

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

FILED
01 JUN 26 PM 3:39
U.S. BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA

IN RE:

C/A No. 97-06698-W

Robert L. Johnson and Lavonda T. Johnson,

JUDGMENT

ENTERED

Debtors.

Chapter 13

JUN 27 2001

S. R. P.

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, The Rothwell Law Firm and NationsBank, N.A. violated the automatic stay under §362(h). Therefore, The Rothwell Law Firm and NationsBank, N.A. are to pay Debtors the following actual damages within ten (10) days of the entry of this Order: (1) attorney's fees in the amount of \$758.50, interest in the total amount of \$49.24 which accrued on the mortgage as a result of the delay in the closing on the property; and damages for emotional distress in the amount of \$150.00. Under the circumstances presented, the Court declines to award punitive damages.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,

June 26, 2001.

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CERTIFICATE OF MAILING

The undersigned deputy clerk of the United States
Bankruptcy Court for the District of South Carolina hereby certifies
that a copy of the document on which this stamp appears
was mailed on the date listed below to:

✓ ✓ JUN 27 2001 (Hoyler) (Wes)
DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE

SHEREE R. PHIPPS

Deputy Clerk

✓ A Hood

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ORDER

Chapter 13

ENTERED

JUN 27 2001

S. R. P.

THIS MATTER comes before the Court upon the Motion for Sanctions for Willful Violation of the Automatic Stay (the "Motion") filed by Robert L. Johnson and Lavonda T. Johnson ("Debtors") on May 14, 2001.¹ The Motion asserts that NationsBank and its attorneys, The Rothwell Law Firm, have willfully violated the provisions of 11 U.S.C. §362² by asserting a judicial lien and preventing the closing on Debtors' residence and that such violation caused Debtors certain damages including additional interest on the first mortgage, costs and expenses associated with the delayed closing, and attorneys' fees associated with the Motion. Thus, Debtors requested that the Court find the parties in willful violation of the automatic stay and award actual and punitive damages against The Rothwell Law Firm and NationsBank. After

¹ The Motion at issue in this Order was originally captioned "Debtor's Response to NationsBank's Motion for Reconsideration, Request for Emergency Hearing, and Motion for Sanctions for Willful Violation of the Automatic Stay." The Motion was, in fact, in response to NationsBank Motion for Reconsideration of Order Authorizing Sale of Assets Free and Clear of Liens whereby NationsBank moved for the Court to alter or amend its Order Authorizing Sale of assets entered on April 25, 2001 to provide that NationsBank's judgment against Debtors attach to the proceeds of the sale. However, on May 14, 2001, on the same date Debtors' Motion was filed, NationsBank filed a Withdrawal of Motion for Reconsideration; therefore, by correspondence to the Court dated May 15, 2001, Debtor's counsel advised that there was no further need for the emergency hearing on the Motion to Reconsider; however, she stated that Debtors were still pursuing the Motion for Sanctions.

² Further references to the Bankruptcy Code shall be by section number only.

considering the pleadings in this matter and the testimony and arguments presented at the hearing on the Motion; the Court makes the following Findings of Fact and Conclusions of Law, pursuant to Fed. R. Civ. P. 52, made applicable in bankruptcy proceedings pursuant to Fed. R. Bankr. P. 7052.³

FINDINGS OF FACT

1. On August 11, 1997, Debtors filed for relief under Chapter 13 of the Bankruptcy Code. Debtors' Schedule A reflected their joint ownership in a house and lot valued at \$30,500. Advanta Mortgage holds a first mortgage on said property in the amount of \$31,000. Furthermore, Debtors' schedule F listed NationsBank, N.A. as an unsecured creditor in the amount of \$8,066.68 for a deficiency claim on a repossessed 1995 Camaro.
2. NationsBank and the Rothwell Law Firm first made an appearance in the case by filing a Proof of Claim on August 26, 1997. The Proof of Claim, signed by A. Todd Darwin of the Rothwell Law Firm, asserted that NationsBank was secured by a judgment attaching to Debtors' real estate and asserted a claim in the amount of \$9,828.57. Furthermore, the Proof of Claim requested that any notices to NationsBank, N.A. be sent to The Rothwell Law Firm, Post Office Drawer 102, Columbia, South Carolina 29202.
3. The first proposed Chapter 13 Plan was filed on August 11, 1997 and did not provide for any specific treatment of NationsBank's claim. Subsequently, on October 14, 1997, Debtors filed a Notice of Plan Modification Before Confirmation and Related Motions which proposed to

³ The Court notes that to the extent any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such, and to the extent any Conclusions of Law constitute Findings of Fact, they are so adopted.

avoid NationsBank's lien. More specifically, the Plan provided as follows:

The debtor hereby moves to avoid the following judicial liens pursuant to 11 U.S.C. §522(f), SC LBR 4003-1, and the notice attached hereto.

