SO ORDERED,

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: July 22, 2019

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

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

PHILICA ANN JONES, **CASE NO. 18-02837-NPO**

DEBTOR. **CHAPTER 13**

ORDER GRANTING MOTION TO HOLD CREDITOR CITY OF JACKSON IN CONTEMPT AND FOR OTHER RELIEF

This matter came before the Court for hearing on June 24, 2019 (the "Hearing"), on the Motion to Hold Creditor City of Jackson in Contempt and for Other Relief (the "Motion for Contempt") (Dkt. 40) filed by the debtor, Philica Ann Jones (the "Debtor"), in the above-referenced chapter 13 bankruptcy case (the "Bankruptcy Case"). At the Hearing, Bryce Kunz represented the Debtor, and no one appeared on behalf of the City of Jackson. In support of the Motion for Contempt, the Debtor testified on her own behalf and introduced into evidence one (1) exhibit.

Jurisdiction

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

Facts

On July 23, 2018, the Debtor filed a petition for relief under chapter 13 of the U.S. Bankruptcy Code (the "Code") (Dkt. 1). On Schedule E/F: Creditors Who Have Unsecured Claims (Official Form 106E/F) ("Schedule E/F"), the Debtor listed City Services Billing as holding a nonpriority unsecured claim in the amount of $7,850.00 for a "water bill." (Dkt. 4 at 14). Apparently, the Debtor has an account with the City of Jackson for water services to her residence. On September 27, 2018, the Court confirmed the Chapter 13 Plan (the "Plan") (Dkt. 2) with a monthly plan payment of $447.00. (Dkt. 27).

At the Hearing, the Debtor testified that she heard on a local news channel that the City of Jackson, prompted by shortfalls in water revenue collections, was going to begin disconnecting services to customers with delinquent water bills. As a result, the Debtor went to the City of Jackson's water/sewer business office on February 28, 2019, to determine whether these efforts would impact her as a debtor in an active bankruptcy proceeding. The Debtor testified that a City of Jackson representative informed her that there is a difference between a bankruptcy filing under chapter 13 and a bankruptcy filing under chapter 7 of the Code and that because she is a chapter 13 debtor, she would have to pay some portion of her past due water bill to avoid the disconnection of her water services. Accordingly, the Debtor entered into the Delinquent Account Agreement (the "Agreement") (Ex. 1) with the City of Jackson that same day.[1] The Agreement, which is based on a form, provides:

[1] Test. of Debtor at 11:29:50 – 11:31:00. The Hearing was not transcribed. References to the argument and testimony presented at the Hearing are cited by the timestamp of the audio recording.

> In consideration of being supplied water service after being delinquent on the above listed account, I, [the Debtor], agree to the following:
>
> - To make an initial payment of $400.00 on 2/28/19 toward my outstanding bill in the amount of $2342.18. I also agree to pay the remaining balance of $1756.64 in monthly installments of $48.79 . . . until the entire balance is paid in full.
>
> - To pay each subsequent current bill by the due date.
>
> In signing this agreement, I understand failure to adhere to this payment schedule will result in the immediate termination of services . . . [and] my account will be assessed a $50.00 service charge and the remaining balance will be due in full prior to reinstatement of services.

(*Id.*) Next to the monthly installment amount of $48.76 appears the handwritten note "36 months." (*Id.*) There are other handwritten figures and notes near the top margin. The Agreement appears to be an attempt to amortize the Debtor's pre-petition arrearage through a payment plan.[2]

The Debtor further testified that she made the initial $400.00 payment to the City of Jackson and has been making the ongoing monthly installment payments in accordance with the Agreement.[3] The Debtor explained that she felt that she had no choice but to enter into the Agreement to prevent the City of Jackson from disconnecting her water services and that water is essential to maintain her home.[4] No evidence was presented at the Hearing that the Debtor has failed to pay any post-petition water bill.

