In the United States Bankruptcy Court

for the Northern District of Iowa

William Richard Lint, Mikki Lynn Lint	Bankruptcy No. 96-12137KC
Debtors	Chapter 7

ORDER RE DEBTOR'S MOTION FOR CITATION OF CONTEMPT

On March 19, 1997, the above-captioned matter came on for hearing pursuant to assignment in Cedar Rapids, Iowa. Debtor Mikki Lynn Lint appeared with her counsel Rick Sole. Preferred Property Management appeared by its President, Thomas Birr and its Attorney, D. J. Smith. The matter before the Court is Debtor's Motion for Citation of Contempt against Preferred Property Management for an alleged violation of the automatic stay pursuant to 11 U.S.C. 362(a)(6) and 362(h). Evidence was presented after which the Court took the matter under advisement.

STATEMENT OF THE CASE

Debtors filed their Chapter 7 Petition on August 27, 1996. Prior to the filing date, Debtor Mikki Lint's son, Brett Hart, rented an apartment located on Rockford Road in Cedar Rapids, Iowa from Mr. Manson Houmes, the owner. At the time of execution of the lease, Debtor Mikki Lint signed as co-signor and guarantor. At that time, Debtor's name was Mikki Lynn Hart and she executed the lease under that name. The apartment was managed by Mr. Houmes at the time of execution of the lease. During Mr. Hart's tenancy, Preferred Property Management took over management of the property.

Manson Houmes, c/o Preferred Property Management is listed as an unsecured creditor in Debtor's Schedule F. The business address is listed as 210 Second Street SE, Cedar Rapids, Iowa 52401. During the course of these proceedings, the Court took judicial notice of the file which does not reflect a returned envelope from this addressee. Attorney for Debtor, Rick Sole, made a professional statement that he has not received a returned letter arising from this notice to Preferred Property Management.

Debtor Mikki Lint testified that after filing her Petition, she began to receive monthly billings from Preferred Management starting in September or October of 1996. She called the office of Preferred Management in Cedar Rapids and talked to an unidentified female. She told this person that she had filed for bankruptcy. This person, according to Debtor, was understanding and requested that Debtor let them know the case number. Debtor stated that she again received a billing statement in November and again called Preferred Management. She gave the unidentified female at Preferred Property Management her case number as well as the name of Mr. Sole, her attorney.

Debtor received a notice in January, 1997 which was introduced as Exhibit A. This notification was from an organization known as Equifax Risk Management Services located in Atlanta, Georgia. The caption of this notification states that: "This communication is from a debt collector. The purpose of

this letter is to collect a debt, and any information obtained will be used for that purpose." The notification refers to an obligation owed to Preferred Property Management by Debtor in the amount of $808. The letter is dated January 8, 1997. Mrs. Lint again called the office of Preferred Property Management and notified an employee that she had filed for bankruptcy. Mrs. Lint testified that she was essentially informed that this was a matter between her and her attorney. Mrs. Lint did not personally send written notification of her bankruptcy case to Preferred Property Management other than what may have been sent by the Clerk of Court at the time of the original filing.

Mr. Thomas Birr is the President of Preferred Property Management. Preferred Property Management provides management services for various rental properties. It employs nine employees. Mr. Birr testified that Debtor's son, Brett Hart, moved out of the apartment in July of 1996 and that in September of 1996, Preferred Property Management sent a preliminary reconciliation report addressed to Brett Hart at the Solon address of Debtor Mikki Lynn Lint. A final reconciliation report was sent in November in the same manner. According to Mr. Birr, the first "credible evidence" that Preferred Property Management had of the filing of the bankruptcy was when Attorney Rick Sole's office sent a copy of the Motion for Contempt. He testified that Preferred Property Management never got a copy of the notice of the filing of the bankruptcy, a copy of the Discharge Order, or any other pleadings or filings from the Bankruptcy Court.

Mr. Birr testified concerning his company's policy and procedure concerning the treatment of individuals who file for bankruptcy. He testified that he is under a fiduciary duty to the property owners which means that until he knows a debt is uncollectible, or a person is under bankruptcy protection, he has a duty to collect debts. His company will take no action to stop proceedings unless it receives "credible evidence". Mr. Birr described what he accepts as credible evidence of the filing of a Bankruptcy Petition. Credible evidence equates to a formal notice of bankruptcy or written verification from an attorney. Notification from a debtor or oral notification from other sources is insufficient credible evidence under the policies of Preferred Property Management. Only written documentation is adequate. If no written documentation is provided, employees of Preferred Property Management are directed to request written documentation from the debtors or ask that their attorney provide this information.

Mr. Birr testified that he understands what the automatic stay is as well as the effect of the automatic stay. He knows the Bankruptcy Clerk's Office for the Northern District of Iowa is located in Cedar Rapids.

Elizabeth Splinter is an employee of Preferred Property Management. She testified that she talked to Mikki Hart (Mikki Lint) after Ms. Lint received the Equifax letter. She stated that she told Debtor that she had to file something. She said that she asked Debtor to have her attorney send documentation. She testified that this was the first contact that she had with Debtor. Ms. Splinter was asked whether it was possible that Debtor provided this information to someone else in the office at an earlier time. She stated that it was possible but unlikely as such information would ordinarily be referred to her or to the company's accountant.

Ms. Splinter applied the same notice requirements about which Mr. Birr testified. She testified that when notified in writing or from an attorney, all steps toward collection ceased. All representatives of

Preferred Property Management were ambiguous about what transpires when it is notified orally or by means other than in writing, without written notification from counsel or the Court.

VIOLATION OF THE AUTOMATIC STAY

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 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.

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); In re Knaus, 889 F.2d 773, 775 (8th Cir. 1989). "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.2d at 776.

One court has designed a test to evaluate whether creditor action constitutes 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). This test holds 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.

A violation of the automatic stays occurs only when the conduct in question is done with knowledge of a bankruptcy filing. Knowledge can be obtained through a formal notice produced and mailed by the Bankruptcy Court or by alternative means including oral notification by a debtor. The Court will review both types of notices separately.

KNOWLEDGE THROUGH COURT GENERATED NOTICE

The ordinary method for providing notice is through court generated notices sent to all creditors by the Bankruptcy Clerk of Court Court. 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 against the imposition of 362(h) sanctions concerning any action 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 a creditor's name and address were properly listed on the matrix of creditors which the Clerk of the Bankruptcy Court uses to mail notices of the debtors' filing is sufficient to raise the presumption that the 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.

While the minority view holds that 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 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. If, however, a creditor is able to rebut the presumption, the debtor, as the moving party in a 362(h) action, has the burden of proof by clear and convincing evidence.

ORAL NOTICE

"The automatic stay is a self-executing provision of the Code and begins to operate nationwide, without notice, once a debtor files a petition for relief." In re Scharff, 143 B.R. 541, 542 (Bankr. S.D. Iowa 1992). In enforcing its provisions, substantial authority supports the proposition that oral notification of bankruptcy provides sufficient knowledge to creditors that subsequent actions to collect an indebtedness constitutes a willful violation of the automatic stay. Forty-Five Fifty-Five,Inc., 111 B.R. 920, 921-22 (Bankr. D. Mont. 1990); In re Stucka, 77 B.R. 777, 781 (Bankr. C.D. Cal. 1987); In re Locasico, 77 B.R. 732, 733 (Bankr. S.D. Fla. 1987); In re Davis, 74 B.R. 406, 410-11 (Bankr. N.D. Ohio 1987); In re Bragg, 56 B.R. 46, 49 (Bankr. D. Ala. 1985); Mercer v. D.E.F., Inc., 48 B.R. 562, 564-65 (Bankr. D.Minn. 1985).

"[N]otice may be oral or written, and may be given by any means and in any manner." Stucka, 77 B.R. at 781. "[W]here a creditor has sufficient facts which would cause a reasonably prudent person to make further inquiry," notice does not need to be formal. Bragg, 56 B.R. at 49 (stating that a "simple telephone call to the clerk's office [following oral notification] would have revealed the filing").

The argument rejected in Mercer is similar to Preferred Property Management's argument. The creditor in Mercer argued that sanctions for violation of the automatic stay were inappropriate when it had not received "official, formal notice of the bankruptcy" despite having received telephone calls from both the debtor and the debtor's attorney. Mercer, 48 B.R. at 564. This argument is similar to Preferred Property Management's as both attempt to establish a distinction between credible and noncredible notice of bankruptcy. This Court finds the conclusions reached in Mercer compelling. For the same reason the arguments were rejected there, this Court concludes that Preferred Property Management's attempted distinction must be rejected for lack of any persuasive legal foundation to support such a proposition.

CREDIBILITY OF WITNESSES

Rule 52(a) of the Federal Rules of Civil Procedure provides that:

Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge credibility of the witness . . .

In weighing the credibility of the witnesses, the Court must examine the evidence presented and evaluate the testimony of the witnesses including variations in their demeanor as well as changes in the tone of the voice. Anderson v. City of Bessemer, 470 U.S. 564, 575 (1985). The Court can assess credibility based upon the content of the testimony as well as the Court's own experience with the way people act. In re Carrigan, 109 B.R. 167, 170 (Bankr. W.D.N.C. 1989). Where two permissible views of the evidence exist, it is the responsibility of the Court to weigh the evidence presented including the credibility of the witnesses and make a choice between them. In re Waugh, 95 F.3d 706, 712 (8th Cir. 1996).

ANALYSIS

The first issue presented requires a determination whether the requisite burden of proof has been met concerning mailed notice of the original petition to Preferred Property Management. A rebuttable presumption is created when an item is properly mailed. Schedule F in this case shows that Preferred Property Management's business is listed as 210 Second Street SE, Cedar Rapids, Iowa 52401. Preferred Property Management acknowledges that this is the correct mailing address but additionally asserts that in its mailing address it uses the description "Suite 701". This portion of the address was not in the address contained in Schedule F of Debtor's Petition.

Upon due consideration, this Court concludes that the absence of the suite number is not fatal to the creation of the presumption. The notice correctly stated the business title for Preferred Property Management as well as correctly listing the street and street number as well as the city, state and zip code. Under these circumstances, the mailing address is adequate for delivery purposes. The rebuttable presumption, that an item properly mailed is received by the addressee, has been generated in this case. The absence of the suite number will be considered, along with all other facts, to determine whether the presumption has been successfully rebutted.

The burden is upon Preferred Property Management to overcome the rebuttable presumption that they received notice of Debtor's filing. If Preferred Property Management is able to rebut this presumption, the burden then switches to Debtors to establish that notice was actually received. The presumption is strong and not rebutted by a simple denial of receipt. Here, the creditor was properly listed in the Schedules with an adequate address. The file does not contain a returned envelope from this mailing. Mr. Sole made a professional statement, as attorney for Debtors, that no notice to Preferred Property Management was returned to him undelivered. Preferred Property Management testified that it uses "Suite 701" as part of its mailing address. No other evidence was elicited to rebut the presumption. Based upon the evidence presented, the record made is insufficient to rebut the presumption raised by

mailing.

Preferred Property Management also denies receiving any type of oral notice from Debtors until after the Equifax delivery in January of 1997. On this issue, the burden of proof is upon Debtors to establish oral notice. The Court's determination of this issue must rest upon the facts elicited at hearing and the credibility of the witnesses.

Debtor testified that she made three separate telephone calls to Preferred Property Management with the first being made in September or October, 1996 and the last in January, 1997. On each occasion, she says that she informed the individual answering that she had filed bankruptcy. Preferred Property Management acknowledges only the final telephone call which was made after the receipt of the Equifax notice. If the testimony of Preferred Property Management is accepted, the final telephone call from Mrs. Lint would have been after the last contact which could be considered an act of contempt and immediately prior to the filing of the contempt citation by Debtor.

