IT IS ORDERED as set forth below:

Date: December 9, 2016

James R. Sacca
U.S. Bankruptcy Court Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

In re:	:	Chapter 7
	:	
ARMANDO MONCADA, JR.,	:	Case No. 16-21407-JRS
	:	
Debtor.	:	
	:	
ARMANDO MONCADA, JR.,	:	
	:	
Movant,	:	
	:	
v.	:	CONTESTED MATTER
	:	
GEORGIA HERITAGE BANK,	:	
	:	
Respondent.	:	

ORDER

Before the Court is Movant's, Debtor Armando Moncada, Jr.'s, motion to hold Respondent, Georgia Heritage Bank, in contempt for knowingly violating the automatic stay of 11 U.S.C. § 362(a). (Doc. 19). Mr. Moncada also seeks actual damages, including attorney's fees, and punitive damages against Respondent. His motion and request for relief is related to a

lawsuit Respondent filed against him and his company, Pathology Consultants of Georgia, Inc., in the Superior Court of Forsyth County, on March 16, 2016, four months before he filed for bankruptcy, alleging breach of contract and breach of guaranty, arising from a default on two promissory notes.

Because no answer was filed by Mr. Moncada or his company, Respondent filed a motion for entry of default judgment on May 18, 2016. Mr. Moncada failed to appear at the hearing on the motion, which was held on July 13, 2016. That same day, the state court verbally granted the motion for default judgment and Respondent submitted a proposed order, but the judge requested some changes. Before the order was entered, Mr. Moncada filed a Voluntary Petition under Chapter 7 of the Bankruptcy Code on July 19, 2016. (Doc. 1). The Bankruptcy Noticing Center ("BNC") provided electronic notice of the bankruptcy to Respondent who received it on July 20, 2016, and two days later, on July 22, 2016, BNC mailed notice via first class mail to Respondent's attorney. (Doc. 7). On July 29, 2016, ten days after the bankruptcy petition was filed, the state court issued a default judgment against Mr. Moncada and his wholly owned company for $748,089.43. (Doc. 25, Ex. A). On August 6, 2016, Mr. Moncada's counsel informed Respondent's counsel, via e-mail of this violation of the automatic stay, which he stated would not be pursued if Respondent moved immediately to vacate the default judgment with respect to Mr. Moncada. (Doc. 19, Ex. B). Two days later, Respondent sent a letter to the state court explaining the filing of the bankruptcy and Respondent's intention to not enforce the judgment at this time, but did nothing to vacate the judgment against Mr. Moncada. (Doc. 20, Ex. B). As of the hearing on Mr. Moncada's motion to hold Respondent in contempt, held on September 8, 2016, the default judgment against Mr. Moncada still had not been vacated. Mr. Moncada seeks damages under § 362(k)(1) based on Respondent's alleged willful violation of

the automatic stay for not stopping the default judgment from being entered and for not taking any steps to vacate it after it was entered.

Generally, creditors' actions taken after the bankruptcy petition is filed are in violation of the automatic stay and void *ab initio*. *Borg Warner Acceptance Corp. v. Hall*, 685 F.2d 1306, 1308 (11th Cir. 1982). A violation of the automatic stay that is (1) with knowledge and (2) intentional will subject a creditor to sanctions under § 362(k)(1). *In re Smith*, 180 B.R. 311, 319 (Bankr. N.D. Ga. 1995). A debtor can then recover "actual damages, including costs and attorneys' fees" for "any willful violation of a stay." 11 U.S.C. § 362(k)(1). A violation does not require the creditor to act with the specific intent to violate the stay; rather, "willfulness" describes the intentional nature of the action violating the stay. *In re Highsmith*, 542 B.R. 738, 747 (Bankr. M.D.N.C. 2015). "If a creditor acts without knowledge of the bankruptcy in violation of the automatic stay it must affirmatively act to restore the pre-violation status quo." *S. Dallas Water Auth. V. Guarantee Co. of N. Am., USA*, 767 F. Supp. 2d 1284, 1297-98 (S.D. Ala. 2011) (quoting *In re Peralta*, 317 B.R. 381, 389 (B.A.P. 9th Cir. 2004)). Typically, an unknowing violation of the automatic stay will not constitute a willful violation, but failure to take affirmative action to undo a violation after learning of a bankruptcy can elevate it to the status of willful. *In re Smith*, 180 B.R. 311, 318 (Bankr. N.D. Ga. 1995) ("[I]f [the stay] has been violated prior to receiving actual notice, the burden is on the creditor to reverse any such action taken in violation of the stay."); *see also In re Keen*, 301 B.R. 749 (Bankr. S.D. Fla. 2003) (finding a willful violation where creditor failed to vacate post-petition default judgment after learning of bankruptcy).

Respondent first argues that its counsel never received any notice that the bankruptcy petition was filed. However, Respondent was listed as a creditor on Mr. Moncada's Schedule E/F

and its counsel was also included on the mailing matrix. BNC provided electronic notice of the commencement of the bankruptcy case to Respondent on July 20, 2016 at the address designated by Respondent to receive such bankruptcy notices, and two days later, BNC mailed the same notice via first class mail to Respondent's counsel. (Doc. 7). At the hearing on Mr. Moncada's motion, counsel for Respondent confirmed the mailing address listed with BNC was correct. Additionally, there is nothing in the record to show that the notices were not delivered. Based on these facts, Respondent received notice of the commencement of the bankruptcy case electronically on July 20 and its counsel should have received the same notice by mail prior to July 29, the date of the entry of the default judgment. As such, the Court finds Respondent had knowledge of Mr. Moncada's bankruptcy petition and, accordingly, the imposition of the automatic stay pursuant to § 362(a), prior to entry of the default judgment.

Despite receiving notice of Mr. Moncada's bankruptcy, Respondent failed to halt the state court from issuing the default judgment nor did it seek to vacate the default judgment after receiving the e-mail from Mr. Moncada's counsel on August 6. "[A] creditor has an affirmative duty to take steps to vacate any judgments signed and entered after the filing of a bankruptcy petition in violation of the automatic stay." *In re Braught*, 307 B.R. 399, 403 (Bankr. S.D.N.Y. 2004) (finding the stay was willfully violated when creditor failed to vacate a state court judgment despite its intention not to enforce judgment); *see also In re H Granados Comms., Inc.*, 503 B.R. 726, 734 (B.A.P. 9th Cir. 2013) (holding there was a willful violation when there was no affirmative action to vacate or cancel a default judgment); *In re Keen*, 301 B.R. at 757 (ordering creditor to pay actual damages and take any necessary steps to remove a default judgment). In contrast, Respondent argues that its acknowledgment in the letter to the state court judge that it would not enforce the judgment was sufficient. The Court agrees with Mr. Moncada

that restoring the pre-violation status quo requires vacating the default judgment. As such, once Respondent received notice of the bankruptcy, Respondent was required to notify the state court that no judgment should be entered against Mr. Moncada or, at the very least, file the necessary pleadings to vacate the judgment against Mr. Moncada. It would have been just as easy for Respondent to provide the state court with a proposed order to vacate the judgment against Mr. Moncada as it was to notify the state court that it would not enforce the judgment against the Mr. Moncada. Because Respondent failed to restore the pre-violation status quo after gaining knowledge of the bankruptcy, there was a willful violation of the automatic stay.

A District Court judge in this division has recently held that the status quo was preserved when a state court lawsuit filed post-petition merely "ceased going forward" against the debtor. *Alley Cassetty Cos. v. Wren*, 502 B.R. 609, 614 (N.D. Ga. 2013). In *Wren*, Alley Cassetty Companies, Inc. ("Alley") extended credit to Hard Rock Pavers, LLC ("Hard Rock") to finance a project, and Wren personally guaranteed this extension. *Id* at 611. Wren filed for bankruptcy but did not list Alley as a creditor so it did not receive notice of the bankruptcy case. Shortly after Wren filed for bankruptcy, Alley filed a state court lawsuit against Hard Rock, Wren, and Hartford Insurance Company (the bond insurer), an unrelated party. *Id.* Counsel for Wren notified counsel for Alley of the bankruptcy and demanded that the suit be dismissed as to Wren because it violated the stay. When counsel for Alley only agreed to stay the suit against Wren instead of dismissing it, Wren filed a motion for sanctions against Alley for a willful violation of the stay. The Bankruptcy Court agreed with Wren and sanctioned Alley for not dismissing the case against Wren – but not the other defendants, but the District Court disagreed and reversed.

Although similar in some ways, *Wren* is materially distinguishable from the case now before the Court. First, in *Wren*, no default judgment was ever entered, only the mere filing of a

lawsuit against the debtor and other parties without notice of the bankruptcy which the creditor immediately stayed as to the debtor upon receiving notice of the bankruptcy. The Bankruptcy Court in *Wren* noted that while the creditor allowed the suit to remain pending, there were no "potentially dispositive rulings or a default judgment." *In re Wren*, 2012 WL 1951112, at *2. The District Court likewise noted that the debtor "did not incur any cost 'in defending against a continuing stay violation and preventing a default judgment.'" 502 B.R. at 614 (quoting *Eskanos & Adler, P.C.*, 309 F.3d 1210, 1215-16 (9th Cir. 2002)). Mr. Moncada was not so fortunate. He had a default judgment entered against him for $748,089.43 and now has had to incur expense to vacate it. When a debtor files for bankruptcy protection, certainly one the fundamental expectations he has is that he will be protected from having a judgment entered against him, let alone a default judgment for $748,089.43. Mr. Moncada is entitled to that fundamental protection.

Second, by the time that matter reached the District Court on appeal, the state court matter had been resolved and the complaint against Mr. Moncada had been dismissed. Here, Mr. Moncada was not so fortunate and a default judgment was entered against him for $748,089.43 that has still not been vacated.

Third, the state court lawsuit here involved two defendants, Mr. Moncada and the corporation which he wholly owns, on a note and a guaranty. In comparison, *Wren* involved multiple defendants, at least one of which was unrelated. 502 B.R. at 611. The District Court held that ceasing further action against the debtor in *Wren* was sufficient because of the potential impact on the action against third parties if the debtor there was dismissed. The vacating of the default judgment against Mr. Moncada would not have any impact on the judgment against his company.

Finally, *Wren* turned on the fact that the creditor did not receive notice of the bankruptcy petition prior to filing the state court lawsuit. 502 B.R. at 613. The creditor was not originally listed in the bankruptcy petition or creditor matrix. *Wren v. Alley Cassetty Cos.*, No. G11-21847-REB, 2012 WL 1951112, at *1 n.1 (Bankr. N.D. Ga. Feb. 8, 2012). As such, the creditor only received notice of the bankruptcy petition filing from the debtor's counsel personally after the lawsuit had been filed. *Id.* In this case, Respondent was listed in Mr. Moncada's bankruptcy petition—a scenario completely opposite to that in *Wren*. In *Wren*, because the creditor had no notice or knowledge of the bankruptcy when filing the state court lawsuit, there could be no willful violation of the automatic stay by filing the lawsuit. Accordingly, the District Court held that although the filing of the lawsuit was a violation of the automatic stay, it was not willful because of this lack of notice. *Id.* Here, however, there was knowledge of the bankruptcy filing and yet Respondent still failed to affirmatively restore the pre-violation status quo and now the Mr. Moncada has a judgment against him for $748,089.43.

Based on the forgoing, Mr. Moncada is entitled to damages, including attorney's fees, pursuant to 11 U.S.C. § 362(k)(1). Mr. Moncada has asked for attorney's fees of $2,925. This Court finds that an award of attorney's fees of $2,250 is appropriate for the facts of this case. Furthermore, the Court does not find that an award of punitive damages is appropriate on these facts. Accordingly, it is hereby

ORDERED that Mr. Moncada's motion be granted; and it is

FURTHER ORDERED that actual damages in the form of attorney's fees in the amount of $2,250.00 be awarded in favor of Mr. Moncada against Respondent Georgia Heritage Bank.

END OF DOCUMENT