



**IT IS ORDERED as set forth below:**

**Date: September 21, 2016**

A handwritten signature in black ink, appearing to read "Barbara Ellis-Monro".

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

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**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,

Defendant.

CASE NO. 14-58377-BEM

CHAPTER 13

ADVERSARY PROCEEDING NO.  
15-5280-BEM

**ORDER**

In this adversary proceeding Brian Stephen Erbesfield (“Plaintiff”) sought compensatory and punitive damages from Daniel Gavrin (“Defendant”<sup>1</sup>) pursuant to 11 U.S.C. § 362(k) [Doc. 1]. A trial was held on January 21, 2016 (the “January hearing”) and February 16,

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<sup>1</sup> Defendant Kara Klatt was dismissed by order entered August 3, 2016. [Doc. 21].

2016 (the “February hearing”) and by Order entered August 3, 2016, the Court held that Defendant willfully violated the automatic stay of § 362(a) and awarded Plaintiff compensatory damages of \$100.92. [Doc. 21]. The Court found further that Plaintiff was entitled to recover attorney’s fees incurred by his attorney, Charles J. Engelberger, III (“Mr. Engleberger”), subject to Mr. Engelberger providing specifics of the time spend and the hourly rate charged. [Id.].

Mr. Engelberger filed an Affidavit of Attorney’s Fees and Costs in which he states that he received an initial retainer of \$2,500.00 (the “Retainer”) and that he charged an hourly rate of \$250.00 plus costs in this matter (the “Affidavit”). [Doc. 25]. The Affidavit details fees of \$5,800.00 and costs of \$513.33, for Investigator fees and Witness Fees, for a total of \$6,313.33 incurred between February 2, 2016 and March 2, 2016. Costs have been paid from the Retainer. Mr. Engelberger is still owed \$3,813.33.

Before Mr. Engelberger filed the Affidavit, Defendant filed a Motion For Reconsideration (the “Motion”) [Doc. 23] and a Motion For Opportunity To Review Documents Submitted And To Respond (the “Motion To Review”). [Doc. 24]. The Court entered an order granting the Motion To Review but denying the Motion “without prejudice to Defendant’s including a mitigation claim in any objection filed in response to the Affidavit.” Defendant withdrew the Motion to Review [Doc. 28] and did not object to the Affidavit. Thus, it appears that Defendant does not object to the fees set forth in the Affidavit.

The “basic point of reference when considering the award of attorney's fees is the bedrock principle known as the American Rule: Each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise.” *Baker Botts L.L.P. v. ASARCO LLC*, 135 S.Ct. 2158, 2164 (2015) (internal quotation and citation omitted). Courts “have recognized

departures from the American Rule only in specific and explicit provisions for the allowance of attorneys' fees under selected statutes.” *Id.* (internal quotation and citation omitted).

Such an exception exists under 11 U.S.C. § 362(k)(1) which makes an award of actual damages, including attorneys’ fees, mandatory when a willful violation of the automatic stay occurs. *In re Parker*, 634 F. App’x 770, 773 (11th Cir. 2015). In awarding fees under § 362(k)(1), the Eleventh Circuit includes fees “necessary to stop an ongoing stay violation, undo the effects of a stay violation, or recover pre-litigation actual damages.” *In re Vaughn*, No. 10-81836-WRS, 2016 WL 836968, at \*3 (Bankr. M.D. Ala. Mar. 3, 2016) (citing *Duby v. United States (In re Duby)*, 451 B.R. 664, 674 (1st Cir. B.A.P. 2011)). When determining the amount of an award, the Court considers the “reasonableness [of fees] and their relation to addressing the stay violations at issue.” *In re Thomason*, 493 B.R. 890, 902 (Bankr. N.D. Ga. 2013) (Brizendine, J.).

When the harm from the stay violation has a de minimis impact on Plaintiff, damages under § 362(k) may be limited to reasonable attorney fees expended. [Doc. 21, p. 15]. As a result, attorney’s fees must be reasonable as reviewed under the lodestar principles. In addition, Courts consider whether a debtor mitigated possible damages. *In re Webb*, 472 B.R. 665 (B.A.P. 6th Cir. 2012) (“Debtors are also under a duty to mitigate their damages; claims for fees incurred in the prosecution of an unnecessary motion are not recoverable.”); *In re Oksentowicz*, 324 B.R. 628, 630 (Bankr. E.D. Mich. 2005); *In re Preston*, 333 B.R. 346, 350–51 (Bankr. M.D.N.C. 2005); *In re GeneSys, Inc.*, 273 B.R. 290, 296 (Bankr. D.D.C. 2001).

Turning to the fees requested, Mr. Engelberger billed a total of 23.2 hours at a rate of \$250.00 per hour. [Doc. 25]. “The first step in the computation of the lodestar is determining the reasonable hourly rate.” *Loranger v. Stierheim*, 10 F.3d 776, 781 (11th Cir. 1994). A court “is

itself an expert on the question and may consider its own knowledge and experience concerning reasonable and proper fees and may form an independent judgment either with or without the aid of witnesses as to value.” *Id.* (internal quotations and citations omitted). The hourly rate of \$250.00 is reasonable and within the range of prevailing community rates for counsel with comparable skill and experience.

In determining a reasonable amount of time, the court considers the nature of the issues compared to the record and hours expended. *Id.*

Although Section 362(h)<sup>2</sup> authorizes the shifting of reasonable fees that may be incurred, any such award is part of a debtor's actual damages and should be closely scrutinized based on all the circumstances. The key question presented is whether the value of the services rendered was truly worth the amount of the fees requested.

*In re Rollins*, 200 B.R. 427, 452 (Bankr. N.D. Ga. 1996) (Brizendine, J.), *rev'd on other grounds*, 243 B.R. 540 (N.D. Ga. 1997), *aff'd sub nom. Campbell v. Rollins*, 140 F.3d 1043 (11th Cir. 1998). In *Rollins* the court determined that the amount of time was unreasonable because of “[t]he relatively minimal amount of damages awarded to Debtor and the lack of factual complexity in this matter.” *Id.* Noting as well that “[t]he amount of time spent by Debtor's counsel was not justified by the economics of this case nor was it reasonable and necessary to protect the interests of Debtor.” *Id.* at 453.

Although none of the hours detailed in the Affidavit stopped an ongoing stay violation, they did result in Plaintiff's recovering pre-litigation actual damages. The award of \$100.92 is a minimal amount. Further, the February hearing was unnecessarily protracted. Thus, Plaintiff and Mr. Engelberger did not mitigate attorney's fees by managing the length and scope of the hearings. Considering the nature of this stay violation and the minimal amount of compensatory damages, 23.2 hours is more than was necessary to recover damages of \$100.92.

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<sup>2</sup> Section 362(k) was previously codified at 362(h).

Although Plaintiff took some steps to mitigate his attorney fees, his efforts were unsuccessful. When the Contempt Proceeding was filed, Plaintiff contacted his bankruptcy attorney and asked that she speak to Defendant about his fees being paid through Plaintiff's bankruptcy case. [Doc. 21, p.5]. In addition, Plaintiff raised the issue at a hearing on Defendant's Motion For Relief<sup>3</sup> after which Defendant filed a notice of stay in the Contempt Proceeding<sup>4</sup>. To this extent, Plaintiff reduced the attorney's fees incurred in this proceeding by shifting this work to his bankruptcy attorney who was paid through Plaintiff's plan and by seeking to address the violation of the automatic stay prior to filing pleadings in the state court. In addition, Plaintiff initially sought to pursue this proceeding *pro se*, however, he was unable to do so.<sup>5</sup> After the January hearing, he retained Mr. Engelberger who billed 9.45 hours to prepare for the February hearing. [Doc. 25].

Based upon the record in this proceeding, the Court concludes that an award of \$6,313.33 is unwarranted. Rather, the Court finds that a reduction from 23.2 hours to 14.45 is reasonable and will award fees of \$3,612.50. This amount reflects the lack of significant factual or legal complexity involved and more accurately reflects efforts to recover \$100.92. Further, the reduction recognizes Plaintiff's failure to mitigate fees by requiring Plaintiff to bear the costs of the Retainer. For the foregoing reasons, it is now,

HEREBY ORDERED that attorney's fees of \$3,612.50 are awarded to Plaintiff. It is further

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<sup>3</sup> Plaintiff raised the stay violation by asking the Court to impose sanctions against Defendant.

<sup>4</sup> As defined in Doc. 21, p. 4.

<sup>5</sup> The January hearing lasted from 11:00 am to just before 2:00pm, but Plaintiff was unable to continue because he had recently been hospitalized and was taking pain medication which appeared to impair his ability to proceed. In the Motion, Defendant argued that the fees awarded Plaintiff should be reduced because Defendant incurred costs to participate in the January hearing. However, the Court denied the Motion and further, because this occurred prior to retention of Mr. Engelberger it is not relevant to the award of attorney's fees.

ORDERED that Defendant shall pay attorney's fees of \$3,612.50 directly to Mr. Engelberger. It is further

ORDERED that the Court will enter a separate judgment awarding damages of \$3,612.50 in attorney's fees and \$100.92 in compensatory damages in favor of Plaintiff and against Defendant.

**END OF ORDER**

**Distribution List**

Brian Stephen Erbesfield  
205 Foothill Drive  
Woodstock, GA 30188

Charles J. Engelberger, III  
The Engelberger Law Group, LLC  
399 Washington Avenue  
Marietta, GA 30060

Daniel E. Gavrin  
The Law Office of Daniel E. Gavrin  
Suite 2920  
6 Concourse Parkway  
Atlanta, GA 30328

Evan M. Altman  
Building 2  
8325 Dunwoody Place  
Atlanta, GA 30350-3307

Mary Ida Townson  
Chapter 13 Trustee  
Suite 2200  
191 Peachtree Street, NE  
Atlanta, GA 30303-1740

U.S. Trustee  
Office of the United States Trustee  
362 Richard Russell Building  
75 Ted Turner Drive, SW  
Atlanta, GA 30303