UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WISCONSIN

In re

Case No. 03-33181

MARK PATRICK BREWER and
MARLENE DIETRICH BREWER,

Chapter 13

Debtors.

MARK PATRICK BREWER and
MARLENE DIETRICH BREWER,
Plaintiffs,

v.

Adv. No. 03-2532

QC FINANCIAL SERVICES, INC. d/b/a QUICK CASH,
Defendant.

MEMORANDUM DECISION

BACKGROUND

The events that led up to the filing of this adversary proceeding are set forth in some detail in *In re Brewer*, 313 B.R. 795 (Bankr. E.D. Wis. 2004), in which this court held that presentation of a post-dated check by the payee after the payor filed a bankruptcy petition, and resulting receipt of the proceeds, was excepted from the automatic stay under 11 U.S.C. § 362(b)(11). Whether retaining the proceeds after demand by the debtors was a violation of the stay under 11 U.S.C. § 362(a) was reserved until the facts were determined. A trial was held on February 2, 2005, and the parties briefed the remaining issues.

The recitation of the pertinent facts will be shortened considerably in this decision. To summarize, the debtor husband took out a payday loan from the defendant, QC Financial Services, Inc. (QC), which was rolled over and interest added to principal several times, and occasionally the

loan amount was reduced slightly. By the time the last loan was agreed to (without cash advance) on August 19, 2003, the amount the debtor agreed to pay was $390 (APR 541.23 %). A post-dated check for $390 dated September 2, 2003, was left in the possession of the defendant to seal the agreement.

The debtors filed a chapter 13 petition on August 29, 2003, and an employee of the debtors' attorney, Lauren Grahovac, testified that she sent a facsimile transmission to the local QC store to inform it of the filing before the check was cashed. This was not disputed. However, the debtors did not stop payment on the check, and it was negotiated by QC on September 2, 2003. It was honored by the debtors' bank the following day. The debtors incurred $67 in bank charges because other checks were not honored by the bank for insufficient funds.

QC's store manager, Diane Fox, testified that at the time of the debtor husband's transactions, the Kenosha store was a new store, and there were no written procedures telling employees what to do when a borrower files a bankruptcy case and QC is in possession of a post-dated check. She did, however, state that their current practice is not to cash it, and she acknowledged that QC had no right to the money once the case was filed. That is how she trains employees now, but there was no specific bankruptcy training in August 2003. At that time, she would consult with the main office for advice, and apparently that is what she told the debtors' attorney's employee when a refund was requested. However, no action was taken to return the funds. Ms. Fox had worked for a finance company before being employed by QC, and she stated that her former employer's practice was to return to the debtor a car the lender had repossessed before filing.

Kerry Hart, QC's loss prevention supervisor from Kansas City, Missouri, testified that he was responsible for advising store managers what to do when a borrower files a bankruptcy case. He

acknowledged that current practice is not to retain funds of debtors when a post-dated check is negotiated after bankruptcy, and this policy might have developed in response to this case and other similar instances involving bankruptcy debtors. He also stated QC did not refund the money after it negotiated the check because he believed, apparently after consultation with counsel, that negotiation was not a violation of the stay. This testimony differs from Ms. Grahovac's testimony that Mr. Hart told her they would not refund the money because the loan was too close to the date of the bankruptcy filing.

DISCUSSION

The only issue before the court at this juncture is whether QC's conduct constitutes a violation of the automatic stay under 11 U.S.C. § 362(a) and, if so, whether the debtors are entitled to damages, including punitive damages, under 11 U.S.C. § 362(h). This court is satisfied that it is and they are.

The pertinent portion of § 362(a) prohibits a creditor from engaging in "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate[.]" 11 U.S.C. § 362(a)(3). The funds in the debtors' checking account were property of the estate at the time of filing. 11 U.S.C. § 541(a)(1), (a)(2)(A). Property of the estate may be claimed exempt by debtors under 11 U.S.C. § 522(b), and the debtors claimed recovery of this $390 check as exempt. No objection to the claim of exemption was made, so exempt property passes out of the estate and remains property of the debtors, free of the claims of creditors. Nevertheless, at the time of filing and at the time the creditor recovered the debtors' funds, the funds were property of the estate and are accorded the protection of the automatic stay.

