

UNITED STATES BANKRUPTCY COURT
 NORTHERN DISTRICT OF INDIANA
 HAMMOND DIVISION AT HAMMOND

IN RE: CASE NO. 06-61618)	
DAVID R. SROGE)	
Debtor)	
*****)		
DAVID R. SROGE)	
)	ADV. PROCEEDING NO. 07-2037
Plaintiff)	
v.)	
ANNA CLAUDETTE SLOAN)	
)	
Defendant)	

FINDINGS OF FACT, CONCLUSIONS
 OF LAW, DECISION, AND JUDGMENT

I

Statement of Proceedings

This Adversary Proceeding came before the Court for a Bench Trial on December 12, 2007 on Adversary Complaint filed by the Plaintiff and then Chapter 13 Debtor David R. Sroge (“Debtor”) on April 3, 2007 versus the Defendant-Creditor Anna Claudette Sloan (“Sloan”) pursuant to §362(k) for an alleged violation of the §362(a) Automatic Stay by Sloan.¹

II

¹

The Debtor’s Main Chapter 13 Case No. 06-61618 was filed on August 10, 2006 and dismissed on December 5, 2007 based on a Motion by the Chapter 13 Trustee for a default in Plan payments. The fact the Debtor’s Main Case was dismissed on December 5, 2007 and the Bench Trial for a Stay Violation by Sloan as alleged by the Debtor in this Adversary Proceeding was held thereafter on December 12, 2007, or after the Debtor’s case was dismissed, does not deprive this Court of subject-matter jurisdiction. It has been expressly held by the Seventh Circuit that an action for the violation of the Automatic Stay pursuant to §362(h) (now §362(k)) survives the termination of the underlying bankruptcy. See Price v. Rockford, 947 F.3d 829, 821-832 (7th Cir. 1991). See also In re Burgner, 218 B.R. 413, 415 (Bankr. E. D. Tenn. 1998) (collecting cases).

The Court would also notice that in the case of In re Consolidated Industries Corp., 360 F.3d 712 (7th Cir. 2004), it was held that an adversary proceeding is not the proper vehicle to present a contempt claim, as civil contempt is a method of enforcing a Court order, not an independent cause of action. Id. 360 F.3d at 716. The proper vehicle to enforce a Court order is a Motion in the original case. Id. However, this procedural defect as to this Adversary Proceeding is not jurisdictional, and a harmless error, as the Defendant received adequate notice of the Plaintiff’s Claim.

Findings of Fact
A
Findings of Fact Based on Judicial Admission
in the Answer by Sloan to the Debtor's Complaint

The Debtor's Adversary Complaint alleges, in part, as follows;

2. On August 23, 2005 Defendant Anna Sloan filed a complaint in the Lake Superior Court under Cause 45D07-0508-SC-01504 alleging that she was owed a debt by David Sroge, Plaintiff/Debtor.

3. On August 10, 2006, the Debtor filed his Chapter 13 Petition.

4. Defendant Anna Sloan was listed as a creditor in Debtor's initial filing and was notified of the Debtor's case by the general notice provided to all creditors by the Clerk of this Court.

5. On August 24, 2006, the Defendant Anna Sloan filed a Motion for Proceedings Supplemental before the Lake Superior Court in Case 45D07-0508-SC-2504.

* * * *

7. Defendant Anna Sloan appeared at the Debtor's Section 341 hearing on September 21, 2006.

8. On October 30, 2006, Defendant Anna Sloan appeared before the Lake Superior Court in Cause 45D07-0508-SC-2504 and again moved the Court to proceed with her case in State Court against David Sroge. Notice of the Debtor's Chapter 13 case was ten again provided to the Defendant via mail and to the Lake Superior Court via fax and mail.

* * * *

10. On February 5, 2007, the Defendant's "friend" Joe Jenkins appeared before the Lake Superior Court and moved the Court to reset the case for proceedings supplemental.

* * * *

12. On March 12, 2007, the Defendant appeared before the Lake Superior Court in Cause 45D07-0508-SC-2504 and moved the Court to issue a warrant for the arrest of the Debtor.

* * * *

14. Despite actual notice of the David Sroge's Chapter 13 Case, Anna Sloan has

continued to harass the Debtor in an attempt to collect her alleged debt.

The Debtor's Complaint alleges that based on the foregoing Sloan violated the §362 Automatic Stay and prayed generally that Sloan be determined to be in contempt of Court, enjoining Sloan from any further action in violation of §362, and generally to pay the Debtor's costs. The prayer to the Complaint did not specifically allege that the Debtor incurred any pecuniary loss or damages as a direct result of the alleged stay violations by Sloan other than he incurred "costs".

The Answer filed by Sloan on April 23, 2007 expressly admitted without qualification Paragraphs numbered 2, 3, 4, and 7 of the Debtor's Complaint as set out above. Thus, Sloan has judicially admitted by her Answer the following:

1. That on August 23, 2005 she filed a Complaint versus the Debtor in the Lake Superior Court alleging she was owed a debt by the Debtor (Answer; Par. No. 2).
2. That subsequent to that time, the Debtor had filed his Chapter 13 Petition under Case No. 06-61618 on August 10, 2006 (Answer; Par. No. 3).
3. That on August 24, 2006, she filed a Motion for Proceedings Supplemental versus the Debtor in the Lake Superior Court on August 24, 2006, or 14 days after the Debtor had filed his Chapter 13 Petition on August 10, 2006 (Answer: Par. No. 5).
4. That on September 21, 2006, she appeared at the Debtor's §341 Meeting of Creditors held on September 21, 2006 (Answer; Par. No. 7).

In addition, in her Answer, Sloan made certain pretrial judicial admissions, which were qualified by certain denials, these were as follows:

1. That she appeared in the Lake Superior Court on October 30, 2006, based on her Motion for Proceedings Supplemental filed on August 24, 2006, but denied she moved the Lake Superior Court to proceed with her case, and when the Debtor did not appear, the Court on its own Motion set the matter for a citation hearing on October 30, 2006 (Answer; Par. No. 8).
2. That a friend of Sloan, one Joe Jenkins, appeared in the Lake Superior Court for a hearing set on February 5, 2007, but that said hearing had been set on the Court's own Motion on January 8, 2007; that Jenkins requested a continuance of the hearing as Sloan could not appear; and, that the Court continued the hearing to March 12, 2007 (Answer; Par. No. 10).

3. That she appeared before the Lake Superior Court on March 12, 2007, but denied that she moved the Court to issue a warrant for the arrest of the Debtor, and that the Lake Superior Court Ordered the issuance of a “Citation” on its own Motion (Answer; Par. No. 12).

Finally, Sloan expressly denied the Debtor’s allegation at Paragraph No. 14 of his Complaint that despite her actual knowledge of the Debtor’s Chapter 13 case, she continued to harass the Debtor, in that the only reason she appeared at the hearings in the Lake Superior Court is because the Court continued to set said hearings in spite of the fact that the Lake Superior Court was aware of the Debtor’s Chapter 13 Petition (Answer; Par. No. 14).

B

Findings of Fact Based on Judicial Notice of Record
in Main Case of Debtor Case No. 06-61618.²

The Court takes judicial notice of the Record in the Debtor’s Chapter 13 case No. 06-61618 as to the following:

1. That the Debtor filed his Chapter 13 Petition on August 10, 2006 (Docket No. 1).
2. That the Debtor’s Verification of Creditor Matrix dated August 10, 2006 and filed on August 10, 2006, listed Anna Sloan as a Creditor (Docket No. 1).
3. That the Debtor’s Schedule F, Creditors Holding Unsecured Nonpriority Claims, filed on August 10, 2006 listed Sloan as a Creditor in the amount of \$4,000.00 as “Disputed Collection Account” with an address of 640 Montgomery Street, Gary, IN

2

Federal Rule of Bankruptcy Procedure 9017 provides that the Federal Rules of Evidence apply in cases under the Code. See also Fed. R. Evid. 1101(a) and (b). Federal Rule of Evidence 201 provides that the Court, whether or not requested, may take judicial notice of adjudicative facts at any stage of the proceedings. Federal Rule of Evidence 201 is the only evidentiary rule on the subject of judicial notice.

This Court has held in In re Snider Farms, Inc., 83 B.R. 977, 986 (Bankr. N. D. Ind. 1988), citing, In re Woodmar Realty, 294 F.2d 785, 788 (7th Cir. 1961), Cert. den. 369 U. S. 803, 82 S. Ct. 643, 7 L. Ed. 2d 5550 (1962), that a bankruptcy court is duty bound to take judicial notice of its records and files. See United States V. Wood, 925 F.2d 1580, 1582 (7th Cir. 1991) (in nondischargeability proceedings the court can take judicial notice of matters of public record); Friedrich v. Mottaz, 294 F.3d 864, 870 (7th Cir. 2002) (bankruptcy judge did not err by taking judicial notice of schedules filed by debtor in main case in §548(a)(1) adversary proceeding); State of Florida Board of Trustees of Internal Improvement Trust Fund v Charley Toppino & Sons, Inc., 514 F.2d 700, 704 (5th Cir. 1975) (not error for a bankruptcy court to take judicial notice of related proceeding and records in cases before a court); In re E. R. Fegert, Inc., 887 F.2d 955, 957-58 (9th Cir. 1989) (the Court may take judicial notice of the file and record in the underlying case).

46403 (Docket No. 1)

4. That on August 14, 2006, the Clerk issued the Court's Notice of Chapter 13 Case, Meeting of Creditor's and Deadlines dated August 15, 2006, in which it was shown that the Petition date was August 10, 2006, and the §341 Meeting of Creditors was set for September 21, 2006 (Docket No. 6).

5. That on September 1, 2006, the EPIQ Systems, Inc. filed its Certificate of Service that the Notice of the Debtor's Chapter 13 Petition issued by the Clerk had been mailed to Anna Sloan by U. S. Mail at 640 Montgomery Street, Gary, IN 46403 on August 15, 2006 (Docket No. 31).

6. That the §341 Meeting of Creditors was commenced on September 21, 2006 and continued to October 23, 2006 (Docket No. 40).

7. That on April 13, 2007 Sloan filed her unsecured Claim No. 33 versus the Debtor's estate in the sum of \$4080.00 based on "fraud/felony". (See Claims Register maintained by Clerk).

C

Findings of Fact Based on
Testimony in Open Court and
Exhibits Admitted into Evidence

The Debtor's main case as to testimony in open Court, was primarily that of Sloan who was called as a Witness by the Debtor. Sloan testified as follows:

1. That she had Official Notice of the Debtor's Chapter 13 Petition from EPIQ Systems, Inc., on behalf of the Clerk of the Court, which was dated August 15, 2006, which was post-marked as being mailed on August 18, 2006 from Kansas City, Kansas, and which was received by her via U. S. Mail (Sloan Exh. No. 2).

2. That she denied that she had received Official Notice of the Debtor's Chapter 13 Petition from EPIQ Systems, Inc. on behalf of the Clerk, prior to when she filed her Motion for Proceedings Supplemental versus the Debtor in the Lake Superior Court on August 22, 2006, which was set for Hearing on September 25, 2006.

3. That she attended the meeting of the creditors held on September 21, 2006, and advised the Chapter 13 Trustee Paul Chael ("Trustee") that she did not think of herself as a creditor because she had not lent money to the Debtor, but that he had stolen money from her instead. She further advised the Trustee that she already had a judgment with the Lake Superior Court; that the Debtor was supposed to pay \$500.00 each month, and that he did not follow through with that. The Trustee's response was that the Debtor could not follow through with that now because he was in bankruptcy;

that everything has to be done pursuant to the plan and that she could object to the plan. Sloan further advised the Trustee that she had been told by a magistrate that what the Debtor had done was a felony, to which the Trustee responded that the bankruptcy did not apply to a criminal case.

4. That on September 25, 2006, she attended the hearing scheduled on the Motion for Proceedings Supplemental in the Lake Superior Court. The hearing was presided over by Magistrate Tammy Somers. She advised the Court that the Debtor had filed a bankruptcy and that she attended the meeting of the creditors. Neither at this point nor at any other time did the Court advise her that no further hearings could be held on this matter because of the bankruptcy filing. The Court set this matter for another hearing for October 30, 2006 without her requesting one. There was no discussion about the issuance of a citation to Debtor nor did she request that a citation be issued.

5. That she did not and does not know what a citation was to be requesting one.

6. That on its own initiative, the Lake Superior Court issued a citation to the Debtor on October 2, 2006.

7. That on October 30, 2006, counsel for the Debtor faxed a Notice of Pending Bankruptcy, which was filed with the Lake Superior Court.

8. That on that same day, she attended the hearing that had been set by Magistrate Somers. At the hearing, Magistrate Somers gave her a copy of the Notice of Pending Bankruptcy that had been filed. The Magistrate did not advise her that she could not proceed further with the case, but set it for another hearing for January 8, 2007, without her requesting another hearing date.

9. On January 8, 2007, she attended a hearing presided over by Magistrate Somers, who asked her if the bankruptcy case had been dismissed. She responded that she did not know because she had not received anything saying so. The Magistrate then set the case for another hearing for February 5, 2007. This hearing date was not requested by her.

10. That on February 5, 2007, she was unable to appear for the hearing set for that day and requested that her friend Joe Jenkins appear on her behalf. At the hearing presided over by Magistrate Somers, she set the case for another hearing for March 12, 2007.

11. That on March 12, 2007, she attended a hearing presided over by Magistrate Somers. Neither the Debtor nor his attorney had appeared. The Magistrate then asked her whether the Debtor's bankruptcy case had been dismissed. She told her that she thought she had seen something to the effect that the case had been dismissed. She responded that she did not know because she had not received anything saying so. The Magistrate then told her to go to the bankruptcy court to find out whether the case had been dismissed and if so, to bring back proof on the bankruptcy court's letterhead. She then advised the Court that she did not know where the bankruptcy court was located. The Magistrate instructed the bailiff to advise her as to where she should go. without her

requesting it, Magistrate Somers set the matter for another hearing for April 2, 2007. The Court did not give an indication to her that it was going to issue a citation against the Debtor that day.

12. That on April 2, 2007 she attended a hearing presided over by Magistrate Somers, who asked her whether she had gone to the bankruptcy court to determine whether the Debtor's bankruptcy case had been dismissed. She responded that she had not done so and that she did not know whether his case had been dismissed or not because she had not received anything to that effect. Without her requesting it, Magistrate Somers set the case for another hearing for April 27, 2007.

