

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF UTAH

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In re)	Bankruptcy Case No. 82M-00329
)	
MIDWEST SERVICE &)	
SUPPLY, INC.)	
)	ORDER GRANTING MOTION
Debtor.)	FOR NEW TRIAL

FACTUAL AND PROCEDURAL BACKGROUND

Midwest Service and Supply Co., Inc. (Midwest) filed a Chapter 11 petition on February 9, 1982. A large portion of Midwest's business includes rebuilding equipment under contract with the United States. On June 23, 1982, Midwest filed a motion for an order to show cause why "the Government" should not "be held in contempt of the automatic stay." Debtor's memorandum in support of the motion alleged that in 1978, Midwest made a contract with the General Services Administration and that under the contract, Midwest received a series of delivery orders from the Department of Defense (referred to hereafter as the government). Midwest said that it was performing on these delivery orders at the time its petition was filed on February 9, 1982. Under the contract, Midwest alleged, it received periodic progress payments and "because of problems which arose under the contract, the government actually paid more to the debtor than it should with the net result being an overbilling." Midwest alleged that the government refused to honor the debtor's billings for progress payments. But the memorandum also indicated that there had been no post-petition progress billings. Midwest alleged that post-petition, it had made several deliveries, for which it received 15% payments "in accordance with the Government's policy of off-setting the progress account," Midwest asserted that "if the Government were not offsetting the progress payments,

the debtor would have received an additional \$140,000 since the filing of the petition." Needless to say, Midwest's allegations were difficult to understand.

The government responded by memorandum, in which it contended the government currently had \$925,616.92 outstanding in "unliquidated progress payments" to Midwest and that "overpayments relating to discrepancies in percentages of completion are conservatively estimated to total \$150,074." The government argued that it had taken no post-petition action to collect any of the overpayment amount. It also argued that for the deliveries in question, when it paid 15% of the contract price, it paid all it was obligated to pay because the remainder had already been paid in the form of progress payments. Thus, the government argued, if the Court adopted the position of Midwest the government would be required to pay 85% in progress payments, plus 100% on delivery, resulting in a payment of 185% of the contract price.

On July 20, the Court held a hearing on Midwest's request that the government be held in contempt for violating the automatic stay. Evidence and arguments were presented. The Court found that there had been a pre-petition overpayment and that the government had reduced the overpayment after the filing of the petition, thus violating the automatic stay. The Court ordered the government to file, within 15 days, an accounting of why and in what amount the overpayment had been reduced post-petition. The accounting has not been filed.

On July 30, 1982, the government filed a motion for a new trial pursuant to Federal Rule 59. The mailing certificate attached to the motion indicates that a copy of the motion was mailed to the debtor's attorney on July 29. The debtor has not filed a response to the motion. The Court now makes its ruling on the motion for a new trial.

ARGUMENTS OF THE GOVERNMENT IN SUPPORT OF A NEW TRIAL

First, the government argues that the Court's award of \$2,000 in attorney's fees against the government was error because the Court, in announcing its ruling from the bench, stated that the government had "substantially prevailed" and because the Court found that the government had "technically violated" the automatic stay but that the violation was not willful. It is the government's position that it was not actually held in contempt because of the finding that the violation was not willful.

Second, the government argues that the Court erred in finding that the government violated the stay because while § 362(a) prohibits certain "acts," the government took no action.

Third, the government argues that the Court erred in finding that the government violated the stay by reducing, post-petition, a pre-petition overpayment because the debtor had not alleged in its motion or memorandum that it was seeking sanctions for that violation, because the government objected to any evidence on that violation, and because the government was unfairly surprised "by the infusion of this new issue on overpayments into the hearing and therefore was not allowed an adequate opportunity to defend the allegation which it has now done in the Memorandum filed herein in Support of this Motion." This argument appears to be based on the due process clause of the Fifth Amendment to the Constitution of the United States. In essence, the government argues that it did not have adequate notice of the violation shown by evidence introduced at the hearing and that it did not have an adequate opportunity to prepare its defense.