The Debtor filed the Motion for Contempt and served process on the City of Jackson by mailing a copy of the Motion for Contempt to its duly elected mayor. (Dkt. 40 at 3); *see* FED. R. BANKR. P. 7006(b)(6). The City of Jackson did not file a response.

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[2] The amount in the Agreement is considerably less than the amount listed in Schedule E/F, for which the Debtor provided no explanation.

[3] *Id.* at 11:32:10 – 11:32:18

[4] *Id.* at 11:32:18 – 11:33:05.

In closing argument at the Hearing, counsel for the Debtor informed the Court that the City of Jackson routinely violates 11 U.S.C. § 362[5] because, despite being aware of pending bankruptcy proceedings, it threatens to disconnect water services to debtors with delinquent accounts unless the debtors pay some amount toward their pre-petition water bill.[6] Counsel for the Debtor further explained that the Debtor seeks $400.00 in actual damages, $500.00 in attorney's fees, and an order prohibiting the City of Jackson from disconnecting the Debtor's water services unless she misses a payment for her current water usage during the pendency of the Bankruptcy Case. The Debtor also requests that the installment payments of $48.79 that she has made pursuant to the Agreement be credited toward any post-petition arrearage amount with the City of Jackson. The Debtor apparently has abandoned her claim for punitive damages.

Discussion

A. Motion for Contempt

Section 362(a) provides that "a petition filed under . . . this title . . . operates as a stay, applicable to all entities, of . . . any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title." 11 U.S.C. § 362(a)(6). In other words, upon the filing of a bankruptcy petition, "an automatic stay operates as a self-executing injunction" that prevents creditors from pursuing collection efforts against the debtor for pre-petition debts. *Campbell v. Countrywide Home Loans, Inc.*, 545 F.3d 348, 354-55 (5th Cir. 2008). The purpose behind the automatic stay in § 362(a) is to provide "breathing room" for a debtor and a chance for a fresh start. *Brown v. Chesnut (In re Chesnut)*, 422 F.3d 298, 301 (5th Cir. 2005)

[5] Hereinafter, all code sections refer to the Code found at Title 11 of the U.S. Code, unless otherwise noted.

[6] 11:33:30 – 11:33:50.

(quotation omitted). Should a creditor violate the automatic stay, Congress has provided a debtor with a private right of action for any "willful violation." *Campbell*, 545 F.3d at 355. "[A]n 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." 11 U.S.C. § 362(k)(1). *But see* 11 U.S.C. § 106(a)(3) (authorizing monetary relief against governmental units but precluding an award of punitive damages).

The Fifth Circuit Court of Appeals has set forth a three-part test for establishing a "willful" violation of the stay under § 362(k): (1) the creditor must have known of the existence of the stay; (2) the creditor's acts must have been intentional; and (3) the creditor's acts must have violated the stay. *Young v. Repine (In re Repine)*, 536 F.3d 512, 519 (5th Cir. 2008). Here, the Debtor alleges that the City of Jackson knew about the Bankruptcy Case and willfully violated the stay by threatening to disconnect the Debtor's water services if she did not enter into the Agreement and pay some amount toward her outstanding water bill.

With respect to the first element, this Court has held that oral notice of the filing of a bankruptcy petition is enough to satisfy the "knowledge" element of § 362(k). *See In re Adams*, 516 B.R. 361, 368 (Bankr. S.D. Miss. 2014); *Johnson v. Magee Rentals, Inc. (In re Johnson)*, 478 B.R. 235, 246-47 (Bankr. S.D. Miss. 2012); *Burns v. Home Zone Sales & Lease Purchase, LLC (In re Burns)*, 503 B.R. 666, 672-73 (Bankr. S.D. Miss. 2013). Here, the Debtor informed the City of Jackson of the pending Bankruptcy Case when discussing her delinquent account. According to the Debtor, a representative told her that there is a difference between filing a bankruptcy case under chapter 13 and filing a bankruptcy case under chapter 7 of the Code. The Debtor did not attempt to explain the representative's reasoning, and no one on behalf of the City of Jackson appeared at the Hearing to offer an explanation. Since the Debtor filed for relief under chapter 13