NationsBank \$9,000.

4. An Affidavit of Service was also filed with the Court on October 14, 1997 which reflected that NationsBank was properly served with a copy of the Notice, Modified Chapter 13 Plan and Related Documents by first-class mail at the following address:

NationsBank, N.A.
c/o Donald E. Rothwell
The Rothwell Law Firm
P.O. Drawer 102
Columbia, SC 29202

5. On November 12, 1997, Debtors' Attorney filed an Affidavit of No Objection wherein she stated that she had served the Plan and related motions on all interested parties and no objections or responses had been served on her or filed with the Court. Therefore, on January 15, 1998, the Court entered an Order Confirming Plan and Resolving Motions,⁴ which was properly served on NationsBank at the same address listed above.

6. On December 30, 1999, Advanta Mortgage Corporation filed a Motion to Modify Stay

⁴ Paragraph 8 of the Confirmation Order specifically set forth that:

Pursuant to 11 U.S.C. §522(f)(1)(B), the court hereby finds that the security interests to be avoided as set forth in the confirmed plan or by separate order impair an exemption to which the debtor(s) would otherwise be entitled under 11 U.S.C. §522(b) and South Carolina Code Sec. 15-41-30 and are, therefore, avoided. Pursuant to 11 U.S.C. §522(f)(1)(A), the court hereby finds that the judicial liens set forth in the confirmed plan or separate order impair an exemption to which the debtor(s) would otherwise be entitled under 11 U.S.C. §522(b) and South Carolina Code Sec. 15-41-30 and are, therefore, avoided to the extent set forth in the plan.

pursuant to §362(d)(1) and (d)(2), in which the creditor asserted that Debtors had failed to make the regular mortgage payments outside their plan and were due for the October 1, 1999 payment and beyond, and had also failed to abide by their Chapter 13 Plan.

7. A Settlement Order was entered into on February 4, 2000, whereby Debtors agreed to bring their post-petition mortgage payments current and reimburse Advanta Mortgage Corporation for the attorney fees and costs in conjunction with the Motion. However, Debtors did not abide to the terms of the Settlement Order and an Affidavit of Default was filed by Advanta Mortgage Corporation's attorney on August 1, 2000. By Order of the Court entered on August 3, 2000, the automatic stay was modified to permit Advanta Mortgage Corporation to proceed with a foreclosure action in the state court against Debtors' property.

8. A foreclosure sale was scheduled for June 4, 2001.

9. On March 14, 2001, several months after the relief from the automatic stay was granted, Debtors filed a Notice of Opportunity for Hearing and Application for Sale of Assets Free and Clear of Liens. In the Notice, Debtors proposed to sell their residence free and clear of all liens and encumbrances. Debtors proposed a private sale of their homes for the price of \$44,500 to Deirdre M. Brown on April 30, 2001.⁵ The Application stated that Advanta Mortgage Corporation, along with its successors and assigns, would be paid in full at the closing of the sale in certified funds in an amount quoted by the creditor to the closing attorney. Furthermore, it specifically stated: "The asserted judgment lien of NationsBank was avoided through the Debtors' Plan of Reorganization and is being paid as an unsecured claim through the Debtors'

⁵ The Application further stated that the appraisal value of the property was \$52,000 and that the buyer had no relationship with Debtors.

Plan of Reorganization.” As reflected in the Affidavit of Service filed with the Motion, NationsBank was served with the Notice and Application at the address specified above.

10. No objections were filed to said Notice of Sale; therefore, by Order Authorizing Sale of Assets Free and Clear of Liens entered on April 25, 2001, Debtors were authorized to sell and to convey to Deirdre M. Brown, for \$44,500.00, Debtors’ interest in their residence located at 2314 Senate Street, Columbia, South Carolina, free and clear of liens and encumbrance.⁶

11. The closing on the residence was scheduled for May 11, 2001 at 5:00 p.m.⁷

12. According to Mr. Rothwell’s statements at the hearing, Mr. Curlin, the closing attorney, contacted his office on April 23, 2001 to request the payoff on NationsBank’s lien. During a follow-up with Mr. Curlin which took place around 4:00 p.m. on the closing date, the Rothwell Law Firm was advised that NationsBank would not receive any money from the sale proceeds due to a previous Order of the Court which reflected that NationsBank’s judgment lien had been avoided. Due to the imminent closing, Scott Hood, Esquire, of the Rothwell Law Firm, filed a Motion for Reconsideration of Order Authorizing Sale of Assets Free and Clear of Liens. The Motion for Reconsideration stated that NationsBank was a secured creditor pursuant to a judgment against Debtors in the amount of \$9,828.57 and requested that the Court alter or amend

⁶ The Order Authorizing Sale of Assets Free and Clear of Liens was only served on Debtor, Debtor’s Attorney, and the Chapter 13 Trustee. Due to passive notice procedures, the Order is not orderly served on the interested parties beside Debtor, his or her counsel, and the Trustee; unless an objection is filed, in which case it is also served on the objecting party.

⁷ The closing on the property had been scheduled twice before. The first closing date was set for April 30, 2001; however, due to the purchaser’s attempt to obtain a mortgage, the closing had to be rescheduled for May 3. Once again, however, the closing did not occur for reasons not related to NationsBank, N.A. The third closing date was then scheduled for May 11 at 5:00 p.m.

its Order Authorizing Sale of Assets to provide that said judgment held by NationsBank “shall attach to the proceeds of sale, shall constitute at least a second lien upon said proceeds, or otherwise that the sale of said property shall not be free and clear of said judgment.” The Motion for Reconsideration also asserted that NationsBank was not served with a copy of the Notice of Opportunity for Hearing and Application for Sale of Assets Free and Clear of Liens.⁸ At the hearing on the Motions for Sanctions which is presently before the Court, Mr. Rothwell stated that his firm was not trying to stop the closing from occurring through the filing of the Motion to Reconsider; rather, all they were trying to do was preserve their client’s rights in any sale proceeds.

13. According to the statements of Janet Haigler, Esquire, Debtors’ attorney, upon receiving notice from her own clients one hour prior to the closing that the closing was being canceled because NationsBank, through its attorneys, was asserting a judgment lien on the property and sale proceeds, she immediately contacted the Rothwell Law Firm by a letter which was delivered to the law firm approximately fifteen minutes prior to the scheduled closing, advising them that NationsBank did not have a judicial lien in that it was avoided through the confirmation of the Chapter 13 Plan. During the hearing, Ms. Haigler also stated that she had asserted in the letter that NationsBank had indeed been served with a copy of the Notice of Sale and further stated that she had requested that someone from the Rothwell Law Firm immediately contact Mr. Curlin, the closing attorney, to advise him that the closing could proceed. However, despite her

⁸ However, in the Objection to Motion for Sanctions and at the hearing on the Motion for Sanctions Mr. Rothwell did not argue that he was not served with the Notice; rather, he argued that he never received a copy of the Order Authorizing Sale of Assets Free and Clear of Liens.

attempts, the closing was canceled on Friday, May 11, 2001 and was rescheduled for May 16, 2001, at which time the closing on Debtor's house finally occurred. Most of the proceeds from the sale were remitted to Advanta Mortgage Corporation; according to the testimony at the hearing on the present Motion, Debtors received approximately \$220.00 from the sale proceeds towards their exemption.⁹

14. On May 14, 2001, Ms. Haigler, on behalf of Debtors, filed the present Motion which is before the Court. In the Motion, Debtors asserted that Debtors' Sales Notice had been properly served on NationsBank's attorneys, at the address set forth in the Proof of Claim filed by NationsBank. Furthermore, Debtors argued that the judgment lien asserted by NationsBank in its Motion for Reconsideration had been avoided by the Court. Lastly, Debtors requested that the Court find NationsBank and its attorneys in willful violation of the Automatic Stay and award actual and punitive damages against them.

15. On May 15, 2001, Scott L. Hood of the Rothwell Law Firm filed a Withdrawal of Motion for Reconsideration.

16. On May 21, 2001, The Rothwell Law Firm filed an Objection to Motion for Sanctions wherein it was asserted that NationsBank, N.A. holds a claim against Debtors' estate in the total amount of \$12,978.84 pursuant to a default judgment filed June 6, 1997. Furthermore, in the Objection, it asserted that the Order of the Court dated April 25, 2001, which authorized the sale of Debtors' property was not served upon NationsBank. Lastly, it stated that the actions of respondents did not constitute a violation of the automatic stay in that the decision to postpone

⁹ There was no clear evidence presented to the Court as to the use of the proceeds from the sale of the subject property.

the closing was made solely by Mr. Curlin, the closing attorney.¹⁰ More particularly, as stated in the Objection, the Rothwell Law Firm's position was as follows:

It is important to note that the Creditor did not demand or seek any type of relief which would have had the effect of preventing the closing from taking place. The Creditor's position was simply that it was possibly entitled to a portion of the sales proceeds. . . . The Debtors could have held the closing and then placed the sale proceeds in escrow until the dispute with the Creditor was resolved. However, it appears the Debtors, upon the advise of the closing attorney, elected to postpone the closing. Hence, if the debtors have suffered any harm as a result of the Creditors' Motion for Reconsideration, the damage was self-inflicted.

17. On May 22, 2001, Janet Haigler, Esquire filed an Affidavit of Attorney's Fees in which she stated that her attorney's fees in conjunction with the Motion presently before the Court were in the amount of \$758.50.

CONCLUSIONS OF LAW

Upon the filing of a petition, the automatic stay goes into effect and stays any actions by creditors to collect on their claim. See, e.g. Brockington v. Citizens and Southern Nat'l Bank (In re Brockington), 129 B.R. 68, 70 (Bankr. D.S.C. 1991). Section 362(a) of Title 11 provides in pertinent part:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, . . . , operates as a stay, applicable to all entities of--

. . .

(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;

¹⁰ The Court accepts that most purchasers would not take title to property subject to judicial liens, and that postponement of the closing was a reasonable response in light of NationsBank's Motion to Reconsider.

- (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.

§362. Furthermore, in order to remedy the wrongs committed by creditors in violating the automatic stay, §362(h) was enacted to provide: “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.” §362(h). In order to recover under §362(h), the moving party has the burden to prove the following elements: ““(1) that a bankruptcy petition was filed, (2) that the debtors are ‘individuals’ under the automatic stay provision, (3) that the creditors received notice of the petition, (4) that the creditors’ action were in willful violation of the stay, and (5) that the debtors suffered damages.” In re Sammon, 253 B.R. 672, 679-80 (Bankr. D.S.C. 2000) (quoting In re Flack, 239 B.R. 155, 162-63 (Bankr. S.D. Ohio 1999)); see also In re Lamar, 249 B.R. 822, 825 (Bankr. S.D. Ga. 2000).

In this case, Debtors have asserted that NationsBank, N.A. and its attorneys the Rothwell Law Firm, have willfully violated the provisions of §362 by seeking to enforce an avoided lien against property of the estate and thus preventing the closing of the property at issue. In determining whether Debtors are entitled to recover proper damages, the Court will take each element set forth above in turn to determine whether Debtors have met their burden of proof in

the matter. The first three elements are clearly met. Debtors, husband and wife, filed for relief under Chapter 13 of the Bankruptcy Code on August 11, 1997. NationsBank was properly notified of the petition, and, as set forth above in the Findings of Fact, was served with a copy of the Notice, Modified Chapter 13 Plan and Related Documents and Confirmation Order, which clearly reflected that NationsBank's judicial lien had been avoided pursuant to §522(f). No appeal was taken from that Order.

The next factor to consider is whether the creditor's action were in willful violation of the stay. In this case, Mr. Rothwell testified that approximately one hour prior to the scheduled closing on Debtors' property on May 11, 2001, his law firm filed a Motion for Reconsideration of Order Authorizing sale of Assets Free and Clear of Liens in which the law firm asserted, on behalf of NationsBank, among other things, a judgment lien on Debtors' property. As a result, Mr. Curlin, the closing attorney, decided to delay the closing on the property until the matters concerning NationsBank's lien was resolved. The Motion for Reconsideration was voluntarily withdrawn a few days after its filing and after the closing had been canceled and a Motion for Sanctions had been filed. At the hearing, Mr. Rothwell argued that it was not his nor his clients' intention to stop the closing from taking place; rather, they were asserting a lien on the proceeds of the sale. The Court finds that NationsBank and The Rothwell Firm's actions were clearly in violation of the automatic stay in that just an hour prior to the closing, they were deliberately and wrongfully asserting a lien over property of the estate and were attempting to collect on a no-longer existing lien; thus in violation of §362(a). See, e.g. §362(a)(2)- (6).

In order to recover pursuant to §362(h), the Court must next determine whether the actions committed were willful so as to give rise to the damages as prescribed in § 362(h).

