UNITED STATES BANKRUPTCY COURT
For the Southern District of Iowa

In re:	**:**	**Case No. 02-06615-rjh7**
ROBERT E. RULLESTAD and	**:**	
JOANN F. RULLESTAD,	**:**	
	:	**Chapter 7**
Debtors.	**:**	

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ORDER—MOTION TO ALTER OR AMEND JUDGMENT AND FOR RELIEF FROM JUDGMENT AND OBJECTION THERETO

Creditor's Motion to Alter or Amend Judgment and for Relief from Judgment and Objection Thereto came on for hearing on October 13, 2003. Stephen D. Marso represented Bank One, N.A. f/k/a First Bank U.S.A. (hereinafter Bank One). Michael P. Mallaney and Ryan E. Weese represented Robert E. and JoAnn F. Rullestad (hereinafter collectively Debtors). At the conclusion of the hearing, the court took the matters under advisement on a briefing schedule. Post-hearing briefs have been received, and the court considers the matters fully submitted.

The court has jurisdiction of these matters pursuant to 28 U.S.C. §§ 157(b)(1) & 1334 and order of the United States District Court for the Southern District of Iowa pursuant to 28 U.S.C. § 157(a). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(O). Upon review of the pleadings, evidence, memorandums, and arguments of counsel, the court now enters its findings and conclusions pursuant to Fed. R. Bankr. P. 9014 & 7052.

FACTS

1. JoAnn Rullestad (hereinafter singularly JoAnn) was 69 years of age on April 29, 2003.

2. JoAnn had suffered from a health problem, and Debtors were unable to remain current in the payment of their debt.

3. Debtors went to Consumer Credit for assistance with their debt problem. They paid bills through Consumer Credit for approximately 3 years, but were unable to lower their debt because of the interest being charged.

4. On December 3, 2002, Debtors filed their voluntary chapter 7 petition.

5. First USA Bank, N.A., P.O. Box 94014, Palatine, IL 60094-4014, was scheduled as an unsecured debt on Schedule F. JoAnn was shown as the Debtor responsible for that scheduled claim of $525.28.

6. Debtors failed to show their social security numbers on the petition.

7. Notice of the filing was given to the Bank One on December 4, 2002.

8. Debtors amended their petition on December 9, 2002, by filing their social security numbers on an amended petition. The amended petition and notice of corrected social security number was served on Bank One on December 14, 2002.

9. Bank One maintains its accounts by name and account number, not by social security number.

10. On December 27, 2002, Bank One sent JoAnn a letter demanding that she pay the debt and warning that failure to pay the debt would show up on the records of all the national credit bureaus for up to seven years.

11. On or about January 19, 2003, JoAnn received a letter from Bank One demanding payment of the account.

12. Debtors received their discharge on March 12, 2003.

13. After the filing of the bankruptcy petition, Debtors received many telephone calls from Bank One demanding payment of the debt.

14. Immediately upon filing of the bankruptcy petition, and during the first telephone call from Bank One, JoAnn advised Bank One that they had filed a bankruptcy petition, and it was their understanding that Bank One was not supposed to be calling them about the debt.

15. On or about February 19, 2003, JoAnn received a statement from Bank One. Bank One added a late fee and finance charge showing a new balance of $587.25.

16. On or about February 24, 2003, JoAnn received a letter from Bank One acknowledging that it had been informed of the filing of the bankruptcy petition fifteen days prior to the letter, but if it did not receive proper bankruptcy information or payment within 15 days it would resume regular collection activities.

17. On March 11, 2003, counsel for Debtors wrote a letter to Bank One's collection agent advising it that a bankruptcy petition had been filed, Bank One was a scheduled creditor, and, to please stop demanding payment of the debt, as it was a violation of the stay.

18. Bank One was given notice of the discharge on March 13, 2003. Bank One acknowledged receipt of the notice on the same date.

19. Debtors continued to receive telephone calls from Bank One demanding payment of the debt.

20. On or about March 20, 2003, JoAnn received a statement from Bank One. Bank One added a late fee and a finance charge showing a new balance of $606.28.

21. JoAnn filed her application for order to show cause why Bank One should not be held in contempt of court for violating the discharge injunction on March 28, 2003.

22. Notice of this application was given to Bank One on March 28, 2003, at two addresses, to-wit: First USA Bank, N.A., PO Box 94014, Palatine, IL 60094-4014 and First USA Bank, N.A., PO Box 15548, Wilmington, DE 19886-5548.

23. Bank One has never filed a response to this application.

24. On April 1, 2003, notice and order issued setting JoAnn's application for order to show cause for hearing on April 29, 2003, at 10:00 a.m.

25. Notice of this hearing was given to Bank One at the above two addresses.

26. On or about April 18, 2003, JoAnn received a statement from Bank One. Bank One added a late fee and a finance charge showing a new balance of $625.54.

27. On April 22, 2003, JoAnn filed her list of exhibits and witnesses. Bank One had been served with this list on April 10, 2003, at the above two addresses.

28. On April 22, 2003, JoAnn filed an amendment to her list of exhibits and witnesses. This amendment was served on Bank One at the above two addresses on April 22, 2003.

29. The hearing on JoAnn's application for order to show cause why Bank One should not be held in contempt was held on April 29, 2003. Bank One failed to appear at that hearing and Bank One did not communicate with either the court or counsel for JoAnn.

30. The minute order from the hearing was entered on April 29, 2003. JoAnn's application was sustained; she was awarded $10.00 in compensatory damages; and, punitive damages in the amount of $50,000.00 were awarded. Counsel for JoAnn was directed to prepare a proposed order and a statement of fees, charges, and expenses related to the contempt action, and submit the same to the court.

31. The minute order was served on Bank One at the above two addresses on May 1, 2004.

32. Counsel for JoAnn submitted his affidavit of attorney's fees on May 1, 2003.

33. Counsel for JoAnn submitted the Memorandum of Decision, Order and Judgment to the court, which was approved by the court and filed on May 23, 2003. This order provided that Debtors were entitled to nominal compensatory damages of $10.00; attorney's fees in the amount of $1,482.50; and, punitive damages in the amount of $50,000.00, plus interest.

34. Judgment was accordingly entered on May 23, 2003.

35. Notice of the judgment was given to Bank One on May 25, 2003, at the above two addresses.

36. Nunc pro tunc order and judgment was entered on June 12, 2003, providing that judgment was entered in favor of JoAnn Rullestad rather that to Debtors.

37. Bank One filed its Motion to Alter or Amend Judgment and for Relief from Judgment and Order on June 20, 2003. This was the first appearance by Bank One.

38. Bank One only sought relief from the judgment and order imposing punitive damages in the amount of $50,000.00, on the basis that the punitive damage award was excessive and violated the due process clause of the constitution.

39. Bank One's legal department was aware of the bankruptcy filing and the application for order to show cause during the course of these proceedings and prior to the hearing on April 29, 2003.

40. Bank One's annual gross income in 2002 was in excess of $16 billion dollars.

DISCUSSION

Bank One filed its motion pursuant to Fed. R. Bankr. P. 9023 & 9024, asking the court to vacate its judgment entered on May 23, 2003, imposing sanctions for violating the automatic stay provisions and the discharge injunction of 11 U.S.C. §§ 362(a) & 524(a) respectively. Bank One asserts that its failure to appear at the hearing and defend against Debtor's motion for sanctions was unintentional and a result of excusable neglect on the part of its legal staff. While acknowledging violations of stay and the discharge injunction, it argues that said violations were the result of human error, oversight, and miscommunication, but not willful conduct on its part. As a result, punitive damages were not warranted. Bank One further argues that even if punitive damages are appropriate, the $50,000.00 award is so grossly out of proportion to the actual damage award of $10.00 as to violate the "Due Process Clause" of the Fourteenth Amendment of the United States Constitution. In addition to vacation of the adverse judgment, Bank One requests a hearing to present evidence of its conduct, or alternatively, for a reduction in the amount of punitive damages.

