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**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA**

In re:) Case No. 07-28781-D-13L
)
MICHAEL WERNER and) Docket Control No. WW-1
BILLIE WERNER,)
) Date: November 18, 2008
Debtors.) Time: 1:00 p.m.
) Dept: D

This memorandum decision is not approved for publication and may not be cited except when relevant under the doctrine of law of the case or the rules of claim preclusion or issue preclusion.

MEMORANDUM DECISION

On July 29, 2008, the debtors herein, Michael Werner and Billie Werner ("the debtors"), filed a Motion for Contempt and Sanctions for Violation of the Automatic Stay, Sections 1322, 1325, and 1327, bearing Docket Control No. WW-1 ("the Motion"), by which the debtors seek sanctions against the United States Department of Veterans Affairs ("VA") for violation of the automatic stay of 11 U.S.C. § 362(a).¹ The VA opposes the Motion. For the reasons set forth below, the court will grant the Motion in part.

I. INTRODUCTION

The debtors filed the petition commencing this chapter 13 case on October 19, 2007. In their master address list, the

1. Unless otherwise indicated, all Code, chapter, section and Rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as enacted and promulgated after the effective date (October 17, 2005) of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23 (2005) (hereinafter the "BAPCPA").

1 debtors listed the VA at a post office box in Saint Paul,
2 Minnesota, and thus, it was to that address that the notice of
3 commencement of the case was mailed on November 2, 2007.² On
4 December 21, 2007, the VA filed a proof of claim for \$24,932. On
5 December 26, 2007, this court confirmed the debtors' chapter 13
6 plan.

7 On or about February 29, 2008, the Department of the
8 Treasury, Financial Management Service applied the debtors' 2007
9 federal income tax refund, \$311, to their debt to the VA.³ On
10 March 17, 2008, the debtors' counsel, Mark Wolff, wrote to the VA
11 complaining that the setoff constituted a collection effort in
12 violation of the automatic stay and demanding the immediate
13 return of the tax refund and an additional payment of \$3,500 in
14 damages. Mr. Wolff sent the letter to the VA at the address of
15 its regional counsel in Oakland, California, which is the address
16 the VA has caused to be listed in the Roster of Public Agency
17 Addresses maintained by the clerk of this court ("the VA's Roster
18 address").⁴

19 / / /

20

21 2. See Certificate of Mailing, filed November 2, 2007, DN
22 11. (Throughout this decision, "DN" will refer to the number of
the cited document on the court's docket.)

23 3. For ease of reference, the court will refer throughout
24 this decision to the debtors' "debt to the VA," rather than the
25 debtors' alleged debt to the VA. Despite these references,
26 nothing herein is meant to suggest that the debtors, or either of
them, owes or does not owe a debt to the VA. The court is not
called upon to make any such finding, one way or the other, at
this time.

27 4. The clerk's office maintains the Roster pursuant to
28 Local Bankruptcy Rule 2002-1(b), which requires debtors in this
district to utilize the address provided by the particular
governmental agency for listing in the Roster.

1 On April 10, 2008, apparently in response to Mr. Wolff's
2 letter, the United States Treasury issued a check for \$294
3 payable to the chapter 13 trustee in this case, Lawrence J.
4 Loheit, with the notation, "A/C Bille [sic] Jaramillo," which is
5 a former name of debtor Billie Werner.⁵ The trustee's office
6 received the check on April 15, 2008, but was unable to link it
7 to this case because it referred to Billie Jaramillo rather than
8 Billie Werner. This resulted in a further delay until June 5,
9 2008, when the trustee's office issued a \$294 check to the
10 debtors.

11 On June 2, 2008, the Internal Revenue Service sent the
12 debtors a notice that they were entitled to an economic stimulus
13 payment of \$600.⁶ On or about June 6, 2008, the Department of
14 the Treasury, Financial Management Service intercepted the
15 stimulus payment and offset it against the debt to the VA.

