ORDERED.

Dated: August 22, 2022

Lori V. Vaughan
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
www.flmb.uscourts.gov

In re	)	
	)	
Kerri L. Rose,	)	Case No. 6:20-bk-04449-LVV
	)	Chapter 13
Debtor.	)	

ORDER DENYING DEBTOR'S MOTION FOR SANCTIONS

At issue is whether M&T Bank violated the automatic stay and codebtor stay by continuing to send statements to the Debtor's non-filing spouse and informing credit reporting agencies that the Debtor's non-filing spouse made late payments on a debt which the Debtor has no personal liability. Having considered the Debtor's request for sanctions for M&T Bank's alleged violation of the automatic stay and codebtor stay, the evidence presented and argument of counsel, the Court denies the Debtor's request for sanctions for the reasons stated below.

Factual Background

In 2017, Kerri L. Rose ("Debtor") and Michael Rose ("Michael"), who are married, purchased a home located at 3028 Egrets Landing Drive, Lake Mary, FL ("Home"). Michael signed a promissory note in the amount of $222,495 ("Note") to purchase the Home.[1] To secure

[1] Bank Ex. 5, Note.

the Note, Michael and the Debtor gave the lender a mortgage on the Home ("Mortgage").[2] The lender later assigned the Note and Mortgage to M&T Bank ("Bank").[3] The Debtor and Michael own the Property.

On August 6, 2020, the Debtor filed for relief under Chapter 13 of the Bankruptcy Code.[4] The bankruptcy schedules listed the Debtor's tenancy by the entirety ownership of the Home and provided that the Bank held a $207,000 claim secured by the Home.[5] The Debtor filed a chapter 13 plan proposing to pay the Bank's claim through the bankruptcy.[6]

The Bank objected to confirmation and filed a secured proof of claim totaling $208,113 ("Claim").[7] The Claim listed arrears totaling $2,031.56 ("Arrears"). In support of the Claim, the Bank attached a claim summary sheet, the Note, the Mortgage and other supporting documents.[8] Two weeks after filing the Claim, the Bank filed a Notice of Postpetition Mortgage Fees, Expenses and Charges that asserted attorney's fees totaling $500 for preparing the Claim ("$500 Attorney Fee").[9] The Debtor amended the chapter 13 plan proposing to pay the Claim, including the Arrears (the "Plan").[10] On December 16, 2020, the Court entered an Order Confirming the Plan ("Confirmation Order"). The Confirmation Order provided that the Bank would receive payments over 60 months consisting of the ongoing mortgage payment, Arrears and $500 Attorney Fee. The Debtor made plan payments to the Chapter 13 trustee, who then disbursed payments to the Bank.

During the Debtor's bankruptcy case, the Bank sent Michael monthly mortgage statements (collectively the "Mortgage Statements") and when the Bank received late payments from the

[2] Bank Ex. 5, Mortgage.
[3] Bank Ex. 5, Note, Assignment of Mortgage.
[4] Doc. No. 1.
[5] Doc. No. 1, Schedule A/B, Schedule D.
[6] Doc. No. 2, p. 3.
[7] Doc. No. 14, Objection to Confirmation. Bank Ex. 5, Claim 6-1. The Bank filed the Claim on September 10, 2020.
[8] Bank Ex. 5, Claim 6-1.
[9] Notice of Postpetition Mortgage Fees, Expenses and Charges filed September 24, 2020.
[10] Doc. No. 19, p.3.

Chapter 13 trustee, the Bank notified credit reporting agencies that Michael had made the late payments.[11] The Mortgage Statements—addressed only to Michael—had a "Bankruptcy Message" on the first page, partly bolded and consistent with other print on the document stating the following:

> **Our records show that you are a debtor in bankruptcy. We are sending this statement to you for informational and compliance purposes only. It is not an attempt to collect a debt against you.**
>
> If your bankruptcy plan required you to send your regular monthly mortgage payment to the Trustee, you should pay the Trustee instead of us. Please contact your attorney or the Trustee if you have questions.
>
> If you want to stop receiving statements, write to us at: M&T Bank, Attn: Customer Asset Management, P.O. Box 5111, Buffalo, NY 14240-5155.

Debtor's counsel responded by mailing the Bank two letters (collectively the "Attorney Letters").[12] The Attorney Letters, which are nearly identical, informed the Bank that it violated the chapter 13 codebtor stay by attempting to collect a debt and notifying the credit reporting agencies that Michael made late payments. The Bank continued sending the Mortgage Statements to Michael and notifying the credit reporting agencies of late payments.

