

UNITED STATES BANKRUPTCY COURT
DISTRICT OF VERMONT



In re:

Annette Pulver-Thomas
Debtor.

Chapter 7 Case
04-10835

ORDER
SUA SPONTE VACATING THE AWARD OF SANCTIONS
AND SETTING A FURTHER HEARING

On May 31, 2005, the Debtor, acting *pro se*, filed a letter with the Court indicating that she needed assistance with her bankruptcy case. She stated that the attorney who had represented her in this chapter 7 case (Gerald Altieri) had died after her case was filed, that she could not afford to retain counsel, that one of her creditors was continuing to attempt to collect a debt notwithstanding that it had been served with notice of the order for relief and her discharge, and that she wanted the Court to stop the creditor's collection efforts against her. See doc. # 9. The Debtor identified the creditor in issue to be Providian Processing Services (also known as Providian Processing Center), acting through its agent, NCB Management Services Incorporated. (cumulatively referred to herein as "Providian"). The Court treated the letter as a motion for sanctions for violation of the stay, set a hearing to consider the motion and issued a hearing notice on June 14, 2005. The hearing notice (doc. # 10) described the hearing as follows:

Evidentiary Hearing on issue of whether the creditor willfully violated the automatic stay and whether the debtor is entitled to damages under 362(h)

and stated that a hearing would be held at 11:00 a.m. on June 28, 2005. A copy of the notice of hearing was sent to Providian. The Debtor appeared *pro se* at the June 28th hearing; there was no appearance by Providian or its agent.

STANDARD FOR AN AWARD OF SANCTIONS

There are two mechanisms for punishing a violation of the stay: as contempt of court and under 11 U.S.C. § 362(h). See generally Collier's on Bankruptcy, 15th ed., ¶ 362.11. Civil contempt sanctions have been found to be an appropriate response to a willful violation of the stay because the automatic stay is considered a court order, and to be an appropriate exercise of bankruptcy court authority under § 105. See Jove Eng'g Inc., v. IRS, 92 F 3d 1539 (11th Cir 1996). If an individual debtor is injured by a party's violation of the stay, § 362(h) is an alternative remedy for a willful violation of the stay. It provides that

An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorney's fees, and, in appropriate circumstances, may recover punitive damages.

Under § 362(h), a court may assess compensatory damages against a party who, with knowledge of a bankruptcy filing, violates the automatic stay and causes injury to the debtor. In re Crysen/Montenay Energy Co., 902 F.2d 1098 (2d Cir. 1990). In Crysen, the Second Circuit Court of Appeals distinguished between those circumstances that warrant an award of compensatory damages from those that justify an award of punitive damages, holding that

[A]ny deliberate act taken in violation of a stay, which the violator knows to be in existence, justifies an award of actual damages. An additional finding of maliciousness or bad faith on the part of the offending creditor warrants the further imposition of punitive damages pursuant to 11 U.S.C. § 362(h).

Id. at 1105. A willful violation of automatic stay, however, standing alone, will not support an award of damages under § 362(h) if the debtor has not suffered any actual damages as result of the violation. In re Siskin, 231 B.R. 514 (Bankr. E.D.N.Y. 1999).

At the hearing in the instant case, the Court found that the creditor willfully violated the stay. The Court subsequently learned, however, that the notice sent to the creditor was not directed to any particular person at Providian and was not sent to the agent who sent the offending letters on behalf of Providian. In light of the gravity of the allegations raised against this creditor, the notice sent to Providian is insufficient. Due process requires that Providian be given more meaningful notice before the Court makes a determination of whether to award sanctions. See Bankruptcy Rule 7004(b)(3). Moreover, after hearing the Debtor articulate her position at the hearing, the Court finds that the letter should be deemed a plea for relief under either the Court's contempt powers or §362(h), rather than under § 362(h) alone. Thus, the Court will address at a future hearing whether Providian willfully violated the stay, if so, whether the Debtor was injured by that violation, and if so, what amount of sanctions should be imposed.

FINDINGS OF FACT

Based upon the record in this case, the Court made the following findings of fact at the hearing:

1. The Debtor filed for chapter 7 bankruptcy relief on June 9, 2004 (doc. #1).
2. The Debtor listed Providian on her Schedule F and the mailing list filed with the petition (Id.).
3. Providian was served with notice of the bankruptcy filing on June 14, 2004 (doc. # 4).
4. The Debtor was granted a discharge on September 8, 2004 (doc. # 5).
5. Providian was served with a copy of the order of discharge on September 8, 2004 (doc. # 6).
6. Neither the notice of commencement of case nor the notice of discharge that were sent to

Providian was returned as undeliverable.

7. On April 20, 2005, Providian, through its agent, sent a letter to the Debtor (the “first letter”) attempting to collect the debt which was discharged in this case.¹
8. The Debtor represented that, in response to this April 20th letter, she sent Providian a letter enclosing copies of the notice of commencement of case and the discharge order at end of April or in early May 2005.
9. On May 5, 2005, Providian, through its agent, sent a letter to the Debtor offering to compromise the debt which was discharged in this case (the “second letter”).
10. The record does not address the question of whether Providian had received the correspondence from the Debtor before it sent the second letter.
11. By virtue of the notices the Court sent to Providian with respect to the filing of the case and the entry of discharge, Providian had notice of the Debtor’s bankruptcy case.
12. Providian’s agent’s letters to the Debtor seek to collect and/or compromise a debt which was included in and discharged by the Debtor’s bankruptcy filing.
13. These attempts to collect the debt constitute a willful violation of the stay.
14. There is no request for, nor evidence warranting, an award of punitive damages.

RECONSIDERATION OF AWARD

At the hearing, the Court granted the Debtor an award of \$500 based upon the above findings and the Court’s conclusion that Providian had willfully violated the stay. However, the Court now vacates that award of damages without prejudice. Upon *sua sponte* reconsideration, the Court determines that it is necessary to (1) give Providian and its agent more meaningful notice, (2) give Providian the opportunity to present evidence on both the allegation of intentional violation of stay and to move to set aside the findings made by the Court at the prior hearing, (3) determine whether any violation of the stay herein is more appropriately punished under the Court’s contempt powers or under § 362(h), and (4) require the Debtor to testify as to any injury she suffered as a result of Providian’s conduct as a prerequisite to granting her an award of damages under 362(h). See Siskin at 521. Therefore, the Court will reconvene the hearing on this matter for these purposes.

The findings of fact shall not be disturbed unless Providian appears at the hearing and presents evidence relevant to the issue of whether it violated the stay that is inconsistent with the above findings.

NOTICE OF HEARING

¹ The letter states that Debtor is allowed to dispute validity of the debt, however if she fails to do so her silence will be interpreted to mean that she acknowledges the debt to be valid.

A continued hearing to address the Debtor's letter of alleged violation of stay will be held at the U.S. Bankruptcy Court, The Opera House, 67 Merchants Row, Rutland, Vermont, on **August 9, 2005 at 11 a.m.** The Court will consider evidence on the following topics at that time:


1. whether there is any basis for setting aside any of the findings of fact made at the prior hearing;
2. whether the stay violation is more appropriately punished by contempt powers or §362(h);
3. whether the Debtor was injured by that stay violation, and
4. if so, what amount of sanctions should be imposed.

Both parties are ordered to appear at the hearing and their failure to do so shall constitute a waiver of their rights to proceed on this issue. Any responsive papers or memoranda of law must be filed by **August 2, 2005.**

The Clerk's Office is hereby directed to serve a copy of this Order on the Debtor, the Office of the U.S. Trustee, and to Providian, by July 6, 2005. Notice to Providian shall be sent via first class mail to the attention of a particular person at both Providian and NCB Management Services, Inc. (such persons to be identified by reference to the record in this case). This notice shall constitute adequate notice of the hearing.

SO ORDERED.

July 1, 2005
Rutland, Vermont



Colleen A. Brown
United States Bankruptcy Judge