UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT

In re:	
Clint Edward Morway and	**Chapter 13 case**
Rebecca Ann Morway,	**# 02-10009**
Debtors.	

Appearances:	*Sheilagh Smith Banks, Esq.*	*Alan Bjerke, Esq.*	*Jan Sensenich, Esq.*
	Smith & Banks	*Bauer, Anderson & Gravel*	*Chapter 13 Trustee*
	South Royalton, VT	*Burlington, VT*	*White River Jtn., VT*
	Attorney for Debtors	*Attorney for Creditor*	*Chapter 13 Trustee*

MEMORANDUM OF DECISION
DENYING DEBTORS' MOTION FOR SANCTIONS/ DAMAGES AND
GRANTING TRUSTEE'S REQUEST TO VOID POST-PETITION PROCEEDINGS

The debtor, Rebecca Ann Morway (hereafter "the debtor"), filed an Emergency Motion for Enforcement and/or Contempt of Stay and Request for Damages [Dkt. #15-1; 15-2] on February 4, 2002, alleging that Chrysler Financial Corporation (hereafter "Chrysler") wilfully violated the automatic stay provisions of 11 U.S.C. §362 by proceeding with a Trustee Process hearing held one day after the debtors, Clint and Rebecca Morway, filed a joint petition for relief under chapter 13 of the Bankruptcy Code. The Chapter 13 Trustee joined in the debtor's motion [Dkt. #19-1] seeking a finding of a wilful violation of the stay by Chrysler and an award of damages. Chrysler filed a response [Dkt. #25-1] denying any violation of the automatic stay and opposing the requested relief. The debtor and Chrysler also filed a Joint Pre-Trial Statement of Facts Not in Dispute. At the conclusion of the hearing held on February 15, 2002, this Court found that the debtor had failed to demonstrate a wilful violation of the stay and had also failed to prove any actual damages caused by Chrysler's alleged violation of the stay, and therefore the Court denied the motion. Since this appears to be a case of first impression in this District and raises a very precise question of state law interpretation, the Court informed the parties that it would issue a written decision.

This Court has jurisdiction over the subject motion pursuant to 28 U.S.C. §§ 157 and 1334.

ISSUE

The issue presented is whether a creditor's post-petition continuation of a Trustee Process Hearing in Vermont state court constitutes a wilful violation of the bankruptcy stay if (1) the creditor did not have notice of the debtor's bankruptcy filing prior to the hearing and (2) the creditor proceeds only against the trustee/employer at said hearing and thereafter. The related issue is whether any determination made at such a hearing is void, and whether any default judgment entered against the trustee/ employer is unenforceable, as a result of the bankruptcy filing having occurred prior to the hearing.

DISCUSSION

1. The Creditor's Conduct Constitutes a Violation of the Stay But Was Not a Wilful Violation of the Stay

Chrysler obtained a state court judgment against Rebecca Morway in Vermont state court on July 16, 2001. Thereafter, Chrysler scheduled a Trustee Process hearing on January 3, 2002 and served the debtor and her employer, Choice Plus of Vermont, Inc. (hereafter "Choice Plus") with a notice of the hearing. The employer was advised by the notice that it had the option of either providing Chrysler with a financial disclosure statement pertaining to the debtor, or appearing at the hearing. The debtors filed for bankruptcy relief on January 2, 2002, one day before the duly scheduled state court hearing. The debtors failed to advise either the state court or Chrysler that a bankruptcy petition had been filed in advance of the hearing. Neither the debtor nor her employer appeared at the hearing and a default judgment was entered solely against the employer.

The debtor's position, both in her papers and at the hearing held on the emergency motion, is that the continuance of the Trustee Process hearing by Chrysler on January 3, 2002 was a wilful violation of the automatic stay provisions of 11 U.S.C. §362. The debtor maintains that Chrysler violated the stay, and is therefore liable for damages pursuant to §362(h), regardless of whether the creditor actually proceeded against the debtor at the hearing to enforce the prior state court judgment and regardless of whether the default judgment entered against her employer as a result of its failure to appear at the hearing fails to attach to property of the debtor's estate. Additionally, the debtor

contends that Chrysler further violated the stay when its counsel proceeded post-petition to enforce and collect upon the default judgment taken against her employer.

The creditor asserts that it could not have wilfully violated the automatic stay when it proceeded with the January 3, 2002 hearing because it did not have notice or knowledge of the bankruptcy filing until after that date. It also maintains that its subsequent collection efforts against the trustee/ employer on its default judgment were appropriate under both Vermont law and federal bankruptcy law.

The debtor concedes that she did not notify the state court or the creditor of the filing prior to the subject hearing and that Chrysler did not proceed against the debtor herself at the hearing. After the debtor and her employer filed motions to vacate the default judgment in state court, the employer settled its dispute with Chrysler in exchange for its payment of $1,000 to Chrysler. The debtor's motion alleges that as a consequence of the Trustee Process Hearing and the subsequent enforcement and settlement payment, Choice Plus retaliated against the debtor by demoting her and reducing her annual compensation by $5,000.

The Chapter 13 Trustee (hereafter "the trustee") acknowledges that the duty to notify the creditor of the bankruptcy filing in this instance lies with the debtor, yet maintains that the post-petition actions of the creditor nonetheless violate the stay and hence are void. The trustee argues that the broad scope of §§362(a)(1), (2), (3) and (6) encompasses and prohibits a creditor from proceeding with a Trustee Process Hearing, and renders any judgment entered in a post-petition Trustee Process Hearing void. The trustee's position is that the judgment of the creditor against the employer is dependent upon the liability of the debtor, that once the stay takes effect the debtor's liability is beyond the creditor's reach and that the debtor's filing places the employer beyond the creditor's reach as well.

The foregoing facts are essentially undisputed. The key dispute is strictly legal, namely whether the creditor committed a wilful violation of the stay either by proceeding with the post-petition Trustee Process Hearing or by subsequently engaging in collection activities against the employer, or both, thereby entitling the debtor to an award of damages and related equitable relief under §362(h) of the Bankruptcy Code. That subsection provides:

> An individual injured by any wilful 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.

Under §362(h), a movant must establish three elements in order for a bankruptcy court to award damages for violation of the automatic stay: (1) that the violation occurred; (2) that the violation was committed wilfully; and (3) that the violation injured the individual seeking damages. *See* In re Hoskins, 266 B.R. 872, 877-78 (Bankr. W.D. Mo. 2001). It is well settled that in order to obtain an award of damages for a creditor's violation of the automatic stay, it must be shown that a creditor has committed a wilful, not merely a technical, violation of the automatic stay. *See* In re Freunscht, 53 B.R. 110, 113 (Bankr. D. Vt. 1985); *see also* In re Okwukwu, 210 B.R. 194 (Bankr. N.D. Ala. 1997); In re Lafanette, 208 B.R. 394 (Bankr. W.D. La. 1996).

In this instance, the parties concur that the Trustee Process Hearing was held post-petition but that neither Chrysler nor the state court had any knowledge of the debtor's bankruptcy at the time of the hearing and the issuance of the default judgment against the debtor's employer. Absent prior notice or knowledge of the debtor's bankruptcy, Chrysler's violation of the stay by proceeding with the hearing and obtaining a default judgment against the debtor's employer was a technical stay violation only and accordingly does not warrant sanctions by this Court. *See* In re Bray Enterprises, Inc., 38 B.R. 75 (Bankr. D. Vt. 1984).

The debtor and trustee also contend that Chrysler's collection efforts directed solely at the debtor's employer based upon its failure to comply with its disclosure or appearance requirements under Vermont law likewise constitutes a wilful violation of the automatic stay based upon Chrysler's counsel proceeding with efforts to collect upon the employer's judgment after being advised of the pending bankruptcy. This claim fails for several reasons. First, the creditor obtained its default judgment against the employer/ trustee in good faith and without knowledge of the pending bankruptcy. Secondly, Chrysler's collection efforts were directed solely at the employer/ trustee for its independent liability under Vermont law. As provided under Vermont law, the liability of the employer is independent and exists separate and apart from the debtors' liability:

> When a person is adjudged trustee by default, the judgment shall be for the amount of damages and costs recovered by the plaintiff in the action, and payable in money at the time the judgment is rendered against the principal defendant. Execution therefor may issue directly against the goods, chattels or estate of the trustee.

12 V.S.A. 3063. In construing Vermont's trustee process provisions, the Vermont Supreme Court held that a trustee against which trustee process is served may, as a result of a total failure to render an appropriate disclosure or comply with its statutory obligations, be liable itself for the amount of

the judgment sought to be satisfied by the trustee process. *See* First Wisconsin Mortgage Trust v. Wyman's, Inc., 139 Vt. 350, 428 A.2d 1119 (1981); *see also* Herrick v. Larson, 111 Vt. 190, 13 A.2d 194 (1940)(in order to answer and avoid a default judgment as a trustee under § 3062, a corporate trustee must make an appropriate disclosure under the statute); *see also* Rule 4.2, Vermont Rules of Civil Procedure. Typically, if an employer complies with the disclosure demand or appears at the Trustee Process Hearing, it would satisfy its obligations under Vermont law and would not be vulnerable to judgment.

Furthermore, there is colorable authority for the creditor's actions under the law of other jurisdictions where state law imposes similar obligations upon third parties to make financial disclosures or to otherwise comply with state garnishment statutes. Bankruptcy courts in those jurisdictions have held that a creditor may pursue its collection remedies against an entity that fails to comply with its statutory obligations, notwithstanding that the principal defendant has filed for bankruptcy protection. *See, e.g.,* In re Sowers, 164 BR 256 (Bankr. E.D. Va. 1994)(judgment creditor's post-petition acts against debtor's employer for failure to comply with pre-petition garnishment summons did not violate automatic stay); In re Waltjen, 150 BR 419 (Bankr. N.D. Ill. 1993)(creditor did not violate stay by offering counsel, who represented debtor and employer, to accept withheld wages in settlement of motion against employer for judgment based on employer's failure to fulfill its duties under garnishment law); In re Gray, 97 BR 930 (Bankr. N.D.Ill. 1989)(after bankruptcy filed, creditor sought to collect against employer on debtor's judgment based on employer's failure to comply with garnishment requirements). The creditor indicates that it relied upon these cases in determining that it was permissible for it to pursue the debtor's employer for its independent liability under Vermont law. However, each of these bankruptcy cases is distinguishable because the employer's failure to comply with its legal obligations pre-dated the debtor's bankruptcy petition. In this instance, Chrysler obtained a default judgment against Choice Plus based upon the employer's failure to appear at a hearing held after the debtor's bankruptcy case had been filed.. Since the automatic stay becomes effective upon filing of a bankruptcy petition, a creditor is prohibited from taking a judgement against an employer for failing to comply with post-trial trustee process in connection with the collection of a debt subject to the automatic stay.

Certainly, if Chrysler or its attorneys had prior knowledge of the bankruptcy filing and proceeded against the debtor to enforce its underlying judgment post-petition, the creditor would have been in wilful violation of the stay and subject to §362(h) sanctions. However, the evidence

is undisputed, and the stipulation of facts confirms, that the creditor only sought to enforce the judgment to the extent it was deemed a liability imposed against the employer based upon the employer's failure to produce the statutorily mandated disclosures or appear at the hearing.

Furthermore, it is axiomatic that absent unusual circumstances not presented here, the automatic stay typically does not apply to proceedings against a non-debtor for its own liability, such as Choice Plus being held liable for a default judgment imposed for its failure to comply with Vermont law. *See* Maritime Electric Co., Inc. v. United Jersey Bank, 959 F.2d 1194 (3rd Cir. 1992); A.H. Robbins Co., Inc. v. Piccinin, 788 F.2d 994 (4th Cir. 1986); Wedgeworth v. Fibreboard Corp., 706 F.2d 541 (5th Cir. 1983); Variable-Parameter Fixture Development Corp. v. Morpheus Lights, Inc., 945 F.Supp. 603 (S.D.N.Y. 1996); In re Siskin, 231 B.R. 514 (Bankr. E.D.N.Y. 1999). This Court finds that Choice Plus's liability, if any, was based upon its failure to comply with the state disclosure statute and did not place Choice Plus in the position of a co-debtor, that the default judgment was not against the debtor's property or an interest of the bankruptcy estate, and that the default judgment was not binding upon the debtor. *See* In re Siskin, 231 B.R. at 518-19. Therefore, this Court finds that Chrysler's conduct in proceeding with collection efforts against the debtor's employer constitute a technical violation of the stay, but do not constitute a wilful violation of the automatic stay, and hence do not warrant sanctions under §362(h).

2. An Assessment of Damages is Not Warranted

At the hearing held herein, prior to making a determination as to any wilful violation of the stay, the Court invited the debtor to introduce evidence as to actual damages arising from any alleged wilful violation of the automatic stay by Chrysler. In response, the debtor's counsel requested the opportunity to present evidence challenging the validity of the state court default judgment against the employer, and that request was denied. Based upon that denial, the debtor declined to present any evidence whatsoever as to damages. Without evidence of actual damages, the Court is unable to grant the debtor a monetary award, even if there were a finding of a wilful violation of the stay. *See* In re Freunscht, 53 B.R. 110, 113 (Bankr. D. Vt. 1985); *see also* In re Robinson, 228 B.R. 75 (Bankr. E.D.N.Y. 1998); In re Bearden, 216 B.R. 951 (Bankr. W.D. Okla. 1997); In re Brock Utilities and Grading, Inc., 185 B.R. 719 (Bankr. E.D.N.C. 1995). Moreover, based upon the record, the Court finds that Chrysler acted in good faith in pursuing its default judgment against the

employer/ trustee in reliance upon its view of Vermont and related federal bankruptcy law, and this provides an additional basis for the denial of sanctions. *See* In re Rhoten Construction Co., 22 B.R. 335, 336 (Bankr. M.D. Tenn. 1982); *see also* In re Walls, 262 B.R. 519, 529 (Bankr. E.D. Cal. 2001).

3. Stay Violation Voids Post-Petition Proceedings

In his memorandum of law, the trustee joins in the debtor's motion for emergency relief and requests, *inter alia,* a determination by this Court that the default judgment obtained against the debtor's employer is void *ab initio* as a matter of law. It is well recognized in this Circuit that actions taken in violation of the automatic stay are void even when the acting party had no actual notice of the stay. *See* Rexnord Holdings, Inc. v. Bidermann, 21 F.3d 522 (2nd Cir. 1994); In re 48th Street Steakhouse, Inc., 835 F.2d 427 (2nd Cir. 1987); Federal Insurance Co. v. Sheldon, 150 B.R. 314 (S.D.N.Y. 1993); *see also* Constitution Bank v. Tubbs, 68 F.3d 685, 691 (3rd Cir. 1995)(automatic stay effective regardless of whether the other parties to the stayed proceeding are aware that a bankruptcy petition has been filed). The stay takes effect immediately upon the filing of a bankruptcy petition. *See* In re Soares, 107 F.3d 969, 975 (1st Cir. 1997). As one court has noted, there is no need for judicial intervention "[b]ecause the automatic stay is exactly what the name implies – 'automatic' – it operates without the necessity of judicial intervention by a bankruptcy court." Sunshine Development, Inc. v. FDIC, 33 F.3d 106, 113 (1st Cir. 1994); *see also* In re Vierkant, 240 B.R. 317, 320-21 (8th Cir. 1999). The automatic stay remains in force until the federal court either disposes of the case or lifts the stay. *See* In re Soares, 107 F. 3d at 975; In re Vierkant, 240 B.R. at 321. Moreover, the scope of the automatic stay is very broad, *see* In re Prudential Lines, Inc., 119 B.R. 430 (S.D.N.Y. 1990) *aff'd.* 928 F.2d 565 (2nd Cir. 1991), and thus even indirect attempts at collection violate the stay. *See* In re Hoskins, 266 B.R. 872 (Bankr. W.D. Mo. 2001); In re A & C Electric Co., 188 B.R. 975 (Bankr. N.D. Ill. 1995).

In this proceeding, the issue is whether the actions undertaken by Chrysler in violation of the stay, albeit in technical violation only, are void. Upon the filing for bankruptcy relief prior to the Trustee Process Hearing, the hearing and the commencement or continuation of all other collection activities pertaining to the debtor and her property became subject to the automatic stay. *See* §§362 (a)(1), (2), (3) and (6). Other bankruptcy courts have acknowledged the automatic effectiveness of

the stay pertaining to actions against the debtor and others under similar circumstances.

In the case of In the Matter of United Imports Corp., 200 B.R. 234 (Bankr. D. Neb. 1996), a chapter 11 debtor, also a defendant in pre-petition litigation with a creditor, filed a motion with the bankruptcy court to determine whether certain discovery orders directed at the debtor *and* its bank *and* its president were automatically stayed upon the filing of the bankruptcy petition. The subpoena upon the debtor's bank sought the production of certain banking records of the debtor. The bankruptcy court held that the discovery obligations of the debtor, its bank and its corporate officer constituted the continuation of a pre-petition lawsuit against the debtor and were stayed upon the filing of the bankruptcy petition. The court explained that once the bankruptcy petition was filed, the stay became effective and the parties to pending litigation cannot undertake any judicial action material to the claim against the debtor without first obtaining lift stay relief from the bankruptcy court.

Similarly, in In re Rhoten Construction Co., 22 B.R. 335 (Bankr. M.D. Tenn. 1982), a debtor filed a motion alleging a violation of the automatic stay by a creditor who filed an action for contempt in state court after the debtor filed for bankruptcy relief. Following the entry of a judgment against the debtor in state court, the creditor had served the debtor with extensive post-judgment interrogatories. Before the deadline for compliance with the discovery requests, the debtor filed for bankruptcy relief. Thereafter, the creditor with full knowledge of the bankruptcy filed a motion in state court for an order of contempt against the debtor for failing to provide the requested financial disclosure information in aid of collecting upon the creditor's judgment. The In re Rhoten Construction Co. court held that the debtor's obligation to furnish the requested financial information ceased upon the filing of the petition in bankruptcy. Moreover, in determining not to sanction the creditor for its technical violation of the automatic stay therein, the court noted that the creditor had acted in good faith. *Cf.* Belcufine v. Aloe, 112 F.3d 633 (3rd Cir. 1997)(third parties cannot be held liable for a post-petition statutory obligation that results from the existence of debtor's entitlement to an automatic stay).

In this instance, the obligations of the debtor and her employer to appear at the Trustee Process Hearing or to provide financial information for use by the creditor in aid of collecting upon the creditor's pre-petition judgment against the debtor ceased upon the debtor filing for bankruptcy relief due to the existence of the automatic stay. The stay has remained in effect and there has been no request for lift stay relief. Therefore, the actions taken by the creditor after the bankruptcy

petition was filed on January 2, 2002 are void *ab initio*[1].

CONCLUSION

Based upon the foregoing, the Court, first, denies the debtor's motion for sanctions based upon its findings that (1) the creditor's conduct constitutes a technical stay violation but occurred while the creditor acted in good faith, (2) the creditor's conduct did not constitute a wilful violation of the automatic stay, and (3) the debtor failed to present any proof of actual damages flowing from the creditor's conduct. Secondly, the Court declares the actions taken by Chrysler after the filing of the bankruptcy petition herein and pursuant to the subject trustee process proceedings to be void *ab initio*.

March 8, 2002
Rutland, Vermont

Colleen A. Brown
United States Bankruptcy Judge

[1] This Court takes no position regarding the status of the settlement agreement and related payment by and between Chrysler and Choice Plus in the state court action. The settlement was apparently undertaken after the debtor and the employer had filed motions to vacate the default judgment in state court respectively, in which the debtor raised the defense that the automatic stay was in effect prior to the Trustee Process Hearing.