



A handwritten signature in blue ink that reads "Neil P. Olack".

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: September 12, 2016

The Order of the Court is set forth below. The docket reflects the date entered.

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF MISSISSIPPI**

IN RE:

MAPLE STOKES,

CASE NO. 16-11883-NPO

DEBTOR.

CHAPTER 13

**ORDER DENYING MOTION FOR REIMBURSEMENT OF DAMAGES
AND FOR SANCTIONS FOR VIOLATION OF THE AUTOMATIC STAY**

This matter came before the Court for hearing on August 25, 2016 (the "Hearing"), on the Motion for Reimbursement of Damages and for Sanctions for Violation of the Automatic Stay (the "Motion") (Dkt. 12) and the proposed Order (the "Proposed Order") (Dkt. 21) filed by Maple Stokes, the debtor (the "Debtor"), in the above-styled chapter 13 bankruptcy case (the "Bankruptcy Case"). At the Hearing, Chris F. Powell ("Powell") represented the Debtor. Family Check Advance did not file a response, and no one appeared on its behalf at the Hearing. After fully considering the matter, the Court finds as follows:

Jurisdiction

The Court has jurisdiction over the parties to and the subject matter of the Bankruptcy Case pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A). Notice of the Motion was proper under the circumstances.

Facts

1. The Debtor initiated the Bankruptcy Case by filing a voluntary petition for relief pursuant to chapter 13 of the Bankruptcy Code on June 2, 2016 (the “Petition”) (Dkt. 1).

2. The Debtor filed the Motion on July 12, 2016, arguing that “Family Check Advance negotiated a check by depositing it at Southern Bancorp in Mound Bayou, M[S]” in the amount of \$426.83, despite the fact that the Debtor filed notice of the filing of the Petition on June 2, 2016. (Mot. at 1). According to the Debtor, Family Check Advance negotiated the check on June 9, 2016, but her bank did not cash it. (*Id.*). The Debtor argued in the Motion that “[a]s a direct consequence of Family Check Advance negotiating the check, despite notice of the bankruptcy, [the Debtor], was charged a \$31.50 insufficient funds check fee by the bank” that she would not have incurred “if Family Check Advance had refrained from negotiating the check.” (*Id.*). The Debtor requested that her actual damages of \$31.50 be reimbursed as well as punitive damages, sanctions, and reasonable attorney’s fees “if [Family Check Advance] does not pay her the \$31.50 before the hearing on this matter.” (*Id.*).

3. In the Proposed Order, the Debtor proposed to award \$31.50 in actual damages, as well as \$500.00 for punitive damages, \$500.00 for sanctions, and \$500.00 for attorney’s fees. (Proposed Order at 1).

4. At the Hearing, the Debtor testified that she obtained a loan from Family Check Advance before she filed the Petition. Apparently, in exchange for the loan, the Debtor gave Family Check Advance a post-dated check. After the Debtor filed the Petition, Family Check Advance presented the check for payment, but the bank dishonored the check because of

insufficient funds. As a result, the Debtor was charged a \$31.50 overdraft fee.¹ The Debtor stated that she made repeated demands to Family Check Advance, but it has yet to reimburse the Debtor for the \$31.50 overdraft fee. Although Powell admitted that the violation of the stay may not have been willful when Family Check Advance negotiated the check, he stated that after Family Check Advance refused to reimburse the overdraft fee despite repeated demands, it became a willful violation so that punitive damages, attorney's fees, and sanctions are appropriate. (10:04:40-10:05:30).²

Discussion

When the Debtor filed the Petition on June 2, 2016, the automatic stay immediately went into effect pursuant to § 362.³ Section 362 provides for a broad stay of a “wide range of actions that would affect or interfere with property of the estate, property of the debtor or property in the custody of the estate.” 3 COLLIER ON BANKRUPTCY ¶ 362.01 (16th ed. 2016). The purpose of the automatic stay in § 362(a) is to allow a debtor a “breathing spell” and a chance for a fresh start. *Brown v. Chestnut (In re Chestnut)*, 422 F.3d 298, 301 (5th Cir. 2005) (quotation omitted). Section 362 “provides an explicit damage remedy for an individual injured by a violation of the stay.” 3 COLLIER ON BANKRUPTCY ¶ 362.01. “Because the stay is imposed automatically, and often without notice to parties who may be stayed, a party may violate the stay without realizing that it has taken effect.” *Id.* On the other hand, Congress has provided a debtor with a private

¹ Throughout the pleadings and at the Hearing both Powell and the Debtor intermittently referred to the fee the Debtor incurred as an “insufficient funds fee” and/or an “overdraft fee.” For the sake of clarity, the Court will hereinafter refer to the fee as an overdraft fee.

² Hearing citations are to the timestamp on the official recording from the Hearing.

³ Hereinafter, all code sections refer to the Bankruptcy Code found in title 11 of the U.S. Code unless provided otherwise.

cause of action for any “willful violation” of the automatic stay. *Campbell v. Countrywide Home Loans, Inc.*, 545 F.3d 348, 354-55 (5th Cir. 2008). The Debtor appears to claim that Family Check Advance is liable for an inadvertent violation of the automatic stay, entitling her to a return of the \$31.50 overdraft fee, as well as a willful violation of the stay, entitling her to punitive damages, sanctions, and attorney’s fees.

I. No Stay Violation

Section 362(b) contains a list of exceptions to the automatic stay, including § 362(b)(11), which excepts “the presentment of a negotiable instrument” 11 U.S.C. § 362(b)(11). The Mississippi Court of Appeals has defined a negotiable instrument as “an unconditional promise or order to pay a fixed amount of money, with or without interest,” and the four (4) elements required by MISS. CODE ANN. § 75-3-104 must be met: (1) it is payable to bearer or to order at the time it is issued or first comes into possession of a holder; (2) it is payable on demand or at a definite time; and (3) it does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money” *Hancock Bank v. Ensenat*, 819 So. 2d 3, 8 (Miss. Ct. App. 2001); MISS. CODE ANN. § 75-3-104(a)(1)-(3). In Mississippi, a personal check is a negotiable instrument subject to the automatic stay exception of § 362(b)(11). *See In re Webb*, 432 B.R. 234, 236 (Bankr. N.D. Miss. 2010) (citing MISS. CODE ANN. § 75-3-104).

In *In re Webb*, before the debtor filed for bankruptcy, he entered into a loan transaction with Quick Lend, Inc. (“Quick Lend”), and, in exchange for a cash advance, he gave Quick Lend a post-dated personal check for \$365.85. *Id.* at 235. Pursuant to the terms of the agreement, Quick Lend negotiated the personal check sixty (60) days later, which was after the debtor filed for bankruptcy, because the loan was not “otherwise satisfied by the debtor.” *Id.* The debtor

incurred an overdraft fee as a result and argued that Quick Lend's negotiation of the check after he filed for bankruptcy relief constituted a willful and malicious violation of the automatic stay. *Id.* at 236. The bankruptcy court held that pursuant to § 362(b)(11), Quick Lend's post-petition negotiation of the personal check did not constitute a violation of the automatic stay. *Id.* at 237. "Because of the unambiguous language of § 362(b)(11), the negotiation of this check, even subsequent to the filing of the debtor's bankruptcy case, did not constitute a violation of the automatic stay." *Id.* at 236. The bankruptcy court went on to conclude, however, that despite the fact that Quick Lend did not violate the automatic stay, it was required to return the proceeds from the cashed check because "[t]he post-petition negotiation of the debtor's personal check constitutes an avoidable post-petition transfer as set forth in § 549(a) of the Bankruptcy Code." *Id.* at 238.

Similarly, in the Bankruptcy Case, Family Check Advance received the personal check from the Debtor before she filed the Petition, but did not attempt to negotiate the check until after. Unlike in *In re Webb*, however, the Debtor's bank in the Bankruptcy Case dishonored the check. Like our sister bankruptcy court in *In re Webb*, the Court finds that Family Check Advance's post-Petition negotiation of the Debtor's personal check was excepted from the scope of the automatic stay by § 362(b)(11). Moreover, because the Debtor's bank did not cash the check, Family Check Advance did not receive any estate funds (unlike Quick Lend in *In re Webb*); therefore, there is no avoidance action to be maintained against Family Check Advance under § 549(a) in the Bankruptcy Case. Without an underlying violation of the automatic stay, the Debtor is not entitled to any damages against Family Check Advance. The Court, therefore, finds that in the absence of a stay violation, the Debtor is not entitled to recover \$31.50 from Family Check Advance.

II. No Willful Stay Violation

Pursuant to § 362(k), an individual injured by a willful violation of the automatic stay “shall recover actual damages, including costs and attorneys’ fees.” 11 U.S.C. § 362(k)(1). “The words ‘shall recover’ indicate that Congress intended that the award of actual damages, costs and attorney’s fees be mandatory upon a finding of a willful violation of the stay.” *Clayton v. Old Kent Mortg. Co. (In re Clayton)*, No. 09-03024, 2010 WL 4482810, at *2 (Bankr. S.D. Tex. Oct. 29, 2010) (citations omitted). “In order to prevail on a § 362(k) claim, a plaintiff must prove by a preponderance of the evidence that the stay imposed under § 362 was violated, that the violation was committed willfully and the plaintiff was injured by the violation.” *Grine v. Chambers (In re Grine)*, 439 B.R. 461, 466 (Bankr. N.D. Ohio 2010).

The Fifth Circuit Court of Appeals has adopted three (3) elements that must be met in order for a stay violation to be considered willful: “(1) the defendant must have known of the existence of the stay; (2) the defendant’s acts must have been intentional; and (3) these acts must have violated the stay.” *Brown v. Chesnut (In re Chesnut)*, 422 F.3d 298, 302 (5th Cir. 2002). “Thus, it is a ‘willful’ violation of the stay if the creditor knew of the automatic stay and his actions that violated the stay were intentional, notwithstanding that the creditor believed in good faith that it had a right to the property.” *Williams v. Jamison (In re Williams)*, No. 13-00001, 2013 WL 4782145, slip op. at *4 (Bankr. S.D. Miss. Sept. 5, 2013).

In addition to the fact that the Debtor did not present any evidence to prove that any of the three (3) elements for a willful violation are satisfied, Family Check Advance did not violate the automatic stay, as the Court discussed in Section I above. Accordingly, the third element of the Fifth Circuit’s test for determining whether a violation of the stay was willful cannot be satisfied. Clearly, in order for a stay violation to be willful, there has to actually be a violation of the stay.

The Motion, therefore, should be denied and the Debtor is not entitled to attorney's fees, punitive damages, or sanctions.

IT IS, THEREFORE, ORDERED that the Motion is hereby denied.

##END OF ORDER##