On January 11, 2021, the Bank sent Michael a letter informing him he was behind on his mortgage payments and that loss mitigation programs could allow him to keep the Home or avoid a foreclosure ("Loss Mitigation Letter").[13] The Loss Mitigation Letter began with "[t]he information contained in his letter is for informational purposes only and is not an attempt to collect an obligation" and went on to describe programs such as forbearance, loan modification and deed in lieu of foreclosure. The Bank addressed the Loss Mitigation Letter to Michael only.

[11] Debtor Ex. 1, 5, and 11.
[12] Debtor Ex. 3. Counsel sent a letter on November 2, 2020 and January 8, 2021.
[13] Debtor Ex. 2

Almost a year later, the Bank sent Michael another letter informing him that he was past due for two mortgage payments ("Past Due Letter").[14] The Past Due Letter stated that the Bank was concerned about the missed payments and wanted to assist. A pamphlet titled "Tips to Avoid Foreclosure" was enclosed with the Past Due Letter. Although the Past Due Letter provided a payment address, the amount past due was not provided and stated "[i]f you have already mailed the payments, please accept our thanks." The Past Due Letter was addressed to Michael, not the Debtor.

On June 30, 2021, the Debtor filed the Motion for Sanctions.[15] The Debtor alleged that the Bank violated the automatic stay and codebtor stay by sending the Mortgage Statements, Lost Mitigation Letter and Past Due Letter and by notifying the credit reporting agencies that Michael had made late payments during the bankruptcy case. The Court held an evidentiary hearing on the Motion for Sanctions.[16] The parties examined witnesses, including the Debtor, Michael, Joshua

[14] Debtor Ex. 10.
[15] Doc. No. 31. The Bank filed a response to the Motion for Sanctions. Doc. No. 35. The Debtor filed a reply and supplemental memorandum. Doc. No. 40 and 54.
[16] The hearing occurred on February 2, 2022.

Tejes, who is Debtor's bankruptcy counsel and Tiffany Hall, who is the Bank's representative.[17]

The Debtor testified that she wanted to protect the Home and included the payments to the Bank through her bankruptcy plan. The Debtor knew the Bank had contacted Michael, not her, but she was confused about the Mortgage Statements which resulted in her being emotional and scared about losing the Home. Although the Debtor contacted the Bank several times to obtain information, the Bank would not talk with her due to the bankruptcy.

Michael testified that the Mortgage Statements also confused him. The Mortgage Statements referred to him as a debtor—even though he had not filed a bankruptcy case—and included charges for a $500 bankruptcy attorney fee and a $350 bankruptcy attorney fee. The Loss Mitigation Letter and Past Due Letter also confused Michael because he did not know why he was receiving them. Michael contacted the Bank at least three times to discuss the bankruptcy, but only spoke with a Bank representative once. Even though the Mortgage Statements provided a

[17] Debtor's counsel objected to the Court considering the testimony of Bank's representative, Tiffany Hall, because she was not disclosed as a witness until January 28, 2022 (Doc. No. 55)—four days prior to the hearing—which is untimely under this Court's Order Scheduling Trial (Doc. No. 43). Debtor's counsel argued that the untimely disclosure did not allow her enough time to prepare and as a result, Debtor's counsel did not know "what questions would be asked" of the witness. The Bank responded that it could not determine who would be available to testify at the hearing by the Order Scheduling Trial deadline and due to individuals being absent from the office for COVID-19 or other personal matters, Bank's counsel did not timely file the witness list. The Court took the objection under advisement and allowed the witness to testify, subject to the testimony being stricken upon ruling on the Objection.

