

# In the United States Bankruptcy Court

## for the Northern District of Iowa

### Western Division

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FRANK HARVEY

*Debtor(s).*

Bankruptcy No. 93-50859XS

Chapter 13

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### ORDER RE: PLAN CONFIRMATION

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The matter before the court is the confirmation of the chapter 13 plan. Hearing was held September 28, 1993 in Sioux City, Iowa. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(L).

On May 17, 1993, Harvey filed a chapter 13 petition and a chapter 13 plan. The plan provided for 36 monthly payments of \$100.00. The plan indicated that the trustee would receive 10 per cent of plan payments but that there would be no payments to any of the creditors. The plan also affirmatively stated "[a]ttorney's fees to be paid through the Plan: NONE." The trustee filed an objection to the plan on July 12, 1993. No other objection was filed.

Harvey filed an amendment to the plan on August 25, 1993 which provided that the priority claim of the Internal Revenue Service in the amount of \$1,200.00 would be paid in full. The amendment also added that "unsecured creditors will be paid any remainder after such payment." The trustee reported that she no longer objected to the plan as amended. Docket no. 31.

At the confirmation hearing, Debra Buckman and her attorney, Judith Garnos, questioned whether they had been served with the amendment to the plan. The debtor had been ordered to serve a copy of the amendment on all creditors by August 31, 1993. Docket no. 24. Garnos and Buckman both are creditors of Harvey. Harvey's counsel filed a certificate of service showing service on September 13, 1993, but no service list was attached. Docket no. 28. After the hearing, Harvey's counsel filed a duplicate certificate of service with a copy of the matrix attached. Docket no. 39. The name and address of Buckman were crossed out on the matrix, but the list indicates that a copy of the amendment was served on Garnos. The court finds that service of the plan amendment did not conform to the 20-day notice requirement of Fed.R.Bankr.P. 2002(a)(6). However, the court believes Buckman and Garnos have not been harmed by the late service. They did not file an objection to the initial plan filed May 17, 1993. Buckman and Garnos receive more favorable treatment under the plan as amended.

The court questioned Harvey's counsel at the hearing about the treatment of creditors other than the IRS. She represented that plan payments would be applied to Harvey's attorney fees and estimated that the fees would be approximately \$1,500.00. This treatment would contradict the terms of the plan. Moreover, the statement of attorney compensation filed May 17, 1993 pursuant to Rule 2016(b) indicates that Harvey has not agreed to pay attorney fees for the bankruptcy proceedings beyond the \$500.00 already paid. Docket no. 3.

Nor has the court approved additional attorney fees. On June 9, 1993, Harvey filed an "Application for Approval of Employment of Attorney" for representation of Harvey in bankruptcy and divorce modification proceedings. Docket no. 13. The application was not accompanied by a certificate of service or an affidavit of the attorney to be employed. The court denied the application as unnecessary by order issued October 4, 1993. Harvey has not filed an application for allowance of attorney fees.

The plan should be approved as written and noticed to creditors. Plan payments will first be applied to Harvey's debt to the IRS and the trustee's fees. The balance will be used to pay unsecured creditors with no plan payments made toward

Harvey's attorney fees. The plan shall be confirmed by separate order.

SO ORDERED ON THIS DAY OF NOVEMBER, 1993.

William L. Edmonds  
Chief Bankruptcy Judge

I certify that on I mailed a copy of this order by U. S. mail to: Ruth Carter, Carol Dunbar, U. S. Attorney and U. S. Trustee.

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FRANK HARVEY  
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**ORDER RE: APPLICATION FOR CONTEMPT**

The matter before the court is the application by Frank D. Harvey to hold Debra D. Buckman and her attorney, Judith Garnos, in contempt of court for violation of the automatic stay. Harvey seeks sanctions against Buckman and Garnos for the continuation of a state court contempt proceeding and for filing an application for wage assignment post-petition. Hearing was held September 28, 1993 in Sioux City, Iowa.

Facts and Procedural History

Creditor Buckman is the former spouse of debtor Harvey. Their marriage was dissolved January 16, 1992 in proceedings in the Iowa District Court for Plymouth County, Equity No. 26788. On November 13, 1991, the parties entered into a stipulation in which the parties agreed, among other things, that Harvey would pay Buckman one-third the value of his vested pension plan benefits accrued up to May 24, 1991. Exhibit 1, page 4. The stipulation was approved by the Iowa District Court on December 14, 1991 and filed January 21, 1992. The stipulation was incorporated into the final decree on January 25, 1993 by a Ruling on Motion to Enlarge the Findings of Fact. Exhibit 2, page 1.

