IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF ALABAMA

In Re:

Case No. 17-02955

ROBINA A. TURNER,

Debtor.

ROBINA A. TURNER,

Plaintiff,

v.

Adversary Case No. 18-0036

FIDELITY BANK,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came before the court for trial on September 6, 2019. The court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334, and the District Court's Order of Reference. The parties also consented to the entry of a final order by this court. (*See* doc. 5).

The court heard testimony from the plaintiff-debtor Robina A. Turner ("Ms. Turner") and from Ronald Kirkland ("Mr. Kirkland"), a recovery officer for the defendant Fidelity Bank ("the bank") and the bank's representative at trial. The court admitted into evidence plaintiff's exhibits 1-3 by agreement of the parties. Having considered the testimony and exhibits, the court rules as follows:

Background

Ms. Turner alleges that the bank violated the automatic stay of 11 U.S.C. § 362 by continuing to send correspondence to her in an attempt to collect a pre-petition debt after she filed for chapter 13 bankruptcy on August 8, 2017. Specifically, the bank sent five "Past Due Notices" dated 9/11/17,

10/11/17, 11/12/17, 4/22/18, and 6/24/18 (*see* Pl. Ex. 2) related to Ms. Turner's vehicle loan with the bank.

The bank received written notice of Ms. Turner's bankruptcy on August 16, 2017. (*See* Pl. Ex. 3). That same day, Ms. Turner contacted the bank because an automatic draft had been taken from her account after she filed for bankruptcy.[1] (*See* Pl. Ex. 1). Ms. Turner had been paying her loan via automatic draft, but she elected to pay it through her chapter 13 plan after filing for bankruptcy.

Mr. Kirkland explained that, after speaking with Ms. Turner, the loan operations department stopped all automatic drafts from Ms. Turner's account. This change resulted in Ms. Turner's account being set up as a "regular pay" account rather than an "automatic draft" account. Because Ms. Turner's account was no longer set up for automatic draft, when the bank did not receive a payment, the system automatically generated past due notices in September 2017, October 2017, November 2017, April 2018, and June 2018. (*See* Pl. Ex. 2). Mr. Kirkland testified that the probable reason that no notices were sent from November 2017 to April 2018 or in May 2018 was because the bank received payments through the bankruptcy and thus Ms. Turner's account did not show up as "past due" for those months.

Mr. Kirkland further testified that when the bank receives notice of a bankruptcy, the normal procedure is that the bank's bankruptcy department changes a computer code in the debtor's account to stop all communications to the debtor. After coding Ms. Turner's account for bankruptcy, someone in the bankruptcy department should have double-checked with the loan department to ensure that no communications would be sent. In Ms. Turner's case, however, this did not happen

[1] The bank credited the money back to Ms. Turner's account within seven days, and she is not seeking damages related to the post-petition automatic draft.

and her account still showed up as a "regular pay" in the bank's system, the change that had been made when Ms. Turner called the bank about the automatic draft. According to Mr. Kirkland, this is the first time of which he is aware that that the normal procedure did not work properly during his more than twenty years at the bank.

The September 2017 past due notice sent to Ms. Turner stated: "We may report information about your loan to credit bureaus. Late payments, missed payments, or other defaults on your loan may be reflected in your credit report." (*See* Pl. Ex. 2). The other four notices did not contain this language, and none of the notices threatened legal action or repossession. (*See id.*).

Ms. Turner testified that she was "really bothered" by the first notice, that she was "really upset" by the second notice, and that she became increasingly upset after continuing to receive the notices. She was afraid that her vehicle was going to be repossessed and she would lose her new job as a result of not being able to get to work. Ms. Turner had trouble sleeping and found it hard to concentrate at work, although she did not see a doctor or take any medication. She spoke with her bankruptcy counsel or someone in his office each time she received the notices, but there was no evidence that the bank was informed or otherwise knew about the errant notices being sent until it received the complaint in this case in July 2018. Mr. Kirkland testified that if the bank been told that the past due notices were still being sent despite the bankruptcy, it would have immediately stopped the past due notices.

Legal Analysis

"The automatic stay provision of § 362(a) is a fundamental protection afforded to debtors by the Bankruptcy Code. Accordingly, the scope of the stay is intentionally broad." *In re Collum*, No. 17-81548-WRS, 2019 WL 3243937, at *2 (Bankr. M.D. Ala. July 18, 2019) (citations omitted). "The stay is intended to prevent creditor harassment and coercion of the debtor. Without the stay,

debtors would not have the necessary breathing space to reorganize their affairs." *Id.* (citations omitted).

Under § 362(k)(1), a debtor "injured by any willful violation of a stay . . . shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." "'Claims under § 362(k) consist of three basic elements: the violation of the stay, the defendants' willfulness, and the plaintiff's injury.'" *In re Jackson*, No. 14-3568-JCO, 2017 WL 1102849, at *4 (Bankr. S.D. Ala. Mar. 23, 2017) (citation omitted). "The burden of proving the violation, willfulness, and injury by a preponderance of the evidence, rests on the" debtor. *In re Brodgen*, 588 B.R. 625, 629 (Bankr. M.D. Ala. 2018). The debtor must also prove her damages "by a preponderance of the evidence." *See In re Horne*, 876 F.3d 1076, 1083 (11th Cir. 2017).

Stay violations "are willful if the violator (1) knew of the automatic stay and (2) intentionally committed the violative act, regardless of whether the violator specifically intended to violate the stay." *In re Jackson*, 2017 WL 1102849, at *4 (citation and quotation marks omitted). "Thus, evidence of intent to violate the stay is not required." *Id.* (citation, quotation marks, and brackets omitted).

Here, there is no dispute that the bank knew about Ms. Turner's bankruptcy as of August 16, 2017 and that it sent five past due notices after it knew about the bankruptcy. *See, e.g.*, *id.* ("'Knowledge of the bankruptcy filing is the legal equivalent of knowledge of the stay.'") (citation omitted). The court also finds that the stay violations were willful. While the court believes Mr. Kirkland that no one at the bank possessed any ill will toward Ms. Turner or intended to violate the stay, that is not the standard. *See, e.g.*, *id.* ("Subjective beliefs or intent of the defendant are irrelevant."). By its own admission, the bank failed to take appropriate steps to avoid violating the

automatic stay when it received notice of Ms. Turner's bankruptcy and continued to send past due notices as a result.

Ms. Turner's testimony establishes that she was injured as a result of the stay violations. The court thus turns to Ms. Turner's requests for actual damages in the form of emotional distress damages and attorney's fees, and for punitive damages.

Emotional distress damages

"[A]t a minimum, to recover 'actual' damages for emotional distress under § 362(k), a [debtor] must (1) suffer significant emotional distress, (2) clearly establish the significant emotional distress, and (3) demonstrate a causal connection between that significant emotional distress and the violation of the automatic stay." *Lodge v. Kondaur Capital Corp.*, 750 F.3d 1263, 1271 (11th Cir. 2014).

Emotional distress damages in this case are a close call and are not easily quantified. Ms. Turner's testimony about being "really bothered" by the first notice and "really upset" by the second notice is insufficient, and the court will not award emotional distress damages based on the first two notices. *See, e.g.*, *In re Morris*, 514 B.R. 658, 668 (Bankr. N.D. Ala. 2014) ("[F]leeting or trivial anxiety or distress will not suffice. Nor will mere aggravation, indignation and annoyance, or being 'upset,' warrant compensation under section 362(k).") (citations and quotation marks omitted). Ms. Turner did not seek medical attention or take medication as a result of the notices. However, she testified, and the court finds, that as the notices continued to come, she suffered increasing anxiety, feared that her vehicle would be repossessed and cause her to lose her new job, and had trouble sleeping and concentrating at work. The court finds that this evidence supports an award for emotional distress. The court is of the opinion that $250.00 per notice for the third, fourth, and fifth notices sent in November 2017, April 2018, and June 2018 – for a total of $750.00 – fairly and

adequately compensates Ms. Turner for her emotional distress. *See, e.g.*, *In re Brodgen*, 588 B.R. at 630.

