

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE SOUTHERN DISTRICT OF IOWA**

IN THE MATTER OF:	:	
Norman Eugene Lettington,	:	Case No. 97-04083-C J
Maxine Ann Lettington,	:	
	:	Chapter 7
Debtors.	:	

**RULING ON 11 U.S.C. SECTION 362(h) MOTION**

The Chapter 7 debtors ask the court to find creditor Steve Welch in civil contempt and to award them compensation, punitive damages, attorney's fees and costs pursuant to 11 U.S.C. section 362(h). The Court has jurisdiction of this matter pursuant to 28 U.S.C. section 1334. This is a core matter pursuant to 28 U.S.C. section 157(b)(2).

**I. BACKGROUND.**

On September 5, 1997 the debtors, Norman E. Lettington and Maxine A. Lettington, filed a petition for relief under Chapter 7 of the United States Bankruptcy Code. On the matrix filed the same day, the debtors included creditor Steve Welch & Associates and stated the address was 2595 Rainbow Valley Blvd, Fallbrook, CA 92028.

On September 5, 1997 the Clerk of Court entered and served the notice of commencement of case, in which December 9, 1997 was set as the deadline for filing dischargeability actions and objections to discharge. The Bankruptcy Noticing Center served parties in interest by first class mail on September 7, 1997.

On September 23, 1997 the debtors filed their Schedules and Statement of Financial Affairs. In Schedule B (Personal Property), the debtors indicate a German Shepherd dog, worth \$100.00, is in their possession. In Schedule F (Creditors Holding Unsecured Nonpriority Claims), the debtors state Steve Welch & Associates hold a \$550.00 claim that was incurred in 1996.

On October 21, 1997 the Chapter 7 trustee filed his report of abandonment of property and report of trustee in no asset case.

On October 24, 1997 Steve Welch, acting pro se, filed a bar date noticed motion for relief from the automatic stay, seeking return of a German Shepherd dog. In the caption, he sets forth the address for Steve Welch And Associates. It is the same as that on the matrix. In the motion and attached affidavit, he alleges the following: on August 15, 1995 he sold the dog to Norman Lettington for \$500.00, plus \$65.00 for a leash, collar and air craft carrier; his company spent more than the usual six weeks training the dog; on March 7, 1996 Mr. Lettington tendered a check in the amount of \$565.00; on March 12, 1996 Mr. Lettington arrived to pick up the dog; on that last date, Mr. Welch learned the bank would not honor the check due to insufficient funds and, therefore, he advised Mr. Lettington he would not release the dog unless he received the purchase

price in cash; Mr. Lettington visited the dog at the kennel, was satisfied with the purchase, and indicated he would return with cash; and on March 9, 1996 Mr. Lettington removed the dog without Mr. Welch's knowledge and without payment. In the declaration, Mr. Welch also states: "I called several times to Des Moines, Iowa, demanding the return of the dog or my money. I never received a call back until this notice of filing Bankruptcy."

On October 29, 1997 the debtors filed their objection to the motion. As an affirmative defense, they argued Mr. Welch did not have a security interest in the dog.

On November 21, 1997 the court conducted a telephonic hearing on the motion and objection. Albert L. Garrison appeared on behalf of the debtors. David E. Ridenour appeared on behalf of Mr. Welch. At the conclusion of the hearing the court entered the following order:

Based on today's hearing, it is hereby ORDERED that: The objection is sustained and the unsecured creditor's motion is denied. (The automatic stay will expire when the general discharge order is entered. *See* 11 U.S.C. section 362(c). That order will be entered on or about December 10 unless one of the events set forth in Federal Rule of Bankruptcy Procedure 4004(c) applies. The discharge injunction applies to unsecured debts that are not determined to be nondischargeable. *See* 11 U.S.C. sections 523 and 524. *See also* Federal Rules of Bankruptcy Procedure 4007 and 7001(6).)

On December 8, 1997 the debtors filed a "Motion Requesting Relief For Violation Of Bankruptcy Code Section 362, Violation Of Automatic Stay" against Mr. Welch. In paragraph 7 and 8 of that motion, the debtors contend:

7. On September 13, 1997, the defendant, through its agent left a recorded message on debtors/plaintiffs answering service that was demeaning and humiliating which acknowledged receipt of the notice of commencement of a case under a chapter 7 case, attempting to collect the debt owing from the debtors/plaintiffs to the defendant.

8. At no time did any agent or employee of the defendant communicate or attempt to communicate with the debtors/plaintiffs' undersigned counsel, although the defendant knew or had reason to know that the debtors/plaintiffs were represented by him as an attorney with respect to their debt, and the defendant knew or could have easily ascertained the address of their attorney.

The debtors ask the court both to hold Mr. Welch in civil contempt and, pursuant to 11 U.S.C. section 362(h), to award them compensation and punitive damages in the amount of \$1000.00, plus attorney fees and costs.

On December 10, 1997 the General Discharge of Debts was entered. (Mr. Welch neither filed an objection to the general discharge of debts nor a complaint to determine the dischargeability of the debt owed to him.)

On January 20, 1998 Mr. Welch, again acting pro se, filed a response to the debtors' section 362(h) motion. In the caption, he sets forth the address for Steve Welch And Associates. It is different from the one on the matrix. In the motion, he denies the allegations. In the affirmative defense, however, he indicates he first learned the debtors were contemplating seeking bankruptcy relief on or about September 13, 1997 when so advised by his son, who had learned about the matter from a friend--one of the debtors' daughters. Based on that information, he called the debtors on or about that date requesting the return of the dog or the money. As an affirmative defense, Mr. Welch also pointed out his address changed on or about March 1, 1997 from that shown on the matrix. Mr. Welch contended he received the notice of the commencement of the case on September 15, 1997 when the landlord from his prior address forwarded it to him via messenger.

On June 9, 1998 the court conducted a telephonic preliminary hearing on the section 362(h) motion and response. Mr. Garrison appeared for the debtors. Mr. Welch represented himself. Mr. Garrison pointed out the address on the motion for relief from stay as proof Mr. Welch should have received the Clerk's notice mailed to the same address. Mr. Welch again acknowledged that he left a message for the debtors around the time in question but stated the message he left referred to a criminal action pending in California state court.<sup>1</sup> At the conclusion of the hearing, the court directed debtors' counsel to file a transcript of the recorded telephonic message in issue and to amend the motion to clarify the nature and extent of the actual damages resulting from that message. The court set a deadline of July 8, 1998 for those items to be filed. On June 10, 1998, a minute order to that effect was entered.

On July 8, 1998 Mr. Garrison filed an amended motion. It reads:

COMES NOW, Norman and Maxine Lettington debtor(s) in the above matter, by and through their attorney, respond to the Court order issued June 9, 1998, the debtors' are hereby submitting a transcript of the recorded telephone message of September 13, 1997, at 3:26 p.m. left on the Lettingtons' voice messaging which stated:

**"Lettington, I just got your Notice of Bankruptcy. I truly believe that you both belong in jail with your daughter."**

1. The Lettingtons' daughter is currently serving a life sentence in prison for murder.
2. The caller ID reflected the phone number (714) 461-7722, which is the same phone number listed at the heading of Mr. Steve Welch "Response to motion requesting relief for violation of Bankruptcy Code Section 362, Violation of Automatic Stay.
3. Due to the fact that this is egregious intentional conduct, no evidence will be offered as to actual damages.

---

<sup>1</sup> 11 U.S.C. section 362(b)(1) clarifies that the filing of a bankruptcy petition does not stay the commencement or continuation of a criminal action or proceeding against a debtor.

## II. DISCUSSION.

The court treats the pending motion as one brought pursuant to section 362(h).<sup>2</sup> That section provides: “An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorney’s fees, and, in appropriate circumstances, may recover punitive damages.”<sup>3</sup> To recover actual damages, the debtors must establish they were injured by the violation of the stay and that the violation was willful. *Lovett v. Honeywell, Inc.*, 930 F.2d 625, 628 (8<sup>th</sup> Cir. 1991). An award of costs and attorney’s fees is inappropriate in the absence of an award of actual damages. *Id.* at 629. To recover punitive damages, the debtors must establish the violation of the automatic stay amounted to egregious, intentional misconduct. *In re Ketelsen*, 880 F.2d 990, 993 (8<sup>th</sup> Cir. 1989).

