SO ORDERED,

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: August 16, 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:

PATRICIA ANN BOHANNON, **CASE NO. 19-02123-NPO**

DEBTOR. **CHAPTER 13**

ORDER DENYING MOTION FOR CONTEMPT

This matter came before the Court for hearing on August 14, 2019 (the "Bankruptcy Hearing"), on the Motion for Contempt (the "Motion for Contempt") (Dkt. 15) filed by the debtor, Patricia Ann Bohannon (the "Debtor"), and Carl Bohannon's Response to Patricia Moore Bohannon's Motion for Contempt (the "Response") (Dkt. 20, 32)[1] filed by the Debtor's former spouse, Carl Bohannon ("Bohannon"), in the above-referenced chapter 13 bankruptcy case (the "Bankruptcy Case"). At the Bankruptcy Hearing, Douglas M. Engell ("Engell") represented the Debtor, and K. Dustin Markham ("Markham") represented Bohannon. By agreement of the parties, seven (7) exhibits were admitted into evidence. Both the Debtor and Bohannon testified at the Bankruptcy Hearing. After considering the evidence and arguments of counsel, the Court

[1] The Response was filed on the docket twice, first when it was sent by mail for filing (Dkt. 20) and again when it was filed electronically (Dkt. 32).

denied the Motion for Contempt from the bench. This Order memorializes and supplements that bench ruling.

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 Bankruptcy Hearing was proper under the circumstances.

Facts

On February 20, 2019, Bohannon initiated a contempt proceeding against his ex-wife, the Debtor, in the Chancery Court of Kemper County, Mississippi to enforce the payment of a property settlement obligation awarded to him in their divorce (the "Contempt Proceeding") (Exs. 1-4). After conducting a hearing, the Chancery Court Judge (the "Chancery Judge") entered the Order Citing Respondent Patricia Moore Bohannon for Contempt and Related Relief (Ex. 5) on April 8, 2019 and set the matter for a "review" hearing on June 18, 2019 (the "June Hearing").

On June 10, 2019, the Debtor retained Engell to assist her in filing a voluntary petition for relief (the "Petition") (Dkt. 1) under chapter 13 of the U.S. Bankruptcy Code (the "Code"). That same day, she retained Philip Mansour, Jr. ("Mansour") to represent her in the Contempt Proceedings. (Test. of Debtor at 10:16:06-10:16:11).[2]

In her bankruptcy schedules, the Debtor identified Bohannon as a creditor holding an unsecured claim of $500.00. (Dkt. 4 at 15). On the creditor mailing matrix filed with the Petition (the "Mailing Matrix") (Dkt. 3), the Debtor listed both Bohannon and Markham. Bohannon confirmed at the Bankruptcy Hearing that the address listed for him in the Mailing Matrix is

[2] The Bankruptcy Hearing was not transcribed. References to the argument and testimony presented at the Bankruptcy Hearing are cited by the timestamp of the audio recording.

correct. (Test. of Bohannon at 10:28:57-10:29:16). The certificate of mailing filed by the Bankruptcy Noticing Center (the "BNC")[3] reflects that the Notice of Chapter 13 Bankruptcy Case Filing (the "Bankruptcy Notice") (Dkt. 10) required by § 342(a) was sent to all creditors on the Mailing Matrix on June 13, 2019 pursuant to Rule 2002(a)(1) and (f)(1) of the Federal Rules of Bankruptcy Procedure. (Dkt. 12).

Notwithstanding the pendency of the Bankruptcy Case, the June Hearing took place as originally scheduled with both the Debtor and Bohannon in attendance along with their respective counsel, Mansour and Markham.[4] For unknown reasons, no notice of the Bankruptcy Case was filed in the Contempt Proceedings before the June Hearing. (Ex. 2). The testimony of the Debtor and Bohannon at the Bankruptcy Hearing about what happened at the June Hearing is conflicting in places, but they agree on the following facts: the June Hearing consisted almost entirely of a bench conference among the Chancery Judge, Markham, and Mansour; no testimony or other evidence was presented at the June Hearing; neither the Debtor nor Mansour mentioned the Bankruptcy Case at the June Hearing; and the only ruling issued by the Chancery Judge was the Order Continuing Review Hearing (Ex. 6) resetting the matter for July 2, 2019 (the "July Hearing").

In addition to the above undisputed facts, the Debtor testified at the Bankruptcy Hearing that she overheard Markham say the word "jail" during the bench conference but did not hear the substance of his conversation. (Test. of Debtor at 10:16:55-10:17:28). She further testified that during a break in the bench conference, Mansour informed, "They want to put you in jail." (*Id.*).

[3] The BNC electronically retrieves data from the case management systems of all bankruptcy courts and mails the resulting notices. *See* FED. R. BANK. P. 9036.

[4] The June Hearing was apparently not recorded or transcribed.

The Debtor's only testimony at the Bankruptcy Hearing regarding Bohannon's knowledge of the Bankruptcy Case before the June Hearing was that she saw Bohannon standing across the street from Engell's office on the same day she filed the Petition and that Bohannon's girlfriend was "telling everyone I filed for bankruptcy." (*Id.* at 10:16:20-10:16:30).

Bohannon testified at the Bankruptcy Hearing that notwithstanding the BNC's certificate of mailing, he never received written notification of the Bankruptcy Case and first learned about the filing from his attorney, Markham, sometime after the June Hearing. (Test. of Bohannon at 10:24:50-10:25:12). Bohannon testified that it was his practice to bring any mail he received at home to Markham's law office and to discuss its contents with Markham later that same day by telephone. (*Id.* at 10:27:55-10:28:56). So if he had received written notification of the Bankruptcy Case by mail, he would have discussed it with Markham.

