

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

|                                |   |                       |
|--------------------------------|---|-----------------------|
| IN THE MATTER OF               | ) |                       |
|                                | ) |                       |
| TANYA CHRISTINE BENNETT,       | ) | CASE NO. 06-31002 HCD |
|                                | ) | CHAPTER 13            |
| DEBTOR.                        | ) |                       |
|                                | ) |                       |
|                                | ) |                       |
| TANYA CHRISTINE BENNETT,       | ) |                       |
| PLAINTIFF,                     | ) |                       |
| vs.                            | ) | PROC. NO. 06-3107     |
|                                | ) |                       |
| MARCEL'S TANNING SALONS, INC., | ) |                       |
| DEFENDANT.                     | ) |                       |
| _____                          | ) |                       |
|                                | ) |                       |
| MARCEL'S TANNING SALONS, INC., | ) |                       |
| COUNTER-CLAIMANT,              | ) |                       |
|                                | ) |                       |
| vs.                            | ) |                       |
|                                | ) |                       |
| TANYA CHRISTINE BENNETT,       | ) |                       |
| COUNTER-DEFENDANT.             | ) |                       |

Appearances:

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

William L. Wilson, Esq., attorney for defendant, Anderson, Agostino & Keller, P.C., 131 South Taylor Street, South Bend, Indiana 46601.

MEMORANDUM OF DECISION

At South Bend, Indiana, on September 17, 2007.

Before the court are the cross-motions for summary judgment filed by the chapter 13 debtor Tanya Christine Bennett, plaintiff in this adversary proceeding ("Bennett" or "debtor"), and by the defendant Marcel's Tanning Salons, Inc. ("Marcel's" or "defendant"). These summary judgment motions arise out of a Complaint for Violation of Automatic Stay and Turnover of Funds filed by Bennett. The Complaint alleges that the defendant violated the automatic stay, 11 U.S.C. § 362, and therefore was required to turn over \$6,673.18, the

amount garnished from the debtor's wages. Marcel's counterclaimed, asking the court to find that the debt of approximately \$215,000 that the debtor owes to Marcel's is not dischargeable under 11 U.S.C. § 523(a)(4) because it arose out of the debtor's embezzlement and/or larceny. After the parties filed a stipulation of facts, motions for summary judgment and briefs in support of the motions, the court took the matter under advisement.

### 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)(E) and (G) 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

The following relevant facts, as presented in the parties' stipulations and briefs, are undisputed. The debtor has filed two bankruptcy proceedings: a chapter 7 proceeding (Case No. 02-31987) filed on April 10, 2002, from which she was discharged on July 22, 2002; and a chapter 13 proceeding (Case No. 06-31002) filed on August 1, 2006, and presently pending.<sup>1</sup> This adversary proceeding was initiated by the debtor, who filed a complaint charging Marcel's with having violated the automatic stay in her chapter 7 bankruptcy.

The debtor was employed by the defendant at one of its retail tanning salons from February 1999 through May 2000. Marcel's filed a complaint with the Indiana law enforcement authorities alleging that Bennett

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<sup>1</sup> Because the debtor filed her chapter 13 case after the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, the new provisions added to the Bankruptcy Code are applicable in this case.

had stolen from her employer during that time, and Bennett was charged with theft on March 6, 2001. On April 10, 2002, while that charge was pending, the debtor filed her chapter 7 bankruptcy petition and the automatic stay of § 362 became effective. She did not list Marcel's as a creditor in her bankruptcy. After the chapter 7 trustee reported that the debtor had no assets available for distribution, she received her discharge on July 22, 2002, and the case was closed on the same day. Six months later, on January 6, 2003, the debtor pled guilty to the charge of theft.

Without notice of the debtor's bankruptcy filing, Marcel's filed a civil suit in the St. Joseph Circuit Court against the debtor on April 25, 2002, to recover the funds stolen or embezzled by her. The debtor, knowing of her pending bankruptcy case, the pending criminal indictment against her, and the newly filed civil suit against her, failed to inform the various courts or interested parties of the other actions. In November of 2002, during discovery in the state court civil litigation, Marcel's attorney deposed the debtor. At the deposition, the debtor revealed that she had filed a previous bankruptcy.

Two years later, Marcel's filed a motion for summary judgment in the state court action. Bennett failed to appear at the hearing on the motion. On December 6, 2004, therefore, the state circuit court granted Marcel's summary judgment motion by default and ordered Bennett to pay Marcel's in excess of \$200,000, based upon treble damages pursuant to the Indiana Crime Victims Relief Act. Garnishment of the plaintiff's wages began on May 27, 2005. Marcel's received \$6,673.18 in garnished wages over a 14-month period.

On August 1, 2006, the debtor filed for bankruptcy relief under chapter 13, and the garnishment payments ceased. She then initiated this adversary proceeding by filing a complaint alleging that Marcel's had violated the automatic stay. Seeking summary judgment on that complaint, the debtor argued that Marcel's filing of a state court civil complaint two weeks after she filed her bankruptcy petition was a violation of 11 U.S.C. § 362(a)(6)<sup>2</sup> and consequently was a legal nullity, even though the creditor had no knowledge of the

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<sup>2</sup> Section 362(a)(6) states that a bankruptcy petition, once filed, operates as a stay of "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title."

bankruptcy. *See* R. 27 (nonpaginated brief); R. 32 at 5. She further asserted that Marcel's, having violated the stay, "had an affirmative duty to undo the filing of the complaint, once it learned of the bankruptcy." *Id.* Since the defendant failed to remedy the situation, the debtor insisted that Marcel's violation of the stay became a willful violation. *See* R. 27; R. 32 at 6-7. According to Bennett, the continuation of Marcel's state court action and subsequent garnishment of her wages were willful stay violations pursuant to § 362(h).<sup>3</sup>

In its summary judgment motion, Marcel's responded that the bankruptcy court, a court of equity, should not overlook the debtor's misdeeds and punish the victim of her theft. *See* R. 23 at 5. It pointed out that Bennett knew, when she filed bankruptcy, that there were pending criminal charges and that she stole money from her former employer. She knew of Marcel's state court lawsuit two weeks later. *See id.* at 7; R. 33 at 1-2. Because Bennett failed to amend her schedules to include Marcel's, Marcel's contended that it never had the opportunity to seek relief from the automatic stay or to complain that her debt to Marcel's was nondischargeable. *See* R. 23 at 8. After asserting that it was "only fair" that Bennett repay some of the funds she stole from Marcel's, the defendant asked that the court retroactively annul or modify the automatic stay and allow Marcel's judgment to stand.<sup>4</sup> *See id.* at 11.

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<sup>3</sup> Section 362(h) is a new provision, added by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. It provides that the automatic stay pertaining to certain personal property of the estate or the debtor is terminated if the debtor fails to comply timely with specific § 521 requirements. The former § 362(h) has been redesignated as § 362(k), and its provisions have been embellished. It now states:

(k)(1) Except as provided in paragraph (2), 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.

(2) If such violation is based on an action taking by an entity in the good faith belief that subsection (h) applies to the debtor, the recovery under paragraph (1) of this subsection against such entity shall be limited to actual damages.

11 U.S.C. § 362(k).

<sup>4</sup> The Special Order confirming the debtor's chapter 13 plan, entered on December 1, 2006, stated that the parties had agreed that Marcel's objection to the confirmation of the debtor's plan and the status of Marcel's claim would be determined after this adversary proceeding is resolved. *See* R. 60 (Case No. 06-31002).

## Discussion

Each party has filed a motion for summary judgment. This court renders summary judgment only if the record shows that “there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c); Fed. R. Bankr. P. 7056; *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). The moving party bears the initial burden of demonstrating that no genuine issue of material fact exists. *See Celotex*, 477 U.S. at 323. If the moving party satisfies its initial burden, then the nonmoving party must “go beyond the pleadings and by [its] own affidavits, or by the ‘depositions, answers to interrogatories, and admissions on file,’ designate ‘specific facts showing that there is a genuine issue for trial.’” *Id.* at 324 (quoting Fed. R. Civ. P. 56(e)). The court neither weighs the evidence nor assesses the credibility of witnesses. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S. Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

When, as in this case, the parties have filed cross motions for summary judgment, the court must examine the evidence and “construe all facts and inferences therefrom ‘in favor of the party against whom the motion under consideration is made.’” *In re United Air Lines, Inc.*, 453 F.3d 463, 468 (7th Cir. 2006) (quoting *Kort v. Diversified Collection Servs., Inc.*, 394 F.3d 530, 536 (7th Cir. 2004)). Summary judgment must be granted “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” *Celotex*, 477 U.S. at 322.

When a debtor files a bankruptcy petition under any chapter of the Bankruptcy Code, he or she is protected immediately and automatically by the Code’s broad stay of all litigation and other actions against the debtor that are attempts to enforce or collect prepetition claims. 11 U.S.C. § 362(a)(1), (6).

Formal service of process is not required. Because the stay is imposed automatically, and often without notice to parties who may be stayed, a party may violate the stay without realizing that it has taken effect. In other cases, a party may knowingly violate the stay, either in the erroneous belief that the party’s action is permitted or in disregard of the stay.

3 *Collier on Bankruptcy* ¶ 362.12 at 362-122 (Alan N. Resnick & Henry J. Sommer, eds.-in-chief, 15th ed. rev'd 2007). A debtor has a right of action for damages when the automatic stay is willfully violated. However, innocent conduct, even if it is a technical violation of the stay, is unlikely to provide a basis for damages or a contempt citation. *See id.* ¶ 362.03[8] at 362-32.

The events at the heart of this controversy began when Bennett, employed by Marcel's between 1999 and 2000, stole money from Marcel's. Marcel's filed a criminal complaint for theft against her on March 6, 2001, and a civil complaint against her on April 25, 2002. However, unbeknownst to Marcel's, Bennett had filed a chapter 7 bankruptcy petition on April 10, 2002. Even though Marcel's, an unscheduled creditor without notice of the filing, was unaware that the automatic stay had taken effect two weeks earlier, that stay affected all actions against the debtor to collect debts owed by the debtor. Bennett claims that Marcel's first violated § 362(a)(6), by filing its state court complaint against the debtor on April 25, 2002, and then violated § 362(h) (now designated § 362(k)), by continuing its action against the debtor once it knew of her bankruptcy filing.

The court notes at the outset that the debtor does not claim a violation of the stay in her present chapter 13 case. Rather, she refers to the automatic stay which went into effect when her chapter 7 bankruptcy case was filed on April 10, 2002. The fact that the chapter 7 case was closed on July 22, 2002, does not affect this court's jurisdiction to determine issues that are relevant to the case. *See Aiello v. Providian Fin'l Corp. (In re Aiello)*, 231 B.R. 693, 706-07 (Bankr. N.D. Ill. 1999), *aff'd*, 257 B.R. 245 (N.D. Ill. 2000), *aff'd*, 239 F.3d 876 (7th Cir. 2001) (citing cases). “[A] bankruptcy court with jurisdiction over the case before it may adjudicate presently relevant issues, even if they directly involve a debtor's closed case, as long as the debtor's asserted rights and remedies were created by the U.S. Bankruptcy Code.” *In re Giddens*, 298 B.R. 329, 337 (Bankr. N.D. Ill. 2003) (citing *In re Aiello*, 231 B.R. at 707). The case need not be reopened in order for the court to consider the issues before it, because the “reopening of a case is not a jurisdictional requirement.” *Id.* (citing *In re Statistical Tabulating Corp., Inc.*, 60 F.3d 1286, 1290 (7th Cir. 1995)). “The bankruptcy court may therefore

properly grant relief from a stay that arose under subsection (a) in a prior, different bankruptcy case before the same court.” *Williams v. Levi (In re Williams)*, 323 B.R. 691, 698 (9th Cir. B.A.P. 2005).