A party who untimely discloses a witness may not use that witness to supply evidence at a hearing unless the untimely disclosure was substantially justified or harmless. *Cinclips, LLC v. Z Keepers, LLC*, Case No. 8:16-cv-1076, 2017 WL 2869532 at *3 (M.D. Fla. July 5, 2017). In determining whether an untimely disclosure was substantially justified or harmless, courts consider the following factors: "(1) the unfair prejudice or surprise of the opposing party; (2) the opposing party's ability to cure the surprise; (3) the likelihood and extent of disruption to the trial; (4) the importance of the evidence; and (5) the offering party's explanation for its failure to timely disclose the evidence." *Id*. Having considered these factors, the Court concludes that the Bank's untimely disclosure was harmless. Sanction requests for automatic stay violations are not unusual. Most hearings, including this one, lasted about 2 hours. The Bank's witness list disclosed what the representative would testify about—the Bank's business records and servicing of the loan—which are common inquiries for these contested matters. The Court needs this information to understand the nature and severity of the alleged stay violation. Debtor's counsel should have anticipated that the Bank would have at least one representative present at the hearing familiar with the loan. Furthermore, Debtor's counsel had ample time prior to trial to prepare for an examination of the Bank's witness. Any further continuance of this hearing (which had already been continued once before at the parties' request) would have disrupted the hearing and impacted the Court's docket. Accordingly, the Objection is overruled.

mechanism to stop the statements, Michael did not send any letters requesting that the Bank stop sending the Mortgage Statements.

Tiffany Hall ("Hall), the Bank's representative, testified that the $500 attorney fee referenced on the Mortgage Statements related to the Notice of Postpetition Mortgage Fees, Expenses and Charges filed in this case—the $500 Attorney Fee. Because the Bank did not timely file a Notice of Postpetition Mortgage Fees, Expenses and Charges for the $350 bankruptcy attorney fee referenced on the Mortgage Statements, the Bank has waived the fee.

Discussion

Filing a petition under the Bankruptcy Code[18] imposes, with certain exceptions, an automatic stay of various acts which attempt to enforce prepetition claims or interfere with property of the estate or the debtor. *In re Jacks*, 642 F.3d 1323, 1328 (11th Cir. 2011). Individuals injured by any willful violation of the stay provided by § 362 shall recover actual damages, including attorneys' fees and costs and when appropriate, punitive damages. 11 U.S.C. § 362(k). A "willful" stay violation occurs when the violator knew the automatic stay was invoked and intended the actions which violated the stay. *Jove Eng'g v. IRS (In re Jove),* 92 F.3d 1539, 1555 (11th Cir. 1996). The violator's specific intent to violate the automatic stay is not required. *Id*. *See also In re Sanders*, Case No. 8:20-bk-02731, 2020 WL 6020347, *2 (Bankr. M.D. Fla. Sept. 15, 2020). Individuals seeking damages for stay violations have the burden of proof to establish that the wrongdoer violated the automatic stay and the violation was willful. *In re Rivera*, Case No. 6:09-bk-00340-ABB, 2009 WL 3735834, *2 (Bankr. M.D. Fla. Nov. 5, 2009).

[18] All references to the Bankruptcy Code refer to 11 U.S.C. §§ 101 *et seq*.

The Bank Did Not Violate the Automatic Stay

Although unclear what provisions of § 362(a) the Debtor asserts that the Bank violated, the only provisions that could plausibly apply here are (3), (4), (5) and (6).[19] These provisions enjoin all entities from:

> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
>
> (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; and
>
> (6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title.

11 U.S.C. § 362(a)(3)-(6). Automatic stay provisions, however, do have their limits. Section 362(a) protects the debtor, property of the debtor and property of the estate. *In re Siskin*, 231 B.R. 514, 519 (Bankr. E.D. N.Y 1999). Non-debtor parties or their property are not protected. *Siskin*, 231 B.R. at 519. "The automatic stay does not afford protection or relief for the Debtor's family or their property." *Siskin*, 231 B.R. at 519 quoting *In re Sumpter*, 171 B.R. 835,843 (Bankr. N.D. Ill 1994).

To begin, the Bank did not violate § 362(a)(6)—any act to collect a prepetition claim against the debtor—because the Bank did not collect and does not have a claim against the Debtor. The Bankruptcy Code defines claim as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed,

[19] At the hearing on February 2, 2022, Debtor's counsel referred to § 362(a) generally. The Motion for Sanctions refers to § 362(a)(1) and the Supplemental Memorandum in Support of the Motion for Sanctions refers to § 362(a)(3) and (a)(6). Because the Bank never commenced any employment of process of a judicial, administrative, or other action or proceeding against the debtor, a violation under § 362(a)(1) could not have occurred.