13. That on April 23, 2007, she attended a hearing presided over by Magistrate Somers. She showed the magistrate a copy of the Summons and Adversary complaint that had been filed against her by the Debtor. The Magistrate reviewed it and told her that she never should have received it; that the Magistrate would straighten this matter out; that she should give her name and telephone numbers to the bailiff and that the Magistrate would contact her later that day.

14. That after leaving the hearing, she went directly to the office of her attorney Rosalind Parr, who advised her that she would call Magistrate Somers to request that she not set this matter for further hearings.

15. That same day, Attorney Parr called Magistrate Somers and requested that she not set this matter for further hearings. Magistrate Somers advised Attorney Parr that she would continue the matter generally.

16. That at all times mentioned herein, she never thought of herself as a creditor since she had not lent any money to the Debtor and because the Debtor had stolen money from her.

17. That the only hearing that she requested to be set was the initial hearing on her Motion for Proceeding Supplemental filed on August 22, 2006. All other hearings were set on the initiative of Magistrate Somers.

The Debtor was also called as a Witness in his main case. His testimony was of little relevance to the Court in deciding this Adversary Proceeding. The Debtor acknowledged he owed a prepetition debt to Sloan, that he had promised to pay Sloan prepetition, and that criminal charges were pending against the Debtor by Sloan whereby he attempted to pay restitution to Sloan in the criminal case.

The cross-exam of Sloan by Counsel for Sloan also served by agreement of Sloan as a submission of Sloan's main case. No other witnesses were called.

There was admitted into evidence by Stipulation of the Parties, Sloan Deposition Exhibit No. 1, which was the Deposition Testimony of Tammy Somers, Magistrate of the Lake Superior Court, taken on October 31, 2007 by Sloan. the Magistrate deposed as follows:

1. That she presided at a hearing on Sloan's Proceeding Supplemental Motion set for October 30, 2006 (Dep: P. 10. LL 20-23).
2. That on October 30, 2006, the Attorney for the Debtor filed a Notice of Pending Bankruptcy and a Notice of Bankruptcy Filing signed by the Clerk of the Bankruptcy Court setting out the Bankruptcy Court and Bankruptcy Case Number of the Debtor, with the Lake Superior Court. Said Notices stated that the Automatic Stay was applicable. (Dep: P. 11. L. 1 + P. 12. LL 1-15. Dep. Exh. No. 1).
3. That Sloan appeared in the Lake Superior Court on January 8, 2006, and requested that the Court issue a Bench Warrant for the Debtor for failure to comply with a Court Order. Sloan also advised the Magistrate that the Debtor's Bankruptcy was dismissed. (Dep: P. 14. LL 3-22).
4. That Sloan was upset that she would not issue a Bench Warrant, she continued the hearing, and she told Sloan she had to provide the Court with information that the Bankruptcy was dismissed because the Court could take no further action once a Bankruptcy was filed. She reset the hearing as Sloan asked for time to get the information the Court requested. (Dept. P. 15. LL. 14-24).
5. That on an unspecified date, the Court bailiff told Sloan to call the Bankruptcy Court to find out whether the case was dismissed or not. Sloan was adamant that a Bench Warrant be issued, so she reset the hearing for April 2007. (Dep. P. 18. LL. 4-14).
6. That on April 23, 2007, Attorney Parr, as attorney for Sloan, called her and asked the Court to not set any more hearings. (Dep: P. 21 LL. 15-24).

III
Conclusions of Law
and
Discussion

No objection was made by counsel to the subject matter jurisdiction of this Court as to this matter. The Court finds subject matter jurisdiction to be present, pursuant to 28 U.S.C. §1334(b), and that this contested matter is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(A). Price v. Rochford,

947 F.2d 829, 832 + N. 1 (7th Cir. 1991) (Claim based on §362(h) (now §362(k) is a core proceeding) (citing, Barnett v. Stern, 909 F.2d 973, 981 (7th Cir. 1990)); In re Skinner, 917 F.2d 444, 448 (10th Cir. 1990); In re Walters, 868 F.2d 665, 669 (4th Cir. 1989); Budget Service Company v. Better Homes of Virginia, Inc., 804 F.2d 289, 292 (4th Cir. 1986).

It has been held that the Standard of Proof as to the violation of the Automatic Stay is by a preponderance of the evidence, rather than by the mere strict standard of clear and convincing evidence. See In re Johnson, 501 F.3d 1163 1170-71 + n. 5 (10th cir. 2007), noting a split by the Courts on the issue. See also, In re Spinner, 398 B.R. 84 94-95 + n. 2 (Bankr. N. D. GA 2008). However, in a nonbankruptcy context, the Seventh Circuit has held that to prevail on a motion for civil contempt, the party must prove by clear and convincing evidence that the opposing party violated a Court Order. Goluba v. The School District of Ripon, et. al., 45 F.3d 1035, 1037 (7th Cir 1995) (citing, Stotler and Co. v. Able, 870 F.2d 1158, 1163 (7th Cir. 1989)).

