Honorable Mike K. Nakagawa
United States Bankruptcy Judge

Entered on Docket
September 08, 2016

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

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In re:	)	Case No.: 15-10712-MKN
	)	Chapter 13
LA SHONDA M. HALEY,	)	
	)	Date: June 22, 2016
Debtor.	)	Time: 2:30 p.m.
	)	

ORDER ON AMENDED MOTION FOR SANCTIONS FOR PRIME ACCEPTANCE CORP.'S VIOLATIONS OF THE AUTOMATIC STAY FOR INACCURATE CREDIT REPORTING AND COLLECTION ACTIONS[1]

On June 8, 2016, the court initially heard the amended Motion for Sanctions for Prime Acceptance Corp's Violations of the Automatic Stay for Inaccurate Credit Reporting and Collection Actions ("Amended Motion") filed by La Shonda M. Haley ("Debtor"). At the hearing, David Krieger, Esq., appeared on behalf of the Debtor, and no one appeared on behalf of Prime Acceptance Corporation ("Prime"). The court directed Debtor's counsel to file a supplemental memorandum of legal authority ("Supplement") in support of the Amended Motion. On June 22, 2016, the court held a second hearing to address the Supplement, at which attorney Krieger appeared on behalf of the Debtor, and no one appeared on behalf of Prime. At the conclusion of the hearing, the matter was taken under submission.

BACKGROUND

[1] In this Order, all references to "ECF No." are to the numbers assigned to the documents filed in the case as they appear on the docket maintained by the clerk of the court. All references to "LR" are to the bankruptcy provisions of the Local Rules of Practice for the District of Nevada. All references to "Section" are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532 ("Code"). All references to "FRBP" are to the Federal Rules of Bankruptcy Procedure. All references to "FRCP" are to the Federal Rules of Civil Procedure.

On February 16, 2015, Debtor filed her voluntary Chapter 13 petition along with her bankruptcy schedules. (ECF No. 1). In her Schedule "D," Debtor listed Prime as holding a $5,560 claim secured by a 2006 Hyundai Elantra.

On February 16, 2015, Debtor also filed her proposed Chapter 13 plan ("Plan"). (ECF No. 2). Under Section 1.03 of the Plan, Debtor is to make payments for 36 months. Under Section 2.13.A of the Plan, Debtor proposed to make 36 monthly payments to Prime in the amount of $167.89 at 5.5% interest totaling $6,044.00. Under Section 5.06 of the Plan, secured creditors such as Prime retain their liens until the debt is paid in full under nonbankruptcy law or the Debtor receives her Chapter 13 discharge. Under Section 1328(a) of the Code, a Chapter 13 debtor receives a discharge upon completion of all payments required by the confirmed plan.

On February 19, 2015, the Bankruptcy Noticing Center mailed a copy of the "Notice of Chapter 13 Bankruptcy Case, Meeting of Creditors, & Deadlines" to Prime at 5097 S 900 E, Salt Lake City, UT 84117-5768. (ECF No. 10).

On March 2, 2015, Prime filed Proof of Claim No. 3-1 ("POC"), wherein Prime alleged a partially secured claim of $5,309.39 and listed its address for notices as being P.O. Box 571680, Salt Lake City, UT 84157.

On April 24, 2015, Debtor mailed a copy of the Plan and a notice of the confirmation hearing to Prime at the address Prime listed in its POC. (ECF No. 16).

On July 7, 2015, the court entered an order confirming the Plan. (ECF No. 22).

On April 18, 2016, Debtor filed her initial Motion for Sanctions for Prime Acceptance Corp's Violations of the Automatic Stay for Inaccurate Credit Reporting and Collection Actions ("Initial Motion"). (ECF No. 31). On that same day, Debtor served the Initial Motion at the address Prime listed in its POC. (ECF No. 32).

On April 19, 2016, the court issued a "Notice of Docketing Error" regarding the Initial Motion, as the PDF image of exhibits attached to the motion were unreadable. (ECF No. 34). On that same day, Debtor filed the Amended Motion (ECF No. 35) that included a corrected PDF image of its exhibits, as well as the Declaration of La Shonda Haley ("Haley Declaration"). As of the date of this Order, Debtor has not filed a certificate of service reflecting that Debtor

served Prime with the Amended Motion.[2]

On June 8, 2016, the court held a hearing on the Amended Motion, during which the court directed Debtor's counsel to file the Supplement. Later the same date, Debtor filed the "Declaration of David Krieger, Esq." in which attorney Krieger stated that he has incurred approximately $2,250 in attorneys' fees regarding the Initial Motion and Amended Motion. (ECF No. 37). As of the date of this Order, Debtor has not filed a certificate of service reflecting that Debtor served Prime with this declaration.

On June 13, 2016, Debtor filed the Supplement the court required at the initial hearing. (ECF No. 39). As of the date of this Order, Debtor has not filed a certificate of service reflecting that Debtor served Prime with the Supplement.

On June 22, 2016, the court held a continued hearing regarding the Amended Motion and the Supplement, after which the court took the matter under submission.

DEBTOR'S CLAIM

On April 16, 2016, Debtor accessed her credit report from Equifax. See Haley Declaration at ¶ 12. Debtor claims that Prime inaccurately reported that Debtor was 30 days late in March 2015, 60 days late in April 2015, 30 days late in September 2015, and 60 days late in October 2015. Id. at ¶ 13. Debtor contends that she "fully complied with [her] Chapter 13 plan terms" and Prime's inaccurate report "is false and misleading." Id. at ¶ 17.

Debtor further claims that Prime inaccurately reported that the "Date of Last Activity" on Debtor's credit report was March 2016. Id. at ¶ 15. According to Debtor, the "Date of Last Activity" reported should have been no later than the petition date. Id. She attests that Prime's reporting of a March 2016 "Date of Last Activity" has "re-aged" the account, thereby causing Prime's claim "to remain on [Debtor's] credit reports longer than legally permitted under the

[2] LR 2002(a)(3) states, in pertinent part, that "[p]roof of service . . . must be filed within seven (7) days after the filing of the papers and pleadings required or permitted to be served. Failure to timely file a certificate of service in compliance with this rule may result in denial of the related motion, or removal of the motion from the court's hearing calendar." Because the court denies the Amended Motion on its merits, this Order is not based on Debtor's failure to comply with LR 2002(a)(3).

Fair Credit Reporting Act . . . ." Id.

Debtor argues that Prime's inaccurate reporting on her credit report constitute violations of the automatic stay. Debtor asserts that Prime's inaccurate reporting has upset and angered her, caused her frustration and emotional distress, and made her fear that "the entire benefit of [her] Chapter 13 filing will be lost" as a result. Id. at ¶¶ 19-22.[3]

APPLICABLE LEGAL STANDARDS

Section 362(k) provides for an award of actual damages for an individual injured by a willful violation of the automatic stay. Actual damages may include costs and attorneys' fees, and, in appropriate circumstances, punitive damages. See 11 U.S.C. § 362(k)(1). Actual damages may include compensation for emotional distress. Proof of pecuniary loss is not required for an award of emotional distress damages. See Dawson v. Washington Mut. Bank (In re Dawson), 390 F.3d 1139, 1149 (9th Cir. 2004). "To recover damages for emotional distress under § 362(k), 'an individual must (1) suffer significant harm, (2) clearly establish the significant harm, and (3) demonstrate a causal connection between that significant harm and the violation of the automatic stay (as distinct, for instance, from the anxiety and pressures inherent in the bankruptcy process).' . . . Emotional harm may be proved by: (1) medical evidence, (2) non-experts, such as family members, friends, or coworkers; or (3) 'even without corroborative evidence where significant emotional distress is readily apparent.' . . . The last category includes cases where the violator's conduct is 'egregious,' or where the conduct is not egregious but the circumstances make it obvious that a reasonable person would suffer significant emotional harm . . . 'Fleeting or trivial anxiety or distress does not suffice . . .'" See America's Servicing Co. v. Schwartz-Tallard, 438 B.R. 313, 321-22 (D. Nev. 2010), citing In re Dawson, 390 F. 3d at 1149-50.

