

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA  
Augusta Division

IN RE:	)	Chapter 13 Case
	)	Number <u>89-10203</u>
EDWARD CARVER	)	
	)	
Debtor	)	
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EDWARD CARVER	)	
	)	
Plaintiff	)	
vs.	)	Adversary Proceeding
	)	Number <u>89-1043</u>
PAULETTE CARVER,	)	
GASPER L. TOOLE, III	)	Filed
FRAMPTON W. TOOLE, III	)	at 7 O'clock & 32 PM
RICHARD L. PEARCE,	)	Date: 12-28-90
d/b/a TOOLE & TOOLE LAW OFFICES	)	
	)	
Defendants	)	

**MEMORANDUM, ORDER AND JUDGMENT**

Plaintiff, Edward Carver, debtor in the underlying Chapter 13 proceeding (hereinafter referred to as "Debtor"), brought this action against defendants, Paulette Carver, Gasper L. Toole, III, Frampton W. Toole, III and Richard L. Pearce alleging that the defendants violated the automatic stay provisions of 11 U.S.C. §362(a) by proceeding with a contempt action against the Debtor in the Family Court of the Second Judicial Circuit in Aiken County, South Carolina with knowledge of the debtor's pending Chapter 13

bankruptcy proceeding. Based upon the evidence presented at trial this court makes the following findings of fact and conclusions of law.

On September 15, 1987, defendant, Richard L. Pearce, an attorney licensed to practice law in the State of South Carolina, filed on behalf of defendant, Paulette Carver, an action in the Family Court of the Second Judicial Circuit in Aiken County, South Carolina, naming Debtor as the defendant. The action sought among other things, legal separation between Mrs. Carver and the Debtor, child support and child custody. On September 25, 1987 the Family Court entered an order granting Mrs. Carver custody and child support, and the use and possession of the marital home, but required Debtor to pay the monthly mortgage payment on the home. Debtor failed to make monthly mortgage payments, and foreclosure proceedings began against the property by the mortgage holder.

Mrs. Carver amended her complaint in the Family Court on December 10, 1987, to seek temporary and permanent alimony payments from the Debtor. Defendant Pearce, as the attorney for Mrs. Carver and Debtor's counsel in the South Carolina Family Court action, C. LaVaun Fox, submitted a consent order which was entered by the court requiring the Debtor to bring the mortgage on the marital home current by December 23, 1987. The order provided that if the Debtor failed to bring the mortgage current and maintain it, he would be held in contempt of court. The Debtor failed to make the mortgage

payments for February and March, 1988, and defendant Pearce on

behalf of Mrs. Carver, brought a motion in the Family Court seeking to have the Debtor held in contempt of court. On March 25, 1988, the Family Court entered an order holding that the Debtor was not in contempt, but directing him to bring the mortgage current by April 1, 1988. On October 20, 1988 the Family Court entered a final order granting a total divorce between the parties. Regarding the marital home the order provided

ORDERED, that Petitioner [Paulette Carver] shall remain in possession of the marital home. The Respondent [Debtor] shall be responsible for the monthly mortgage payment as well as the annual tax statement and insurance premium due on the marital home. Respondent shall forward to Petitioner ten days in advance of its due date, the monthly mortgage payment for Petitioner to forward to the mortgage company. Petitioner shall remain in possession of the marital home until the youngest child reaches the age of eighteen, at which time the marital home shall be sold and the net proceeds from such sale divided evenly between Petitioner and Respondent . . . .

On February 10, 1989, the Debtor filed for protection under Chapter 13 of the Bankruptcy Code in this court. on March 10, 1989 defendant Pearce filed yet another motion on behalf of Mrs. Carver seeking to have Debtor held in contempt for his failure to make the monthly mortgage payment. The same day, defendant Pearce attended on behalf of Mrs. Carver, a hearing in the Court of Common Pleas of Aiken County, South Carolina regarding the foreclosure on the marital home. On March 13, 1989 the Master-In-Equity of the

Court of Common Pleas of Aiken County, South Carolina received

notice that Debtor had filed a petition in bankruptcy and entered an order striking the foreclosure proceeding with leave to restore. On the same day, defendant Pearce learned of Debtor's bankruptcy proceeding as he received a copy of the first page of Debtor's bankruptcy petition from the Court of Common Pleas in South Carolina. Between March 14 and March 23, 1989 defendant Pearce attempted unsuccessfully to contact by telephone the Debtor's attorney in the bankruptcy proceeding. Defendant Pearce made no effort to independently verify the status of the Debtor's Chapter 13 proceeding or the contents of the Debtor's proposed plan to deal with the prepetition payment arrearage due the mortgage holder on the marital home. The Debtor in his proposed plan, confirmed June 30, 1989, provided for the curing of the prebankruptcy filing arrearages due the mortgage holder through payments disbursed from the Chapter 13 trustee with the debtor maintaining postbankruptcy filing payments directly to the mortgage holder as they came due. Subsequent to receiving the notice of bankruptcy filing defendant Pearce, who does not maintain a regular bankruptcy practice, contacted a fellow lawyer regularly engaged in bankruptcy practice and received advice to go forward with the contempt hearing.

On March 23, 1989, the contempt action brought by defendant Pearce on behalf of Mrs. Carver came on for hearing before the Honorable Peter R. Nuessle, Judge of the Family Court in South Carolina. Defendant Pearce appeared at the hearing on behalf of

Mrs. Carver and informed the court of Debtor's pending bankruptcy petition, but added in his remarks to the court,

Your honor, of course, in the normal scheme of things bankruptcy does stay proceedings. However, in bankruptcy that does not apply to matters involving family court and child support payments.

Defendant Pearce also stated to the court at that hearing

They are taking steps to foreclose this property, your honor. We have a final hearing before the Master-In-Equity. So once the property is released, it will be a very short period of time in which the property will be sold. . . . We believe that his [Debtor] conduct is contemptuous. He's done it in the past. He's doing it again now. Without some sort of Order from this Court we feel that he is going to continue doing it. So, you know, we want some teeth behind the original decree so that Mrs. Carver and these four children will have a place to live and not be at the mercy of the whims of Mr. Carver when he wants to decide he wants to make a mortgage payment.

. . . .

Debtor appeared at the hearing without a lawyer and requested a continuance to seek counsel. At the conclusion of the hearing, Judge Nuessle held the Debtor in contempt of court and sentenced him to six months in jail which sentence would be suspended upon the payment by the Debtor of all arrearages and charges due the holder of the mortgage on the marital home. The order also required the Debtor to pay within 60 days all attorneys fees and costs incurred by Mrs. Carver in the contempt action. A bench warrant was entered ordering the immediate arrest of the Debtor. The Debtor was jailed

for 7 1/2 days and was forced to borrow Eight Thousand Seven

Hundred Ninety-Two and 48/100 (\$8,792.48) Dollars from friends and relatives in order to cure the mortgage arrearage and pay all attorneys fees and costs to regain his freedom. During his incarceration, the Debtor lost Eight Hundred Sixty-Four and No/100 (\$864.00) Dollars in wages. The Debtor has incurred One Hundred Thirty-Nine and 30/100 (\$139.30) Dollars in deposition costs during this litigation.

Defendants Gasper L. Toole, III and Frampton W. Toole, III are law partners with defendant Pearce doing business as Toole & Toole Law Offices. Defendant Pearce and the law firm represented defendant Paulette Carver as her attorneys in the Family Court contempt proceeding.

The Debtor contends that the defendants are jointly and severally liable to him for damages sustained as the result of Mr. Pearce proceeding with the hearing on contempt on March 23, 1990 with knowledge of the pending bankruptcy proceeding. The defendants maintain that the stay of 11 U.S.C. §362(a)<sup>1</sup> is not applicable to

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<sup>1</sup>11 U.S.C. §362(a) provides:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), operates as a stay, applicable to all entities, of

(1) the commencement or continuation, including the issuance or employment of process,

of a judicial, administrative, or other action or proceeding against the debtor

the collection of alimony, maintenance, or support which includes the monthly mortgage payment at issue in this matter.

Additionally, the defendants contend that the Family Court of Aiken County, South Carolina held the Debtor in criminal contempt of court, not the defendants. The defendants are incorrect in their analysis.

The stay of Section 362(a) applies to actions to collect alimony or support payments due from the debtor at the time of or prior to the debtor's filing for protection under the Bankruptcy

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that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

Code unless such collection actions are directed against property which is not property of the estate. 11 U.S.C. §362(b)(2)<sup>2</sup>. This exception to the automatic stay is narrowly drawn to apply only to actions to collect alimony, maintenance and support from property that is not property of the estate. A Chapter 13 proceeding creates a bankruptcy estate which consists of all legal or equitable interest of the debtor in property as of the commencement of the case. 11 U.S.C. §541(a)(1). The action brought by these defendants sought to have the Debtor jailed if he did not cure the arrearages on the marital home from property of the bankruptcy estate. The automatic stay of 11 U.S.C. §362(a) applies to prevent such actions from being brought against a debtor who has sought protection from creditors under the Bankruptcy Code. See, Bible v. Bible, (In re: Bible) 110 B.R. 1002 (Bankr. S.D. Ga. 1990). The contempt action was directed at the Debtor to collect a prepetition debt, past due payments on the marital residence from property of the estate, the