The automatic stay under review, then, is the stay which went into effect when the debtor’s chapter 7 bankruptcy case was filed. It remained in effect from April 10, 2002, until the debtor received her discharge on July 22, 2002. *See* 11 U.S.C. § 362(c)(2) (providing that the stay expires, by operation of law, when a debtor is granted or denied a discharge, the case is dismissed, or the case is closed, whichever is earliest).

The automatic stay remains in effect until the bankruptcy court disposes of the case or grants relief from the stay. Actions taken in violation of the automatic stay ordinarily are void.

*Middle Tennessee News Co., Inc. v. Charnel of Cincinnati, Inc.*, 250 F.3d 1077, 1082 (7th Cir. 2001) (citations omitted). During that period, the state criminal proceeding already was pending against the debtor and the state civil proceeding was initiated. It is a bedrock principle of bankruptcy law that a bankruptcy petition does not stay “the commencement or continuation of a criminal action or proceeding against the debtor.” 11 U.S.C. § 362(b)(1). Section 362(b)(1) covers all parts of a criminal proceeding; it does not bar the prosecution of criminal offenses or the sentencing of the convicted offender.

The debtor does not argue that the state criminal proceedings against her violated the automatic stay. Instead, she contends that the defendant’s filing of a state court civil suit against her constituted a stay violation. She admits that, because the defendant was not listed as a creditor in her bankruptcy, Marcel’s had no notice, and the violation therefore was a technical one. *See* R. 27 (nonpaginated). However, she claims that, once she informed Marcel’s counsel of her prior bankruptcy filing during her state court deposition in November 2002, the defendant had knowledge of the bankruptcy. Therefore, all acts taken after the deposition, she insists, were in willful violation of the automatic stay.

It is clear that the deposition occurred post-discharge, after the stay terminated. The debtor therefore does not present a claim for willful violation of the automatic stay under § 362(h), because no willful violation activity occurred while the automatic stay was in effect. *See Odom v. Columbia University*, 906 F. Supp. 188,

195 (S.D.N.Y. 1995) (no possibility that a post-discharge collection attempt was a § 362 violation). Section 362(h) was added to the stay provision to increase the court's power "to stay creditors' collection efforts in order to preserve the debtor's estate." *Aiello v. Providian Fin'l Corp.*, 239 F.3d 876, 880 (7th Cir. 2001). Once the discharge was entered and the estate was closed, under § 362(c)(2) no stay protection was available. *See In re Dill*, 300 B.R. 658, 664 (Bankr. E.D. Va. 2003). The stipulated evidence supports proof of Marcel's technical violation of the automatic stay under § 362(a)(6) but provides no basis for relief under § 362(h).

The defendant argued that the debtor's decision not to list Marcel's as a creditor reflected a failure in her duty, as a debtor, to disclose all her assets and liabilities on her schedules. *See R.23* at 7-8. According to the debtor, however, Bennett had no duty to include Marcel's as a creditor in her chapter 7 case because she did not owe a debt to Marcel's. *See R. 27; R. 32* at 7. The court disagrees. It finds that the debtor, knowing of the criminal charges initiated by Marcel's against her, failed to file a complete list of creditors under § 521(a)(1)(A). The debtor's explanation – that Marcel's did not yet hold a judgment against her – rings hollow. She knew that Marcel's had filed criminal charges against her prepetition and, two weeks after she filed bankruptcy, had filed civil charges to recoup money it claimed she stole from Marcel's business. It is clear that Marcel's had a potential claim against the debtor, even if Bennett disputed it. *See Farmers & Merchants Bank v. Gonzales (In re Gonzales)*, 355 B.R. 644, 647 (Bankr. N.D. Ohio 2006) (finding that debtor, the subject of a criminal investigation, was required to disclose in her petition and schedules her potential liability to plaintiff in civil lawsuit, as well). Because Bennett failed to list or schedule Marcel's during the bankruptcy proceeding, Marcel's was unable to file a proof of claim or seek denial of discharge or a determination of the dischargeability of the debt owed to the defendant.

