

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

IN THE MATTER OF)	
)	
BOBBIE LYNN BURD,)	CASE NO. 07-30013 HCD
)	CHAPTER 7
DEBTOR.)	
)	
)	
BOBBIE LYNN BURD,)	
PLAINTIFF,)	
vs.)	PROC. NO. 07-3033
)	
MEDICAL RECOVERY SPECIALISTS, INC.,)	
DEFENDANT.)	

Appearances:

Joseph F. Zielinski, Esq., counsel for plaintiff, Debra Voltz-Miller & Associates, 1951 East Fox Street, South Bend, Indiana 46613.

MEMORANDUM OF DECISION

At South Bend, Indiana, on June 29, 2007.

Before the court in this adversary proceeding are the Complaint for Violation of the Automatic Stay and the Verified Motion for Default Judgment filed by the plaintiff Bobbie Lynn Burd, a chapter 7 debtor (“plaintiff”), by counsel, against the defendant Medical Recovery Specialists, Inc. (“defendant”). The defendant did not answer the pleading or respond to the motion. Despite the lack of response from the defendant, the court finds that the plaintiff failed to prove that a violation of the automatic stay occurred in this case. Accordingly, the court denies both the Complaint and the Motion.

Jurisdiction

Pursuant to 28 U.S.C. § 157(a) and Northern District of Indiana Local Rule 200.1, the United States District Court for the Northern District of Indiana has referred this case to this court for hearing and determination. After reviewing the record, the court determines that the matter before it is a core proceeding

within the meaning of § 157(b)(2)(A)¹ over which the court has jurisdiction pursuant to 28 U.S.C. §§ 157(b)(1) and 1334. This entry shall serve as findings of fact and conclusions of law as required by Federal Rule of Civil Procedure 52, made applicable in this proceeding by Federal Rules of Bankruptcy Procedure 7052 and 9014. Any conclusion of law more properly classified as a factual finding shall be deemed a fact, and any finding of fact more properly classified as a legal conclusion shall be deemed a conclusion of law.

Background

On April 17, 2007, the plaintiff filed her Complaint pursuant to 11 U.S.C. §§ 362(a)(6) and 362(h), asking the court to find that the defendant Medical Recovery Specialists, Inc., willfully violated the automatic stay issued in her bankruptcy case. She provided the following facts in the Complaint.

The plaintiff filed her chapter 7 bankruptcy petition on January 6, 2007. The automatic stay provision of § 362(a) was activated at the time her petition was filed. The defendant, an agent collecting for Advocate Illinois Masonic Medical Center (“Medical Center”), was listed as an unsecured creditor on Schedule F of the plaintiff’s bankruptcy schedules. Both the defendant and the Medical Center received notice of the plaintiff’s bankruptcy on January 10, 2007, through the Bankruptcy Noticing Center (“BNC”).

On January 26, 2007, the defendant sent a collection letter to Graham Toth, at the debtor’s address, demanding payment of a debt owed to the Medical Center.² *See* R. 1, Ex. 3. On February 6, 2007, plaintiff’s counsel notified the defendant by letter that its collection request constituted a violation of the automatic stay:

I am the attorney representing Bobbie Burd in the filing of a Chapter 7 bankruptcy. Said Bankruptcy was filed on January 6, 2007, and Illinois Masonic Medical Center was listed as a creditor. My client advises me that she continues to receive requests for payment which is in violation of the Stay Order issued by the Court. Any future collection attempts will be viewed as contempt of the court’s Order and I will proceed accordingly.

¹ The court notes that a violation of the automatic stay is not included in the non-exhaustive list of “core proceedings” found at 28 U.S.C. § 157(b)(2). Nevertheless, “courts generally agree that claims under 11 U.S.C. § 362(k) and its predecessor (§ 362(h)) qualify as ‘core proceedings.’” *Miller v. District of Columbia*, ___ B.R. ___, 2007 WL 1748890 at *5 (D.D.C. June 18, 2007).

² The Complaint did not point out that the collection letter was addressed to Graham Toth and not to the debtor.

R, 1, Ex. 4. Nevertheless, on March 21, 2007, the defendant sent a second collection letter, attempting to collect the same debt. On April 17, 2007, therefore, the plaintiff filed this Complaint alleging, in Count I, that the two letters sent to the plaintiff violated the automatic stay pursuant to § 362(a)(6), which prevents “any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case.” R. 1 at 3. In Count II, the plaintiff alleged that the defendant willfully violated the automatic stay under § 362(h). *See id.*

The defendant did not respond to the Complaint. Although the summons and Complaint were served on the defendant, nevertheless it did not file an answer or other responsive pleading. On May 23, 2007, therefore, the plaintiff filed a Verified Motion for Default Judgment and submitted a form of Order of Judgment by Default. She requested that the court grant the plaintiff’s Complaint and award actual, statutory, and punitive damages, to be turned over to the chapter 7 panel trustee for distribution to the creditors who had filed claims.

