

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

In re:

Case No. 6:07-bk-05560-ABB
Chapter 7

ALICE MARY IWAN,

Debtor.

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ORDER

This matter came before the Court on the Motion for Sanctions for Violation of the Automatic Stay (Doc. No. 12) ("Motion") filed by Alice Mary Iwan, the Debtor herein ("Debtor"), against Ford Motor Credit Company ("Ford"). An evidentiary hearing was held on January 7, 2008 at which the Debtor, her counsel, and counsel for Ford appeared. The Court makes the following findings and rulings after reviewing the pleadings and evidence, hearing live testimony and argument, and being otherwise fully advised in the premises.

The facts are undisputed. The Debtor filed this individual Chapter 7 case on November 6, 2007 ("Petition Date"). Ford, pre-petition, obtained a judgment against the Debtor in Ford Motor Credit Co. v. Alice Mary Iwan in the County Court for Orange County, Florida, Case No. 07-CC-1648. It obtained a continuing writ of garnishment from the Florida state court and served it on the Debtor's employer, Boston Diagnostic Imaging, prepetition. Ford stated in open Court that it had served the writ of garnishment on the Debtor's employer prepetition; Ford did not provide a copy of the judgment or writ of garnishment. The Debtor was issued a paycheck on November 9, 2007 for wages earned during the prepetition pay period October 20, 2007 through November 2, 2007.¹ The amount of \$249.56 was garnished from the Debtor's wages post-petition, and retained by her employer on November 9, 2007.² The garnished wages constitute the Debtor's compensation for a pre-petition employment period.

The Debtor listed Ford as an unsecured creditor for \$10,881.73 and Solomon, Ginsberg,

& Vigh, as Ford's counsel in Schedule F.³ Notice of the Debtor's bankruptcy filing was issued to Ford and its counsel on November 7, 2007, pursuant to the Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines (Doc. No. 11). The Debtor claimed her wages exempt in Schedule C pursuant to Section 222.11(2)(a), Florida Statutes. FLA. STAT. § 222.11(2)(a) (1998).

The Debtor's counsel sent a letter to Ford's counsel on November 14, 2007 requesting return of the garnished wages.⁴ Ford replied stating: "Ms. Iwan filed her bankruptcy petition on November 6, 2007. Our file reflects that all payments received here were for payroll periods that preceded November 6, 2007."⁵ Ford provided no legal support for its position in its correspondence. It did not return and continues to hold the garnished funds.

Section 77.06(1), Florida Statutes

Ford asserted the retention of the Debtor's wages is authorized by Section 77.06(1), Florida Statutes, based on its perfected garnishment lien on the Petition Date. Section 77.06(1), as amended effective July 1, 2000, provides:

Service of the writ shall make garnishee liable for all debts due by him or her to defendant and for any tangible or intangible personal property of defendant in the garnishee's possession or control at the time of the service of the writ or at any time between the service and the time of the garnishee's answer. Service of the writ creates a lien in or upon any such debts or property at the time of service or *at the time such debts or property come into the garnishee's possession or control.*

FLA. STAT. § 77.06(1) (2000) (*emphasis added*).⁶ A review of the case law issued by the Florida federal and state courts after July 1, 2000 reflects

³ Debtor's Exh. No. 1 (Doc. No. 1).

⁴ Debtor's Exh. No. 3.

⁵ Debtor's Exh. No. 4.

⁶ Section 77.06(1) was amended in 2000 by adding the last sentence.

¹ Debtor's Exh. No. 2.

² Id.

only one decision relating to Section 77.06(1), and it is not relevant to the issue presented.⁷

Ford served its writ of garnishment on the Debtor's employer pre-petition. The threshold issue for determination is whether the service of the writ of garnishment created a lien on the garnished funds. Service of a writ of garnishment "consists of notifying a third party to retain something he has belonging to the defendant." Cont'l Nat'l Bank of Miami v. Tavormina (In re Masvidal), 10 F.3d 761, 763 (11th Cir. 1993) (citing Thompson v. Commercial Union Ins. Co., 267 So.2d 18, 20 (Fla. 1st DCA), *cert. denied*, 271 So. 2d 461 (Fla. 1972)).

The employer had no property of the Debtor in its "possession or control" when the writ of garnishment was served. No property of the Debtor, specifically, her wages, came into the employer's possession or control until post-petition on November 9, 2007 when the Debtor's paycheck was issued. Ford held no garnishment lien on the Debtor's property on the Petition Date pursuant to Section 77.06(1). No lien arose upon the service of the writ of garnishment on the Debtor's employer pursuant to the plain and unambiguous language of Section 77.06(1).

11 U.S.C. Section 362(a)

The automatic stay of 11 U.S.C. Section 362(a) arose on the Petition Date preventing:

- (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title;

...