undisputed, legal, equitable, secured or unsecured." 11 U.S.C. § 101(5)(A). Here, the Debtor signed the Mortgage, not the Note. The Mortgage provides "…any Borrower who co-signs this Security Instrument but does not execute the Note ("a co-signer"):..(b) is not personally obligated to pay the sums secured by this Security Agreement."[20] As a result, the Debtor is not obligated to pay the sums secured by the Mortgage (i.e. the Note) and the Bank does not have a right to payment from the Debtor. *See Flagstar Bank, FSB v. Hochstadt*, 405 F.App'x 347 (11th Cir. 2010)(examining identical mortgage provision and determining that spouse who only signed mortgage cannot be held liable beyond interest in the property because the spouse did not sign the note). The Mortgage Statements, Loss Mitigation Letter and Past Due Letter—all addressed to Michael—support the conclusion that the Bank does not have a right to payment from the Debtor. This conclusion does not change because the Debtor included the Bank in her bankruptcy plan and the Bank filed a proof of claim.

Furthermore, the Court concludes that the Mortgage Statements, Loss Mitigation Letter and Past Due Letter were for informational purposes and did not violate the stay. *See In re Brigman*, Case No. 3:13-bk-5073-PMG, 2014 WL 12951445, *3 (Bankr. M.D. Fla. 2014)("Statements or actions that are purely informational, however, are not violations of the stay."). The statements and letters did not request payment from the Debtor and simply informed Michael—a non-filing spouse—about the amounts due under his loan or available loss mitigation options. The Mortgage Statements predominately state that they are for informational purposes only. Although the Debtor and Michael expressed confusion and concern about receiving the statements and letters, the Court did not conclude from their testimony that they felt a "pressure to pay" or harassment from the Bank.

[20] Bank Ex. 5, Mortgage at ¶ 12.

Indeed, the Mortgage Statements instructed Michael to contact his attorney or the Chapter 13 Trustee with questions and instructed Michael to pay the Chapter 13 Trustee and not the Bank if the plan required the regular monthly mortgage to be paid to the Chapter 13 Trustee. Neither the Attorney Letters nor Michael instructed the Bank to stop sending the Mortgage Statements. No doubt the Mortgage Statements caused confusion by referring to Michael as a debtor, but such inaccuracies do not violate the automatic stay. To the extent the Debtor argues the Bank violated § 362(a)(6) by reporting to credit reporting agencies that Michael made late payments, the automatic stay does not protect non-debtor individuals from such actions. *Cf. In re Porcoro*, 565 B.R. 314 (Bankr. D. N.J. 2017)(mere act of reporting a *debtor's* truthful credit information post-petition but pre-discharge does not itself violate the automatic stay). Accordingly, the Bank did not act to collect a prepetition claim against the Debtor.

The Bank did not violate § 362(a)(3)—any act to obtain possession or control of property of the estate—because the Bank's actions did not disturb the status quo of the Home. The Debtor argued that the Bank improperly added fees owed under the Note and Mortgage which reduced the Home's equity and "artificially created an appearance" that the Bank was not adequately protected and could allow the Bank to initiate a foreclosure action.[21] The only fees referenced are a $500 attorney fee (which the Bank confirmed is the $500 Attorney Fee) and a $350 attorney fee referenced on two Mortgage Statements dated October 16, 2020 and November 17, 2020.

As an initial matter, any argument by the Debtor that the Bank violated the automatic stay by adding the $500 Attorney Fee and $350 attorney fee to the amounts owed under the Note and Mortgage in an attempt to obtain possession or control of the Property has been waived. The Confirmation Order provided for payment of the $500 Attorney Fee and the $350 attorney fee

[21] Doc. No. 54, p. 8-9.

appeared on Mortgage Statements dated prior to the Confirmation Order. Section 1327 states that "[t]he provisions of a confirmed plan bind the debtor and each creditor, whether or not the claim of such creditor is provided for by the plan, and whether or not such creditor has objected to, has accepted, or has rejected the plan." 11 U.S.C. § 1327(a). A "plain reading of § 1327(a) makes clear that the binding effect of a confirmed plan encompasses all issues that could have been litigated…" in the bankruptcy case. *In re Gonzalez*, 832 F.3d 1251, 1258 (11th Cir. 2016). The issue of whether the Bank violated the automatic stay by adding the $500 Attorney Fee and $350 attorney fee to the amounts owed under the Note and Mortgage in an attempt to gain possession or control of the Home could have been litigated at or prior to confirmation. As a result, the Debtor waived any alleged stay violation as to the $500 Attorney Fee and $350 attorney fee.[22]