On May 3, 1993, Buckman filed an application for order for rule to show cause in the Iowa District Court for Plymouth County. Exhibit 2. The application alleged that Harvey willfully refused to comply with the terms of the stipulation and other court orders in the matter of the marriage between the parties. The application requested an order to show cause why Harvey "should not be held in contempt and punished for contempt and/or should not be imprisoned until he performs the requirements of said orders." Exhibit 2, page 4. The application also requested an order of attachment on Harvey's personal property.

The Iowa District Court issued the Order for Rule to Show Cause May 3, 1993 and set the matter for hearing at 11:00 A.M. on May 17, 1993. Exhibit 3. At 10:33 A.M. on May 17, 1993, Harvey filed his chapter 13 petition. Docket no. 1. The district court matter was continued to June 1, 1993. The district court requested briefs on the issue of whether a continuation of the action would be a violation of the automatic stay in bankruptcy. Exhibit 4, page 2.

On May 28, 1993, Harvey filed an ex parte application for order enforcing the automatic stay and enjoining the state court proceedings against Harvey. Docket no. 7. The motion to enforce the stay was denied as unnecessary as the stay is

self-effectuating. Docket no. 8.

At the June 1, 1993 hearing on contempt, the Iowa District Court found that although Buckman had requested other forms of relief, the application was essentially a request for a finding of criminal contempt for willfully and knowingly refusing to obey court orders. Exhibit 4, page 2. The court concluded that the proceeding was punitive and criminal in nature and therefore was excepted from the automatic stay pursuant to 11 U.S.C. § 362(b)(1). Exhibit 4, pages 2-3, citing Scully v. Iowa District Court, 489 N.W.2d 389 (Iowa 1992). Based upon the evidence presented at the hearing, the court found Harvey in contempt of court beyond a reasonable doubt and ordered that he be imprisoned for 30 days. The order and judgment was filed June 3, 1993. The matter is now on appeal to the Iowa Supreme Court. Harvey obtained a stay of the order pending appeal.

On June 3, 1993, Harvey filed an application in bankruptcy court to enjoin enforcement of the Iowa District Court's order and to obtain sanctions against Buckman and Garnos. Docket no. 9. The application for injunction sought to enjoin the Plymouth County Sheriff and the Iowa District Court. The application was not brought by adversary proceeding and was not accompanied by a certificate of service. Hearing was held on June 4, 1993. At the time of the hearing, Harvey had obtained a temporary stay of the Iowa District Court's order and was pursuing an appeal. This court dismissed the application for injunction without prejudice. The court granted Buckman relief from the stay to participate in the appeal to the Iowa Supreme Court.

At the June 4 hearing, it was brought to this court's attention that Buckman had filed a post-petition application for wage assignment. Attorney Garnos stated to the court that at the state court hearing on June 1, Harvey acknowledged he was in arrears on his child support payments. Garnos stated that she believed the wage assignment proceeding came within an exception to the automatic stay. The court advised Garnos that in a chapter 13 proceeding, property of the estate includes the debtor's post-petition wages pursuant to 11 U.S.C. § 1306, and that Garnos could not rely on the exception of 11 U.S.C. § 362(b)(2) for collection of support payments. Garnos immediately directed the sheriff to return all papers pertaining to the application for wage assignment and not to serve them. Exhibit B. Garnos filed a dismissal of the action on June 11, 1993. The hearing previously set for June 14 was canceled.

On September 30, 1993, Harvey's counsel filed an affidavit of fees incurred in pursuit of the contempt matters now before the court. Docket no. 35. The affidavit is not accompanied by a certificate of service.

### **Discussion**

The court considers Harvey's application for contempt a motion for sanctions pursuant to 11 U.S.C. § 326(h). That section provides:

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 willful violation of the automatic stay occurs when a person acts deliberately with knowledge of the bankruptcy petition. In re Knaus, 889 F.2d 773, 775 (8th Cir. 1989).

#### State Court Contempt Proceeding

Harvey argues that the continuation of the state court contempt proceeding was a violation of the automatic stay. Buckman and Garnos contend that the proceeding was a criminal proceeding excepted from the stay by 11 U.S.C. § 362(b)(1).

The Iowa District Court determined, before proceeding with the contempt action, that the proceeding was criminal in nature and thus was excepted from the automatic stay. The parties have not raised the issue of the effect of the state court's determination on the bankruptcy court. Case authority is split on the issues of whether a state court has jurisdiction to determine applicability of the stay to proceedings pending before it and whether such a state court determination is binding on the bankruptcy court. Compare Hunt v. CFTC (In re Hunt), 93 B.R. 484, 489 (Bankr. N.D. Tex. 1988) ("jurisdiction to determine the applicability of the automatic stay is vested within the exclusive jurisdiction

of the bankruptcy courts," or U. S. District Courts and U. S. Courts of Appeal); In re Raboin, 135 B.R. 682, 684 (Bankr. D. Kan. 1991) (bankruptcy court has "exclusive jurisdiction to determine the extent and effect of the stay"); with In re Bona, 124 B.R. 11, 14-15 (S.D. N.Y. 1991) (state court has concurrent jurisdiction with the bankruptcy court to determine applicability of the stay; bankruptcy court is precluded from relitigating the issue); In re Mann, 88 B.R. 427, 429-30 (Bankr. S.D. Fla. 1988) (same); Matter of Brady Municipal Gas Corp., 936 F.2d 212, 218 (5th Cir. 1991), cert. denied by Sanders v. City of Brady, 112 S.Ct. 657 (1991) (state courts have concurrent jurisdiction over matters arising under or arising in bankruptcy cases; "bankruptcy courts are prohibited from relitigating these matters if the state courts have already resolved them").

The court will not decide these jurisdictional issues for under either line of authority the result would be the same. This court agrees with the state court's finding that the state court contempt proceeding was not stayed. Other issues raised in the appeal to the Iowa Supreme Court, including the sufficiency of evidence to support the judgment, are not before the bankruptcy court. The only decision regarding the state contempt matter that is made by this court is that the state proceeding came within an exception to the automatic stay pursuant to 11 U.S.C. § 362(b)(1).

That subsection provides that the filing of a bankruptcy petition does not operate as a stay of "the commencement or continuation of a criminal action or proceeding against the debtor." A contempt proceeding falls within the §362(b)(1) exception when it is punitive in nature rather than remedial.

[W]here the contempt citation is designed to uphold an order of a court and not calculated to enforce a money judgment, pursue a "collection motive," or to harass a defendant, . . . courts have determined that enforcement of that order would not be in violation of the automatic stay.

Rook v. Rook (In re Rook), 102 B.R. 490, 493 (Bankr. E.D. Va. 1989), aff'd 929 F.2d 694 (4th Cir. 1991). "[T]he purpose of civil contempt is remedial, coercive, and for the benefit of the complainant, while the purpose of criminal contempt is to protect the authority and vindicate the dignity of the court." Roussin v. Johnson (In re Roussin), 97 B.R. 130, 132 (D. N.H. 1989); Titan Enterprises Int'l., Ltd. v. Anoai (In re Anoai), 61 B.R. 918, 920-21 (Bankr. D. Conn. 1986). Some courts have found that, regardless of the labels "civil" and "criminal" contempt, the provisions of § 362(a) simply do not apply to proceedings meant to uphold the dignity of the court and to punish the debtor for flouting court orders. Rook, 102 B.R. at 493, 495 and cases cited.

A purgeable sanction is indicative of a coercive or remedial contempt proceeding that would be stayed under § 362(a). In In re Thayer, 24 B.R. 491 (Bankr. W.D. Wis. 1982), the debtor's former spouse filed a post-petition motion to enforce a contempt order against the debtor for failure to make support and property settlement payments. The debtor was sentenced to 90 days in jail, but the sanction would be stayed if the debtor paid the debt. The bankruptcy court found the state court proceeding was an attempt to collect pre-petition debt and violated the stay.

An unconditional sanction, however, indicates a contempt proceeding is meant to punish the debtor and uphold the dignity of the court rather than to collect the underlying debt. Rook, 102 B.R. at 494-95; Scully v. Iowa District Court, 489 N.W.2d 389, 392 (Iowa 1992). The Iowa Supreme Court has concluded that contempt sanctions for willful disobedience of a dissolution decree, pursuant to the authority of Iowa Code § 598.23, are essentially punitive in nature. Scully, 489 N.W.2d at 393, citing McNabb v. Osmundson, 315 N.W.2d 9 (Iowa 1982).

In the state court contempt proceeding against Harvey, the court found beyond a reasonable doubt that Harvey willfully and knowingly failed to comply with the court's previous order despite an ability to do so. Exhibit 4. Although there was insufficient evidence concerning Harvey's ability to pay attorney fees awarded under the decree, the court found that Harvey failed to pay over to Buckman one-third of his vested pension plan as required by the stipulation and instead chose to use the funds as he saw fit. The court said Harvey's action challenges the dignity of the court and flouts its authority. The court imposed an unconditional sanction of 30 days in the Plymouth County jail.

This court finds that the contempt proceeding against Harvey in state court was not in violation of the automatic stay. The court determined that the proceeding was punitive in nature as it was designed to ensure compliance with the court's orders and uphold the dignity of the court. Exhibit 4, page 2.

The fact that Buckman requested alternative forms of relief in her application for order for rule to show cause is not

determinative. The application was filed before the automatic stay came into effect. Nor is it relevant to the stay issue whether there was sufficient evidence to support the judgment. That issue is left for the Iowa Supreme Court. The purpose of the state court proceeding was to determine whether Harvey was in criminal contempt, and if so, to punish him for it. See Anoai, 61 B.R. at 921.

Harvey argues the Scully case is distinguishable because in his case the contempt decision occurred post-petition, whereas in Scully, the debtor was found in contempt before filing. However, § 362(b)(1) excepts from the stay both the commencement and continuation of criminal proceedings against the debtor. Nor does it matter that Scully involved a chapter 7 case and Harvey has filed a chapter 13 petition. The provisions of § 362 apply in both liquidation and reorganization cases. 11 U.S.C. § 103(a). The analysis under § 362(b)(1) would be the same in either case. See In re Altchek, 124 B.R. 944, 959 (Bankr. S.D. N.Y. 1991) and U.S. v. Troxler Hosiery Co., Inc., 41 B.R. 457, 460-61 (M.D. N.C. 1984), *aff'd* 796 F.2d 723 (4th Cir. 1986), *cert. denied* 107 S.Ct. 1566 (1987), in which contempt proceedings came under the § 362(b)(1) exception in chapter 11 cases.

The court concludes that the state court contempt proceeding against Harvey was excepted from the stay pursuant to § 362(b)(1). Buckman and Garnos were not in contempt of the bankruptcy court for continuing the proceeding.

It is unnecessary to consider the creditors' alternative argument that the proceeding was excepted under § 362(b)(2) as collection of support from property that is not property of the estate. The court notes that the federal exemptions under 11 U.S.C. § 522(d) are not applicable in Harvey's case. 11 U.S.C. § 522(b)(1); Iowa Code § 627.10. Also, no evidence was presented to show what interest, if any, Harvey had in the pension plan at the time of his petition. Harvey's schedules indicate that he had none. Docket no. 1, Schedule B, item 11.

#### Wage Assignment

Harvey also argues that Buckman and Garnos should be sanctioned for bringing a post-petition wage assignment action against him. The debtor's post-petition wages are property of a chapter 13 estate. 11 U.S.C. § 1306(a)(2); Porter v. Goodyear Employees Credit Union (In re Porter), 25 B.R. 424 (Bankr. D. Vt. 1982). Any act to obtain possession of property of the estate is a violation of the stay. 11 U.S.C. § 362(a)(3). Proceedings such as wage garnishment or wage assignment against a chapter 13 debtor are in violation of the stay. In re Suarez, 149 B.R. 193 (Bankr. D. N.M. 1993).

Attorney Garnos stated to the court that she mistakenly believed the garnishment action came within an exception to the stay and that the violation was inadvertent. The willfulness requirement of § 362(h) refers to deliberate conduct with knowledge of the bankruptcy filing. In re Knaus, 889 F.2d 773, 775 (8th Cir. 1989). A willful violation of the automatic stay does not require a specific intent to violate a court order. Aponte v. Aungst (In re Aponte), 82 B.R. 738, 742 (Bankr. E.D. Pa. 1988), quoting Wagner v. Ivory (In re Wagner), 74 B.R. 898, 903 (Bankr. E.D. Pa. 1987). Nor does it require a specific intent to violate the automatic stay. Taborski v. United States, 141 B.R. 959, 965-67 (N.D. Ill. 1992). A violation may be willful even if an entity believes the stay is not applicable to its conduct. See In re McLaughlin, 96 B.R. 554, 558-59 (Bankr. E.D. Pa. 1989) (creditor may be liable for violation of the automatic stay even for "subjectively innocent" conduct). The filing of the application for a wage assignment was a violation of the automatic stay.

However, the court finds that Harvey has suffered no damages as a result of filing the wage assignment and is not entitled to sanctions. Section 362(h) allows an individual to recover "actual damages" caused by a willful violation of the stay. See McLaughlin, 96 B.R. at 561 (discussion of injury requirement). Harvey's counsel, Ruth Carter, was not required to take special action to enforce the automatic stay. On June 4, 1993, during the hearing on the state contempt matter, Carter notified the court that she had received a copy of the wage assignment documents. When attorney Garnos learned that the action was stayed by the bankruptcy petition, Garnos directed the Plymouth County Sheriff the same day to return the papers to her. Exhibit B. Harvey was never served with the wage assignment documents. Garnos took prompt action to dismiss the proceeding. Moreover, Carter's affidavit regarding time expended in pursuing sanctions against Garnos and Buckman does not show any time spent on the wage garnishment matter. Docket no. 35. Harvey's motion for sanctions should be overruled.

#### ORDER

IT IS ORDERED that Frank Harvey's Application for Finding of Civil Contempt and his request for damages is denied.

SO ORDERED ON THIS 19th DAY OF NOVEMBER, 1993.

William L. Edmonds  
Chief Bankruptcy Judge

I certify that on I mailed a copy of this order by U. S. mail to: Ruth Carter, Judith Garnos, U. S. Attorney, Carol Dunbar and U. S. Trustee.