DISCUSSION

The Award of Attorney's Fees

With respect to the government's arguments respecting the award of attorney's fees, the Court wishes to make it

clear that it did find the government in contempt for violating the automatic stay and that distinctions between a technical violation and a willful violation are meaningless in this case. This Court has previously ruled that "the disobedience, in civil contempt, need not be willful." In re Reed, 11 Bankr. 258, 268 (D. Utah 1981). In this regard, the Court notes that the United States Supreme Court has held, in a case cited in the Reed opinion, that "the absence of willfulness does not relieve from civil contempt. Civil as distinguished from criminal contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance. (Citations omitted). Since the purpose is remedial, it matters not with what intent the defendant did the prohibited act. The decree was not fashioned so as to grant or withhold its benefits dependent on the state of mind of respondents. It laid on them a duty to obey specified provisions of the statute. An act does not cease to be a violation of a law and of a decree merely because it may have been done innocently." McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949) (referring to violations of a decree enjoining violations of the Fair Labor Standards Act). The principle of law announced in McComb applies with equal force to the injunction of the automatic stay imposed by 11 U.S.C. § 362(a).

The Argument that the Government Took No Action

The Court rejects as a matter of law the government's contention that it did not commit an act within the meaning of 11 U.S.C. § 362. This argument appears to be one of law, not fact.

The government concedes that "in the instant case, the overpayments existing at the time the Chapter 11 Petition was filed must be characterized as in the nature of a debt." The government also concedes that that debt was reduced after

the filing of the petition. It is the government's position, however, that the reduction which took place was not because of any act of the government, but because "contract performance reduces the estimated amount of overpayments as the contractor 'catches up' with the percentage of completion for which he was erroneously paid progress payments." Because it did not direct Midwest to perform under contracts with existing overpayments, the government argues, the blame for the reduction in the pre-petition debt "must be attributed to Midwest itself." "It was solely due to (Midwest's) actions," the government contends, "that the debt was reduced."

The Court is unpersuaded by the government's analysis. The government held a pre-petition debt. Post-petition, it became obligated to make payments because of Midwest's performance on the contract. The Court found at the previous hearing that the government, to an extent yet undetermined because of the government's failure to file an accounting, withheld payments in order to reduce the pre-petition overpayment debt. The Court necessarily found that the government's withholding of payment was an act within the meaning of 11 U.S.C. § 362(a).

The Due Process Question

After examining the pleadings and memoranda on file, the Court has determined that the debtor did not put the government on sufficient notice that it would seek sanctions for violation of the stay by post-petition reduction of pre-petition overpayments. Because of this, and because the debtor has not opposed the motion, the Court will grant the relief requested.

The "New Trial"

Although the government frames its request for relief in terms of a new trial, it says that it does not wish to introduce further testimony. It appears from the government's memorandum that it simply wishes the Court to reconsider its

ruling in light of the legal arguments made in the motion. In this respect, the motion appears to fall more properly within the bounds of Federal Rule 60(b) than Federal Rule 59.

As noted above, the Court rejects two of the government's arguments as a matter of law. Other legal arguments raised by the government's memorandum, however, have some persuasive force. But since Midwest may have been waiting for a ruling on whether the Court would consider these new legal arguments before filing a responsive memorandum, the Court fixes October 22, 1982 as the last day on which Midwest may file a memorandum responding to those arguments the Court has not already rejected. If it so desires, the government may respond to Midwest's memorandum on or before ten days from the date of its service on the government. If Midwest does not intend to respond, it shall forthwith notify the Court and counsel.

IT IS THEREFORE ORDERED that the government's motion for a new trial is granted, subject to the provisions stated above. Nothing in this order has relieved the government from the prior order of this Court regarding the accounting.

DATED this 11 day of ^{October}~~September~~, 1982.

BY THE COURT:



GLEN E. CLARK
UNITED STATES BANKRUPTCY JUDGE