Judge

FILED
U.S. Bankruptcy Court
WDNC, Charlotte, NC

SEP 14 2000

Geraldine Treutelaar Crockett, Clerk
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UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION

IN RE:	)	**Case No. 99-40608**
	)	**Chapter 13**
DONNA GIAIMO EMORY,	)	
	)	JUDGMENT ENTERED ON 9/14/00
Debtor.	)	
	)	

ORDER DENYING DEBTOR'S MOTION FOR SANCTIONS

This matter is before the Court upon Donna Giaimo Emory's ("Emory" or "Debtor") Motion for Sanctions filed by the Debtor Arising Out of Alleged Violations of the Automatic Stay Provided for by 11 U.S.C. § 362, dated February 24, 2000, and the Objection and Request for Hearing of Respondent CIT/Group Sales Financing, Inc. ("CIT") dated March 17, 2000. A hearing was conducted on July 28, 2000.

Based upon that hearing, the Court finds and concludes as follows:

FINDINGS OF FACT

1. This matter is a core proceeding under 28 U.S.C. § 157(b)(2), as it relates to claims against the estate; matters arising out of the administration of this bankruptcy case; and rights established under Title 11. As such, this Court may enter final, dispositive orders subject to appeal under 28 U.S.C. § 158. Budget Service Co. v. Better Homes of Virginia, 804 F.2d 289 (4th Cir. 1986).

2. Both personal and subject matter jurisdiction lie in this forum under §§ 157(b)(2) and 1334 of Title 28, United States Code.

3. This bankruptcy case is referred to this Court pursuant to Order of the Judges of the United States District Court for the Western District of North Carolina dated July 30, 1984.

4. On August 27, 1999, Emory filed a Chapter 13 case in this District, together with her proposed Plan. The filing triggered the automatic stay provisions of 11 U.S.C. § 362(a), thereby staying collection efforts against the Debtor.

5. In her petition, Emory listed a secured debt of $66,459.68, owed to CIT on a 1997 Winnebago. She also stated her intention to abandon the vehicle to CIT in full satisfaction of its claim. However, as a debtor's bankruptcy schedules are only filed with the Court and are not served on creditors, CIT did not receive copies of the schedules.

6. CIT did receive notice of Emory's bankruptcy. Emory's attorney mailed CIT a letter advising it of the bankruptcy and of the automatic stay after the case was filed. CIT also received the standard Notice of the Chapter 13 Case, Meeting of Creditors, Confirmation Hearing, and Deadlines issued by the Bankruptcy Clerk on September 16, 1999. Emory's proposed Plan Summary accompanied this Notice.

7. The Western District of North Carolina uses a standard Chapter 13 Plan Summary (Local Form 20). W.D.N.C. Local Bankr. Rule 3015-1, 1998 rev. The plan form has four sections:

a) a preamble describing the plan and the confirmation procedure;

b) a plan summary, describing the payments to be made by the debtor together with any special features of the plan;

c) motions to value or avoid liens under sections 506 and 522(f); and

d) general provisions concerning the plan, confirmation procedures, and claims.

Due to the volume of Chapter 13 plans administered by the Court and its trustees, use of the Plan is required. Local Rule 3015-1: Local Form 20. If debtors wish to obtain relief not contemplated by the summary form, they are expected to file an independent motion and set the matter for hearing. They are not at liberty to simply "load up" the form with additional terms and requirements.[1]

8. Emory intended to surrender the Winnebago, so she listed CIT's debt at paragraph 3.b. of her proposed Plan, as "Property to be Surrendered." In the blank provided to describe that property, Emory listed the 1997 Winnebago. This was in keeping with the form Plan's instructions. However, she then added the statement, "Surrender in Full Satisfaction of Debt."

9. This type of stealth valuation was improper, both under the form Plan and under the Bankruptcy Code. Section 3.b. of the form Plan, begins with the following instruction:

> The Debtor shall surrender the collateral securing the claims of following creditors **in satisfaction of the secured portion of such creditors allowed claims. To the extent that the collateral does not satisfy such a creditors' claim, the creditor shall hold a general unsecured claim.** All such unsecured deficiency claims must be filed with the trustee to be included for bankruptcy. (Emphasis added).

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[1]On several occasions since the form Plan was adopted (December 1998), the judges of this District have declined to enforce such "loaded up" plans. One recent plan proposed by Mr. Gardner clients which sought to set liquidated damages for future stay violations committed by creditors against the debtor. This effort was rejected by Judge Marvin R. Wooten. In re Charmee Latrese Head, No. 99-40823, Order dated March 16, 2000.

Obviously, this part of the form Plan was not intended for making collateral valuations; nor does it bar deficiency claims. Rather, 3.b. expressly allows creditors the opportunity to file deficiency claims. Thus, the Debtor's use of this section to bar a deficiency claim by CIT was outside the bounds of this provision.

10. In order to value a secured claim, the Bankruptcy Code requires a motion and opportunity for a hearing. 11 U.S.C. § 506; Fed. R. Bankr. P. 3012. To this end, the form Plan includes a section for valuation motions, a fact that is reflected in the title of the form Plan. Unfortunately, Emory chose not to complete the form valuation motion; nor did she file a separate motion to value CIT's claim. Rather, the note in the surrender portion of the Plan is the only effort that she made to avoid CIT's lien.

11. After bankruptcy, CIT's representative repossessed the Winnebago from the office of Emory's attorney where it was being stored. The record reflects no discussion at this time about the surrender being conditioned upon CIT waiving a deficiency claim. In fact, imposing such a condition would have been most unusual. Usually lacking the financial ability and/or the desire to retain the collateral, debtors often surrender encumbered assets for foreclosure. Rarely are debtors in a position to demand that the surrender be conditioned upon full satisfaction of the debt. Instead, deficiency claims usually follow the surrender.

12. Emory's unusual attempt to eliminate CIT's deficiency went unnoticed. On November 3, 1999, her Chapter 13 Plan was confirmed by this Court's order without objection.

13. Like the plan summary, the Order Confirming Plan is based upon a form, with case specific information added to describe the particulars of the plan - payment amount, plan duration, and any other special features. The order states that any motions for valuation or to avoid certain liens contained in the plan summary are granted unless otherwise noted.

14. Since Emory did not value CIT's lien in her Plan, the Confirmation Order did not assign a value to CIT's secured claim. In fact, the Order Confirming Plan makes no reference to CIT at all.

15. This dispute between CIT and Emory arose when, after liquidating its collateral, CIT mailed Emory a receipt dated January 13, 2000. The receipt gives Emory's original loan balance, reflects a $47,376.00 adjustment (reduction) of that balance, and shows a deficiency of $19,083.78. The receipt is purely informational; it makes no demand for payment or any threat for failure to pay. In fact, CIT issued this notice to account for its sale of the Winnebago in order to comply with North Carolina law (specifically Article 9 of the UCC, which requires a secured creditor to account for disposition of collateral). Although the receipt was sent directly to Emory rather than to her bankruptcy attorney, clearly the receipt was not intended for collection purposes.

16. CIT thereafter filed an amended proof of claim to provide for its deficiency as an unsecured claim.

17. Emory and her counsel chose to treat the receipt as an illegal demand for payment, and the amended proof of claim as a violation of Emory's Plan under principles of res judicata. This motion followed.

18. Emory deems CIT's issuance of the receipt to be a wilful violation of the stay. She asks that CIT pay her monetary damages of $2,500, $2,500 in attorney's fees, and punitive damages in excess of $10,000. She demands that CIT's $19,083.78 deficiency claim be stricken and that its debt be discharged. Also, claiming that CIT violated Article 2 of Chapter 75 of the North Carolina General Statutes, titled "Prohibited Acts by Debt Collectors," she demands damages of $2,000. She says CIT violated the federal Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et. seq.*, and for this wants damages of $1,000. She says CIT should be held in contempt of court for its actions. Finally, at hearing, Emory argued that in sending its receipt and in filing an amended deficiency claim, CIT violated her confirmed Chapter 13 Plan. For this, she demands sanctions.

CONCLUSIONS OF LAW

The Debtor's Motion is without merit and should be DENIED.

A. *Sending of Receipt by CIT was not a Wilful Stay Violation*

Emory's claims for sanctions based upon a wilful violation of the automatic stay and her civil contempt motion overlap, and for simplicity will be referred to simply as a stay violation.[2] Emory

[2]It has been said that § 362(h), which was added to the Code in the 1984 BAFJA Amendments, does not supplant, but merely supplements, the courts' inherent contempt powers. Richard J.

maintains that by sending her the receipt, CIT wilfully violated the automatic stay.

The applicable statute is 11 U.S.C. § 362. Section 362(a) provides that the filing of a petition in bankruptcy court renders an automatic stay:

> applicable to all entities, of ... the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim, against the debtor that arose before the commencement of the case under this title. 11 U.S.C.§ 362(a)(1).

Due to the breadth of the statute, almost any postpetition action taken to collect from a debtor or his property violates the automatic stay. Section 362(a). However, these violations generally fall into two distinct groups, technical and wilful violations.

Technical violations are by far the larger group of stay violations. These violations usually are the results of inadvertent errors which precipitate demands for payment ("duns"). Generally speaking, the collection industry employs sophisticated procedures to conform with the bankruptcy laws, including the automatic stay. The creditor ordinarily receives notice of the bankruptcy, flags his debtor's account to prevent future billings, and files a proof of claim. However, errors occasionally occur.

Stehl, <u>Eligibility for Damage Awards Under 11 U.S.C. § 362(h): The Second Circuit Answers the Riddle - When Does Congress Actually Mean What It Says?</u>, 65 St. John's L. Rev. 1119 (1991). However, since § 362(h) provides for damages only, courts tend to treat stay violations as contempt under Section 105 when injunctive relief is sought.

Most postpetition collection actions against a debtor occur immediately after the bankruptcy is filed and before the creditor's system is flagged. However, inadvertent violations occasionally occur later in a case as collection accounts are sold; new personnel are placed in charge of the account; a first disbursement is made by the trustee on an unsecured claim, etc.

While annoying to the debtor, technical stay violations are usually not actionable. A simple call or letter by the debtor or his attorney to the creditor usually stops the billings. Moreover, sanctioning the offending creditor is not usually appropriate. As U.S. District Judge Richard Voorhees' has held in In re Hamrick, 175 B.R. 890 (W.D.N.C. 1994), a creditor's inadvertent mailing of a single dun does not constitute a wilful violation of the stay and is not the basis for sanctions.

A second type of stay violations also exists, the so-called wilful acts. Some creditors simply refuse to alter their collection procedures because of bankruptcy, and wilfully elect to violate the automatic stay. In fact, some creditors appear to view paying sanctions for violating the stay as a cost of doing business.[3] After all, for every debtor who files a motion for sanctions, there are several more who will pay the debt just to get the creditor off their backs.

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[3]Even after a sanctions motion is filed, some creditors ignore the notice of hearing, and a number choose to ignore the subsequent sanctions order. Only when the damages imposed become large in amount do these creditors respond and take corrective measures. The same entities tend to commit stay violations in case after case.

By volume, wilful violations occur much less frequently than technical violations. However, wilful violations are also much more of a problem for debtors. When a stay violation is wilful, the debtor can only protect himself by filing a sanctions motion. No number of letters from a debtor's attorney will stop these collection attempts. One must involve the court.

To this purpose, Section 362(h) exists. Section 362(h) is the debtor's shield against wilful stay violations. Under this provision, an individual injured by a willful violation is entitled to recover from the creditor his actual damages, including costs and attorneys' fees. In appropriate circumstances, the debtor may also recover punitive damages.

While the stay is designed to be a defensive mechanism, the ability to recover sanctions from creditors tempts some debtors and their attorneys to use Section 362(h) as a sword--that is, to make money from threatening or bringing stay motions.

Emory's motion appears to be motivated by such a profit motive or some other improper purpose. Looking at this record, there appears to be a total disconnect between the facts and the relief that Emory is seeking. Here, the debtor has received a piece of paper from CIT and has no damages. However, Emory demands that CIT pay her $2,500 monetary damages, $2,500 in attorney's fees, and punitive damages in excess of $10,000. She demands that CIT's $19,083.78 deficiency claim be stricken and that its debt be discharged.[4] Similar demands accompany her other claims for relief.[5]

The motion is not well founded. On these facts, the undersigned cannot find CIT guilty of a wilful violation of the stay justifying sanctions. At most, this would be a technical violation under the Hamrick definition.

As noted, this single mailing by CIT to the debtor was intended to comply with the Uniform Commercial Code. It did not demand payment, threaten action, or demand that the debtor take any action. The facts do not suggest a wilful violation. Emory has suffered no damages. Accordingly, Emory is not entitled to a recovery. Certainly punitive damages of the level she seeks are not appropriate.

B. *CIT's Deficiency Claim did not Violate the Debtor's Plan*

Emory next argues that the "Surrender in Full Satisfaction of Debt" language in her Chapter 13 Plan established that CIT was not entitled to a deficiency claim under principles of res judicata. Thus, Emory says CIT violated her confirmed plan by filing an

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[4] Interestingly, on the date this motion was heard, Mr. Gardner represented debtors in 41 different cases appearing on the docket. Of his 41 cases, no less than 15, or 37%, were there on motions for sanctions brought against creditors for alleged stay violations.

[5] For CIT's alleged violation of NCGS Chapter 75, Emory demands $2,000. She says CIT violated the federal Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et. seq.*, and for this wants damages of $1,000. She says CIT should be held in contempt of court for its actions and wants sanctions. Finally, Emory argues that in filing an amended deficiency claim, CIT violated her confirmed Chapter 13 Plan. For this, she also demands sanctions.

amended proof of claim. Again she demands damages. Again, the Court disagrees with her reasoning.

Section 1327, entitled "Effect of Confirmation," provides in part:

> The provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan.

11 U.S.C. § 1327(a).

This language has been interpreted to mean that a plan is "res judicata" as to all issues that were or could have been litigated before confirmation. In re Linkous, 990 F.2d 160, 166 (4th Cir. 1993). However, there are several limitations on this effect. One is the due process clause of the Fifth Amendment, as the Fourth Circuit ruled in Linkous.

In Linkous, the Chapter 13 debtor owed two loans to Piedmont Trust Bank. Each loan was undersecured, and Linkous' plan bifurcated the claims, treating them as secured only to the extent of the collateral value. A summary of the plan was mailed to Piedmont. This summary described the payments and term of the plan, but did not mention Piedmont's secured loans. Nor did it state that the debtor intended that the loans would be treated as only partially secured. Id. at 161.

Piedmont failed to attend the confirmation hearing, and the bankruptcy court confirmed Linkous' plan. Thereafter, Piedmont filed claims in the case and moved the bankruptcy court to revoke confirmation. Id. The Bankruptcy Court denied Piedmont's motions on the basis of res judicata. The District Court reversed, on the grounds that Piedmont had not received adequate notice of what would take place at the confirmation hearing. Id. at 162.

On appeal, the Fourth Circuit agreed that the notice provided to creditors about this Plan was inadequate to affect Piedmont's lien, for due process reasons. The appellate court therefore refused to recognize the res judicata effect of the plan as to Piedmont's lien rights.

In so ruling, the Circuit Court pointed out that an "elementary and fundamental requirement of due process for any proceeding which is to be accorded finality is notice reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Id. at 162 (citing Mullane v. Central Hanover Bank & Trust, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950)).

The Fourth Circuit felt that the notice of the confirmation hearing for Linkous' plan was constitutionally inadequate because it failed to specify that the bankruptcy court would also consider security valuation issues at the hearing. As the Court observed, the procedural framework for valuing collateral under § 506(a) is contained in Bankruptcy Rule 3012, which provides:

> The court may determine the value of a claim secured by a lien on property in which the estate has an interest on motion of any party in interest and after a hearing on notice to the holder of the secured claim and any other person the court may direct.

In order to "reasonably convey the required information," Linkous holds that the notice to creditors must state that such a valuation hearing will take place. Id. at 162 (citing Mullane, 339 U.S. at 314, 70 S.Ct. at 657). While a valuation hearing may be held in conjunction with a confirmation hearing, "[m]ere notice that the bankruptcy court will hold a confirmation hearing on a proposed bankruptcy plan, without inclusion of notice specifically directed at the security valuation process, does not satisfy the requirement of Rule 3012." Id. (citing In re Calvert, 907 F.2d 1069, 1072 (11th Cir. 1990)). Linkous' notice to Piedmont of the confirmation hearing was inadequate to affect the lender's secured claims because it did not reference an intent to reevaluate those claims.

The Fourth Circuit reached a similar conclusion in the case of Cen-Pen v. Hanson, 58 F.3d 89 (4th Cir. 1995). In that case, the Chapter 13 debtors' plan purported to vest their residence in them, free and clear of a secured creditor's lien. When the creditor filed a complaint to assert its lien interest, the debtors argued the creditor had lost its liens due to the res judicata effect of the confirmed plan. The Court of Appeals disagreed, holding that a Chapter 13 plan could not determine lien rights. According to the Court, in order for a debtor to extinguish or modify a lien during bankruptcy, some "affirmative step" must be taken. Id. at 92. Otherwise, the debtor's property remains subject to the security interest following confirmation. The Bankruptcy Code and Rules define what affirmative action is required. They also prescribe the level of due process to be provided.

In Cen-Pen, the debtors' plan had attacked the validity of a lien itself (rather than disputing the value of that lien as in Linkous and the current case). The Fourth Circuit held that attempting this under a plan did not constitute a sufficient affirmative step, because Bankruptcy Rule 7001(2) expressly requires an adversary proceeding "to determine the **validity,** priority, or extent **of a lien.**" Id. (Emphasis added.)

Since confirmation of a Chapter 13 plan is res judicata only as to issues that can be raised in the less formal procedure for contested matters,[6] Cen-Pen held that confirmation could not have a preclusive effect as to the validity of the lien. Lien disputes must be resolved by adversary proceedings.

In the current case, Emory apparently meant to determine the value of CIT's secured claim (and then to satisfy that claim by surrendering the collateral to the lender).[7] The case is therefore factually closer to Linkous than Cen-Pen.

However, in order to have the Court determine the value of its secured claim,[8] Emory needed to cast this as a motion and give

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[6]In other words, if an issue must be raised through an adversary proceeding, mere confirmation alone cannot have a preclusive effect because the issue has not been actually litigated. See Cen-Pen, 58 F.3d at 93 (citing In re Beard, 112 B.R. 951 (Bankr. N.D.Ind. 1990)).

[7] An equally plausible interpretation of this effort was that Emory anticipated future stay litigation involving CIT, such as a dispute over the nature of the interest in the Winnebago that was bought.

[8] Whether or not the debtor would be entitled to do so as to property that was being surrendered under the decision in Dewsnup v. Timm, 502 U.S. 410, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992), is an issue that need not be determined here.

proper notice to CIT. Under Linkous, this motion could have been filed in conjunction with her plan. Alternatively, she could have filed a separate motion to value the CIT claim and set the matter for hearing. Either option would have afforded CIT sufficient notice of what the Debtor intended.

Emory did neither. Instead of filing a motion, she simply buried her statement that she intended to satisfy the lien by surrender in an inapplicable part of the plan. She now asks the Court to declare that notation controlling. The Court will not honor this request.

Apart from the fact that Emory has failed to follow the mandatory local form, she has never filed a motion. These omissions have denied CIT due process as defined in Linkous.[9] Since Emory failed to take "adequate affirmative steps" to value CIT's secured claim, no res judicata effect derives from her Plan as to CIT's lien.

However, even if this note were sufficient, Emory's plan is itself ambiguous and should not be interpreted to bar CIT from asserting a deficiency claim. Looking again at Section 3.b. of the

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[9] The Debtor's notation, "Surrender in Full Satisfaction of Debt," which accompanied a description of the property to be surrendered, did not constitute "notice reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action," as required by Linkous. 990 F.2d at 162. Nor did it afford CIT an opportunity to present objections at a hearing. The Debtor's approach would require creditors to closely scrutinize every word of a plan summary, including boilerplate language, with a critical eye to find unusual features. Not only does this approach results in insufficient notice, but it also defeats the purpose of a standard plan summary form which is to expedite review of these documents.

form plan, "Property to be Surrendered," the following instruction pertains:

> The Debtor shall surrender the collateral securing the claims of following creditors **in satisfaction of the secured portion of such creditors allowed claims. To the extent that the collateral does not satisfy such a creditors' claim, the creditor shall hold a general unsecured claim.** All such unsecured deficiency claims <u>must be filed</u> with the trustee to be included for bankruptcy. (Emphasis added).

The form Plan contemplates deficiency claims. Contrast this language with the Debtor's typed-in note that follows: "1997 Winnebago-Surrender in Full Satisfaction of Debt." The Debtor would bar a deficiency claim by CIT.

Emory has chosen to use the plan summary in a way not permitted by the Court's Local Rules. The result of her effort is a plan which is confusing: Does the plan allow deficiency claims, or does it not? One cannot tell. For both reasons, the Court will not enforce this language to prevent the assertion of a deficiency claim.

A final reason exists to deny the Debtor's plan a res judicata effect as to CIT's deficiency claim. A plan is res judicata only as to terms which are confirmed. In this case, the Order Confirming the Plan makes no mention of CIT's lien claim. It does not provide that the CIT collateral was surrendered in full satisfaction of its claim. Rather, the Order states that it affects only liens dealt with by those motions contained in the plan. With no such motion in the Debtor's plan, Emory's proposal to surrender the Winnebago in full satisfaction was not confirmed, and no res judicata effect lies as to CIT's claim.

C. *Federal Fair Debt Collections Practices Act*

It is also clear that CIT's actions did not violate the federal Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq*. The FDCPA prohibits a debt collector from communicating with a consumer that he knows to be represented by an attorney. However, by statute, a creditor collecting its own debt is not a "debt collector." 15 U.S.C. 1692(a)(6). Since this receipt was sent directly by CIT employees, the company could not have violated the Fair Debt Collection Practices Act.

D. *State "Prohibited Acts by Debt Collectors" Statute*

Likewise, CIT did not violate North Carolina's version of the Fair Debt Collection Practices Act, N.C.G.S. §§ 75-55 through 75-56. Just as with the federal law, this Act prohibits a bill collector from using unconscionable means to collect a consumer debt. As Emory points out, "prohibited means" include communicating with a consumer known to be represented by counsel. N.C.G.S. § 75-55(3). CIT had notice that Emory was represented by counsel before it mailed her the receipt, so she contends CIT violated the Act.

This argument does not hold. While the general rule prohibits communications with a represented debtor, a bill collector may send the consumer "a statement of account used in the normal course of business." N.C.G.S. § 75-55(3). The receipt mailed to Emory is such a statement. In fact, CIT only sent Emory the receipt at this time because it was attempting to comply with another applicable North Carolina l

aw.

Under the Uniform Commercial Code, a secured creditor is required to account to a borrower for any deficiency remaining after it disposes of collateral. N.C.G.S. 25-9-504(2). This is what CIT was doing when it sent the receipt to Emory - accounting to its debtor for the sale of the Winnebago. Certainly, it is not an unconscionable collection act for a creditor to try to comply with another applicable North Carolina statute.

CONCLUSION

For all these reasons, the Court believes that the Debtor's motion is frivolous and should be **DENIED.**

SO ORDERED.

J. Craig Whitley
United States Bankruptcy Judge