The bank argues that emotional distress damages are inappropriate because Ms. Turner failed to contact the bank to stop the notices being sent. However, once a creditor is "notified of the automatic stay, the debtor is not required to take any more action to halt the attempts of creditors to collect on pre-petition debt." *See In re Roche*, 361 B.R. 615, 621 (Bankr. N.D. Ga. 2005). "The responsibility is placed on the creditor because to place the onus on the debtor . . . would subject the debtor to the financial pressures the automatic stay was designed to temporarily abate[] and render the breathing spell from his creditors illusory." *See id.* (citation, quotation marks, and ellipses omitted); *see also, e.g.*, *In re Burbano*, No. 16-68396-PMB, 2017 WL 1058219, at *5-6 (Bankr. N.D. Ga. Mar. 20, 2017). However, as discussed below, the court finds that the debtor's attorney should have reached out to the bank's counsel before filing this case.

Attorney's fees

"Section 362(k) only requires courts to award reasonable fees; thus, a court may use its discretion to eliminate unnecessary or excessive fees." *In re Collum*, 2019 WL 3243937, at *5; *see also id.* at *7 ("While the Court has no authority under § 362(k) to avoid attorney's fees for willful violations, it may reduce or limit those fees based on their reasonableness."). "Where the damages to the client are minimal, a court is well within its discretion to limit the award of fees." *Id.* at *6. "The failure of debtor's counsel to attempt non-litigious resolution of a routine stay violation may further justify the reduction of attorney's fees." *Id.*

Ms. Turner testified that she called her bankruptcy counsel's office each time she received a notice. The bank's counsel had filed a notice of appearance in Ms. Turner's bankruptcy case with his contact information on August 18, 2017 – ten days after the petition date and almost a month

before the first post-petition past due notice. This was a routine stay violation situation involving computer-generated notices. One telephone call, email, or letter from debtor's counsel to the bank's counsel would have resulted in the bank fixing its error on Ms. Turner's account, thus allaying Ms. Turner's concerns without the need for court intervention. "In instances where efforts to reach out to creditors would be futile, debtors' attorneys may have no choice but to go directly to the court. For example, where the bad actions of a contumacious creditor make extrajudicial resolution unlikely, debtors should not fear reproach for seeking bankruptcy court intervention." *Id.* at *5. However, as in this case, "when the matter is routine and likely easily settled, debtor's counsel should make some effort to resolve the issue with the creditor or creditor's counsel." *See id.*

Under these circumstances, the court does not find it necessary to perform a detailed lodestar analysis of the attorney's fees and conduct a separate evidentiary hearing. The court, based on its own experience in private practice and on the bench, finds that the time reasonably required for Ms. Turner's counsel to discuss the initial stay violation with Ms. Turner and communicate with the bank's counsel would have been an hour and that a reasonable hourly rate would be $250.00. The court will thus award attorney's fees in the amount of $250.00. *See, e.g.*, *id.* at *7 (awarding fee of $150.00).

Punitive damages

"It takes more than a willful violation of the stay to justify punitive damages. Bankruptcy courts have found punitive damages to be appropriate where the debtor's conduct was egregious, vindictive, malicious, or accompanied by bad faith." *In re McBride*, 473 B.R. 813, 822 (S.D. Ala. May 22, 2012) (citations and quotation marks omitted). "Bankruptcy cases in this circuit have followed this approach and have not awarded punitive damages without weighty circumstances." *Id.* (citation, quotation marks, and brackets omitted). "'Decisions awarding punitive damages in this

context typically consider the following factors: (1) the nature of the violator's conduct; (2) the nature and extent of the harm to the debtor; (3) the violator's ability to pay; (4) the motives of the violator; and (5) any provocation by the debtor.'" *Id.* (citation omitted).

The court has analyzed these factors and declines to award punitive damages. The bank's actions – while perhaps negligent – were not egregious vindictive, malicious, or accompanied by bad faith. Although Ms. Turner testified that she was worried that her vehicle would be repossessed, the bank never threatened repossession or took any steps to repossess her vehicle. There are no "weighty circumstances" present here justifying punitive damages.

Conclusion

For the reasons discussed above, the court will enter a separate judgment in favor of the plaintiff Robina A. Turner in the amount of $750.00 for emotional distress damages and $250.00 for attorney's fees, for a total damages award of $1,000.00. The court denies any other relief.

Dated: September 17, 2019

HENRY A. CALLAWAY
CHIEF U.S. BANKRUPTCY JUDGE