take to avoid further humiliation and embarrassment caused by continuing the display of his status as a debtor. Any reasonable person would view this conduct as unfair under the circumstances. In this small town, displaying the petition in the window of The Store would necessarily shame and humiliate Debtor in front of his friends and neighbors.

There is no evidence that Mrs. Nelson directly demanded payment of Debtor's prepetition debt. However, like the debtor in *Sechuan City*, Debtor here was placed in the position of either paying the prepetition debt or continuing to suffer the humiliation and shame of having his status as a debtor flaunted to every customer of The Store in his small-town community. This constitutes the type of harassment and coercive conduct which Congress intended to prevent through the automatic stay.

While a mere communication of the fact of a debtor's bankruptcy petition or of a creditor's lending policies can be deemed informative and not coercive in violation of the automatic stay, the conduct in this case goes well beyond such a

benign purpose. See Brown v. Penn. State Employees Credit Union, 851 F.2d 81, 84 (3d Cir. 1988). This Court concludes that this conduct, under these facts, constitutes a violation of the automatic stay.

The types of damages which arise from an entity's violation of the automatic stay include actual damages, attorney fees, and punitive damages. 11 U.S.C. § 362(h). Debtor, having represented himself without an attorney, has incurred no attorney fees for which Mrs. Nelson may be liable. Actual damages may not be based on mere speculation, guess or conjecture. In re Flynn, 169 B.R. 1007, 1021 (Bankr. S.D. Ga. 1994). Courts have awarded damages for emotional distress or mental anguish for violations of the stay, even in the absence of expert medical testimony. Id. (awarding \$5,000 for actual damages due to emotional distress); Carrigan, 109 B.R. at 1070 (awarding \$1,000 to compensate for debtors' great fear, stress, anxiety, and humiliation). Punitive damages are appropriate where the violator's actions constitute egregious, intentional misconduct. Knaus, 889 F.2d at 776.

In light of the foregoing law and the surrounding circumstances, the Court concludes that Mrs. Nelson's conduct was a flagrant violation of the automatic stay which caused Debtor embarrassment, humiliation and shame. The Court concludes that this conduct constitutes an obvious attempt to punish Debtor for pursuing his rights under the Bankruptcy Code. See Knaus, 889 B.R. at 776. The natural consequence of this conduct was to oppress, harass and abuse Debtor, which requires imposition of some sanction. See Carrigan, 109 B.R. at 172. On the record presented, the Court concludes that Mrs. Nelson is liable for actual damages to compensate for causing Debtor humiliation and embarrassment in the amount of \$100. Furthermore, the Court awards punitive damages in the amount of \$100.

WHEREFORE, Debtor's Petition for Violation of Automatic Stay is GRANTED.

FURTHER, the Court finds that Lois Nelson and The Store violated the automatic stay, § 362(a)(6), and are subject to sanctions pursuant to § 362(h).

FURTHER, judgment shall enter in favor of Debtor Mark Alan French and against Lois Nelson and The Store in the amount of \$100 of actual damages and \$100 of punitive damages for a total judgment of \$200.

FURTHER, the judgment shall be enforceable by the Chapter 7 trustee and payment shall be made to the Chapter 7 trustee. See Sechuan City, 96 B.R. at 45.

SO ORDERED this 31 day of July, 1995.



Paul J. Kilburg
U.S. Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF IOWA

AUG 04 1995

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|-------------------|---|---------------------------|--------------------------|
| IN RE: |) | | |
| |) | Chapter 7 | BARBARA A. EVERLY, CLERK |
| MARK ALAN FRENCH, |) | | |
| |) | Bankruptcy No. 95-20770KD | |
| Debtor. |) | | |

**ORDER RE U.S. TRUSTEE'S MOTION
TO MODIFY JUDGMENT**

On July 25, 1995, this Court entered an judgment against Lois Nelson and The Store in the total amount of \$200 for violation of the automatic stay. The Court's order further stated that "the judgment shall be enforceable by the Chapter 7 trustee and payment shall be made to the Chapter 7 trustee. See Sechuan City, 96 B.R. at 45." The U.S. Trustee moves to modify the judgment. He asserts that the judgment should be payable to and enforceable by Debtor Mark Alan French rather than the Chapter 7 trustee.

