

IN THE UNITED STATES BANKRUPTCY COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

U.S. BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI
FILED

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DEPUTY

IN RE:

ROBERT WAYNE HOUF
AND BONNIE JEAN HOUF

CASE NO. 8600593JC

MOTION FOR SANCTIONS

ROBERT WAYNE HOUF
AND BONNIE JEAN HOUF

VS.

CITIZENS NATIONAL BANK OF PAINTSVILLE, KENTUCKY
AND RUSSELL LEMASTER, VICE PRESIDENT OF CITIZENS
NATIONAL BANK AND S. H. JOHNSON, ATTORNEY FOR
CITIZENS NATIONAL BANK

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Attorney for Citizens
National Bank of
Paintsville, Kentucky,
and Russell Lemaster,
Vice President of
Citizens National Bank,
and S. H. Johnson, Atty.
for Citizens National
Bank

Edward Ellington, Bankruptcy Judge

O P I N I O N

THIS MATTER came on for hearing on three
Motions for Sanctions filed by Robert Wayne Houf and

Bonnie Jean Houf against Citizens National Bank of Paintsville, Kentucky, Russell Lemaster, Vice President of Citizens National Bank and S. H. Johnson, attorney for Citizens National Bank; and separate written Responses filed by each of the Defendants.

After hearing the facts and considering the same, this Court entered a written Order on October 3, 1986, in which the Court found that the Motion for Sanctions against Citizens National Bank of Paintsville, Kentucky and against Russell Lemaster, Vice President of Citizens National Bank should be granted and the Motion for Sanctions against S. H. Johnson, attorney for Citizens National Bank should be denied. The Order imposed sanctions in the amount of \$3,500 and attorney's fees for \$1,500. It is from this written Order that Citizens National Bank of Paintsville, Kentucky and Russell Lemaster appeal.

STATEMENT OF THE CASE

Robert Wayne Houf and Bonnie Jean Houf filed a joint petition under Chapter 13 of the Bankruptcy Code on March 21, 1986, being Bankruptcy Case No. 8600593EEJ. In April, 1986 the Debtors filed three motions for sanctions against Citizens National Bank of Paintsville, Kentucky (CNB), Russell Lemaster, Vice President of Citizens National Bank (Lemaster) and

S. H. Johnson, attorney for Citizens National Bank (Johnson) for violation of the §362 automatic stay. Responses were filed by each of the defendants, CNB, Lemaster and Johnson, and the matter came on for hearing on August 7, 1986.

The Court will reconstruct the circumstances surrounding these proceedings up to the hearing date.

On August 7, 1984, CNB made a loan of \$23,202.50 to the Debtors and took as collateral for the loan a 1982 Chevrolet pickup, a 1983 Mobile Home and real estate. The secured indebtedness was evidenced by a promissory demand note, an executed security agreement and an executed real estate mortgage. There is no dispute as to the validity of any of these documents. The address of the Debtors is shown on the security agreement as General Delivery, Oil Springs, Kentucky.

On June 10, 1985, the Debtors moved from Kentucky to Jackson, Mississippi. Bonnie Houf testified that she contacted persons at the bank just prior to the Debtors moving and informed the bank of their intentions of taking the pickup and mobile home to Jackson, Mississippi.

The Debtors submitted into evidence a number of checks written to CNB dated from July, 1985 to March, 1986. All of these checks written during this

time gave the Debtors' address as being in Jackson, Mississippi and were drawn on either First National Bank or Trustmark National Bank, which are one and the same bank in Jackson. The Debtors also submitted into evidence payment receipts which were returned by CNB to the Debtors by mailing them to the Debtors' Mississippi address.

On October 21, 1985, the Mississippi State Tax Commission sent notice to CNB that Robert Houf now resided in Mississippi and had made application to relicense the title to the 1982 pickup in Mississippi. The notice explained that CNB's lien would be perfected in Mississippi when it was recorded on the Mississippi certificate of title. A copy of this notice was also mailed to Robert Houf at his Mississippi address.

On November 7, 1985, Joyce Takacs, Assistant Vice President at CNB, wrote the Debtors and expressed her concern about the Debtors' account and suggested that there may be a need for some restructuring of the loan. The letter was mailed to the Debtors in Mississippi and plainly stated that the Bank knew the mobile home was in Mississippi.

On November 26, 1985, the Debtors executed and delivered to CNB a promissory note in the amount of \$2,000, payable in 90 days.

On February 18, 1986, a "Notice of Authorization to File Suit" was sent by CNB to its attorneys, Johnson & Johnson. The notice provided that Robert Houf, who was shown on the document as having a Mississippi address, was delinquent on a debt to the bank and if payment was not received by February 28, 1986, legal action would be taken. Lemaster, Vice President at CNB, testified that in this procedure which the bank followed, it was usually about 60 days after the deadline date before an actual law suit was filed against a delinquent customer.

On March 21, 1986, the Debtors filed their joint petition for relief under Chapter 13 of the Bankruptcy Code. CNB received actual notice on that date of the filing of the bankruptcy petition by a telephone call from the Debtors and their attorney. Specifically, the telephone conference was with Russell Lemaster.

At the time of the telephone conference Lemaster admitted that he had already contacted a collection agency in Mississippi to repossess the Debtors' mobile home and truck, but he would not inform the Debtors of which collection agency he had contacted. Testimony showed that Lemaster told the Debtors that he would contact the collection agency again and have the repossession stopped. Lemaster testified that

he did call the collection agency and leave a message to stop the repossession of the mobile home and truck. However, on March 24, 1986, three days after the filing of the petition, persons from the collection agency, representing CNB, appeared at the Debtors' home and attempted to recover the mobile home and truck. The parties from the collection agency did not leave the Debtors' home until the Debtors' attorney telephoned and convinced them that a stay was in effect.

On March 25, 1986, CNB filed a complaint in the Johnson County Circuit Court, Kentucky to obtain a judgment against the Debtors for their default on the two notes at the bank. This action was filed after actual notice of the bankruptcy petition and in the face of the section 362 automatic stay.

On March 28, 1986, Lemaster, acting as Vice President of CNB, filed criminal charges in Kentucky against the Debtors alleging that the Debtors had defrauded a creditor and thus committed a felony by removing the bank's collateral to Jackson, Mississippi. As a result of this criminal action, warrants were issued for the Debtors' arrest. On April 8, 1986, members of the Hinds County, Mississippi, Sheriff's Department went to the home of the Debtors, placed them under arrest and incarcerated them in the Hinds County Jail. The Debtors were released only after securing a

\$5,000 property bond.

On April 16, 1986, the Debtors filed two Motions for Sanctions, one against CNB and one against Russell Lemaster. On April 18, 1986, the Debtors filed a third Motion for Sanctions against S. H. Johnson. These motions all contended that the section 362 automatic stay had been violated.

On May 30, 1986, each of the defendants filed a separate response to the Motions for Sanctions.

On July 31, 1986, CNB voluntarily dismissed the civil action in Kentucky on the grounds that the defendants/Debtors had filed bankruptcy.

On August 1, 1986, upon motion by Russell Lemaster, the criminal warrants in Kentucky were also dismissed.

The matter presently before the Court came on for hearing on August 7, 1986, on the three Motions for Sanctions and the Responses thereto. The parties hereto, along with their respective counsel, appeared on said date and answered ready for trial. The Court, after hearing all evidence presented, together with argument of counsel, issued its oral opinion from the bench and found that the Motions for Sanctions against CNB and Lemaster should be granted and the Motion for Sanctions against S. H. Johnson should be denied. The Court ordered that sanctions in the amount of \$3,500 would be imposed against CNB and Lemaster and

attorney's fees awarded to the Debtors in the amount of \$1,500 for costs. The Court entered its written Order on October 3, 1986. It is from this decision that CNB and Russell Lemaster appeal.

**STATEMENT OF ISSUES ON APPEAL AS SET FORTH
BY CITIZENS NATIONAL BANK OF PAINTSVILLE,
KENTUCKY AND RUSSELL LEMASTER**

1. Whether the Bankruptcy Court erred in holding that the filing of criminal charges against the debtors was a violation of and contrary to 11 U.S.C. §362.

2. Whether the Bankruptcy Court erred in holding that the filing of criminal charges against the debtors was an attempt to recover the bank's money.

