

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
ROOM 211
FEDERAL BUILDING AND U.S. POST OFFICE
225 SOUTH PIERRE STREET
PIERRE, SOUTH DAKOTA 57501-2463

IRVIN N. HOYT
BANKRUPTCY JUDGE

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May 1, 2003

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Subject: *Brian J. Duffy v. Mary Duffy (In re*
Brian J. Duffy), Adversary No. 02-4069;
Chapter 7; Bankr. No. 02-40948

Dear Counsel:

The matter before the Court on a summary judgment motion is whether Defendant Mary Duffy violated the automatic stay. This is a core proceeding under 28 U.S.C. § 157(b)(2). This letter decision and accompanying order shall constitute the Court's interim findings and conclusions under Fed.R.Bankr.P. 7052. As set forth below, the Court concludes that Defendant Mary Duffy willfully violated the automatic stay and that under 11 U.S.C. § 362(h) she is obligated to pay to Plaintiff-Debtor the actual damages that arose from this violation.

SUMMARY OF FACTS. Mary Duffy obtained a state court hearing date of August 19, 2002, to examine Brian J. Duffy about a divorce-related debt. At the hearing, the state court judge ordered Mary Duffy's attorney to prepare a warrant for Brian Duffy's arrest due to his failure to appear.¹ For whatever reason, Brian Duffy and his attorney missed the hearing and were so advised by the state court judge upon their arrival in the courtroom. On August 20, 2002, counsel for Brian Duffy advised counsel for Mary Duffy that Brian Duffy intended to file for bankruptcy. He also learned of Mary

¹ The Hon. William M. Srstka, Jr., presiding.

Re: Brian and Mary Duffy
May 1, 2003
Page 2

Duffy's intent to proceed with an arrest warrant.

Brian Duffy ("Debtor") filed a Chapter 7 petition and schedules on August 21, 2002. That day, the state court judge also issued the warrant for Debtor's arrest. The warrant directed that Debtor be arrested and held in custody until he pays "the money judgment awarded to ... Mary Duffy along with Attorney's fees and costs or until he shall be discharged pursuant to law."

In his bankruptcy, Debtor included Mary Duffy on his schedule of general unsecured creditors. He described her claim as a "property settlement" and valued it at \$20,441.00. On his statement of financial affairs, Debtor erroneously stated that he was not involved in any lawsuits or administrative proceedings, executions, garnishments, or attachments in the past year.

The Bankruptcy Court Clerk's notice of the commencement of Debtor's case was served by mail on August 23, 2003. Included on the mailing list was Mary Duffy, in care of her attorney.

Debtor's attorney filed a motion before the state court to have the warrant quashed. The state court declined to do so without a hearing. A hearing was held September 6, 2002. Debtor's attorney appeared, but Debtor did not. The state court declined to stop Mary Duffy's collection action on the grounds that it was in violation of the automatic stay. Instead, he directed Debtor's attorney to appear at a second hearing with Debtor in tow. At the second hearing on September 10, 2002, the state court judge questioned Debtor, but he again declined to quash the warrant as an act in violation of the automatic stay. Instead, the judge directed the parties to settle the matter that day. The parties then conferred at the courthouse and Mary Duffy and her attorney agreed to have the warrant quashed, which the state court then ordered.

On September 6, 2002, Mary Duffy filed a relief from stay motion with the Bankruptcy Court. She wanted the stay lifted so that she could return to state court to enforce the terms of the parties' settlement at the time of their divorce. That settlement provided that Debtor would indemnify her from any deficiency on the mortgages that were on the marital home. The property settlement² also included this provision:

² A copy of the property settlement was an exhibit to Mary Duffy's relief from stay motion. Some interlineations cannot be read, however.

Re: Brian and Mary Duffy
May 1, 2003
Page 3

[Debtor] specifically acknowledges herein that all debts and obligations assumed by Plaintiff herein and property awarded to [Mary Duffy] hereunder are in lieu of maintenance and support (although specifically not to be deemed alimony for purposes of Federal tax return adjustments) and therefore, non-dischargeable against [Mary Duffy] in accordance with 11 U.S.C. § 523(a)(5) of the present Federal Code, and any amendments thereto.

Debtor contested the motion, arguing in part that the subject debt may not be excepted from the discharge despite the nondischargeability provision in the parties' earlier divorce settlement.

Mary Duffy commenced an adversary proceeding in Bankruptcy Court against Debtor on October 2, 2002. She sought a declaration that her divorce-related claim against Debtor was nondischargeable under 11 U.S.C. § 523(a)(15), not § 523(a)(5) which had been referenced in the parties' divorce settlement.

A hearing on Mary Duffy's relief from stay motion was held October 9, 2002. The motion was denied. The Court concluded that Mary Duffy's nondischargeability complaint under § 523(a)(15) had to be resolved first since she would not have a debt to enforce unless the Bankruptcy Court first determined that the debt was nondischargeable.³

On November 1, 2002, before Mary Duffy's nondischargeability complaint was resolved, Debtor commenced this adversary proceeding against her seeking actual and punitive damages due to her delay in getting the arrest warrant quashed. Debtor argued that it took several hours of legal work and two state court hearings before

³ A Bankruptcy Court has exclusive jurisdiction to determine nondischargeability under 11 U.S.C. § 523(a)(15). 11 U.S.C. § 523(c)(1); *Renfrow v. Draper*, 232 F.3d 688, 693 (9th Cir. 2000). When a determination of nondischargeability under § 523(a)(5) is at issue, however, an apparent majority of courts has held that a state court has concurrent jurisdiction. See, e.g., *Cummings v. Cummings*, 244 F.3d 1263, 1267 (11th Cir. 2001); *Sickal v. Frye (In re Frye)*, 231 B.R. 71, 72-73 (Bankr. E.D. Mo. 1999); and *In re Ball*, 181 B.R. 384, 385 (Bankr. E.D. Ark. 1995).

Re: Brian and Mary Duffy
May 1, 2003
Page 4

Mary Duffy and her attorney and the state court judge could be convinced that any continued debt collection action there was in violation of the automatic stay. Debtor sought actual damages of \$534.24 in attorney's fees and sales tax in getting the arrest warrant quashed, \$313.76 in attorney's fees and sales tax in resisting Mary Duffy's relief from stay motion, and \$5,000 in punitive damages and to cover the costs of bringing the adversary proceeding.

Mary Duffy answered the complaint and counterclaimed that Debtor's suit against her was frivolous and intended only as harassment. She sought from him the attorney's fees and other costs she incurred in defending the action.

In Mary Duffy's adversary proceeding, the parties reported a settlement just prior to the December 11, 2002, trial date. The settlement provided that Debtor would assume the liability to a mortgage holder on the former marital home and that the obligation would be nondischargeable. The settlement was filed January 29, 2003, and approved by order entered January 31, 2003.

The parties were not able to resolve Debtor's violation of the automatic stay complaint against Mary Duffy, despite this Court's strong encouragement to do so. The matter was submitted on Defendant Mary Duffy's Motion for Summary Judgment and briefs from each party.⁴

⁴ Plaintiff-Debtor did not file a cross-motion for summary judgment. The record indicates, however, that both parties contemplated that Defendant Mary Duffy's summary judgment motion would lead to a final order from the Court since no material issues of fact were raised and since both parties fully briefed all legal issues regarding Defendant Mary Duffy's liability under § 362(h). See *Jarrett Ranches, Inc. v. Farm Credit Banks of Omaha (In re Jarrett Ranches, Inc.)*, 107 B.R. 969, 971-72 (Bankr. D.S.D. 1989), *rev'd on other grounds*, 128 B.R. 263 (D.S.D. 1990); compare *Williams v. City of St. Louis*, 783 F.2d 114, 116 (8th Cir. 1986) (summary judgment improperly entered for defendant on issue not raised by defendant in its motion and not directly addressed by the plaintiffs); see also *Walker v. Missouri Department of Corrections*, 138 F.3d 740, 742 (8th Cir. 1998) (*sua sponte* summary judgment should not be granted unless the nonmovant has notice and an opportunity to respond). Accordingly, the only issue remaining is the amount of damages Defendant Mary Duffy owes Plaintiff-Debtor.