Yet, even if the Debtor did not waive the stay violation claim as to the $500 Attorney Fee or $350 attorney fee, the Debtor's argument still fails. Section 362(a) "prohibits affirmative acts that would disturb the status quo of estate property." *City of Chicago, Illinois v. Fulton*, 141 S.Ct. 585, 590 (2021). Merely retaining power over or control of estate property is not enough—an affirmative act is required. *Id*. Here, the Bank did not take any affirmative act to gain possession or control of the Home. It did not record a *lis pendens* or file a foreclosure action as to the Home. The Bank already held the Mortgage which secured all amounts owed under the Note. The amounts owed under the Note simply increased due to the Debtor's bankruptcy filing. The Debtor did not demonstrate the $500 Attorney Fee charged by the Bank was improper or not allowed under the Note and the Bank waived the $350 attorney fee. The Bank simply retained its mortgage, but took

[22] The Debtor did not demonstrate that the Bank ever formally added the $350 attorney fee to the amounts due under the Note and Mortgage. Although the Mortgage Statements refer to a $350 attorney fee, the Mortgage Statements did not seek payment or include the $350 attorney fee in the monthly payment amount due. The Past Payment Breakdown on the Mortgage Statements also show that no monthly mortgage payments have been applied to fees. At the February 2, 2022 hearing, Hall testified that the Bank waived the $350 attorney fee referenced on the Mortgage Statements. *See In re Jacks*, 642 F.3d 1323, 1328-29 (11th Cir. 2011)(bank's recording of fees on its internal records without any attempt to collect the fees from the debtor or estate or modify the mortgage does not violate § 362(a)(3)).

no affirmative acts to disturb the status quo of estate property—the House—as of the bankruptcy filing.

For similar reasons, the Bank did not violate § 362(a)(4) and (a)(5)—any act to create, perfect, or enforce any lien against property of the estate or property of the debtor.

The Bank Did Not Violate the Codebtor Stay

Section 1301(a) of the Bankruptcy Code states "a creditor may not act, or commence or continue any civil action, to collect all or any part of a consumer debt of the debtor from any individual that is liable on such debt with the debtor, or that secured such debt." 11 U.S.C. § 1301(a). The primary purpose of the codebtor stay is to protect the chapter 13 debtor from indirect pressure a creditor may exert through the debtor's friends or family who may have co-signed a debt. *In re Cain*, 347 B.R. 428, 431 (Bankr. N.D. Fla. 2006). Any protection afforded the codebtor is incidental. *Cain*, 347 B.R. at 431. "For the codebtor stay to apply:(1) there must be an action to collect a consumer debt; (2) the consumer debt must be one owed by the debtor; and (3) the action to collect must be against an individual that is liable on such debt with the debtor." *In re Alvarez Velez*, 617 B.R. 158, 166 (B.A.P. 1st Cir. 2020). *See also, Smith v. Capital One Bank (USA), N.A.,* 845 F.3d 256, 259 (7th Cir. 2016); *In re Fadel*, 492 B.R. 1, 15 (B.A.P. 9th Cir. 2013). "[I]t is not only critical that both the debtor and co-debtor be liable to some third party, they must also both be liable on the particular debt that the creditor is trying to collect." *Cain*, 347 B.R. at 431

Here, the codebtor stay does not apply to Note, or the Bank's actions with respect to the Note and Michael. As previously discussed, the Debtor is not obligated to pay the sums secured by the Mortgage (i.e. the Note) and the Bank does not have a right to payment from the Debtor. *See Flagstar Bank, FSB v. Hochstadt*, 405 F.App'x 347 (11th Cir. 2010)(examining identical mortgage provision and determining that spouse who only signed mortgage cannot be held liable

beyond interest in the property because the spouse did not sign the note). The consumer debt here—the Note—is not owed by the Debtor, and the Debtor is not liable on the Note with Michael. The codebtor stay does not apply to Michael with respect to the Note. Because the codebtor stay does not apply, the Bank's actions of sending the Mortgage Statements, Loss Mitigation Letter, Past Due Letter and of reporting to the credit reporting agencies that Michael made late payments, could not have violated the codebtor stay.

For the reason stated above, it is **ORDERED** that the Motion for Sanctions Due to Willful Violation of Automatic Stay, as supplemented (Doc. Nos. 31 and 54) is **DENIED**.

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Attorney Kateryna Vykhodets is directed to serve a copy of this order on interested parties who are non-CM/ECF users and file a proof of service within 3 days of entry of the order.