

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

In re)	
)	
WILLIAM BRADY TIMBS)	Case No. 93-35222
a/k/a BILL TIMBS)	Chapter 7
REBECCA LYNN GROSS TIMBS)	
a/k/a BECKY TIMBS)	
)	
Debtors)	

M E M O R A N D U M

This case is before the court on the motion filed by debtors, William and Rebecca Timbs, on March 3, 1994, seeking damages and other relief for the alleged willful violation of the automatic stay¹ by Northside Hospital, a creditor of the debtors. Northside Hospital filed a response and a request for summary disposition of debtors' motion without a hearing.² This is a core proceeding. 28 U.S.C. § 157(b)(1) and (b)(2)(o). See *In re Depew*, 51 B.R. 1010, 1014 (Bankr. E.D. Tenn. 1985).

¹11 U.S.C. § 362(h) provides:

"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."

²Northside Hospital also filed the affidavit of Lori Lufkin, a paralegal employed by Lufkin & Henley, P.C., which takes issue with the allegations contained in paragraph 11 of debtors' motion concerning the substance of a telephone conversation of February 2, 1994, between Ms. Lufkin and the secretary for debtors' attorney. Ms. Lufkin's version of the telephone conversation is accepted as true for the purpose of considering debtors' motion at this time.

I.

The debtors filed for relief under chapter 7 of the Bankruptcy Code on December 30, 1993, and thereupon, the automatic stay provided by 11 U.S.C. 362(a) went into effect. Respondent, Northside Hospital, along with its attorney of record, David A. Lufkin, were included on Schedule F "Creditors Holding Unsecured Nonpriority Claims," and listed on the mailing matrix for notice purposes. The debtors disclosed in their statement of financial affairs that Northside Hospital had obtained a judgment against them in the approximate amount of \$16,000.00, and that since December 13, 1993, Rebecca Timbs' wages had been garnished by Northside Hospital in the bi-weekly amount of \$164.40 in execution of the judgment. In their motion, the debtors allege that since the filing of their petition, the garnishment has continued with Rebecca Timbs' wages again being garnished on or about January 5, January 19, February 2, and February 16, 1994, despite notice of the bankruptcy filing to Northside Hospital and Mr. Lufkin by the clerk of the court and despite several calls to Mr. Lufkin's office by debtors' attorney and his secretary demanding "that steps be taken immediately to insure that Mrs. Timbs' wages were not garnished."

In Northside Hospital's response filed by Mr. Lufkin, he admits that he prepared and sent to the Chancery Court of Carter County an "application for execution" of the judgment under cover of a letter dated November 10, 1993. Further, Mr. Lufkin does not dispute the fact that his office received notice of the bankruptcy

filing, and Mr. Lufkin states that he advised the collection company by whom he was employed to collect this debt of the debtors' pending bankruptcy by letter dated January 19, 1994. Mr. Lufkin contends, however, that neither he nor Northside Hospital was "required to take any affirmative act" such as tendering an order or release to the state court to stop the garnishment process after receiving notice of the bankruptcy. This court disagrees.

II.

The legislative history of 11 U.S.C. 362(a) illustrates the importance of the automatic stay:

The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.

H. Rep. No. 595, 95th Cong., 1st Sess. 340, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6296. To put the burden of stopping the postpetition garnishment on the debtors and their bankruptcy counsel, as Northside Hospital suggests, would in effect subject the debtors to financial pressures which the automatic stay was designed to eliminate.

The bankruptcy court in *In re Elder*, 12 B.R. 491 (Bankr. M.D. Ga. 1981), addressed the question of "who is suppose[d] to stop the downhill snowballing of a continuing garnishment so that the automatic stay under 11 U.S.C. § 362 is effective?" *Id.* at 494. As

in this case, the facts in *Elder* involved a continuing garnishment proceeding which was instituted prepetition by a creditor, and which resulted in the wages of the debtor being garnished postpetition. The court held that the creditor's inaction concerning the garnishment proceeding which it had set in motion willfully violated the automatic stay. *Id.* at 495-96. The court explained:

Part of what is stayed in 11 U.S.C. § 362 is "continuation."³ Garnishment involves a creditor, a garnishee, and a court. Creditor sets in motion the process. Creditor is in the driver's seat and very much controls what is done thereafter if it chooses. If the "continuation" is to be stayed, it cannot choose to do nothing and pass the buck to the garnishee or the court in which the garnishment is filed to effectuate the stay. Positive action on the part of the creditor is necessary so that "continuation" may be stayed.

Id. at 494. See also *In re Dungey*, 99 B.R. 814, 817 (Bankr. S.D. Ohio 1989) (creditor has affirmative obligation to halt all collection activity including garnishment after receiving notice of bankruptcy); *In re Outlaw*, 66 B.R. 413, 417 (Bankr. E.D.N.C. 1986) (creditor has duty to notify sheriff to stop execution process); *Matter of Dennis*, 17 B.R. 558, 560 (Bankr. M.D. Ga. 1982) (creditor's attorney as officer of court has affirmative duty to stop garnishment process).

³11 U.S.C. § 362(a)(1) provides in material part that the filing of a petition operates as a stay of "the commencement or continuation...of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of a case under this title..." (emphasis supplied)

III.

Based upon the record before it, the court finds that Northside Hospital willfully violated the automatic stay by failing to take any action to stop the continuing postpetition garnishment proceeding against Mrs. Timbs despite having notice of the bankruptcy and the repeated demands of debtors' counsel. The court will set this matter for hearing on the remaining issue of damages and other relief sought by debtors.

ENTER: March 21, 1994

BY THE COURT

A handwritten signature in cursive script, reading "Marcia P. Parsons".

MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE