

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ENTERED ON
MAY 26 2009
DOCKET

IN RE:

SOLOMON OLUMUYUWA OLUFELO,

Debtor.

CASE NO. A03-72113-REB

NEIL C. GORDON, Chapter 7 Trustee
for the Estate of Solomon Olumuyyuwa Olufelo,

Plaintiff,

ADVERSARY PROCEEDING
NO. 04-6481

v.

SOLOMON OLUMUYUWA OLUFELO,
YESTEC COMPUTERTechnology, LLC,
WILSHIRE CREDIT CORPORATION, and
OCWEN FEDERAL BANK, FSB,

Defendants.

CHAPTER 7

JUDGE BRIZENDINE

**ORDER GRANTING MOTION FOR SUMMARY JUDGMENT
AGAINST CO-DEFENDANTS DEBTOR
AND YESTEC COMPUTER TECHNOLOGY, LLC
and
ORDER GRANTING MOTION FOR SUMMARY JUDGMENT IN PART
AGAINST DEFENDANT WILSHIRE CREDIT CORPORATION
AND ORDER AND NOTICE OF PRE-TRIAL HEARING**

Before the Court is the motion of Plaintiff Neil C. Gordon, Chapter 7 Trustee herein, for summary judgment against Co-Defendants Solomon Olumuyyuwa Olufelo, Yestec Computer Technology, LLC, and Wilshire Credit Corporation filed on January 28, 2008. Plaintiff-Trustee commenced this adversary proceeding against said Co-Defendants through the filing of a complaint on August 25, 2004, seeking recovery of certain monies for this bankruptcy estate along with

damages and related fees for prosecuting this matter, in addition to a denial of Debtor's discharge.¹ More specifically, Trustee alleges that Debtor sold his former residence on March 11, 2004 during the pendency of this case for the sum of \$440,000.00 without Bankruptcy Court approval or notice to the Chapter 13 Trustee in violation of 11 U.S.C. § 363(b). In addition, Trustee contends that through their actions, Co-Defendants Ocwen Federal Bank FSB and Wilshire Credit Corporation enabled this loss of monies by the estate. Specifically, he states that Ocwen as servicing agent provided pay-off information and accepted \$273,708.74 from said sale proceeds in satisfaction of its pre-petition claim against Debtor to the detriment of the unsecured creditors of this estate. Similarly, Wilshire allegedly furnished pay-off information to Debtor and accepted the sum of \$68,975.34 in satisfaction of its second position deed to secure debt. The Trustee asserts that prior to said transfers, both Co-Defendants Ocwen and Wilshire had knowledge of the pendency of this case.²

The Trustee further contends that Debtor took the net proceeds of \$41,030.02, deposited said funds into a personal bank account, and withdrew the sum of approximately \$34,000.00 which he then placed into a business account established for Defendant Yestec Computer Technology, LLC. To date, Trustee alleges, Debtor persists in his failure to account for the monies he received from the sale in question, along with failing to produce documents at his meeting of creditors, or appear or produce documents at his court-ordered Rule 2004 (Fed.R.Bankr.P.) examination.

As a result of said transactions, Trustee claims the bankruptcy estate is entitled to relief

¹ Debtor-Defendant filed the above-styled case under Chapter 13 on August 30, 2003, and same was converted to a case under Chapter 7 on March 29, 2004.

² The Court is advised that the Trustee and Co-Defendant Ocwen have reached a settlement in this matter. The Trustee and counsel for Ocwen filed a joint stipulation of dismissal with prejudice as to Ocwen on January 5, 2009.

against these Co-Defendants as follows:

Count I - request for turnover from Debtor and Yestec, or entry of judgment on a joint and several basis against said entities;

Count II - denial of Debtor's discharge under 11 U.S.C. § 727(a)(2)(B) for transfer of property with intent to hinder, delay, or defraud creditors;

Count III - denial of Debtor's discharge under Section 727(a)(3) for failure to produce financial records;

Count IV - denial of Debtor's discharge under Section 727(a)(4)(A) for knowingly and fraudulently making a false oath or account;

Count V - denial of Debtor's discharge under Section 727(a)(4)(D) for failing to produce and knowingly and fraudulently withholding from Trustee certain books and records related to his property and finances;

Count VI - denial of Debtor's discharge under Section 727(a)(5) for failure to account for the disposition of the net proceeds referenced above;

Count VII - denial of Debtor's discharge for failure to appear at Rule 2004 examination;
and

Count VIII - an accounting from Debtor regarding the allocation of the sale proceeds at issue.

In Count X, the Trustee seeks judgment against Defendant Wilshire for actual damages of \$41,030.20, plus attorney's fees, costs, and punitive damages on grounds of alleged willful violation of automatic stay by Wilshire under Section 362(a)(6) and request for actual damages plus

attorney's fees, as well as costs and punitive damages under Sections 105(a) and/or 362(h).³

Trustee contends Debtor has been completely uncooperative throughout this litigation, and further contends that Yestec is merely a corporate fiction. Defendant Wilshire answered the complaint and admits receiving certain monies from Debtor, but denies it intentionally violated the automatic stay. Wilshire also filed a cross-claim against Debtor and Defendant Yestec to the extent it suffers liability if Debtor's sale is found to have been fraudulent. Ocwen also answered and filed a cross-claim against Debtor and Yestec on grounds of contribution and indemnification similar to Wilshire. Trustee claims both Wilshire and Ocwen have been unduly litigious in this proceeding, causing a burden to the estate through the incurrence of attorney's fees and expenses exceeding \$51,484.00 and \$1,626.30, respectively, in addition to other costs of the Trustee. As set forth in the brief accompanying the motion, Trustee currently seeks relief against Wilshire in the amount of the net proceeds received by Debtor resulting from the improper post-petition transfer, along with costs, attorney's fees, and punitive damages.⁴ In his answer, Debtor denies all allegations.

Based on the Trustee's statement of material facts not in dispute, which Debtor and Yestec have not refuted and are thereby deemed to admit, and the filed response of Wilshire thereto, it appears undisputed that Debtor caused an unauthorized post-petition transfer of property of this estate, resulting in the pay off of certain prepetition obligations held by Ocwen and Wilshire and the receipt of the net proceeds or portion thereof by Debtor and/or Yestec to the detriment of the

³ In the complaint, the Trustee also included a count (Count IX) for willful violation of automatic stay by Ocwen under Section 362(a)(6) with a request for actual damages plus attorney's fees, plus costs and punitive damages under Sections 105(a) and/or 362(h). As noted above, the Trustee and Ocwen have reached a settlement in this matter.

⁴ See note 3 above.

unsecured creditors of this estate.⁵

Summary judgment may be granted pursuant to Federal Rule of Civil Procedure 56, applicable herein by and through Federal Rule of Bankruptcy Procedure 7056, if “there is no genuine issue as to any material fact and...the moving party is entitled to a judgment as a matter of law.” Fed.R.Civ.P. 56(c). In deciding a motion for summary judgment, the court “is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202, 212 (1986). All reasonable doubts should be resolved in favor of the non-moving party, and “if reasonable minds could differ on any inferences arising from undisputed facts, summary judgment should be denied.” *Twiss v. Kury*, 25 F.3d 1551, 1555 (11th Cir. 1994), citing *Mercantile Bank & Trust Co. v. Fidelity & Deposit Co.*, 750 F.2d 838, 841 (11th Cir. 1985). Presumptions or disputed inferences drawn from a limited factual record cannot support entry of summary judgment under Fed.R.Civ.P. 56(c), applicable herein through Fed.R.Bankr.P. 7056.

Based on the present record, the Court concludes that the Trustee has established a basis for relief on his motion with regard to entry of a judgment against Debtor for net proceeds received and for a denial of Debtor’s discharge under 11 U.S.C. § 727(a) in causing the unauthorized transfer at issue, in addition to his persistence in unduly withholding and/or concealing certain information pertaining to said transfers and the disposition of the net sale proceeds thereof from the Trustee. The Court further concludes that summary judgment is also warranted against Yestec for recovery of those proceeds as that entity improperly received from Debtor.

With respect to Trustee’s claim for sanctions against Wilshire for willful violation of the

⁵ Neither Debtor nor Yestec have filed a response to the Trustee’s motion for summary judgment. *See* Local Rule BLR 7056-1(a)(2) (N.D.Ga.).

automatic stay under Section 362(k)(1), the Court concludes that the Trustee has established an entitlement to relief. Wilshire does not deny that it had actual notice of the case (*see* Trustee's Statement of Material Undisputed Facts, ¶ 16 and Wilshire's Response filed March 5, 2008). Wilshire does deny, however, that it had any knowledge whatsoever that Debtor was proceeding without authority, that it intended to violate the stay and harm this estate, or that it otherwise participated in the closing of the unauthorized sale at issue. Wilshire maintains that its cashier department did not know about the pending bankruptcy case, and that it in no way affirmatively aided Debtor in his misconduct. *See* Wilshire's Response, ¶¶ 8-12.

The legal standard for willful violation of the automatic stay does not insist, however, on a "specific intent to violate the stay," and indeed, good faith is not even relevant as long as the defendant has knowledge of the bankruptcy case filing and performs an intentional act against property of the estate. *Sensenich v. Ledyard National Bank (In re Campbell)*, 398 B.R. 799, 811-13 (Bankr. D.Vt. 2008). Further, inadvertent clerical acts are not excepted from claims of stay violation, and a corporate creditor with "institutional knowledge of the automatic stay" is charged with such knowledge among all its employees. *See Associated Credit Serv., Inc. v. Champion (In re Champion)*, 294 B.R. 313, 317 (Bankr.App. 9th Cir. 2003); *see also Roche v. Pep Boys, Inc. (In re Roche)*, 361 B.R. 615, 623 (Bankr. N.D.Ga. 2005); *In re Robinson*, 228 B.R. 75, 84 n. 13 (Bankr. E.D.N.Y. 1998). Under this standard, as long as a corporate employee of Wilshire had notice of the case, which is admitted, by virtue of the transfer of claim filed on March 1, 2004, the intentional act of the cashier department in posting the payment from Debtor to his loan obligation is a "willful violation of the automatic stay."

Wilshire argues further, however, that whatever the facts, the Trustee lacks standing to

recover damages under Section 362(k) because he is not a "natural person." *See Jove Eng'g, Inc. v. Internal Revenue Service*, 92 F.3d 1539 (11th Cir. 1996). This Court agrees with those cases reasoning that a trustee is a natural person, though the bankruptcy estate he or she represents may not be. Therefore, the Court concludes that the Trustee can alternatively seek relief under Section 105(a) as also alleged herein. *See e.g. Havelock v. Taxel (In re Pace)*, 67 F.3d 187 (9th Cir. 1995); *cf. In re Garofalo's Finer Foods, Inc.*, 186 B.R. 414 (N.D.Ill. 1995); *Campbell*, 398 B.R. at 814-15.

Applying the legal standard set forth in *Jove Engineering*, 92 F.2d at 1555-56, to the undisputed facts of record, the Court concludes as previously stated that the Trustee has established a claim for relief against Wilshire based on an intentional violation of the automatic stay. Although for purposes of establishing liability the specific intent to violate the stay is not required, same could bear on the question of the amount of damages to be awarded, which in turn, raises questions of fact that are not appropriate for disposition by summary judgment as the Court must make findings on matters such as state of mind and witness credibility. Moreover, the Court needs further information regarding the stipulation between the Trustee and Ocwen in order to completely resolve the remaining claims of the Trustee in this matter and any remaining claims between Wilshire and the other Co-Defendants herein.

Accordingly, based on the foregoing, it is

ORDERED that the motion of Plaintiff Chapter 7 Trustee for summary judgment against Defendant Debtor and Defendant Yestec Computer Technology, LLC be, and hereby is, **granted** in favor of Trustee; and it is

FURTHER ORDERED that judgment be entered against Defendant Debtor and

Defendant Yestec Computer Technology, LLC on a joint and several basis and in favor of Trustee for the net proceeds as described above in the sum of \$41,030.02; and it is

FURTHER ORDERED that Trustee's objections to the discharge of Debtor herein be, and the same hereby are, **sustained** and Debtor's discharge be, and the same hereby is, **denied** under 11 U.S.C. § 727(a). Finally, it is

FURTHER ORDERED that Trustee's motion for summary judgment against Defendant Wilshire Credit Corporation for violation of the automatic stay be, and the same hereby is, **granted** with respect to liability, and a final judgment will be entered against Wilshire at such time as the appropriate amount of damages has been determined at trial. Accordingly, it is

FURTHER ORDERED AND NOTICE IS HEREBY GIVEN that a pre-trial hearing will be held at 1:30 o'clock p.m. on the 25th day of June, 2009, in Courtroom 1202, Richard B. Russell Federal Building and United States Courthouse, 75 Spring St., S.W., Atlanta, Georgia, prior to setting a trial date to determine the amount of the award of damages against Defendant Wilshire Credit Corporation.

The Clerk is directed to serve a copy of this Order and Order and Notice of Pre-Trial Hearing upon Debtor, counsel for Debtor, counsel for the Chapter 7 Trustee, counsel for Yestec Computer Technology LLC, counsel for Wilshire Credit Corporation, counsel for Ocwen Federal Bank FSB, and the United States Trustee.

IT IS SO ORDERED.

At Atlanta, Georgia this 22nd day of May, 2009.



ROBERT E. BRIZENDINE
UNITED STATES BANKRUPTCY JUDGE