Dated: August 25, 2005
The following is ORDERED:

Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re KENNETH D. SESSIONS, Debtor.	Case No. 04-34931-L Chapter 13
Kenneth D. Sessions, Plaintiff, v. Rachel Putnam, Defendant.	Adv. Proc. No. 05-00231

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT is the Motion to Dismiss, Or In The Alternative, For Summary Judgment, Of Defendant Rachel Putnam ("Putnam"). Putnam asserts that the claims raised in the Complaint for Violation of the Automatic Stay, for Sanctions and Neglect and/or Intentional Infliction of Emotional Distress ("Complaint") should be dismissed at plaintiff's cost for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Bankruptcy Procedure 7012, which incorporates Federal Rule of Civil Procedure 12(b)(6). Putnam also seeks summary

judgment on the basis that no genuine issue of fact exists and that she is entitled to prevail as a matter of law. In his Complaint, the Debtor alleges that by requesting and being awarded attorney's fees while knowing that he was a debtor in bankruptcy, Putnam violated the automatic stay and is subject to sanctions pursuant to section 362(h) of the Bankruptcy Code.[1] Since Putnam has filed several exhibits outside of the pleadings in support of her motion, the Court will treat the motion as a motion for summary judgment. Fed. R. Bankr. P. 7012(b), 7056(e); Fed. R. Civ. P. 12(b). For the reasons stated below, Putnam's motion for summary judgment will be granted. This is a core proceeding. 28 U.S.C. § 157(b)(2)(G).

FACTS

The Debtor filed a petition seeking relief under Chapter 13 of the Bankruptcy Code on September 23, 2004. On February 22, 2005, Michelli Sessions, the Debtor's wife, filed a motion to terminate stay to proceed with divorce. The motion was resolved on March 8, 2005, by entry of a consent order terminating the automatic stay for the "express and sole purpose of allowing the debtor to proceed with the divorce trial set for May 2, 2005 in the Circuit Court of Shelby County, TN."

On April 7, 2005, counsel for the parties appeared before the divorce referee upon a petition for modification of pendente lite support filed by the Debtor. Putnam appeared for Mrs. Sessions and attorney Juliette Hill-Akines appeared for the Debtor. Putnam objected to the hearing going forward on that day on the basis that her client had a pending motion for contempt against the Debtor for failure to pay alimony and that she was uncertain about whether the divorce referee or

[1] The Bankruptcy Code is contained in 11 U.S.C. §§ 101-1330. Unless stated to the contrary, all future statutory references are to the Bankruptcy Code, e.g., "§ ____."

the bankruptcy court should hear the modification request. Hill-Akines responded that Putnam's objections were intended for delay and that modification of a support award is specifically excepted from the automatic stay. The divorce referee decided to proceed with the hearing.

Following the Debtor's testimony about his current income, Mrs. Sessions, by her attorney, moved to deny the modification based on an insufficient change in circumstances. The motion was granted, and Putnam then moved on behalf of her client for an award of attorney fees arising out of the petition for modification. This motion was granted and the Debtor was directed to reimburse Mrs. Sessions for attorney fees in the amount of $500.00.

On April 28, 2005, the Debtor filed his complaint in this court alleging that despite her knowledge of his bankruptcy filing, Putnam "willfully requested and was awarded attorney fees in violation of the automatic stay." The Debtor asserts that the effect of the award was to prefer one unsecured creditor over other unsecured creditors. The Debtor alleges that "[t]he Defendant's conduct exceeds all bounds tolerated by decent society and was calculated to cause and did cause the Plaintiff mental distress of a serious kind." The Debtor seeks $500.00 in compensatory damages, punitive damages, court costs, and attorney fees.

Putnam moved to dismiss the complaint or, in the alternative, for summary judgment. Putnam asserts that there are no disputed issues of fact; that the Debtor waived the protection of the automatic stay at the hearing in question; that the hearing was based on the motion filed by the Debtor, not by Putnam (implying that the automatic stay does not apply to a hearing initiated by the Debtor); and/or that the automatic stay was terminated as to the divorce proceedings by the consent order.

ANALYSIS

Federal Rule of Civil Procedure 56(c), as incorporated by Federal Rule of Bankruptcy Procedure 7056, governs motions for summary judgment in adversary proceedings in bankruptcy. Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). When a court reviews a motion for summary judgment, "the evidence, all facts, and any inferences that may be drawn from the facts must be viewed in the light most favorable to the nonmoving party." *Poss v. Morris (In re Morris),* 260 F.3d 654, 665 (6th Cir. 2001) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986)). The non-moving party must present enough evidence to show that there is a genuine issue of material fact in order to prevail. *Klepper v. First Am. Bank,* 916 F.2d 337, 342 (6th Cir. 1990). "A mere scintilla of evidence is insufficient; 'there must be evidence on which the jury could reasonably find for the [non-movant].'" *In re Morris,* 260 F.3d 654, 665 (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 252 (1986)). Summary judgment should be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986).

