In the United States Bankruptcy Court

for the Northern District of Iowa

RAYMOND G. TROESTER , JANIS K. TROESTER	Bankruptcy No. 95-21085KD
Debtors.	Chapter 7

ORDER RE MOTION FOR SANCTIONS FOR VIOLATION OF AUTOMATIC STAY AND ANSWER THERETO

On October 11, 1995, the above-captioned matter came on for hearing pursuant to assignment on Debtors' Motion for Sanctions for Violation of Automatic Stay. Debtor Raymond Troester appeared with Attorney Paul Fitzsimmons. D & J Feed Service and Four County Ag Service was represented by Attorney Richard Pattison. Mr. Lyle Opheim and Mr. Lyle Johannson, the owners of D & J Feed Service, were also represented by Mr. Richard Pattison. Mr. Tom Stoffel, an employee of D & J Feed Service, was present pro se. Evidence was presented after which the Court took the matter under advisement.

STATEMENT OF THE CASE

The file reflects that Debtors filed their voluntary Chapter 7 Petition on June 9, 1995 and the automatic stay, under 362, came into effect. The Court took judicial notice of the file including the schedules filed with the Petition. The schedules list Four County Ag Service, located at 625 Lybrand in Postville, Iowa as a Creditor. The evidentiary record establishes that Mr. Lyle Johannson and Mr. Lyle Opheim are the sole shareholders in the corporation known as Four County Ag Service. D & J Feed Service is owned by Four County Ag Service and is operated under this trade name. Both Mr. Opheim and Mr. Johannson are actively involved in these businesses. Four County Ag Service is located in Postville and D & J Feed Service is located in Monona, Iowa. The business of both enterprises is to sell feed and associated products for agricultural purposes. Debtors purchased cattle feed from D & J in Monona well in advance of the petition date of the bankruptcy. Debtors' Exhibit 1 reflects that amounts due and owing were more than 90 days delinquent by June 30 of 1995. The total amount owing in June was $6,175.09.

After filing their petition, Debtors received a notice from Four County Ag Service postmarked July 3, 1995. Debtors received a second document entitled final notice from D & J Feed Service postmarked July 11, 1995. While both of these bills came from the separate business entities, they reflect a billing in the amount of $6,175.09 for the same feed.

Mr. Tom Stoffel is a salesman for D & J Feed. On July 17, Mr. Stoffel received a telephone call from Debtor Raymond Troester. Mr. Troester told Stoffel that he wished to talk to him at the farm but did not specify the exact reason. Prior to going to the farm, Stoffel talked to Johannson about the possible reasons why Debtor might wish to talk to Stoffel. They concluded that one reason may be the final notice sent about a week before. However, Johannson and Stoffel both testified that it was not Stoffel's job to deal with accounts as he was a salesman. He was left with no directives as to what to tell Troester if he wished to discuss the billing. Troester went to the farm at about 9:00 a.m. on July 19, 1995. At this point, the parties' versions of what happened diverges.

Debtor testified that when he had talked to Stoffel on the phone, he did not mention the bankruptcy. Debtor testified that he wished to talk to Stoffel about renting the hog facility either personally or to some individuals that Stoffel knew. Debtor testified that when he brought up the hog facility rental idea Stoffel said that any such rental arrangement would have to be accomplished on the basis of some set-off against the bill owed to D & J. Debtor testified that, at that point, he told Stoffel that he was in bankruptcy. He said he told Stoffel two or three times but Stoffel kept coming back to the feed bill as a set-off to any rental of the hog facility. Debtor stated that Stoffel did not directly demand payment though he did continue to bring up the issue and Stoffel said he wanted to negotiate the bill. Debtor stated that eventually both individuals became angry, particularly after Stoffel kept referring to the bill. Debtor eventually suggested that the bill be prorated among Debtor and certain individuals associated with the feed store. Debtor testified that he eventually pushed Stoffel against the wall.

Stoffel testified that he went to the Troester farm because of Troester's call, though he was not aware of the reason why Troester wanted to see him. He said he had known Debtor for many years and that he considered them to be friends, but that he had not known of the Troesters' bankruptcy prior to his going to the farm. He testified that, as soon as he got to the farm, Debtor pulled the final notice bill out of his back pocket and said, "What the hell is this all about?" He testified that Debtor was very upset and swearing. At some point, Stoffel learned of Debtors' bankruptcy. Stoffel stated that he was assaulted by Debtor, that his shirt was ripped off, that he was choked, and eventually kicked in the groin. He testified that he tried to get away by getting in his truck but Debtor continued to pound on the hood. He stated that he was in fear at the time he left the farm as a lot of threatening comments had been made by Debtor. When Mr. Stoffel got back to his office, he told Johannson that he was going to quit because he was upset and distraught about what had just happened. Johannson suggested that Stoffel go the Sheriff and make a report. Stoffel did so on July 20, 1995. This report was offered into evidence as Exhibit A.

Stoffel testified that he did not go to the farm to collect the bill. He stated that he had no knowledge that Debtor was in bankruptcy at the time he went to the farm. He testified that a lot of things were said while he was there which are now unclear to him. However, he said that he did not demand payment of the bill and denies that he kept demanding payment during the time that he was there. He testified that it is not his position with the company to collect bills after final notice and that he would not have gone there for that purpose.

Ms. Debra Brainard is a clerk with Four County Ag Service. It is her job to go to the post office and pick up the mail, sort it, and open it for distribution. She worked during the month of June, 1995. She testified that she does not recall receiving correspondence from the bankruptcy court relative to Debtors. She testified that they periodically receive notices in the mail. She testified that she shows

these to Johannson after which she enters them in the computer which is programmed to then stop future billings. She testified that the first correspondence which she received from the bankruptcy court was the Motion for Sanctions after all of the facts in this case had occurred. She testified that, to her knowledge, there was no correspondence before that time and she was unaware that Debtors were in bankruptcy until Stoffel came back and informed his superiors. She testified that their mailing address is P.O. Box 129, 625 Lybrand Street, Postville, Iowa which is consistent with the creditor notice on the matrix. Mr. Lyle Opheim and Mr. Lyle Johannson also both testified that they had not received any notice of the bankruptcy. Both also testified that they periodically receive bankruptcy notices in their business, that they honor the automatic stay and that they enter them on the computer so future billings will not be sent. They testified that they had no knowledge that Debtors were in bankruptcy prior to Stoffel returning from his visit to Mr. Troester.

After Stoffel returned from Debtors' farm and spoke to Johannson, Johannson called Debtor personally. Johannson testified that he told Debtor he should not treat people in the manner in which he treated Stoffel. He also informed Debtor that he had sent the final notice to get a judgment against him as he had no knowledge of their bankruptcy until Stoffel came back and told him. While he was talking to Troester, the evidence establishes that Johannson again told Debtor that they would get a judgment on the account. Johannson testified that the first formal written notice that he received from the Court was when he received the Motion for Sanctions.

Based upon the foregoing findings of fact, legal issues are raised concerning the effect of any notice received by Four County Ag Service; the legal effect of the notices sent by Four County Ag Services and D & J Feed Service to Debtors after the commencement of his Chapter 7 petition; the effect of creditor's employee going to Debtors' farm and eventually discussing the bankruptcy; and the legal effect of a conversation between one of the owners of Four County Ag Services and Debtor subsequent to Creditor's employee returning to the office. These issues will be discussed separately hereafter.

CREDITOR'S KNOWLEDGE OF DEBTORS' BANKRUPTCY

Section 362(h) provides for sanctions, in appropriate circumstances, against creditors who violate the automatic stay. It provides that:

An individual injured by any ***willful violation*** of the 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(h) (1995) (emphasis added). A violation is "willful" if the violator's conduct is deliberate and done with knowledge of the bankruptcy filing. In re Knaus, 889 F.2d 773, 775 (8th Cir. 1989); In re Denklau, 158 B.R. 796, 800 (Bankr. N.D. Iowa 1993). Lack of knowledge or notice of a bankruptcy case by a creditor precludes that creditor's actions from being "willful" violations, prior to gaining knowledge of the bankruptcy. In re Bennett, 135 B.R. 72, 76 (Bankr. S.D. Ohio 1992); See Fidelity Mortgage Investors v. Camelia Builders, Inc., 550 F.2d 47 (2d Cir. 1976), cert. denied, 429 U.S. 1093 (1977). If a creditor did not receive the mailed notice of a debtor's bankruptcy, that creditor has a valid defense to 362(h) sanctions concerning any actions taken prior to gaining actual

knowledge of the bankruptcy.