An award of attorneys' fees under Section 362(k) may include the fees incurred in

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[3] The Haley Declaration is rife with legal conclusions and arguments rather than testimony based on personal knowledge. Because the court concludes that the alleged credit reporting alone was insufficient to constitute a violation of the automatic stay, the court makes no finding as to whether any of the testimony contained in the declaration is credible, nor as to the weight to be given the testimony.

seeking to enforce the automatic stay, including on appeal, and is not limited to the attorneys' fees incurred up to the time the automatic stay violation ceases. See America's Servicing Co. v. Schwartz-Tallard (In re Schwartz-Tallard), 803 F.3d 1095, 1101 (9th Cir. 2015), overruling Sternberg v. Johnson (In re Sternberg), 595 F.3d 937 (9th Cir. 2010).

A prerequisite to awarding any actual or punitive damages under Section 362(k) is a finding that the creditor's violation of the automatic stay was willful. Proof of specific intent to violate the automatic stay is not required. See Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178, 1191 (9th Cir. 2003). Instead, the moving party need only demonstrate that the creditor knew of the automatic stay, and that the creditor's actions that violated the stay were intentional. See Havelock v. Taxel (In re Pace), 67 F.3d 187, 191 (9th Cir. 1995). A party with knowledge of the bankruptcy proceeding is considered to have knowledge of the automatic stay. See Eden Place, LLC v. Perl (In re Perl), 513 B.R. 566, 576 (B.A.P. 9th Cir. 2014), rev'd on other grounds, 811 F.3d 1120 (9th Cir. 2016).

DISCUSSION

Debtor alleges that Prime violated the automatic stay[4] by representing on Debtor's credit report that she was 30 to 60 days late during the post-petition period and by reporting the "Date of Last Activity" as March 2016, thereby allegedly "re-aging" the account. The court disagrees with Debtor's implied argument that inaccurate credit reporting, without more, constitutes a violation of the automatic stay as a matter of law. Indeed, even some of Debtor's cited case authority[5] recognize that a debtor must prove that the creditor's reporting was done with the purpose of coercing the debtor to pay the reported debt. See, e.g. Lohmeyer v. Alvin's Jewelers

[4] Although Debtor only cites to Section 362(a)(3) as the source of Prime's alleged stay violation, the court assumes, for purposes of this Order, that the Amended Motion argues that Prime's actions constituted a violation of any subsection under Section 362(a).

[5] The majority of Debtor's cited case authority involve alleged violations of the discharge injunction, and not the automatic stay. However, because the standard for both violations are similar, the court finds that Debtor's cited case authority is relevant to the present matter. See Zilog, Inc. v. Corning (In re Zilog, Inc.), 450 F.3d 996, 1008 n.12 (9th Cir. 2006) ("[W]e see no material difference between the discharge injunction and the automatic stay for these purposes. A contempt order entered for violation of either is governed by the same standards, namely those applicable to all civil contempt proceedings.").

(In re Lohmeyer), 365 B.R. 746, 750 (Bankr. N.D. Ohio 2007); Smith v. American Gen. Fin. Inc. (In re Smith), 2005 WL 3447645, at *3 (Bankr. N.D. Iowa Dec. 12, 2005); Carriere v. Proponent Fed. Credit Union, 2004 WL 1638250, at *8 (W.D. La. July 12, 2004); see also Spaulding v. Citizens Fed. Sav. & Loan Assoc. (In re Spaulding), 116 B.R. 567, 570-71 (Bankr. S.D. Ohio 1990), citing, Morgan Guaran. Trust Co. of N.Y. v. American Sav. & Loan Assoc., 804 F.2d 1487, 1491 (9th Cir. 1986) ("[T]his court recognizes that other courts have held that mere requests to pay, absent coercion or harassment, do not constitute an actionable violation of the automatic stay. Letters that are isolated and informational are less likely to result in violations of the automatic stay than are letters that are repetitive and request payment.").

In Morgan Guaran. Trust Co. of N.Y., a holder-in-due-course presented two of the debtor's bearer notes to a third party bank during the post-petition period. 804 F.2d at 1490-91. The Ninth Circuit panel found that the presentment of such notes did not constitute a violation of the automatic stay. Id. at 1492. In reaching this conclusion, the circuit held "that the language and purposes of section 362(a) do not bar mere requests for payment unless some element of coercion or harassment is involved." Id. at 1491.

In Zotow v. Johnson (In re Zotow), 432 B.R. 252, 259 (B.A.P. 9th Cir. 2010), the Bankruptcy Appellate Panel for the Ninth Circuit ("BAP") also stated, in the context of a motion alleging a creditor's violation of the automatic stay, that "one distinguishing factor between permissible and prohibited communications is evidence indicating harassment or coercion." Therefore, unlike the decision in In re Sommersdorf 139 B.R. 700 (Bankr. S.D. Ohio 1991), cited by the Debtor,[6] where the bankruptcy court appeared to state that negative credit reporting, standing alone, violated the stay, the Ninth Circuit requires "evidence indicating harassment or coercion." In re Zotow, 432 B.R. at 259.

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[6] See Amended Motion at p. 10. There is case law indicating that a creditor's refusal to correct a debtor's credit report after a request is made under the Fair Credit Reporting Act ("FCRA") may support a debtor's claim that a creditor violated the automatic stay and/or the discharge injunction. See Torres v. Chase Bank USA, N.A., 367 B.R. 478 (Bankr. S.D. N.Y. 2007). In the instant case, however, Debtor has not alleged that she made a request to Prime in accordance with the FCRA.

Debtor has not presented the court with any evidence that Prime's credit reporting was coercive or harassing. Indeed, Debtor had already obligated herself under her confirmed Plan to pay Prime what appears to be 100% of Prime's claim over a 36 month period. Debtor has apparently complied with the terms of her confirmed Plan because Prime stated in the credit report that Debtor "PAYS AS AGREED." See Equifax Report at p. 2, attached to Amended Motion. Debtor's implied argument that Prime's credit reporting, which includes Prime's statement that Debtor is paying as agreed, constitutes a coercive or harassing attempt to collect a debt the Debtor has already obligated herself to pay is nonsensical at best. It makes even less sense in the context of a Chapter 13 where the individual debtor has not completed payments under her confirmed Plan and has not received a discharge: Debtor is still personally liable for the debt set forth in the POC and the credit report accurately reflects her status without including a payment demand. Under these facts and circumstances, the court cannot conclude that Prime's credit reporting, without more, violated the automatic stay.

Debtor's cited cases involving a court's denial of a motion to dismiss a complaint are distinguishable because the standards under FRCP 12(b)(6) and FRBP 7012 are demonstrably different than the standard applicable in the present case. See Venugopal v. Digital Fed. Credit Union, 2013 WL 1283436 (N.D. Cal. March 27, 2013); Montgomery v. Wells Fargo Bank, NA, 2012 U.S. Dist. LEXIS 162912 (N.D. Cal. Nov. 13, 2012); Russell v, Chase Bank USA, N.A. (In re Russell), 378 B.R. 735 (Bankr. E.D. N.Y. 2007); In re Lohmeyer, 365 B.R. 746; In re Burgess, 2007 WL 130818 (Bankr. E.D. Va. Jan. 12, 2007); Norman v. Applied Card Sys., Inc. (In re Norman), 2006 WL 2818814 (Bankr. M.D. Ala. Sept. 29, 2006); Smith v. American Gen. Fin. Inc. (In re Smith), 2005 WL 3447645 (Bankr. N.D. Iowa Dec. 12, 2005); Carriere, 2004 WL 1638250; see also Nalangan v. Cavalry Portfolio Servs., 2015 Cal. App. Unpub. LEXIS 5179 (Cal. App. Dep't Super. Ct. March 19, 2015).[7] Unlike the instant proceeding, FRCP 12(b)(6) and FRBP 7012 only require a debtor to allege sufficient facts in a complaint to state a claim for

[7] The court was required to find this case on its own because the Debtor provided an incorrect citation in her Amended Motion. See Amended Motion at p. 15. Debtor also incorrectly cited another decision –"*Grantham v. Bank of America, N.A.* 2012 WL 5094729 (N.D. Cal. Nov. 26, 2012)"–which the court has not been able to locate.

relief.

Here, the Debtor, who seeks an award of damages through an uncontested motion, is in a procedural posture akin to a plaintiff requesting a default judgment. In such circumstances, a plaintiff is not entitled to a default judgment as a matter of right, but must instead provide evidence of the necessary facts to support entry of a default judgment. See Vogt v. Dynamic Recovery Servs. (In re Vogt), 257 B.R. 65 (Bankr. D. Colo. 2000); Irby v. Fashion Bug (In re Irby), 337 B.R. 293 (Bankr. N.D. Ohio 2005). Even the case authority the Debtor cites recognize this distinction. See In re Russell, 378 B.R. at 741-42; Torres v. Chase Bank USA, N.A., 367 B.R. 478, 485-87 (Bankr. S.D. N.Y. 2007); In re Lohmeyer, 365 B.R. at 750.[8]

Debtor's additional authorities involving alleged violations of the Federal Deceptive Trade Practices Act and/or the FCRA are also distinguishable because they do not implicate the Bankruptcy Code or otherwise discuss the interplay between credit reporting and the automatic stay. See Slorp v. Lerner, Sampson & Rothfuss, 587 Fed. Appx. 249 (6th Cir. Sept. 29, 2014); Purnell v. Arrow Fin. Servs., LLC, 303 Fed. Appx. 297 (6th Cir. Dec. 16, 2008); Malone v. Cavalry Portfolio Servs., LLC, 2015 WL 7571881 (W.D. Ky. Nov. 24, 2015); Akalwadi v. Risk Mgmt. Alts., Inc., 336 F.Supp. 2d 492 (D. Md. 2004); Sullivan v. Equifax, Inc., 2002 WL 799856 (E.D. Pa. April 19, 2002); Ditty v. Checkrite, Ltd., Inc., 973 F.Supp. 1320 (D. Utah 1997); Rivera v. Bank One, 145 F.R.D. 614 (D.P.R. 1993).[9]

Finally, contrary to Debtor's argument, see Supplement at pp. 3-5, the BAP's

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[8] As the number of bankruptcy filings in this district has decreased, the number of motions for sanctions has increased, each alleging some type of violation of the automatic stay, a court order, the discharge injunction, or any combination thereof. Most, if not all, of these motions are accompanied by similar declarations in which the individual debtor attests that the creditor's action has caused some type of emotional reaction such as stress, anxiety, depression, anger, and the like. Some of the motions border on the frivolous, either as to the alleged basis for liability, or the alleged damages suffered, and sometimes both.

[9] Debtor also cited to "*Price v. West Capital Financial Services Corp.*, (D. Ariz. Feb. 4, 1998)" for the following quotation: "The Court takes judicial notice that creditors use the placement of delinquency notices with credit bureaus, at least in part, as an attempt to effect payment." See Amended Motion at p. 12; Supplement at p. 7. Debtor did not include a citation for the case, however, and the court was not able to locate an order or opinion in such a case from its own research.

unpublished decision in Bell v. Clinical Labs of Hawaii, LLP (In re Bell), 2008 WL 8444796 (B.A.P. 9th Cir. Feb. 11, 2008), is factually distinguishable. In Bell, the only issue on appeal was whether the bankruptcy "court abused its discretion by denying debtor's request for his attorney's fees, as actual damages, pursuant to [former] § 362(h)." Id. at *2. Therefore, any snippets of that opinion Debtor attempts to cherry-pick in support of her argument are merely dicta. Contrary to Debtor's implied argument, the BAP's unpublished decision in Bell did not conclude that a creditor's negative credit reporting, standing alone, violated the automatic stay. Instead, the facts in Bell reflect that the creditor "continued to send debtor collection notices . . . for prepetition debt after his filing." Id. at *1. The BAP elaborated that "Debtor received over seventeen [collection] notices" from the creditor during the post-petition period. Id. Therefore, in Bell, the creditor's negative credit reporting coupled with the creditor sending seventeen post-petition collection notices violated the automatic stay because the creditor was clearly "attempt[ing] to collect a prepetition debt . . . ." Id. at *3. In essence, the court in Bell concluded that the debtor had met his burden of proving that the creditor's communications were coercive and harassing. No such evidence has been offered by the Debtor in the instant case.

IT IS THEREFORE ORDERED that the amended Motion for Sanctions for Prime Acceptance Corp's Violations of the Automatic Stay for Inaccurate Credit Reporting and Collection Actions, brought by Debtor La Shonda M. Haley, Docket No. 35, be, and the same hereby is, **DENIED**.

Copies sent to all parties via CM/ECF ELECTRONIC FILING

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