Two weeks after the chapter 7 bankruptcy petition was filed, Marcel's filed the state civil suit against her. Bennett again gave no notice to anyone. She failed to advise Marcel's or the state court of the bankruptcy. In addition, the debtor did not amend her schedules to include Marcel's as a creditor. *See Jaeger v. Clear Wing Productions, Inc.*, 465 F.Supp.2d 879, 882 (S.D. Ill. 2006) ("The caselaw plainly holds that a debtor must amend

his pleadings whenever circumstances change.”); *In re Massa*, 217 B.R. 412, 418 (Bankr. W.D.N.Y. 1998) (“If the Debtor had properly performed his duties under Section 521(1) and Rules 1007(a) and (b)(1), he would have listed the [] creditors and fully disclosed the pending State Court Action, and all of the time and resources expended in this matter could have been avoided.”), *aff’d*, 187 F.3d 292 (2d Cir. 1999). Because of the debtor’s conduct, Marcel’s had neither notice nor knowledge of the debtor’s filing of a bankruptcy petition during the time that the automatic stay was in effect, between April 10 and July 22, 2002.

The act which violated the automatic stay was the defendant’s filing of the state court lawsuit. If the debtor had given Marcel’s notice of the bankruptcy filing during the pendency of the case, the defendant would have been under an affirmative duty to respond by undoing the technical violation or remedying the situation. *See, e.g., In re Taylor*, 190 B.R. 459, 461 (Bankr. S.D. Fla. 1995). Indeed, at that incipient stage of the state court case, the withdrawal of the complaint would have been simple. However, it is undisputed that the defendant was unaware of its technical violation of the automatic stay throughout the debtor’s chapter 7 bankruptcy. Moreover, there is no allegation of conduct on the part of the defendant that escalated the technical violation into a willful violation of the automatic stay before the debtor was discharged. The case law uniformly holds that a mere technical violation of the automatic stay does not warrant an award of damages, *see McMullen v. Sevigny (In re McMullen)*, 386 F.3d 320, 330 (1st Cir. 2004), or sanctions, *see In re Welch*, 296 B.R. 170, 172 (Bankr. C.D. Ill. 2003). No evidence or arguments were presented by the debtor to demonstrate that the defendant’s unknowing and merely technical breach of the stay deserves any damage award.

When Bennett was granted a discharge under § 727, the debts listed in her bankruptcy case were discharged and the automatic stay expired. However, a § 727 discharge “does not discharge an individual debtor from any debt – neither listed nor scheduled under section 521(1).” 11 U.S.C. § 523(a)(3) (stating which unlisted, unsecured debts are not discharged); *see also Gagan v. American Cablevision, Inc.*, 77 F.3d 951, 968 (7th Cir. 1996) (concluding that the discharge order did not discharge debt to plaintiff, who had no notice of the bankruptcy until after the discharge order); *In re Barnes*, 969 F.2d 526, 528 (7th Cir. 1992) (“A discharge in bankruptcy does

not discharge any debt not listed in the debtor's schedule of debts unless the creditor 'had notice or actual knowledge' of the bankruptcy proceeding in time to make a timely filing in the proceeding.") (quoting § 523(a)(3)(A)). The court determines that no debt to Marcel's was listed or scheduled in Bennett's bankruptcy (even though the debtor knew full well of the criminal and civil actions Marcel's had brought in state court) and therefore that no debt to Marcel's was discharged at the conclusion of Bennett's chapter 7 bankruptcy.<sup>5</sup> Consequently, the discharge injunction of § 524, which took effect on July 22, 2002, and which enjoined any entity from starting or continuing to act in order to collect a discharged debt, did not enjoin Marcel's or its action in state court.

Because the parties agree that the defendant's filing of the state court civil action was a technical violation of the automatic stay, the defendant requested an annulment or modification of the stay retroactively in order to cure its inadvertent stay violation and to ratify or validate its filing of the state court complaint. *See* R. 23 at 6-7. The court is given the power to grant such relief under § 362(d), which states, in pertinent part:

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay — (1) for cause . . . .

