

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF ILLINOIS

IN RE: )  
 )  
TIMOTHY P. HERBST, ) Bankruptcy Case No. 98-33679  
 )  
Debtor. )

OPINION

The issue before the Court is whether a creditor and its attorney should be sanctioned pursuant to 11 U.S.C. § 362(h) for filing a complaint in State Court to collect on a discharged debt that was the subject of a proposed reaffirmation agreement that was never filed with the Bankruptcy Court. The Creditor and its original attorney, who is also a subject of the Motion for Sanctions, did not appear at the hearing held on this matter on November 8, 1999. Attorney Steven M. Wallace was retained, on October 26, 1999, as new counsel for Creditor and appeared at the hearing. The Debtor and his counsel appeared at the hearing.

The Debtor, Timothy P. Herbst, filed his Petition for Relief Under Chapter 7 of the Bankruptcy Code on December 1, 1998, thereby triggering the automatic stay. The Debtor claims that, in December 1998, he completed and signed a reaffirmation agreement, which he then forwarded to Creditor, The Auction Finance Program, Inc. The Creditor also claims to have forwarded to the Debtor, in December 1998, a signed reaffirmation agreement. At the hearing on November 8, 1999, the

parties agreed that a valid reaffirmation agreement was never filed as required by the Bankruptcy Code. In the Matter of Chad Turner, 156 F.3d 713 (7th Cir. 1998).

The debt that was the subject of this dispute was discharged by this Court on April 30, 1999, when the Debtor's Discharge Order was entered. After the discharge was granted, the Creditor filed a complaint in State Court to collect on the debt. At the hearing on November 8, 1999, counsel for the Creditor conceded that the Creditor's conduct in filing the complaint resulted in a willful violation of the automatic stay provision of 11 U.S.C. § 362(a), and that the Debtor's request for attorney fees of \$1,027 was reasonable. Attorneys' fees are mandatory when there has been a willful violation of the automatic stay. The Court finds the Debtor's request for attorney fees is justified. The Debtor claimed to have actual damages for having to attend Court on this matter and for being confronted by Creditor's efforts to collect on the discharged debt. The Creditor still attempted to get the Debtor to settle this matter up to the time of this hearing. Under these circumstances, the Court finds that the Debtor is entitled to compensatory damages of \$500.

In some instances, punitive damages for willful violations of the automatic stay are appropriate. Judge Larry Lessen, in In re Martin, Case No. 97-71599 (Bankr. CD Ill. 1997), sets out the standards as follows:

Punitive damages for willful violations of the automatic stay are appropriate where the creditor's conduct is particularly egregious. In re Sumpter, supra 171 B.R. at 845. In determining whether punitive damages are appropriate, the Court looks at (1) the nature of the creditor's conduct, (2) the creditor's ability to pay damages, (3) the creditor's motive, and (4) any provocation by the debtor.

According to the exhibits admitted into evidence at the hearing on November 8, 1999, the attachments to Debtor's Motion for Sanctions, and the arguments of counsel, the Creditor learned early on that there was no valid reaffirmation filed with the Court. Nonetheless, the Creditor filed a complaint in State Court to collect on the debt after the Discharge Order was entered. Exhibits in this matter include:

(a) "Plaintiff's Exhibit 1" is a letter from Creditor's Collection Department, dated April 14, 1999, acknowledging that Creditor was uncertain whether a reaffirmation agreement had been filed with the Court.

(b) "Plaintiff's Exhibit 2" includes several items: a June 28, 1999, letter from Debtor's attorney to Creditor's attorney, which enclosed a copy of the Debtor's April 30, 1999, Discharge Order and stated that, if the Creditor's collection lawsuit was not dismissed, the Debtor would move to have the Creditor held in contempt of Court; a June 29, 1999, facsimile from Debtor's attorney to Creditor's attorney enclosing a copy of the April 30, 1999, Discharge Order; Certificate of Service; Notice of Chapter 7 bankruptcy case filing, which contains a notice to creditors

that a violation of the automatic stay by a creditor could result in a penalty; and Debtor's Schedule F listing this Creditor.

(c) Attached to the Motion for Sanctions is a copy of a September 20, 1999, letter from counsel for Debtor to Creditor's counsel asking the Creditor to dismiss the collection suit and a September 22, 1999, facsimile from the Debtor's counsel to Creditor's counsel asking the Creditor to dismiss the collection lawsuit.

How did the Creditor respond to the Debtor's letters, facsimiles, and telephone calls concerning the debt that was discharged on April 30, 1999? In one letter, dated September 20, 1999, attached to the Motion for Sanctions from the Creditor's counsel to Debtor's counsel, Creditor's counsel wanted to discuss settlement of the issue. In another letter, dated October 4, 1999, also attached to the Motion for Sanctions, counsel for Creditor said Creditor would not dismiss its case. The parties also acknowledged that numerous telephone discussions were held concerning the collection lawsuit.

In this matter, the nature of the Creditor's conduct was that of defiance. The Creditor clearly had actual knowledge that no valid reaffirmation agreement existed, but clearly pursued for months its collection lawsuit filed after the subject debt was discharged. It wasn't until the hearing on November 8, 1999, that the Creditor, through its new counsel, acknowledged the violation of the stay. There

is no evidence that this Creditor could not pay damages. The Creditor's motive is clear. The Creditor wanted to force a settlement with the Debtor and collect, even though the debt was discharged and the Creditor's collection lawsuit was in violation of the stay. The Creditor appears to be a sophisticated creditor with a Miami Beach, Florida, address and a separate Collection Department. The evidence shows that this Creditor chose to risk sanctions in order to collect on this discharged debt. There was no evidence of provocation by the Debtor. Creditor submitted a case from the Northern District of Illinois, entitled In Re Smith, 224 B.R. 388 (Bankr. N.D. Ill. 1998), for the proposition that an award of punitive damages against a creditor who violates the discharge injunction should not be granted unless the debtor proves malevolent intent or bad faith. In that case, Judge Schmetterer found that the creditor was not acting in bad faith when it violated the injunction.

In this case, when all facts are considered, the Court finds that the Creditor was acting in bad faith when it filed and pursued a collection suit on a debt it knew was discharged. The Creditor even refused to dismiss the lawsuit in light of overwhelming evidence of actual notice that the suit was improper and in violation of the stay. In fact, the Creditor here attempted to use the collection lawsuit to force settlement of a debt that had been discharged for several months. The law is clear that there is an affirmative duty on the part of one

who violates the automatic stay to undo the violation without unreasonable delay, or face sanctions as a consequence. In re Martin, supra, at 5. The Creditor's defense at the hearing, that it was not aware that a valid reaffirmation agreement was not timely filed and that it did not actively pursue the collection suit, was not credible in light of the overwhelming evidence to the contrary.

For the foregoing reasons, the Court finds that the Creditor, The Auction Finance Program, Inc., and Creditor's attorney, Charles J. Grimsley, violated the automatic stay provisions of 11 U.S.C. § 362(a), and that actual damages of \$1,527, including \$1,027 in attorney's fees and punitive damages of \$2,000, should be awarded to the Debtor pursuant to 11 U.S.C. § 362(h).

This Opinion is to serve as findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure. See written Order.

ENTERED: November 19, 1999.

/s/ GERALD D. FINES  
United States Bankruptcy Judge