Nevertheless, the overwhelming majority of the Courts have applied the preponderance of the evidence standard in the context of an alleged stay violation. In re Johnson, 501 F.3d at 1171. n. 5. See e.g. In re McCarthey, 350 B.R. 820, 826 (Bankr. N. D. Ind. 2006); In re Galmore, 390 B. R. 901, 906-07 (Bankr. N. D. Ind. 2008). The Court concurs with the analysis of the Johnson court and decides that in the contest of an alleged violation of the Automatic Stay, the preponderance of the evidence standard should apply.

The automatic stay is self-executing, effective upon the filing of the bankruptcy petition. In re Gruntz, 202 F.3d 1074, 1081 (9th Cir. 2000). As stated by the Court in Matter of Holtkamp, 669 F.2d 505, 508 (7th Cir. 1982), the purpose of the automatic stay is to preserve what remains of the Debtor's insolvent estate and to provide a systematic equitable liquidation procedure for all creditors, secured, as well as unsecured, thereby preventing a chaotic and uncontrolled scramble for the Debtor's assets

in a variety of uncoordinated proceedings in different courts. “[T]he stay insures that the debtor’s affairs will be centralized, initially, in a single forum in order to prevent conflicting judgments from different courts and in order to harmonize all of the creditor’s interests with one another.” A.H. Robins Co. v. Piccinin, 788 F.2d 944, 998 (4th Cir. 1986) (quoting, Fidelity Mortgage Investors v. Camelia Builders, Inc., 550 F.2d 47, 55 (2nd Cir. 1976), cert. den. 429 U.S. 1093, 97 S. Ct. 1107, 51 L. Ed. 2d 540.) The stay is imposed automatically in order to give the bankruptcy court an opportunity to assess the debtor’s situation and to embark on an orderly course in resolving the estate. United States v. Michalek, 54 F.3d 325, 333 (7th Cir. 1995).

As soon as a petition in bankruptcy is filed the automatic stay provisions of 11 U.S.C. §362 takes effect, and prevents all pre-petition creditors from taking any action to collect their debts. Matter of Vitreous Steel Products Co., 911 F.2d 1223, 1231 (7th Cir. 1990); In re Price, 42 F.3d 1068, 1071 (7th Cir. 1994). The automatic stay is effective upon the date of filing, and formal service thereof is not required. Richard v. City of Chicago, 80 B.R. 451, 453 (N.D. Ill. 1987); In re Miller, 22 B.R. 479, 481 (D. Md. 1982); Morgan Guar. Trust Co. of New York v. Hellenic Lines, Ltd., 38 B.R. 987, 998 (S.D.N.Y. 1984).

The automatic stay is an injunction. Matter of James Wilson Associates, Inc., 965 F.2d 160, 166 (7th Cir. 1992). In re Gruntz, 202 F.3d 1074, 1082 (9th Cir. 2000) (the automatic stay is an injunction issuing from the authority of the bankruptcy court and is not subject to collateral attack in other courts). Although the automatic stay is imposed initially not by judicial decree, but by legislative command, it would exalt form over substance to maintain that the stay is not a judicial order. United States v. Michalek, 54 F.3d 325, 333 (7th Cir. 1995). Because the automatic stay is essentially a court ordered injunction, Matter of James Wilson Associates, Inc., 965 F.2d at 166, Michalek, 54 F.3d at 333, any person or entity who violates the stay may be found in contempt of court. Carver v. Carver, 954

F.2d 1573, 1578 (11th Cir. 1972) cert. den. 113 S. Ct. 496; In re Chateaquay Corp., 920 F.2d 183, 186-87 (2nd Cir. 1990).

The cases are rather consistent in holding that once a creditor has been notified of the bankruptcy filing, and the automatic stay, after initially taking certain action versus the property of the Debtor's estate without knowledge of the bankruptcy, the creditor has a duty to inquire as to the scope of the stay, and to take affirmative steps to restore the status quo, at the time of the filing of the bankruptcy petition. That is, the creditor should undo its postpetition collection activities without the Debtor having to seek affirmative relief from the bankruptcy court, and failure to do so may subject the creditor to sanctions for violating the automatic stay. See In re Meis-Nachtrab, 190 B.R. 302, 307 (Bankr. N.D. Ohio 1995); In re Smith, 170 B.R. 111, 115 (Bankr. N.D. Ohio 1994); In re Roberts, 175 B.R. 339, 343 (9th Cir. BAP 1994); In re Fry, 122 B.R. 427, 429-30 (Bankr. N.D. Okla. 1990); In re Lile, 103 B.R. 830, 837 (Bankr. S.D. Texas 1989); In re Sams, 106 B.R. 485, 490 (Bankr. S.D. Ohio 1989) (collecting cases); In re Dumgey, 99 B.R. 814, 816-17 (Bankr. S.D. Ohio 1989); In re Holman, 92 B.R. 764, 769 (Bankr. S.D. Ohio 1998); In re Skinner, 90 B.R. 470, 480 (D. Utah 1988); In re Wright, 75 B.R. 414, 416 (M.D. Fla. 1987); In re Stephen W. Grosse, P.C., 68 B.R. 847, 850 (Bankr. E.D. Pa. 1987); Matter of DePoy, 29 B.R. 471, 476 (Bankr. N.D. Ind. 1983); In re Lowry, 25 B.R. 52, 56 (Bankr. E.D. Mo. 1982); In re Miller, 22 B.R. 479, 481 (D. Md. 1982); In re Johnson, 18 B.R. 755, 757 (Bankr. S.D. Ohio 1982); In re Warimer, 16 B.R. 216, 218 (Bankr. N.D. Tex. 1981); In re Elder, 12 B.R. 491, 495-96 (Bankr. M.D. Ga. 1981).

Where there is uncertainty about an order of the bankruptcy court, or the applicability of the automatic stay, the creditor may petition the court for clarification, and otherwise the creditor takes a calculated risk under threat of contempt when he undertakes his own determination of what the order means. In re Galmore, 390 B.R. 901, 907 (Bankr. N. D. Ind. 2008); Matter of Batala, 12 B.R. 397, 400

(Bankr. Ga. 1981); In re Clark, 49 B.R. 704, 707 (Bankr. Guam 1985); In re Kearns, 161 B.R. 701, 705 (D. Kan. 1993), opinion modified on reconsideration, 168 B.R. 423; In re Gray, 97 B.R. 930, 936 (Bankr. N.D. Ill. 1989))

Although a postpetition act of a creditor in violation of the automatic stay is void even if the creditor has no notice thereof, in order to find a creditor in contempt of court for violation of the automatic stay, it must be shown that the respondent had either official or actual knowledge of the existence of debtor's bankruptcy case. If actual knowledge of the Bankruptcy is shown official notice thereof is not necessary to sustain a contempt citation. In re De Jesus Suez, 721 F.2d 848, 853 (Puerto Rico, 1983); In re Smith Corset Shop, Inc., 696 F.2d 971, 977 N. 7 (1st Cir. 1982); Matter of Hailey, 621 F.2d 169, 172 (5th Cir. 1980); Haile v. New York State Higher Education Service Corp., 90 B.R. 51, 55 (W.D.N.Y. 1988); In re Skinner, 90 B.R. 470, 479-80 (D. Utah 1988); In re Calender, 89 B.R. 280, 282-83 (Bankr. D. Columbia 1988); Matter of Carter, 16 B.R. 481, 483 (W.D. Mo. 1981), aff'd, 691 F.2d 390, 391-92; In re Clifton Steel Corp., 35 B.R. 732, 736 (N.D.N.Y. 1983); In re Edwards, 5 B.R. 663, 665 (Bankr. M.D. Ala. 1980); Matter of Holland, 21 B.R. 681, 689 (Bankr. N.D. Ind. 1982); In re Waters, 22 B.R. 387, 388 (Bankr. N.D. Tex. 1982).

The debtor has the burden of proving the creditor with actual notice. Once the creditor receives actual notice, the burden shifts to the creditor to prevent violations of the automatic stay. Fleet Mortg. Group, Inc. v. Kaneb, 196 F.3d 265, 269 (1st Cir. 1999).

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8 (“BAPCPA”) became effective as to most provisions thereof and is applied prospectively to cases filed on or after October 17, 2005. See in Re Sidebottom, 430 F.3d 893, 897 + n.1 (7th Cir. 2005).

Prior to the enactment of BAPCPA, §362(h) provided as follows:

(h) 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.

Former Section 362(h) was amended and redesignated as §362(k). Section 362(k)(2) was added and limits the damages that may be received if a creditor violates the Stay in the good faith belief that the Stay had been terminated. See Collier on Bankruptcy, 15th Ed. Rev., Par. §362. L.H. [4][g], P. 362-142.

Section 362(k) as presently constituted now provides as follows:

(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 taken by an entity in the good faith belief that subsection (h) applies to the debtor, the recover under paragraph (1) of this subsection against such entity shall be limited to actual damages.

In that the Debtor filed his Chapter 13 Petition on August 10, 2006, §362(k) is applicable to this Adversary Proceeding.

As noted by the Court in In re Lightroot, 339 B.R. 141 (Bankr. E. D. PA. 2008), §362(k) provides for an express, limited, statutory good faith exception in two distinct ways: (1) the limitation applies only to good faith violation of §362(h), which relates only to action taken in the good faith belief that the Automatic Stay had terminated because a debtor fails to perform his or her obligations under §521(a)(2) in a timely manner; and (2) it precludes only the imposition of punitive damages and in no situations restricts the imposition of “actual damages” for willful violation of the Automatic Stay. Id. 399 B.R. at 149-50. Thus, if the conduct in issue does not involve a statement of intention under §521, alleged good faith is “irrelevant”. Id. 399 B.R. at 150 (citing In re Mu'min, 374 B.R. 149, 168-69 (Bankr. E. D. PA 2007)).

It has been consistently held that The creditor’s “good faith” belief that he is not violating the automatic stay is not determinative of “willfulness” damages under §362(k) (Former §362(h). In re

Walker, 168 B.R. 114, 121 (E.D. La. 1994), aff'd., 51 F.3d 562; In re South Bay Medical Associates, 184 B.R. 963, 970 (C.D. Cal. 1995); In re Esposito, 154 B.R. 1011, 1014 (Bankr. N.D. Ga. 1993); In re Betts, 165 B.R. 233, 241-42 (Bankr. N.D. Ill. 1994); In re Alberto, 119 B.R. 985, 993 (Bankr. N.D. Ill. 1990) reconsid. den. 121 B.R. 527. Thus, a good faith belief in a right to the property is not relevant to a determination of whether the violation is wilful. Fleet Mortg. Group, Inc. v. Kanet, 196 F.3d 265, 269 (1st Cir. 1999); In re Johnson, 501 F.3d 1103, 1172 (10th Cir. 2007). Ignorance of bankruptcy law does not excuse anyone involved in a wilful violation. In re Halas, 249 B.R. 182, 191 (Bankr. N. D. Ill 2000).

The case law is clear that a “willfull violation” of the Stay does not require a specific intent to violate the Stay; it is sufficient that the creditor takes questionable action despite the awareness of the pending bankruptcy proceeding. In re Radcliffe, 563 F.3d 67, 631 (7th Cir. 2009). See also In re Price, 42 F.3d 1068, 1071 (7th Cir. 1994) (a “willfull violation” does not require a specific intent to violate the stay; violation by IRS was wilful as was aware of bankruptcy proceeding and declined to halt collection); In re Landsdale Family Restaurants, Inc., 977 F.2d 826, 829 (3rd Cir. 1992) (violation is “willfull” if creditor knows of stay and takes intentional action violating it, and good faith belief insufficient to escape liability); In re Riddick, 231 B.R. 265, 267-68 (Bankr. W. D. Ohio 1999) (“willfull” in §362(h) (now §362(k)) has been interpreted to simply mean acting intentionally and deliberately while knowing of a pending bankruptcy) (collecting cases).

The Court finds that the testimony of Sloan, to a certain extent, was a somewhat credible and an accurate recounting of what transpired postpetition between Sloan, the Debtor, and the Lake Superior Court as far as it went, i.e. subsequent to the filing of the Debtor’s Chapter 13 Petition on August 10, 2006, as further explained and qualified by the Deposition testimony of Magistrate Somers of the Lake Superior Court.

However, notwithstanding this finding, the Court decides that nevertheless Sloan willfully

violated the Automatic Stay by virtue of her admitted conduct. It is clear that except for the filing of a Motion for Proceedings Supplemental versus the Debtor in the Lake Superior Court on August 22, 2006 Sloan had at all relevant times both official and actual knowledge of the Debtor's Chapter 13 Petition. The Court will not make any finding of contempt based on the August 22, 2006 Motion by Sloan, as it was clear she did not have actual notice of the Debtor's bankruptcy at that time, and the only competent evidence of official notice on August 22, 2006 when she filed her Motion for Proceedings Supplemental, was that she had not received the Bankruptcy Notice from the Clerk by U. S. Mail prior to the filing of that Motion.

The assertion by Sloan that she was not a prepetition creditor of the Debtor, in that the Debtor committed a criminal act of theft is clearly untenable, incorrect, and misplaced. Sloan had obtained a prepetition Civil Judgment versus the Debtor in the Lake Superior Court, and had filed a Claim versus the Debtor's Chapter 13 estate. Thus, Sloan was a "creditor" as defined by §101(10), and she had a prepetition "Claim" versus the Debtor's estate, pursuant to §101(5), the collection of which was automatically stayed pursuant to §362(a)(1) and (2).

The Court would note in passing that, as Sloan was advised by the Chapter 13 Trustee, she was not stayed from the commencement or continuation of a criminal proceeding versus Debtor for theft pursuant to §362(b)(1). See e.g. In re Gruntz, 202 F.3d 7074, 1087-88 (9th Cir. 2000). Any misguided confusion by Sloan between her right to proceed postpetition with a civil claim versus the Debtor, as opposed to the prosecution of a criminal case, is no defense to the Debtor's Complaint.

As soon as Sloan received official notice from the Clerk of the Debtor's bankruptcy, which would be late in August, 2006, she had an affirmative duty to immediately verify with the Clerk of Bankruptcy Court whether or not the Debtor's bankruptcy was still pending, and upon being so advised to, in turn, immediately advise the Lake Superior Court that no further action should be taken by that

Court regarding her Motion for Proceedings Supplemental. The fact that the Lake Superior Court may have issued various Orders regarding the Debtor on its own Motion as asserted by Sloan is not a defense to the Debtor's Complaint. In fact, according to the Deposition of Magistrate Somers Sloan falsely represented to her that the Debtor's Bankruptcy had been dismissed.