The general provision of § 362(a)(3) is trumped by an exception under § 362(b)(11), and this court has found that the defendant's act to obtain possession of property of the estate, i.e., presenting the check and having the bank honor it, is within the narrow scope of the exception. *See In re Brewer*, 313 B.R. 795 (Bankr. E.D. Wis. 2004). QC proposes to latch onto that narrow exception, which was not even intended for the protection of a creditor like QC, who knowingly takes the debtors' money to the exclusion of the debtors' exemptions or other creditors' interests in the estate, and extend the exception to allow it to keep the money because it is too small and too much trouble for the debtors to recover.

One defense that QC advances is that the transfer of the debtors' funds was a voluntary transfer by the debtors because the debtors did not stop payment on the check. The debtor husband testified that stopping payment would have cost $29 in bank fees. Someone who has to patronize a loan store like QC's that charges over 500% interest – a disabled veteran like Mr. Brewer – cannot spend $29 unless it is absolutely necessary. In hindsight, of course, that would have been cheaper than the $67 the bank charged for checks that bounced because the Brewers thought the $390 was still in the account. Their assumption is not unreasonable, given that Ms. Grahovec notified the creditor that the bankruptcy was filed before the check was negotiated, and that meant the debt was discharged and the stay prevented the creditor from paying itself. The fact that negotiating the check falls technically under § 362(b)(11), a statute designed to protect banks that process vast numbers of checks without knowledge of a bankruptcy, does not give the creditor the right to point a finger at the debtor and say, "This is your fault because you didn't stop me, and now I get to keep the money."

The automatic stay was intended to preserve the status quo at the time of filing. However, the creditor's position in this case does not preserve the status quo; it allows the creditor to improve its position vis a vis other creditors and the debtors *after* filing. Thus, failure to immediately return the funds after negotiating the check is an exercise of control over property of the estate. Just because an entity comes into possession of property of the estate legally after filing does not entitle the entity to keep it, even if the entity is a creditor. The creditor in this case had no interest in the funds that it had a right to protect. The money rightfully belonged to someone else, namely the debtors, assuming the exemption is allowed, or the estate if it is not, and failure to turn over the funds is an unauthorized exercise of control over property of the estate that is prohibited by the automatic stay. 11 U.S.C. § 362(a)(3).

The major factor that makes the creditor's conduct outrageous is the "so sue me" or "catch me if you can" posture it took. QC eventually offered to refund the $390, but only after this adversary proceeding was filed, as it had done in other similar cases. Mr. Hart admitted as much. If one can assign anthropomorphic qualities to a corporation, one can see the creditor with its thumb firmly pressed to its nose, fingers waving in the breeze. It would have been easy to return the check to the debtors or to issue them a new one – even easier than returning collateral in which the creditor had a perfected security interest, as Ms. Fox testified her previous employer had done. Doing so would have preserved the status quo, while keeping the money did not. Forcing the debtors to incur legal costs they clearly could not afford, for the admitted purpose of keeping money the creditor knew it was not entitled to, is entirely reprehensible, especially given the disparate abilities of the parties to pursue litigation. The protection of 11 U.S.C. § 362(b)(11) was not intended to facilitate the conduct practiced by this creditor after it recovered the debtors' money, and it does not compel

a result that authorizes it. The prohibition under § 362(a)(3) against "exercise [of] control over property of the estate" includes control over property obtained lawfully post-petition. *See, e.g., In re Del Mission Ltd.*, 98 F.3d 1147 (9th Cir. 1996) (retention by state of funds pending an appeal of bankruptcy court order requiring state to refund taxes paid by trustee was an exercise of control over the estate's property in violation of the automatic stay).

Ms. Grahovec stated that Mr. Hart told her QC would not return the funds because the bankruptcy was too close in time to the loan sought to be discharged. Mr. Hart stated his refusal was because he believed QC had not violated the automatic stay. Perhaps he did know about § 362(b)(11) at the time, but QC had to give back the money in other cases, and this court had not yet ruled on the issue. Also, his reasoning does not follow, as lawfully obtaining funds does not necessarily convey the right to keep them. It is akin to post-petition conversion, once the funds were legally in the possession of QC and demand had been made for their rightful return. If Mr. Hart felt there was some fraud involved, QC would need to file an adversary proceeding. The stay applies even to debts excepted from discharge, *In re Passmore*, 156 B.R. 595, 599 (Bankr. E.D. Wis. 1993), so the timing of the debt, especially a rollover where no money changed hands, is no excuse. What Mr. Hart was saying was that QC was exercising self help to collect what *might* be a non-dischargeable debt, without the necessity of involving the bankruptcy court in an adversary proceeding under 11 U.S.C. § 523 and without the necessity of according the debtors due process. This approach violates both the spirit and the letter of § 362.