of the Code, the Debtor claims that the representative told her that she needed to enter into the Agreement and to pay an amount toward her outstanding bill or the City of Jackson would disconnect her water service. Believing she had no other option, the Debtor entered into the Agreement and made a $400.00 payment "toward [her] outstanding bill" as well as some monthly payments. (Ex. 1). Under Mississippi law, knowledge and information received by an agent conducting the business of a principal is imputed to the principal, regardless of whether the agent communicated that knowledge or information to the principal. *Lane v. Oustalet*, 873 So. 2d 613, 617 (Miss. 2004). The existence of an agency relationship depends upon whether the parties intended to create an agency relationship, a factual issue that may be proved by either direct or circumstantial evidence. *Engle Acoustic & Tile, Inc. v. Grenfell*, 223 So. 2d 613, 617 (Miss. 1969). Here, the representative urged the Debtor to enter into the Agreement and calculated various amounts that the Debtor would need to remit to the City of Jackson for the continuation of water services. The Court finds that these facts establish an agency relationship between the representative and the City of Jackson. Because of the agency relationship, the information regarding the Debtor's pending Bankruptcy Case that was communicated to the representative before the execution of the Agreement was imputed to the City of Jackson.

Additionally, the Debtor listed the City of Jackson as a creditor on Schedule E/F when she filed the Petition. More specifically, the Debtor listed "City Services Billing" as holding a nonpriority unsecured claim in the amount of $7,850.00 for a "water bill." (Dkt. 4 at 14). On the Mailing Matrix, the Debtor listed City Services Billing as residing at 1000 Metrocenter Mall, Ste. 103, Jackson, MS 39209. (Dkt. 3). The chapter 13 trustee filed the Notice of Chapter 13 Bankruptcy Case (the "Notice of Bankruptcy Case") and set the meeting of creditors for August 21, 2018. (Dkt. 9). The Bankruptcy Noticing Center informed the City of Jackson about the

Notice of Bankruptcy Case by first class mail. (Dkt. 12). On September 27, 2018, the Court entered the Order Confirming Chapter 13 Plan (the "Order Confirming Plan") (Dkt. 27). Again, the Bankruptcy Noticing Center informed the City of Jackson about the Order Confirming Plan by first class mail. (Dkt. 28). For these reasons, the Court finds that the City of Jackson had notice of the existence of the automatic stay and, thus, the first element of the test is satisfied.

As for the second and third elements of the test, it is clear that the City of Jackson's actions to collect upon the Debtor's pre-petition debt were intentional and violated the automatic stay. No one on behalf of the City of Jackson appeared at the Hearing to dispute the Debtor's testimony regarding the Agreement, and the language in the Agreement requiring the Debtor "[t]o make an initial payment of $400.00 on 2/28/19 toward [her] outstanding bill" clearly constituted an act to collect on a pre-petition debt in violation of the automatic stay. Accordingly, all three elements of the test established by the Fifth Circuit in *In re Repine* are satisfied, and the Court finds that the City of Jackson willfully violated the automatic stay.

Although not addressed at the Hearing, the Court finds that the U.S. Supreme Court's recent decision in *Taggart v. Lorenzen*, 139 S. Ct. 1795 (2019), does not change the result reached here. In *Taggart*, the U.S. Supreme Court held that a creditor may be found in civil contempt for willfully violating the discharge injunction if "there is not a 'fair ground of doubt' as to whether the creditor's conduct might be lawful under the discharge order." *Id.* at 1804. Adopting a standard for civil contempt developed outside the bankruptcy context, the U.S. Supreme Court ruled that § 524 and § 105 "authorize a court to impose civil contempt sanctions where there is no objectively reasonable basis for concluding that the creditor's conduct might be lawful under the discharge order." *Id.* at 1801. The U.S. Supreme Court rejected a standard that permitted a finding of civil contempt based upon the creditor's knowledge of the discharge order and its intention to

take the actions that violated the order and found that such a standard operated much like a strict liability standard. *Id.* at 1803.

The standard akin to strict liability rejected by the U.S. Supreme Court appears to be similar to the three-part test set forth by the Fifth Circuit in *In re Repine* for establishing a "willful" violation of the stay under § 362(k). *In re Repine*, 536 F.3d at 519. The U.S. Supreme Court, however, expressly declined to decide whether the word "willful" in § 362(k) supports the standard developed by the Fifth Circuit. *Taggart*, 139 S. Ct. at 1804. Regardless, the wrongfulness of the City of Jackson's conduct in fabricating a distinction between chapter 7 debtors and chapter 13 debtors to coerce the Debtor to pay her pre-petition delinquent water bill satisfies the less stringent "no fair ground of doubt standard" for establishing a "willful" violation of the discharge injunction. Although there are significant differences between chapter 7 cases and chapter 13 cases, no reasonable creditor would believe that any of those differences would permit a creditor to coerce a chapter 13 debtor to pay a pre-petition debt inconsistent with the terms of the debtor's confirmed chapter 13 plan.

The Court pauses to address a second issue not raised at the Hearing. The Code treats public utility service providers like the City of Jackson differently than other creditors. Unlike other creditors who generally may decline to do business with a debtor after a bankruptcy petition has been filed, § 366 prohibits a public utility from discontinuing service to a debtor on the basis of nonpayment of a pre-petition debt within the first twenty (20) days after commencement of a bankruptcy case. 11 U.S.C. § 366(a), (b). Thereafter, except in chapter 11 cases, the public utility may discontinue service only if the debtor fails to furnish adequate assurance of future payment, usually in the form of a security deposit. 3 COLLIER ON BANKRUPTCY ¶ 366.01 (16th ed. 2019); *see In re Fox*, Case No. 15-11390-NPO (Bankr. S.D. Miss. June 19, 2015). The purpose of § 366

is to prevent a public utility from using the threat of disconnection of services to obtain payment from a debtor of a pre-petition debt while not forcing the utility to provide unsecured services for which it may never be paid. *Ga. Power Co. v. Sec. Inv. Props., Inc. (In re Sec. Inv. Props., Inc.)*, 559 F.2d 1321, 1325 (5th Cir. 1977). Section 366(b) has been read as an exception to the automatic stay, allowing a public utility to discontinue a debtor's service for failure to provide adequate assurance of payment for future services but not for failure to pay pre-petition arrearages. *See In re Jones*, 369 B.R. 745 (B.A.P. 1st Cir. 2007). The facts here fall in the latter category for which there is no stay exception under § 366.[7]

B. Civil Contempt

As the automatic stay is essentially a court-ordered injunction, any creditor who violates the stay may be held in contempt of court. *Carver v. Carver*, 954 F.2d 1573, 1578 (11th Cir. 1992). An action for contempt of court may be either criminal or civil in nature. *Placid Refining Co. v. Terrebonne Fuel & Lube, Inc. (In re Terrebonne Fuel & Lube, Inc.)*, 108 F.3d 609, 612 (5th Cir. 1997). If the intent behind the contempt order is to punish, then the order is for criminal contempt. *Id.* If, however, the intent of the contempt order is to "coerce compliance with a court order or *to compensate another party for the contemnor's violation*," the order is civil. *Id.* (emphasis added). Bankruptcy courts have the power to hold entities in civil contempt under § 105(a) but not in criminal contempt. *Sanchez v. Ameriquest Mortg. Co. (In re Sanchez)*, 372 B.R. 289, 309 (Bankr. S.D. Tex. 2007).

Any entity that willfully violates the automatic stay is subject to the bankruptcy court's civil contempt power. *In re Meinke, Peterson, Damer, P.C.*, 44 B.R. 105, 108 (Bankr. N.D. Tex.

[7] As opposed to the Debtor's pre-petition arrearage, the City of Jackson could have met with the Debtor to make a payment arrangement regarding any post-petition arrearage.

