

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

IN RE:)

) Chapter 7

JONAS W. BANDY)

JULIA M. BANDY,) Bankruptcy No. 03-00753

)

Debtors.)

ORDER RE MOTION FOR SANCTIONS

On July 24, 2003, the above-captioned matter came on for hearing pursuant to assignment. Debtors Jonas and Julia Bandy appeared by Attorney Stuart Hoover. The matter before the Court is Debtors' Motion for Sanctions against Homecomings Financial of Dallas, Texas for alleged violation of the automatic stay pursuant to 11 U.S.C. § 362(a)(6) and § 362(h). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(O).

FINDINGS OF FACT

Debtors filed a Chapter 7 petition on March 10, 2003. Homecomings Financial is a creditor holding a second mortgage on Debtors' residence. There is evidence that the fair market value of the residence is \$96,000 with a senior mortgage in the amount of \$86,957. The remaining equity of \$9,043.00 is subject to the secured interest of Homecomings Financial. Homecomings Financial contacted Debtors prior to the entry of discharge and attempted to collect on their debt. The contacts included at least six letters and 21 phone calls.

Debtors previously filed a Motion for Sanctions alleging a violation of 11 U.S.C. § 524(a). This section imposes an injunction against creditor attempts to collect any personal liability from debtors after the entry of discharge. The Court determined that the contacts existing at the time of the hearing on the § 524(a) motion on May 22, 2003 preceded the entry of the discharge and denied sanctions. However, the Court did not prohibit Debtors from reexamining the matter as a violation of the automatic stay under § 362(h).

Debtors subsequently filed under § 362(h) seeking the imposition of sanctions for violation of the automatic stay. The deadline for filing objections to discharge passed on June 6, 2003. The Court was advised, at the time of hearing, that post-discharge contacts were also made by Homecomings Financial.

CONCLUSIONS OF LAW

A bankruptcy petition filed under § 301 of the Code imposes the automatic stay pursuant to § 362. All voluntary cases are included in § 301. The automatic stay, under § 362, prohibits any entity from taking 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 extremely broad. In re Knaus, 889 F.2d 773, 774 (8th Cir. 1989). By the passage of § 362, 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 the violation 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 with knowledge of the bankruptcy filing. In re Dencklau, 158 B.R. 796, 800 (Bankr. N.D. Iowa 1993). In imposing actual damages, the trial court has discretion to fashion the punishment to fit the circumstances. Hubbard v. Fleet Mortg. Co., 810 F.2d 778, 782 (8th Cir. 1987) (citing United States v. United Mine Workers, 330 U.S. 258, 303 (1947)).

ANALYSIS

In this case, Homecomings Financial has been served on two separate occasions with motions for sanctions. At no time has Homecomings Financial filed an appearance or made contact with Debtors' counsel. There have been numerous contacts involving letters and telephone calls to Debtors. While the contacts have not been of a threatening nature, they have been numerous and have sought payment of a debt in violation of the automatic stay.

In addition, though not directly at issue here, since Debtors have now brought this Motion under § 362(h), there have been post-discharge contacts which raise an issue which this Court has not, to its knowledge, previously addressed in the Northern District of Iowa. That is, the extent of rights of undersecured creditors who retain some rights though post-discharge liens pursuant to 11 U.S.C. § 506(a). Undersecured creditors who make post-discharge contacts with debtors must navigate a very narrow path between legality and violation of the post-discharge injunction. Some contacts are necessary and proper for maintaining the debtor-creditor relationship with regard to the surviving lien. In re Garske, 287 B.R.

537, 545 (B.A.P. 9th Cir. 2002). While post-discharge contacts by creditors are permitted to some extent, they must not attempt to collect any unsecured obligation as a personal obligation of the debtor or, otherwise, they risk violation of § 524(a)(2).

The general rule provides that creditors with partially discharged claims may initiate minimal contact with the debtor to the extent necessary to service the surviving secured debt. In re Henry, 266 B.R. 457, 472 (Bankr. C.D. Cal. 2001). Normal and reasonable contacts such as mailing coupons or monthly statements to a discharged debtor in order to service the surviving secured debt do not violate the injunction. However, courts addressing this issue emphasize that any post-discharge contact by an undersecured creditor must be minimal, unobtrusive, polite, and with no greater frequency than a debtor not in bankruptcy would reasonably expect. Any conduct or contact beyond this minimal standard constitutes a violation of the post-discharge injunction. However, as this is being treated as a pre-discharge violation, these issues need not be resolved with finality unless Homecomings' contacts with Debtors continue in the future.

Homecomings Financial has been properly served with notice of the pendency of this bankruptcy. It has been properly served with the Motion for Sanctions under § 362(a)(6) and § 362(h). The Court determines that there has been a substantial number of contacts through telephone and mailings. The Court finds that Debtors have been damaged and they are entitled a modest sum for actual damages, punitive damages, attorney's fees and costs.

WHEREFORE, Debtors' Motion for Sanctions against Homecomings Financial is GRANTED.

FURTHER, the Court finds that Debtors have established by clear and convincing evidence that Homecomings Financial willfully violated the automatic stay, § 362(a)(6) and is, therefore, subject to sanctions pursuant to § 362(h).

FURTHER, the Court finds that Debtors have sustained actual damages in the amount of \$500.

FURTHER, the Court finds that Debtors have incurred attorney's fees in the amount of \$400.

FURTHER, the Court finds that Debtors should be awarded punitive damages in the amount of \$1,500.

FURTHER, judgment is entered in favor of Debtors Jonas and Julia Bandy and against Homecomings Financial for these amounts.

FURTHER, said judgment shall collect interest at the rate of 10% per annum from the date of entry of this judgment.

FURTHER, any Court costs associated with Debtors' pursuit of these sanctions are assessed to Homecomings Financial.

SO ORDERED this 29th day of July, 2003.

KILBURG
CHIEF BANKRUPTCY JUDGE

PAUL J.