No material factual dispute was raised in Putnam's answer to the complaint, and none was raised in the Debtor's response to Putnam's motion. The Debtor does appear to be confused about who was awarded attorney fees, however. The parties were ordered to supplement the record in this case to supply a copy of the order entered in the state court. A copy of that order has been supplied,

and it makes clear that attorney fees were awarded to Mrs. Sessions, not to Putnam. This fact is important because it clarifies that the award of attorney fees was intended to benefit the Debtor's spouse, and only indirectly, that spouse's attorney.[2] As the result of the petition for modification of pendente lite support filed by the Debtor, Mrs. Sessions incurred an obligation for attorney fees to secure Putnam's appearance on her behalf. The ruling of the divorce referee was adverse to the Debtor because the Debtor was unable to demonstrate a substantial and material change in circumstances that would warrant a reduction in support. This should have been known to the Debtor, or at least to his attorney, prior to the hearing. In essence, the hearing was unnecessary, and caused Mrs. Sessions to incur a debt for attorney fees which she should not have had to incur. The divorce referee therefore shifted this cost to the Debtor. It is not inappropriate to infer that the award of attorney fees to Mrs. Session was intended as additional support for Mrs. Sessions. For purposes of the Bankruptcy Code, attorney fees may be considered additional support when awarded in connection with alimony. *See e.g., In re Van Aken*,320 B.R. 620, 629 (B.A.P. 6th Cir. 2005); *In re Silver stein*, 186 B.R. 85, 87 (Bankr. W.D. Tenn. 1995). The automatic stay of section 362(a) does not apply to actions to establish or modify an order for alimony, maintenance, or support. 11 U.S.C. § 362(b)(2)(A)(ii). The order of the divorce referee established an obligation for spousal support in the form of attorney fees, and resulted from a petititon to modify support filed by the Debtor. As such, the entry of the order was not precluded by the automatic stay. If it was not inappropriate for

[2] The Court does not intend to imply that the result in this case would have been different if attorney fees had been awarded directly to Putnam rather than to her client. The fact that fees were awarded to the Debtor's spouse only makes clear the true nature of the award. See *In re Calhoun,* 715 F.2d 1103, 1107 (6th Cir. 1983), which holds that obligations owed to a third party but for the benefit of a spouse, former spouse or child of a debtor may be in the nature of support.

Mrs. Session to be awarded attorney fees as additional support, it was not inappropriate for Putnam, her attorney, to ask for them.

The order of the divorce referee was entered after the Debtor's bankruptcy petition was filed, and thus creates a post-petition obligation, which is not subject to discharge. The automatic stay does not prevent the collection of alimony, maintenance or support from property that is not property of a bankruptcy estate. 11 U.S.C. § 362(b)(2)(B). The order of the divorce referee does not specify how the obligation is to be paid, and it does not appear from the record presented by the parties that Mrs. Sessions has made any effort to collect the obligation owed to her.

The Debtor's Chapter 13 plan does not make provision for payment of post-petition obligations. As the result of the confirmation order entered in his case, all of the Debtor's assets and his post-petition wages remain property of the bankruptcy estate. It would be appropriate for Mrs. Sessions to seek relief from the automatic stay to permit her to collect the post-petition obligation owed to her from the Debtor's wages or other assets. In the event such a motion is filed, the Court will be called upon to determine whether the Debtor has wages or other assets not necessary to satisfy his obligation to make plan payments and not necessary for the support of himself and any other dependents from which Mrs. Sessions could be paid. In the alternative, the Debtor may file a motion to modify his confirmed plan to provide for payment of this post-petition obligation through his plan. In that event, the Court will be called upon to determine whether the addition of this post-petition obligation to the plan would impair the rights of creditors currently provided for in the plan. The fact that the obligation to Mrs. Sessions represents spousal support will weigh heavily in favor of doing one or the other rather than asking Mrs. Sessions to wait to be paid until the plan is completed or the case is dismissed.

Putnam has asked for an award of costs associated with filing her motion. The Court is not aware of any costs associated with the filing of a motion to dismiss or a motion for summary judgment in the context of an adversary proceeding in bankruptcy. None were specified by Putnam and none are reflected as paid by Putnam on the court docket. Accordingly, that portion of her motion that asks for an award of costs will be denied.

CONCLUSION

There are no disputed issues of material fact. Putnam's request for an award of attorney fees on behalf of her client in connection with a petition to modify pendente lite support did not violate the automatic stay. Putnam's motion for summary judgment is **GRANTED,** but her attendant motion for award of costs is **DENIED.**

cc: Debtor/Plaintiff
Attorney for Debtor/Plaintiff
Defendant
Attorney for Defendant