UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

In re:

Case No. 9:11-bk-05881-FMD
Chapter 13

John A. Sciarrino,

Debtor.
_____/

ORDER GRANTING CITY OF NAPLES' MOTION FOR SUMMARY JUDGMENT
(Doc. Nos. 53, 55, 80)

The City of Naples ("City") provided postpetition utility services to real property owned by a Chapter 13 debtor, and thereafter sent an invoice for those services to the debtor. The debtor claims that the City violated the automatic stay when it sent the invoice. The automatic stay imposed by 11 U.S.C. § 362(a) stays actions to collect prepetition debts or to enforce debts against property of the estate. But the City's debt was incurred postpetition. And the debtor's post-confirmation earnings are property of the estate only to the extent necessary for the fulfillment of his Chapter 13 plan. Because the debtor did not demonstrate that the City sought to satisfy its postpetition debt from post-confirmation earnings that the debtor needed to fund his plan (*i.e.*, property of the estate), the Court finds that the City's invoice did not violate the automatic stay.

BACKGROUND

This case came before the Court for hearing on March 19, 2013, on the City's motion for summary judgment (Doc. No. 80) on the City's *Motion for Order Confirming Absence or Termination of Automatic Stay* (Doc. No. 53) (the "Stay Motion") and the *Debtor's Motion for Sanctions as to the City of Naples and Request for Attorneys Fees* (Doc. No. 55) (the "Sanctions Motion"). Having considered the record and the arguments of counsel, the Court determined that no genuine disputes of material fact exist, and that the City is entitled to summary judgment in its favor as a matter of law. This order supplements the oral ruling made by the Court at the conclusion of the hearing.

FACTS

The facts are not in dispute. On March 30, 2011, John A. Sciarrino (the "Debtor") filed a voluntary petition under Chapter 13 of the Bankruptcy Code. The Debtor did not list the City as a creditor in his bankruptcy schedules. He did list his 50% ownership interest in the real property located at 1300 Pine Street, Naples, Florida (the "Property") and the holder of a mortgage on the Property (the "Mortgage Holder").[1] Although the Property is located outside the municipal boundaries of the City, the City provided it with certain utility services.[2] The City's Code of Ordinances governs the provision of utility services to properties located within the City's service area and establishes the liability of the City's system users and customers to pay the monthly rates, fees, and charges for the utility services provided.[3]

For several years preceding his bankruptcy filing, the Debtor rented the Property to tenants who paid the City's utility bills.[4] The tenant who resided at the Property before the Debtor filed for bankruptcy ended a "direct service agreement" with the City (under which the tenant had paid utility bills directly to the City) just a week before the Debtor filed his bankruptcy.[5] From that time on, the City maintained the utility account for the Property in the names of the Debtor and the co-owner of the Property, and continued to accrue charges on account of the Property's connection to the City's water and sewer systems, as well as for actual consumption charges.[6]

The Debtor's Chapter 13 plan (the "Plan") provided for the Debtor's surrender of the Property to the Mortgage Holder. The Plan also stated that "[p]roperty of the estate shall vest in Debtor upon confirmation."[7] The Plan was confirmed on June 4, 2012.[8] However, the Debtor remained a co-owner of the Property until March 5, 2013, when the Mortgage Holder's foreclosure sale was concluded.

---

[1] Doc. No. 1, pp. 9, 16.
[2] The City's service area extends beyond the municipal boundaries into portions of unincorporated Collier County. (Doc. No. 72, City of Naples' Affidavit, ¶ 7.)
[3] Doc. No. 83, Exh. A (Part II, Chapter 30, Articles I-III, including, specifically, Section 30-9).
[4] *See* Debtor's Affidavit (Doc. No. 71, ¶ 5); *see also* City of Naples' Affidavit (Doc. No. 72, ¶¶ 19, 21).
[5] City of Naples' Affidavit (Doc. No. 72, ¶ 19).
[6] *Id.* at ¶¶ 9-11, 15, 27. *See also* City's Code of Ordinances, Section 30-9 (Doc. No. 83, Exh. A).
[7] Doc. No. 37, p. 4.
[8] Doc. No. 43.

On July 11, 2012, while the Debtor's bankruptcy case was pending and the Debtor was still a record owner of the Property, the City sent the Debtor an invoice in the amount of $321.76 for postpetition utility services provided to the Property.[9] On August 1, 2012, the Debtor responded to the City by sending a letter informing the City of his pending bankruptcy (the "Debtor's Letter"). The Debtor requested that the City not contact him again, and warned the City of a possible automatic stay violation.[10] It is undisputed that the City had no knowledge of the Debtor's bankruptcy filing until it received the Debtor's Letter. Upon its receipt of the Debtor's Letter, the City promptly filed the Stay Motion, seeking a determination pursuant to § 362(j)[11] that it had not violated the automatic stay or, alternatively, that the automatic stay had terminated. The Debtor responded by filing the Sanctions Motion.

Notwithstanding the City's receipt of the Debtor's Letter and the Sanctions Motion, the City continued to provide services to the Property. As of December 27, 2012, the City's charges for postpetition utility services had increased to a total of $812.58.[12] The Debtor, based upon his interpretation of the City's Code of Ordinances, disputes his underlying liability for the utility charges.[13] However, the issue of the Debtor's liability is not before the Court, and the Court makes no findings on the issue of the Debtor's liability to the City.

ANALYSIS

Jurisdiction

The Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the Standing Order of General Reference entered in this District. This is a "core" proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (G).[14]

Summary Judgment Standard

Rule 56(a) of the Federal Rules of Civil Procedure, as incorporated by Rule 7056 of the Federal Rules of Bankruptcy Procedure, directs the court to grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Thus, where the facts are undisputed and the only issues to be decided are issues of law, entry of summary judgment is appropriate.[15] The movant bears the initial burden to demonstrate that there are no disputed material facts and that the movant is entitled to judgment as a matter of law.[16] Once the movant has satisfied its burden, the burden then shifts to the non-moving party to show that specific facts exist that raise a genuine issue for trial.[17] The non-moving party cannot satisfy that burden merely by relying on allegations in the pleadings.[18] Nor will legal conclusions suffice.[19] Rather, the non-moving party must present actual evidence, which would be admissible at trial, of specific facts to defeat a properly supported summary judgment motion.[20] Evidence that is merely colorable, or is not significantly probative of a disputed fact, cannot satisfy the non-moving party's burden, and a mere scintilla of evidence is likewise insufficient.[21] Furthermore, if a defendant moves for summary judgment on a plaintiff's claim, summary judgment is appropriate if the defendant demonstrates that the plaintiff will be unable to meet its burden of proof on any of the essential elements of the plaintiff's claim.[22]

---

[9] Doc. No. 53, Exh. B, p. 3.

[10] Doc. No. 53, Exh. B, p. 1.

[11] Unless otherwise stated, all statutory references are to the United States Bankruptcy Code, 11 U.S.C. § 101, *et seq*.

[12] City of Naples' Affidavit (Doc. No. 72, ¶¶ 14-15).

[13] At the March 19, 2013 hearing, the Debtor argued that he is not included within the definition of a "customer" under section 30-2 of the City's Code of Ordinances because he did not personally reside at the Property.

[14] While not technically a motion to "terminate, annul, or modify the automatic stay," courts have nevertheless regarded motions for sanctions resulting from alleged violations of the automatic stay to be core proceedings. *See generally* C.J.S. Bankruptcy § 187. A motion to confirm the absence of the automatic stay would likewise constitute a core proceeding.

[15] 10A Fed. Prac. & Proc. Civ. § 2725 (3d ed. 2012); *West Chelsea Buildings, LLC v. U.S.*, 109 Fed. Cl. 5, 15 (Fed. Cl. 2013).

[16] Fed. R. Civ. P. 56(a); *Coleman v. Circle K. Stores, Inc.*, 2013 WL 2278021, at *1 (11th Cir. May 24, 2013).

[17] *Dietz v. Smithkline Beecham Corp.*, 598 F.3d 812, 815 (11th Cir. 2010).

[18] *Jordan v. Secretary, Dept. of Corrections*, 502 Fed. Appx. 834, 837 (11th Cir. 2012).

[19] *Id*.

[20] Fed. R. Civ. P. 56(c)(2), (4); *Holt v. Blakley*, 167 Fed. Appx. 86, 89 (11th Cir. 2006).

[21] *Johnson v. Secretary, U.S. Dept. of Veterans Affairs*, 2013 WL 1811796, at *1 (11th Cir. May 1, 2013).

[22] *Johnson v. Equifax, Inc.*, 510 F. Supp. 2d 638, 644 (S.D. Ala. 2007).

Only Post-Confirmation Earnings That Are Necessary to Fund the Plan Are Property of the Estate and Protected by the Automatic Stay.

Pursuant to § 362(a), the filing of a bankruptcy petition operates as a stay of all actions to collect claims against the debtor that arose before the commencement of the case or to enforce claims against property of the debtor's bankruptcy estate.[23] This stay, which arises by operation of law the instant that the bankruptcy petition is filed, is commonly referred to as the "automatic stay." Although most of the provisions of § 362(a) impose a stay of actions relating to the collection of prepetition debts, both §§ 362(a)(3) and (4) stay actions against property of the estate without requiring that the action be on account of a prepetition debt. Thus, as to postpetition debts, the automatic stay only applies to the collection of the debt from property of the estate. Section 362(j) provides that, on request of a party in interest, the court shall issue an order under § 362(c) confirming that the automatic stay has been terminated. Section 362(c)(1) provides that the stay of an act against property of the estate continues until the property is no longer property of the estate.

The question is whether the City's invoice to the Debtor was an attempt to collect a debt from property of the estate. The Debtor contends that because he is a Chapter 13 debtor, his postpetition earnings are property of the estate by virtue of § 1306(a)(2). The Debtor reasons that because he would have to satisfy the City's demand for payment from his postpetition earnings, the City has sought to collect its debt from property of the estate in violation of § 362(a)(3).

Under §1306(a)(2), a Chapter 13 debtor's earnings continue as property of the estate until such time as the case is closed, dismissed, or converted to another chapter. But, under § 1327(c), unless otherwise provided in the plan or the order confirming the plan, the confirmation of the plan vests all property of the estate in the debtor. This results in a tension between § 1306(a)(2) and § 1327(c). These code sections appear to be mutually exclusive.

The Eleventh Circuit has addressed this issue in *Telfair v. First Union Mortgage Corp.*[24] In *Telfair*, the debtor made payments to his mortgage lender directly to the lender and not through plan payments made by the debtor to the Chapter 13 trustee. The lender applied the payments it received from the debtor to attorney's fees rather than to the debtor's loan payments. The debtor asserted that the lender had violated the automatic stay because the payments were made from his postpetition earnings, which the debtor claimed were property of the estate.

Analyzing the tension between §§ 1306 and 1327, the Eleventh Circuit discussed the three models that courts have adopted to resolve this conflict: (i) the estate termination approach, in which all property of the estate (including property that has not yet come into existence) becomes property of the debtor upon confirmation; (ii) the estate preservation approach, in which all property of the estate remains property of the estate after confirmation and until discharge, dismissal, or conversion; and (iii) the estate transformation approach, in which "only that property necessary for the execution of the plan" remains property of the estate after confirmation.[25] The Eleventh Circuit adopted the estate transformation approach, striking a compromise between the extremes of the estate termination approach and the estate preservation approach. The court harmonized §§ 1306(a)(2) and 1327(b) "to mean simply that while the filing of the petition for bankruptcy places all the property of the debtor in the control of the bankruptcy court, the plan upon confirmation returns so much of that property to the debtor's control as is not necessary to the fulfillment of the plan."[26] Applying the estate transformation model to the facts in *Telfair*, the court held that because the debtor was paying the lender outside the plan, the loan payments were not necessary to fund the plan and, therefore, were not property of the estate. Accordingly, the court held that the lender had not violated the automatic stay.

Since *Telfair*, the Eleventh Circuit has opined twice more on the interplay of §§ 1306(a)(2) and 1327(b). In *Muse v. Accord Human Resources, Inc.*,[27] the court followed *Telfair*, again holding that "any property interest acquired by [the debtor] after [confirmation] which was not necessary to fulfill the plan, became the property of the debtor."[28] Most recently, the court in *In re Waldron* affirmed the bankruptcy court's findings that the debtor's post-confirmation claim for underinsured motorist benefits

[23] Section 541(a) defines "property of the estate" generally as all legal or equitable interests of the debtor in property as of the commencement of the case.
[24] 216 F.3d 1333 (11th Cir. 2000).
[25] *Id.* at 1340.
[26] *Id.* (citing *In re Heath*, 115 F.3d 521, 524 (7th Cir. 1997)).
[27] 129 Fed. Appx. 487 (11th Cir. 2005).
[28] *Id.* at 489 (finding that an unpaid wage claim, which arose nearly two years after confirmation and which was not necessary to fun the plan, was property of the debtor – not the estate).

was property of the estate.[29] When the debtors sought to settle the claim without further court approval and to retain the resulting proceeds, the bankruptcy court ruled that the claim was property of the estate and that any settlement proceeds had to be disclosed and distributed to creditors. While on its face *Waldron* appears to lend some support to the Debtor's argument because the Eleventh Circuit held that the postpetition property interest was property of the estate, the court itself distinguished the property interests in *Waldron* from those of *Telfair* on the basis that the *Waldron* underinsured motorist claim was an "entirely new property interest."[30] As the court stated in *Waldron*, "[n]ew assets that a debtor acquires unexpectedly after confirmation by definition do not exist at confirmation and cannot be returned to him then."[31] As in *Telfair*, the Debtor's postpetition earnings are not an "entirely new property interest."

In *In re Jones*,[32] the First Circuit's Bankruptcy Appellate Panel ("BAP") addressed facts similar to those herein. The BAP held that the automatic stay did not apply to either a utility provider's demand for payment for postpetition services or its subsequent termination of service for failure to pay. The *Jones* court reasoned that if it held that any act to collect a postpetition debt from a Chapter 13 debtor implicates the automatic stay, the court would be signifying that postpetition creditors could not invoice debtors for postpetition debts without stay relief, as the very act of sending such an invoice would constitute an attempt to collect postpetition debt from the debtor's postpetition income. But, the court held, such a rule would conflict with the general rule that "[p]ost-petition creditors providing a Chapter 13 debtor with goods or services are permitted to invoice debts as they come due and payment by the Chapter 13 debtor from post-petition income does not require authorization by the Court."[33]

While *Jones* did not expressly articulate the estate transformation approach adopted in *Telfair*, the court did signal that it was following that approach in holding that "[t]he inclusion of a debtor's postpetition earnings in her chapter 13 estate is intended to capture for dedication to a chapter 13 plan all funds necessary to effectuate that plan. It does not prohibit a debtor from using postpetition earnings to satisfy postpetition obligations."[34] Implicit in that statement is the concept that if a debtor's postpetition earnings are not necessary to fund the chapter 13 plan, they are the debtor's property to spend as the debtor chooses. This would include the payment of postpetition debts.

Consistent with the holdings of *Telfair* and *Jones*, the Court finds that only that portion of the Debtor's post-confirmation earnings that are necessary to fund the Plan is property of the estate.

The Debtor Did Not Rebut the City's Properly Supported Summary Judgment Motion.

In order to discharge its initial summary judgment burden, the City, as the moving party, is required to demonstrate the absence of any genuinely disputed material fact and its entitlement to judgment as a matter of law. The Court finds that under *Telfair*, *Jones*, and other applicable case law, the City satisfied its burden by demonstrating that its invoice was for a postpetition debt.[35]

Once the City satisfied its initial burden, the burden shifted to the Debtor to present actual evidence that the City had targeted property of the estate. At a hearing concerning relief from the automatic stay under §§ 362(d) and (e), the debtor has the burden of proof on all issues other than whether the debtor has equity in the property.[36] Although the Stay Motion requests an order confirming the absence or termination of the automatic stay under 362(j), given the procedural posture of this case, it is appropriate to apply the burden of proof provisions applicable to a motion under §§ 362(d) or (e). Therefore, it was the Debtor's burden to present evidence that the City's collection efforts were directed to postpetition earnings that were necessary to fund the Plan. The Debtor provided no evidence on this issue and thus failed to meet his burden in opposing the motion. Accordingly, the Court finds that the City is entitled to summary judgment on the Stay Motion.

