

**In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division**

In the matter of:)	
)	Adversary Proceeding
KAREN L. BEASLEY)	
(Chapter 13 Case Number <u>04-60286</u>))	Number <u>05-6055</u>
)	
<i>Debtor</i>)	
)	
)	
KAREN L. BEASLEY)	
)	
<i>Plaintiff</i>)	
)	
v.)	
)	
SEA ISLAND BANK)	
)	
<i>Defendant</i>)	

**MEMORANDUM AND ORDER
ON DEFENDANT’S MOTION FOR PARTIAL SUMMARY JUDGMENT**

INTRODUCTION

The Debtor filed this adversary proceeding alleging that Sea Island Bank (the “Bank”) violated the automatic stay through its sending and her receipt of multiple post-petition statements requesting repayment of a loan. The Bank filed a Motion for Partial Summary Judgment seeking a ruling that no punitive damages or damages for emotional distress were recoverable as a matter of law and that the Debtor’s actual damages should be limited due to her failure to mitigate those damages (the “Motion”). *See* Dckt. No. 16 (June

1, 2006). The Debtor filed a response. *See* Dckt. No. 20 (June 22, 2006). After considering the pleadings, evidence, and applicable authorities, the Court enters the following findings of fact and conclusions of law in conformance with Federal Rule of Bankruptcy Procedure 7052.

FINDINGS OF FACT

The Debtor applied for and received a revolving line of credit with the Bank on June 13, 1985. She made her last payment and last draw on the line of credit on March 5, 2004. The Debtor filed a Chapter 13 bankruptcy case on March 9, 2004. *See* Case No. 04-60286. The Bank filed with the Court the affidavits of two of its employees who handled the Debtor's line of credit. They both assert that they do not recall ever attempting to contact the Debtor concerning her account after receiving notice of her bankruptcy case. The Bank claims that after receiving notice of the Debtor's bankruptcy case, it charged off her loan on March 29, 2004.

The Bank issued statements to the Debtor concerning her account on May 20, 2005, August 20, 2005, September 20, 2005, and October 20, 2005. The following phrase is included on all four statements: "Please return the upper portion with your payment and retain the statement portion below for your records." *See* Dckt. No. 18, Ex. E (June 1, 2006). After receiving these statements, the Debtor went to her bankruptcy counsel, who issued letters to the Bank on June 6, 2005, August 26, 2005, and September 30, 2005. All three were addressed "To Whom It May Concern." *See Id.* Ex. F. All three letters informed the Bank that the Debtor had a pending Chapter 13 bankruptcy case and requested that the

Bank cease all future direct contact with the Debtor. All three letters were sent to the same address listed on the Bank's statements as the proper address to send payments.

After the October 20, 2005, statement from the Bank, the Debtor instituted this adversary proceeding against the Bank on November 15, 2005. The adversary charges the Bank with violating the provisions of the automatic stay under 11 U.S.C. § 362.¹ In her complaint, the Debtor seeks sanctions against the Bank for its purported violations. The Debtor claims that she has suffered actual damages, costs and attorney's fees, punitive damages, and any other relief that the Court deems appropriate. *See* Dckt. No. 1 (November 15, 2005).

In filing the Motion, the Bank asserts that as a matter of law, the Debtor has not presented evidence sufficient to support an award of punitive damages or emotional distress damages. Furthermore, the Bank contends that whatever actual damages that the Debtor has suffered should be limited due to her failure to mitigate those damages.

STANDARD OF REVIEW

Summary judgment is appropriate 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.” Fed. R. Civ. Proc. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Rule 56 of the Federal Rules of Civil Procedure

¹ Hereinafter, all Section references are to Title 11 of the United States Code.

applies to motions for summary judgment in bankruptcy adversary proceedings. *See* Fed. R. Bankr. Proc. 7056. The party moving for summary judgment has the burden of demonstrating that no dispute exists as to any material fact. Adickes v. S.H. Kress & Co., 398 U.S. 144, 156, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). Once this burden is met, the non-moving party must present specific facts that demonstrate that there is a genuine dispute over material facts. Finally, a court reviewing a motion for summary judgment must examine the evidence in a light most favorable to the non-moving party, and all reasonable doubts and inferences should be resolved in the favor of the non-moving party.

CONCLUSIONS OF LAW

Because this case was filed before October 17, 2005, the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 do not apply.

Punitive Damages

The Bank asserts that the Debtor cannot recover punitive damages because the Bank did not willfully violate the automatic stay and did not act with malicious intent to harm or in arrogant defiance of federal law. Under previous Section 362(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.

11 U.S.C. § 362(h).

To prove a “willful” violation, the debtor does not need to establish a “conscious intent to harm.” In re Livingston, 1992 WL 12004360, *6 (Bankr. S.D. Ga. 1992). Rather, what “is required is a showing that the party knew of the filing of the bankruptcy petition and with that knowledge, acted intentionally or deliberately.” Id. According to the text of previous Section 362(h), punitive damages are permitted for a willful violation of Section 362 in “appropriate circumstances.” Courts have stated that a creditor’s persistent violation of the automatic stay, even if minor, may support an award of punitive damages. *See, e.g., In re Newell*, 117 B.R. 323, 324-25 (Bankr. S.D. Ohio 1990)(“For a willful violation susceptible to an award of punitive damages in favor of the debtor, there must be a showing of egregious actions, *persistence in the activity after notice of the violation*, failure to appear to contest the allegations of intent, or *some other fact which at least raises an inference that the creditor is acting knowingly in conscious violation of the stay.*”) (emphasis added).

In the present case, it is undisputed that the Bank sent four statements to the Debtor concerning her account after she filed her bankruptcy case. Each statement contained language indicating that the Bank expected payment. In addition, it is undisputed that the Debtor’s counsel sent letters to the Bank after the Debtor received the first three statements. Each letter clearly informed the Bank that the Debtor was in a pending Chapter 13 case and asked the Bank to stop all future direct contact with the Debtor. All three letters were sent to the address provided by the Bank as the appropriate address to send payments. After the third letter failed to prevent the October 20, 2005, statement from the Bank, the Debtor instituted this adversary proceeding. Based on these facts, this Court cannot say as a matter of law that these are not “appropriate circumstances” to support an award of punitive

damages due to the Bank's actions. As a result, this portion of the Motion is denied.

Emotional Distress Damages

A debtor may be awarded emotional distress damages for a creditor's violation of the automatic stay "if a preponderance of the evidence shows that emotional harm occurred and that the defendant's conduct in willfully violating the stay was the cause of that harm." Bishop v. U.S. Bank/Firststar Bank, N.A. (In re Bishop), 296 B.R. 890, 895 (Bankr. S.D. Ga. 2003). Furthermore, such damages are "appropriate where a natural and powerful emotional distress is readily apparent from the nature or extent of the wrongful conduct under the particular circumstances surrounding the stay violation." Id. The Motion, however, seeks summary judgment, which requires a demonstration that there is no genuine dispute over material facts. This heightened standard requires a greater showing than a mere preponderance of the evidence, which is the burden set at trial.

The Bank asserts that the Debtor cannot show that she has suffered any such harm and that she has made no claim for expenses relating to medical or psychological treatment for stress. *See* Dckt. No. 18 (June 1, 2006). In her first response to the Bank's interrogatories, the Debtor stated that it was "very stressful to me to keep being harassed by this bank" and that it was "very frustrating that I have to play by the rules and this bank does not." *See* Dckt. No. 14 (March 20, 2006). In addition she stated that she worried "that when all is said and done [the Bank] will sue me or garnish my wages." Id. While this evidence alone may not be sufficient to prove by a preponderance of the evidence that the Debtor suffered emotional distress sufficient for damages under previous Section 362(h), it does

raise a genuine issue of material fact.² From these statements, it is evident to the Court that the Debtor suffered or is suffering something akin to emotional distress due to the Bank's actions. As a result, it is not appropriate to rule on these damages at this time. Because the Bank has not carried its burden with respect to the Debtor's claim for emotional distress damages, that portion of the Motion is denied.