Debtor testified at the contempt hearing prior to employees of Preferred Property Management. In her testimony she described how employees at Preferred Property Management informed her in the first two telephone conversations that her oral notification was inadequate and how she was requested to provide them with the bankruptcy case number as well as the name of her attorney. There is nothing to indicate in this record that, at the time she testified, she was aware of the internal procedures which would later be testified to by representatives of Preferred Property Management. It is noteworthy that the procedure she described is almost identical to that explained by Preferred Property Management. The procedure utilized by Preferred Property Management may not be unique but it is sufficiently unusual that a non-lawyer, unfamiliar with bankruptcy noticing procedure, would most likely not understand the implications of this procedure. It is improbable that a non-legally trained Debtor would fabricate such an explanation.

Representatives of Preferred Property Management were careful to describe the procedure which is utilized by their company concerning notification of bankruptcy. This procedure provides that until or unless Preferred Property Management receives "credible evidence" of a bankruptcy filing, it will not forego future collection action. Credible evidence includes only written notification from the Bankruptcy Court or written notification from an attorney. It does not include oral notification from the bankrupt or some other individual. Under the internal procedures of Preferred Property Management, the telephone calls from Debtor Mikki Lint would not be credible evidence of the filing of her bankruptcy petition.

Representatives of Preferred Property Management went to some length to explain that these types of procedures would be logged with the company and that some record would exist of this notification. However, under Preferred Property Management's own procedures, this oral notification would have no effect on the collection process because only written documentation is considered credible. If oral notification by Mrs. Lint is deemed inadequate to forego future collection action, there would be no reason to make note of a telephone contact in the permanent records of Preferred Property Management.

Mr. Birr testified concerning the collection procedures of Preferred Property Management. At some stage, Preferred Property Management turns delinquent accounts over to a collection agency. This occurred here and the obligation of Brett Hart, in which Debtor was a guarantor, was turned over to Equifax for collection from Debtor. Mr. Birr was asked whether this was not an attempt to collect this obligation. Presumably, this testimony was provided on the issue of whether Preferred Property Management's conduct constituted a collection effort. Mr. Birr testified that: "The Equifax letter is not a collection step. It is a third party intermediate step prior to collection action." This is illuminating testimony considering that the Equifax letter was introduced into evidence as Debtors' Exhibit A and in bold letters at the top of the letter states: "This communication is from a debt collector. The purpose of this letter is to collect a debt, and any information obtained will be used for that purpose."

Representatives of Preferred Property Management testified concerning internal procedures as well as the telephone call which was admittedly received by Preferred Property Management in January, 1997. Both representatives testified that it would be unusual for a receptionist to take this type of information and that most of these types of calls would be referred either to Ms. Splinter or to the company accountant. However, neither testified unconditionally that this did not occur and there is no testimony in this record other than that statement which indicates that other employees of Preferred Property Management did not take these calls. There is no evidence to contradict Mrs. Lint's testimony that she did place these calls.

Representatives of Preferred Property Management testified that there would be no reason for them to pursue collection after notification of bankruptcy and that the files would be closed so they could move on to more profitable endeavors. However, the basic premise, while superficially logical, is incorrect. The absence of a profit motive exists only if it is assumed that there would be no collection. If a creditor attempts and is successful in collecting a debt which would be discharged, the creditor is generating a profit which would otherwise be lost. The position expressed by Preferred Property Management is not an accurate reflection of what occurs when creditors attempt to collect obligations after entry of a discharge.

Debtor had no reason to withhold information of her bankruptcy case from Preferred Property Management. She was a co-signor and guarantor on her son's lease. She listed all of her debts including this obligation in her bankruptcy schedules. She began receiving statements from Preferred Property Management in September and October, 1996 after having filed her bankruptcy petition. While compelling reasons exist to stop collection, no motive exists for this Debtor to withhold notification from Preferred Property Management that she filed for bankruptcy.

This Court observed the witnesses and carefully evaluated the testimony presented. The testimony of Debtor is credible. It is the finding of this Court that on three separate occasions Debtor contacted Preferred Property Management and notified them orally that she had filed a bankruptcy petition. The Court further finds that mailed notice was provided by the Clerk of the Bankruptcy Court and was received in due course by Preferred Property Management.

At least three documents were forwarded from Preferred Property Management to Debtor after the filing of the bankruptcy petition and after Preferred Property Management was notified of the filing of this petition. The first two letters were mailed to Debtor but were arguably directed to her son, as this

was apparently the mailing address which he left when he vacated the apartment. The final document is a letter from Equifax, initiated by conduct of Preferred Property Management, and directed to Debtor. Despite Preferred Property Management's testimony that this was not a collection effort, the document rebuts such a contention by its unambiguous statement that this was an attempt to collect a debt.

Representatives of Preferred Property Management testified that they have experience dealing with the bankruptcy process and understand the implications of the automatic stay. It is the conclusion of this Court that Preferred Property Management violated the automatic stay and did so in a willful manner after having been advised of the filing of Debtor's bankruptcy petition. Preferred Property Management violated the automatic stay provisions of 11 U.S.C. 362(a)(6) in that it did, after the filing of the bankruptcy petition, act to collect or recover a claim against Debtor that arose before the commencement of the case. In so doing, the conduct of Preferred Property Management violated both prongs of the Briggs test. The first prong is violated in that the letter from Equifax was intended to have a significant impact on Debtor's determination as to whether she would repay the obligation. The second prong is satisfied in that the conduct is contrary to what a reasonable person would consider to be fair conduct under all of the circumstances.

While a specific intent to violate the stay is not necessarily a prerequisite for a finding of willfulness, In re Atlantic Business and Community Corp., 901 F.2d 325, 329 (3rd Cir. 1990), it is obvious that a creditor must have at least a general intent to collect or recover a claim against a debtor in order to make the creditor's action a violation of the automatic stay under 362(a)(6). Applying this standard, Preferred Property Management had such an intent to collect a claim against Debtor, all of which violated 362(a)(6).

Debtor has met her burden of proof and has established that the conduct of Preferred Property Management constitutes a violation of the automatic stay which was willful in nature and, therefore, subjects Preferred Property Management to appropriate sanctions.

DAMAGES

Section 362(h) provides for sanctions against creditors who violate the automatic stay. This section provides that:

An individual injured by any willful violation of the stay provided by this section shall recover actual damages, including costs and attorney's fees, and, in appropriate circumstances, may recover punitive damages.

Courts may award 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). Courts award such damages even in the absence of expert medical testimony. Id. Damages may be awarded to compensate debtors for fear, stress,

anxiety and humiliation. In re Carrigan, 109 B.R. 167, 170 (Bankr. W.D.N.C. 1989). Punitive damages are appropriate where the violator's actions constitute egregious, intentional misconduct. In re Knaus, 889 F.2d 773, 776 (8th Cir. 1989).

It is the conclusion of this Court that the conduct of Preferred Property Management was a willful violation of the automatic stay which caused Debtor embarrassment and anxiety. The acts occurred after receiving notice from the Clerk as well as three telephone calls from Debtor advising Preferred Property Management of the filing of this bankruptcy petition. This conduct constitutes an intentional and inappropriate attempt to coerce payment from Debtor. A natural consequence of these acts was to harass Debtor into payment of a prepetition debt after she had exercised her rights under the Bankruptcy Code. Preferred Property Management is liable for actual damages to compensate Debtor for anxiety and embarrassment caused as well as for attorney's fees in pursuing her rights. Furthermore, the Court finds that the conduct was willful and oppressive under all the circumstances and justifies an award of punitive damages.

WHEREFORE, Debtor's Motion for Citation of Contempt against Preferred Property Management is GRANTED.

FURTHER, the Court finds that Debtor has established by clear and convincing evidence Preferred Property Management willfully violated the automatic stay, 362(a)(6), and is therefore subject to sanctions pursuant to 362(h).

FURTHER, Attorney Rick Sole is directed to submit to the Court within ten days of the date of this Order an affidavit of attorney's fees expended in the prosecution of this contempt application.

FURTHER, upon receipt of the attorney's fees affidavit from Mr. Sole, the Clerk is requested to forward the file to the Court at which time the Court will enter a final judgment by separate order.

FURTHER, this Order is not a final judgment, but rather the final judgment including final amounts awarded will be entered upon receipt of the affidavit from Mr. Sole.

SO ORDERED this 4th day of April, 1997.

Paul J. Kilburg
U.S. Bankruptcy Judge