Re: Brian and Mary Duffy
May 1, 2003
Page 5

APPLICABLE LAW -- SUMMARY JUDGMENT. Summary judgment is appropriate when "there is no genuine issue [of] material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Bankr.P. 7056 and Fed.R.Civ.P. 56(c). An issue of material fact is *genuine* if it has a real basis in the record. *Hartnagel v. Norman*, 953 F.2d 394, 395 (8th Cir. 1992)(quotes therein). A genuine issue of fact is *material* if it might affect the outcome of the case. *Id.* (quotes therein).

The matter must be viewed in the light most favorable to the party opposing the motion. *F.D.I.C. v. Bell*, 106 F.3d 258, 263 (8th Cir. 1997); *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1490 (8th Cir. 1992)(quoting therein *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 587-88 (1986)(cites therein)). The nonmoving party is entitled to all reasonable inferences that can be drawn from the evidence without resorting to speculation. *P.H. v. School District of Kansas City, Missouri*, 265 F.3d 653, 658 (8th Cir. 2001)(quoting therein *Sprenger v. Fed. Home Loan Bank of Des Moines*, 253 F.3d 1106, 1110 (8th Cir. 2001)(internal quotation omitted)). Only disputes over facts that might affect the outcome of the suit under the applicable law properly preclude the entry of summary judgment. *P.H. v. School District*, 265 F.3d at 658.

The movant meets his burden if he shows that the record does not contain a genuine issue of material fact and he identifies that part of the record that bears out his assertion. *Handeen v. LeMaire*, 112 F.3d 1339, 1346 (8th Cir. 1997)(quoting therein *City of Mt. Pleasant v. Associated Electric Coop*, 838 F.2d 268, 273 (8th Cir. 1988)). No defense to an insufficient showing is required. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 156 (1970)(cite therein); *Handeen*, 112 F.3d at 1346. If the movant meets his burden, however, the nonmovant, to defeat the motion, "must advance *specific facts* to create a genuine issue of material fact for trial." *Bell*, 106 F.3d at 263 (emphasis added)(quoting *Rolscreen Co. v. Pella Products of St. Louis, Inc.*, 64 F.3d 1202, 1211 (8th Cir. 1995)). The nonmovant must do more than show there is some metaphysical doubt; he must show he will be able to put on admissible evidence at trial proving his allegations. *Bell*, 106 F.3d at 263 (citing *Kiemele v. Soo Line R.R. Co.*, 93 F.3d 472, 474 (8th Cir. 1996), and *JRT, Inc. v. TCBY System, Inc.*, 52 F.3d 734, 737 (8th Cir. 1995)).

APPLICABLE LAW -- VIOLATION OF THE AUTOMATIC STAY. Under § 362(a)(6), the filing of a petition in bankruptcy "operates as a stay... of... any act to collect, assess, or recover a claim against the debtor

Re: Brian and Mary Duffy
May 1, 2003
Page 6

that arose before the commencement of the case[.]” When that stay is willfully violated by a creditor, § 362(h) provides that an injured party “shall recover actual damages, including costs and attorneys’ fees, and, in appropriate circumstances, may recover punitive damages.” See *Knaus v. Concordia Lumber Co. (In re Knaus)*, 889 F.2d 773, 774-76 (8th Cir. 1989). To recover, the movant must show that he was injured and that the stay violation was willful. *Lovett v. Honeywell*, 930 F.2d 625, 628 (8th Cir. 1991).

