

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

In the matter of:)
)
MELVIN KING, JR.)
LINDA FAYE KING,)
(Chapter 13 Case 97-42598))

Debtors

MELVIN KING, JR.)
LINDA F. KING, and)
SHERICO A. GREEN)

Plaintiffs

v.)
)
WORLD OMNI FINANCIAL CORP.,)

Defendant

Adversary Proceeding

Number 98-4009

FILED

4 o'clock & *30* min. *P.M.*
Date 9/9/98

MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia



MEMORANDUM AND ORDER
ON DEFENDANT WORLD OMNI FINANCIAL'S
MOTION FOR SUMMARY JUDGMENT

Pending before the Court is the motion for summary judgment filed by the Defendant, World Omni Financial Corporation ("World Omni"), against the Debtor/Plaintiffs, Melvin and Linda King and Sherico Green in their action pursuant to the co-debtor stay of 11 U.S.C. § 1301. Plaintiffs have filed a memorandum in opposition to

World Omni's motion. The matter having been submitted for decision by the Court, I make the following Findings of Fact and Conclusions of Law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.

FINDINGS OF FACT

The following facts have been stipulated by the parties and are not in dispute. Debtors Melvin and Linda King filed a petition for relief under Chapter 13 of Title 11 on September 2, 1997. Sherico Green co-signed on a car purchased by Linda King, the security interest on which is held by World Omni. After the Kings filed their petition in bankruptcy, World Omni reported to certain credit agencies that Sherico Green's account with it was "included in bankruptcy." Debtors and Mr. Green then filed this complaint seeking a remedy under Section 1301 of Title 11, the so-called "co-debtor stay." Prompted by the filing of the complaint, World Omni requested that the credit report be changed to indicate that the account is "included in the bankruptcy of another."

CONCLUSIONS OF LAW

This is a core proceeding under 11 U.S.C. § 157(b)(1), arising under the Bankruptcy Code. Bankruptcy Rule 7056 incorporates Rule 56 of the Federal Rules of Civil Procedure, which provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with

the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." FED. R.CIV. P. 56(c). All evidence must be considered "in the light most favorable to the non-moving party." Rollins v. Tech South, Inc., 833 F.2d 1525, 1528 (11th Cir. 1987). The moving party bears the initial burden of showing the absence of any genuine issue of material fact or that it is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986). Once the movant carries its burden, the burden then shifts to the nonmoving party to introduce "significant, credible evidence sufficient to show" that there is a genuine issue of material fact. United States v. Four Parcels of Real Property, 941 F.2d 1428, 1438 (11th Cir. 1991).

Defendant World Omni asserts that it is entitled to summary judgment because 1) as a matter of law, the credit report did not violate 11 U.S.C. § 1301 and 2) the First Amendment of the United States Constitution protects its credit report on Mr. Green. I deny the Defendant's motion.

Protection of Co-debtors Under the Bankruptcy Code

In a Chapter Thirteen case, co-debtors are protected by the "co-debtor stay," which provides as follows:

. . . [A]fter the order for relief under this chapter, a creditor may not act, or commence or continue any civil action, to collect all or any part of a consumer debt of the debtor from any individual that is liable on such debt with the debtor, or that secured such debt.

11 U.S.C. § 1301(a). World Omni argues that its action in reporting the bankruptcy to the credit report of Mr. Green is not an “act to collect” but is simply an informational report of truthful fact. A notation on a non-debtor’s credit report can, however, violate the automatic stay of action found in Section 1301. *See Matter of Sommersdorf*, 139 B.R. 700 (Bankr. S.D.Ohio 1991). Such an inquiry involves a question of material fact and thus cannot form the basis for summary judgment in favor of World Omni.

Constitutional Protection of Credit Reports

This Court is presented also with an issue of first impression: World Omni argues that even if the notation on Mr. Green’s credit report was an attempt to collect its debt, application of Section 1301 to its action violates the First Amendment of the United States Constitution as a matter of law.¹ To note at the outset that First Amendment jurisprudence is less than clear with regard to the automatic stay is quite fair. Attempting to cleanly cull guidelines as to the parameters of First Amendment protections

¹ 28 U.S.C. § 2403(a) requires this Court to notify the United States Attorney General whenever the constitutionality of an Act of Congress has been drawn into question. Because this Order does not resolve the issue of constitutionality, such notification will be given by separate Order.

is not easy. Courts utilize a spectrum of approaches where the right of free speech intersects with the imposition of bankruptcy stays. *See, e.g., In re National Service Corporation*, 742 F.2d 859 (5th Cir. 1984) (automatic stay as prior restraint on creditor speech presumptively invalid); *In re Andrus*, 189 B.R. 413 (N.D.Ill. 1995) (automatic stay regulates “speech-plus” conduct that can be restrained if significant government interest); *In re Stonegate Security Services, Ltd.*, 56 B.R. 1014 (N.D.Ill. 1986) (public criticism does not present clear and present danger of interference with judicial process); *In re Sechuan City*, 96 B.R. 37 (Bankr. E.D.Pa. 1989) (public statement of bankruptcy falls into lower spectrum of protected speech but government interest is significant).

Whatever standards or means these courts employ in addressing First Amendment concerns, however, all share the common thread of resolving the issue by looking to the circumstances of the case. As a blanket rule, this Court cannot say that in all cases, under all possible circumstances, a credit report is entitled to stringent First Amendment protections. *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758, 105 S.Ct. 2939, 2944 (1985) (protection to be afforded particular credit report “depends on whether the report’s ‘content, form, and context’ indicate that it concerns a public matter.”). In a plurality opinion, the Supreme Court stated:

We have long recognized that not all speech is of equal First Amendment importance. It is speech on “‘matter of public

concern” that is “at the heart of the First Amendment’s protection.”

Id. at 758-759.

Whether the credit report at issue in this case touches upon a matter of public concern and whether the act of reporting the bankruptcy was an attempt to collect so as to implicate substantial government interests are both questions of fact not appropriate for resolution at summary judgment. World Omni has not carried its burden of proving that as a matter of law, its action in reporting the bankruptcy to Mr. Green’s credit agency is protected by the First Amendment.

ORDER

In consideration of the foregoing IT IS HEREBY ORDERED that the Motion for Summary Judgment of World Omni Finance Corporation is denied.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 4th day of September, 1998.