

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

IN RE:	:	CASE NO. G11-21847-REB
	:	
KEVIN ERIK WREN	:	
and JANINE MARIE WREN,	:	
	:	
Debtors.	:	
<hr style="width: 40%; margin-left: 0;"/>		
KEVIN E. WREN,	:	CONTESTED MATTER
	:	
Movant,	:	
	:	
v.	:	
	:	CHAPTER 7
ALLEY CASSETTY COMPANIES, INC.,	:	
	:	
Respondent.	:	JUDGE BRIZENDINE
	:	

ORDER

Before the Court is the motion of Debtor-Movant to hold Respondent Alley Cassetty Companies, Inc. in contempt based upon said Respondent's alleged violation of the automatic stay provided in 11 U.S.C. § 362(a), and for an award of damages and punitive damages under Section 362(k) as well as an award for attorney's fees for willful violation of this stay. Debtor's request for relief arises in connection with a certain law suit admittedly commenced in state court by Respondent after the filing of this Chapter 7 bankruptcy case, and Respondent's refusal to dismiss Debtor from same. The suit names Debtor and a corporate entity in which he allegedly held an interest as defendants. In its response, Respondent states that it did not have notice of this bankruptcy case when it filed its suit, and that it has confirmed to Debtor's counsel in writing that it will not prosecute this matter in view of the pendency of the bankruptcy case. Further, Respondent invited Debtor to file a notice of stay in the state suit.

Debtor contends, however, that this course of action is not sufficient, as Respondent must affirmatively act to cease its suit by dismissing Debtor therefrom.

The automatic stay is a fundamental tenet of federal bankruptcy law protecting debtors and also creditors, and its effect is immediate on the filing of a case upon all persons and entities irrespective of notice. Actions taken subsequent to such filing are in violation of the automatic stay and void *ab initio*. See *Borg Warner Acceptance Corp. v. Hall*, 685 F.2d 1306 (11th Cir. 1982). Further, intentional acts taken against a debtor or property of his bankruptcy estate after a case has been filed and with knowledge of same may be punishable as contempt of court, subjecting the actor to “actual damages, including costs and attorneys fees” for a willful violation of the automatic stay. See generally *Carver v. Carver*, 954 F.2d 1573 (11th Cir. 1992), *cert. denied*, 506 U.S. 986, 113 S.Ct. 496, 121 L.Ed.2d 434 (referring to former Section 362(h)); see also *Jove Engineering, Inc. v. Internal Revenue Service*, 92 F.3d 1539, 1555 (11th Cir. 1996). Punitive damages may also be appropriate when an actor proceeds with malice or in bad faith. See *In re Esposito*, 154 B.R. 1011 (Bankr. N.D.Ga. 1993) (discussing former Section 362(h)).

As mentioned above, the question presented herein centers on whether Respondent had an affirmative duty to dismiss the Debtor as a party from its state court law suit after it became aware of the pendency of his bankruptcy case, and if so, whether its failure to do so renders it liable for damages under Section 362(k). Debtor contends that he suffered injury by incurring attorney’s fees and costs in attempting to enforce the stay by having to take steps insisting that Respondent dismiss him from its suit, which it has refused to do.

Respondent states that it commenced the state court action without any knowledge of this bankruptcy case and had it in fact known of same in a timely manner, it would not have named the

Debtor as a defendant.¹ Once it became aware of the filing through Debtor's counsel, Respondent notified counsel that it would not continue with its active prosecution of the suit and asked Debtor to inform the state court about the bankruptcy. Since Debtor has now taken the initiative to file a suggestion of bankruptcy in the state court proceeding, Respondent asserts nothing else is required to maintain the status quo and, therefore, no basis for awarding damages herein has been shown. It is Respondent's position that no willful violation of the automatic occurs by reason of a continuing action if the creditor dismisses, or as is the case here, *stays* the matter as same relates to the Debtor. *See Eskanos & Adler, P.C. v. Leetien*, 309 F.3d 1210, 1214 (9th Cir. 2002).²

As Debtor notes, there is authority for the proposition that the failure to undo a violation of the stay that is innocent in nature could operate to elevate the status of same into a willful violation. *See Mitchell Construction Co. v. Smith (In re Smith)*, 180 B.R. 311, 319 (Bankr. N.D.Ga. 1995). There is no evidence that Respondent has acted to seize property of the estate or exert pressure on Debtor to collect a pre-petition debt other than the fact that the state action remains pending. At the same time, Respondent does not explain why it could not file a written notice with the state court or seek stay relief in this court. To place the burden on debtors either to file notices everywhere litigation or other legal action may be pending or to resort to this court for relief tends to defeat the broadly intended function of the stay, which again, operates automatically to enjoin any and all efforts against a debtor or his

¹ Debtor acknowledges that Respondent was not included on his creditor mailing matrix.

² Of course, although Respondent voluntarily agreed to cease its pursuit of the matter and represents it would have filed a stay, it is Debtor who actually obtained the stay in the action in issue by filing a suggestion of bankruptcy. Hence, Respondent's statement seems to beg the question submitted for decision herein—i.e., did it do enough to avoid sanctions? Further, the court in *Leetien* actually affirmed an award for damages based on a willful violation of the stay because a creditor did not act to prevent entry of a default judgment. 309 F.3d at 1215-16.

property to create, collect, or enforce a debt. It is the creditor who assumes the risk when it acts, or fails to act as appropriate by taking corrective steps to restore a situation to its pre-bankruptcy status, with respect to same in relation to the scope and effect of the stay. *See e.g. Bunch v. NCNB South Carolina (In re Bunch)*, 119 B.R. 77, 79-80 (Bankr. D.S.C. 1990); *Miller v. The Savings Bank of Baltimore (In re Miller)*, 22 B.R.479, 481 (D.Md. 1982).

Sanctions have been imposed in situations where an initially innocent creditor failed to remedy a situation where a post-petition judgment has been entered. *Keen v. Premium Asset Recovery Corp. (In re Keen)*, 301 B.R. 749, 754 (Bankr. S.D.Fla. 2003). The record reflects, however, that although the suit remains pending, it has not continued in the sense that hearings have been sought or convened, or that potentially dispositive rulings or a default judgment have been entered or even entertained by the state court. The Court finds that no harm has resulted from the continuance of the state court law suit, which by all appearances has ceased going forward.³ It also appears Respondent was not motivated by any improper intent in filing the suit or refusing to dismiss Debtor. Notwithstanding the foregoing, the Court concludes that Respondent still bears the responsibility for ensuring that its suit will be halted for the duration, and it should have been the one to file the suggestion of bankruptcy. It is not up to a debtor to enforce the automatic stay as a creditor sits idly by and waits. *Accord Elder v. City of Thomasville (In re Elder)*, 12 B.R. 491, 494 (Bankr. M.D.Ga. 1981).⁴ To this limited extent, the Court will award Debtor actual damages in the form of reasonable attorney's fees.

³ This Court acknowledges Respondent's argument that Respondent and similarly situated creditor litigants have concerns regarding the possible binding effect of dismissing a claim or a party in a law suit under applicable state law.

⁴ The Court further observes that Respondent will also bear any responsibility if action is taken in the state court suit that negatively affects Debtor or property of the estate.

Upon review of the record, the legal arguments of counsel, and applicable authority, and based upon the foregoing discussion, it is

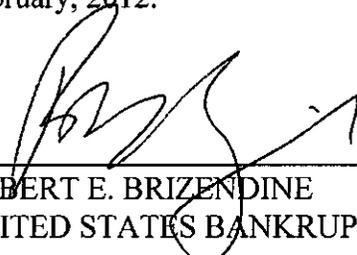
ORDERED that Debtor's motion be, and the same hereby is, **granted** to the extent provided herein; and, it is

FURTHER ORDERED that actual damages in the form of attorney's fees in an amount to be determined will be awarded in favor of Debtor against Respondent Alley Cassetty Companies, Inc. under 11 U.S.C. § 362(k). Following the filing of an affidavit by Debtor's counsel reflecting the amount of time expended and the attorney's fees being sought, the Court will schedule a hearing to hear any arguments in support of same as well as any objections thereto.

The Clerk is directed to serve a copy of this Order upon counsel for Debtor-Movant, counsel for Respondent Alley Cassetty Companies, Inc., the Chapter 7 Trustee, and the United States Trustee.

IT IS SO ORDERED.

At Atlanta, Georgia this 6th day of February, 2012.



ROBERT E. BRIZENDINE
UNITED STATES BANKRUPTCY JUDGE