

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Southern Division

In re:)	Bankr. No. 02-40948
)	
BRIAN J. DUFFY)	Chapter 7
Soc. Sec. No. [REDACTED]-7166)	
Debtor.)	
)	
BRIAN DUFFY,)	Adv. No. 02 4069
Plaintiff and)	
Counter Defendant)	
)	
-vs-)	DECISION RE: DAMAGES
)	ARISING FROM VIOLATION
MARY DUFFY,)	OF AUTOMATIC STAY
Defendant and)	
Counter-Claimant.)	
)	

The matter before the Court is the calculation of damages arising from Defendant Mary Duffy's violation of the automatic stay. See *Duffy v. Duffy (In re Duffy)*, Bankr. No. 02-40948, Adv. No. 02-4069, slip op. (Bankr. D.S.D. May 2, 2003). This is a core proceeding under 28 U.S.C. § 157(b)(2)(B). This Decision and accompanying Order and Judgment, in tandem with the Court's earlier letter decision entered May 2, 2003, which is incorporated herein, shall constitute the Court's final findings and conclusions pursuant to Fed.R.Bankr.P. 7052. As set forth below, the Court concludes that Plaintiff-Debtor Brian J. Duffy is entitled to damages of \$1,922.16 arising from Defendant Mary Duffy's violation of the automatic stay.

SUMMARY.

In its May 2, 2003, letter decision the Court concluded that Defendant Mary Duffy had wilfully violated the automatic stay and that she was obligated under 11 U.S.C. § 362(h) to compensate

Plaintiff-Debtor Brian J. Duffy for the actual damages that arose from the violation. Therein, the Court stated:

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. [FOOTNOTE OMITTED.]

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 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.

Duffy, slip op. at 8-9. The Court declined to award punitive damages. *Id.* at 10.

Debtor filed his affidavit on May 16, 2003. He claimed that he was scheduled to drive truck when the September 10, 2002, state court hearing was held, that he normally drives 900 miles per day, and that he is paid \$.25 per mile. Thus, he calculated that his damages for lost wages on September 10, 2002, was \$225.00.

Debtor's attorney, Brian J. Ahrendt, also filed his affidavit on May 16, 2003. He stated that his fees and costs for the state court hearings on September 6, 2002, September 10, 2002, and for

bringing this adversary proceeding totaled \$1,840.16. His affidavit included an itemization of these fees, which included compensation for attorney's fees and sales tax on the compensation. He did not include any out-of-pocket expenses.

Mary Duffy objected to both affidavits. She argued that Debtor was committing a fraud upon the Court by seeking more lost wages than he could lawfully earn in one day as a commercial truck driver. She also challenged Debtor's failure to provide any documentary evidence of his lost wages, and she noted that his claimed lost wages for one day's work was not in accord with the income that he disclosed in his bankruptcy schedules. Mary Duffy asked that these damages be rejected entirely. She also asked that Attorney Arendt's fees be rejected as damages, in part because he prepared Debtor's implausible affidavit of lost wages.

Debtor filed a response to Mary Duffy's objection on June 4, 2003. He noted for the Court that Mary Duffy had used a not-yet-in-effect federal regulation to calculate how many hours he could lawfully drive in one day. Thus, he argued, he had the ability on September 10, 2002, based on regulations then in effect, to drive the number of hours claimed in his affidavit. He also argued that the lost wages he claimed were not inconsistent with the income reported on his bankruptcy schedules because he does not work every day of the week.

With the response, Debtor filed a second affidavit regarding the basis for his lost wage claim for September 10, 2002. It said

much the same as his response. He stated that he was unable to provide documentation of his lost wages because he is not a typical wage earner. With the response, Attorney Ahrendt also filed an affidavit disclosing his research on how many hours in a day that Debtor could lawfully drive. A copy of the current federal regulation on which he relied was also included with Debtor's response.

Mary Duffy filed a reply on June 11, 2003. She continued to urge the Court to deny any of Debtor's lost wages for September 10, 2002, since Debtor had failed to produce any documentary evidence of them.

Discussion.

Mary Duffy has not challenged the reasonableness of the attorney's fees that Debtor incurred as damages nor has she claimed that Attorney Ahrendt's itemization was incomplete or inaccurate. Accordingly, damages of \$1,840.16 will be awarded to reflect these attorneys' fees as set forth in Attorney Ahrendt's affidavit.

Determining a reasonable sum for Debtor's lost wages is a bit more difficult. Debtor has essentially claimed that he would receive \$225 for a 24-hour day of driving and regulated rest. He did not, however, subtract from his calculated one day's wage of \$225 those payroll deductions that are normally taken before he receives the net. Debtor further did not offer any documentary evidence of how many days a year he drives and what he takes home (net) from a typical run. Finally, Debtor did not offer any

documentary evidence that he actually had a job lined up on September 10, 2002, before he was called to the state court hearing.

Because Debtor did not furnish any documentation to support the lost wages set for in his affidavit, the Court will instead rely on his Schedule I. According to his Schedule T, Debtor's net income per month is \$2,036.16 or about \$82 per work day (based on an average of 25 work days per month). Thus, he will be awarded damages of \$82 for lost wages on September 10, 2002. Though Debtor admittedly does not work a standard forty-hour, five-day week, use of that standard insures, in the absence of better documentary evidence which Debtor did not furnish, a more reliable calculation of his lost wages for one day.

An appropriate order will be entered.

Dated this 25th day of June, 2003.

BY THE COURT:



Irvin N. Hoyt
Bankruptcy Judge

ATTEST:

Charles L. Nail, Jr., Clerk

By: Diane Mickelson
Deputy Clerk



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

JUN 26 2003

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

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.

JUN 26 2003

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

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