IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 96-30110

CARL F. KORESDOSKI
d/b/a ACP AUTOMOTIVE CO.
f/d/b/a ACD VENDING
f/d/b/a ACP WARRANTY CO.
AMY E. KORESDOSKI
a/k/a AMY HEESTAND
a/k/a AMY EASTERDAY

Debtors

PUBLISHED:

NOTICE OF APPEAL FILED: February 14, 2002

DISTRICT COURT NO.: 3:02-cv-00166

DISPOSITION: ì Notice of Voluntary Dismissal of Appeal filed April 19, 2002.
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Debtors

MEMORANDUM ON DEBTORS' MOTION FOR CERTIFICATE OF CONTEMPT

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RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

The Debtors filed a Debtors' Motion for Certificate of Contempt (Contempt Motion) on June 20, 2001. The Debtors seek actual and punitive damages, along with attorney fees, from Citifinancial, Inc.[1] for alleged violations of the automatic stay of 11 U.S.C.A. § 362(a) (West 1993). This contested matter was tried before the court on January 28, 2002.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(A), (O) (West 1993).

I

The Debtors filed their Joint Voluntary Petition under Chapter 7 on January 11, 1996. Citifinancial was scheduled as a secured creditor on the basis of a 1995 purchase money loan financing the acquisition of a computer.

On January 17, 1996 - six days after the bankruptcy filing - Citifinancial obtained a $7,462.02 default judgment against the Debtors in the General Sessions Court for Knox County, Tennessee. The Notice of Commencement of the Debtors' bankruptcy case was mailed to parties in interest, including Citifinancial, the previous day - January 16, 1996. The court has before it no evidence that Citifinancial received the notice or was otherwise aware of the Debtors' bankruptcy prior to obtaining the default judgment.

On April 3, 1996, the Debtors and Citifinancial entered into an Agreement to Reaffirm the Citifinancial debt. The Debtors then received their discharge on April 22, 1996. Shortly

[1] The Contempt Motion was brought against Associates Financial Services Company of Tennessee, Inc. (Associates). Citifinancial is Associates' successor-in-interest. The court will refer to Associates and Citifinancial collectively as Citifinancial.

thereafter, on April 25, 1996, the court entered an Agreed Order to Lift Automatic Stay as to Certain Computer Equipment and an Agreed Order to Lift Automatic Stay as to Certain Household Furnishings (Agreed Orders). The Agreed Orders allowed Citifinancial to repossess its collateral and provided that the Debtors would not reaffirm the subject debt.[2]

II

The Contempt Motion alleges that Citifinancial wrongfully caused the default judgment to appear on the Debtors' credit bureau reports. The Debtors additionally contend that Citifinancial wrongfully continues to make credit bureau inquiries as to the Debtors' current credit standing.

In the Debtors' opinion, these alleged automatic stay violations keep them from currently obtaining credit at the best possible interest rate. According to the Debtors, the credit bureau notations and inquiries by Citifinancial are viewed by potential lenders as derogatory postbankruptcy credit, thereby compounding the negative effect of their Chapter 7 filing.

The Debtors ask for damages of at least $180,000.00. That figure stems from their claim that the default judgment caused a one percent increase in the interest rate of their recently-obtained home mortgage. The Debtors also complain of difficulties in obtaining an apartment, utility service, and automobile financing.

III

Under the Bankruptcy Code, the Debtors' Chapter 7 filing operated as a stay of, *inter alia*:

[2] Although not an issue in the present contested proceeding, the Agreement to Reaffirm clearly does not comport with the reaffirmation requirements of 11 U.S.C.A. § 524(c) (West 1993). It was, therefore, never enforceable.

> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> . . . .
>
> (4) any act to . . . enforce any lien against property of the estate;
>
> (5) any act to . . . enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;
>
> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title[.]

11 U.S.C.A. § 362(a)(1), (4)-(6) (West 1993 & Supp. 2001); *cf*. *Easley v. Pettibone Mich. Corp.*, 990 F.2d 905, 910 (6th Cir. 1993) (Actions in violation of the automatic stay are voidable **?**[a]nd unless equity dictates otherwise, these actions *will* be voided by the court in which the invalid action against the debtor was filed." (emphasis in original)). The automatic stay remained in effect in this case until the Debtors received their discharge on April 22, 1996. *See* 11 U.S.C.A. § 362(c)(2)(C) (West 1993).

The parties agree that Citifinancial at least **?**technically" violated the automatic stay by obtaining the default judgment. However, before a debtor can recover damages under § 362, the stay violation must be more than merely **?**technical." Section 362(h) provides that **?**[a]n individual injured by any willful violation of [the automatic stay] shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." 11 U.S.C.A. § 362(h) (West 1993).

In other words, to recover under § 362(h) the Debtors must show a willful stay violation and injury resulting therefrom. *See id*. A violation is ?willful" if deliberately carried out with knowledge of the debtor's bankruptcy. *See Walker v. Midland Mortgage Co. (In re Medlin)*, 201 B.R. 188, 194 (Bankr. E.D. Tenn. 1996). The Debtors bear the burden of proof. *See In re Skeen*, 248 B.R. 312, 316 (Bankr. E.D. Tenn. 2000).

IV

The court cannot find that Citifinancial willfully violated the automatic stay. Without knowledge of the Debtors' Chapter 7 filing, the default judgment was not a willful stay violation. As noted, the Debtors presented no evidence that Citifinancial had notice of the bankruptcy prior to obtaining the judgment. It is certainly unlikely that Citifinancial received the clerk's Notice of Commencement only one day after it was mailed. The Debtors have not specified any other alleged violation taking place prior to the April 22, 1996 expiration of the automatic stay.

Additionally, even if the court could find a willful stay violation, the Debtors failed to prove that they were damaged in any way. For example, the testimony of Michael Baskett was offered by the Debtors to show that a judgment reported as ?postbankruptcy" can compound the bankruptcy's negative credit rating effect.[3] Mr. Baskett, however, was without knowledge as to any specific harm suffered by the Debtors. Further, the court does not consider the hearsay testimony of Carl Koresdoski (which was not objected to by Citifinancial), regarding what certain loan officers told him, as having probative value. The Debtor's testimony was conclusory and

[3] Mr. Baskett, who has worked as a credit officer for approximately fifteen years, was called by the Debtors as an expert witness. His testimony was admitted into evidence without objection by Citifinancial.

unsupported by any evidence. Lastly, the Debtors offered no documentation relating to their mortgage, or to any other loan or service purportedly denied to them, upon which the court could base a calculation of damages. *See Archer v. Macomb County Bank*, 853 F.2d 497, 499 (6th Cir. 1988) (Damages cannot be ?based on speculative evidence and mere conjecture.").

V

During opening arguments, counsel for the Debtors advised that the Contempt Motion also sought damages for violations of the discharge injunction of 11 U.S.C.A. § 524(a)(2) (West 1993). Although the Contempt Motion and the Debtors' other pretrial filings make no mention of the discharge injunction, the court will nonetheless briefly address that claim.

Section 524(a)(2) provides that the Debtors' April 22, 1996 discharge ?operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor . . . ." 11 U.S.C.A. § 524(a)(2) (West 1993). The court may award damages for violations of the discharge injunction pursuant to its § 105(a)[4] powers. *See In re Lafferty*, 229 B.R. 707, 713 (Bankr. N.D. Ohio 1998).

The Debtors base their Contempt Motion on Citifinancial's reports to, and inquiries with, the various credit bureaus. Courts previously addressing similar cases have generally required a motivation to collect the underlying debt. *See, e.g., Vogt v. Dynamic Recovery Servs. (In re Vogt)*,

[4] ?The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C.A. § 105(a) (West 1993).

257 B.R. 65, 71 (Bankr. D. Colo. 2000) (There must be ?‹an act' to extract payment."); *Singley v. American Gen. Fin. (In re Singley)*, 233 B.R. 170, 173 (Bankr. S.D. Ga. 1999) (credit bureau reports made with the intent of harassing or coercing a debtor). *But cf. In re Sommersdorf*, 139 B.R. 700, 701 (Bankr. S.D. Ohio 1991) (Notations on credit reports are ?just the type of creditor shenanigans intended to be prohibited" by the Bankruptcy Code.). The language of §§ 362 and 524, prohibiting ?acts" to collect, enforce, or recover prepetition debts, supports the majority view.

Mr. Baskett offered his opinion that credit inquiries, such as the ones made by Citifinancial, are generally considered to be collection activities. The court cannot, however, find that the Debtors were damaged in any way by these acts. Mr. Koresdoski's October 22, 1999 Credit File states that the types of inquiries made by Citifinancial ?do not appear on credit files businesses receive, only on copies provided to you [the consumer]." A potential lender's decision not to extend credit to the Debtors (or to extend credit at a higher rate of interest) cannot possibly have been affected by information of which the lender was unaware.

Additionally, the Debtors have not proven that Citifinancial reported its judgment in order to extract payment.[5] There is also no persuasive evidence before the court connecting the reporting of Citifinancial's judgment to any specific injury suffered by the Debtors.[6] Further, Mr. Koresdoski's October 22, 1999 and April 12, 2001 credit reports, which make no mention of the

[5] In some instances, such as Mr. Koresdoski's August 18, 2000 Trans Union credit report, notice of the judgment was ?obtained from public records" rather than from a report by Citifinancial.

[6] For example, except for Mr. Koresdoski's testimony regarding what he was allegedly told by a loan officer, the Debtors offered no proof that an alleged one percent increase in their home mortgage was caused solely by the judgment report and not by either their bankruptcy or by a combination of factors. In fact, the Debtors did not prove what percent of interest they were charged on this loan, much less that a one percent increase occurred.

sessions court judgment, call into doubt the extent to which the judgment was reported at all or, if reported, whether it was removed from the credit reports prior to the time he made his alleged high-interest rate loans.[7]

In short, the Debtors have presented the court with evidence of what *can* happen when derogatory postbankruptcy notations appear on a credit report. The Debtors have not, however, established that such compensable damage in fact occurred in this case. *See Archer*, 853 F.2d at 499.

The Debtors' Motion for Certificate of Contempt must therefore be denied. An order consistent with this Memorandum will be entered.

FILED: February 5, 2002

BY THE COURT

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

[7] For example, a credit report issued for Mr. Koresdoski by Trans Union on May 2, 2001, lists the General Sessions Court default judgment as **?**Civil Judgment in Bankruptcy." Mr. Koresdoski was asked on cross examination whether a judgment, **?**if it's included in your bankruptcy, it's not any more derogatory [from a credit reporting perspective] than the bankruptcy itself." He responded: **?**That would be correct, sir." Mr. Koresdoski also testified that the mortgage loan he obtained with the allegedly high-interest rate was in the summer of 2001, after the Trans Union credit report was issued showing Citifinancial's default judgment as included in the bankruptcy. The Debtors introduced no credit reports that were issued during the summer of 2001. In fact, they did not introduce any credit reports after May 2, 2001.

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O R D E R

For the reasons stated in the Memorandum on Debtors' Motion for Certificate of Contempt filed this date, the court directs that the Debtors' Motion for Certificate of Contempt filed by the Debtors on June 20, 2001, is DENIED.

SO ORDERED.

ENTER: February 5, 2002

BY THE COURT

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE