

FILED  
UNITED STATES  
DISTRICT COURT  
DISTRICT OF UTAH

269

NOV 16 2 40 PM '88

MAINTENANCE NUMBER

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH  
CENTRAL DIVISION

IN RE:

KENT E. HOFHEINS and  
KARI W. HOFHEINS,

Debtors.

MEMORANDUM DECISION  
AND ORDER

UTAH INDEPENDENT BANK,  
a Utah corporation,

Appellant,

-vs-

KENT E. HOFHEINS and  
KARI W. HOFHEINS,

Respondents.

Civil No: C-88-664W

87C-06000

This matter is before the court regarding the bankruptcy appeal of an order sanctioning Utah Independent Bank for violations of the automatic stay. The court held a hearing regarding this appeal on November 8, 1988. John B. Anderson and Kevin Olsen appeared on behalf of Utah Independent Bank (the "Bank"). Michael H. Wray and Thomas D. Neeleman appeared on behalf of the debtors. Prior to the hearing the court had carefully reviewed the appellate briefs filed by counsel and the record on appeal. After taking this appeal under advisement, the court now renders the following memorandum decision and order.

### Background

The debtors, Kent and Kari Hofheins, own and operate a farming and cattle operation located in Beaver, Utah. The debtors run their business along with Ora Hofheins. The debtors claim an ownership interest in the real property utilized by the farming operation.

In 1983 and 1984, the debtors and Ora Hofheins entered into four loan transactions and received sums in the approximate amount of \$78,000.00. The loans were secured by farm equipment, cattle, and cattle semen.

On November 16, 1987, the debtors filed a petition under Chapter 12 of the Bankruptcy Code. The Bank received notice of the debtors' bankruptcy filing. Subsequent to receiving notice, the Bank spoke with the debtors and advertised for the sale of certain cattle semen. The Bank sold some of this collateral in May of 1988.

On April 4, 1988, the bankruptcy court held a confirmation hearing regarding the debtors' Chapter 12 plan. At this hearing the debtors testified to trading fifteen corral fence panels and the use of a loading chute as part payment for feed bought during the winter months. The debtors testified that Ora Hofheins owned the fence panels. The debtors' initial plan was not confirmed, and the court allowed the debtors to amend

their plan.

Prior to the second confirmation hearing, set for May 23, 1988, the Bank repossessed 49 fence panels and gates from the debtors' property. These fence panels were bolted together and formed a corral on the debtors' farm. The fence panels are each valued at approximately \$35-\$40.

On May 20, 1988, the debtors filed a motion requesting the bankruptcy court to cite the Bank for contempt and impose sanctions pursuant to U.S.C. § 362(h). The motion was heard prior to the confirmation hearing on May 23, 1988. After hearing the evidence, the bankruptcy judge found that selling some of the cattle semen was a violation of the automatic stay, although not a serious violation. The court believed that this violation, nevertheless, reflected upon the Bank's attitude toward the automatic stay and bankruptcy law.

The bankruptcy judge also found that the Bank's repossession of the fence panels was a clear violation of 11 U.S.C. § 362(a)(3). The court concluded that the fence panels were fixtures attached to the real property of the debtors. The fences were property of the debtors and were being used by the estate. The judge mentioned that this violation was the most egregious violation of the automatic stay that he had ever seen. Accordingly, the judge imposed sanctions in the sum of \$4,000, representing actual damages, and \$10,000, representing punitive

damages. The bankruptcy judge signed his order on July 19, 1988. An appeal was timely filed.

#### Discussion

In reviewing the decision of the bankruptcy court, this court must accept the findings of fact of the bankruptcy court unless the findings are clearly erroneous. Bankr. Rule 8013; In re Mullet, 817 F.2d 677, 678 (10th Cir. 1987). "'A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" Anderson v. Bessemer City, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985) (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)). In addition, this court must make a de novo review of all legal determinations and conclusions of law. Mullet, 817 F.2d at 679.

The question before this court is whether the bankruptcy court erred in awarding sanctions against the Bank pursuant to 11 U.S.C. § 362(h) or under its civil contempt power.<sup>1</sup> To resolve this question, this court must review whether the bankruptcy court's findings were clearly erroneous and whether the record supports the amount of sanctions imposed.

---

<sup>1</sup> The Order of the bankruptcy court does not clearly specify whether sanctions were imposed pursuant to § 362(h) or the court's civil contempt power.

I. Section 362(h):

Generally, section 362 provides an automatic stay of any and all proceedings against a debtor immediately following the filing of a bankruptcy petition. The importance of the automatic stay in bankruptcy is made clear in the legislative history of section 362:

The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 340-42 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 54-55 (1978); reprinted in 1978 U.S. Code Cong. & Admin. News 5787 at 5840, 6296-97.

Recognizing the need to compensate and even punish for violations of the automatic stay, Congress added subsection (h) to section 362 in 1984. This provision empowers the bankruptcy court to impose sanctions for willful violations of the automatic stay. Subsection (h) provides as follows:

(h) 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.

Pursuant to this provision, the bankruptcy court must compensate an individual injured by a willful violation of the automatic stay for actual damages, including attorney's fees and costs. In appropriate circumstances, the bankruptcy court can impose punitive damages and thereby punish the individual or entity violating the stay.

Because section 362(h) provides broad compensatory and even punitive remedies for a violation of the automatic stay, the provision contains fairly rigid threshold requirements. In particular, subsection (h) only provides a remedy for willful violations of the stay. For purposes of section 362(h), "willful" means deliberate or intentional. In re Skinner, 90 Bankr. 470, 474 (D. Utah 1988). In other words, the one must intend to do the act which violates the automatic stay rather than intend to disobey the Bankruptcy Code. Implicit in section 362(h) is the additional requirement that the person or entity violating the automatic stay have notice of the stay.

In the present case, the record shows that the Bank was aware of the Hofheins' bankruptcy and was knowledgeable concerning the Hofheins' farming operation. The bankruptcy judge found that the Bank had violated the automatic stay when its representative sold certain cattle semen and repossessed 49 fence panels from the debtors' property when the automatic stay was in effect. The bankruptcy judge determined that the Bank's removal

of the fence panels was the more egregious violation.

After carefully reviewing the record, this court concludes that the bankruptcy judge's findings regarding violations of the automatic stay were not clearly erroneous. The record supports a finding that the Bank sold cattle semen, property of the estate, without court approval and in violation of the automatic stay. The record further indicates that the fence panels were fixtures to the real property owned by the debtors. The realty as well as the fence panels were necessary to the debtors' farming and cattle business. Although the Bank claims that it believed that a non-debtor, Ora Hofheins, owned the fence panels, the Bank was aware that the fence panels were necessary to the debtors' business. Accordingly, this court concludes that the bankruptcy judge correctly found violations of the automatic stay by the Bank.

Nevertheless, under section 362(h) the court must find a "willful" violation of the automatic stay in order for sanctions to be imposed. The bankruptcy court found that the Bank "knowingly, willfully and intentionally" violated the automatic stay. This court concludes that the record indicates that the Bank willfully violated the automatic stay. The record shows that the Bank was clearly aware of the Hofheins' bankruptcy when its representatives repossessed the fence panels and sold the cattle semen without court approval. The Bank intended to

repossess the panels and sell the cattle semen despite the automatic stay and, thus, can be sanctioned pursuant to section 362(h).

Under appropriate circumstances, the bankruptcy court can impose punitive damages under § 362(h). See Budget Service Co. v. Better Homes of Va., 804 F.2d 289 (4th Cir. 1986). "Proof that a debtor has been injured by a willful violation of the automatic stay is sufficient to invoke the sanctions under [11 U.S.C. § 362(h)], of actual and punitive damages, costs and attorneys' fees." Id. at 293.

In the present case, the bankruptcy judge found that the debtors had been damaged in the sum of \$4,000.00 as a result of the Bank's removing the fence panels in violation of the automatic stay. Moreover, the bankruptcy judge observed that the Bank's removal of the fence panels was a more egregious violation of the automatic stay than he had ever seen before in his court. The bankruptcy judge found that the Bank's actions were "vicious, vindictive, spiteful, wanton and contemptuous."

This court concludes that the award of punitive damages was appropriate under the circumstances of this case. The bankruptcy judge was able to discern the demeanor of the witnesses and the attitudes of the Bank employees. Moreover, the Bank was well acquainted with the business operation of the debtors and knew that the removal of the fence panels would



disrupt the debtors' business as well as violate the automatic stay. In view of these considerations and after a review of the pertinent case law on the subject, this court affirms the bankruptcy court's decision to award punitive damages. See Budget Service Co. v. Better Homes of Va., 804 F.2d 289 (4th Cir. 1986).

