UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

IN THE MATTER OF:	:	**CASE NUMBER**
	:	
FAITH SUSAN ARNELL,	:	BANKRUPTCY CASE
	:	NO. 05-12444-WHD
	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 13 OF THE
Debtor.	:	BANKRUPTCY CODE

ORDER

Faith Susan Arnell (hereinafter the "Debtor") seeks sanctions against Southern Federal Credit Union (hereinafter "SFCU") pursuant to section 362(h) of the Bankruptcy Code. The Debtor contends that SFCU willfully violated the automatic stay when it froze a portion of the balance in the Debtor's savings account. SFCU opposes the imposition of sanctions, arguing that it merely maintained the status quo and did not violate the automatic stay. Following an evidentiary hearing on November 17, 2006, the Court took the matter under advisement. This matter constitutes a core proceeding, over which this Court has subject matter jurisdiction. *See* 28 U.S.C. § 1334; *MBNA America Bank, N.A. v. Hill*, 436 F.3d 104 (2d Cir. 2006) (action under section 362(h) is core proceeding because it derived directly from the Bankruptcy Code and can be brought only in the context of a bankruptcy proceeding).

FINDINGS OF FACT

The Debtor filed a voluntary petition under Chapter 13 of the Code on July 25, 2005.

At the time of filing, the Debtor maintained an account with SFCU, with a balance of approximately $37. On Schedule C, the Debtor claimed the funds in the account as exempt. The Debtor also possessed a federal retirement account (hereinafter the "TSP Account") with a balance of approximately $24,000, which she also claimed as exempt under O.C.G.A. section 44-13-100(a)(2.1). On Schedule F, the Debtor listed two unsecured debts to SFCU in the amounts of $5,716 and $7,361. SFCU filed two proofs of claim that evidenced unsecured debt totaling $12,628.75. The Debtor proposed a Chapter 13 plan that provided for payment of a 100% dividend to unsecured creditors. The Debtor's plan was confirmed by order entered October 6, 2005.

The Debtor was employed by the Federal Aviation Administration (hereinafter the "FAA"). The Debtor suffers from Hepatitis C and is required to take certain medications that prevented her from being able to perform her job duties. On December 24, 2005, the Debtor took an early medical retirement from the FAA and, on March 30, 2005, transferred $22,095.53 from the TSP Account into her SFCU account. Following this deposit, the Debtor had sixty days to complete a roll over of these funds into a new, qualified account in order to preserve the tax treatment of the funds and avoid paying a tax penalty.

On April 24, 2006, the Debtor converted her case to one under Chapter 7. Gary W. Brown (hereinafter the "Trustee") was appointed as the trustee of the Debtor's Chapter 7 bankruptcy estate. The Debtor filed amended schedules in which she listed as assets her SFCU account, with a balance of $335, and the TSP Account, with a balance of $24,000,

and again claimed these assets as exempt property.[1] By amendment filed on September 15, 2006, the Debtor disclosed that the actual balance in the SFCU account at the time of conversion was $26,859.25 and the balance in the federal retirement account was $0. At the time of the conversion, the Debtor scheduled the debt owing to SFCU as unsecured in the amount of $5,451 and $7,178.

On May 4, 2006, SFCU placed an administrative hold on $15,000 of the funds in the Debtor's SFCU account. On May 6, 2006, SFCU filed a motion for relief from the automatic stay. SFCU asserted that the Debtor owed SFCU an unsecured debt of $12,581.18. As the Debtor's SFCU account contained funds in excess of the debt owed to SFCU, SFCU asserted that the debt owed by SFCU to the Debtor for the account balance and the debt owed by the Debtor to SFCU were mutual debts, which entitled SFCU to exercise a state law right to setoff the amount of its unsecured debt from the account balance. SFCU sought relief from the automatic stay to setoff these debts. SFCU also contended that its claim was partially secured, presumably by the account balance. On May 7, 2006, SFCU filed a second motion for relief from the stay in which it asserted that the loans at issue were fully secured by the funds in the SFCU account. On May 10, 2006, the Debtor filed the instant motion to hold SFCU in contempt for its violation of the automatic stay. SFCU released the administrative hold on the funds in the Debtor's account on May

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[1] The Trustee objected to the Debtor's exemption of certain retirement accounts and payments received from those accounts. This objection was denied by way of a consent order entered on October 31, 2006.

14, 2006 and withdrew both motions for relief on May 17, 2006, prior to the scheduled hearing date.

As a result of the Debtor's Hepatitis C, the Debtor is required to take medication that results in severe depression. Consequently, the Debtor takes anti-depressant medication. When told of the fact that her SFCU account had been frozen, the Debtor suffered at least two anxiety attacks, and her psychiatrist recommended that she increase the dosage of her anti-depressant medication. Additionally, the Debtor cares for her granddaughter, who suffers from cerebral palsy. The Debtor's ability to do so was impaired by the anxiety and stress that the Debtor suffered as a result of SFCU's actions.

CONCLUSIONS OF LAW

A filing of a voluntary petition triggers an automatic stay that prevents an entity from taking "any act to obtain property of the estate or of property from the estate or to exercise control over property of the estate" or "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case." 11 U.S.C. § 362(a)(3); (a)(6). The petition also "operates as a stay, applicable to all entities, of . . . the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor." *Id.* § 362(a)(7). Section 553, however, preserves a creditor's right, where one exists under state law, to setoff against a debt owed by the creditor to the debtor, so long as both debts arose prior to the commencement of the case. *See* 11 U.S.C.

§ 553. Additionally, section 542(b) requires a creditor who owes a debt to the estate "that is matured, payable on demand, or payable on order" to pay the debt to the trustee, but excuses the creditor from doing so if the creditor has a valid right of setoff. *See* 11 U.S.C. § 542(b).

Payment of the debt owed to the estate prior to setoff would "divest" the creditor of the right to effectuate the setoff. *See Bank of Maryland v. Strumpf*, 516 U.S. 16, 20 (1995). In order to protect the creditor's right to setoff the debt, the United States Supreme Court held that the automatic stay does not prevent a creditor from placing an administrative hold on funds in a bank account until such time as the creditor can obtain relief from the automatic stay to effectuate the setoff. *See Strumpf*, 516 U.S. at 20-21 (1995). In *Strumpf*, the Court concluded that, where a bank had an undisputed right of setoff, the bank's temporary refusal to pay a debt owed to the estate did not constitute a setoff because it did not involve "(i) a decision to effectuate a setoff, (ii) some action accomplishing the setoff, and (iii) a recording of the setoff." *Strumpf*, 516 U.S. at 19. Accordingly, the temporary hold did not violated section 362(a)(7). Additionally, the Court found that the temporary hold was not "an act to obtain property of the estate," an act "to exercise control over property of the estate," or an "act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case" and, therefore, did not constitute a violation of subsections 362(a)(3) or (a)(6). *Strumpf*, 516 U.S. at 21.

SFCU cites *Strumpf* for the proposition that it did not violate the automatic stay by

simply placing a hold on the funds in the account while it promptly filed a motion seeking relief from the automatic stay in order to effectuate what it believed to be a valid setoff. In response, the Debtor submits that the facts of this case are distinguishable from the facts of *Strumpf* and, consquently, the holding of *Strumpf* does not preclude a finding that SFCU violated the automatic stay in refusing to pay the debt owed by SFCU to the debtor. Specifically, the Debtor points to the fact that, in *Strumpf*, the Court noted that it was undisputed that the bank had a valid setoff right, while, in this case, the Debtor contends that SFCU had no right of setoff due to a lack of mutuality between the debt owed by the Debtor to SFCU (a pre-petition debt) and the debt owed by SFCU to the Debtor (a post-petition debt).

The Debtor correctly asserts that a valid right of setoff, as preserved by section 553, requires the existence of mutual debts. Section 553 preserves a right of setoff between only pre-petition debts. *See* 11 U.S.C. § 553; *Newberry Corp. v. Fireman Fund Ins. Co.*, 95 F.3d 1392, 1398 (9th Cir. 1996); *In re Orr*, 234 B.R. 249 (Bankr. N.D.N.Y. 1999). In this case, the debt owed by the Debtor arose pre-petition, but, with the exception of the $37 balance in the Debtor's SFCU account on the petition date, the debt owed by SFCU to the Debtor arose post-petition, at the time when the Debtor deposited additional funds into her SFCU account. Accordingly, SFCU had no valid setoff right with regard to the bulk of the funds in the SFCU account at the time it implemented the administrative freeze.

The question presented by the Debtor's position is whether the Supreme Court's

holding in *Strumpf* turned on the fact that the bank had a valid right of setoff. The Court was not presented with a case in which the creditor's right to setoff turned out to be invalid. Accordingly, this Court must determine whether the validity of the setoff right was critical to the Supreme Court's determination that a temporary freeze to preserve the status quo while the creditor seeks relief from the stay (and, in this case, a determination as to whether it has a valid setoff right) is neither a setoff, an exercise of control over estate property, nor an act to collect a pre-petition debt.

First, the Court must conclude that, even though SFCU did not have a valid right of setoff with regard to the bulk of the funds owed by SFCU to the Debtor, SFCU's temporary refusal to pay its debt to the Debtor was not a setoff and, therefore, did not violate section 362(a)(7). Under *Strumpf*, a setoff requires "(i) a decision to effectuate a setoff, (ii) some action accomplishing the setoff, and (iii) a recording of the setoff." *Strumpf*, 516 U.S. at 19. It is undisputed that SFCU never intended to "permanently settle" the accounts without obtaining relief from the stay, which was never granted, and that SFCU never recorded the setoff. Accordingly, under the definition of a setoff established by the Court in *Strumpf*, it cannot be said that a setoff occurred. As a setoff is the only action proscribed by section 362(a)(7), SFCU did not violate section 362(a)(7). Further, SFCU moved for stay relief just two days after it implemented the freeze. SFCU, therefore, acted more promptly than did the bank in *Strumpf* in order to bring the matter before the Court for a determination as to whether stay relief should be granted to permit SFCU to execute a setoff. *See Town of*

Hempstead Employees Federal CU v. Wicks, 215 B.R. 316 (E.D.N.Y. 1997) (noting that a freeze may become a setoff if the creditor does not timely act to move for relief from the stay).

Second, the Court must also conclude that SFCU did not violate section 362(a)(3). Section 362(a)(3) stays "any act to obtain property of the estate or of property from the estate or to exercise control over property of the estate." In *Strumpf*, the Supreme Court noted that funds deposited into an account do not remain property of the debtor or become property of the estate. Instead, the bank account simply represents a "promise to pay, from the bank to the depositor." *Strumpf*, 516 U.S. at 21. Therefore, a bank's freeze is merely a refusal to perform a contractual promise and not an exercise of control over estate property. *See id.* (stating that the debtor's "view of things might be arguable" if the bank account did consist of the debtor's funds that could be considered property of the estate). In *In re Jimenez*, 335 B.R. 450, 458 (Bankr. D.N.M. 2005), the bankruptcy court characterized the Supreme Court's statement as dicta and held that, notwithstanding the *Strumpf* decision, the "Plaintiff's account balances became property of the estate." In doing so, the court recognized that the obligation of the bank to repay the funds deposited represented an "intangible right to payment" held by a Chapter 7 debtor, which did become property of the bankruptcy estate upon the commencement of the case. *Id.* at 459. Consequently, an act that prevented access to the funds constituted an exercise of control over that intangible property right. *Id.*

In this case, the Court need not determine whether the *Jimenez* court is correct on this point. Even if the failure to release a portion of the funds in a debtor's account is considered an act to exercise control over property, section 362(a)(3) prohibits only acts to obtain or exercise control over estate property, and the Debtor has asserted in this and prior litigation that the funds deposited post-petition into the SFCU account never became property of the Debtor's bankruptcy estate due to the characterization of the funds as retirement benefits, which are excluded from the bankruptcy estate pursuant to section 541(c)(2).[2]

Finally, the Court must determine whether SFCU violated section 362(a)(6). Section 362(a)(6) stays "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case." 11 U.S.C. § 362(a)(6). Most cases interpreting section 362(a)(6) consider the specific facts surrounding the creditor's conduct when determining whether the creditor has attempted to collect, assess, or recover a pre-petition claim against the debtor. *See In re Holden*, 217 B.R. 161 (D. Vt. 1997) (IRS utilized an open-ended administrative freeze of debtor's tax refund to coerce the debtors into entering a reaffirmation agreement).