DISCUSSION

This Court is aware that under section 362 criminal proceedings are not automatically stayed. Section 362(b)(1) provides:

(b) The filing of a petition under section 301, 302, or 303 of this title, . . ., does not operate as a stay--

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

Although the criminal proceedings are not automatically stayed, case law is clear that the Court

may enjoin criminal proceedings pursuant to section 105 of the Bankruptcy Code if the Court finds that it is clear that the principal motivation behind the criminal prosecution is neither punishment nor a sense of duty but to obtain payment. In Re Penny, 414 F.Supp. 1113 (W.D. N.C. 1976); In the Matter of Butler, 11 C.B.C.2d 1118 (Bkrtcy. W.D. Mo., 1984); In Re Reid, 9 B.R. 830 (Bkrtcy. M.D. Ala., 1981); In Re Kaping, 13 B.R. 621 (Bkrtcy. Oreg., 1981); In Re Caldwell, 5 B.R. 740 (Bkrtcy. W.D. Va., 1980); In Re James, 10 B.R. 2 (Bkrtcy. W.D. N.C., 1980). Note that some courts also hold that in addition to the principal motivation of the creditor to collect the debt, that there must be a showing of extraordinary circumstances, of bad faith or harassment. See In the Matter of Taylor, 12 B.C.D. 655 (D.C. Maryland, 1984), citing Younger v. Harris, 401 U.S. 37 (1971).

Reviewing the facts of this case, the Court finds that CNB filed the criminal charges against the Debtors not for the purpose of aiding law enforcement officers or to protect society, but merely to aid in the collection of its debt.

CNB based its criminal complaint on the fact that the Debtors had moved the bank's collateral to Mississippi and thus defrauded the bank.

The Court finds that CNB had not only

constructive but actual notice that the Debtor had moved from the State of Kentucky to the State of Mississippi in June, 1985. The evidence showed that the bank had been contacted about the Debtors moving prior to the Debtors leaving Kentucky. The evidence further showed that after the Debtors moved, CNB received and accepted payments from the Debtors made with checks drawn on a Jackson, Mississippi bank. CNB had also returned payment receipts to the Debtors at their Mississippi address. The Mississippi State Tax Commission had also notified the bank in October, 1985 that the Debtors were in Mississippi and were seeking to have the title to their truck relicensed in Mississippi. In November, 1985, a letter was mailed to the Debtors in Mississippi from CNB concerning restructuring of the Debtors' loan and the letter actually stated that the bank knew that the mobile home was now located in Mississippi. Thus, there is no question that the bank knew the Debtors and their collateral were no longer in Kentucky.

On March 28, 1986, criminal charges were brought by Lemaster and subsequently the Debtors were arrested and jailed on April 8, 1986. Since the bank knew well in advance that the Debtors had moved from the State of Kentucky, this Court cannot see any purpose in the filing of the criminal charges except

that the bank was attempting to put pressure on the Debtors and harass them in an effort to recover the bank's money.

It was the purpose of this Court's oral opinion of August 7, 1986, and written Order of October 3, 1986, to show that CNB and Lemaster should have sanctions imposed against them. The Court made a specific finding to show that sanctions were being imposed for a combination of reasons. CNB's actions of attempted repossession and the filing of a civil suit to obtain a judgment against the Debtors are in themselves a violation of the section 362 automatic stay and standing alone can be relied upon by this Court to find that CNB and Lemaster should pay the \$3,500 and \$1,500 pursuant to section 362(h). Thus, even if the Court had not made a specific finding that the criminal proceedings were not for the purpose of aiding law enforcement or to protect society, CNB and Lemaster would still be held in violation of the automatic stay.

Simply stated, this Court went a step further to make findings concerning the criminal proceedings in order to fully show that the evidence revealed that there was a combination of events which justify imposing sanctions in the amount of \$3,500 and awarding attorney's fees in the amount of \$1,500.

This Court did not intend for its Order to be interpreted as finding that a filing of a criminal proceeding, per se, was a violation of the automatic stay. The section 362 automatic stay does not affect a legitimate, bona fide criminal action or proceeding. Thus, this Court finds that its Order of October 3, 1986, was in line with the facts and appropriate due to the totality of the circumstances.

DATED this the 17 day of April, 1987.


U. S. BANKRUPTCY JUDGE