Federal Rule of Bankruptcy Procedure 9006(e) provides that service of notice by mail is complete upon mailing. Courts have construed this rule in consonance with the common law doctrine which recognizes a rebuttable presumption that an item properly mailed is received by the addressee. In re Borchert, 143 B.R. 917, 920 (Bankr. D.N.D. 1992); See Hagner v. United States, 285 U.S. 427, 430 (1932). The fact that Creditor's name and address were properly listed on the matrix of creditors which the Clerk of the Bankruptcy Court used to mail notices of Debtors' filing is sufficient to raise the presumption that Creditor received such notice. In re Longardner, 855 F.2d 455, 460 (7th Cir. 1988). The presumption is strong and not easily rebutted. Borchert, 143 B.R. at 920.

The minority view provides a simple denial of receipt by the addressee is sufficient to rebut the presumption. In re Yoder Co., 758 F.2d 1114, 1118 (6th Cir. 1985) The majority view, however, provides that a denial, standing alone, is not sufficient to rebut the presumption. Longardner, 855 F.2d at 459; Yoder, 758 F.2d at 76 n.1. Even so, a solitary denial of receipt creates a question of fact as to the addressee's receipt of the notice and thus Creditor's knowledge of Debtor's bankruptcy. Longardner, 855 F.2d at 459. In a 362(h) action, Debtors, as the moving party, has the burden of proof by a clear and convincing evidence standard.

Applying the foregoing general propositions, the Court will analyze the facts presented. The burden of going forward is initially upon Creditor to overcome the rebuttable presumption that notice of Debtors' filing was received by this Creditor. If Creditor is able to rebut this presumption, the burden then switches to Debtors to establish that notice was actually received. The application of these legal principles ultimately involves an analysis of the facts.

Debtors listed Four County Ag Services as a Creditor in their matrix. The mailing address provided by Debtors is the correct mailing address for D & J Feed Services. Nevertheless, Four County Ag Services presented compelling evidence that it is generally familiar with bankruptcy procedures. The business has, in the past, received notices from bankruptcy court and they are familiar with the impact of the filing and the automatic stay. Ms. Debra Brainard is the clerk responsible for handling the mail for Four County Ag Services. She testified that, during the month of June, 1995, she does not recall receiving a notice relating to Debtors. She testified that she also does the computer entry work for the business and normally enters Chapter 7 filings in the computer. This computer is programmed to thereafter terminate future billings. In addition to Ms. Brainard, both owners of the business testified that they did not receive any written notice nor were they aware through any other source that Debtors had filed for bankruptcy until they received the notice for sanctions in the mail. The Court has evaluated the entire evidentiary record on this issue and has also observed the witnesses and their credibility. The Court concludes that, based upon the entire evidentiary record as well as the consideration of the credibility of the witnesses, for unexplained reasons, this Creditor did not receive notice of the filing by Debtors of their Chapter 7 petition. The record additionally reflects that this Creditor was not aware through any other source of the filing by Debtors. It is the ultimate conclusion of this Court, therefore, that this evidentiary record supports a sufficient factual finding of nonreceipt of notice to overcome the rebuttable presumption of service of notice of this bankruptcy by mail.

The burden of proof is then placed upon Debtors to go forward with the evidence and establish notice by this Creditor. Debtors did not produce any additional evidence establishing mail receipt of notice or actual notice which would satisfy the burden of proof required to establish Creditor knowledge of Debtors' bankruptcy and, therefore, a willful violation of the stay.

