

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

**In re:
SNYDER HOME BUILDERS, L.L.C.,
Debtor.**

**Case No. 01-25643
Chapter 7**

**RICHARD SCOTT SNYDER,
Plaintiff,**

v.

Adversary Proc. No. 02-0255

**ATTIC INSULATION, L.L.C.,
Defendant**

**MEMORANDUM OPINION AND ORDER
GRANTING DEFENDANT’S MOTION TO DISMISS COMPLAINT**

The plaintiff’s complaint asserts a cause of action for damages resulting from the Defendant’s willful violation of the automatic stay of 11 U.S.C. § 362. The Defendant has answered the complaint but also moved to dismiss it for failure to state a cause of action under FED. R. CIV. P. 12(b)(6). Subsequent to the motion to dismiss, the Plaintiff has moved to amend his complaint, and the Defendant continues to rely upon the dismissal motion as well as to oppose the amendment. For purposes of this Rule 12(b)(6) motion, the court will assume the amendment to the complaint is granted, and the court must construe the complaint in a light most favorable to the Plaintiff. *See Inge v. Rock Financial Corp.*, 281 F.3d 613, 619 (6th Cir. 2002).

COMPLAINT’S ALLEGATIONS AND DISCUSSION

The complaint, and its amendment, allege that Richard Snyder is an individual general partner of the Debtor Snyder Home Builders, L.L.C. (“Home Builders”); that on January 19, 2001 Richard Snyder, believing sufficient funds were on deposit, signed a check drawn on the account of another entity, Snyder Development, and that check was presented to Attic Insulation (“Attic”) for payment of a \$2,350.00 account. The check was

dishonored by the drawee bank. On April 18, 2001, Home Builders filed its Chapter 11 petition in this court, and on July 9, 2001 Richard Snyder filed his individual Chapter 11 petition. A Chapter 11 trustee was appointed on August 20, 2001, and all of the Snyder-related cases were converted to Chapter 7 on November 9, 2001.

Although the date is not specifically alleged in the complaint, it is of record in this case that on October 26, 2001, an order was entered substantively consolidating the Chapter 11 cases of Home Builders and Richard Snyder with those filed by other Snyder entities. Moreover, that October order brought into the consolidated bankruptcy estate the assets and liabilities of all Snyder-owned entities that were not yet in bankruptcy, since those entities were “hopelessly entangled” with the entities that had filed bankruptcy. See Consolidation Order, docket entry 548. No objections were filed to this consolidation of entities that had not filed for bankruptcy relief and, although the best available notice was given to creditors, the order notes, in part, “that the Court has not been made aware of any unsecured creditors who will be adversely affected by substantive consolidation.” *Id.* One of those entities that had not filed for bankruptcy relief but that was brought into the consolidated bankruptcy estate was Snyder Development, the entity on whose account the subject check was written.

Returning to the complaint’s allegations, as amended, following dishonor of the check, Attic attempted to collect it by contacting a representative of Home Builders and demanding payment. Absent at least partial payment, a threat of turning the check over to the law enforcement authorities is alleged to have been made. Following further demands, Home Builders made \$100 payments on five occasions. On August 13, 2001, Richard Snyder received a letter from the Shelby County District Attorney’s office stating that a complaint had been filed by Attic pursuant to TENN. CODE ANN. § 39-14-121 and advising that unless the check was made good within fifteen days Mr. Snyder could be subject to criminal prosecution. On February 21, 2002, Mr. Snyder was arrested and charged with the bad check violation. He was jailed for a day until bond could be posted. Mr. Snyder, of course, was required to employ counsel to defend him, and the court is advised that the criminal charges against him have been subsequently dismissed.

Mr. Snyder seeks damages for his arrest, incarceration and humiliation, as well as

his actual damages, including loss of income and attorney's fees. Moreover, he seeks punitive damages due to his allegation that § 362(h) was triggered.

Section 362(h) states:

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.

For purposes of analysis of this subsection, the date of commencement of a bankruptcy case triggers the automatic stay of § 362(a), and the following dates are relevant:

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| January 19, 2001 | Snyder Development's check signed by Richard Snyder |
| April 18, 2001 | Snyder Home Builders filed Chapter 11 |
| July 9, 2001 | Richard Snyder filed Chapter 11 |
| August 8, 2001 | Joint administration of the Chapter 11 cases ordered |
| August 13, 2001 | Letter from District Attorney to Richard Snyder |
| August 20, 2001 | Chapter 11 trustee appointed |
| October 26, 2001 | Order consolidating filed and non-filed Snyder entities |
| November 9, 2001 | Consolidated cases converted to Chapter 7, with Chapter 7 trustee appointed |
| February 21, 2002 | Richard Snyder arrested |
| March 20, 2002 | Richard Snyder's complaint for damages filed |

Attic's motion to dismiss relies principally upon the criminal prosecution being an action of the State of Tennessee and an exception from the automatic stay under § 362(b) (1), which excepts "the commencement or continuance of a criminal action or proceeding against the debtor." Moreover, Attic relies upon TENN. CODE ANN. § 39-14-122's protection from criminal or civil liability for any person that causes an arrest of the drawer of a bad check, if that person acted in good faith after notice of dishonor from the drawee bank. The court concludes, however, that the more determinative issue for purposes of this motion is the date of consolidation, October 26, 2001, which would have been the first date when Attic could have possibly known that the drawer of the check, Snyder Development, was under any bankruptcy protection.

Snyder Development was never a named bankruptcy petitioner; rather, its assets and liabilities were brought into the bankruptcy estate solely by the substantive consolidation order. Orders consolidating entities that have not specifically filed for bankruptcy relief with entities that have filed are rare and present troubling issues concerning the impact of such consolidation upon creditors of the non-filing entities. In this case, the court recalls discussion in open court about the impact on such creditors, and it is significant that the consolidation order includes language making it clear that the court was not advised of any negative impact on creditors of those entities being brought into the consolidated bankruptcy case. No creditors opposed the consolidation, but the court recalls its concern that there was always the possibility that some creditor would be unaware of the consolidation until after the fact. In other words, the court entertained and expressed a due process concern for the unscheduled creditors.

This adversary proceeding highlights why those concerns have validity. The critical issue for the court is whether an automatic stay was in effect as to Snyder Development, the drawer of the subject check, at the time of the initiation of the criminal prosecution by Attic's complaint to the State. Attic was a creditor of Snyder Development, and nothing is alleged in the complaint to indicate that Attic considered itself to have a claim against Richard Snyder. At the time the check was turned over to the District Attorney General, which could have been no later than when the District Attorney wrote to Richard Snyder (the complaint alleges that Attic complained to the District Attorney on August 9), Snyder Development was not a debtor in bankruptcy and the consolidation order had not been entered. The complaint, paragraph 10, asserts that Attic's referral to the District Attorney violated the automatic stay because it was intended as a debt collection action. There would have been no means for Attic to know at that time that Snyder Development was in bankruptcy or that a consolidation order was contemplated. Although the District Attorney's letter and subsequent prosecution was directed to Richard Snyder, the signer of Development's check, that was apparently a decision, right or wrong, made by the District Attorney. Nothing in the complaint, as amended, asserts that Attic had a role in deciding that Richard Snyder should be individually prosecuted. Thus, nothing in the complaint alleges a specific violation of the automatic stay in Richard Snyder's individual

case. Rather, the thrust of the complaint is to relate back the consolidation order, which brought Snyder Development into bankruptcy, to the automatic stay triggered by the bankruptcy filings of Home Builders and/or Richard Snyder. The complaint is filed in the Home Builders' case, which was the first case filed and the one into which all other cases were consolidated.

The consolidation order in this case did not state that it would have a nunc pro tunc effect, that is making the effective date of a consolidation of a non-filing entity the same as the commencement date of the original bankruptcy petition. Although there is authority for a nunc pro tunc effect of a consolidation order such as this one, that authority is for such purposes as avoidance recovery. See, e.g., *First Nat'l Bank of Barnesville v. Rafoth (In re Baker & Getty Fin. Servs., Inc.)*, 974 F.2d 712, 721 (6th Cir. 1992) (giving nunc pro tunc effect to a consolidation for the purposes of transfer analysis). Relating back the date of a consolidation order to the date of the first bankruptcy filing makes sense for purposes of treating the assets, including avoidance actions, of the consolidated entity as joined with the assets of the original bankruptcy debtor. That, however, is a totally different issue from treating the consolidated entity as enjoying the full protections of the automatic stay from the original debtor's filing date. In order for this plaintiff's complaint to survive, it is necessary for the court to construe the consolidation order as bringing Snyder Development under an automatic stay preceding Attic's complaint to the District Attorney. In other words, Development must receive Home Builder's April 18, 2001 commencement date and automatic stay trigger.

Due process is offended if that were the result. "A violation of the automatic stay can be willful when the creditor knew of the stay and violated the stay by an intentional act." *TranSouth Fin. Corp. v. Sharon (In re Sharon)*, 234 B.R. 676, 687 (B.A.P. 6th Cir. 1999). "To establish a willful violation, it must be shown that the party knew of the bankruptcy filing and then took some action, without regard to whether the party had specific intent to violate the stay or acted in good faith based upon a mistake of law or legal dispute regarding its rights." *In re Flack*, 239 B.R. 155, 162 (Bankr. S.D. Ohio 1999) (citing *Sharon*). "A violation is willful if 'the creditor deliberately carried out the prohibited act with knowledge of the debtor's bankruptcy case.'" *In re Printup*, 264 B.R. 169, 173 (Bankr. E.D.

Tenn. 2001) (quoting *Walker v. Midland Mortgage Co. (In re Medlin)*, 201 B.R. 188, 194 (Bankr. E.D. Tenn.1996)). The complaint's paragraph 15 asserts that Attic's alleged debt collection effort in turning over the check to the prosecutor was the stay violation that caused Richard Snyder's damages. It must, therefore, be alleged and capable of proof that Attic willfully violated an automatic stay. Since the target of Attic's efforts, even if they were collection motivated, could only be toward the drawer of the check, Snyder Development, and since the court concludes that Attic could have had no knowledge that Snyder Development would be consolidated into the existing bankruptcies at the time of its referral to the District Attorney, the court further concludes that Attic's referral could not have been a willful violation of the automatic stay imposed by the prior filings.

As a result of this conclusion, it is unnecessary for the court to address any questions about Richard Snyder's standing to pursue the cause of action.

CONCLUSION

Based upon the foregoing discussion, the court concludes that the complaint, as amended, filed by Richard Snyder fails to state a cause of action against Attic for a willful violation of the automatic stay.

ORDER

IT IS THEREFORE ORDERED that the complaint filed in this proceeding is **DISMISSED**. Each party shall bear their own costs.

SO ORDERED this 5th day of August, 2002.

WILLIAM HOUSTON BROWN
UNITED STATES BANKRUPTCY JUDGE

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