Precedent in this District has interpreted the term “willful” as used in §362(h) as follows:

A “willful violation” does not require specific intent to violate the automatic stay. Rather the statute provides for damages upon a finding that the defendant knew of the automatic stay and that the defendant’s actions which violated the stay were intentional. Whether the party believes in good faith that it had a right to the property is not relevant to whether the act was “willful” or whether compensation must be awarded.

Boone v. Federal Deposit Ins. Corp. (In re Boone), C/A No. 99-03864-W; Adv. Pro. No. 97-80163-W (Bankr. D.S.C. 7/28/1998) (quoting In re Clarkson, 168 B.R. 93 (Bankr. D.S.C. 1994)) (citations omitted); see also Brockington v. Citizens & Southern Nat’l Bank (In re Brockington), 129 B.R. 68, 70 (Bankr. D.S.C. 1991) (setting forth the same definition for the term “willful” and noting that “[e]ach violation of the automatic stay must be considered in its entirety with due consideration of the underlying facts prior to any levy of sanctions.”).

In this case, The Rothwell Firm, on behalf of its client, intentionally asserted a judgment lien which had been avoided through the confirmation of Debtors’ Chapter 13 Plan in January of 1998. NationsBank was properly served with a copy of Debtors’ Chapter 13 Plan which clearly proposed to avoid its lien, and a copy of the Confirmation Order. The documents were forwarded to the post office box of The Rothwell Law Firm, as requested by NationsBank in its Proof of Claim. Furthermore, NationsBank was also served, through its attorney, with a copy of the Notice of Opportunity for Hearing and Application for Sale of Assets Free and Clear of Liens which clearly stated that the judgment lien of NationsBank had been avoided through Debtors’ Plan and Confirmation. Mr. Rothwell argued at the hearing that on the eve of the closing his office received a call by Mr. Curlin asking him for a payoff and had assumed from that call that

he was still entitled to some proceeds from the sale. Such an assumption was not grounded in the facts and the Confirmation Order and Notices received in the case which clearly indicated that his client's lien had been avoided.

Having found that NationsBank and The Rothwell Firm's actions willfully violated the automatic stay pursuant to §362(h), the Court must determine the appropriate damages to be awarded to Debtors.¹¹ First of all, as a result of the assertion of the avoided lien just hours prior to the closing, Debtors had to retain further services by their attorney. According to the Affidavit of Attorney's Fees filed by Ms. Haigler on May 22, 2001, the amount of attorney's fees associated with the Motion for Sanctions which is at issue in this Order totaled \$758.50. Furthermore, Ms. Johnson testified at the hearing that as a result of the delay in the closing date Debtors incurred additional interest on the first mortgage for four extra days, at the rate of \$12.31 per day, for a total of \$49.24. Courts have also recognized, when appropriate, emotional damages as allowable actual damages under §362. See, e.g. Deleon v. US (In re Deleon), 93-72315-D; Adv. Pro. 95-8130-D (Bankr. D.S.C. 4/12/1996). Ms. Johnson testified that as a result of NationsBank and The Rothwell Law Firm's actions, she became emotionally distraught and depressed for several days and was further embarrassed to be seen by the prospective purchasers. As a result and under the circumstances of this case, the Court finds the testimony credible and therefore finds that an award for emotional distress in the amount of \$150.00 is proper in this case; it is therefore,

¹¹ Despite the fact that the Court finds that awarding Debtors' damages is appropriate in this case pursuant to §362(h), the Court recognizes that The Rothwell Law Firm handles a number of creditor claims in this Court and has not previously appeared to disregard the rights of debtors pursuant to the Bankruptcy Code. Furthermore, the Court recognizes that the imminency of the closing may have contributed to the actions taken in this case.

ORDERED that The Rothwell Law Firm and NationsBank, as a consequence of their actions in violating the stay under §362(h), are to pay Debtors the following actual damages within ten (10) days of the entry of this Order: (1) attorney's fees in the amount of \$758.50, interest in the total amount of \$49.24 which accrued on the first mortgage as a result of the delay in the closing on the property; and damages for emotional distress in the amount of \$150.00. Under the circumstances presented, the Court declines to award punitive damages.

AND IT IS SO ORDERED.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
June 26, 2001.

CERTIFICATE OF MAILING

The undersigned deputy clerk of the United States
Bankruptcy Court for the District of South Carolina hereby certifies
that a copy of the document on which this stamp appears
was mailed on the date listed below to:

JUN 27 2001

✓ ✓ (Hawley) ✓ (K.S.)

DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE

SHEREE R. PHIPPS

Deputy Clerk

(Hood)