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[2] For this same reason, SFCU did not have an affirmative obligation under section 542(b) to pay the funds in the account to the debtor. *See* 11 U.S.C. § 542(b)("Except as provided in subsection (c) or (d) of this section, an entity that owes a debt *that is property of the estate* and that is matured, payable on demand, or payable on order, shall pay such debt to, or on the order of, the trustee, except to the extent that such debt may be offset under section 553 of this title against a claim against the debtor.").

Accordingly, having carefully considered the specific facts of this matter, the Court concludes that the placing of an administrative hold on funds in a debtor's bank account, when the bank is a creditor holding a pre-petition claim against the debtor, but has no valid right of setoff, is an act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case. *See United States v. Holden*, 258 B.R. 323 (D. Vt. 2000) (IRS violated section 362(a)(6) when it placed a freeze on debtor's tax refund because IRS lacked a valid right of setoff and its actions were in furtherance of collecting pre-petition tax debt); *In re Orr*, 234 B.R. 249 (Bankr. N.D.N.Y. 1999) (holding that bank violated automatic stay by freezing account balance without a right of setoff). *Strumpf* does not compel the opposite result. *See id.; see also In re Harris*, 260 B.R. 753 (Bankr. D. Md. 2001); *In re Orr*, 234 B.R. 249 (Bankr. N.D.N.Y. 1999) (noting that *Strumpf* approved only a temporary freeze in furtherance of preserving a valid right of setoff). The underlying support for the Supreme Court's holding in *Strumpf* -- that the failure to release funds is not an act to collect a pre-petition debt -- was prompted by the expediency of saving the creditor from engaging in an action that would deprive the creditor of its setoff right, which Congress has specifically preserved in section 553 and has protected under section 542(b) by excusing the creditor from paying a debt owed to the debtor if the creditor holds a valid right to setoff the debt. When the creditor has no such setoff right, the Court is left only with an unsecured creditor making a prohibited attempt to better its position with regard to all other unsecured creditors. This is exactly the conduct that is prohibited by section

362(a)(6).[3]

Having found that SFCU violated section 362(a)(6), the Court must now determine whether the Debtor is entitled to damages pursuant to section 362(h). "An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorney's fees, and, in appropriate circumstances, may recover punitive damages." 11 U.S.C. § 362(h). A violation of the automatic stay is "willful" if the party "(1) knew the automatic stay was invoked and (2) intended the actions which violated the stay." *In re Jove Engineering, Inc.*, 92 F.3d 1539, 1554 (11th Cir. 1996). Therefore, to establish entitlement to an award of damages under section 362(h), an individual must show that: 1) the creditor violated the automatic stay with knowledge of the bankruptcy filing and 2) that the individual was injured by the stay violation.

In this case, there is no question that SFCU had knowledge of the Debtor's bankruptcy filing at the time it implemented the administrative freeze. The Debtor has also established that she was injured by the administrative freeze. According to the testimony presented at the hearing, the Debtor had placed the funds into her SFCU account with the intention of rolling over the funds in order to avoid paying a tax penalty. When the funds were frozen, the Debtor's attorney took immediate action to have the freeze released in order to permit the Debtor to complete the rollover. At the very least, the Debtor was

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[3] The Court need not and does not address whether SFCU's actions would have violated section 362(a)(6) if SFCU had possessed a valid right of setoff.

damaged by having to incur legal costs to deal with the freeze. Consequently, all that remains for the Court to determine is whether the Debtor suffered any additional actual damages as a result of the freeze, to calculate the amount of such damages, and to determine whether the $2,500 in punitive damages requested by the Debtor would be appropriate.

"Actual damages," within the meaning of section 362(h), include compensatory damages for out-of-pocket loss, attorneys fees and costs incurred in dealing with the violation, and compensation for emotional distress. *See In re Dawson*, 390 F.3d 1139, 1149 (9th Cir. 2004); *In re Poole,* 242 B.R. 104 (Bankr. N.D. 1999) (Murphy, J.); *In re Bishop*, 296 B.R. 890, 895 (Bankr. S.D. Ga. 2003) ("A bankruptcy court may award damages attributed to emotional distress if a preponderance of the evidence shows that emotional harm occurred and that the defendant's conduct in willfully violating the stay was the cause of that harm."). To establish a claim for emotional distress damages, "an individual must (1) suffer significant harm, (2) clearly establish the significant harm, and (3) demonstrate a causal connection between that significant harm and the violation of the automatic stay (as distinct, for instance, from the anxiety and pressures inherent in the bankruptcy process). *Id.* To establish such harm, the debtor may corroborate her testimony with medical evidence or the testimony of non-experts, including family and friends. Alternatively, the Court can infer from the nature of the conduct whether such conduct would lead to the alleged harm. *See id.*; *see also In re Bishop*, 296 B.R. at ("An award of damages for emotional distress due