Duty to Mitigate Actual Damages

Finally, the Bank asserts that whatever actual damages the Debtor may have suffered could have been mitigated "with a simple phone call to the Bank." *See* Dckt. No. 18, p. 4 (June 1, 2006). This Court has previously determined that actual damages under previous Section 362(h) can include "out-of-pocket expenses, attorney's fees, and emotional distress." *In re Bishop*, 296 B.R. at 894. Furthermore, bankruptcy courts have the authority to award attorney's fees due to a violation of the automatic stay if (1) the expenses or costs resulted from the violation and (2) those expenses and costs are reasonable. *In re GeneSys, Inc.*, 273 B.R. 290, 296 (Bankr. D.D.C. 2001). In the present case, it is undisputed that the Bank sent four statements to the Debtor requesting payment on her account. In response, the Debtor enlisted the aid of her bankruptcy counsel, who submitted letters to the Bank informing it of the Chapter 13 case and its apparent violations of the automatic stay.

The Bank contends that the Debtor had a duty to mitigate her actual damages

² While this Court has previously concluded that "fleeting and inconsequential" emotional damages are not entitled to compensation, such a determination is more appropriately made after a full evidentiary hearing and not on a motion for summary judgment. *See In re Bishop*, 296 B.R. at 896; *Washington v. IRS (In re Washington)*, 172 B.R. 415, 427 (Bankr. S.D. Ga. 1994).

by not going to her bankruptcy counsel for assistance. Indeed, debtors have a duty to mitigate the damages that may arise due to a creditor's violation of the automatic stay. In re Esposito, 154 B.R. 1011, 1015 (Bankr. N.D. Ga. 1993). In GeneSys, the debtor had accumulated a large amount of legal fees due to a creditor's technical violation of the automatic stay, and it was apparent to the court that the debtor's activities were not aimed at solely resolving the technical violation. 273 B.R. at 291-92. The court stated:

[There] was no reason for the debtor to damage itself by incurring more than modest attorney's fees in addressing the technical violation of the automatic stay. *Any reasonable debtor would have minimized its attorney's fees by having counsel simply request reversal of the setoff and waiting a reasonable period of time for the [creditor] to respond: no emergency existed.*

Id. at 292-93 (emphasis added).

That is what happened in the present case. The first three times that she received a statement from the Bank after the filing of her Chapter 13 case, the Debtor went to her bankruptcy counsel, who subsequently sent a letter to the Bank informing it of the case and asking it to cease all direct contact with the Debtor. Each letter was sent in response to an action made by the Bank that allegedly violated the automatic stay. The Debtor did not resort to litigation until her bankruptcy counsel's three previous letters failed to prevent the Bank from issuing the October 20, 2005 statement.

The facts of this case do not resemble those of In re Brock Utilities & Grading, Inc., 185 B.R. 719 (Bankr. E.D.N.C. 1995). In that case, the creditor

acknowledged to the debtor and its bankruptcy counsel its awareness of the debtor's pending Chapter 11 case. Subsequently, the creditor sent an inadvertent computer-generated notice of intention to levy to the debtor. After this action, the debtor's counsel did not contact the creditor to clarify any misunderstandings but went forward with a motion for damages for the creditor's violation of the automatic stay. Under these circumstances, the bankruptcy court refused to award sanctions. In this case, despite sending three letters to the proper address, neither the Debtor nor her bankruptcy counsel ever received a reply from the Bank indicating that it was aware of the Debtor's bankruptcy case and that it did not intend to take subsequent collection activities. Furthermore, the Debtor waited until she received the fourth statement from the Bank before filing this adversary proceeding. *See Id.* at 720 ("Creditors who send computer-generated collection notices have a responsibility and obligation to ensure that such notices are not sent to bankruptcy debtors. Actual damages, attorney's fees and punitive damages *may be appropriate where creditors ignore this responsibility.*") (emphasis added).

The Bank suggested an amount of attorney's fees that would be reasonable under the circumstances of this case, although it implies that amount should be close to zero. *See Dckt. No. 18, p. 9 (June 1, 2006)*. Of course, any award of attorney's fees by the Court will be granted only upon a finding that they are reasonable under the circumstances. *See In re GeneSys*, 273 B.R. at 296. Under these circumstances, the Court cannot conclude that the Debtor's actions were so unreasonable such that any potential award of attorney's fees must be substantially reduced. As a result, this portion of the Motion is denied.

ORDER

Pursuant to the foregoing, IT IS THE ORDER OF THIS COURT that the Bank's Motion for Partial Summary Judgment is DENIED. The case will be set for a final pre-trial conference on September 21, 2006, at 10 a.m. in Statesboro, Georgia.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ____ day of August, 2006.