Debtor's prepetition assets. The fact that these payments could

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<sup>2</sup>11 U.S.C. §362(b)(2) provides:

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. §78eee(a)(3)), does not operate as a stay (2) under subsection (a) of this section of the collection of alimony, maintenance, or support from property that is not property of the estate.

be construed as alimony, maintenance or support does not matter in this instance as the action was not directed at property which was not property of the estate. The action was directed at the Debtor.

The contention that the Family Court of South Carolina was responsible for holding the Debtor in criminal contempt of court and the defendants were not responsible for the action is not supported by the facts or the law of South Carolina. The stay of §362(a) does not apply to criminal proceedings. 11 U.S.C. §362(b)(1)<sup>3</sup>. In spite of the testimony from two attorneys appearing on behalf of the defendants to the contrary, the action was an action for civil contempt.<sup>4</sup>

Civil contempts are those quasi contempts which consist in failing to do something which the

contemptor is ordered by the court to do for the benefit or advantage of another party to

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<sup>3</sup>11 U.S.C. §362(b)(1) provides:

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3), does not operate as a stay

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor.

<sup>4</sup>Judge Nuessle testifying as a witness for defendants stated that he regarded the proceeding as a mixed question of both criminal and civil contempt. From the facts set forth in the transcript of the proceeding before Judge Nuessle and the clear statement of the law in South Carolina, this court disagrees with Judge Nuessle's characterization.

the proceeding before the court while criminal contempts are all those acts in disrespect of court or of its process or which obstruct the administration of ice, or tend to bring the court into disrespect, such as disorderly conduct, insulting behavior in the presence or immediate vicinity of the court, or acts of violence which interrupt its proceedings; also disobedience or resistance to the process of the court, interference with property in the custody of the law, misconduct of officers of the court

. . . .

Clamp v. Hall, 287 S.C. 270, 335 S.E.2d 815 (Ct. App. 1985) [quoting State v. Nathans, 49 S.C. 199, 207, 285 S.E.2d 52, 55 (1896)]. Sanctions for contempt may entail imprisonment, and the imprisonment is civil in nature when it is intended to coerce, rather than punish. Clamp, supra [citing Shillitani v. U.S. 384 U.S. 364, 370, 86 S.Ct. 1531, 1535, 16 L.E.2d 622, 627 (1966)]. See also Bible supra at 1005.

The defendants' contend that the findings in Judge Nuessle's order support a determination of criminal contempt:

ORDERED that Edward L. Carver be, and hereby is, found to be in contempt of this court; it is further,  
ORDERED that for his contemptuous conduct, Edward L. Carver be, and hereby is, sentenced to six months incarceration in the Aiken County Detention Center, or such other type facility, PROVIDED HOWEVER, this this (sic) sentence shall be suspended upon payment in full of the total arrearage figure in order to reinstate the marital home mortgage as verified by the attorneys for the mortgagee, N.Y. Guardian Mortgage Corporation. . . .

Defendants' contention that Judge Nuessle's sentencing of the Debtor to a specific period of incarceration suspended upon the

payment of mortgage arrearages is analogous to a criminal sentence suspended upon the payment of a fine is without merit.

Incarceration upon conviction of a criminal offense suspended upon the payment of a fine to a governmental authority is that a criminal sentence. However, as in this case, where a contemtor may purge his contempt by paying directly to an injured party indemnification for the harmed cause by the contempt, such contempt is civil in nature. Curlee v. Howe, 277 S.C. 377, 287 S.E.2d 915 (1982). The imprisonment of the Debtor for failing to maintain the monthly mortgage payments on the marital home was intended to coerce him to cure the arrearages and to make timely all future payments, not punish him for any criminal contempt. The court provided for a suspended sentence upon payment of the arrearages. The action was brought by defendant Pearce on behalf of Mrs. Carver, carried to hearing by him with knowledge of the Debtor's bankruptcy filing, and urged by him at hearing. Defendant Pearce pressed the Family Court to hold the Debtor in contempt of court. Defendant Pearce continued to ask that the court hold the Debtor in contempt even though Mr. Pearce had knowledge of the plaintiff's bankruptcy proceeding. The action was an effort to force the payment of Mrs. Carver's claim for prepetition mortgage arrearage payments through the sanctions of the Family Court to the exclusion of federal bankruptcy laws. See

In re: Caldwell, 5 B.R. 740 (Bankr W.D. Va. 1980).

Defendant Pearce in going forward with the civil

contempt proceeding was in violation of the stay of §362(a). Bankruptcy Code §362(h)<sup>5</sup> provides for the recovery of damages by an individual injured by any such violation determined to be "willful". The defendants' contented that they acted in good faith and without a conscious intent to violate the bankruptcy stay; and therefore, could not be found to be in "willful" violation of the automatic stay. As further evidence of Mr. Pearce's good faith in proceeding with the contempt action, the defendants point to his efforts at obtaining the advice of experienced bankruptcy counsel. Defendants appear to suggest that some sort of subjective conscious intent to do harm is necessary for violation of the automatic stay to be considered willful. Under 362(h), there need not be a subjective conscious intent to do harm for an act to be considered a willful violation of the stay. "Instead, all that is required is that the party violated the stay with actual knowledge or reason to know that a case had been filed. In re: Bragg, 56 B.R. 46 (Bankr. M.D. Ala. 1985)." Blair v. South Carolina National Bank, (In re: Blair) Adv.

Pro. No. 187-0039 p. 7 (Bankr. S.D. Ga. Feb. 11, 1988, Davis, J.).

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<sup>5</sup>11 U.S.C. §362(h) provides:

(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.

In this case defendant Pearce knew of the pendency of the bankruptcy proceeding and proceeded with the contempt hearing in the Family Court of South Carolina. This is sufficient to establish a willful violation of the bankruptcy stay. The fact that defendant Pearce received bad advice before proceeding with the contempt hearing does not mitigate against a finding of a willful violation. Mr. Pearce knew of the bankruptcy filing and under took a course of conduct in violation of the §362(a) stay.

Mr. Pearce further contends that his conduct was not in willful violation of the §362(a) stay because he was zealously representing his client's interests as required of every lawyer. Mr. Pearce misstates a lawyer's obligation to his client. A lawyer should zealously represent his client within the bounds of the law. See e.g. South Carolina Supreme Court Rule 32; American Bar Association Code of Professional Responsibility Canon 7; State v. Harper, 297 S.C. 257, 376 S.E.2d 272 (1989). In this instance, defendant Pearce in his representation of Mrs. Carver exceeded the bounds of the law, specifically the provisions of §362(a) of the Bankruptcy Code.

Mr. Pearce willfully violated the provisions of §362(a) of the Bankruptcy Code causing injury to the Debtor. Mr. Pearce is liable to the Debtor for damages flowing from that violation. Regarding defendants Gasper L. Toole, III, Frampton W. Toole, III, and the partnership Toole & Toole Law Offices, Mr. Pearce, while

acting as a partner of these defendants and in furtherance of the business of Toole & Toole Law Offices, the representation of clients in the practice of law, and while acting within the scope of his employment willfully violated the provisions of 11 U.S.C. §362 which violation resulted in damages suffered by the Debtor. Defendants Gasper L. Toole, III, Frampton W. Toole, III and the partnership Toole & Toole Law Offices are jointly and severally liable with defendant Pearce for any damages attributable to the conduct of Mr. Pearce. See South Carolina Insurance Co. v. James C. Green & Co., 290 S.C. 171, 348 S.E.2d 614 (Ct. App. 1986); In re: Blair, supra; In re: Smith Adv. Pro. No. 187-0017 (Bankr. S.D. Ga. July 2, 1987 Davis, J.). Regarding defendant Paulette Carver, when Mrs. Carver selected her counsel, she conferred upon the lawyer the authority to take action on her behalf in the prosecution of the contempt action to the extent that Mr. Pearce deemed legal, proper and necessary in the management of the matter under consideration. Mr. Pearce's acts are the acts of the client, Mrs. Carver. Simon v. Flowers, 231 S.C. 545, 99 S.E.2d 391 (1957). Mrs. Carver retained defendant Pearce to represent her in the prosecution of the contempt action and is responsible with the other defendant for the damages suffered by the Debtor as a result of those acts.

This court having determined that the Debtor was injured by a willful violation of the stay of §362(a), the imposition of actual damages, including costs and attorneys fees is appropriate.

