

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)	
REBECCA LYNN TIMBS)	
a/k/a REBECCA LYNN GROSS)	Chapter 7
)	
Debtors)	

M E M O R A N D U M

This matter is before the court on the "MOTION TO SET ASIDE ORDER OF MARCH 21, 1994 UNDER RULE 60 OF THE F.R.C.P."¹ filed by Northside Hospital on May 5, 1994. For the following reasons, the motion of Northside Hospital is denied.

I.

As background, the court's order entered March 21, 1994, set a hearing for April 26, 1994, to consider proof of damages and any other relief to which the debtors were entitled as a result of the finding that "Northside Hospital willfully violated the automatic stay by failing to take any action to stop a postpetition garnishment of debtor Rebecca Timbs' wages once it received notice of the debtors' bankruptcy." That specific finding was made after consideration of the (1) debtors' motion against Northside Hospital filed March 3, 1994, which was served by debtor's attorney via U.S.

¹Although not designated as such, the court assumes that the motion is being made under Rule 9024 of the Federal Rules of Bankruptcy Procedure.

24

mail upon Northside Hospital and David A. Lufkin, its attorney, on February 23, 1994; (2) response to the debtors' motion and request for summary disposition of said motion without a hearing which was filed by Mr. Lufkin on behalf of Northside Hospital on March 1, 1994; and (3) affidavit of Lori A. Lufkin filed by Mr. Lufkin on behalf of Northside Hospital on March 14, 1994.

At the hearing on April 26, 1994, Mr. Lufkin appeared before the court and participated in the hearing by cross-examining the only witness to testify, the debtor, Rebecca Timbs, and by arguing the merits of the contested matter. Thereupon, the court issued an order which was entered on May 4, 1994, granting judgment against Northside Hospital in the amount of \$797.36 in actual damages, and \$2000.00 in punitive damages.

II.

Northside Hospital's present motion requests that the court, pursuant to FED. R. CIV. P. 60, set aside its March 21, 1994 order.² However, Northside Hospital fails to set forth the specific grounds under FED. R. CIV. P. 60, as incorporated by FED. R. BANKR. P. 9024, *i.e.* clerical or other mistakes, inadvertence, excusable neglect, newly discovered evidence, fraud, *etc.*, which entitles it to relief. Despite this deficiency, the court will address the

²There has been no request by Northside Hospital that the court set aside its May 4, 1994 order. However, because of the allegations that the court never acquired personal jurisdiction over Northside Hospital and that it was not properly served, the court will address that argument as to both the March 21 and the May 4 orders.

various legal arguments raised by Northside Hospital in support of its motion.

First, Northside Hospital asserts that the court did not have personal jurisdiction over it because no complaint has been filed and neither Northside Hospital nor Mr. Lufkin was served with "any process." See motion of Northside Hospital at ¶ nos. 1, 2, 5, 8, 9, 10 and 14. However, it was not necessary for debtors to file a complaint; a request for sanctions under § 362(h) arising from willful violations of the automatic stay may be sought by motion rather than complaint. See *In re Hooker Investments, Inc.* 116 B.R. 375, 378 (Bankr. S.D.N.Y. 1990); *In re Zumbrun*, 88 B.R. 250, 252 (9th Cir. B.A.P. 1988).

With respect to Northside Hospital's allegation that it has never been served, the record conclusively establishes the contrary. The certificate of service attached to the motion filed by the debtors on March 3, 1994, evidences that on February 23, 1994, copies of the motion were appropriately served by first class mail upon Mr. Lufkin and upon Northside Hospital in accordance with FED. R. BANKR. P. 9014 and 7004 (1) and (3), with the copy to Northside Hospital directed to the attention of "[a]ny Officer, Managing or General Agent." On March 1, 1994, a response to the debtors' motion was filed by "David A. Lufkin, Attorney for Northside Hospital" in which Northside Hospital takes issue with the merits of the debtors' motion and specifically requests a summary disposition of the motion without a hearing. Thereafter, on March 14, 1994, Northside Hospital filed an affidavit of Lori A.

Lufkin in support of its response. Then, at the hearing of April 26, 1994, Mr. Lufkin appeared on behalf of Northside Hospital and defended the motion on its merits.