- (4) any act to create, perfect, or enforce any lien against property of the estate;

- (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title.

11 U.S.C. §§ 362(a)(1), (4), (5) (2007).

The Debtor's employer did not have control or possession of any property of the Debtor until November 9, 2007. The automatic stay arose on November 6, 2007. Section 362(a) barred any action by Ford to garnish the Debtor's wages post-petition and create a lien. The Debtor was protected by the automatic stay when the Debtor's wages were garnished on November 9, 2007. Ford refused to return the garnished funds.

Ford's counsel submitted case law from the United States Bankruptcy Court for the Southern District of Florida holding service of a writ of garnishment creates a valid lien which dates from the time of service. In re Marineau, No. 06-10619, 2006 WL 1751740 (Bank. S.D. Fla. 2006). Ford's counsel represented Ford was aware of and relied on the decision at the time of garnishment.

Ford's alleged reliance is misplaced and contradictory to the plain and unambiguous language of Section 77.06(1), Florida Statutes, and 11 U.S.C. Section 362(a). Ford did not obtain a lien on the Debtor's wages post-petition pursuant to Section 77.06(1).

Ford's post-petition actions were in violation of the automatic stay pursuant the plain an unambiguous language of 11 U.S.C. Section 362(a).

11 U.S.C. Section 362(k)

The Debtor seeks an award of sanctions, including punitive damages, for violations of the automatic stay by Ford. Ford's counsel was prepared to turnover a check for \$249.56 at the evidentiary hearing, if the Court so ordered, and requested that punitive damages sanctions not be imposed.

Section 362(k) provides a debtor who suffers injuries by "any willful violation" of the automatic stay "shall recover actual damages, including costs and attorneys' fees, and, in

⁷ The decision is General R.A.C., Inc. v. Coldwell Banker Residential Real Estate, Inc., 876 So. 2d 606 (Fla. 3d DCA 2004) holding the 2000 amendments to Section 77.06(1) were not relevant to the real estate escrow garnishment matter at issue.

appropriate circumstances, may recover punitive damages.” 11 U.S.C. § 362(k)(1). The Eleventh Circuit Court of Appeals determined a “willful violation” of the automatic stay occurs when the creditor “(1) knew the automatic stay was invoked and (2) intended the actions which violated the stay.” Jove Eng’g, Inc. v. I.R.S., 92 F.3d 1539, 1555 (11th Cir. 1996).

Ford refused to return the funds to the Debtor despite knowledge of the Bankruptcy Filing and receipt of the Debtor’s counsel’s request. Ford’s actions were knowing and intentional. Ford knew the automatic stay was invoked and intended the actions which violated the stay. Ford willfully violated the automatic stay of Section 362(a). Jove, 92 F.3d at 1555.

The Debtor suffered actual damages, including attorney’s fees and costs, as a result of Fords’ willful violation of the automatic stay. The Debtor seeks an award of \$1,586.76 consisting of (i) \$66.13 in lost wages; (ii) \$25.00 late fee for the Debtor’s son’s daycare incurred as a result of the garnishment; (iii) \$249.56 in wages garnished; and (iv) \$1,246.07 in attorney’s fees.⁸ She seeks an award of punitive damages.

The Debtor’s Motion is due to be granted. Compensatory damages of \$1,586.76 are appropriate. Punitive damages are not required in this case. The Debtor and her counsel are entitled to actual damages of \$1,586.76, including costs and attorneys’ fees, pursuant to 11 U.S.C. Section 362(k).

Accordingly, it is

ORDERED, ADJUDGED and DECREED that Ford committed willful violations of the automatic stay of 11 U.S.C. Section 362(a) and an award for actual damages is appropriate pursuant to 11 U.S.C. Section 362(k); and it is further

ORDERED, ADJUDGED and DECREED that Debtor’s Motion (Doc. No. 12) is hereby **GRANTED**; and it is further

ORDERED, ADJUDGED and DECREED that the following individuals and law firm are hereby awarded damages pursuant to 11 U.S.C. Section 362(k) against Ford: (i) Debtor Alice Mary Iwan in the amount of \$340.69; (ii) Debtor’s counsel, Wolff, Hill, McFarlin & Herron, PA, in the amount of \$1,246.07.

A separate Judgment consistent with these findings and rulings shall be entered contemporaneously.

Dated this 16th day of January, 2008.

/s/ Arthur B. Briskman
ARTHUR B. BRISKMAN
United States Bankruptcy Judge

⁸ During the evidentiary hearing, Debtor testified that she incurred attorney’s fees in the amount of \$1,246.07. Exhibit No. 5, admitted into evidence and provided by Debtor’s Counsel, included a statement for attorney’s fees in the amount of \$500.00 (Doc. No. 12). However, the statement admitted into evidence did not reflect fees incurred for counsel’s representation during the evidentiary hearing.