An act in violation of the automatic stay is *willful* when the creditor acts deliberately with knowledge that the bankruptcy petition has been filed. *Knaus*, 889 F.2d at 775; *Siharath v. Citifinancial Services, Inc. (In re Siharath)*, 285 B.R. 299, 304 (Bankr. D. Minn. 2002); *In re Dencklau*, 158 B.R. 796, 799 (Bankr. N.D. Iowa 1993); *Rhodes v. I.R.S. (In re Rhodes)*, 155 B.R. 491, 494 (Bankr. W.D. Ark. 1993). Specific intent to violate the stay is not required. *Siharath*, 285 B.R. at 304; *Dencklau*, 155 B.R. at 800. “A violation may be willful even if an entity believes the stay is not applicable to its conduct.” *Id.* (citing *In re McLaughlin*, 96 B.R. 554, 558-59 (Bankr. E.D. Pa. 1989)).

Section 362(h) provides that punitive damages may be awarded under “appropriate circumstances.” In this Circuit, those appropriate circumstances exist when the violating creditor’s conduct is egregious and intentional. *Knaus*, 889 F.2d at 776 (quoting therein *United States v. Ketelsen (In re Ketelsen)*, 880 F.2d 990, 993 (8th Cir. 1989)).

DISCUSSION -- LIABILITY UNDER § 362(h). Mary Duffy violated the automatic stay when she continued her state court debt collection action against Debtor after receiving actual notice that he had filed bankruptcy. Since she did not have notice that a bankruptcy petition actually had been filed when she obtained the warrant, that act did not violate the stay. All actions in state court thereafter, when she did have notice of the bankruptcy through her attorney, did violate § 362(a). That the state court judge may also have erroneously understood the impact of the stay does not relieve Mary Duffy and her attorney from respecting it.

Mary Duffy argued that she should be relieved of any liability because Debtor filed his petition in bad faith. The stay went into effect regardless of whether the petition was filed in good faith. Accordingly, Mary Duffy’s only recourse was to seek relief from the stay under 11 U.S.C. § 362(d) or suspension or dismissal of

Re: Brian and Mary Duffy
May 1, 2003
Page 7

Debtor's case under 11 U.S.C. § 305(a)⁵ if indeed, Debtor's bankruptcy was commenced in bad faith.

Moreover, there is no indication that Debtor's petition was filed in bad faith. Though Mary Duffy was by far his largest unsecured creditor, Debtor also had several large credit card debts for which he could seek bankruptcy relief. Further, Debtor's promise to indemnify Mary Duffy from the marital home mortgage debt and his agreement at the time of the divorce that the debt was nondischargeable under § 523(a)(5) alone were not determinative of whether the subject debt was nondischargeable.⁶

⁵ A creditor's ability to move for dismissal or conversion of a Chapter 7 case under 11 U.S.C. §§ 706 or 707 are very limited. Compare 11 U.S.C. §§ 1112, 1208, and 1307.

⁶ Federal law controls whether a given debt is actually in the nature of support and thus excepted from discharge under § 523(a)(5). *Scholl v. McLain (In re McLain)*, 241 B.R. 415, 419 (B.A.P. 8th Cir. 1999); *Tatge v. Tatge (In re Tatge)*, 212 B.R. 604, 608 (B.A.P. 8th Cir. 1997). The Court must consider the question in light of all facts and circumstances relevant to the intent of the parties at the time the obligation was created, not at the time of the dischargeability trial. *Cummings v. Cummings (In re Cummings)*, 147 B.R. 747, 750 (Bankr. D.S.D. 1992) (citing *William v. Williams (In re Williams)*, 703 F.2d 1055, 1058 (8th Cir. 1983)). The crucial issues are the intent of the parties and the function the award was to serve. *Tatge*, 212 B.R. at 608. How the state court or state law characterized the debt is not binding on the Bankruptcy Court. *McLain*, 241 B.R. at 419. Plain language in the support obligation, however, may compel a conclusion that the debt is for support if there is a stated exchange of obligations so that the non debtor spouse or former spouse will have the means necessary to adequately support the family unit. *Id.* at 420. Further,

[p]rovisions to pay expenditures for the necessities and ordinary staples of everyday life may reflect a support function. *Id.* (cites therein). Moreover, the assumption of the other spouse's debt can be support for bankruptcy purposes. *Id.*

Cummings, 147 B.R. at 750. Factors that the Court may consider include:

1. the relative financial conditions of the parties at the time of the divorce or separation;

Re: Brian and Mary Duffy
May 1, 2003
Page 8

Finally, the fact that Mary Duffy obtained a nondischargeable judgment subsequent to the violation of the automatic stay does not moot or void her stay violation. Debtor suffered actual damages in the form of attorney's fees and costs due to her violation of the stay. That harm was not erased by the outcome of Mary Duffy's nondischargeability action.

DISCUSSION -- DAMAGES. Section 362(h) provides that the party injured by a stay violation "shall recover actual damages, including costs and attorneys' fees[.]" The actual damages that Debtor incurred include the attorney's fees and related costs he must pay for his attorney's preparation and attendance at the state court hearings on September 6 and September 10, 2002; any wages Debtor lost due to his appearance on September 10, 2002; and the attorney's fees and other costs Debtor incurred to bring this adversary proceeding.⁷

So that these damages may be accurately calculated, Debtor's attorney shall submit to the Court an itemization of his services rendered (date, description of each service rendered, time expended for each service) and associated reimbursable costs. Debtor shall submit an affidavit detailing any lost wages. Mary Duffy then will

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2. the parties' respective employment history and future prospects for financial stability;
 3. whether one party received more marital property than the other;
 4. the periodic nature of the payments;
 5. whether it would be difficult for the spouse, former spouse, or child to meet daily living expenses without the debtor's assumption of the subject debt.

Tatge, 212 B.R. at 608 (cites therein).

⁷ In *Lovett v. Honeywell*, the attorneys' fees that the Bankruptcy Court had awarded were for the legal expenses the trustee incurred in seeking a temporary restraining order from the Bankruptcy Court, an issue that was attended by several other complex legal issues regarding trucking tariffs and the Interstate Commerce Commission. *Lovett*, 930 F.2d at 627-29. The Court of Appeals vacated this award and concluded that it was inappropriate for the Bankruptcy Court to award attorneys' fees and costs under § 362(h) unless the recovering party, there the case trustee, suffered some other type of damage. *Id.* at 629. Here, the actual, "other" damages to which the *Lovett* decision refers are the state court related attorneys' fees and costs that Debtor incurred; Debtor's attorneys' fees and costs in bringing this adversary before the Bankruptcy Court are not his sole damages.

Re: Brian and Mary Duffy
May 1, 2003
Page 9

be given an opportunity to respond to each before the Court makes an award.

Damages will not be awarded to Debtor for costs associated with the relief from stay hearing. Though Mary Duffy's motion was not successful, the Court does not conclude that it was filed in bad faith. The Court also cannot find that such a motion "violated" the stay.

Punitive damages will not be awarded under these circumstances where no egregious behavior is apparent. Instead, this case will serve as a learning opportunity for Mary Duffy and her attorney. Whether a state court action is stayed when a bankruptcy petition is filed is a gray area in which attorneys are best advised to always tread lightly. This is especially true when the state court is dealing with any debt-related matters, including civil contempt proceedings. See, e.g., *Atkins v. Marinez (In re Atkins)*, 176 B.R. 998, 1005-06 (Bankr. D. Minn. 1994). When there is any doubt, the issue should be brought promptly before the Bankruptcy Court. In *re Henstra*, 75 B.R. at 260, 264 (Bankr. D. Minn. 1986).

An appropriate interim order will be entered granting summary judgment to Plaintiff-Debtor. A final order setting forth the damage award will be entered after Debtor's attorney's itemization and Debtor's affidavit are received.

Sincerely,



Irvin N. Hoyt
Bankruptcy Judge

INH:sh

CC: adversary file (docket original; copies to parties in interest)

I hereby certify that a copy of this document was electronically transmitted, mailed, hand delivered or faxed this date to the parties on the attached service list.

MAY 02 2003

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court, District of South Dakota
By MIN

NOTICE OF ENTRY
Under F.R. Bankr.P. 9022(a)
Entered

MAY 02 2003

Charles L. Nail, Jr., Clerk
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