11 U.S.C. § 362(d). "Whether to annul the automatic stay is a decision committed to the bankruptcy court's discretion." *In re Myers*, 491 F.3d 120, 128 (3d Cir. 2007). Whether "cause" exists to grant such extraordinary relief must be determined by the facts of the case. *See In re Confidential Investigative Consultants, Inc.*, 178 B.R. 739, 751-52 (Bankr. N.D. Ill. 1995). The determination is often made by balancing equitable considerations. *See In re Myers*, 491 F.3d at 129; *In re Gossett*, 369 B.R. 361, 376 (.Bankr. N.D. Ill. 2007); *Christian v. Citibank, F.S.B.*, 231 B.R. 288, 289-90 (N.D. Ill 1999). Courts have suggested factors to weigh in the decision:

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<sup>5</sup> The court is not making a determination on the nondischargeability of that debt. Even though the defendant asserted that Bennett's "theft would be within the exception to discharge found in Section 523(a)(4)," R. 30 at 3, dischargeability is not an issue in this proceeding. Dischargeability determinations are raised by the filing of a complaint in an adversary proceeding, not in this context. Moreover, facts concerning the debtor's guilty plea and the conditions of her sentence may affect a dischargeability determination. Those facts and issues are not before this court in this adversary proceeding.

- (1) whether the creditor was aware of the filing or encouraged violation of the stay;
- (2) whether the debtor engaged in inequitable, unreasonable or dishonest behavior; and
- (3) whether the creditor would be prejudiced.

*In re Myers*, 491 F.3d at 129; *see also Easley v. Pettibone Michigan Corp.*, 990 F.2d 905, 911 (6th Cir. 1993) (concluding that “only where the debtor unreasonably withholds notice of the stay and the creditor would be prejudiced if the debtor is able to raise the stay as a defense, or where the debtor is attempting to use the stay unfairly as a shield to avoid an unfavorable result, will the protections of section 362(a) be unavailable to the debtor”). Some appellate courts state that bankruptcy courts have “wide latitude in crafting relief”; others observe that stay relief is appropriate only in “extreme circumstances.” *See In re Myers*, 491 F.3d at 129 (reviewing case law). The *Myers* court noted in particular the Ninth Circuit’s position that “retroactive annulment may be appropriate where the bankruptcy filing has been in bad faith,” and concluded that “balancing the equities is the appropriate test.” *Id.*(citing *Phoenix Bond & Indemnity Co. v. Shamblin (In re Shamblin)*, 890 F.2d 123, 126 (9th Cir. 1989)). The creditor first must show circumstances warranting annulment, and then the debtor has the burden of proving that cause does not exist to annul or modify the stay. *See* 11 U.S.C. § 362(g); *In re Barr*, 318 B.R. 592, 599 (Bankr. M.D. Fla. 2004); *In re Syed*, 238 B.R. 126, 132 (Bankr. N.D. Ill. 1999).

The usual procedure for obtaining an annulment of the automatic stay is that the creditor request relief pursuant to § 362(d) and demonstrate cause for annulment at a hearing. There are cases, however, in which the court has made the determination in the adversary proceeding before it, without a hearing. In *Reichenbach v. Kizer (In re Reichenbach)*, 174 B.R. 997 (Bankr. E.D. Ark. 1994), for example, the automatic stay issue was raised in the context of a motion for summary judgment. The court found that, “under the particular circumstances of this case, where the debtor raises the voidness of the act as a shield despite his failure to provide notice of the bankruptcy to the creditor, the Court may decide it in this adversary proceeding.” *Id.* at 1002 (citing cases). In this case, as well, this court finds that the uncontested facts herein undeniably favor an annulment of the automatic stay.