to a violation of the stay is appropriate where a natural and powerful emotional distress is readily apparent from the nature or extent of the wrongful conduct under the particular circumstances surrounding the stay violation."); *In re Poole*, 242 B.R. at 112 (medical testimony is not required to establish emotional distress damages).

In this case, the Debtor seeks an award of $4,000 for the emotional distress caused by the administrative freeze. The Court, having considered the testimony presented by the Debtor regarding her reaction to the freeze, as well as her unique physical and emotional condition, finds that the Debtor suffered emotional distress as a result of SFCU's actions. The Debtor suffered panic attacks and was required to seek treatment from her psychiatrist and to increase the dosage of her medication. She also suffered stress due to her inability to properly care for her granddaughter. That being said, the amount of damages sought by the Debtor appears to be excessive in light of the fact that there is no evidence that the Debtor has apportioned her damages to account for the general stress and anxiety caused by the filing of the bankruptcy case itself, the dispute between the Debtor and the Trustee over the validity of her exemption of the TSP funds, and the investigation performed by SFCU in contemplation of filing a complaint objecting to her discharge. For this reason, the Court finds that $2,000 is an appropriate award to compensate the Debtor for her emotional stress and anxiety, as well as any resulting medical costs incurred as result of this anxiety and stress.

The Debtor also requests an award of $5,400 for attorney's fees incurred in

connection with this matter. At the time of the hearing, the Debtor's attorney stated in his place that he had spent seventeen hours on the Debtor's case and that this time did not include time spent dealing with the Trustee's objections to the Debtor's exemptions. However, the Debtor's attorney did not specify his hourly rate. SFCU did not question the amount of time spent or seek to examine the Debtor or her counsel as to the reasonableness of the time spent or to clarify the amount of the hourly rate. In her brief, the Debtor seeks compensation for twenty-four hours of attorney time and has attached an itemization of the time spent at an hourly rate of $225. It appears that the difference between the hours stated at the time of the hearing and the hours itemized in the Debtor's brief can be accounted for in the time spent preparing the Debtor's post-hearing brief. Having reviewed the itemization, the Court finds that 18.5 hours of the attorney time spent constitute actual damages caused by SFCU's conduct. It appears that the remaining time would have been required regardless of whether SFCU froze the Debtor's account. However, because the Debtor failed to file the itemization in advance of the hearing or to alert SFCU as to the requested hourly rate, and SFCU had no opportunity to object to the hourly rate at the time of the hearing, the Court will permit SFCU an opportunity to file an objection to the fees sought. If no objection is filed within fifteen (15) days of the entry of this Order, the Court will enter a final order awarding the Debtor attorney's fees in the amount of $4,162.50.

Finally, the Court declines to award punitive damages. Punitive damages are appropriate only when the creditor has acted maliciously or in bad faith. *See In re Esposito,*

154 B.R. 1011 (Bankr. N.D. Ga. 1993) (Murphy, J.). The facts established at the hearing indicate that SFCU took its actions in good faith reliance on the advice of its counsel that a temporary freeze would not violate the automatic stay. There is no indication that SFCU acted maliciously or ignored the importance of the automatic stay. SFCU promptly filed a motion for relief from the stay and then withdrew the motion and released the administrative freeze in an effort to mitigate any damages to the Debtor. For these reasons, the Court concludes that SFCU did not act in bad faith.

CONCLUSION

For the reasons stated above, the Debtor's Motion for Contempt is **GRANTED**.

Debtor shall be entitled to the entry of a judgment for $2,000 for actual damages, including damages for emotional distress and medical costs. Additionally, unless an objection is filed within fifteen (15) days of the entry of this Order, the Court will award the Debtor $4,162.50 in attorney's fees.

IT IS SO ORDERED.

At Newnan, Georgia, this 26 day of December, 2006.

W. HOMER DRAKE, JR.
UNITED STATES BANKRUPTCY JUDGE