Having reconsidered the circumstances and applicable law in light of the U.S. Trustee's motion, the Court concludes that the judgment should be modified as requested. The Court finds that damages arising from a violation of the automatic stay under § 362(h) are not property of the estate in this Chapter 7 case. Cf. United States v. McPeck, 910 F.2d 509, 512 n.7 (8th Cir. 1990) (stating that in a Chapter 13 case, a § 362(h) claim for damages becomes property of the estate under § 1306(a)(1)). Therefore, the Chapter 7 trustee has no interest in the judgment and should not be responsible for its enforcement. The judgment should be modified to make it payable to and enforceable by Debtor.

WHEREFORE, the U.S. Trustee's Motion to Modify Judgment is GRANTED.

FURTHER, the judgment entered July 25, 1995 against Lois Nelson and The Store in the total amount of \$200 shall be enforceable by Mark Alan French and payment shall be made to Mark Alan French.

FURTHER, the Chapter 7 trustee has no obligation to collect or enforce the judgment.

SO ORDERED this 4th day of August, 1995.



Paul J. Kilburg
U.S. Bankruptcy Judge

Notice sent to:

Mark Alan French
659 1st N.W.
P.O. Box 491
Elkader, IA 52043

Paul Fitzsimmons
790 Town Clock Plaza
Steele Centre
Dubuque, IA 52001

US Trustee - CR
Law Building Suite 400
225 2nd Street SE
Cedar Rapids, IA 52401

The Store
Attn: Lois Nelson
P O Box 243
Elkader, IA 52043

mailed 8/4/95 mg

FILED
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF IOWA

AUG 03 1995

BARBARA A. EVERLY, CLERK

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF IOWA

IN RE:) CHAPTER 7
) CASE NO. 95-20770-KD
MARK ALAN FRENCH,)
)
Debtor.) U.S. TRUSTEE'S MOTION
) TO MODIFY JUDGMENT

The U.S. Trustee respectfully moves the court for an order modifying the judgment entered in this case on July 25, 1995. In support of this motion, which is filed pursuant to Bankruptcy Rule 9024 and Rule 60 F.R.Civ.P., the U.S. Trustee states as follows:

1. This motion concerns the following provisions of the judgment entered in this case on July 25, 1995:

IT IS FURTHER ORDERED that judgment shall enter in favor of Debtor Mark Alan French and against Lois Nelson and The Store in the amount of \$100 of actual damages and \$100 of punitive damages for a total judgment of \$200.

IT IS FURTHER ORDERED that judgment shall be enforceable by the Chapter 7 Trustee and payment shall be made to the Chapter 7 Trustee. See In re Sechuan City, 96 B.R. 37, 45 (Bankr. E.D. Pa. 1989).

2. The order and judgment do not indicate how the damage award should be distributed by the case trustee. The opinion in Sechuan City indicates that "[t]hese damages, which shall be payable to the chapter 7 trustee, will be distributed to creditors in the priority established by 11 U.S.C. section 727." 96 B.R. at 45. The court was apparently referring to 11 U.S.C. section 726, which governs the distribution of property of the estate.

3. The case trustee has a statutory duty to administer the property of the estate. 11 U.S.C. section 704. The damages awarded to the debtor do not qualify as estate assets under 11 U.S.C. section 541.

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4. The trustee lacks the financial capacity to pursue recovery on behalf of the debtor. He would not be compensated for the effort. Under 11 U.S.C. section 326(a), the trustee may not take a fee on funds disbursed to the debtor.

5. The damage award is based on 11 U.S.C. section 362(h). It provides that:

An 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. [Emphasis added].

6. The debtor will not receive any money if the damages are "distributed to creditors in the priority established by" section 726. Sechuan City, 96 B.R. at 45. The \$200 will be consumed by administrative expenses and payments to creditors.

7. To ensure that the "injured individual" recovers the damages awarded by the court, the final paragraph of the judgment should be modified to state that "the judgment shall be enforceable by Mark Alan French and payment shall be made to Mark Alan French." The case trustee should be relieved of his obligation to enforce the judgment.

For the reasons stated, the U.S. Trustee respectfully moves the court for an order modifying the judgment entered in this case on July 25, 1995.

Dated this 3rd day of August, 1995.

CERTIFICATE OF SERVICE

I certify that I mailed/hand delivered a copy of the foregoing document to which this certificate is attached to the parties or attorneys of record, shown below, on the

3rd day of August, 19 95
UNITED STATES TRUSTEE

By Lisa L. McMiller
copies to:

Copies to:

Mark Alan French
Lois Nelson, c/o The Store
Paul J. Fitzsimmons, Chapter 7 Trustee

Barbara G. Stuart
United States Trustee
Region 12

By: John F. Schmillen
John F. Schmillen, ID #76543
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225 Second Street S.E.
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