Sloan appeared at the Debtor's §341 First Meeting of Creditors on September 21, 2006 and examined the Debtor. The Trustee expressly told her that because the Debtor was in bankruptcy everything had to be done pursuant to his Plan. When Sloan thereafter appeared for the hearing on her Motion for Proceedings Supplemental only four days later on September 25, 2006, based on her official and actual notice of the Debtor's pending bankruptcy, she had an affirmative duty at that time to advise the Lake Superior Court of the pending Bankruptcy, and move that her Motion for Proceedings Supplemental be withdrawn without prejudice, or that the very least, move that the hearing thereon be continued generally until the Debtor's Chapter 13 case was either dismissed or completed and closed. This duty continued each time Sloan thereafter appeared in the Lake Superior Court on her Motion. Despite the fact that the Lake Superior Court had advised her to go to the Bankruptcy Court to see if the Debtor's Chapter 13 case was still pending and report the status of the Debtor's Bankruptcy to the Court she failed or refused to do so. See, e.g. In re Galmore, 390 B.R. 901 (Bankr. N. D. Ind. 2008).

The above conduct constitutes a willful violation of the Stay, and her assertion that she acted in good faith reliance as the issuance of Orders versus the Debtor by the Lake Superior Court on its own Motion is no defense. It is also noted that while the official Court record may reflect that the Lake Superior Court set or reset hearings on its own Motion, in fact they were set or reset based on the oral request of the Debtor in order to comply with the Lake Superior Court request of the Debtor for more information on the status of the Debtor's Bankruptcy. Sloan knowingly permitted the Lake Superior Court to set these hearings versus the Debtor on its own Motion being well aware that either the

Debtor's Chapter 13 Petition was pending, or that she should have known the Debtor's bankruptcy was still pending, if she had acted reasonably and made proper inquiry with the Clerk of the Bankruptcy Court.

The Court now turns to the issue of damages. The Debtor did not prove up that he had incurred any specific, pecuniary, actual damages as a direct result of Sloan's various Stay violations, other than the attorney's fees that he incurred to his counsel in prosecuting this Adversary Proceeding.

Any deliberate act taken in Violation of a Stay, which the Violator knows is in existence, justifies the award of actual damages. in re Crysen/Montenay Energy Co., 902 F.2d 1098, 1005 (2nd Cir. 1990). Actual damages "must be based on losses actually suffered" as a result of the stay violation. Archer v. Macomb County Bank, 853 F.2d 497, 500 (6th Cir. 1988). As the Court stated in In re Alberto, 119 B.R. 985 (Bankr. N. D. Ill. 1990):

The Court cannot award damages, costs, or fees where none have been clearly proven. Such results obtain, notwithstanding the fact that both rule 9011 and Section 362 have been violated. Damages can only be awarded if there is evidence supporting the award of a definite amount, which may not be predicted upon pure speculation. Once a party has proven that he has been damaged, he needs to show the amount of damages with reasonable certainty.

Id., 119 B.R. at 995. See also Lovett v. Honeywell, 930 F.2d 625, 629 (8th Cir. 1991); In re Still, 117 B.R. 251, 254 (Bankr. E. D. Tex. 1990). However, attorney's fees and costs may be assessed in enforcing the stay violation even though no actual underlying damages are shown, as these fees and costs are themselves a form of actual damages. See in In re Chateauguay Corp., 112 B.R. 526, 533 (S. D. N. Y. 1990), rev'd. on other grounds, 920 F.2d 183 (2nd Cir. 1990); In re Omni Graphics, Inc., 119 B.R. 641, 645 (Bankr E. D. Wis. 1990).

The Debtor's attorney orally reported to the Court in open Court that he had expended nine hours in legal services to the Debtor on this Adversary Proceeding, and that his hourly rate was \$200.00 an hour for a total of \$1,800.00. The Court finds that the services rendered by him to the Debtor to

be necessary and that the attorney's hourly rate to be reasonable. Accordingly, \$1,800.00 in actual, compensatory damages shall be awarded to the Debtor.

The Debtor's Complaint did not pray for punitive damages as expressly allowable pursuant to §362(k), and the Debtor did not submit any competent evidence at the Trial that would require a finding of such willful and malicious conduct as would require an award of punitive damages. Accordingly, none shall be awarded.

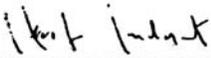
It is therefore,

ORDERED, ADJUDGED, AND DECREED, that the Defendant should be and is hereby determined to be in contempt of the Court for willful violation of the Automatic Stay. And it is further,

ORDERED, ADJUDGED, AND DECREED, THAT THE Plaintiff should be and is hereby awarded actual, compensatory damages versus the Defendant in the sum of \$1800.00.

The Clerk shall enter this Judgment on a separate document.

May 6, 2010



JUDGE, U. S. BANKRUPTCY COURT

Distribution:

Attorney Dabertin
Attorney Parr
Trustee
U. S. Trustee