



IT IS ORDERED as set forth below:

Date: August 2, 2016

A handwritten signature in black ink, appearing to read "Barbara Ellis-Monro", is written over a horizontal line.

**Barbara Ellis-Monro
U.S. Bankruptcy Court Judge**

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

IN RE:

BRIAN STEPHEN ERBESFIELD,

Debtor.

BRIAN STEPHEN ERBESFIELD,

Plaintiff,

v.

DANIEL E. GAVRIN, ESQ and KARA
KLATT,

Defendants.

CASE NO. 14-58377-BEM

CHAPTER 13

ADVERSARY PROCEEDING NO.
15-5280-BEM

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A trial was held in this adversary proceeding on January 21, 2016 and February 16, 2016 (the "Trial"). Plaintiff, Brian Stephen Erbesfield ("Plaintiff") seeks a determination that Defendants, Daniel E. Gavrin ("Gavrin") and Kara Klatt ("Klatt" and with Gavrin,

“Defendants”) willfully violated the automatic stay of 11 U.S.C. §362(a) and are therefore liable for compensatory and punitive damages under 11 U.S.C. §362(k). [Doc. No. 1]. The matters raised in Plaintiff’s complaint are within this Court’s jurisdiction and subject to entry of a final judgment as core matters that involve “a substantive right created by the Bankruptcy Code...” *In re Toledo*, 170 F.3d 1340, 1344 (11th Cir. 1999); 28 U.S.C. § 157(b)(2)(O).

After carefully considering the pleadings, the testimony and documentary evidence presented and the applicable authorities, the Court enters the following findings of fact and conclusions of law in accordance with Fed. R. Bankr. P. 7052.

I. FACTUAL BACKGROUND

Plaintiff is Klatt’s ex-husband. The parties’ marriage ended in divorce in 2010. Pursuant to the final order entered by the Superior Court of Gwinnett County, Georgia (the “Superior Court”) on June 16, 2010 [Dft Ex 1C] Plaintiff was responsible for paying child support of \$525.00 per month due on the 5th day of each month beginning in May 2010 plus one-half of insurance premiums and all medical expenses for the couple’s child. [*Id.*] Plaintiff testified that he paid his child support obligations timely and in full until he was injured in July 2012. Klatt testified to the contrary that Plaintiff never paid his obligations on time. In any event, it appears that no contempt motions were filed until after Plaintiff’s injury when Plaintiff and his attorney, Ms. Banks-Ware, sought to modify his child support obligation (the “Modification Proceeding”).

Litigation in the Modification Proceeding lasted approximately a year and a half and contempt motions were filed by both Plaintiff and Klatt. The Superior Court held a trial on the modification and the contempt motions and by order of March 5, 2014 found Plaintiff in contempt for failing to pay child support and related obligations in the amount of \$5,472.36,

which Plaintiff was ordered to pay in monthly installments of \$456.03 beginning on April 1, 2014 until paid in full (the “March 5 Order.”). [Dft 1-D] The March 5 Order also ordered Plaintiff to pay \$2,000.00 in attorney’s fees to Gavrin, who was Klatt’s attorney, within 90 days of the order. [*Id.*] On March 5, 2014, the Superior Court also entered an order on Plaintiff’s modification request in which the court decreased Plaintiff’s future monthly child support obligation to \$500.00 per month (the “Modification Order”) but declined to make the modification retroactive. [Dft Ex. 1A, B; Pltf Ex. S, T] The Superior Court also awarded Plaintiff \$1,000.00 in attorneys’ fees pursuant his contempt motion. [Dft Ex. 1E]

On April 29, 2014 Plaintiff filed a petition under Title 11, chapter 13 (the “Petition Date”). Defendants were listed on Plaintiff’s Creditor Address Matrix and were served with the Notice of Chapter 13 Bankruptcy Case, Meeting of Creditors and Deadlines, which was mailed on May 2, 2014. [Main Case Doc. 8].. Plaintiff filed an Amended Chapter 13 Plan on June 16, 2014 (the “Amended Plan”). [Main Case Doc. 12] The Amended Plan provides in part, for payment of an estimated child support arrearage in the amount of \$6,000.00. [*Id.*]. The Amended Plan further provides that unsecured creditors will be paid 100% on their claims through the case. [*Id.*] The Amended Plan was confirmed on June 27, 2014, without objection by Gavrin or Klatt. [Main Case No. 14]

On June 30, 2014, Gavrin and Ms. Banks-Ware were both at the DeKalb County, Georgia Courthouse on separate unrelated matters and the two had a brief conversation regarding the payment of the fee awards ordered by the Superior Court. In an email exchange on July 1, 2014, Ms. Banks-Ware declined to allow offset of her fee award with that awarded to Gavrin and indicated that Gavrin’s fees would be paid through Plaintiff’s bankruptcy case. [Pltf Ex. C] Gavrin testified that he understood Ms. Banks-Ware’s comments to mean that Plaintiff would not

pay the fee award. Ms. Banks-Ware testified that she believed Plaintiff would pay the award as provided in the Amended Plan.

Gavrin became aware of Plaintiff's bankruptcy case at some point after April 29, 2014 and no later than June 30, 2014 when he spoke with Ms. Banks-Ware. Both Defendants filed proofs of claim in Plaintiff's case on July 28, 2014. Klatt prepared her own proof of claim which she signed on May 16, 2014 in the amount of \$6,635.68 based on the March 5 Order. [Dft Ex. 3] Gavrin signed his proof of claim on July 9, 2014 which is in the amount of \$2,000.00 and is also based on the March 5 Order. [Pltf Ex. B]

On July 16, 2014, after the proofs of claim had been executed, but before they were filed, Gavrin filed a Petition For Citation of Contempt (the "Petition") in the Superior Court (the "Contempt Proceeding."). In the Contempt Proceeding, Gavrin sought to collect \$1,629.24 in child support payments, \$282.75 in insurance payments plus the \$5,472.36 ordered to be paid in the March 5 Order on Ms. Klatt's behalf and to collect, on his own behalf, the \$2,000.00 attorney's fees awarded in the March 5 Order [Dft Ex. 1].

Gavrin testified that he initiated the Contempt Proceeding in an effort to preserve the claims raised in the Petition because he understood the bankruptcy may take years to complete.¹ To that end, Gavrin instructed his associate Mr. Joiner to file the Petition and direct the Contempt Proceeding be stayed. As instructed, Mr. Joiner took the Petition to the clerk's office for the Superior Court and filed it. Mr. Joiner testified that he told the intake clerk the matter should be stayed.

After the Petition was filed, Mr. Joiner arranged for it and Requests for Admission to be served by the Cherokee County Sheriff's office. Gavrin testified that the Petition was served to avoid an automatic dismissal even though he did not intend to prosecute

¹ The Petition for Contempt alleges that Plaintiff is in contempt of the March 5 Order. [Dft Ex. 1]

the Petition at that time. The Petition was personally served on Plaintiff by a Sherriff's Deputy on September 10, 2014. [Pltf Ex. V]. Plaintiff testified that receiving service at his home, in front of his neighbors, was embarrassing.

Thereafter, on September 24, 2014, Plaintiff contacted his bankruptcy counsel Ms. Wells Thomas' office to ask if they had heard back from Gavrin regarding his response to "the message you left about him being included in the bankruptcy?" [Pltf Ex. E]. Ms. Wells Thomas testified that, in an abundance of caution, she advised Plaintiff to answer the Petition to insure that the Superior Court knew of his pending bankruptcy. Ms. Wells Thomas also advised Plaintiff that Gavrin "seemed to understand" bankruptcy protection but that they did not go into much detail in their conversation. This testimony was consistent with Gavrin's and Mr. Joiner's regarding this conversation – in which Gavrin let Ms. Wells Thomas know that he generally knew about the stay in bankruptcy and told her that they had asked that the Contempt Proceeding be stayed. This is also consistent with Gavrin's testimony regarding an incident where he had been in court and a lawyer told the judge that a bankruptcy had been filed which resulted in the court immediately staying the proceeding.

Plaintiff filed an answer to the Petition in the Superior Court on September 29, 2014. [Pltf Ex. F]. Notwithstanding Mr. Joiner's asking an intake clerk in the Superior Court's clerk's office to stay the proceeding, on November 14, 2014, the Superior Court issued a Notice of Hearing and scheduled a hearing on the Petition for December 3, 2014 (the "December 3 Hearing"). When Gavrin received the notice of hearing he instructed his paralegal, Ms. Johnson, to have the matter taken off the calendar. Ms. Johnson contacted Ms. Parham, the calendar clerk for Judge Batchelor, and the matter was continued. However, it does not appear that anyone in Gavrin's office advised Ms. Wells Thomas that the matter would not be heard on December 3,

2014. Nor does it appear that the Superior Court clerk, Ms. Parham, advised Plaintiff or his counsel of the continuance. Ms. Parham testified that she prepared the notice of hearing, which was dated November 14, 2014 and was filed with the clerk on November 17. Ms. Parham testified further that the notice would have been mailed on November 17 or the next day and that she would have either contemporaneously or soon thereafter noted the continuance of the December 3 Hearing on the docket. Plaintiff testified that he went to court in Gwinnett County on December 3, 2014, but that the Contempt Proceeding was not called because it had been continued. Gavrin testified that the matter had been continued just before the Thanksgiving holiday.

On November 21, 2014, Plaintiff filed his responses to the Requests For Admission that had been served with the Petition. [Pltf Ex. G]. Plaintiff simultaneously filed a Motion to Dismiss the Petition For Citation of Contempt on the grounds that the amounts are being paid through the Amended Plan. [Pltf Ex. H]. No response to the motion to dismiss was filed.

Just about a year later, on November 16, 2015, Plaintiff's wife sent an email inquiry to Ms. Parham in which she inquired about the December 3 Hearing and its continuance. [Pltf Ex. M]. Ms. Parham initially responded that "the calendar notes just say 'bankruptcy Cont', then one minute later, she responded that her "notes say that the attorney for the Plaintiff called and asked that the case be continued" and finally, four minutes later she responded further that, "I think that may have been part of the problem, we only got a phone call and didn't get anything in writing." [Pltf Ex. M]. Ms. Parham testified that if an attorney calls and advises that a party has filed bankruptcy that she would request that something be filed with the bankruptcy case number.

On December 4, 2014, Gavrin filed a Motion For Relief From Automatic Stay in Plaintiff's chapter 13 case in which he sought to modify the automatic stay to collect postpetition child support and insurance arrearages totaling \$903.10 (the "Motion For Relief"). A hearing was held on January 27, 2015, at which Gavrin advised this Court that he had filed the Petition because of delinquencies under the March 5 Order and was seeking stay relief to pursue both delinquent postpetition payments and the amounts owed under the March 5 Order. [Main Case, Doc. 29 p. 4]. The Court denied the Motion For Relief and entered an order requiring Plaintiff to make postpetition payments to the department of Human Services (which was the parties' prior practice) on time and in full. At the hearing on the Motion For Relief, Plaintiff sought imposition of sanctions against Gavrin. The Court declined to consider the alleged stay violation at the hearing on the Motion For Relief.

The Contempt Proceeding was stayed on March 27, 2015 when Gavrin filed a Notice of Bankruptcy Automatic Stay and thereafter, on July 2, 2015, Plaintiff filed this adversary proceeding in which he seeks an award of damages for an alleged violation of the automatic stay (the "Adversary Proceeding"). [Dft Ex. 6; Doc. 1]. In closing argument, held February 26, 2016 Defendants moved that Klatt be dismissed from the proceeding and Plaintiff agreed that the evidence did not support a finding that Klatt violated the automatic stay. Thus, the findings herein are limited to Gavrin, and the Court will dismiss Klatt from this proceeding.

II. CONCLUSIONS OF LAW

The automatic stay goes into effect upon the filing of a bankruptcy case and prohibits various acts that constitute attempts to enforce prepetition claims. 11 U.S.C. § 362(a); *see also In re Jacks*, 642 F.2d 1323, 1328 (11th Cir. 2011). Among other things, the automatic stay prohibits, "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” and “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)(1), (a)(3). In addition, the commencement of a bankruptcy case creates an estate comprised of “all legal or equitable interests of the debtor in property as of the commencement of the case.” 11 U.S.C. § 541(a)(1). In a chapter 13 case property of the estate also includes postpetition earnings of the debtor. 11 U.S.C. § 1306(a).

Section 362(b) of the Code contains certain exceptions to the automatic stay including an exception for “...collection of a domestic support obligation from property that is not property of the estate.”² 11 U.S.C. § 362(b)(2)(B). While § 362(b)(2)(B) allows for collection of alimony, maintenance or support from property that is not property of the bankruptcy estate, this exception is narrow and “has little application in chapter 13 cases since the term ‘property of the estate’ includes earnings of the debtor acquired after the commencement of the bankruptcy case.” *Rogers v. Overstreet (In re Rogers)*, 164 B.R. 382, 387 (Bankr. N.D. Ga. 1994) (Drake, J.) (citing *Carver v. Carver*, 954 F.2d 1573 (11th Cir. 1992)) (footnote omitted); 11 U.S.C. § 1306(a). Thus, “attempts by a former spouse to collect back support payments from a chapter 13 debtor may not escape the scope of the automatic stay, despite § 362(b)(2).” *Id.* 387-88.

The automatic stay is “one of the fundamental debtor protections provided by bankruptcy laws.” *Roche v. Pep Boys (In re Roche)*, 361 B.R. 615, 621 (Bankr. N.D. Ga. 2005) (Diehl, J.) (quoting *Midlantic Nat’l Bank v. New Jersey Dep’t of Envtl. Prot.*, 474 U.S. 494, 503, 106 S. Ct. 755, 761 (1986)). As such, the Code provides that “an individual injured by any

² A domestic support obligation includes obligations owed to a former spouse in the nature of alimony, maintenance or support of such spouse or former spouse or child of the debtor. 11 U.S.C. §101(14A).

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(k).

Violation of the automatic stay is willful if the creditor "(1) knew the automatic stay was invoked and (2) intended the actions which violated the stay." *Jove Eng'g, Inc. v. IRS*, 92 F.3d 1539, 1555 (11th Cir. 1996). In order to recover under § 362(k), the injury alleged must have been proximately caused by the stay violation. *Bankers Healthcare Grp., Inc. v. Bilfield (In re Bilfield)*, 494 B.R. 292, 302 (Bankr. N.D. Ohio 2013); *Henkel v. Lickman (In re Lickman)*, 297 B.R. 162, 190 (Bankr. M.D. Fla. 2003); see also *Roche v. Pep Boys, Inc. (In re Roche)*, No. 05-63544, AP No. 05-09040, 2006 WL 6592059, at *4, 2006 Bankr. LEXIS 2325, at *12 (Bankr. N.D. Ga. May 17, 2006) (Diehl, J.) (finding that "Defendants['] failure to release the garnishment was the proximate cause of Plaintiff's" injury). Debtor has the burden to establish a willful violation of the stay by a preponderance of the evidence. *Spinner v. Cash In A Hurry, LLC (In re Spinner)*, 398 B.R. 84, 94-95 (Bankr. N.D. Ga. 2008) (Diehl, J.).

A. The Contempt Proceeding Was Not Within the Exception of § 362(b)(2)(B)

Defendant argues that filing the Petition did not violate the stay because this action was within the exception of § 362(b)(2)(B). In so arguing Defendant relies on *Rogers*. In *Rogers*, prior to filing a chapter 13 case, a superior court ordered debtor to pay delinquent child support by a date certain and if he failed to do so he would be incarcerated. The debtor failed to pay on time and instead filed a chapter 13 case. Notwithstanding, and with knowledge of the bankruptcy filing, the superior court incarcerated debtor until his mother paid the back child support into the registry of the superior court. Thereafter, the debtor filed an action in the superior court seeking to modify his child support obligation. The debtor's ex-wife filed a

counterclaim in that action alleging that the debtor's payments, both prepetition and postpetition, were in arrears. The superior court found that the debtor was in contempt on both a prepetition and postpetition basis, but "in view of the automatic stay" took no action to hold the debtor in contempt on account of the prepetition debts. 164 B.R. at 385-86.

Thereafter, the debtor filed three adversary proceedings in which he alleged that the incarceration, the filing of the counterclaim and the collection of the funds placed in the registry of the superior court all violated the automatic stay. *Id.* at 386. With respect to the counterclaim, the debtor's ex-wife testified that she was not seeking to collect prepetition amounts and the superior court order so held. *Id.* at 393. As a result, Judge Drake concluded that the automatic stay was not implicated by the state court action because the debts were not prepetition debts and the stay does not apply to postpetition debts. *Id.* at 393-94. In addition, Judge Drake opined that it was likely that the funds the debtor's ex-wife sought to collect were not property of the estate because debtor had income in excess of that necessary to fund his chapter 13 plan and "case authority suggests that property of the estate includes his earnings only to the extent necessary to fund the plan." *Id.* at 394 (citing *Am. Gen. Fin., Inc. v. McKnight (In re McKnight)*, 136 B.R. 891, 894-95 (Bankr. S.D. Ga. 1992)).

Here, in contrast, the obligations that are the subject of the Contempt Proceeding are prepetition obligations comprised of child support arrearages³ and fees awarded in the March 5 Order. The March 5 Order provides that Plaintiff "shall pay to Daniel E. Gavrin, Esq., ... Two Thousand (\$2,000.00) dollars; said amount to be paid ... within 90 days of this order." Defendant argues that because the fees awarded to Gavrin did not come due until after the

³ A review of the Petition indicates that some portion of the child support arrearages may be postpetition obligations. The Court concludes otherwise however, because the March 5 Order was entered nunc pro tunc to January 9, 2014 such that additional prepetition amounts may have accrued prepetition. Further, Gavrin testified that the amounts owed were from the January 2014 hearing and did not argue that any amount accrued postpetition.

Petition Date the obligations arose postpetition. This argument misses the mark because the March 5 Order makes clear that as of the entry of that order, Plaintiff was unconditionally obligated to pay Gavrin. Although Plaintiff had up to 90 days to pay the fee award and the obligation was not fully matured, this does not change the fact that Gavrin had a right to payment on the Petition Date.⁴

“In deciding whether a claim arose prepetition or postpetition, the courts ‘focus on the time when the act giving rise to the claim was performed.’” *Atwater v. Charles (In re Charles)*, 2014 WL 1466449, at *2 n.21, 2014 Bankr. LEXIS 1624, at *6 n.21 (Bankr. M.D. Fla. Apr. 15, 2014) (citing *In re Pan Am. Hosp. Corp.*, 364 B.R. 839, 843 (Bankr. S.D. Fla. 2007)); *Bill Heard Enters., Inc.*, 400 B.R. 813, 824 (Bankr. N.D. Ala. 2009) (deciding that a claim for damages under franchise agreement arose prepetition even though the amount could not be calculated at the time the claim arose); *Epstein v. Official Comm. of Unsecured Creditors of Estate of Piper Aircraft Corp.*, 58 F.3d 1573, 1576 (11th Cir. 1995) (determining that a claim arises for bankruptcy purposes if there is a preconfirmation relationship between the debtor and creditor and prepetition conduct giving rise to the claim); see *Bendall v. Lancer Mgmt. Group, LLC*, 523 Fed. Appx. 554, 557-58, (11th Cir. 2013) (noting that claims arising from contracts executed prior to a bankruptcy constitute claims within the meaning of § 101(5) regardless of whether a cause of action has accrued under applicable nonbankruptcy law at the time of the filing); *In re Hall*, 454 B.R. 230, 234 (Bankr. N.D. Ga. 2011) (Mullins, J.) (finding that postpetition homeowners association assessments were not claims because the causal conduct, postpetition ownership of property, had not occurred on the petition date). The conduct giving rise to the attorney’s fee award in the March 5 Order occurred prepetition, during the

⁴ The definition of claim provides, in part, that a claim is “any right to payment, whether or not such right is ...contingent, mature, unmatured, disputed...” 11 U.S.C. §101(5).

Modification Proceeding, such that the Court cannot agree that the attorney's fee award is a postpetition obligation akin to that addressed in *Rogers*. Rather, it is a prepetition claim.

Defendant argues further that if the exception found in § 362(b)(2)(B) applies to pursuing collection on a contempt action where the collection was against property not part of the bankruptcy estate, then the exception should likewise apply to the filing of the Petition which had not been adjudicated and therefore had the potential to apply to property not part of the bankruptcy estate. Defendant's argument continues that what occurred here was

far less obtrusive than the action [Defendant] could have taken under 11 U.S.C. Section 362(b)(2)(b). The filing of a Petition for Contempt is only the beginning of the collection process, but without an Order of the Court, there can be no property pursued. So how can the stay be violated with the protections provided under 11 U.S.C. Section 362(b)(2)(B) if the Petition for Contempt was never reduced to an Order of the Superior Court of Gwinnett County?

[Doc. No. 19]. In making this argument, Defendant relies on *In re Angelo*, 480 B.R. 70 (Bankr. E.D. Mass. 2012). In *Angelo*, a state court determined that the stay did not apply to a contempt action that sought collection against debtor's pension rights which were not property of the bankruptcy estate. *Id.* at 87.88. The bankruptcy court agreed and concluded that the contempt action applied only to the debtor's pension rights. *Id.* at 87.

Here, unlike in *Angelo*, there has been no determination whether the exception of §362(b)(2)(B) applies. Indeed that is the question presently before the Court. And, in further contrast to *Angelo*, the evidence elicited at Trial did not show that Plaintiff has any property that is not property of the bankruptcy estate nor did Defendants present any evidence that collection would be limited to property that was not property of the bankruptcy estate. Further, there was no evidence that Plaintiff has any income that would not be necessary to fund the Amended Plan. Moreover, even if Plaintiff has income in excess of that necessary to fund the Amended Plan,

there is still no property that is not property of the estate because both the Amended Plan and the order confirming the Amended Plan provide that no property of the estate vests in Plaintiff until he is discharged, the case is dismissed or the Court orders otherwise and none of these events have occurred. [Main Case Doc. 12 ¶ 9; Main Case Doc. 14]. Thus, there is no property that is not property of the bankruptcy estate that could be subject to collection through the Contempt Proceeding, and Gavrin's reliance on both *Rogers*⁵ and *Angelo* is misplaced.

Because the Contempt Proceeding began the process of collecting prepetition claims and was not limited to collection against property that is not property of the bankruptcy estate the exception of § 362(b)(2)(B) did not apply to the filing of the Contempt Proceeding.

B. Defendant Willfully Violated The Automatic Stay

Section 362(b)(2)(B) did not apply to the filing of the Petition and it is undisputed that Gavrin knew about Plaintiff's bankruptcy when the Petition was filed. Consequently, filing the Petition was in willful violation of the automatic stay.

Gavrin argues that because he filed the Petition to preserve the claims asserted⁶, did not intend to prosecute the Contempt Proceeding and attempted to stay the matter, he did not willfully violate the automatic stay. This is contrary to the law because "a good faith belief that the stay is not being violated is not relevant to whether the act was 'willful' or whether compensation must be awarded." *Alley Cassetty Cos. v. Wren*, 502 B.R. 609, 614 (Bankr. N.D. Ga. 2013) (quoting *Morris v. Peralta*, 317 B.R. 381, 389 (B.A.P. 9th Cir. 2004)). Rather, at the point at which Gavrin became aware of the bankruptcy he had an "affirmative duty" to conform

⁵ The cases relied upon in *Rogers* to support the proposition that income that is not necessary to fund a plan is not property of the estate either expressly hold or assume that property of the debtor reverted on confirmation of the chapter 13 plan. Thus, these cases are inapposite.

⁶ Actions taken in violation of the stay are void and without effect. *Rogers*, 164 B.R. at 388 (citing *Albany Partners, Ltd. v. Westbrook (In re Albany Partners, Ltd.)* 749 F.2d 670 (11th Cir. 1984)); *Borg-Warner Acceptance Corp. v. Hall*, 685 F.2d 1306, 1038 (11th Cir. 1982); *In re Ungar*, 104 B.R. 517, 520 (Bankr. N.D. Ga. 1989) (Drake, J.). Thus, it is possible that filing the Petition would not preserve the claims raised. However, the Court need not and does not decide this issue in this proceeding.

his conduct to the automatic stay, and his failure to do so violated the stay. *Sternberg v. Johnston*, 595 F.3d 937, 944 (9th Cir. Ariz. 2009) (holding an attorney violated the stay when a pre-petition claim in state court was neither stayed nor vacated); see *Mitchell Constr. Co., Inc. v. Smith (In re Smith)*, 180 B.R. 311, 319 (Bankr. N.D. Ga. 1995) (Murphy, J.) (holding an attorney violated the stay when he failed to file a motion to vacate, failed to provide the state court with verification that Debtor had a bankruptcy case pending, and failed to respond to the motion to vacate).

Gavrin was aware of the bankruptcy prior to filing the Petition such that the filing of the Petition did not conform to the automatic stay and constitutes a willful violation of the stay. Gavrin's ineffective effort to simultaneously file and stay the Contempt Proceeding does not conform to the automatic stay. Rather his action in directing Mr. Joiner to file and stay the Contempt Proceeding merely confirms his knowledge of the bankruptcy and the application of the stay. While Gavrin could have filed a motion for relief from stay or asked the Superior Court to determine if the stay applied as occurred in *Angelo*, Gavrin did not and, thus he operated at his peril in filing the Petition. See *Pope v. Wagner (In re Pope)*, 209 B.R. 1015, 1020-21 (Bankr. N.D. Ga. 1997) (Drake, J.); *In re Glass*, 240 B.R. 782, 787 (Bankr. M.D. Fla. 1999); *Rogers*, 164 B.R. at 388.

C. Damages

If a willful violation of the stay occurs, “[s]ection 362(k)(1) states plainly that a debtor's “actual damages[] includ[e] costs and attorneys' fees” and that an award of actual damages is mandatory when the stay is violated willfully.” *In re Parker*, 634 F. App'x 770, 773 (11th Cir. 2015). Section 362(k) explicitly requires that a debtor “must have first been ‘injured’ by the stay violation” and “that the creditors' actions caused the debtor to suffer damages which

are ‘actual,’ that is damages that the debtor in fact incurred.” *Hutchings v. Ocwen Fed. Bank, FSB (In re Hutchings)*, 348 B.R. 847, 881 (Bankr. N.D. Ala. 2006). Typically, “attorney’s fees are included in ‘actual damages’” under section 362(k). *Parker*, 634 F. App’x at 773. However, “if the willful violation has a de minimis impact on the debtor, a court may limit damage awards under § 362(h) to reasonable attorney fees expended.”⁷ *Roche*, 361 B.R. at 624. The burden of proof is borne by the party seeking damages. Actual damages in terms of expenses “must be proven with reasonable certainty.” *In re Archer*, 853 F.2d 497, 499-500 (6th Cir. 1988); *In re Sumpter*, 171 B.R. 835, 844 (Bankr. N.D. Ill. 1994); *In re Washington*, 172 B.R. 415, 426-27 (Bankr. S.D. Ga. 1994). In appropriate circumstances punitive damages may be awarded. *Parker*, 634 F. App’x at 773. To support an award of punitive damages the party seeking such an award must establish that the defendants conduct was “egregious, intentional misconduct”. *Roche*, 361 B.R. at 624.

In many respects, the harm to Plaintiff was de minimis: he did not miss out on any employment opportunities and was not forced to take time away from work to redress the violation. On the other hand, the filing of the Petition caused Plaintiff to be served with process in public and to defend against the Contempt Proceeding until it was effectively stayed in March 2015, eight months after it was filed.

Gavrin argues that the damages Plaintiff seeks were due to Plaintiff’s failure to mitigate and in response to notices that he had not timely paid his domestic support obligations as required in the February 20, 2015 consent order on the Motion for Relief. [Main Case Doc. 27]. While it is true that § 362(k) damages are subject to a duty to mitigate, here, Gavrin filed the Contempt Action in violation of the stay and caused it to be served on Plaintiff, which required Plaintiff to respond to the Contempt Proceeding, attend the December 3 Hearing, and file

⁷ Section 362(k) was previously codified at §362(h).

additional pleadings after it became clear that the action was not stayed. *See In re Esposito*, 154 B.R. 1011, 1015 (Bankr. N.D. Ga. 1993) (Murphy, J.).

Plaintiff's testimony and documents establishing the costs Plaintiff incurred in defending the Contempt Proceeding were admitted into evidence. [Pltf Ex. N, N-1]. The costs incurred for these filings and attending the December 3 Hearing total \$138.39 which is comprised of: \$58.62 for Plaintiff's mileage to Superior Court to file the answer, \$58.62 for Plaintiff's mileage to attend the December 3 Hearing, and \$21.15 for Plaintiff to send the Motion to Dismiss the Contempt Proceeding to the Superior Court. *Id.* Plaintiff filed the answer on advice of counsel, and given the subsequent scheduling of a hearing on the Petition it would appear that filing an answer was warranted. Similarly, since no one advised Plaintiff that the December 3 Hearing was continued his appearance in Gwinnett County was necessary. Finally, because the Contempt Proceeding was not stayed, as evidenced by the scheduling of the December 3 Hearing, it was also necessary to file a motion to dismiss. There was, however, no evidence presented as to why Plaintiff incurred the additional cost to drive to Gwinnett County to file the answer as opposed to mailing the papers as was done with the motion to dismiss. Thus, the Court finds it appropriate to reduce the actual damage award in conjunction with the proceedings in the Contempt Proceeding by the difference between the cost to mail the answer to the Superior Court and the cost to drive to Gwinnett County. Thus, Plaintiff is entitled to an award of actual damages in the amount of \$100.92.

Plaintiff further seeks recovery of the costs associated with this proceeding, including the fees for his attorney, Charles J. Engelberger, III. At the time this proceeding was filed Gavrin had in fact filed a notice of stay and this Court had denied the Motion For Relief such that no further action was necessary in the Contempt Proceeding and Plaintiff had ceased to

incur costs associated with halting the Contempt Proceeding⁸. Because of that and the de minimis damage to Plaintiff the Court finds that the costs associated with this proceeding, with the exception of Mr. Engelberger's attorneys fees, are not compensable.

Although Plaintiff is entitled to an award of attorney's fees, as the violation had a de minimis impact on Plaintiff, attorney's fees must be reasonable and reviewed under the lodestar principles. Plaintiff submitted Exhibit N1 to this Court as evidence of attorney's fees and at the hearing on February 16, 2016, Mr. Engelberger stated his hourly rate was \$250, that he received a \$2,500 retainer, and that he had, at the time of closing argument and prior to the briefing requested by this Court, already spent 10 to 11 hours or an additional \$700.00 such that his total fees were \$3,100.00 to \$3,200.00. The Court cannot rely on an estimate in determining the reasonableness of fees and will direct Mr. Engelberger to file an affidavit setting forth the time spent in this proceeding with specificity.

Plaintiff also seeks damages for the emotional distress he alleges he suffered because of the filing of the Contempt Proceeding. Emotional distress damages are included within actual damages contemplated by § 362(k). However not every willful violation of the automatic stay merits compensation for emotional distress. *Green Point Credit, LLC v. McLean (In re McLean)*, 794 F.3d 1313, 1325 (11th Cir. 2015). To recover "actual" damages for emotional distress under § 362(k), a plaintiff must (1) suffer significant emotional distress, (2) clearly establish the significant emotional distress, and (3) demonstrate a causal connection between that significant emotional distress and the violation of the automatic stay. *Lodge v. Kondaur Capital Corp.*, 750 F.3d 1263, 1271 (11th Cir. 2014).

⁸ There seems to be a split in authority over what actions a creditor must take to restore the pre-violation status quo. *In re Johnson*, 479 B.R. 159, 170 (Bankr. N.D. Ga. 2012) (Bonapfel, J.) and *In re Buchanan*, 273 B.R. 749, 751 (Bankr. M.D. Ga. 2002) held that actions commenced after the filing of the petition are void and must be dismissed. However, *Alley Cassetty*, 502 B.R. at 613-14 concluded that it is sufficient to stay the matter. In any event, once the action is stayed the ability to establish the causal element necessary to an award of damages is implicated.

Plaintiff testified that Gavrin's failure to dismiss the Petition caused him stress, depression and ill health. Other than Plaintiff's testimony generally stating that the pending Contempt Proceeding caused him stress and depression there was no evidence of visits to doctors, or other evidence to support the health issues asserted. Nor was any evidence presented to establish Plaintiff's specific conditions, when they first occurred or if they became worse at any point in time. Accordingly, the Court finds that Plaintiff has not proven that his emotional distress was caused by Gavrin's violation of the automatic stay.

Plaintiff also argues that Gavrin's knowing violation of the stay, failure to research the topic and filing pleadings that included a request for a rule nisi and incarceration were egregious and warranted an award of punitive damages. Although Gavrin's attitude struck the Court as somewhat cavalier⁹, he did attempt, albeit ineffectively, to stay the action and did not pursue the relief requested in the Petition. Accordingly, the Court concludes that Gavrin's conduct did not rise to the level of egregious intentional misconduct necessary for an award of punitive damages.

III. CONCLUSION

Plaintiff established that Gavrin willfully violated the automatic stay and that Plaintiff incurred actual damages in the amount of \$100.92 to defend the Contempt Proceeding. Plaintiff is also entitled to recover attorney's fees for Mr. Engelberger's work in this proceeding subject to a final determination of reasonableness upon counsel's filing an affidavit as to the actual time expended in this case and his hourly rate. Based upon the foregoing, it is now,

⁹ The Court found Gavrin's testimony that he thought he had done enough to stay the Contempt Proceeding and also that he had only been exposed to the automatic stay once before to be credible. However, Gavrin did not research the automatic stay or inquire of counsel more experienced in bankruptcy matters the propriety of his actions and thus acted with little regard for the automatic stay and at his peril.

HEREBY ORDERED that Plaintiff is entitled to recover from Gavrin compensatory damages of \$100.92; it is

FURTHER ORDERED that Plaintiff is entitled to recover attorney's fees incurred by Mr. Engleberger subject to Mr. Engelberger submitting an Affidavit setting forth the actual time expended in this proceeding and his hourly rate; it is

FURTHER ORDERED that Mr. Engelberger shall file the referenced Affidavit within 10 days of entry of this order; it is

FURTHER ORDERED that Ms. Klatt is hereby dismissed from this proceeding.

END OF ORDER

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