In its review of the cases granting and denying retroactive annulment of the stay, this court finds that the circumstances usually justifying annulment involved wrongdoing on the part of a debtor and innocent (or less improper) acts on the part of a creditor who was unaware of the bankruptcy. *See, e.g., In re Myers*, 491 F.3d at 129-30; *In re Calder*, 907 F.2d 953, 956-57 (10th Cir. 1990); *In re Smith Corset Shops*, 696 F.2d 971, 976-77 (1st Cir. 1982); *Allen v. Wells Fargo Bank Minnesota, N.A.*, 334 B.R. 746, 754 (D.D.C. 2005); *In re Barr*, 318 B.R. at 599; *In re Syed*, 238 B.R. at 132-33; *In re Pulley*, 196 B.R. 502, 505-06 (Bankr. W.D. Ark. 1996). The Seventh Circuit Court of Appeals, in *Mathews v. Rosene*, 739 F.2d 249 (7th Cir. 1984), reviewed a case in which the debtor “unreasonably and inexcusably delayed asserting his claim against state court jurisdiction to the bankruptcy court” and in which the creditor “would be seriously prejudiced if the state court order is voided.” *Id.* at 251. Recognizing that “[s]uspension of Section 362 automatic stay provisions may be consonant with the purposes of the Bankruptcy Act when equitable considerations weigh heavily in favor of the creditor and the debtor bears some responsibility for creating the problems,” it affirmed the district court’s application of the equitable doctrine of laches, which similarly defeated the debtor’s claims. *Id.*

Guided by the factors listed above and the balancing of equitable considerations reflected in the analyses of previous court decisions, this court finds that there is cause herein to grant the defendant’s request for relief under § 362(d). It is clear that the defendant was unaware of the debtor’s bankruptcy filing and that the debtor intentionally failed to notify the defendant of her bankruptcy at any time during the bankruptcy proceedings. The court finds that the debtor, by unreasonably withholding notice of the automatic stay, engaged in inequitable behavior to the prejudice of the defendant. It also finds that the debtor has asserted a five-year-old violation of the stay “unfairly as a shield to avoid an unfavorable result.” *See Easley*, 990 F.2d at 911. In light of that misuse of the automatic stay, the court determines that the protections of § 362(a) are unavailable to this debtor. *See id.*; *see also In re Pulley*, 196 B.R. at 505-06; *In re Reichenbach*, 174 B.R. at 1002. In the interests of equity and judicial economy, this court finds that retroactive relief is appropriate under § 362(d) to annul the

automatic stay retroactively and thereby to validate the defendant's filing of its state court action during the debtor's bankruptcy, an act only technically in violation of the automatic stay.

In summary, the court finds that there are no genuine issues of material fact in this adversary proceeding. Moreover, there is no dispute concerning the essential facts necessary to determine whether the defendant violated the automatic stay provisions of § 362(a)(6) and § 362(k). From the stipulated facts it is clear that the defendant, throughout the debtor's chapter 7 case, was unaware of the bankruptcy and therefore of its technical violation of the stay. Because it only learned of the bankruptcy four months after the debtor's case was closed, the defendant as a matter of law did not willfully violate the automatic stay under § 362(k). In light of the debtor's decision not to include the defendant in her bankruptcy schedules or to inform the defendant of the bankruptcy proceedings, the court finds that no award of damages or sanctions pursuant to § 362 is warranted. It therefore denies the debtor's request for turnover of the \$6,673.18 in wages garnished by the defendant. The court also determines that the debtor's § 727 discharge of her debts did not discharge the unscheduled debt to Marcel's or include the defendant's state court action under the § 524 discharge injunction. Finally, the court finds that, in view of the undisputed facts and the balancing of the equities, the automatic stay is annulled retroactively and the defendant's filing of its state court action during the debtor's bankruptcy is validated. Accordingly, the court denies the debtor's summary judgment motion on her Complaint and grants the defendant's summary judgment motion.

#### Conclusion

For the reasons presented in this Memorandum of Decision, the court denies the Motion for Summary Judgment on Debtor's Complaint filed by Tanya Christine Bennett, plaintiff in this adversary proceeding, and grants the Motion for Summary Judgment by Marcel's Tanning Salons, Inc., defendant herein.

SO ORDERED.

/s/ Harry C. Dees, Jr.  
Harry C. Dees, Jr., Chief Judge  
United States Bankruptcy Court