At no time prior to this present motion to set aside filed May 5, 1994, did Northside Hospital or Mr. Lufkin, on its behalf, ever complain that it had not been properly served with a copy of debtors' March 3, 1994 motion or that the court did not otherwise have personal jurisdiction over Northside Hospital. Even though it is clear that the court acquired personal jurisdiction over Northside Hospital when debtors' attorney properly served it with a copy of the motion as required by FED. R. BANKR. P. 9014, Northside Hospital, in choosing to voluntarily appear and defend the motion on its merits, waived any purported defect pertaining to personal jurisdiction or service of process. See *Rauch v. Day & Night Mfg. Corp.*, 576 F.2d 697, 700 (6th Cir. 1978) (personal jurisdiction may be founded upon voluntary appearance); *In re Fairfield Group Partnership*, 69 B.R. 318, note 1 (Bankr. E.D. Tenn. 1987) (general appearance through filing of response to motion for contempt waived any procedural defect in service of motion pursuant to Rule 7004). Accordingly, this argument is without merit.

Next, Northside Hospital argues that there is no proof that the wages of Mrs. Timbs have been garnished in execution by Northside Hospital or that notice of the debtors' bankruptcy filing was ever given to Northside Hospital or Mr. Lufkin. See motion of Northside Hospital at ¶ nos. 6, 9 and 10. This argument is incredible in light of (1) the response of Northside Hospital

wherein Mr. Lufkin acknowledges that he received a copy of the "Notice of Bankruptcy," and that he, in turn, notified the collection agent for Northside Hospital by letter dated January 19, 1994, of the debtors' bankruptcy filing; and (2) Northside Hospital's motion for leave to appeal filed March 31, 1994, wherein Mr. Lufkin recites in the statement of facts section the following:

On November 10, 1993, Northside Hospital filed a garnishment against the wages of Rebecca Timbs. The debtors did not file their petition for relief under Chapter 7 of the Bankruptcy Code until December 30, 1993. After the garnishment left the hands of Northside Hospital and was served upon the garnishee employer, the employer withdrew approximately \$164.40 by-weekly [sic] from Mrs. Timb's [sic] wages. Further, the garnishment continued in effect after the filing of the debtor's [sic] bankruptcy and Rebecca Timb's [sic] wages were garnished on January, [sic] 5, 19, February 2, and 16, 1994.

In fact, Northside Hospital raises none of these alleged defects in its motion for leave to appeal and states that the only issues for appeal are whether Northside Hospital willfully violated the automatic stay and which entity is responsible for stopping a garnishment once a bankruptcy has been filed. Moreover, the uncontradicted evidence presented at the hearing on April 26, 1994, was that Mrs. Timbs' wages had been garnished postpetition by Northside Hospital despite the fact that Northside Hospital received notice from the clerk of the bankruptcy filing. Accordingly, this argument is equally without merit.

Northside Hospital asserts that the court has treated it unfavorably by not setting its motion for leave to appeal for

hearing and in not staying the hearing of April 26 which was set by the court's order of March 21, 1994. See motion of Northside Hospital at ¶ nos. 4 and 8. However, it is the district court which acts on a motion for leave to appeal, not the bankruptcy court. See FED. R. BANKR. P. 8003; see also *In re Fillard Apartments, Ltd.*, 104 B.R. 480 (S.D. Fla. 1989) (certification by bankruptcy judge is not required for an interlocutory appeal to district court). As to staying the hearing, Northside Hospital never filed a motion to stay the April 26, 1994 hearing on damages pending appeal as allowed by FED. R. BANKR. P. 8005, or even a motion for a continuance. And nowhere in the notice of appeal or in the motion for leave to appeal filed by Northside Hospital on March 31, 1994, did it request such a stay. Accordingly, Northside Hospital's claim that the court improperly failed to consider its request for a stay, when no request was ever made, is not only baseless but preposterous.

Finally, Northside Hospital argues that it is inequitable to require a creditor such as it to take action to stop a garnishment postpetition which it had put into motion before the bankruptcy filing since the debtors "receive the primary benefit" of the bankruptcy filing. See motion of Northside Hospital at ¶ nos. 7 and 14. As set forth in this court's March 21, 1994 memorandum, § 362 of the Bankruptcy Code, not this court, imposes the requirement that a creditor cease all collection efforts. This court has no authority to direct the contrary, even if it were in the interest of equity. See *In re C-L Cartage Co., Inc.*, 899 F. 2d

1490, 1494 (6th Cir. 1990) (bankruptcy courts cannot use equitable principles to disregard unambiguous statutory language).

III.

The remaining arguments contained in Northside Hospital's motion are either directed to the debtors' second motion which is set for hearing on May 17, 1994, or have no legal or equitable basis. An order will be entered in accordance with this memorandum denying Northside Hospital's motion to set aside this court's orders of March 21, 1994 and May 4, 1994.

ENTER: May 16, 1994

BY THE COURT

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

MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE