

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA**

In re,

Glenn M. Griffin,

Debtor(s).

Glenn M. Griffin,

Plaintiff(s),

v.

William Herman,

Defendant(s).

C/A No. 09-04489-JW

Adv. Pro. No. 09-80199-JW

Chapter 13

JUDGMENT

Based on the findings of fact and conclusions of law set forth in the attached Order of the Court, Plaintiff Glenn M. Griffin's request for relief under § 362(k) is denied and the Complaint, filed December 31, 2009, is dismissed with prejudice.

**FILED BY THE COURT
03/09/2010**



Entered: 03/09/2010

Chief US Bankruptcy Court Judge
District of South Carolina

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ORDER

This matter comes before the Court for a status hearing in this adversary proceeding, in which the Plaintiff, Glenn M. Griffin (“Debtor”) asserts a violation of the automatic stay and co-debtor stay.¹ Debtor was represented by his counsel, but did not attend the hearing. The Defendant, William Herman (“Herman”) represented himself *pro se*. In order to save themselves further costs and inconvenience, the parties stipulated that the Court could make a final ruling in the adversary proceeding based upon their statements of fact and positions asserted during the hearing.

Debtor had a prior bankruptcy case pending in this Court, C/A No. 09-00851-dd, which was dismissed on May 18, 2009. On June 12, 2009, during a period when Debtor did not have a pending bankruptcy case, William K. Herman (“Herman”) initiated collection efforts on a judgment obtained against Debtor by filing a writ of execution with the Aiken County Sheriff’s Office. Debtor filed this second bankruptcy case, C/A No. 09-04489-jw,

¹ Debtor’s spouse is not a party to this proceeding, nor is she is debtor in the bankruptcy case, C/A No. 09-04489.

on June 17, 2009, and listed Herman as a creditor. Herman subsequently received notice of Debtor's filing of this second bankruptcy case.

Unbeknownst to Herman, the Sheriff's Office maintained an active file following the filing of this case, and on October 7, 2009, sent a letter to Debtor notifying him of an execution against property and demanding payment. Upon being advised by Debtor of the bankruptcy, the Sheriff's Office ceased further execution efforts. Debtor asserts that this attempt of the Sheriff's Office to collect on behalf of Herman upset him and, as a result, Debtor asked counsel to file a lawsuit against Herman for violating the automatic stay. Neither Debtor nor Debtor's counsel notified Herman in advance of the lawsuit demanding that the execution be stopped. Debtor's complaint, filed on December 31, 2009, asserts causes of action for willful violations of the automatic stay and the co-debtor stay. No evidence regarding the co-debtor was presented. The co-debtor is not a plaintiff in this adversary proceeding or a debtor in this case. Debtor did not present any evidence regarding damages to the alleged co-debtor.

Herman asserts that he was not aware that the execution against property would continue following the Debtor's filing of this bankruptcy case or that he had a duty to request that the Sheriff's Office cease collection efforts. Herman is an elderly gentleman, who has indicated that he is terminally ill and has suffered significant emotional distress as a result of Debtor's failure to pay, harassing telephone calls to him and his family, and these bankruptcy proceedings. He contends that he did not intend to violate the stay. The Court finds Herman credible.

Section 362(k) of the Bankruptcy Code provides that "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 the Fourth Circuit, a willful violation of the automatic stay occurs when “a creditor knows of the pending bankruptcy petition and intentionally attempts to continue collection procedures in spite of it.” In re Bolen, 295 B.R. 803, 808 (Bankr. D.S.C. 2002) (citing Budget Serv. Co. v. Better Homes of Virginia, Inc., 804 F.2d 289, 293 (4th Cir. 1986)). A “willful violation” does not require a creditor to have the specific intent to violate the automatic stay. In re Weatherford, 413 B.R. 273, 285 (Bankr. D.S.C. 2009). To satisfy the “willful” element of this cause of action, the moving party must simply demonstrate that the creditor had knowledge of the bankruptcy and the creditor’s actions that violated the stay were intentional. Id. Debtor, as the moving party, bears the burden of proof in an action for violation of the automatic stay. Id.

Considering Herman’s testimony and the totality of the circumstances in this case, including Herman’s age and illness, the Court is convinced that Herman neither acted nor intended to act to collect his judgment once he received notice of the bankruptcy case. It appears that Herman was unaware that the Sheriff’s Office would continue its collection efforts at the time it sent the letter to Debtor, which was nearly four months after he had requested execution on the judgment. Debtor has failed to demonstrate that Herman’s failure to ensure that the Sheriff’s Office ceased collection efforts constituted an intentional attempt to collect the debt. See In re Robb, 399 B.R. 171, 176 (Bankr. N.D.W.Va. 2008) (denying a debtor’s motion for summary judgment where the debtor failed to demonstrate that the creditor’s failure to affirmatively release a judgment lien was actually an affirmative attempt to collect a debt).

This case appears to be distinguishable from In re Weatherford, 413 B.R. 273 (Bankr. D.S.C. 2009). In Weatherford, the creditors procured a judgment against the debtor while she was in bankruptcy, which was therefore void, and attempted to execute against the judgment during her pending case. The creditor also retained payments it collected on the void judgment during a period when the debtor's case was dismissed, despite written demand made by the debtor's counsel. The Court held that the creditor's failure to vacate a judgment obtained in violation of the automatic stay and failure to return payments made by the debtor to satisfy the void judgment following notice of the bankruptcy constituted a willful violation of the automatic stay. No evidence has been presented in this case that Herman obtained his judgment in violation of the automatic stay or that his judgment is void. In Weatherford, the debtor presented testimony indicating that she suffered from anxiety and depression as a result of the creditor's actions, which required medication and counseling. No credible or convincing evidence of damages due to emotional distress has been presented in this case.

Based on the foregoing, the Court concludes that no willful violation of the automatic stay has occurred.² To be certain, Herman's judgment is being addressed in Debtor's chapter 13 plan and cannot be collected or enforced during the case. At the present time, Herman and the Sheriff's Office are prohibited from taking further collection action.

² Even if Herman's inaction constitutes a willful violation of the stay, it appears that there are no damages to Debtor beyond the attorney's fees incurred in bringing this adversary proceeding. Debtor offered no evidence of the extent of his emotional distress and admitted that there were no medical consequences as a result of his distress. The Sheriff's Office ceased execution efforts upon being advised that Debtor had filed bankruptcy. Debtor's primary claim for damages is attorney's fees, which were stated to be in the amount of \$526.50 prior to the hearing, but these fees appear unwarranted. It was within Debtor's control not to incur the attorney's fees. It appears that Debtor or his counsel could have resolved this matter by notifying Herman that he needed to cease collection efforts, instead of immediately filing a lawsuit. Under similar circumstances, where the only damages sustained from a violation of the stay are the attorneys fees related to bringing a violation of stay cause of action, courts have held that such damages are insufficient to satisfy the damage element of 11 U.S.C. § 362(k), unless the debtor attempts to resolve the dispute beforehand. See e.g., Robb, 399 B.R. at 176n.3; In re Preston, 333 B.R. 346, 351 (Bankr. M.D.N.C. 2005); In re Martinez, 281 B.R. 883, 886 (Bankr. W.D. Tex. 2002); In re Sammon, 253 B.R. 672, 681-82 (Bankr. D.S.C. 2000).

In the event Debtor completes his payments under the plan, his debt may be discharged. If the case is dismissed prior to the Debtor receiving his discharge, the judgment will remain in effect and the judicial lien will be restored under § 349(b).

Accordingly, it is hereby

ORDERED that Debtor's request for relief under § 362(k) is denied and the Complaint, filed December 31, 2009, is dismissed with prejudice.

AND IT IS SO ORDERED.

**FILED BY THE COURT
03/09/2010**



Entered: 03/09/2010

Chief US Bankruptcy Court Judge
District of South Carolina