

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA**

<p>In Re: Timothy Zelazny, Debtor.</p>	<p style="text-align:right">Bankruptcy Case No.: 04-42279 NCD Chapter 7</p>
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**PIONEER FINANCIAL, LLC AND MESSERLI & KRAMER, P.A.'S
MEMORANDUM IN OPPOSITION OF DEBTOR'S MOTION
TO AVOID LIEN AND IMPOSE SANCTIONS FOR VIOLATION OF
THE AUTOMATIC STAY AND DISCHARGE INJUNCTION**

FACTS

Debtor, Timothy Zelazny, "Debtor," owed Pioneer Financial LLC, as successor in interest to Providian Bank, "Pioneer" for charges made by Debtor on his credit card with Providian Bank. Pioneer, through its undersigned attorneys, applied for and received a Judgment, ordered April 2, 2004, in the amount of \$7,431.68, pursuant to Rule 55.01(1) of the Rules of Civil Procedure. On April 2, 2004, Wright County District Court issued Pioneer, through its undersigned attorneys, a Writ of Execution, in the amount of \$7,431.68.

On or about April 12, 2004, pursuant to Minnesota Statutes Chapter 551, Pioneer served the Debtor's bank, Wells Fargo, with its Third Party Levy, Disclosure Form, and a copy of the Writ of Execution. On April 23, 2004, Pioneer's counsel was advised of the Debtor's April 22, 2004 bankruptcy filing and, on the same day, diligently forwarded its standard release to Wells Fargo via facsimile to 602-378-5437. On May 12, 2004, following numerous inquiries from Debtor's counsel as to whether release was ever forwarded to Wells Fargo, Pioneer's counsel transmitted a second release to Wells Fargo via facsimile to 602-378-5437. Debtor's counsel again claimed in several phone calls to Pioneer's counsel that Wells Fargo did not receive the release and requested that Pioneer's counsel re-fax an additional copy. On May 14, 2004, as requested, Pioneer's counsel re-

faxed a copy of the release dated May 12, 2004, to **both** Wells Fargo and Debtor's counsel's office. Debtor's counsel continued to phone or fax Pioneer's counsel's office with varying demands designed to obtain control of the funds from Wells Fargo for the Debtor prior to the Meeting of Creditors which was not scheduled to be heard until June 3, 2004.

Pioneer, through its counsel, performed over and above its due diligence with respect to releasing its interest in the funds. Debtor's counsel's office continued to phone Pioneer's office numerous times over the next seven days reiterating their demand that Pioneer release the funds to the Debtor. Pioneer's counsel's staff specifically advised Debtor's counsel that what she was asking Pioneer to do was, in fact, to control the funds and, in effect, direct control of the funds to the Debtor prior to the Meeting of Creditors. On May 21, 2004, Debtor's counsel requested another copy of our release be faxed to their office. Pioneer, through its counsel, again complied and faxed another copy of the release to the Debtor's attorney's office.

On June 2, 2004, the day before the Meeting of Creditors, Pioneer's counsel received two separate phone calls, and a facsimile, from Debtor's attorney stating that she wanted a release that "meets Wells Fargo's requirements" and "verbal confirmation that the intent of the two...releases Wells Fargo has received was to give the debtor the funds back.". Pioneer's counsel explained to Debtor's counsel that Wells Fargo would need to speak with its own legal counsel with respect to the funds, that Messerli & Kramer P.A., could not advise Wells Fargo as to how to proceed, and that any direction given regarding turnover, remittance, or return of the funds would be considered exercising control over the funds.

Interestingly, after the Meeting of Creditors on June 3, 2004, Pioneer's counsel did not receive any communication from Debtor's counsel's office regarding this matter for over three months. On September 13, 2004, Debtor's attorney called Pioneer's counsel's office and now stated that she wanted a release of Pioneer's interest as of the date that the lien took effect. Pioneer, through its counsel, did not at any time request or receive any remittance whatsoever pursuant to its

pre-petition collection attempts or judgment, either from the Debtor directly or from Wells Fargo. The funds were never in the control of either Pioneer or Messerli & Kramer P.A. Furthermore, Pioneer and Messerli & Kramer P.A., can only assume, that if funds are still being withheld, they continue to remain under the control of Wells Fargo.

Debtor fails to present any argument whatsoever in his motion or memorandum to justify or establish his assertion that either Pioneer or Messerli & Kramer P.A., violated the discharge injunction or the automatic stay. Debtor makes no mention of his assertion that the discharge injunction was violated outside of the caption on the documents. In fact, Pioneer and Messerli & Kramer P.A., affirmatively deny that either party acted to commence, continue, or employ any process, or acted to collect, recover, or setoff any debt discharged in the Debtor's bankruptcy, but, rather, acted with diligence at all times relevant to this matter.

Curiously absent from this motion is the party holding the funds and refusing turnover, Wells Fargo Bank, N.A. This is likely because Debtor's counsel prefers to involve this creditors counsel prefers to involve this creditors counsel rather than address the issue squarely. Wells Fargo Bank, N.A., is a necessary party to this motion which cannot be properly determined with out notice to and involvement of the bank.

Based on the foregoing facts, Pioneer and Messerli & Kramer P.A., were never in violation of the automatic stay under 11 U.S.C. §362 or the discharge injunction under 11 U.S.C. §524. Pioneer and its counsel, Messerli & Kramer P.A., do not object to the motion to avoid the lien in and of itself, but do steadfastly object to the motion as it relates to the alleged violation of the automatic stay.

