

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

9-19-98
19-11-9-2015
19-11-9-2015

IN RE:

Cassandra LeGrand,

Debtor.

Cassandra LeGrand,

Plaintiff,

v.

Department of Housing and Urban
Development and Internal Revenue Service,

Defendants.

C/A No. 98-01921-W

Adv. Pro. No. 98-80166-W

JUDGMENT

Chapter 7

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, the Department of Housing and Urban Development willfully violated the automatic stay of 11 U.S.C. § 362. The parties shall submit a joint stipulation of damages in the form of a consent order by Monday, March 15, 1999. If the joint stipulation of damages is not timely filed, the Court will conduct an additional hearing on the issue of damages on March 30, 1999 at 10:00 a.m. in the United States Bankruptcy Court, 1100 Laurel Street, Columbia, South Carolina.



UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
March 8, 1999.

ENTERED

MAR 09 1999

J.G.S.

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:

Cassandra LeGrand,

Debtor.

Cassandra LeGrand,

Plaintiff,

v.

Department of Housing and Urban
Development and Internal Revenue Service,

Defendants.

C/A No. 98-01921-W

Adv. Pro. No. 98-80166-W

ORDER

Chapter 7

THIS MATTER comes before the Court upon the Complaint filed by the Debtor, Cassandra LeGrand ("Debtor" or "Ms. LeGrand") seeking damages against the Defendants Department of Housing and Urban Development ("HUD") and the Internal Revenue Service for willful violation of the automatic stay of 11 U.S.C. § 362.¹

At the pre-trial conference, the parties stipulated that the Internal Revenue Service could be dismissed as a party. The parties also stipulated that the issue of liability could be bifurcated from the issue of damages and if the Court found a willful violation of the automatic stay, the parties could agree to the amount of damages or the Court could conduct an additional hearing. The parties further stipulated that the issue of liability could be tried based upon a Stipulation of

¹ Further references to the Bankruptcy Code, 11 U.S.C. § 101 *et seq.*, shall be by section number only.

ENTERED

MAR 09 1999

J.G.S.

JN-1987-

22

Facts without the necessity for further evidence. Therefore, based upon the Stipulation of Facts filed with the Court on February 2, 1999, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Ms. LeGrand was indebted to HUD based upon a loan for property improvements. She became in arrears on her payments and on June 25, 1997, HUD send a Notice of Intent to Offset to Ms. LeGrand. HUD then notified the Internal Revenue Service that Ms. LeGrand was indebted to HUD and requested that the Internal Revenue Service setoff the debt against Ms. LeGrand's 1997 tax refund.

On March 4, 1998, Ms. LeGrand filed a voluntary Chapter 7 petition. Her schedules and statements included HUD as an unsecured creditor and HUD, the Internal Revenue Service and the United States Attorney for the District of South Carolina were listed on her mailing matrix and received actual notice of the filing of the Chapter 7 petition.

After the filing of the bankruptcy petition, on June 1, 1998, the Internal Revenue Service setoff Ms. LeGrand's 1997 income tax refund in the amount of \$1,956.00 and applied it against the debt owed to HUD.

On June 25, 1998, Ms. LeGrand's attorney wrote a letter to HUD enclosing a copy of the March 4, 1998 bankruptcy petition and advised HUD that they were in violation of the automatic stay and requested the release of the funds that had been setoff.

On July 10, 1998, HUD responded to the June 25, 1998 letter and advised Ms. LeGrand's attorney that the IRS refund was a pre-petition setoff and that HUD was entitled to keep the entire refund.

CONCLUSIONS OF LAW

HUD takes the position that its actions were not stayed by § 362 as it was simply exercising its right of setoff. The Court disagrees. Section 362(a)(7) of the Bankruptcy Code explicitly provides as follows.

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--
(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;

11 U.S.C. § 362(a)(7). It is clear based upon the Stipulation of Facts filed by the parties that HUD was exercising a post-petition setoff of Ms. LeGrand's tax refund against a pre-petition debt clearly in violation of the express language of § 362(a)(7).

Section 362 is the cornerstone of the Bankruptcy Code and is to be interpreted broadly, applicable not only to commercial creditors but also to governmental units.

The automatic stay, provided by § 362, preserves the status quo of the bankruptcy estate as of the date of the commencement of the case.

The stay of section 362 is extremely broad in scope and, aside from the limited exceptions of subsection (b), should apply to almost any type of formal or informal action against the debtor or property of the estate. The stay applies to all entities, a term which, under section 101, includes governmental units.

2 King, Collier on Bankruptcy, ¶ 362.04 (15th ed. 1995).

"Governmental unit" is defined to mean, inter alia, United States, department, agency, or instrumentality of the United States. See 11 U.S.C. § 101(27).

In re Deleon, 93-72315-D (Bkrcty.D.S.C. 4/11/96) aff'd at United States of America v. Deleon, 3.96-1662 (D.S.C. 10/6/97).

There have been numerous occasions in which courts have found the United States violated § 362(a)(7) by exercising a right of setoff.

Other Courts have also awarded attorney's fees against the United States for civil contempt because of violations of § 362(a)(7), which stays any setoff. See, United States v. Reynolds, 764 F.2d 1004 (4th Cir.1985); United States v. Norton, 717 F.2d 767 (3rd Cir.1983). After § 362(h) was enacted in 1984, courts continued to award damages and attorney's fees against the United States for violations of the automatic stay through wrongful setoffs. See, In re Ketelsen, 78 B.R. 573 (Bankr.D.S.D.1987); In re Rinehart, 76 B.R. 746 (Bankr.D.S.D.1987); Matter of Woloschak Farms, 74 B.R. 261 (Bankr.N.D.Ohio 1987).

In re Academy Answering Services, Inc., 90 B.R. 291 (Bkrtcy.N.D. Ohio (1988) rev'd on appeal at United States v. Academy Answering Service, Inc., 100 B.R. 327 (N.D. Ohio 1989) (finding that sovereign immunity as to an award of attorney's fees for violation of the automatic stay had not been waived).²

The Fourth Circuit Court of Appeals has similarly examined facts similar to the ones before this Court and has held that the actions of the Internal Revenue in retaining a debtors' tax refund was a setoff subject to the automatic stay provisions of § 362(a)(7) and their actions in retaining the funds resulted in a violation of the stay. United States v. Reynolds, 764 F.2d 1004 (4th Cir.1985).

While the United States Supreme Court, subsequent to the United States v. Reynolds

² In the present case, the issue of sovereign immunity has not been raised before the Court. "11 U.S.C. § 106 provides that, "to the extent set forth in this section," sovereign immunity is abrogated as to a governmental unit with respect to several sections of Title 11, included among which is 11 U.S.C. § 362." In re Deleon, 93-72315-D, slip op. at fn. 3. Also see Boone v. F.D.I.C. (In re Boone), 97-80163-W; Adv. 97-80163 (Bkrtcy. D.S.C. 7/29/98), Anderson v. FDIC, 918 F.2d 1139, 1143 (4th Cir. 1990) and In re Aer-Aerotron, Inc., 172 B.R. 202 (Bkrtcy.E.D.N.C. 1994).

decision, held that a temporary administrative hold freezing a debtor's assets in the creditor's possession based upon a right of setoff is not a violation of the automatic stay, Citizens Bank of Maryland v. Strumpf, 516 U.S. 16, 116 S.Ct. 286 (1995), the action of HUD in this case was not a temporary freeze of the refund but an actual setoff and thus a violation of the automatic stay. HUD has exercised complete control over the Debtor's tax refund and has refused to return it to the Debtor or to the Debtor's Chapter 7 estate and despite the fact that the Chapter 7 petition was filed on March 4, 1998, HUD has not sought to have the automatic stay lifted to allow it to exercise its rights of setoff.

Additionally, it is clear that the acts of HUD and the Internal Revenue Service were that of a setoff and not a recoupment.

"A 'set-off' is a demand which the defendant has against the plaintiff, arising out of a transaction extrinsic to the plaintiff's cause of action, whereas a "recoupment" is a reduction or rebate by the defendant of part of the plaintiff's claim because of a right in the defendant arising out of the same transaction." Black's Law Dictionary - 5th Ed. citing Zweck v. D P Way Corp., 70 Wis. 2d 426, 234 N.W. 2d 921, 924.

In re LaPierre, 180 B.R. 95 (Bkrcty. D.S.C. 1994). The stipulated facts indicate that the refund was seized by the Internal Revenue Service and applied to HUD's loan debt.

It also appears from a review of the Stipulation of Facts filed by the parties that the violation of the automatic stay by HUD was willful.

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. In re Bloom, 875 F.2d 224 (9th Cir.1989); In re Inslaw, Inc., 83 B.R. 89 (Bankr.D.D.C.1988); In re Mews [Mewes], 58 B.R. 124 (Bankr.D.S.D.1986); In re Tel-A-Communications Consultants,

Inc., 50 B.R. 250 (Bankr.D.Conn.1985). 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. In re Bloom, supra.; In re Inslaw, Inc., supra.; In re AM International, Inc., 46 B.R. 566 (Bankr.M.D.Tenn.1985).

In re Clarkson, 168 B.R. 93 (Bkrcty. D.S.C. 1994) and In re Brockington, 129 B.R. 68 (Bkrcty. D.S.C. 1991). Based upon the Stipulation of Facts, the Court finds that the actions of HUD in directing the Internal Revenue Service to setoff Ms. LeGrand's tax refund post-petition without seeking relief from the automatic stay was a willful violation of the automatic stay.

In this district, the Court has enacted Local Rule 4001-2 which provides an expedited procedure for seeking a setoff of a tax return. Pursuant to Local Rule 4001-2, a notice of intent to setoff is filed and if no objections are filed within thirty (30) days, the stay is automatically lifted. In this case, HUD chose not to follow Local Rules 4001-2, file a motion for relief from the automatic stay or to return the tax refund to the Debtor. If the actions of HUD were not willful when the bankruptcy petition was initially filed, they certainly became willful by not rectifying the situation.

Most courts appear to accept the premise that once a creditor has been notified of the bankruptcy filing, the creditor has a duty to restore the status quo; that is the creditor should undo its post-petition collection activities without the debtor having to seek affirmative relief from the bankruptcy court. In re Robinson, Case No. 89-00897, C-89-8102 (Bankr.D.S.C. 1-2-90), In re Stephen W. Grosse, P.C., 68 B.R. 847 (Bankr.E.D.Pa.1987) accord, e.g., In re Miller, 22 B.R. 479 (D.C.Md.1982). An incident which may not be willful at its inception becomes willful if the offending creditor fails to take steps to rectify the situation in a timely manner. In re Ketelsen, 78 B.R. 573 (Bankr.D.S.D.1987).

In re Bunch, 119 B.R. 77(Bkrcty.D.S.C. 1990).

For all of the reasons stated within, it is therefore,

ORDERED, that the Department of Housing and Urban Development willfully violated the automatic stay of 11 U.S.C. § 362 and pursuant to § 362(h), which provides that “[a]n 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,” the Court must award damages against HUD. Therefore, pursuant to the Stipulation of Facts filed by the parties on February 2, 1999, the parties shall submit a joint stipulation of damages in the form of a consent order by Monday, March 15, 1999. If the joint stipulation of damages is not timely filed, the Court will conduct an additional hearing on the issue of damages on March 30, 1999 at 10:00 a.m. in the United States Bankruptcy Court, 1100 Laurel Street, Columbia, South Carolina.

AND IT IS SO ORDERED.


UNITED STATES BANKRUPTCY JUDGE

Columbia, South Carolina,
March 8, 1999.

CERTIFICATE OF MAILING
The undersigned Deputy Clerk of the United States
Bankruptcy Court for the District of Columbia hereby certifies
that a copy of the document on which this stamp appears
was mailed on the date listed below to:

MAR 10 1999

DEBTOR, DEBTOR'S ATTORNEY, TRUSTEE
JUDY G. SMITH
Deputy Clerk

w/ judgment

Cox

Bailly

Index

99-30