Fed. R. Bankr. P 9023 incorporates Fed. R. Civ. P. 59, which provides for the amendments of judgments. Motions to alter or amend judgments allow a district court the opportunity to correct its mistakes in the time immediately following its entry of judgment in the matter. Innovative Home Health Care, Inc. v. P.T.-O.T. Associates of

the Black Hills, 141 F.3d 1284, 1286 (8th Cir. 1998). Such motions serve the limited purposes of correcting manifest errors of law or fact or to present newly discovered evidence. Id. They cannot be used to "introduce new evidence, tender new legal theories, or raise arguments which could have been offered or raised prior to entry of judgment." Id. A motion to alter or amend judgment must be filed no later than ten days after the entry of judgment. Fed. R. Civ. P. 59(e). The court has broad discretion in determining whether or not to grant a motion to alter or amend its judgment. Innovative Home Health Care, Inc., 141 F.3d at 1286.

In this case, hearing was held on JoAnn's motion for sanctions on April 29, 2003, and the court entered its minute order finding in favor of Debtor and awarding damages. The court directed Debtor's counsel to file a statement of costs and attorney fees and prepare a proposed order to submit to the court. The court approved the proposed order and entered judgment on May 23, 2003. Accordingly, the bar date for filing a Rule 59(e) motion was June 2, 2003. See Fed. R. Bankr. P. 9006(a). As Bank One filed the instant motion on June 20, 2003, the court will deny it as untimely.

Fed. R. Bankr. P. 9024 incorporates Fed. R. Civ. P. 60, which provides in pertinent part:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons; (1) mistake, inadvertence, surprise, or excusable neglect; …(6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

"[E]xcusable neglect encompasses both simple, faultless omissions and omissions caused by carelessness." Amtech Lighting Services Co. v. Payless Cashways, Inc. (In re Payless Cashways, Inc.), 230 B.R. 120, 138 (B.A.P. 8th Cir. 1999) citing Pioneer Inv. Servs. V. Brunswick Assocs. Ltd. Partnership, 507 U.S. 380, 388 (1993). Courts make an equitable determination of whether the neglect is excusable, based on all the relevant circumstances. "Factors to consider include (1) the danger of prejudice to the [nonmovant]; (2) the length of the delay and its potential impact on judicial proceedings; (3) the reason for the delay, including whether it was within the reasonable control of the movant; and (4) whether the movant acted in good faith." Id. In applying the factors, the focus is heavily on the blameworthiness of the defaulting party. Id.

In applying the Pioneer factors, the court finds significant prejudice to JoAnn, the nonmoving party. She has already endured Bank One's violations of the automatic stay and discharge injunction. She incurred expense in responding to the violations by seeking assistance from her attorney and additional protection from the court. The court has held one hearing in this matter in which JoAnn provided evidence. Requiring JoAnn to participate in a second evidentiary hearing would put an additional financial burden on her.

The length of delay in Bank One responding to the motion for sanctions, while not negligible, is still well within the one-year time limit set forth in the rule for requesting relief from judgment. However, its potential impact affects the finality of the judgment and delays JoAnn's ability to enforce said judgment. It also has the potential to keep JoAnn's bankruptcy case open for an extended period of time.

In considering the third and fourth factors, the court finds that they weigh heavily against the requested relief. Bank One acknowledges that it received notice of the bankruptcy filing and notice of the motion for sanction. Said notices were forwarded to its legal department. Bank One did not provide evidence from any source with firsthand knowledge providing a reason for failing to defend the motion for sanctions. The court surmises that Bank One made a decision not to expend resources to participate in the hearing choosing, rather, to await the outcome. Upon receiving notice of the extent of the judgment, it now seeks to present evidence to vacate or modify the punitive damage award. In so doing, Bank One attempts to manipulate the rules of procedure in a fashion for which they were never intended. The court will not countenance such practice, and so finds that Bank One waived its right to present any evidence which was available for its defense at the time of trial See In re See, 301 B.R. 554, 556 (Bankr. N.D. Iowa 2003) (considering a motion to alter or amend judgment). Accordingly, the court finds that Bank One has not carried its burden to show that its neglect in defending against the motion for sanctions was excusable.

Further, the court does not agree that the punitive damages award is so out of proportion to compensatory damages as to run afoul of the Due Process Clause of the Fourteenth Amendment. As the Supreme Court stated, a high ratio may comport with due process where economic damages are small, but the causation was particularly egregious. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003); see also Williams v. Kaufman County, 352 F.3d 994, 1016 (5th Cir. 2003) ("punitive damages-to-compensatory damages 'ratio analysis' cannot be applied effectively in cases where only nominal damages have been awarded…"). The main precept to take from the

case law is that the award must be reasonable based on the circumstances. See Id. at 425-26 and Williams, 352 F.3d at 1016.

In this case, the court found that Bank One willfully violated both the automatic stay and the discharge injunction. It continued to demand payment after receiving notice of Debtors' bankruptcy filing even after receiving corroboration from their attorney that a bankruptcy petition had been filed, and Bank One was a scheduled creditor.

Bank One flagrantly ignored both the automatic stay provisions and the discharge injunction, two of the most fundamental protections provided by the bankruptcy code. In determining the appropriate sanction, the court necessarily considered Debtor's ability to enforce the sanction. Based on the record before the court, Bank One has no known assets in Iowa, and in order to enforce her judgment, JoAnn must register the judgment with foreign a court. She must necessarily retain associate counsel, which would require a fee sharing arrangement and thereby incur additional expense. Accordingly, while keeping the award at a reasonable amount, the court awarded sufficient punitive damages to afford JoAnn the ability to domesticate and collect the judgment. To do otherwise, would make any award and sanction meaningless and eviscerate the protections the automatic stay and discharge injunction were intended to provide. Bank One could continue with business as usual and ignore these provisions of the Bankruptcy Code with impunity, knowing that Debtors could not afford to enforce an insubstantial judgment.

As to Bank One's argument that its conduct was not as egregious as that of the creditor in In re Capion, No. 98-2242 & In re Bowser, No. 98-4140 slip. op. (Bankr. S.D. Iowa June 28, 2000) (Judge Hill Dec. # 330), the court finds that these cases are distinguishable upon the facts. The court notes that the initial punitive damages award

against the creditor in these cases was $100,000.00. Upon motion for relief from judgment, the creditor argued that it did not receive proper notice of the motion for sanctions, and therefore, was prevented from presenting a defense to the action. Counsel for Debtors acknowledged that service on the creditor was inadequate, and the judgment was vacated by a consent order.

In this case there is no allegation that service was improper or inadequate. To the contrary, Bank One acknowledges that it received notice and notified its legal department. After that point, it has no explanation as to why it failed to appear at the hearing or respond in any way to the motion for sanctions. Rather than being deprived of its right to a hearing, Bank One chose not to participate in the hearing. Consequently, it has been treated no differently by the court than the creditors in Capion and Bowser.

For all the foregoing reasons, the court finds that Bank One has not shown that its failure to defend against the motion for sanctions was the result of excusable neglect. Further, the court does not find the award of punitive damages so burdensome as to violate due process. Accordingly, the court will deny Bank One's motion for relief.

ORDER

IT IS ACCORDINGLY ORDERED that Creditor Bank One, N.A. f/k/a First Bank U.S.A.'s Motion to Alter or Amend Judgment and for Relief from Judgment is hereby DENIED.

Dated: _____, 2004

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RUSSELL J. HILL, JUDGE
U.S. BANKRUPTCY COURT