Discussion

“The ‘automatic stay’ is a statutory injunction against efforts outside of bankruptcy to collect debts from a debtor who is under the protection of the bankruptcy court.” *Aiello v. Providian Fin’l Corp.*, 239 F.3d 876, 878 (7th Cir. 2001). In this case, the plaintiff asserts that the defendant violated § 362(a)(6), which stays “any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case.” The plaintiff also argues that the violation of the automatic stay was willful. Section 362(k)(1) (designated as § 362(h) prior to the enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”)) provides that “an 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.” The debtor-plaintiff bears the burden of establishing that a stay violation occurred and that she suffered damages. *See Kramer Consulting, Inc., v. McCarthy (In re McCarthy)*, 350 B.R. 820, 826 (Bankr. N.D. Ind. 2006); *see also In re Gossett*, ___ B.R. ___, 2007 WL 1226629 (Bankr. N.D. Ill. 2007) (stating that burden, under § 362(k), lies with the debtor); *In re Harris*, 310 B.R. 395, 399 (Bankr. E.D. Wis. 2004) (placing

burden of proof of willful violation of stay on debtor under pre-BAPCPA § 362(h)). It is the view of the plaintiff that the defendant, aware of the plaintiff's filing of a bankruptcy petition and also provided actual notice of the automatic stay by the letter of plaintiff's counsel, willfully violated the stay by sending the second collection letter.

The court finds, however, that the plaintiff has not established that the defendant has attempted to collect a debt from her, the chapter 7 debtor. "When a debtor files a bankruptcy petition, his creditors are barred from any 'effort to collect a debt directly from the debtor.'" *In re McCarthy*, 350 B.R. at 826 (quoting *Aiello*, 239 F.3d at 879). The defendant in this case sent the collection letters to the Medical Center's patient, Graham Toth, not to the plaintiff-debtor Bobbie Burd. It demanded payment from Graham Toth. The defendant has not attempted to collect payment from the plaintiff.

The plaintiff did not explain the identity of Graham Toth or why he received mail at the plaintiff's address. Searching the record in this case, the court found that the plaintiff's Schedule H lists Gregory D. Toth, living in South Bend, Indiana, as a codebtor.³ However, there is no "Graham Toth," from Wyatt, Indiana or any other address, listed in the petitions, schedules or statements of the debtor. Moreover, the debtor states on Schedule I that she has no dependents.

The court finds, therefore, that the plaintiff failed to meet the burden of proof on the relief requested. She was unable to prove that the defendant's collection letters constituted a collection of a debt directly from the debtor. *See In re Silver*, 303 B.R. 849, 864 (10th Cir. B.A.P. 2004) (stating that nondebtors are not protected by the automatic stay), *supplemented by* 305 B.R. 381 (10th Cir. B.A.P. 2004); *In re Northeast Glass, Inc.*, 112 B.R. 475, 477 (Bankr. D. Mass. 1990) (finding that creditor did not violate stay by levying against nondebtor); *see also* 3 Collier on Bankruptcy ¶ 362.03[8][b], "Acts against Nondebtors Not Stayed," at 362-34 (Alan N. Resnick & Henry J. Sommer, eds.-in-chief, 15th ed. rev'd 2006). In addition, the court finds that the plaintiff failed to show any claim of actual damages, costs, or attorney fees or any justification for other damages. *See Grochocinski v.*

³ Gregory D. Toth is listed as codebtor on a debt owed to Family Learning Center, not to the Medical Center.

Allstate Ins. Co. (In re Lyckberg), 310 B.R. 881, 891 (Bankr. N.D. Ill. 2004) (declining to award damages when no showing of actual damages was made; declining request to assess costs, fees or punitive damages as well).

The court finds that the defendant's acts, in sending two letters to a nondebtor at the plaintiff's address, does not constitute a violation of the automatic stay pursuant to 11 U.S.C. § 362(a)(6) and certainly does not constitute a willful violation pursuant to 11 U.S.C. § 362(k)(1). Accordingly, the court denies both the plaintiff's Complaint for Violation of the Automatic Stay and the Verified Motion for Default Judgment.

SO ORDERED.

/s/ Harry C. Dees, Jr.
HARRY C. DEES, JR., CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT