
**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 97-12062-JMD
Chapter 13Matthew F. Judge and
Janice M. Judge,
DebtorsMatthew F. Judge and
Janice M. Judge,
Plaintiffs

v.

Adv. No. 99-1011-JMD

Harry Lomas IV,
Amy J. Lomas, and
Jeffrey A. Lomas,
Defendants*Raymond J. DiLucci, Esq.*
RAYMOND J. DILUCCI, P.A.
*Attorney for Debtors/Plaintiffs**Kathleen Walls, Esq.*
PRATT VREELAND KENNELLY & ZONAY, LTD
Attorney for Defendants

MEMORANDUM OPINION

I. INTRODUCTION

The Court has before it the plaintiffs' motion for summary judgment on a complaint brought pursuant to 11 U.S.C. § 362(h) seeking damages for violation of the automatic stay.¹ This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in

¹ Although oral argument on the motion was scheduled for August 16, 1999, after reviewing the pleadings, the Court finds that oral argument will not provide any additional assistance to the Court. The hearing is hereby canceled.

accordance with 28 U.S.C. § 157(b). For the reasons set forth below, the Court grants plaintiffs' motion for summary judgment and awards damages pursuant to 11 U.S.C. § 362(h) in the amount of \$1,075.

II. SUMMARY JUDGMENT STANDARD

Under Rule 56(c) of the Federal Rules of Civil Procedure, made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7056, a summary judgment motion should be granted only when “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.” “Genuine,” in the context of Rule 56(c), “means that the evidence is such that a reasonable jury could resolve the point in favor of the nonmoving party.” Rodriguez-Pinto v. Tirado-Delgado, 982 F.2d 34, 38 (1st Cir. 1993) (quoting United States v. One Parcel of Real Property, 960 F.2d 200, 204 (1st Cir. 1992)). “Material,” in the context of Rule 56(c), means that the fact has “the potential to affect the outcome of the suit under applicable law.” Nereida-Gonzalez v. Tirado-Delgado, 990 F.2d 701, 703 (1st Cir. 1993). Courts faced with a motion for summary judgment should read the record “in the light most flattering to the nonmovant and indulg[e] all reasonable inferences in that party’s favor.” Maldonado-Denis v. Castillo-Rodriguez, 23 F.2d 576, 581 (1st Cir. 1994).

III. FACTS

The undisputed facts are as follows. On or about May 16, 1997, the defendant, Harry Lomas IV (“Lomas”) obtained a pre-judgment ex parte attachment in the amount of \$195,000 against Matthew Judge (“Judge”) in the Hillsborough County Superior Court (“Superior Court”). On June 2, 1997, the plaintiffs filed a voluntary Chapter 13 bankruptcy petition in the United States Bankruptcy Court. The defendants were not listed as creditors on the plaintiffs’ schedules. On July 8, 1997, the Chapter 13 trustee conducted the first meeting of creditors, which Lomas’s attorney, David Young, attended.

On or about October 31, 1997, a Superior Court writ of attachment issued. At some point, the attachment was recorded in the Hillsborough County Registry of Deeds. On or about November 25, 1997, Lomas filed a complaint against Judge in Hillsborough County Probate Court (“Probate Court”) asserting

counts for breach of trust and breach of fiduciary duty and requesting that the Court order Judge to probate Lomas's mother's estate and provide an accounting. On or about January 15, 1998, the Probate Court scheduled a hearing for February 11, 1998. On or about February 11, 1998, the Probate Court entered a default judgment against Judge as he failed to file an appearance in the Probate Court action. On April 3, 1998, the Probate Court granted Lomas's request for damages in the amount of \$201,557.10. Lomas never sought relief from the automatic stay in the Bankruptcy Court to take any of the above-described actions against Judge after he and his wife filed for bankruptcy in June 1997.

