

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION**

IN RE

**Jerry F. Blurton,

Debtor.**

**Case No. 01-11191

Chapter 7**

**Jerry F. Blurton,

Plaintiff,**

v.

Adv. Pro. No. 01-5179

**Robert's Jewelers,

Defendant.**

**MEMORANDUM OPINION AND ORDER RE
(1) DEBTOR'S COMPLAINT FOR DAMAGES FOR VIOLATION OF THE
AUTOMATIC STAY and (2) DEFENDANT'S COUNTERCLAIM**

The Court conducted a trial in this matter on April 3, 2002. FED. R. BANKR. P. 7001. Pursuant to 28 U.S.C. § 157(b)(2), this is a core proceeding. After reviewing the testimony from the trial and the record as a whole, the Court makes the following findings of facts and conclusions of law. FED. R. BANKR. P. 7052.

I. FINDINGS OF FACT

Prior to the trial in this matter, the parties submitted the following stipulation of uncontested facts:

1. On September 16, 1999, Debtor signed an application for a revolving charge agreement with Defendant.
2. On September 16, 1999, Debtor signed an agreement to purchase a 14 karat white gold .65 diamond wedding ring pursuant to an open end account and security agreement. Pursuant to the terms of the agreement, the Debtor was to pay

\$3,300.00 (including sales tax of \$230.00) for the aforesaid wedding ring and at that time made a \$500.00 down payment on the account and agreed to pay the balance at the rate of \$175.00 per month with 18% interest per annum. The agreement further provided that the Defendant would retain a security interest in the aforesaid wedding ring.

3. Debtor filed a Chapter 7 bankruptcy petition on March 16, 2001.
4. On March 22, 2001, Defendant issued a Summons to Recover Personal Property against Debtor.
5. Notice of Commencement of Case under Chapter 7 of the Bankruptcy Code, Meeting of Creditors, and fixing of Dates, dated March 27, 2001, was mailed to creditors at the address indicated on the bankruptcy matrix.
6. The Deputy of Madison County delivered the Summons to Recover Personal Property to Jerry Blurton, Sr., with a notation to deliver a copy of the Summons to Debtor, on March 31, 2001.
7. On April 11, 2001 counsel for Defendant drafted and mailed a letter to counsel for Debtor requesting that the Debtor either reaffirm the debt or surrender the collateral.
8. On April 18, 2001, counsel for the Debtor sent a letter to counsel for Defendant, confirming a phone conversation regarding the bankruptcy, the post-petition General Sessions suit filed against the Debtor and the Defendant's intention to non-suit the General Sessions suit against Debtor.
9. On April 23, 2001, counsel for Defendant non-suited the post-petition General Sessions suit filed against the Debtor.
10. On or about April 25, 2001, an Amended Commencement of Case was mailed to the creditors on the matrix.
11. On April 28, 2001, Defendant sent a statement of account [to the debtor].
12. On May 28, 2001, Defendant sent a second statement of account [to the debtor].
- [13. The instant adversary proceeding was filed on June 4, 2001.]

In addition to the stipulated facts, the Court finds that Joel Newman, the credit manager for Robert's Jewelers, was informed by his attorney of the debtor's bankruptcy filing. Newman testified that Robert's Jewelers uses a computerized billing system and that to cease sending bills to a particular customer he only needs to push one button. Newman further testified that

although he had dealt with other bankruptcy clients before and that 20% of his time was spent on collection efforts, he had no knowledge of the existence of the automatic stay or what it encompassed.

The Debtor testified that he purchased the ring as an engagement ring for his ex-wife. At the time of the divorce, the Debtor's ex-wife had possession of the ring. The Debtor testified that he does not know if his ex-wife still has possession of the ring. Since filing his Chapter 7 petition, the Debtor has not filed a statement of intention with respect to Robert's Jewelers' collateral, nor has he been making adequate protection payments.

II. CONCLUSIONS OF LAW

A. The Debtor's Complaint for Damages for Violation of the Automatic Stay

Filing a bankruptcy petition triggers the automatic stay provisions under 11 U.S.C. § 362(a)(1) through (8), which prohibit creditors from attempting to collect most debts from the debtor or the debtor's property. The automatic stay provisions under 11 U.S.C. §362(a) arise by operation of law upon the mere commencement of a case filed under any operative chapter of the Bankruptcy Code (i.e., chapter 7, 9, 11, or 13); and as such, a court hearing or specific order is not required. Once the stay becomes effective, it is applicable to all entities.¹ For the purposes of the Bankruptcy Code, the term "entity" is broadly defined to include persons, estates, trusts, and governmental units.² The term "person" includes individuals, partnerships, and corporations.³ All property of the section 541(a) bankruptcy estate is subject to and protected by the automatic

stay. The term "property of the estate" is defined broadly under the Bankruptcy Code to include all legal or equitable interests of the debtor in real, personal, or intangible property as of the commencement of the case, wherever located.⁴

Subsection (h) of 11 U.S.C. § 362 provides that "[a]n 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."⁵ As a practical matter, the section 362(a) automatic stay, if innocently violated, will not halt collection activity of creditors, if such creditors are not actually aware that the debtor has in fact filed a bankruptcy case. If, however, a creditor knowingly and willfully ignores the statutory prohibitions provided by the automatic stay, the creditor may be subject to sanctions for violations of the stay. "Because Congress chose to use the word "shall" in drafting § 362(h), the imposition of sanctions under this statute is mandatory. A bankruptcy court does not have the discretion to decide if sanctions are the appropriate remedy for a violation of the stay. So long as there is a "willful violation," the court must impose them.