In this case, the Debtor was required to pay Eight Thousand Seven Hundred Ninety-Two and 48/100 (\$8,792.48) Dollars in order to gain his freedom. Eight Thousand Three Hundred Eight and 48/100 (\$8,308.48) Dollars was paid through defendant Toole & Toole Law Offices to attorneys representing the mortgage holder and the balance Four Hundred Eighty-Four and No/100 (\$484.00) Dollars was payment for attorneys fees and costs due Toole & Toole Law Offices for the representation of Mrs. Carver in the contempt action. The Debtor acknowledges that Five Thousand Six Hundred Fifty and No/100 (\$5,650.00) Dollars of this sum represented prebankruptcy filing mortgage payment arrearage to be paid under the Debtor's Chapter 13 plan. During the Debtor's incarceration he lost income from his employment of Eight Hundred Sixty-Four and No/100 (\$864.00) Dollars.<sup>6</sup> During the course of this adversary proceeding Debtor incurred deposition costs of One Hundred Thirty-Nine and 30/100 (\$139.30) Dollars. The Debtor was jailed for a period of 7 1/2 days. His loss of freedom is valued at One Thousand and No/100 (\$1,000.00) Dollars per day. See generally Brock v. Brock (In re: Brock) 58 B.R. 797 (Bankr. S.D. Ohio, 1986); In re: Shropshire, 25

B.R. 128 (Bankr. W D. Wa. 1982). In addition to the foregoing

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<sup>6</sup>Debtor's contention that he was denied a salary increase as a result of the incarceration and thereby suffered a 15-year economic loss reduced to present value of \$10,000.00 is unsupported by the evidence as to the loss or reason for denial of the increase and speculative as to the value of any such lost increase.

362(h) provides for the recovery of attorneys fees as a component of any actual damages awarded. From a review of the pleadings filed in this adversary the court determines the reasonable value of attorneys fees to be One Thousand and No/100 (\$1,000.00) Dollars.

In appropriate circumstances §362(h) allows for the recovery of punitive damages. Punitive damages are an extraordinary remedy designed to punish and deter particularly egregious conduct. Stephens v. South Atlantic Cannery Inc. (Coca Cola Co.) 848 F.2d 484 (4th Cir. 1988) cert. denied 109 S.Ct. 564, 102 L.E.2d 589. Such damages are not intended to compensate victims, but rather are private fines, awarded in addition to what is necessary to compensate the victim. Punitive damages are levied to punish a defendant for his conduct and to deter other from engaging in similar conduct in the future. Floyd v. Eastern Airlines, Inc. 872 F.2d 1462 (11th Cir. 1989) cert. granted 110 S.Ct. 2585. From the evidence presented, punitive damages are not warranted. Testimony of Mr. Henderson Johnson and Mr. William Short, attorneys from South Carolina as well as that of Mr. Pearce mitigate against the imposition of punitive damages. Mr. Johnson testified as to the professional standards of practice for lawyers in Aiken County, South Carolina and that defendant Pearce's conduct was within those standards. Mr. Short testified that on the limited information supplied by Mr. Pearce he advised Mr. Pearce that proceeding with the contempt action would not violate §362 of the Bankruptcy Code.

Mr. Pearce's testimony that at the time he believed he acted in the best interest of his client, Mrs. Carver, offers a reasonable explanation for his conduct. In spite of the fact that the Debtor suffered the outrage of being jailed for more than a week the conduct of the defendants in clear violation of the §362 stay does not rise to the level necessary for the imposition of punitive damages to punish the defendants for the action against the Debtor and to deter others from similar conduct. While the testimony of Messrs. Johnson, Short and Pearce was accepted by this court in mitigation against the imposition of punitive damages, the testimony does not alter the fact that defendant Pearce willfully violated the automatic stay of §362(a) and with the remaining defendants are liable for the actual damages suffered by the Debtor. This court having determined that defendant Richard L. Pearce willfully violated the provisions of 11 U.S.C. §362(a) which willful violation caused injury to the Debtor; and that remaining defendants, Paulette Carver, Gasper L. Toole, III, Frampton W. Toole, III, and the partnership Toole & Toole Law Offices are jointly and severally liable with the defendant Richard L. Pearce for damages arising from such violation judgment is ORDERED entered for the Debtor Edward Carver jointly and severally against defendants, Paulette Carver, Gasper L. Toole, III, Frampton W. Toole, III, Richard L. Pearce, and the partnership Toole & Toole Law Offices in the sum of Eighteen

Thousand Two Hundred Ninety-Five and 78/100 (\$18,295.78) Dollars

together with future interest as provided by law. Further ORDERED that upon full satisfaction of the judgment, defendants are allowed an unsecured claim to be paid in full in the Debtor's underlying Chapter 13 bankruptcy proceeding in the amount of Five Thousand Six Hundred Fifty and No/100 (\$5,650.00) Dollars.

JOHN S. DALIS  
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia  
this 28th day of December, 1990.