The court finds it more likely than not that Mr. Welch did receive the notice of the commencement of the case on or about September 13, 1998 and called shortly thereafter to leave the message set forth in the amended motion.<sup>4</sup> The short recorded message, however, does not contain a demand for payment.<sup>5</sup> Indeed, the debtors have indicated they would not offer any evidence of actual damages at an evidentiary hearing.

The court finds that the second sentence of the two sentence recorded message is certainly insensitive given the incarceration of one of the Lettingtons' daughters, but it is not egregious given the parties’ strained relationship resulting from the insufficient funds check and the subsequent disappearance of the German Shepherd dog. The alleged

---

<sup>2</sup> Though debtors referred to “civil contempt” in their motion seeking relief for the alleged violation of the automatic stay, they did not ask the court to consider this under Federal Rule of Bankruptcy Procedure 9020. Furthermore, based on the filings and arguments of the parties to date, the court does not find this to be a situation in which it would appoint an attorney to pursue such an action.

<sup>3</sup> Solely for the purpose of this discussion, the court will assume the message in issue constitutes a violation of the automatic stay.

<sup>4</sup> The motion, as it was filed on December 8, 1997, contended Mr. Welch had called on September 13, 1997 to collect the debt. In his January 20, 1998 response to that motion, Mr. Welch suggested he had called on or about September 13, 1997 to request return of the dog or payment. During oral argument on June 9, 1998, he stated the recorded message referred to a criminal action pending in state court. The message set forth in the amended motion is consistent with Mr. Welch’s recollection at the time of argument.

<sup>5</sup> The Notice of Commencement of Case contains the following admonition:

CREDITORS MAY NOT TAKE CERTAIN ACTIONS. A creditor is anyone to whom the debtor owes money or property. Under the Bankruptcy Code, the debtor is granted certain protection against creditors. Common examples of prohibited actions by creditors are contacting the debtor to demand repayment, taking action against the debtor to collect money owed to creditors or to take property of the debtor, and starting or continuing foreclosure actions, repossessions, or wage deductions. If unauthorized actions are taken by a creditor against a debtor, the court may penalize that creditor. A creditor who is considering taking action against the debtor or the property of the debtor should review Sec. 362 of the Bankruptcy Code and may wish to seek legal advice. The staff of the clerk of the bankruptcy court is not permitted to give legal advice.

A lay creditor reading the notice literally might not realize any and all contact or correspondence that directly or indirectly bears on the creditor’s claim may violate the automatic stay. Though Mr. Welch apparently made demands for return of the dog or payment prior to receiving notice of the bankruptcy, nothing indicates he made any such prior call with actual knowledge that the debtors in fact had filed their petition. Indeed, he seemingly heeded the warning in the notice when he called the debtors on or about September 13, 1997 because he did not mention return of the dog or payment.

violation of the automatic stay was an isolated incident. Mr. Welch thereafter did attempt to obtain relief from the automatic stay but did so by filing an appropriate motion.

### III. CONCLUSION.

Wherefore, the court finds:

(1) The debtors have indicated they will not offer any evidence on actual damages and, therefore, no evidentiary hearing to determine whether they have been injured by the alleged violation of the automatic stay and whether the alleged violation was willful is warranted;

(2) The debtors have indicated they will not offer any evidence on actual damages and, therefore, no consideration of costs and attorney's fees is appropriate; and

(3) The brief recorded message, upon which the debtors rely for an award of punitive damages, is not egregious and, therefore, no evidentiary hearing to determine whether the alleged violation of the automatic stay constituted egregious, intentional misconduct is warranted.

A separate Order denying the motion will be entered accordingly.

Dated this \_\_\_\_ day of August, 1998.

---

LEE M. JACKWIG  
U.S. BANKRUPTCY JUDGE