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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

Sec #251

In re:

JOY R. DUNYON, a/k/a
JERRY DUNYON,

Debtor.

MEMORANDUM DECISION
AND ORDER

Civil No: C-88-510W

87B-04887

This matter is before the court on an appeal from a bankruptcy court Memorandum Opinion and Order dated May 27, 1988. The court held a hearing regarding this matter on December 22, 1988. James S. Lowrie and Jerome Romero appeared on behalf of the appellants, BancBoston Financial Company ("BancBoston") and Jones, Waldo, Holbrook & McDonough. Noel S. Hyde appeared on behalf of the appellee, the debtor. Prior to the hearing, the court had carefully reviewed the appellate briefs filed by counsel and the record on appeal. After taking this matter under advisement following the hearing, the court has further considered the law and facts and now renders the following memorandum decision and order.

Background

BancBoston obtained a prepetition state court judgment in the amount of $347,947.37 against the debtor, Mr. Dunyon, resulting from his personal guarantee of obligations of the Ryan Distributing Company. BancBoston retained Jones, Waldo, Holbrook

& McDonough to collect payment on the judgment against Mr. Dunyon.

During the summer of 1987, BancBoston took actions to enforce the judgment. BancBoston conducted a supplemental proceeding with the debtor and caused a writ of execution to be issued against automobiles titled to the debtor, and against stock owned by the debtor in a company controlled by the debtor, Joyco, Inc. BancBoston also caused charging orders to be issued against the debtor's interests in two partnerships that the debtor controlled, J.F. Dunyon Company and Joy Dunyon & Associates.

Joyco and Joy Dunyon & Associates filed a lawsuit ("Company Lawsuit") against BancBoston seeking to halt the execution sale of the above-mentioned automobiles, claiming that these entities were the true owners of the automobiles. On September 3, 1987, BancBoston filed a counterclaim against Joyco and Joy Dunyon & Associates, alleging that these companies were the recipient of fraudulent transfers from the debtor and that the companies were the alter ego of the debtor. BancBoston also filed a third-party complaint against the debtor seeking declaratory relief respecting the exemptibility of a lifetime annuity owned by the debtor which BancBoston had garnished, and against Daniel Hirst alleging that he was the recipient of a fraudulent conveyance from the debtor. Thereafter, the Company

Lawsuit was consolidated with the original action against the debtor.

On September 18, 1987, Mr. Dunyon filed for protection under Chapter 7 of the Bankruptcy Code. Notice of the debtor's Chapter 7 case was served upon BancBoston. In addition, a copy of the bankruptcy notice was served upon BancBoston's counsel, Jones, Waldo, Holbrook and McDonough, on October 6, 1987.

On December 14, 1987, the appellants served a motion to amend its counterclaim in the consolidated state court action upon counsel for the Dunyon Companies. The purpose of the motion was to join J.F. Dunyon as a counterclaim defendant. The motion was not served upon counsel for the debtor. Attached as an exhibit to the motion was the proposed amended counterclaim. The amended counterclaim renamed the debtor as a third-party defendant and realleged fraudulent conveyance claims against the debtor.

On December 24, 1987, the Chapter 7 trustee filed with the court his Report of Trustee in No-Asset Case stating that there were no assets to administer in the case. On January 5, 1988, the debtor received a discharge. Nevertheless, at a hearing held before Judge John H. Allen in the bankruptcy court on January 13, 1988, the trustee for the debtor's estate stated that his no-asset report was filed in error. See Transcript of January 13, 1988 Hearing at 4. Consequently, the trustee

represented to the court his intention to reopen the Dunyon Chapter 7 case in order to administer other assets. Counsel for BancBoston was present at that hearing and, thus, became aware on January 13, 1988 that the no-asset report was filed in error by the trustee. On January 28, 1988, the trustee withdrew his report and the court signed an order on February 3, 1988, allowing the trustee to proceed with the administration of the estate's assets.

On January 15, 1988, counsel for BancBoston filed in state court BancBoston's motion to amend its counterclaim. The certificate of service attached to the motion noted that the motion had been previously served upon counsel for the Dunyon Companies on December 14, 1987. Earlier on January 12, 1988, BancBoston filed another motion in the consolidated state court action for a prejudgment writ of attachment and writ of garnishment against the Dunyon Companies. The motion sought to attach money and real property in order to collect the Dunyon judgment and alleged that Dunyon and the Dunyon Companies had effectuated improper transfers of assets with the intent to defraud BancBoston. The hearing on the motion for the prejudgment writs was held in state court on January 20, 1988. No relief from the automatic stay was sought by BancBoston as it related to the continued collection of its judgment in state court.

In response to BancBoston's motions in state court, the debtor filed a motion for sanctions in the bankruptcy court on February 26, 1988. The debtor asserted that both BancBoston and its attorneys violated the automatic stay imposed by Section 362(a) and also the injunction provided pursuant to the discharge order entered January 5, 1988.

After taking this motion under advisement, the bankruptcy court ruled that the appellants had willfully violated the automatic stay and awarded sanctions in the sum of $2,340.50 pursuant to 11 U.S.C. § 362(h). The court expressly found that "the republication by BancBoston of its amended complaint against Dunyon and its continued use of the fraudulent conveyance terminology in its complaint constituted a violation of the stay." Memorandum Opinion at 13. The court found this conduct willful and without justification and, thus, subject to sanctions pursuant to 11 U.S.C. § 362(h).

The court based its award of sanctions on the attorney's fees and expenses expended by the debtor's counsel in proceeding in state court and in bringing the motion for sanctions. After carefully reviewing the time records provided by the debtor's counsel and the objections filed by BancBoston to the fees, the bankruptcy court allowed all fees except for fees generated from research specifically relating to the alter ego theory. A timely appeal of the bankruptcy court's order was

filed by the appellants.

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 appellants pursuant to 11 U.S.C. § 362(h) under the circumstances of this case. 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. The court is also requested to decide the proper procedure for bringing a motion for sanctions pursuant to 11 U.S.C. § 362.

Appropriateness of Seeking Relief for Automatic Stay Violations By Motion:

Appellants argue that the debtor is precluded from

sanctions under 11 U.S.C. § 362(h) because he filed a motion seeking sanctions rather than filing an adversary proceeding and complaint. The debtor responds that proceeding by motion is proper under bankruptcy procedure.

In the interest of promoting the expeditious administration of an estate, the bankruptcy procedural rules allow motions to be the primary means of seeking relief before the bankruptcy court. In particular, all relief and requests for orders in connection with the automatic stay are requested by motion. See Bankruptcy Rule 4001. Moreover, a request for sanctions under section 362(h) as well as a request for contempt sanctions can be made by motion. See Bankruptcy Rule 9014; In re Depew, 51 Bankr. 1010 (Bankr. E.D. Tenn. 1985); Matter of Behm, 44 Bankr. 811 (Bankr. W.D. Wis. 1984). Generally, as a matter of policy, requests for sanctions in connection with violations of the automatic stay should be made by motion in order to expedite the administration of the case.

In addition, the court notes that the appellants were not prejudiced by the debtor's seeking sanctions by way of a motion rather than a complaint. A request for sanctions under section 362(h) is a contested matter governed by Bankruptcy Rule 9014. Contested matters necessarily adopt several procedures applied in adversary proceedings such as evidentiary hearings. The applicability of Bankruptcy Rule 9014 and the hearing held

before Judge Boulden regarding the debtor's motion for sanctions afforded the appellants the same substantive rights as they would have had if the debtor had proceeded by a complaint rather than by motion. Cf. In re Elegant Concepts, Ltd., 67 Bankr. 914, 917-18 (Bankr. E.D.N.Y. 1986).

