

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

FILED
at ___ O'clock & ___ min. ___ M

JUN 20 2003

BRENDA K. ARGOE, CLERK
United States Bankruptcy Court
Columbia, South Carolina (8)

IN RE:

Kathy L. Wymer and
Charles A. Rupe,

Debtors.

Charles A. Rupe,

Plaintiff,

v.

Providian National Bank and
Presidio, LLC as successor in interest to
Providian National Bank,

Defendants.

C/A No. 02-15468-W

Adv. Pro. No. 03-80042-W

JUDGMENT

Chapter 7

ENTERED

JUN 20 2003

D.G.

Based upon the Findings of Fact and Conclusions of Law as recited in the attached Order of the Court, the Plaintiff's Motion for a Default Judgment and Determination of Damages based upon the Complaint filed in the above-captioned adversary proceeding is granted and damages are awarded in the amount of \$616.00 in actual damages, \$2,400.00 in attorney's fees, and \$2,000.00 in punitive damages, for a total damages award of \$5,016.00.

Columbia, South Carolina,

June 20, 2003.


UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

FILED
at **O'clock & ~~AM~~**

JUN 20 2003

BRENDA K. ARGOE, CLERK
United States Bankruptcy Court
Columbia, South Carolina (8)

IN RE:

Kathy L. Wymer and
Charles A. Rupe,

Debtors.

Charles A. Rupe,

Plaintiff,

v.

Providian National Bank and
Presidio, LLC as successor in interest to
Providian National Bank,

Defendants.

C/A No. 02-15468-W

Adv. Pro. No. 03-80042-W

ORDER

Chapter 7

ENTERED

JUN 20 2003

D.G.

THIS MATTER comes before the Court on a complaint (the "Complaint") filed by Charles A. Rupe ("Plaintiff" or "Debtor")¹ against Providian National Bank ("Providian") and Presidio LLC ("Presidio") as Successor in Interest to Providian (collectively, the "Defendants"), on a Motion for Default Judgment (the "Motion") and for a determination of damages. The Complaint seeks injunctive relief and damages, alleging a violation of the automatic stay imposed by 11 U.S.C. § 362(a)² and a violation of the South Carolina Unfair Trade Practices Act. Defendants did not file a response to the Complaint, and, on April 30, 2003, Plaintiff submitted an Affidavit of Default. On May 2, 2003, the Clerk of Court entered an Entry of Default as to

¹ Kathy L. Wymer and Charles A. Rupe filed a Voluntary Petition seeking Chapter 7 bankruptcy relief on December 30, 2002. The Complaint was filed solely by Charles A. Rupe.

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

Providian, and, on May 5, 2003, as to Presidio. After considering the pleadings in the adversary proceeding, the affidavits and evidence presented in support of the Motions, and the arguments of counsel; the Court makes the following Findings of Fact and Conclusions of Law:³

FINDINGS OF FACT

1. On December 30, 2002, Plaintiff filed a Voluntary Petition seeking Chapter 7 bankruptcy relief.
2. On or about January 15, 2003, and thereafter, Defendants, by and through their collection agency, sent billing letters and debt collection letters to Plaintiff.
3. Defendants, by and through their collection agent, contacted Plaintiff by telephone after he had filed for bankruptcy, demanding payment of their scheduled debt. According to Plaintiff's testimony, the Court finds the telephone calls were harassing and threatening in nature.
4. Plaintiff testified that one of the telephone calls from Defendant seeking collection was received by his learning disabled son, a minor.
5. Counsel for Plaintiff represented that service upon Defendants was proper.
6. Plaintiff alleges that he has suffered severe embarrassment and emotional distress and seeks damages, including punitive damages, in an amount in excess of \$10,000.00, attorney's fees, and costs. Counsel for Plaintiff submitted an Affidavit of Attorney's Fees in the amount of \$2,400.00.
7. Plaintiff testified that he suffered actual damages of lost wages totaling \$116.00 as a

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.

result of having to attend and testify at the hearing on the Complaint.

CONCLUSIONS OF LAW

Section 362 of the Bankruptcy Code provides that the filing of a bankruptcy petition operates as a stay 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 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;

11 U.S.C. § 362(a). Further, § 362(h) 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.”

Sanctions pursuant to § 362(h) are appropriate upon proof that a debtor has been damaged by a willful violation of the automatic stay. Budget Serv. Co. v. Better Homes, 804 F.2d 289, 293 (4th Cir. 1986). The term “willful” does not require specific intent. Knowledge of the bankruptcy filing and a finding that the action by the offending party was an intentional act is sufficient. Id.; Brockington v. Citizens & S. Nat’l Bank (In re Brockington), 129 B.R. 68, 70 (Bankr. D.S.C. 1991). See also Bulldog Trucking, Inc. v. Shaw’s Express, Inc. (In re Bulldog Trucking, Inc.), Nos. 94-1936, 94-1975, 94-2104, 1995 WL 613043 at **3 (4th Cir. 1995) (citing the Third and Ninth Circuits’ holding that specific intent to violate stay is not required).

Inasmuch as an Entry of Default has been made as to the Defendants, and Defendants made no appearance at the hearing, the entry of a Default Judgment is proper at this time. Accordingly, the facts alleged in the Complaint are deemed admitted. See Ryan v.

Homecomings Fin'l Network, 253 F.3d 778, 780 (4th Cir. 2001) (defendant's default admits plaintiff's well-pleaded allegations of fact).

This Court has awarded actual damages for lost wages, attorney's fees, and costs for a willful violation of the automatic stay as well as actual damages for emotional distress and punitive damages in some instances pursuant to § 362(h). See Dudley v. Pro Motors (In re Dudley), C/A No. 02-13169-W, Adv. Pro. No. 02-80352-W, slip op. at *4 (citing cases in the context of wrongful repossession of vehicle).

The mailing of a collection letter has been deemed a technical violation of the automatic stay that may or may not call for the imposition of sanctions depending on the circumstances of the case. See Hamrick v. United States (In re Hamrick), 175 B.R. 890, 893-94 (Bankr. M.D.N.C. 1998) (innocent clerical error by mailing of one collection letter was not willful); In re Brock Util. & Grading, Inc., 185 B.R. 719, 720 (Bankr. E.D.N.C. 1995) (even if computer-generated notice of intention to levy is considered willful, debtor suffered no damages). However, even a technical violation of the stay may entitle a debtor to recover attorney's fees, costs, and damages. Zuppas v. GECC, Nos. 86-1148, 86-1157, 1987 WL 36979 at **2 (4th Cir. Mar. 27, 1987) (technical violation of stay warranted recovery of damages where defendant attempted to collect insurance proceeds that should have remained in debtor's estate).

Further, where there are repeated attempts postpetition to collect a debt, sanctions, including punitive damages, are appropriate. See In re Sawyer, No. 01-13639, 2002 WL 523903 at * 2 (Bankr. M.D.N.C. Apr. 1, 2002) (letters and telephone calls to Debtor in attempt to collect debt postpetition warranted imposition of actual and punitive damages, costs, and attorney's fees); Deleon v. United States, C/A No. 93-72315-D, Adv. Pro. No. 95-8130-D, slip op. (Bankr.

D.S.C. Apr. 12, 1996), aff'd, C/A No. 3:96-1662-10, slip op. (D.S.C. Aug. 21, 1997). (sending of three computer generated collection letters violated stay entitling debtor to damages and recovery of attorney's fees).

Plaintiff testified that Defendants were advised of his pending Chapter 7 bankruptcy case. Plaintiff further testified that despite this notice to Defendants, two harassing telephone calls were made and two letters were received postpetition seeking collection of the debt owed Defendants.⁴ Taken as a whole based on the evidence presented, Defendants' repeated collection efforts, as well as the extreme nature of the attempts, are willful violations of § 362 and warrant the recovery of damages, costs and attorney's fees pursuant to § 362(h).⁵

Plaintiff testified that his lost wages to attend the hearing totaled \$116.00. An affidavit submitted by counsel for Plaintiff represents that he expended twelve (12) hours of time in representing Plaintiff in this prosecution. He further states that the normal and customary hourly rate was \$200.00 per hour, but that he was relying upon the discretion of the Court to determine the amount of the fees based upon "the Court's file, the Court's knowledge of the litigation between these parties, which reflects the difficulty of the services rendered, the time necessarily expended, the result accomplished, the professional standing of counsel, and fees customarily charged in this area for similar legal services." In consideration of these factors, the Court finds

⁴ The attempts to collect the debt were apparently carried out by a collection agent on behalf of Defendants.

⁵ Inasmuch as the Court is finding that Defendants' collection efforts are violative of § 362, the Court will not address at this time Plaintiff's additional counts set forth in the Complaint.

that \$2,400.00 is a reasonable attorney's fee.⁶ To the extent there is any alternate fee arrangement between Plaintiff and counsel that would otherwise limit counsel's recovery, counsel is to reduce his recovery thereby and the Court will award the lesser amount.⁷

Additionally, while this Court does not always award actual damages for emotional distress where there is no support to illustrate an actual injury by specific corroborating evidence or medical evidence, the Court is convinced that the extreme nature of the language used and threats made in this instance, particularly in light of the statement made to the minor disabled child, warrant damages for emotional distress in the amount of \$500.00. Finally, considering Defendants' repeated collection efforts after being informed of the bankruptcy filing, the harassing nature of the telephone calls including that received by the learning disabled minor son of Plaintiff, and in order to deter such violations in the future, the imposition of punitive damages in this case in the amount of \$2,000.00 is warranted.

CONCLUSION

From the findings and conclusions above, the Court, therefore,

ORDERS the entry of a default judgment against Defendants in the amount of \$616.00 in actual damages, \$2,400.00 in attorney's fees, and \$2,000.00 in punitive damages, for a total

⁶ The Court is aware that Plaintiff's counsel frequently files actions for violations of the automatic stay in instances where creditors have sent postpetition collection letters. Many of these actions are settled for nuisance value or for attorney's fees only. Plaintiff's counsel should be fairly compensated for his efforts but is not to be encouraged to pursue similar action in instances where there is no other actual damage to the debtor.

⁷ If an alternative fee agreement exists, such as a contingency fee agreement, counsel for Plaintiff shall submit a further affidavit and, if appropriate, a proposed order within ten (10) days following entry of this Order setting forth the alternative fee agreement and reducing the award of attorney's fees in a manner consistent with the agreement.

damages award of \$5,016.00.

AND IT IS SO ORDERED.

Columbia, South Carolina,

June 20, 2003.


UNITED STATES BANKRUPTCY JUDGE