According to Markham, he too was unaware of the Bankruptcy Case before the June Hearing. (Opening Statement at 10:08:40-10:08:55). Markham confirmed Bohannon's custom of bringing any mail he received to Markham's office for his review. (Closing Arg. at 10:31:01-10:32:31). Yet Bohannon never brought Markham any mail notifying Bohannon of the Bankruptcy Case. Markham also represented to the Court that the Chancery Judge reset the Contempt Proceeding to July 2, 2019 to accommodate Mansour who only recently had been retained by the Debtor. (Opening Statement at 10:09:05-10:10:09).

On June 26, 2019, the Debtor filed the Motion for Contempt alleging that Bohannon and Markham, despite their knowledge of the Bankruptcy Case, proceeded with the June Hearing in violation of the automatic stay under 11 U.S.C. § 362.[5] (Dkt. 15). In the Response, Bohannon

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

denies having received any notice of the Bankruptcy Case either before or during the June Hearing. (Dkt. 32).

On July 1, 2019—the day before the rescheduled July Hearing—Engell filed the Notice of Bankruptcy (Ex. 7) in the Contempt Proceedings. It is undisputed that at the July Hearing, the Chancery Judge met with Markham and Mansour in his chambers where they discussed the pendency of the Bankruptcy Case, and thereafter the Chancery Judge declined to proceed any further pending instructions from this Court. (Ex. 2).

Discussion

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) (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).

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 Bohannon and Markham knew about the Bankruptcy Case but proceeded with the June Hearing anyway in willful violation of the stay. The Court finds that the Debtor has not shown that either Bohannon or Markham had knowledge of the Bankruptcy Case before the June Hearing, and, therefore, the Debtor has not satisfied the first element of the Fifth Circuit's three-part test for establishing an actionable stay violation.

The Debtor largely relies on the BNC's certificate of mailing of the Bankruptcy Notice as evidence that Bohannon and Markham had knowledge of the Bankruptcy Case. A correctly-mailed notice creates a presumption that proper notice of the bankruptcy case was given under both Rule 9006(e) of the Federal Rules of Bankruptcy Procedure and common-law precepts. *Greyhound Lines, Inc. v. Rogers (In re Eagle Bus Mfg., Inc.)*, 62 F.3d 730, 735 (5th Cir. 1995). The presumption, however, can be overcome "by *clear and convincing evidence* that the mailing was not, in fact, accomplished." *Beitel v. OCA, Inc. (In re OCA, Inc.)*, 551 F.3d 359, 371 (5th Cir. 2008).

Both Bohannon and Markham denied that Bohannon ever received the Bankruptcy Notice in the mail. Although a bare denial of receipt generally is insufficient to rebut the presumption that proper notice was given, there was additional evidence presented at the Bankruptcy Hearing that supports the contentions of Bohannon and Markham that neither of them received the Bankruptcy Notice. *Eagle Bus Mfg. Inc.*, 62 F.3d at 735.

It was customary for Bohannon to bring any mail he received at home to Markham's law office for Markham's same-day review. Thus, Bohannon would have brought any mail containing the Bankruptcy Notice to Markham's attention, but, according to Markham, he did not do so.

Markham's representations to the Court in this regard support Bohannon's testimony. The undisputed facts as to what happened at the June Hearing also support the contentions of Bohannon and Markham. No one mentioned the Bankruptcy Case at the June Hearing, and the Chancery Judge rescheduled the Contempt Proceedings to accommodate Mansour. Under these unusual facts, the Court finds that the evidence at the Bankruptcy Hearing was sufficient to rebut the presumption of proper notice arising from the BNC's certificate of mailing.

The Court also finds that testimony of the Debtor that she saw Bohannon near Engell's office and that Bohannon's girlfriend was "telling everyone" about the Bankruptcy Case too tenuous to establish by implication that Bohannon and/or Markham knew about the bankruptcy filing before the June Hearing. The Debtor's testimony about Bohannon's girlfriend was brief and included no information from which the Court could ascertain when the girlfriend (and, therefore, Bohannon) first became aware of the Bankruptcy Case.

As to the Debtor's allegation that Markham violated the stay by asking the Chancery Judge to incarcerate her for contempt, there is no audio recording or transcript of the bench conference, and Markham denies having said the word "jail." Given the lack of credible evidence, the Court will not resolve this dispute. Regardless, it is undisputed that the Chancery Judge did not move forward with the Contempt Proceedings and, thus, there was no possibility of the Debtor's incarceration at the June Hearing.

It would have been a simple matter for either the Debtor or Mansour to inform the Chancery Judge of the pendency of the Bankruptcy Case before the June Hearing. Why they did not do so and, moreover, why Engell waited until one day before the rescheduled July Hearing to file the Notice of Bankruptcy (Ex. 7) are questions left unanswered at the Bankruptcy Hearing.

Because the Court finds that neither Bohannon nor Markham had notice of the Bankruptcy Case before the June Hearing, the first element of the test set forth by the Fifth Circuit in *In re Repine* is not satisfied. Accordingly, the Court finds it unnecessary to consider the second and third elements of the test.

Conclusion

Based on the foregoing, the Court finds that the Debtor has failed to show that either Bohannon or Markham willfully violated the automatic stay by proceeding with the June Hearing, and, accordingly, finds that the Motion for Contempt should be denied.

IT IS, THEREFORE, ORDERED that the Motion for Contempt hereby is denied

##END OF ORDER##