In addition, this court concludes that the amount of damages assessed was appropriate and not excessive. The award of actual damages was based on evidence of the value of the removed fence panels and also served to compensate the debtors for attorney's fees and costs. The court further notes that the bankruptcy court's award for actual damages serves to compensate the debtors for the value of the removed fence panels. As a result, the Bank need not return the fence panels to the debtors. It is also this court's opinion that under these circumstances the sum of \$10,000 is not an excessive amount for punitive damages. This sanction appears to be an appropriate amount necessary to coerce the Bank into future compliance with the bankruptcy laws.

## II. Civil Contempt Sanctions:

When the automatic stay has been violated, the bankruptcy court may impose civil contempt sanctions under Code section 105(a) and Bankruptcy Rule 9020. In general, a civil contempt citation is an extraordinary remedy and is only

appropriate when the automatic stay has been violated by a party having actual knowledge of the automatic stay. Matter of Hailey, 621 F.2d 169, 172 (5th Cir. 1980). In order for a party to be cited for civil contempt, a court must find that the party violated a specific and definite court order and that the party had knowledge of the order sufficient to put him on notice of the proscribed conduct. Fidelity Mortgage Investors v. Camelia Builders, Inc., 550 F.2d 47, 51 (2d Cir. 1976), cert. denied, 429 U.S. 1093 (1977); see also Yeates v. United States, 316 F.2d 718, 723 (10th Cir. 1963).

Nevertheless, the disobedience in a civil contempt need not be willful because the purpose of civil contempt sanctions is remedial. McComb v. Jacksonville Paper Co., 336 U.S. 187, 191, 69 S.Ct. 497, 499, 93 L.Ed. 599 (1949). As a result, the showing required for civil contempt sanctions in connection with a violation of the automatic stay is less stringent than the showing required for sanctions under section 362(h). In re Tel-A-Communications Consultants, Inc., 50 Bankr. 250, 253 (Bankr. D. Conn. 1985).

After carefully reviewing the record, the court determines that the bankruptcy court's order was also authorized pursuant to the court's contempt power. The court has previously discussed how the Bank's actions violated the automatic stay imposed by 11 U.S.C. § 362. Any serious violation of the

automatic stay defies the integrity of the bankruptcy administration of a case. In this case, the Bank's actions worked to impair the debtors' reorganization efforts. Accordingly, this court believes that the sanctions imposed were also appropriate under 11 U.S.C. § 105(a) and Bankruptcy Rule 9020.

III. Actual Damages for Appeal Expenses:

This court has previously observed that appeal expenses, including attorney's fees and costs, can be recovered as part of a civil contempt sanction. In re Skinner, 90 Bankr. 470, 480 (D. Utah 1988). This court remands this matter, in part, to the bankruptcy court to determine whether the debtors should be compensated for their expenses incurred in the course of this appeal. The bankruptcy court is instructed to permit the debtors' counsel the opportunity to submit a motion and affidavit regarding these expenses and to permit the Bank's counsel an opportunity to respond. Thereafter, the bankruptcy court can resolve this remaining issue.

Conclusion

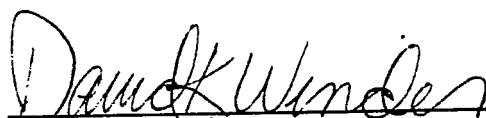
Based upon the above analysis, this court concludes that there is ample evidence in the record to support the bankruptcy judge's imposition of sanctions based on either 11 U.S.C. § 362(h) or the court's implicit contempt powers recognized in 11 U.S.C. § 105(a). The court determines that the

bankruptcy court's finding that the automatic stay was willfully violated was not clearly erroneous but correct under the circumstances of this case. The court further concludes that the award of actual and punitive damages is appropriate in this case.

In addition, this court remands this matter, in part, to the bankruptcy court for further resolution. The bankruptcy court is instructed to determine whether the debtors should be compensated for their expenses, including attorney's fees and costs, incurred during the pendency of this appeal.

Accordingly, IT IS HEREBY ORDERED that the bankruptcy court's award of sanctions against Utah Independent Bank is AFFIRMED. This matter is remanded for the sole purpose of having the bankruptcy court determine whether the debtors' appeal expenses should be added to the sanctions already imposed against the Bank.

Dated this 18<sup>th</sup> day of November, 1988.



\_\_\_\_\_  
David K. Winder  
United States District Judge