


ORDERED.

Dated: October 01, 2018


Cynthia C. Jackson
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
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In re:

Fernando A. Padilla,

Debtor.

Case No. 6:16-bk-07989-CCJ
Chapter 7

**ORDER DENYING DEBTOR'S MOTION FOR SANCTIONS
AGAINST MARINER FINANCE, LLC AND MARINER FINANCE FLORIDA, INC.**

This case came before the Court for trial on the Verified Amended Motion by Debtor for Sanctions Against Mariner Finance, LLC and Mariner Finance Florida, Inc. (collectively "Mariner") for violating the automatic stay pursuant to Section 362(k) of the Bankruptcy Code (Doc. No. 30, the "Motion for Sanctions"). By the Motion for Sanctions, the Debtor argues that Mariner violated the automatic stay by calling him to request payment despite his intent to surrender Mariner's collateral, and by threatening to revoke his driver's license if he did not sign papers transferring the title of Mariner's collateral. Mariner denies that a stay violation occurred. The Court, having taken evidence (including the testimony of the Debtor, his cousin, and a Mariner representative) and considered the record in this case, denies the Motion for Sanctions.

Background

Fernando A. Padilla (the “Debtor”) filed a Chapter 7 bankruptcy case, *pro se*, on December 9, 2016 (the “Petition Date”). At the Petition Date, the Debtor owned a 2000 Oldsmobile vehicle (the “Van”) encumbered by a lien held by Mariner. The Debtor’s bankruptcy statements disclosed that he intended to surrender the Van to Mariner, but the Debtor did not file a certificate stating that he served the statements on Mariner. Mariner did not receive notice of the Debtor’s bankruptcy case until December 21, 2016.

After the Petition Date, the Debtor received telephone calls from Mariner. The Debtor did not answer all of Mariner’s telephone calls. When the Debtor did answer a call, the Debtor testified that he spoke with only one person - Jasmine Santiago (“Santiago”) - the Senior Assistant Manager of Mariner’s Orlando office. After Mariner received notice of the Debtor’s bankruptcy case, the Debtor testified that he spoke with Santiago in December 2016, January 2017, and April 2017. The Debtor would notate the calls he received from Mariner on his personal calendar.

Two telephone calls with Santiago allegedly occurred on December 23, 2016 and January 23, 2017 (collectively the “Santiago Calls”). During the Santiago Calls, the Debtor testified that Santiago wanted the Debtor to “make a deal” and asked him to visit Mariner’s Orlando office. During this same time period, Mariner mailed the Debtor a reaffirmation agreement for the Van. The Debtor declined to “make a deal” during the Santiago Calls, and asked Mariner to stop calling him. The Debtor’s cousin also testified that he overheard the Santiago Calls, and that the Debtor asked Mariner to stop calling him on the last call.

On January 31, 2017, the Debtor visited Mariner’s Orlando office and brought the Van (which no longer operated) with him. The Debtor had a brief conversation with a manager and gave the manager the keys to the Van. The manager told the Debtor that he could not leave the Van at the office. The Debtor left the office immediately, leaving the Van behind. For the next

couple of months, the Debtor testified that Mariner called him on several occasions. The Debtor did not answer any of the telephone calls.

A tow truck operator arrived at Mariner's Orlando office on April 14, 2017, to remove the Van. On the same date, the Debtor received a telephone call (the "April Call"). During the Debtor's testimony about the April Call, the Debtor sometimes referred to the tow truck operator as having made the call, and at other times Santiago. After the April Call, the Debtor testified that he called the police because he was concerned that Mariner could revoke his driver's license. Having spoken with the police, the Debtor went to the Office that same day (the "April Meeting").

At the April Meeting, the Debtor testified that Santiago told him to sign the papers transferring title to the Van or he could lose his driver's license. The Debtor stated that he signed a document transferring the Van's title. About a week later, the Debtor received a discharge in his bankruptcy case. The Debtor then, with counsel, filed the Motion for Sanctions.

Santiago testified at trial that the Santiago Calls never occurred. Santiago explained that Mariner's policies require employees to notate all telephone calls with customers in Mariner's computer system. And, according to Mariner's computer records, the Debtor did not receive a phone call from Mariner (including Santiago) after December 20, 2017, the date Mariner received notice of the bankruptcy. Santiago testified that once a customer files bankruptcy, Mariner's home office handles all further communications with the customer, and not Mariner's Orlando office. Santiago further testified that she did not work the day of the April Meeting and did not make any telephone calls to the Debtor that day.

Discussion

The filing of a bankruptcy case invokes an automatic stay as provided under Section 362 of the Bankruptcy Code.¹ The automatic stay generally prohibits a creditor from taking any "act" to collect a prepetition debt against the debtor.² An individual injured by any willful violation of

the automatic stay under Section 362 of the Bankruptcy Code shall recover actual damages, including attorney fees and costs, and in appropriate circumstances, may recover punitive damages.³ A stay violation is “willful” if the creditor “(1) knew the automatic stay was invoked, and (2) intended the actions which violated the stay.”⁴ The Debtor has the burden to prove that a willful stay violation occurred and that he or she was injured by the violation.⁵

Here, the Debtor did not meet his burden. The Debtor did not demonstrate that Mariner willfully violated the automatic stay by calling him. As to the telephone calls made by Mariner prior to December 21, 2016, the telephone calls are not willful violations because Mariner did not have notice that the Debtor had filed a bankruptcy case. As to the Santiago Calls, the Court finds that Mariner’s records are credible and that the calls did not occur. But even if the Santiago Calls did occur, the Santiago Calls are not a stay violation.

The Santiago Calls occurred around the time Mariner sent the Debtor a reaffirmation agreement for the Van. Based on the timing of the Santiago Calls and the Debtor’s testimony that Mariner wanted to “make a deal,” the Court finds that the Santiago Calls were merely Mariner’s attempts to negotiate a reaffirmation agreement. A creditor discussing or negotiating a reaffirmation agreement with a debtor does not violate the automatic stay provided that the creditor does not coerce or harass the debtor.⁶ Based on the Debtor’s testimony, the Santiago Calls (if they did occur) did not coerce or harass the Debtor. And even though the Debtor’s bankruptcy statements disclose that the Debtor intended to surrender the Van, Mariner could have been contacting the Debtor about a reaffirmation agreement because the Debtor did not serve Mariner with a copy of the statement as required by Bankruptcy Rule 1007,⁷ and the evidence presented does not demonstrate that Mariner knew about the Debtor’s intent to surrender the Van prior to the Santiago Calls.

As to the April Call, the Debtor did not prove that Mariner made the call or willfully violated the automatic stay. Mariner's records are credible and demonstrate that the April Call did not occur. In addition, Santiago - the only Mariner employee that the Debtor spoke with on the telephone - testified that she did not work that day. The Debtor's own testimony even supports this conclusion by often referring to the tow truck operator as having made the April Call. And, this Court could not ascertain from the Debtor's testimony what Mariner may have said to the Debtor during the April Call if it did occur. Having considered the evidence presented, the Court cannot conclude that Mariner willfully violated the automatic stay by making telephone calls to the Debtor.⁸

The Debtor did not demonstrate that Mariner willfully violated the automatic stay by threatening to revoke his driver's license if he did not sign papers transferring title of the Van. Here, the Court finds Santiago's testimony credible. Santiago testified that she did not work the date of the April Meeting. As a result, Santiago could not have made a threat to revoke the Debtor's driver's license. Although the Debtor testified at one point that Santiago made the threat, most of the Debtor's testimony about the threat appeared to focus on the tow truck operator, and not Santiago. Having considered the evidence presented, the Court cannot conclude that Mariner willfully violated the automatic stay by threatening to revoke his driver's license if he did not sign papers transferring title of the Van.

Finally, the Debtor relied primarily on his testimony to support the Motion for Sanctions at trial. Overall, the Court gave lesser weight to the Debtor's testimony in making the above conclusions. Throughout the trial, the Debtor's testimony was often confusing, nonresponsive, and at times contradictory. The Debtor appeared to need leading questions from his counsel to arrive at the facts needed to support the Motion for Sanctions. This Court spent a significant amount of time after the trial listening to the Debtor's testimony. And having considered the

Debtor's testimony and all other evidence admitted, the Court cannot find that Mariner willfully violated the automatic stay. Accordingly, for the reasons stated above, the Motion for Sanctions (Doc. No. 30) is denied.

Attorney Robert Branson is directed to serve a copy of this order on interested parties and file a proof of service within three (3) days of entry of the order.

¹ See 11 U.S.C. § 362(a)(2010).

² See 11 U.S.C. § 362(a).

³ See 11 U.S.C. § 362(k)(1).

⁴ *Jove Eng'g, Inc. v. I.R.S.*, 92 F.3d 1539, 1555 (11th Cir. 1996).

⁵ See *In re Zajni*, 403 B.R. 891, 895 (Bankr. M.D. Fla. 2008)(Funk, J.); See also *In re Robinson*, 2012 WL 2847603, *3 (Bankr. M.D. Fla. 2012)(Briskman, J.)(debtor has the burden to establish a violation of the automatic stay occurred and such violation was willful); *In re Baldwin*, 2007 WL 4414870, *4 (Bankr. S.D. Fla. 2007)(movant bears burden by a preponderance of the evidence that violator knew of the automatic stay and intended the actions that constitute the stay violation).

⁶ See *In re Jamo*, 283 F.3d 392, 399 (5th Cir. 2002); *Cox v. Zale Del., Inc.*, 239 F.3d 910, 912 (7th Cir.2001); See also *In re Estrada*, 439 B.R. 227, 230 (Bankr. S.D. Fla. 2010)(adopting *Jamo* that "while the automatic stay is in effect, a creditor may engage in post-petition negotiations pertaining to a bankruptcy-related reaffirmation agreement so long as the creditor does not engage in coercive or harassing tactics.").

⁷ Bankruptcy Rule 1007(b)(2) states that "[a] copy of the statement of intention shall be served on the trustee and the creditors named in the statement on or before the filing of the statement."

⁸ As to any other telephone calls from Mariner that the Debtor did not answer, the Debtor failed to demonstrate that Mariner willfully violated the automatic stay. Again, Mariner's records do not show any calls to or from the Debtor after December 21, 2016. And to the extent that any calls did exist, the Debtor did not demonstrate that Mariner made the telephone calls to collect a prepetition debt. Here, the telephone calls could have related to other matters that do not violate the stay, such as reaffirmation agreement negotiations or the Debtor's Van parked at the Office.