Violations of the Automatic Stay:

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 fo 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, 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 bankruptcy court found the appellants had violated the automatic stay by continuing collection efforts against Dunyon and his companies. In

particular, the court found that the republication by BancBoston of its amended counterclaim against Dunyon and its continued use of fraudulent conveyance language in its complaint constituted a violation of the automatic stay. This finding was the sole basis of the bankruptcy court's award of sanctions under section 362(h).

The appellants admit that BancBoston's initial cause of action against the debtor was republished in the proposed amended counterclaim attached as an exhibit to the motion to amend. This motion was filed on January 15, 1988 and previously served upon counsel for the Dunyon Companies.

After a careful review, the court concludes that the bankruptcy court's finding of fact was not clearly erroneous regarding the republication as being a violation of the automatic stay.[1] The bankruptcy court's reasoning regarding why the republication constituted a violation was also correct. The court regards the republication as not a serious violation of the automatic stay. Nonetheless, the appellants intended to pursue the motion as early as December 14, 1987, when the automatic stay was clearly in effect.

The appellants' intent to pursue the motion, as

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[1] Nevertheless, the bankruptcy court was incorrect in stating that the motion to amend was filed on December 11, 1987. The motion was served on December 14, 1987 and filed on January 15, 1988.

demonstrated by serving the motion in December, made the act of republication "willful" under the language of section 362(h). Serving the motion was a willful and intentional act even though the appellants communicated their intent not to pursue the fraudulent conveyance actions against property of the Dunyon estate.

The appellants also violated the automatic stay when they filed the motion to amend on January 15, 1988. Although a no-asset report and order discharging the debtor were previously filed, the appellants received notice at a court hearing held before Judge Allen on January 13, 1988 that the no-asset report was filed in error. While the bankruptcy court's ruling at that hearing is somewhat unclear, it appears that the bankruptcy court clearly granted relief from the automatic stay and may have reopened the Dunyon bankruptcy case pursuant to the trustee's request. Obviously, the bankruptcy court recognized that the automatic stay for the Dunyon case was still in effect based on the trustee's representations and, thus, granted BancBoston relief from the stay. Because BancBoston's counsel was present at that hearing and learned that the automatic stay was in effect, BancBoston is estopped from relying on any extinguishment of the automatic stay. Consequently, the appellants further violated the automatic stay when they filed the motion to amend on January 15, 1988 in state court.

Sanctions Under 11 U.S.C. § 362(h):

This court must also review whether the record supports the amount of sanctions imposed. Before awarding damages pursuant to section 362(h), the bankruptcy court must determine that the debtor was indeed injured by the violation of the automatic stay. In re Bain, 64 Bankr. 581, 584 (Bankr. W.D. Va. 1986).

After reviewing the transcript of the March 21, 1988 hearing on the debtor's motion for sanctions, the affidavit of Noel S. Hyde, and the memoranda filed on the subject of damages, the court observes that not all fees claimed by debtor's counsel are a direct and foreseeable consequence of the appellants' republication violation. Indeed, the only damages resulting from this violation arise from debtor's counsel's fees expended in preparation for the motion for sanctions and the debtor's expenses in defending this appeal. Therefore, this court will remand this matter to the bankruptcy court to recalculate the award of damages accordingly.

Conclusion

The court affirms the bankruptcy court's finding of fact that the appellant's republication contained in BancBoston's proposed amended counterclaim willfully violated the automatic stay in contravention of 11 U.S.C. § 362(h). Nevertheless, the court remands this matter to the bankruptcy court to recalculate

the award of sanctions. The award of sanctions should be based on those legal fees and expenses directly related to the republication violation, including fees expended regarding the motion for sanctions and regarding this appeal.

Accordingly, IT IS HEREBY ORDERED that the bankruptcy court's memorandum opinion, dated May 27, 1988, is affirmed in part and remanded for further proceedings consistent with this decision.

Dated this 30th day of December, 1988.

David K. Winder
United States District Judge

Mailed a copy of the foregoing to the following named counsel this 30th day of December, 1988.

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