1984). For a creditor's violation of the stay to be willful, the creditor must act with knowledge of the stay. *Id.* If a creditor is found to be in contempt because of a willful violation of the automatic stay, then the bankruptcy court may award sanctions to the debtor. *In re Sanchez*, 372 B.R. at 310. As described above, the City of Jackson's act to collect on a pre-petition debt constituted a willful violation of the automatic stay. The City of Jackson, therefore, is in civil contempt of court, and the Debtor is entitled to damages arising out of the City of Jackson's violation of the automatic stay.

C. Damages

Since the Court has determined that the City of Jackson willfully violated the automatic stay and is in contempt of court, the Debtor is entitled to damages. A finding of civil contempt entitles a debtor to compensation for the damages suffered because of the creditor's actions. *In re Terrebonne Fuel & Lube, Inc.*, 108 F.3d at 612-13. Under § 362(k), a debtor who successfully proves all three (3) elements of a willful violation of the automatic stay may recover actual damages, including attorney's fees. *See* 11 U.S.C. § 362(k). Because the damages available under § 362(k) include the compensatory damages a debtor can recover in an action for contempt of court, the Court's calculation of damages pursuant to § 362(k) is sufficient for the entirety of the Debtor's damages.

Damages under § 362(k) "must be proven with reasonable certainty and may not be speculative or based on conjecture." *Clayton v. Old Kent Mortg. Co. (In re Clayton)*, No. 09-03024, 2010 WL 4482810, at *2 (Bankr. S.D. Tex. Oct. 29, 2010) (quotation omitted). The Debtor claims she is entitled to actual damages for the pre-petition debt collected and for attorney's fees and expenses. Specifically, the Debtor requests return of the $400.00 that she paid to the City of Jackson "toward [her] outstanding bill" and $500.00 in attorney's fees and expenses. The Debtor

also requests that the installment payments of $48.79 that she made pursuant to the Agreement be credited toward any post-petition arrearage with the City of Jackson. The Court finds that the City of Jackson should remit to the Debtor the $400.00 collected on her pre-petition debt under the Agreement and that $500.00 is a reasonable amount in attorney's fees for filing and prosecuting the Motion for Contempt. Since no one appeared on behalf of the City of Jackson at the Hearing, and the Court is unable to discern how the City of Jackson has applied the Debtor's installment payments made pursuant to the Agreement, the Court finds that the installment payments should be credited toward the Debtor's post-petition arrearage, if any.

Conclusion

Based on the foregoing, the Court finds that the Debtor has successfully demonstrated that the City of Jackson willfully violated the automatic stay. As mentioned earlier, the City of Jackson did not file a response to the Motion for Contempt, and no one on behalf of the City of Jackson appeared at the Hearing to respond to the Motion for Contempt. Consequently, the Court finds that the Motion for Contempt should be granted and that the City of Jackson should be held in civil contempt of court. Additionally, the Debtor should be entitled to actual damages in the amount of $400.00 and attorney's fees in the amount of $500.00. To the extent that the Debtor has accumulated post-petition arrearage with the City of Jackson, the Court finds that the installment payments of $48.79 that the Debtor has made pursuant to the Agreement should be credited toward that amount.

IT IS, THEREFORE, ORDERED that the Motion for Contempt hereby is granted, and the City of Jackson hereby is held in civil contempt of court.

IT IS FURTHER ORDERED that the Debtor hereby is awarded actual damages in the amount of $400.00 with interest at the federal judgment interest rate, 28 U.S.C. § 1961(a), against the City of Jackson pursuant to § 362(k).

IT IS FURTHER ORDERED that the Debtor hereby is awarded attorney's fees in the amount of $500.00.

IT IS FURTHER ORDERED that installment payments of $48.79 made by the Debtor to the City of Jackson pursuant to the Agreement shall be credited toward the Debtor's post-petition arrearage, if any.

##END OF ORDER##