The term "willful" is not defined by the Bankruptcy Code; however, courts have been rather thorough in interpreting the term. Judge Stair of the Eastern District of Tennessee aptly summed up the interpretation as follows:

A violation [of the automatic stay] is willful if "the creditor deliberately carried out the prohibited act with knowledge of the debtor's bankruptcy case." Walker v. Midland Mortgage Co. (In re Medlin), 201 B.R. 188, 194 (Bankr.E.D.Tenn.1996).

The level of culpability necessary for a "willful" violation of the stay has been summarized as follows:

A specific intent to violate the stay is not required, or even an awareness by the creditor that her conduct violates the stay. It is sufficient that the creditor knows of the bankruptcy and engages in deliberate conduct that, it so happens, is a violation of the stay. Moreover, where there is actual notice of the bankruptcy it must be presumed that the violation was deliberate or intentional. Satisfying these requirements itself creates strict liability. There is nothing more to prove except damages. In re Daniels, 206 B.R. 444, 445 (Bankr.E.D.Mich.1997) (internal citations and quotations omitted). "[G]ood faith is not a defense and is irrelevant to liability." Id. at 446.

In re Printup, 264 B.R. 169, 173 (Bankr. E.D. Tenn. 2001). It is irrelevant to a court faced with imposing § 362(h) sanctions whether a defendant actually intended to violate the automatic stay.

So long as the defendant had knowledge of the bankruptcy case and took a deliberate act in violation of the automatic stay, a bankruptcy court must award the plaintiff actual damages. *In re Hill*, 222 B.R. 119, 123 (Bankr.N.D.Ohio 1998). Should the court make an additional finding that the defendant acted in bad faith or with malice, the court may also award punitive damages to the debtor.⁶

In the case at bar, it is clear that the defendants had actual notice of the Debtor's bankruptcy case prior to sending him the two statements on April 28, 2001, and May 28, 2001. Joel Newman, the credit manager for Robert's Jewelers, admitted that he had been informed by his attorney of the Debtor's pending bankruptcy case. He also testified that it was an extremely

simple process to stop the statements from being generated by the computer program. The actions by Robert's Jewelers in this case clearly come within the prohibitions of 11 U.S.C. § 362. As a result, the Court finds that (1) Robert's Jewelers did willfully violate the automatic stay and the debtor is entitled to an award of actual damages.

In determining the amount of damages to award the Debtor, the Court has reviewed the affidavit of attorney's fees and expenses the Debtor's attorney has filed with the Court. The Court finds that the Debtor is entitled to an award of \$5,100.00 against the defendants, Robert's Jewelers. Of this amount, \$5,000.00 is for attorney's fees and expenses.

B. Defendant's Counterclaim

Within thirty days of filing a bankruptcy petition, a debtor is required to file a statement indicating whether he is going to (1) retain property which secures a consumer debt (by either redeeming the property or reaffirming the debt) or (2) surrender the property to the secured creditor. 11 U.S.C. § 521(2)(A). The debtor is then required to perform his stated intention within forty-five days of filing the notice of intent. 11 U.S.C. § 521(2)(B). In the case at bar, the Debtor has not filed any such statement with the Court. The debtor has also not made any adequate protection payments to the creditor.

There are no statutory sanctions for failure to comply with 11 U.S.C. § 521(2)(A) and (B). *In re Irvine*, 192 B.R. 920 (Bankr. N.D. Ill. 1996); however, "failure to perform the duties imposed within Section 521(2) provides grounds for vacating the automatic stay . . ." *Id.* at 922.

In the case at bar, the debtor filed his Chapter 7 bankruptcy petition on March 16, 2001. As of the date of this opinion, he has not filed any statement of intent with respect to Robert's Jewelers' collateral. As a result, the Court finds that the automatic stay should be lifted in favor of Robert's Jewelers, as debtor is deemed to have abandoned any interest he has in the collateral.

III. ORDER

It is therefore **ORDERED**:

(1) That the Debtor's Complaint for Damages for Violation of the Automatic Stay is **Granted**. The Debtor is hereby awarded a judgment against the Defendant, Robert's Jewelers in the amount of \$5,100.00.

(2) That the Defendant's Counterclaim is **Sustained** in so far as the automatic stay is lifted.

IT IS SO ORDERED.

By the Court,

G. Harvey Boswell
United States Bankruptcy Judge

Date: May 3, 2002

cc:

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1. 11 U.S.C. § 362(a).
2. 11 U.S.C. § 101(15).
3. 11 U.S.C. § 101(41).
4. 11 U.S.C. § 541(a); 28 U.S.C. § 1334(e).
5. 11 U.S.C. § 362(h) (1994).
6. See *Crysen/Montenay Energy Co. v. Esselen Assocs., Inc. (In re Crysen/Montenay Energy Co.)*, 902 F.2d 1098, 1105 (2d Cir. 1990); *Cuffee*, 901 F.2d at 329. Although courts are required to award actual damages to an injured plaintiff for violations of the automatic stay, the imposition of punitive damages is left to the court's discretion. See *In re Timbs*, 178 B.R. 989, 997 (Bankr. E.D. Tenn. 1994). The factors considered in a § 362(h) punitive damages action "include the nature of the creditor's conduct, the creditor's ability to pay the damages and the creditor's motives, and any provocation by the debtor." *In re Emberton*, 263 B.R. 817 (Bankr. W.D. Ky. 2001).