POSTPETITION BILLINGS

The evidence is uncontroverted that Creditor sent two billing statements to Debtors after they filed their bankruptcy petition. The receipt of billing notices, especially one marked "Final Notice" can reasonably be expected to have a significant impact on a Debtor's determination whether to repay an underlying debt. Briggs, 143 B.R. at 453. The receipt of a bill is the event which ordinarily triggers the payment of the underlying debt by most debtors. Additionally, postpetition billing is contrary to what a reasonable person would consider to be fair under the circumstances. Id. Thus, sending of the postpetition billing notices clearly violated the automatic stay under 362(a)(6).

However, for Creditor to be subject to sanctions for these actions under 362(h), these clear violations must have been committed after Creditor gained knowledge of Debtors' bankruptcy. Knaus, 889 F.2d at 775. As previously determined by the Court in this ruling, Creditor successfully rebutted and Debtors were unable to establish mailed notice or actual knowledge by this Creditor prior to the mailing of the two billing statements in question. It is, therefore, the conclusion of this Court that the postpetition billing statements do not constitute willful violations of the automatic stay.

REMARKS OF SALESMAN TO DEBTOR

At Debtor's request, Creditor's salesman, Stoffel, visited Debtor at Debtor's farm. During this visit, a verbal argument and physical conflict arose between the parties. In the course of these events, statements were made by Stoffel which Debtor now suggests violated the automatic stay. This Court cannot conclude from the evidentiary record exactly what was said to Debtor by Stoffel. It is clear that Stoffel became aware of Debtors' bankruptcy while at the farm. In order to be subject to sanctions under 362(h), Creditor conduct must be deliberate and done with knowledge of the bankruptcy filing. Knaus, 889 F.2d at 773; Dencklau, 158 B.R. at 800.

Although the pleadings do not indicate a specific subsection of 362(a) as the basis for this assertion of a violation of the stay, the Court will assume it is 362(a)(6). Under this section, "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case . . ." is a violation of the stay. 11 U.S.C. 362(a)(6). A creditor's actions constitute a violation of 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.

In re French, No. 95-20070KD, slip op. at 3 (Bankr. N.D. Iowa July 27, 1995) (citing In re Briggs, 143 B.R. 438, 453 (Bankr. E.D. Mich 1992)).

While a specific intent to violate the stay is not a prerequisite for a finding of willfulness, In re Atlantic Business & Community Corp., 901 F.2d 325, 329 (3d Cir. 1990); Bennett, 135 B.R. at 76, it is apparent that a creditor must have at least a general intent to collect or recover a claim against debtor in order to make the creditor's action violative of the automatic stay under 362(a)(6). The Briggs test attempts to provide objective standards for ascertaining this intent.

It is the conclusion of this Court that Stoffel did not make remarks to Debtor which might be violative of 362(a)(6) until after he was verbally threatened and physically assaulted by Debtor. During the altercation, Stoffel became fearful for his own safety, causing him to become unclear as to the substance of any comments which he may have made to Debtor. Whether or not Stoffel uttered the remarks in an attempt to dissuade Debtor from further pummeling is irrelevant to this analysis. Under the circumstances, Stoffel's remarks could not be reasonably expected to have a significant impact on Debtor's decision as to whether to repay his debt to Creditors. Briggs, 143 B.R. at 453. Further, from a subjective standpoint, given Stoffel's state of mind at the time, it is unfair to conclude that any comments made by him were made with the general intent of attempting to collect or recover a claim against Debtor. This conclusion is credibly supported by the testimony of Creditor's owner that Stoffel was not responsible for the collection of debts, after a final notice is sent to the customer. It is the conclusion of this Court that Debtor's testimony fails the Briggs test. As such, Stoffel's remarks do not constitute a violation of the automatic stay, willful or otherwise and absent a violation of the stay, Creditor can not be sanctioned.

JOHANNSON'S THREAT TO PURSUE JUDGMENT ON THE DEBT

When Stoffel returned from Debtors' farm he communicated to Johannson, one of Creditor's owners, that Debtors had filed for bankruptcy. At that point, Creditor acquired actual knowledge of Debtors' bankruptcy. Any subsequent action in violation of the automatic stay constitutes a "willful" violation. Knaus, 889 F.2d at 775. After his conversation with Stoffel, Johannson called Debtor. During this call, Johannson told Debtor that Creditor intended to get a judgment against Debtor on the prepetition debt.

The issue presented is whether this threat of litigation against Debtor was a violation of the automatic stay. Applying the Briggs test, the threat that a creditor is going to seek a judgment against a debtor is the type of action which could reasonably be expected to have a significant impact on the debtor's determination as to whether to repay the underlying debt. But for the protections provided by bankruptcy and in light of Creditor's threat, the only way for Debtor to avoid the litigating of the dispute would be to pay off the debt.

The threat of litigation also satisfies the second prong of the test. Seeking a judgment against a debtor who has filed for bankruptcy protection could not be considered to be fair under the circumstances. Thus, Johannson's threat to seek a judgment against Debtor during his phone call to Debtor was a violation of the automatic stay under 362(a)(6). Since Johannson had been made aware of Debtors' bankruptcy prior to making such call, it also constitutes a willful violation. Knaus, 889 F.2d at 775.

DAMAGES

A debtor injured by a willful violation of the automatic stay is entitled to actual damages, including costs and attorneys' fees. 11 U.S.C. 362(h). Courts have awarded actual damages for emotional distress or mental anguish resulting from a creditor's violation, although such damages may not be based on mere speculation, guess or conjecture. In re Flynn, 169 B.R. 1007, 1021 (Bankr. S.D. Ga. 1994). Punitive damages are appropriate where the violator's actions constitute egregious, intentional misconduct. Knaus, 889 F.2d at 776.

It is difficult to identify any injury which Debtor may have incurred as a result of Creditor's willful violation of the stay. This situation is unlike other cases where courts have awarded damages based upon a creditors' actions which were intended to embarrass, humiliate or shame debtors. See In re Sechuan City, Inc., 96 B.R. 37 (Bankr. E.D. Pa. 1989) (creditor who was debtor's commercial landlord posted debtor's bankruptcy petition in the lobby access to the debtor's restaurant); In re Neal, 106 B.R. 90 (Bankr. E.D.N.C. 1989) (creditor's husband crashed into debtor's lawn party with a truck for the purpose of humiliating the debtor in front of friends); French, slip op.1 (creditor posted the debtor's bankruptcy petition in the window of the creditor's convenience store).

The telephone call from Johannson to Debtor is the only violation of the stay in this case. It was limited to the privacy of the telephone line. There is no indication that others might have overheard the violative conversation, so as to create the kind of public humiliation or shame present in other cases. Thus actual damages, if any, are nominal, although Debtor is entitled to the attorneys' fees and costs he incurred in bring this action. 11 U.S.C. 362(h).

Johannson's threat to seek a judgment against Debtor constitutes an intentional violation of the stay, particularly in light of Johannson's testimony regarding his experience dealing with business bankruptcies and his policy of honoring the automatic stay. The threat, however, in the context of the entire case, hardly seems to have been egregious behavior. It is fair to conclude that the telephone call was a spontaneous act, motivated by Johannson's reaction to Debtor's treatment of Stoffel. Due to the lack of egregiousness in Creditor's violation, punitive damages are not appropriate in this case. Knaus, 889 F.2d at 776.

WHEREFORE, Debtors' Motion for Sanctions, in the one particular specified in this ruling, is GRANTED.

FURTHER, the Court finds that Four County Ag Service violated the automatic stay, 362(a)(6), and is subject to sanctions pursuant to 362(h).

FURTHER, judgment shall enter in favor of Debtors Raymond G. Troester and Janis K. Troester and against Four County Ag Services in the amount of $50 of actual damages.

FURTHER, for the reasons stated in this opinion, no punitive damages are awarded.

FURTHER, judgment for attorney fees is entered in favor of Debtors and against Four County Ag Services in the amount of $100.00.

FURTHER, as this is a Chapter 7 filing, the judgment entered against Four County Ag Services in the total amount of $150.00 shall be enforceable by Debtors and funds collected shall be payable to Debtors.

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

SO ORDERED this 3rd day of November, 1995.

Paul J. Kilburg
U.S. Bankruptcy Judge