DOCKET NUMBER: 96-10772
ADV. NUMBER: 96-1093
JUDGE: M. A. Mahoney
PARTIES: Michael A. Pannitti, Norwest Financial Alabama, Inc., Cheryl L. Baggott
CHAPTER: 13
ATTORNEYS:
DATE: 10/18/96
KEY WORDS:
PUBLISHED:

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF ALABAMA

In Re

MICHAEL A. PANNITTI Case No. 96-10772-MAM-13

Debtor.

MICHAEL A. PANNITTI

Plaintiff,

vs. Adv. No. 96-1093

NORWEST FINANCIAL ALABAMA, INC.
and CHERYL L. BAGGOTT

Defendants.

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING MOTION FOR SANCTIONS

This case is before the Court on opposing motions for summary judgment and a motion for sanctions pursuant to Fed. R. Bankr. P. 9011 by defendant Cheryl L. Baggott against debtor's counsel. This Court has jurisdiction to hear these matters pursuant to 28 U.S.C. §§ 157 and 1334 and the Order of Reference of the District Court. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). For the reasons indicated below, the Court is granting the plaintiff's motion for summary judgment against Norwest Financial and Cheryl L. Baggott, denying the defendants' motion for summary judgment, and denying defendant Cheryl L. Baggott's motion for sanctions against Robert Blair pursuant to Fed. R. Bankr. P. 9011.

FACTS

Michael Pannitti (Pannitti) filed a Chapter 13 bankruptcy case on March 5, 1996. On May 22, 1996, the Court entered an order confirming his plan over the objection of Norwest Financial (Norwest). At the confirmation hearing many of the facts involved in this adversary case and sanctions motion were elicited from witnesses as the Court had to determine the validity of Norwest's lien against Pannitti's personal property; whether Norwest's claim against Pannitti in regard to a purchase from Henig Furs should be treated as secured; and whether Pannitti filed his case or plan in bad faith. The findings of fact and conclusions of law read into the record at the conclusion of that hearing are incorporated by reference into this order. The gist of the ruling (as it pertains to Norwest's claims) was that both loans of Norwest to Pannitti were to be treated as unsecured debts in Pannitti's plan.

Only one of the Norwest claims is at issue in this adversary case. It is the purchase money loan made to Pannitti at the time he purchased a "blue fox mink coat." (Transcript, p.7.) The purchase was made on February 13, 1996 from Henig Furs, Inc. who, at that time, was able to use Norwest to finance many of its customers' purchases. When the purchase was made, a Henig Furs employee filled out the necessary papers for Pannitti to obtain a purchase money loan from Norwest on his purchase. Pannitti signed a retail installment contract and note and security agreement. No description of the merchandise purchased was included in the retail installment contract, although a space for that information was provided.

On February 17, 1996, Pannitti's wife exchanged the blue fox coat for 3 leather coats, 3 pair of leather gloves, a suede vest, and a mink teddy bear. Norwest was never notified of this exchange until the Chapter 13 confirmation hearing on May 2, 1996.

On April 2, 1996, after Pannitti's bankruptcy case was filed, Norwest sent him a computer generated letter requesting payment of his Norwest debts. On or about April 2, 1996, Norwest personnel also called the Pannittis to inquire about payment. During the telephone call, the local Norwest office was informed of the bankruptcy filing. Mrs. Pannitti sent the notice of bankruptcy and list of creditors to Norwest after the call. A notice had gone to Norwest's office in Iowa at the filing of the case, but not to the local office. On or about April 3, 1996, the local Norwest office received the copies mailed by Mrs. Pannitti.

On April 8, 1996, Norwest personnel faxed a copy of Pannitti's bankruptcy notice and a copy of the front page of his retail installment contract with Norwest to its counsel in the matter, Cheryl L. Baggott (Baggott). She noticed that the contract did not contain a description of the goods sold. She was concerned that the failure to specifically describe the collateral taken by Norwest as security for the loan might subject Norwest to penalties under the federal Truth-In-Lending Act. For that reason, she advised Clovis Wright, an employee of Norwest, to type a description of the coat purchased on the retail installment contract. He typed in "Black fox stroller fur" and faxed a copy of the changed contract to Baggott. On April 10, 1996, Baggott mailed a letter to Pannitti, copied to his counsel, which stated:

> I represent Norwest Financial Alabama, Inc., who accepted assignment of your retail instalment contract with Henig Furs. In looking at your contract today, I discovered an error under the section entitled "description of goods sold." Henig Furs failed to write in a description of its purchase money security interest, a black fox fur (sic) you purchased from its store. This error has now been corrected as shown by the enclosed copy of your contract.

LAW

Based upon Norwest's actions, the debtor filed this adversary case entitled "Motion to Hold In Contempt." It is a suit seeking compensatory and punitive damages from Norwest and

its counsel for their violation of the automatic stay. 11 U.S.C. § 362(h). Both the plaintiff/debtor and the defendant/creditor filed motions for summary judgment as required by the Court at a pretrial held on August 29, 1996. Each is treated as a response to the other. Finally, Cheryl L. Baggott, individually, filed a motion for sanctions against debtor's counsel, Robert Blair.

There are four issues to be addressed in this case:

A. Were there violations of the automatic stay by Norwest or its counsel?
B. Were the violations willful?
C. What are appropriate damages?
D. Are sanctions against debtor's counsel warranted?

A. Were there violations of the automatic stay by Norwest or its counsel?

Section 362 of the Bankruptcy Code prohibits "any act to obtain possession of property of the estate or . . . to exercise control over property of the estate." 11 U.S.C. § 362(a)(3). There are two different groups of actions to be discussed. First, there are Norwest's actions in sending a collection letter and telephoning the Pannittis about payments. Second, there are Baggott's and Norwest's actions in altering the retail installment contract and sending a letter to Pannitti.

1. The letter of April 2, 1996 to Pannitti and the telephone call to Mrs. Pannitti were violations of the stay because their purpose was to seek to "collect . . . or recover a claim against the debtor." 11 U.S.C. § 362(a)(6). Pannitti incurred the debt to Norwest prepetition. Norwest's call in regard to where to pay the debt and a letter request for payment are collection actions.

2. A violation of the federal Truth-In-Lending Act creates a potential right to monetary damages for an injured consumer. 15 U.S.C. § 1640. Norwest's failure to describe its collateral as required under title 15 and the potential cause of action based on that failure was an asset of Pannitti at the time of the filing of his Chapter 13 case. *Fair v. Nationwide Mortg.*

Corp., 34 B.R. 981, *vacated and remanded*, 739 F.2d 959 (D.C.D.C. 1983); *Matter of Rose*, 17 B.R. 55 (Bankr. W.D. Ark. 1981); *In re Gassaway*, 28 B.R. 842 (Bankr. N.D. Miss. 1983); *Matter of Wood*, 643 F.2d 188 (5th Cir. 1980); *Miller v. Shallowford Community Hosp., Inc.*, 767 F.2d 1556 (11th Cir. 1985); *Havelock v. Taxel (In re Pace)*, 159 B.R. 890 (Bankr. 9th Cir. 1993). Such an asset is "property of the estate" as that term is defined pursuant to 11 U.S.C. § 541(a)(1). By adding a description to the retail installment contract and sending a notice of the correction to Pannitti, Baggott was, in her own words, attempting "to protect Norwest against a possible lawsuit for monetary damages." (Affidavit of Cheryl L. Baggott, Defendants' Exhibit 4 to Defendants' Motion for Summary Judgment, page 1, paragraph 3.) This action was an attempt to eliminate Pannitti's potential claim against Norwest. It was an action "to obtain possession of property of the estate" or to take possession (by elimination) of "property from the estate" or "to exercise control over" (by alteration) property of the estate.

This case is similar to a recent case from Tennessee. *Walker v. Midland Mortgage Co. (In re Medlin)*, 1996 WL 588325 (Bankr. E.D. Tenn. Oct.8, 1996). In the *Medlin* case, the mortgage company inserted a date in the acknowledgment to a deed of trust and re-registered the deed after the mortgagee of the property had filed bankruptcy. Although holding that the certificate of acknowledgment was not invalidated by having no date in it and, therefore, the mortgage lien was valid, the court also held that the mortgage company had violated the stay and was subject to a damage award pursuant to 11 U.S.C. § 362(h).

Norwest's and Baggott's actions are not excepted from the stay. The only possible applicable exception is 11 U.S.C. § 362(b)(3) which allows an action "to perfect, or to maintain or continue the perfection of, an interest in property to the extent that the trustee's (debtor's) rights and powers are subject to such perfection under section 546(b)." Norwest did not raise

this argument and has therefore waived it. However, if it had been raised, it would not have been successful. The actions did not affect the interest of Norwest in the property (the fur); they only prevented Norwest from being potentially liable for additional claims by Pannitti.