LEGAL ARGUMENT

Debtor asserts in his memorandum that Pioneer's lien is avoidable under the Bankruptcy Code. As previously stated, both Pioneer and Messerli & Kramer stipulate to this assertion. As previously noted, Pioneer, through its counsel, released its interests in these funds numerous

times months ago. Debtor also asserts that the "Debtor may avoid this transfer as a preferential transfer.", incorrectly quoting 11 U.S.C. §522(d) and citing it together with 11 U.S.C §547 as authoritative in this matter. Pioneer and Messerli & Kramer, P.A. object to this assertion. 11 U.S.C §547 is both inapplicable and inappropriate to the matter at hand. Upon notification of the Debtor's bankruptcy filing, subsequent to the service of the bank levy and prior to remittance of any funds, Pioneer, through its counsel, diligently faxed its release to Wells Fargo, several times. Pioneer did not request or receive remittance nor did it direct or exercise control over the funds which are subject of this motion. Quite simply, the issue of a preferential transfer is moot.

In his third assertion, Debtor states that Pioneer has "willfully violated the automatic stay and discharge provisions of the Bankruptcy Code". Debtor specifically cites 11 U.S.C. §362(a)(3) and states that the bankruptcy petition operates as a stay, applicable to all entities, of "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". Debtor immediately thereafter cites *Knaus v. Concordia Lumber Co. (In re Knaus)*, 889 F.2d 773, 775 (8th Cir.1989), stating "Thus, where a creditor seizes of a debtor after the debtor has filed a bankruptcy petition, the automatic stay has clearly been violated." In *In re Knaus*, the creditor had seized property, pre-petition, pursuant to its judgment against the debtor, but had not yet liquidated the property through a sheriff's sale at the time of the debtor's bankruptcy filing. As such, the creditor in *Knaus*, was stayed from taking any action necessary to sell the property and had an obligation to motion the court for relief or release the property. By taking neither action, the creditor in *Knaus* was in violation of the stay. In the present case, Pioneer had released, on three separate occasions, the funds attached by Pioneer pursuant to its pre-petition bank levy and, moreover, did not seize property of the Debtor post-petition.

Debtor also incorrectly cites case law in *Atkins v. Martinez (In re Atkins)*, 176 B.R. 998 1008 (Bankr. D. Minn. 1994) as authoritative in this case. However, Pioneer's lien was static in

nature and for this reason is distinguishable from *In re Atkins*. In *In re Atkins*, the creditor had obtained a bench warrant, which is not a static, but a *continuing* action. Therefore, the creditor in *In re Atkins* clearly had an obligation to quash the warrant to comply with the automatic stay.

In the present case, Pioneer, through its counsel, diligently released its interest in the attached funds and, after doing so, had no physical control over the funds or what Wells Fargo did with them. It was Wells Fargo that retained physical and fiscal control over the funds until they were to be either *returned* to the Debtor, *remitted* to the creditor, or *turned over* to the Trustee. As noted, Pioneer, through its counsel, had relinquished its interest to the funds three times by forwarding release of the funds to Wells Fargo and notifying Wells Fargo of the Debtor's bankruptcy filing; remittance of the funds to Pioneer was not requested or expected by Pioneer. To reiterate, neither Pioneer nor Messerli & Kramer, P.A. at any time following the bankruptcy filing performed any prohibited act to obtain possession of the funds or to exercise control over the funds under 11 U.S.C. §362(a)(3).

Debtor fails to present any argument whatsoever to establish his assertion that Pioneer and Messerli & Kramer P.A., intentionally violated the discharge injunction under 11 U.S.C. §524. Both Pioneer and Messerli & Kramer P.A., vehemently deny that they acted in any way to violate the discharge injunction. Clearly, the intentions of Pioneer and Messerli & Kramer P.A., were to release the levy.

By analogy, this Court recently held that a sheriff did not willfully violate the stay because the sheriff could not determine to whom the property was to be released. In *re Westman*, 300 B.R. 338 (D.Minn. 2003). Likewise, Pioneer, although it had released its interest, could not direct Wells Fargo Bank to release the money to any particular entity (Trustee, Debtor, or Debtor's attorney) without knowledge of any other claims or issues.

In his memorandum, Debtor fails to present any factual contentions or evidentiary support to establish his assertion that Pioneer or Messerli & Kramer P.A., committed either an intentional

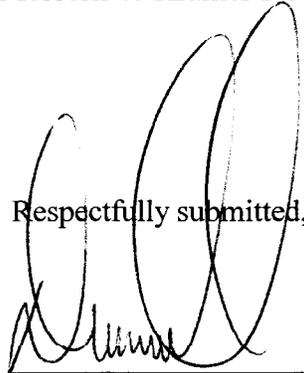
violation of the automatic stay under 11 U.S.C. §§362(a), or (h), or an intentional violation of the discharge injunction under 11 U.S.C. §524, or even that he was, indeed, injured by a stay violation. Pioneer and Messerli & Kramer P.A., have been forced to object to the Debtor's motion due to his unfounded assertions that they intentionally violated the automatic stay and discharge injunction and, further, have incurred unnecessary attorneys fees and costs in their defense of same.

CONCLUSION

Pioneer and Messerli & Kramer P.A., do not oppose the Debtor's motion to avoid the lien. Neither Pioneer nor Messerli & Kramer P.A., have intentionally violated the automatic stay or the discharge injunction. Accordingly, Pioneer & Messerli & Kramer P.A., respectfully request that the balance of the Debtor's motion be denied.

Dated: 10-5, 2004.

Respectfully submitted,



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