16 Meanwhile, as of June 2, 2008, prior to the time the chapter
17 13 trustee issued his \$294 check to the debtors, the debtors and
18 their counsel had no reason to believe any action had been taken
19 in response to Mr. Wolff's March 17, 2008 letter. Thus, on June
20 2, 2008, Botum Chhay, an associate in Mr. Wolff's office, began
21 what developed into a series of e-mails to and from Assistant
22 U.S. Attorney Ana Maria Martel (referred to herein as "the VA's
23

24 5. The VA now explains that the \$17 variance between the
25 check amount and the refund amount was a "debt management fee"
26 that has since been returned to the debtors. See United States'
Response Re Debtors' Alleged Damages, filed November 10, 2008, DN
48, 2:3-5.

27 6. This payment, issued pursuant to the Economic Stimulus
28 Act of 2008, Pub. L. No. 110-185, 122 Stat. 613, will be referred
to as the "stimulus payment."

1 counsel"). On June 20, 2008, Ms. Chhay notified the VA's counsel
2 that the VA had set off the stimulus payment as well as the tax
3 refund. The exchange ended with a final e-mail from the VA's
4 counsel on June 20, 2008. At no point prior to July 29, 2008,
5 the date on which the Motion was filed, did the VA's counsel
6 inform Ms. Chhay that the tax refund had been returned (albeit to
7 the chapter 13 trustee) or that the stimulus payment would be
8 returned. In fact, the series of e-mails would reasonably lead
9 one to conclude that if the debtors wanted to have their tax
10 refund and stimulus payment returned, they would need to file a
11 motion.

12 The debtors responded to the VA's inaction by filing the
13 Motion on July 29, 2008. On August 15, 2008, the trustee's
14 office received from the United States Treasury a check for \$583
15 (the \$600 stimulus payment less a \$17 debt management fee), and
16 on August 21 and September 4, 2008, checks for \$17 each,
17 representing the two debt management fees previously withheld.

18 II. ANALYSIS

19 A creditor who willfully violates the automatic stay exposes
20 himself or herself to an award of damages, including costs and
21 attorney's fees, in favor of an injured debtor. § 362(k)(1).

22 The Ninth Circuit Court of Appeals defines such a "willful
23 violation" as follows:

24 A "willful violation" does not require a specific
25 intent to violate the automatic stay. Rather, the
26 statute provides for damages upon a finding that the
27 defendant knew of the automatic stay and that the
28 defendant's actions which violated the stay were
intentional. Whether the party believes in good faith
that it had a right to the property is not relevant to
whether the act was "willful" or whether compensation
must be awarded.

1 In re Bloom, 875 F.2d 224, 227 (9th Cir. 1989).

2 In this case, the VA knew of the debtors' bankruptcy filing
3 as early as December 21, 2007, when it filed its proof of claim.
4 The VA relies for its principal defense on the highly technical
5 and complicated new notice requirements imposed by the BAPCPA,⁷
6 arguing that because the initial notice was not sent to the VA's
7 Roster address, it was not "effective" notice. Thus, the VA
8 contends it did not have effective notice until shortly after
9 March 17, 2008, when it received Mr. Wolff's letter. New
10 § 362(g)(2) might bear on this question,⁸ but for the fact that
11 the debtors have now confined their damages request to the time
12 period after March 17, 2008.⁹

13
14 7. See KEITH M. LUNDIN, CHAPTER 13 BANKRUPTCY, 3D ED. § 365.1
15 (2000 & Supp. 2007-1).

16 8.
17 A monetary penalty may not be imposed on a creditor for
18 a violation of a stay in effect under section 362(a)
19 (including a monetary penalty imposed under section
20 362(k)) . . . unless the conduct that is the basis of
21 such violation . . . occurs after such creditor
22 receives notice effective under this section of the
23 order for relief.

24 § 362(g)(2).

25 9. Some further discussed is warranted, however. Kathy
26 Medeiros signed the proof of claim filed on December 21, 2007, on
27 behalf of the VA. In the proof of claim, Ms. Medeiros indicated
28 that future notices should be sent to the VA at the office of its
Regional Counsel in Martinez, California. She did not, however,
apparently take any steps to verify that an offset in violation
of the stay would not occur. It appears to be the same Kathy
Medeiros who now testifies that "[w]hen VA is properly notified
that one of its debtors has filed bankruptcy, if the matter has
been referred to TOP [the Treasury Offset Program], VA will
advise Treasury to cease collection efforts until further
notice." Ms. Medeiros also testifies that "[t]he Debtors'
attorney did not notify the Regional Counsel's Office in Oakland
that the Werners had filed bankruptcy until Mr. Wolf [sic] wrote
(continued...)

1 During the two and one-half months after Mr. Wolff sent his
2 letter, the VA took no steps to inform him or the debtors that it
3 would return the tax refund; thus, further action on Mr. Wolff's
4 part was required.¹⁰ He assigned the task to Ms. Chhay, who, in
5 turn, was referred by the IRS to Ms. Martel.

6 Ms. Chhay tried four times over the next few days to resolve
7 the matter in a civil fashion with the VA's counsel. The latter,
8 however, immediately took a combative tone, asking if Ms. Chhay
9 was sure she wanted "to open this can of worms for \$311." The
10 VA's counsel suggested that the debtor may have "lied about his
11 income, disability or dependents," she threatened to take the
12 debtors' depositions, she said she would ask for attorney's fees
13 if the matter were litigated, and she challenged Ms. Chhay's
14 knowledge of community property law and the law on setoffs. The
15 VA's counsel concluded the discussions as follows:

16 I am not going to educate you further. If you think
17 you have grounds, go right ahead and file. However,
18 check with Mark [Wolff]. He will tell you I don't
19 bluff and fight hard.

20 9. (...continued)
21 to them on March 17, 2008," and that "[u]pon being notified of
22 the Werners' bankruptcy, Regional Counsel notified the proper VA
23 office to cause the TOP offset to stop until further notice." In
24 these circumstances, the court is not impressed with Ms.
Medeiros' conclusion that "[t]he failure of the Debtors to
properly notify the VA accounts for the failure to timely stop
TOP [offset] collections on this matter." See Declaration of
Kathy Medeiros, filed August 19, 2008, DN 29, ¶¶ 32-36.

25 10. The court recognizes that a check for the return of
26 most of the tax refund was issued on April 10, 2008. The parties
27 have not addressed the question whether the check should have
28 been issued to the debtors rather than the trustee, and the court
expresses no view. But certainly, notice should have been given
to the debtors or their counsel, who was, after all, the one
threatening to seek an award of damages.

1 Exhibit G in Support of Motion for Sanctions, filed September 16,
2 2008, DN 37, p. 1.

3 The VA's counsel apparently failed to take the elementary
4 step of contacting the VA, either during her exchange with Ms.
5 Chhay or thereafter. As a result, another five weeks passed.
6 During that time, the debtors received the trustee's check for
7 \$294, with no explanation of its source, as apparently, none had
8 been provided by the VA to the trustee. The amount did not match
9 up with the debtors' tax refund or their stimulus payment, and
10 was \$617 short of the total withheld by the VA on account of both
11 payments. And still, no notice was provided to either the
12 debtors or their counsel by the VA or its counsel. (In her
13 capacity as attorney for the VA, Ms. Martel was acting as its
14 agent.)

15 Thus, on July 29, 2008, the debtors filed the Motion. There
16 is nothing in the record from which the court might conclude that
17 the return of the stimulus payment was in process before that
18 date. Thus, the court finds that the filing of the Motion was
19 necessary for the debtors to obtain the return of that payment.¹¹
20 The Motion was also necessary for the debtors to obtain the two
21 \$17 "debt management fees," not received by the trustee's office
22 from the VA until August 21 and September 4.

23
24 11. Indeed, the VA states that "[g]iven the confusion
25 caused by Debtors' failure to give proper notice, it was not
26 until this motion was filed that the VA became aware that the
27 stimulus payment had also been offset." Opposition to the
28 Debtors' Motion for Sanctions, filed August 19, 2008, DN 28
("Opposition"), 5:17-18. This statement is directly contradicted
by Ms. Chhay's June 20, 2008 e-mail to the VA's counsel,
responded to four minutes later, when the VA's counsel challenged
Ms. Chhay to "go right ahead and file," and threatened to "fight
hard."

1 Using a "best defense is a good offense" strategy, the VA
2 attacks the debtors. The VA states that "Mrs. Werner knowingly
3 received VA pension benefits to which she was not entitled and
4 failed to pay them back," and accuses her of filing a misleading
5 declaration. Opposition, 1:23-24, 6:6-20. The VA also claims it
6 was legally entitled to offset a portion of the debtors' tax
7 refund. Neither of these points, even if accurate, is relevant
8 to the questions of whether the VA violated the automatic stay,
9 and if so, what damages should be awarded the debtors.¹²

10 The court concludes that the VA violated the automatic stay
11 when it failed to return the \$17 balance of the tax refund
12 promptly after Ms. Chhay contacted the VA's counsel in early June
13 and when it failed to return the \$600 stimulus payment promptly
14 after Ms. Chhay advised the VA's counsel of its interception on
15 June 20. The court also concludes that the debtors, through
16 counsel, made reasonable efforts to resolve these issues short of
17 filing a motion, but their efforts were rebuffed. The evidence
18 demonstrates, without contradiction, that no effort was made to
19 return either of these sums until after the Motion was filed.

20
21 12. The court finds troubling, however, Ms. Medeiros'
22 conclusory testimony that "Mrs. Werner was regularly advised that
23 she was required to report any changes to her income and any
24 changes to her marital status, . . . which reporting requirements
25 she disregarded." The supporting exhibits (DNs 30, 31) are far
26 from conclusive on, at least, the remarriage question. Only one
27 -- Exhibit 4, printed from the VA's website on August 14, 2008 --
28 refers to an "unmarried surviving spouse." Exhibits 2 and 3 --
the application form and verification form -- both ask whether
the surviving spouse has remarried since the death of the
veteran. Neither informs the spouse that he or she will not
qualify or no longer qualifies if the answer is yes. Exhibit 6,
a form letter from the VA to Billie Jaramillo, contains a list
entitled "What Are Your Responsibilities?" The list contains
five changes of which Ms. Jaramillo was to inform the VA --
remarriage is not among them.

1 III. CONCLUSION

2 The VA failed to fully correct its initial stay violations
3 until September 4, 2008, almost six months after Mr. Wolff's
4 letter to what the VA concedes was the correct address for
5 "effective" notice, almost three months after Ms. Chhay made her
6 efforts, and over a month after the Motion was filed. This
7 ongoing failure to remedy the situation itself violated the
8 stay.¹³ Were a remedy not available for this type of delaying
9 tactic, the automatic stay would hold very little value.

10 For the reasons addressed above, the debtors' request for an
11 award of their attorney's fees incurred in addressing the stay
12 violations, for the time period April 18 through September 17,
13 2008, a total of \$4,037.50, and costs reimbursement of \$209, will
14 be granted. The court finds this fee request both reasonable and
15 necessary to remedy the VA's stay violation.

16 The additional damages sought are in the nature of emotional
17 distress damages. Such damages are recoverable under § 362(k).
18 Dawson v. Wash. Mut. Bank (In re Dawson), 390 F.3d 1139, 1148
19 (9th Cir. 2004). However, the evidence in this case, in the form
20 of two declarations of debtor Billie Werner, is simply
21 insufficient to clearly establish significant emotional harm.
22 Nor is the evidence sufficient to demonstrate a causal connection
23 between the stay violation and the alleged harm, as for example,
24 with the cancellation of a trip to a friend's 60th birthday
25 party.

26 _____
27 13. The knowing retention of funds taken in violation of
28 the automatic stay is itself a violation of the stay. California
Empl. Dev. Dep't v. Taxel (In re Del Mission), 98 F.3d 1147,
1151, 1152 (9th Cir. 1996).