Both the debtors and the creditor have advanced theories of recovery and defenses based on turnover under 11 U.S.C. § 542, and a post-petition transfer under 11 U.S.C. § 549. Because this court has found the creditor violated the automatic stay by retaining funds recovered by negotiating

a post-dated check post-petition, it is not necessary to address these theories. *See In re Crawley*, 318 B.R. 512 (Bankr. W.D. Wis. 2004) (holding chapter 13 debtors did not have standing to invoke trustee's strong-arm avoidance powers).

This is a consumer debt. The court is satisfied that QC's conduct in this case is willful and outrageous, and the debtors are entitled to recover actual damages, including costs and attorney fees. 11 U.S.C. § 362(h). A separate hearing will be set to determine the appropriate amount. As to punitive damages, both Ms. Fox and Mr. Hart testified that QC no longer engages in the practice complained of by the debtors. Many courts have considered the deterrent effect in determining punitive damages. *See, e.g., In re Ocasio*, 272 B.R. 815, 825 (B.A.P. 1st Cir. 2002) ("the primary purpose of punitive damages awarded for a willful violation of the automatic stay is to cause a change in the creditor's behavior; [and] the prospect of such change is relevant to the amount of punitive damages to be awarded"); *In re Diviney*, 225 B.R. 762 (B.A.P. 10th Cir. 1998) (in fixing punitive damages at $40,000, resulting in 2.25 to 1 ratio of punitive to actual damages, bankruptcy court expressed intent that award be sufficient to deter bank, and similarly situated creditors, from unilaterally determining scope and effect of automatic stay).

Nevertheless, deterrence is not the sole factor in an award of punitive damages. Pursuant to § 362(h), individuals injured by willful violations of the automatic stay are entitled to recover punitive damages in "appropriate circumstances." 11 U.S.C. § 362(h). The Bankruptcy Code does not attempt to delineate further what this means, leaving it to the sound discretion of the bankruptcy court. Usually, an award of punitive damages requires more than mere willful violation of the automatic stay. Relevant factors are: (1) the nature of the creditor's conduct; (2) the creditor's ability

to pay damages; (3) the motive of the creditor; and (4) any provocation by the debtor. *In re Heghmann*, 316 B.R. 395 (B.A.P. 1st Cir. 2004).

The cases interpreting "appropriate circumstances" indicate that egregious, intentional misconduct on the violator's part is necessary to support a punitive damages award. *See, e.g., In re Sumpter*, 171 B.R. 835, 845 (Bankr. N.D. Ill. 1994) (holding "punitive damages are awarded in response to particularly egregious conduct for both punitive and deterrent purposes"); *Davis v. IRS*, 136 B.R. 414, 424 (E.D.Va.1992) (finding "only egregious or vindictive misconduct warrants punitive damages for willful violations of the automatic stay"); *Nissan Motor Acceptance Corp. v. Baker*, 239 B.R. 484 (N.D. Tex. 1999) (upholding award of actual damages in the amount of $23,000, plus punitive damages, where the court found that the creditor's failure to turn over a repossessed automobile for two months after it received notice of the debtor's chapter 7 filing was a willful violation of the automatic stay); *In re Omni Graphics, Inc.*, 119 B.R. 641 (Bankr. E.D. Wis. 1990) (award of punitive damages requires not only willful violation of stay but also finding of "appropriate circumstances," such as egregious, intentional misconduct by violator). The testimony at trial established that QC's conduct was egregious and intentional with respect to the husband debtor in this case, and punitive damages will be imposed.

This decision constitutes the court's findings of fact and conclusions of law pursuant to Fed. R. Bankr. P. 7052. A separate hearing will be set to determine the debtors' actual damages and to assess the appropriate amount of punitive damages.

Dated: April 13, 2005.

BY THE COURT

Honorable Margaret Dee McGarity
Chief United States Bankruptcy Judge