

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF ILLINOIS**

**IN RE:** )  
 )  
**SHOLANDA K. WELLMAKER,** ) **No. 02-34687**  
**Debtor.** )

**OPINION**

The matters before the Court are the Motion to Annul the Stay filed by Deutsche Bank (Creditor) and the Motion for Contempt and Sanctions filed by the Debtor, Sholanda K. Wellmaker (Debtor). The facts are not in dispute and can be found either in the Court's records or from the oral stipulation presented to the Court at the hearing on the motions.<sup>1</sup>

The Creditor holds a mortgage on the Debtor's residential real estate. The Debtor filed three cases in Bankruptcy.

**CASE ONE** (Case No. 02-32334)

June 21, 2002	Debtor files her first Chapter 13 case.
October 21, 2002	Case was DISMISSED due to failure to file an amended plan. Debtor did not move to reinstate this case.
December 13, 2002	Case was closed.

**CASE TWO** (Case No. 02-34687)

December 19, 2002	Debtor files her Second Chapter 13 case.
July 26, 2004	Case was DISMISSED on motion of the Chapter 13 Trustee for non-payment. (S)
August 5, 2004	Debtor moved to reinstate the case and to convert the proceeding to Chapter 7. (S) The Creditor did not receive notice of this motion or the hearing date. (S)
August 16, 2004	Order entered granting Motion to Reinstate. An order was

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<sup>1</sup>The stipulated facts are indicated by "(S)".

also entered converting Case to Chapter 7. (S) The Creditor did not receive notice of these two orders. (S)

Notice of Chapter 7 Bankruptcy case and 341 Meeting Notice for September 10, 2004, was sent out. The Certificate shows the Creditor and its attorneys in Chicago were served. It does not show service on the Creditor's local attorneys. (S) The Creditor contends it never received this notice.

September 10, 2004 The Creditor sends out a Notice of a Foreclosure Sale in the state court foreclosure action. The Debtor does not respond. (S) The 341 Meeting in the bankruptcy case is conducted. (S)

October 29, 2004 The state court foreclosure sale is held. (S)

November 11, 2004 The Creditor files to have the foreclosure sale approved and for possession. (S)

November 15, 2004 The Debtor received her Chapter 7 discharge.

Between Nov. 11 and Nov. 17, 2004 The Debtor's attorney contacts the Creditor's local attorney and advises the Creditor's attorney of the pending Chapter 7 case in bankruptcy. (S)

November 18, 2004 The Creditor has the state court foreclosure sale vacated. (S)

November 20, 2004 The Creditor files its Motion to Annul the Stay. (S)

December 1, 2004 The Debtor files her response to the Creditor's Motion to Annul the Stay and also files her Motion for Contempt and Sanctions against the Creditor for violating the stay. (S)

**CASE THREE** (Case No. 04-35119)

December 20, 2004 Debtor files her Third Chapter 13 Case. Debtor has filed her plan and schedules in this case and the § 341 Meeting of Creditors was scheduled for January 11, 2005. There has been no other pleadings or events in this case.

Because it went to sale after the case was converted to one under Chapter 7 of the Bankruptcy Code, the Creditor is asking to have the stay annulled. The Debtor opposes this request because she is concerned that if the stay is annulled the Creditor will go back into state court and have the

foreclosure sale reinstated. The Debtor also is seeking sanctions because the sale was held after the case was reinstated and converted to one under Chapter 7 of the Bankruptcy Code.

The first issue before the Court is whether there was a stay in effect after the Chapter 13 in the second case was dismissed. Section 362(c) of the Bankruptcy Code provides as follows:

(c) Except as provided in subsections (d), (e), and (f) of this section—

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and

(2) the stay of any other act under subsection (a) of this section continues until the earliest of--

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied.

11 U.S.C. § 362(c).

As the second case was dismissed, the stay was terminated. However, when the second case was reinstated, the automatic stay was also reinstated. *See, In re Hakim*, 244 B.R. 820 (Bankr.N.D.Cal. 1999); *In re Diviney*, 225 B.R. 762 (10th Cir. BAP 1998); *In re Nail*, 195 B.R. 922 (Bankr.N.D.Ala. 1996).

The next issue before the Court is whether the reinstated stay should be annulled. Considering what occurred in the second case and the filing of the third case, annulling the stay would serve no useful purpose. Annulling the stay would be appropriate if there were grounds for sanctifying the foreclosure sale held in violation of the reinstated stay. However, the Creditor has already vacated the foreclosure sale and there is nothing that would be sanctified by annulling the stay. Furthermore, as the second case has been converted to one under Chapter 7 of the Bankruptcy Code and the Debtor has received a discharge, the stay ceases to exist. Were it not for the filing of the third case, the Creditor would be free of the stay and could again proceed with the foreclosure sale in state court. With the filing of the third case, a new stay issued which requires the Creditor to

seek relief in order to continue with the foreclosure sale.

In summary, with the filing of the third case, the Debtor and the Creditor are where they were when the second case was filed and a stay issued. No sale had been concluded and the stay prevents one from occurring. So this Court sees no need to take action in the second case.

The last issue before this Court arises under § 362(h) which provides as follows:

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.

11 U.S.C. § 362(h).

The first sub-issue is whether there was a willful violation of the stay. As the movant, the Debtor has the burden of demonstrating that “the stay violation occurred and was committed willfully by the respondent, and that the movant was damaged.” *In re Steenstra*, 280 B.R. 560, 566 (Bankr.D.Mass. 2002). Courts have construed the term “willful violation” as “a deliberate and intentional act done with the knowledge that the act is in violation of the stay.” *In re Forty-Eight Insulations, Inc.*, 54 B.R. 905, 909 (Bankr.N.D.Ill. 1985). *See also In re Steenstra*, 280 B.R. at 566 (“All that is required is knowledge of the existence of the stay and an intent to commit the act which violated the stay.”). Specifically, “[a] ‘willful violation’ requires a finding that ‘the defendant knew of the automatic stay and that the defendant’s actions which violated the stay were intentional.’” *In re Vega*, 216 F.3d 1085, 1085 (9th Cir. 2000). Furthermore, “if a party knows of a bankruptcy filing, ‘it necessarily follows that the [party] willfully violated the automatic stay’ when it intentionally acted in a way that violated it.” *Id.* In making a willful violation analysis, the *Vega* Court found a willful violation where the creditor knew that the stay was reinstated, yet intentionally sought recovery from the debtor by filing in state court. *Id.*

In the case before this Court, the Debtor has not convincingly demonstrated that the Creditor

willfully violated the stay. As discussed *supra*, a willful violation of a stay requires that a defendant had knowledge of the stay and that it intended to commit the act which violated the stay. In this case, however, the creditor never received notice of the second case being reinstated and converted to a Chapter 7 case, and while the Creditor and its Chicago counsel got notice of the Chapter 7 case and the First Meeting of Creditors, its local counsel, who was handling the foreclosure and bankruptcy, did not. Absent proper and complete service, it is difficult to conclude the Creditor had knowledge of the stay. Further indication that the Creditor did not willfully violate the stay lies in the fact that it voluntarily vacated the foreclosure sale upon being notified by the Debtor's attorney of the pending Chapter 7 case.

The second sub-issue under § 362(h) is whether, upon a finding of a willful violation under Section 362(h), the Debtor would be entitled to damages. Pursuant to Section 362(h), in order to be entitled to actual damages, the Debtor must show, by a preponderance of the evidence, that she was injured by the willful violation of the stay. *In re Steenstra*, 280 B.R. at 569. The Debtor in this case did not prove that she was injured by the Creditor's alleged willful violation of the stay because the Creditor vacated the sale upon learning that the Debtor's case was reinstated and converted, and as pointed out above, she presently is protected by a stay that prevents the Creditor from going forward with a foreclosure sale and she is in the same position she was in before her second case was dismissed.

This Opinion constitutes this Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. A separate Order will be entered.

Dated: 3/28/05

/s/WILLIAM V. ALTENBERGER  
UNITED STATES BANKRUPTCY JUDGE

**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF ILLINOIS**

**IN RE:** )  
 )  
**SHOLANDA K. WELLMAKER,** ) **No. 02-34687**  
**Debtor.** )

**ORDER**

For the reasons stated in an Opinion filed this day, IT IS HEREBY ORDERED that both the Motion to Annul filed by Deutsche Bank and the Motion for Contempt and Sanctions filed by the Debtor are DENIED.

Dated: 3/28/05

/s/WILLIAM V. ALTENBERGER  
UNITED STATES BANKRUPTCY JUDGE

Copies to:  
Pearson C.J. Bush  
Laura K. Grandy  
U.S. Trustee