IV. DISCUSSION

“Section 362(a)(1) of the Bankruptcy Code provides that the filing of a bankruptcy petition stays the commencement or continuation of all nonbankruptcy judicial proceedings against the debtor.” Soares v. Brockton Credit Union (In re Soares), 107 F.3d 969, 973 (1st Cir. 1997). The stay springs into being immediately upon the filing of a bankruptcy petition. See id. at 975 (quoting Sunshine Dev., Inc. v. FDIC, 33 F.3d 106, 113 (1st Cir. 1994)). It is automatic because it operates without the necessity for judicial intervention. See id. “It remains in full force until a federal court either disposes of the case . . . or lifts the stay” Id. (citing 11 U.S.C. §§ 362(c)(2) and (d)-(f)). “Litigants who take action against a bankruptcy estate without receiving the prior approval of the court or falling under one of the statutory exceptions are subject to sanctions.” Nelson v. Taglienti (In re Nelson), 994 F.2d 42, 44 (1st Cir. 1993).

Section 362(h) of the Bankruptcy Code provides:

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). In the present case, Judge is entitled to summary judgment in his favor and to actual damages, including costs and attorney's fees, if the Court finds that the undisputed facts demonstrate that Lomas willfully violated the automatic stay.

Lomas admits in his opposition to the motion for summary judgment that he violated the automatic stay,² but argues that his violation was not willful. This Court has previously held that “a creditor acts willfully if it (1) has knowledge of the petition, and (2) the act which violates the stay was intentional.” Putnam v. Rymes Heating Oils, Inc. (In re Putnam), 167 B.R. 737, 740 (Bankr. D.N.H. 1994). See also Maritime Asbestosis Legal Clinic v. LTV Steel Co., Inc. (In re Chateaugay Corp.), 112 B.R. 526, 530 (S.D.N.Y.) (“Section 362(h), thus, requires only general intent to take actions which have the effect of violating the automatic stay and not specific intent to violate the automatic stay. . . . ‘Not even a “good faith” mistake of law or a “legitimate dispute” as to legal rights relieve a willful violator of the consequences of the act.’”) (quoting In re Sansone, 99 B.R. 981, 985-87 (C.D. Cal. 1989)), rev’d on other grounds, 920 F.2d 183 (2^d Cir. 1990). Lomas’s violation of the automatic stay in bringing suit and obtaining a default judgment against Judge in Probate Court, months after the Judges filed bankruptcy, was willful in the sense intended by section 362. Lomas was aware of the Judges’ bankruptcy case as his attorney attended the first meeting of creditors in July 1997. In addition, Lomas was aware, through counsel, that under section 362 the filing of a bankruptcy petition institutes an automatic stay of all proceedings. Lomas’s attorney has admitted that, after the Judges filed bankruptcy, he read and familiarized himself with section 362 before taking further action to obtain a judgment against Judge in state court. See Defendants’ Opposition to Motion for Summary Judgment at 1 and attached Affidavit of David A. Young at ¶¶ 4 and 5. The parties do not dispute that Lomas’s actions in filing the complaint in Probate Court and requesting damages upon default were intentional. Taken together, these facts are sufficient to support a finding that Lomas’s violation of the automatic stay was willful.

Section 362(h) provides that an individual “shall recover actual damages, including costs and attorney’s fees . . . , and, in appropriate circumstances, . . . punitive damages” if he is injured by a willful violation of the stay. Judge does not request any damages for harm personally suffered by him (e.g., lost wages attributable to time spent dealing with violation of the stay); rather, he seeks an award of \$2,850 for the attorney’s fees he incurred litigating the stay violation.

² “There is no question that there was a technical violation of the stay in this case.” Defendants’ Opposition to the Motion for Summary Judgment at 3.

As previously held by Judge Yacos, attorney's fees associated with bringing litigation to determine and enforce the sanctions under section 362(h) may be recovered under that section. See Joslyn v. Ford Motor Credit Corp. (In re Joslyn), 75 B.R. 590, 593 (Bankr. D.N.H. 1987) ("The whole point of the § 362(h) provision is to discourage violations of the automatic stay by appropriate sanctions—and litigation to determine and enforce the sanctions is necessarily implied. This court accordingly believes it appropriate to award damages for the violation of the automatic stay and to make an appropriate award of the attorneys' fees necessary to remedy that violation."). Section 362(h) and its sparse legislative history are silent, however, on the standards and methodology to be used in determining assessments of fees and costs for willful violations of the automatic stay. See Putnam, 167 B.R. at 741. Courts that have awarded fees under section 362(h) have tempered such awards by a reasonableness standard. See id.

Judge seeks damages of \$2,850, which consist of nineteen hours of attorney time at \$150 per hour. Several items on counsel's itemized bill clearly are not appropriate for inclusion in Judge's request for sanctions. First, fees in the amount of \$150 for time spent preparing amendments to schedules are not related to the stay violation and therefore should not be included as part of the attorney's fees to be paid by Lomas. Second, fees in the amount of \$150 for time spent preparing an automatic stay notice should not be allowed because the purpose of this notice and its recipient are unclear from the bill. Third, fees in the amount of \$150 for time spent preparing a motion for clarification should not be included as part of the damages because these services were not sufficiently described so as to provide the Court with a basis for determining their necessity and relevance to the stay litigation. Fourth, the Court has no record of a hearing being held on March 4, 1999 in either the bankruptcy case or in any of the adversary proceedings involving the plaintiffs and the defendants. Therefore, attorney's fees in the amount of \$150 for the alleged hearing should not be included as damages. Fifth, fees in the amount of \$150 incurred in preparing an answer and objection to the defendants' motion for escrow in the main case should not be paid by Lomas as this related to the defendants' claim to funds from the bankruptcy estate and not to the stay litigation. Sixth, the hearing on April 30, 1999 concerned confirmation of the debtors' Chapter 13 plan, motions to dismiss or convert the debtors' case, the debtors' objection to the defendants' proof of claim, and the defendants' motion for escrow. Again, this hearing related to activities in the main case and not to this adversary proceeding;

therefore, these fees in the amount of \$300 should not be included in the sanction award. Seventh, fees in the amount of \$150 related to plaintiffs' objection to the motion to compel should be disallowed. The Court has previously granted the defendants' motion to compel discovery and awarded sanctions to the defendants for the plaintiffs' failure to timely and to adequately answer the interrogatories. See Memorandum Opinion dated June 18, 1999. Lastly, the Court finds that fees in the amount of \$825 for five and a half hours spent in attorney-client meetings is excessive given the straightforward nature of the case; the Court finds that two hours and fees of \$300 are reasonable for various attorney-client meetings. In a similar vein, the Court finds that \$100 is reasonable for various telephone conferences with defendant's attorney.

Having reviewed all items on counsel's bill, the Court finds that the remaining attorney's fees are reasonable and should be included in the sanction award in this case. Accordingly, pursuant to section 362(h), Judge is awarded \$1,075 as a sanction for Lomas's violation of the automatic stay.³

³ These fees include \$300 for various meetings with client, \$150 for research at the registry of deeds and probate court, \$225 for preparing the complaint for sanctions for the stay violation, \$100 for telephone conferences with David Young, \$150 for attending a hearing in Probate Court, and \$150 for preparing answers to interrogatories.

V. CONCLUSION

Because there are no genuine issues of material fact and the record, when viewed in the light most favorable to the defendants, supports a finding that Judge is entitled to a judgment as a matter of law, the Court grants the plaintiffs' motion for summary judgment. As a sanction pursuant to section 362(h), the Court orders Lomas to pay attorney's fees in the amount of \$1,075 to Judge by August 18, 1999.

This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate order consistent with this opinion.

DATED this ____ day of June, 1999, at Manchester, New Hampshire.

J. Michael Deasy
Bankruptcy Judge