

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In re:

BKY 4-88-437

CHERYL L. McPECK,
Debtor.

OPINION RE: SANCTIONS FOR
WILLFUL VIOLATION OF STAY

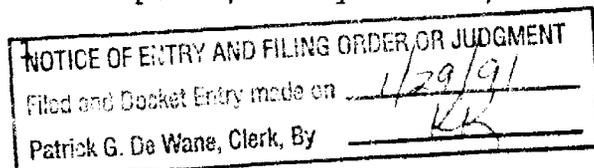
At Minneapolis, Minnesota, January 29, 1991.

The above-entitled matter came on for hearing before the undersigned on the 4th day of December, 1990 on a motion by the Debtor for an order sanctioning the Internal Revenue Service (the "IRS") under 11 U.S.C. § 362(h) for its alleged repeated violations of the automatic stay and awarding attorney's fees under 26 U.S.C. § 7430. The appearances were as follows: Tracy Anagnost for the IRS; and Ian Ball for the Debtor. This Court has jurisdiction over the parties to and the subject matter of this case pursuant to 28 U.S.C. §§ 157 and 1334, and Local Rule 103. Moreover, this Court may hear and finally adjudicate this motion because its subject matter renders such adjudication a "core" proceeding pursuant to 28 U.S.C. § 157(b)(2)(O).

I. FACTS

Debtor filed a voluntary petition for relief under Chapter 13 of the Bankruptcy Code on February 4, 1988. The IRS does not deny that it received proper notification of the filing. In fact, it filed a proof of claim early in the tumultuous history of this case.

In early June, 1990, Riley Owens ("Owens"), a tax examiner with the IRS' automated collection site ("ACS") in Clayton, Missouri, telephoned the Debtor's ex-spouse, Randy McPeck, in an



effort to induce Mr. McPeck to pay taxes owed for the 1986 tax year. Debtor and Mr. McPeck had filed a joint tax return for the 1986 tax year. Due to programing limitations that have since been corrected, the ACS computer stored a record of the 1986 tax debt only under Mr. McPeck's social security number, and consequently there was no record at ACS for the Debtor. During his telephone conversation with Mr. McPeck, Owens obtained the Debtor's telephone number in order to contact her regarding payment of the 1986 tax debt. Mr. McPeck testified that during their conversation he informed Owens that the Debtor had filed for bankruptcy. Owens testified to the contrary.

On the evening of June 26, 1990, Owens contacted the Debtor by telephone and demanded payment of the 1986 tax debt. Debtor informed Owens that she had filed for bankruptcy and requested that he contact her attorney, Ian Ball ("Ball") at the telephone number she provided. Owens terminated the conversation and telephoned Ball's office, but no one answered since it was in the evening. Approximately 15 minutes after his first call, Owens again contacted the Debtor and requested that she instruct Ball to telephone Owens to provide him with information confirming her filing. ACS has computer records of these calls. Ball subsequently called Owens with such information.

Debtor also testified that an unidentified, female, IRS employee called on a subsequent evening and requested payment of the 1986 debt. Debtor allegedly informed the employee that she had

filed for bankruptcy and requested that the employee contact Owens. ACS has no computer record of this alleged call.

II. DISCUSSION

Debtor contends that all three calls constituted willful violations of the automatic stay. Pursuant to section 362(h) of the Bankruptcy Code, Debtor requests an award of actual damages for mental anguish and attorney's fees and an award of punitive damages:

An 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(h). In addition, Debtor requests that any attorney's fees awardable under section 362(h) be awarded instead under 26 U.S.C. §7430, which requires the Debtor to show that the IRS' position regarding this motion was not substantially justified.

The IRS responds that 1) the first call did not constitute a willful violation of the stay, since at the time he made the call Owens allegedly had no knowledge that the Debtor had filed for bankruptcy; 2) the second call did not constitute a willful violation because Owens did not demand payment but instead merely asked the Debtor to have her attorney call him; and 3) the third call never occurred. In addition, the IRS contends that its agents' actions did not constitute "appropriate circumstances" warranting an award of punitive damages.

A. Actual Damages

The IRS asserts that the Debtor is not entitled to actual damages because none of the phone calls constituted a willful

violation of the automatic stay. I have previously held that all the Debtor is required to show in order to establish that the IRS willfully violated the automatic stay is that the IRS had adequate notice of the Debtor's filing and that it intentionally did the act that violated the automatic stay. In re McPeck, BKY 4-88-437, slip op. at 16 (Bkctcy. D. Minn. Oct. 13, 1988). See also Stucka v. United States (In re Stucka), 77 B.R. 777, 783 (Bkctcy. C.D. Cal. 1987). The IRS does not deny that it had been properly notified of the Debtor's filing over two years before the offending telephone calls were made. The IRS also admits that its agent made the first two calls. This is sufficient to establish a willful violation.¹ The IRS' conduct is not excused by the alleged fact that prior to the first call Owens and ACS had no record of the Debtor's filing:

If the automatic stay is to afford any meaningful protection to a debtor attempting to reorganize, it must be enforced against the colossus of the I.R.S. just as it is against individual and corporate creditors who may persist in their collection efforts after a petition for relief has been filed. The burden has to be on the I.R.S. to develop sufficient procedures to avoid the continuation of its collection efforts once a petition has been filed.

In re Santa Rosa Truck Stop, Inc., 74 B.R. 641, 642 (Bkctcy. N.D. Fla. 1987).

The IRS contends that the second call did not violate the stay because Owens merely asked the Debtor to have her attorney call him. This fact may have some bearing on the issue of punitive

¹ Thus, I need not find whether or not Mr. McPeck told Owens that the Debtor had filed for bankruptcy.

damages, but it does not make the call any less a violation of the stay. Owens had called the Debtor only 15 minutes earlier and demanded payment. Such repetitive calling constitutes impermissible harassment of the Debtor, even if the caller makes no demand for payment and later claims no harassment was intended. The IRS' assertion that Owens called for the purpose of confirming the bankruptcy filing does not excuse his actions, since the IRS had already received adequate notice of the Debtor's filing.

Debtor, however, has failed to show any actual damages except attorney's fees. I cannot put a price on any distress the telephone calls may have caused her.

Nonetheless, Debtor is entitled to reasonable attorney's fees for bringing this motion, since Debtor has shown a willful violation of the stay.² Contrary to the IRS' assertion, the violation need not be continuing at the time the motion for damages was made. Section 362(h) contains no such limiting language. The purpose of section 362(h) is not only to deter further violations by the IRS, but also to compensate the Debtor for past violations. Consequently, Debtor is entitled to seek recovery for any actual damages, including reasonable attorney's fees, that she has sustained, even if the violations had ceased before Debtor filed her motion.

² I need not find whether or not the third phone call occurred, since Debtor proved no actual damages except attorney's fees, and an award of attorney's fees is justified based on the first phone call alone.

B. Punitive Damages

Debtor has failed to show that an award of punitive damages is warranted. Such an award would have been warranted only if the Debtor had shown that the IRS' agents had engaged in "egregious, intentional misconduct." United States v. Ketelsen (In re Ketelsen), 880 F.2d 990, 993 (8th Cir. 1989). Two or three phone calls in the evening do not constitute such egregious misconduct.

C. Attorney's Fees Under 26 U.S.C. § 7430

Debtor does not meet the requirements for an award of attorney's fees under section 7430 of the Internal Revenue Code. In order to be entitled to an award under section 7430, the Debtor must have, inter alia, "substantially prevailed with respect to the most significant issue or set of issues presented." 26 U.S.C. § 7430(c)(4)(A)(ii)(II). Debtor succeeded in showing that the IRS had willfully violated the automatic stay, and thus she was entitled to attorney's fees under 11 U.S.C. § 362(h), but the IRS prevailed on the issues of other actual damages and punitive damages. The IRS had ceased violating the automatic stay before the Debtor filed this motion, and thus the Debtor's purpose for bringing the motion was to seek an award for other actual damages and punitive damages. Consequently, the Debtor did not substantially prevail with respect to the most significant issues presented.

Moreover, the Debtor must show that the IRS' position was not substantially justified. 26 U.S.C. § 7430(c)(4)(A)(i). She has

failed to meet this requirement as well, since the IRS prevailed on the issues of other actual damages and punitive damages.

III. CONCLUSION

Debtor has demonstrated that the IRS willfully violated the automatic stay when one of its agents telephoned the Debtor to request payment of a tax debt more than two years after the IRS had received adequate notice that the Debtor had filed for bankruptcy. The only actual damages Debtor has shown are her attorney's fees in bringing this motion, which will be offset against the Debtor's prepetition debt to the IRS. United States v. McPeck, 910 F.2d 509 (8th Cir. 1990). Debtor is not entitled to punitive damages under 11 U.S.C. § 362(h) or attorney's fees under 26 U.S.C. § 7430. This Court will issue an appropriate order not less than five days after Debtor's attorney has submitted a proposed form of order and an affidavit regarding his fees for this motion, during which time the IRS may object to said affidavit.


Nancy C. Preher
United States Bankruptcy Judge