B. Were the violations willful?

A "willful" act occurs "if the creditor engages in a deliberate action that is done in violation of the automatic stay with knowledge that the debtor has filed a petition in bankruptcy." *Washington v. IRS (In re Washington)*, 172 B.R. 415, 419 (Bankr. S.D. Ga.1994); *Matthews v. U.S. (In re Matthews)*, 184 B.R. 594, 599 (Bankr. S.D. Ala. 1995). The acts of Norwest in telephoning the Pannittis and sending the collection letter were not done with actual knowledge of the stay. The actions were not willful. The actions of Baggott and Norwest in alteration of the retail installment contract and mailing notice of the alteration to Pannitti were taken with full knowledge of the stay. The actions were deliberate. Baggott intended to protect Norwest from suit. The actions were willful.

C. What are appropriate damages?

Baggott's actions in sending a letter to Pannitti and Norwest's alteration of Pannitti's retail installment contract were willful violations of the stay. Damages from these actions would be the attorneys fees involved in bringing this adversary and the loss by Pannitti of a potential cause of action due to the alteration. "Whether the party believes in good faith that it had a right to the property is not relevant to whether the act was 'willful' or whether compensation must be awarded." *Pinkstaff v. U.S. (In re Pinkstaff)*, 974 F.2d 113, 115 (9th Cir. 1992) *quoting, Goichman v. Bloom (In re Bloom)*, 875 F.2d 224, 227 (9th Cir. 1989).

As to the alteration, in the Eleventh Circuit, actions taken in violation of the stay are void and without effect. *Borg-Warner Acceptance Corp. v. Hall,* 685 F.2d 1306 (11th Cir. 1982).

Therefore, the alteration did not eradicate any potential Truth-In-Lending Act suit Pannitti might have based upon the original contract. Both Norwest and Pannitti's rights remained exactly as they were immediately before bankruptcy as to that asset.

As to attorneys fees, there was no proof of fees offered by debtor's counsel, Robert Blair. The attorneys fees and expenses for which Baggott would be liable would be those necessary to compensate Pannitti for the cost of filing the adversary case and preparing his summary judgment motion. Such fees and costs are appropriate damages. 11 U.S.C. § 362(h). *In re Medlin*, 1996 WL 588325 *4-5.

Punitive damages may be awarded also if the circumstances warrant it. The standard for imposition of such an award is heavy.

> Punitive damages are awarded in response to particularly egregious conduct for both punitive and deterrent purposes. Such awards are "reserved . . . for cases in which the defendant's conduct amounts to something more than a bar (sic) violation justifying compensatory damages or injunctive relief.". . . To recover punitive damages, the defendant must have acted with actual knowledge that he was violating the federally protected right or with reckless disregard of whether he was doing so.

Fry v. Today's Homes, Inc. (In re Fry), 122 B.R. 427, 431, (Bankr. N.D. Okla. 1990) *citing, Wagner v. Ivory (In re Wagner)*, 74 B.R. 898, 903-4 (Bankr. E.D. Pa. 1987). In this case, although Baggott's and Norwest's actions were willful violations of the stay, their conduct was not egregious. The Court believes their motives were sincere.

In conclusion, since the actions of the employees of Norwest in sending a collection letter and telephoning the Pannittis were technical violations of the automatic stay, done without actual knowledge of the stay, and they did not cause any damages to the debtor, there is no cause of action against them pursuant to 11 U.S.C. § 362(h). The actions of Norwest and Baggott in alteration of the retail installment contract and notice to Pannitti were willful violations of the

stay. They are liable to the debtor for his actual attorneys fees and expenses in bringing this adversary. No other damages were proven.

D. Are sanctions against debtor's counsel warranted?

Debtor's counsel would be liable for sanctions under Fed. R. Bankr. P. 9011 if his actions in bringing this action were done "to harass or to cause unnecessary delay or needless increase in the cost of litigation or administration of the case." The Court concludes that there was a violation of the stay. Therefore, the adversary case was warranted. The motion should be denied.

Therefore, it is ORDERED:

1. Plaintiff's motion for summary judgment is GRANTED. Plaintiff's counsel shall submit an affidavit by November 4, 1996, indicating the fees and expenses incurred by the debtor in this adversary case. Counsel should list his hours in one-tenth hour increments and give detail in regard to his activities. Expenses shall be individually listed. Defendants shall file any objections to the fees and expenses in writing by November 19, 1996. Then the Court will consider the amount of the award.

2. Defendants' motion for summary judgment is DENIED.

3. Defendant Cheryl L. Baggott's motion for sanctions is DENIED.

Dated: October 18, 1996

MARGARET A. MAHONEY
CHIEF BANKRUPTCY JUDGE