With respect to the Sanctions Motion, the City is entitled to summary judgment if it is able to disprove

[29] 536 F.3d 1239 (11th Cir. 2008).
[30] *Id.* at 1242.
[31] *Id.* at 1243.
[32] 369 B.R. 745 (1st Cir. BAP 2007).
[33] *Id.* at 750.
[34] *Id.* at 750-51.

[35] *See, e.g., In re Jones*, 369 B.R. at 750 (authorizing postpetition creditors to invoice debtors for postpetition services); *Fleetwood Homes of Georgia v. Morrison*, 263 B.R. 646, 652 (S.D. Ga. 2000) ("money that does not go towards paying the plan is not property of the estate"); *In re Harris*, 458 B.R. 591 (Bankr. N.D. Fla. 2011) (holding that funds used to pay debts that are not included in the plan are not necessary to the fulfillment of the plan).
[36] Section 362(g); *In re Ramos*, 357 B.R. 669, 671 (Bankr. S.D. Fla. 2006).

an element of the Debtor's claim. In order to prevail on the Sanctions Motion, the Debtor needed to prove that the City willfully violated the automatic stay.[37] For the City to have willfully violated the stay, however, it would have had to have known that the automatic stay was in effect.[38] As set forth above, it is undisputed that the City had no notice of the Debtor's bankruptcy filing until it received the Debtor's Letter. Thus, even if the City's invoice was a violation of the stay – which the Court finds it was not – the violation was not willful, and the Debtor is not entitled to damages.

Lastly, the Debtor has acknowledged that under § 366, the City was authorized to terminate utility services to the Property without violating the automatic stay.[39] Section 366(b) permits a utility to discontinue service if "neither the trustee nor the debtor, within 20 days after the date of the order for relief, furnishes adequate assurance of payment, in the form of a deposit or other security, for service after such date." However, despite this acknowledgement, the Debtor contends that while terminating utility service for non-payment of postpetition charges is not a violation of the automatic stay, the mere sending of a bill or notice of non-payment for those same charges is a violation. The Court finds no reason to differentiate between collection methods (*i.e.*, sending invoices for postpetition debt or terminating utility service for failure to pay postpetition debt).[40]

For the foregoing reasons, the City is entitled to summary judgment in its favor on the Sanctions Motion.

[37] *See* § 362(k) (authorizing damages only for injuries resulting from a willful violation of the automatic stay); *see also In re Robinson*, 2012 WL 2847603, at *3 (Bankr. M.D. Fla. July 11, 2012) (stating that the debtor has the burden to establish a violation of the automatic stay and that such violation was willful).

[38] *See Jove Engineering, Inc. v. I.R.S.*, 92 F.3d 1539, 1555 (11th Cir. 1996) (noting that a willful violation requires the creditor (i) to have known of the automatic stay and (ii) to have intentionally committed the violative act); *In re Hardy*, 97 F.3d 1384, 1390 (11th Cir. 1996) (stating that willfulness requires the defendant to have known that the automatic stay was invoked and to have intended the actions which violated the stay).

[39] *See* Transcript of March 19, 2013 hearing (Doc. No. 96, pp. 32-33).

[40] *In re Jones*, 369 B.R. at 750.

The City Is Not Limited to In Rem *Remedies against the Property.*

The Debtor also argues that the City should not be permitted to pursue the Debtor personally for the postpetition utility bills, and that its remedies should be limited to an *in rem* claim against the Property. In support of this position, the Debtor cites Judge Paskay's decision in *In re Nease.*[41] But, Judge Paskay's analysis may also be read to support the City's position on this issue.

In *Nease*, the debtors vacated their homestead and stopped maintaining the property. Ten months later, they filed a Chapter 13 bankruptcy. Their plan provided for the surrender of the homestead to the mortgage lender. On the same day that the debtors filed their bankruptcy, the county in which the homestead was located sent them a notice that the excessive growth on the property was a violation of the county's code of ordinances. The county ordinance permitted the county to perform the work necessary to bring the property into compliance and to impose a fine upon the property owner, which constituted a lien against the property. Given the date of the notice, it stands to reason that the notice of violation was an attempt to enforce a prepetition violation. In response to the notice, the debtors' attorney wrote the county and advised it of the debtors' pending bankruptcy case. Despite having notice of the bankruptcy, the county sent a second notice of violation. The debtors argued that the county's continued efforts to enforce the code violation constituted a violation of the automatic stay. The court disagreed, finding that there was "no doubt that the action of the County was a governmental action within the governing body's 'police and regulatory power,' which falls squarely within the exception to the operation of the automatic stay under Section 362(b)(2) [now 362(b)(4)] of the Code."[42]

After concluding that the police power exception to the automatic stay permitted the county to enforce its ordinance, the court addressed the debtors' argument that the county was prohibited from imposing personal liability against them for the violation and could only impose a lien against the property. The debtors argued that they should not be held personally liable for any monetary fine because they had surrendered the property to the secured creditor. The court rejected the debtors' argument that their surrender of the property relieved them from any personal liability, but nevertheless limited the county's remedy to an *in rem*

[41] 391 B.R. 470 (Bankr. M.D. Fla. 2008).

[42] *Id.* at 472.

proceeding to impose a lien because it would be "patently unfair under the undisputed facts."[43] Notwithstanding this holding, the court went on to recognize that "the imposition of fines and imposition of personal liability on the [d]ebtors *would be technically permissible*," and concluded that the county's actions were not a willful violation of the automatic stay.[44] In light of the court's recognition that *in personam* liability was technically permissible, *Nease* does not generally stand for the proposition that debtors are not personally liable for postpetiton debts, and it does not support the Debtor's argument. And, in any event, *Nease* addressed the police powers exception to the automatic stay - not a postpetition claim.

The fact that the Debtor's Plan provided for the surrender of the Property to the Mortgage Holder does not relieve the Debtor of personal liability for the incidents of ownership of the Property.[45] In *In re Canning*, the court noted that the Bankruptcy Code does not force a creditor to assume ownership of a property or to take possession of a property, even where the debtor has surrendered the property to the creditor.[46] Thus, until a debtor no longer owns the property in question, he remains liable for the incidents of ownership, such as accruing real estate taxes, insurance premiums, and postpetition association fees.[47] The City's utility services in question are likewise an incident of ownership, for which the Debtor remained personally liable until the foreclosure process concluded. Judge Paskay in *Nease* even recognized that "[t]he contention of Debtors' counsel that the action of 'surrender' divested any legal interest of the Debtors in the subject property is improper."[48] Accordingly, the City is not limited to an *in rem* remedy.

CONCLUSION

The City has met its burden to demonstrate that there are no disputed material facts and that it is entitled to judgment as a matter of law on both the Stay Motion and the Sanctions Motion. The burden then shifted to the Debtor to show that specific facts exist that raise a genuine issue for trial. The Debtor has not met this burden. Accordingly, it is

ORDERED:

1. The City's *Motion for Summary Judgment* (Doc. No. 80) is GRANTED.

2. The City's *Motion for Order Confirming Absence or Termination of Automatic Stay* (Doc. No. 53) is GRANTED. Pursuant to § 362(j), the Court hereby confirms that the automatic stay is not in effect with respect to the City's attempt to collect the alleged postpetition utility debts.

3. The *Debtor's Motion for Sanctions as to the City of Naples and Request for Attorneys Fees* (Doc. No. 55) is DENIED.

DONE and **ORDERED** in Chambers at Tampa, Florida, on July 10, 2013.

/s/
Caryl E. Delano
United States Bankruptcy Judge

Attorney, Kimberly Davis Bocelli, Esq., is directed to serve a copy of this order on interested parties and file a proof of service within 3 days of entry of the order.

---

[43] *Id.* at 473.
[44] *Id.* (emphasis supplied).
[45] *In re Arsenault,* 456 B.R. 627, 630-31 (Bankr. S.D. Ga. 2011) (noting that as long as a debtor remains the record owner of the property, he remains liable for the incidents of ownership); *In re Canning*, 442 B.R. 165, 172 (Bankr. D. Me. 2011).
[46] *In re Canning*, 442 B.R. at 172.
[47] *Id.* (citing *Foster v. Double Ranch Ass'n*, 435 B.R. 650, 653 (9th Cir. BAP 2010)).
[48] *In re Nease*, 391 B.R. at 473.