

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

In re:

Case No. 8:02-bk-15645-PMG
Chapter 7

LINDA M. BOCZAR,
a/k/a Linda Morrison, Boc
a/k/a Linda Morrison Boczar,

Debtor.

**ORDER ON DEBTOR'S MOTION FOR
CONTEMPT OF COURT AGAINST ROBERTA
ROSS, MERIDIAN KESSLER NEIGHBORHOOD
ASSOCIATION, ALICE BERGER AND
DAVID BERGER**

THIS CASE came before the Court for hearing to consider the Motion for Contempt of Court against Roberta Ross, Meridian Kessler Neighborhood Association, Alice Berger, and David Berger (the Respondents). The Motion was filed by the Debtor, Linda M. Boczar.

In the Motion, the Debtor asserts that the Respondents violated the automatic stay by continuing certain litigation against her in Indiana after the filing of her bankruptcy case. The Debtor therefore asks the Court to sanction the Respondents by awarding her "costs and compensation" for the damages that she incurred as a result of the violation.

Background

On August 9, 2000, Meridian Street Foundation, Alice Berger, and David Berger, among other Plaintiffs, commenced a State Court action in Indiana against the Debtor and other Defendants. Roberta Ross, Esquire (Ross) is the State Court Plaintiffs' attorney.

The Indiana lawsuit related to certain real property located at 4821 N. Meridian Street in Indianapolis.

On December 28, 2000, the Debtor and her husband transferred the Meridian Street property to the Easom Trust.

On August 12, 2002, the Debtor filed a petition under Chapter 7 of the Bankruptcy Code in the Bankruptcy Court for the Middle District of Florida.

The Debtor did not disclose the existence of the pending Indiana lawsuit in response to the question requiring disclosure of pending litigation in her Statement of Financial Affairs filed in the bankruptcy case. Additionally, the Debtor did not disclose any interest in any real property on the schedule of assets filed in her bankruptcy case.

The Debtor did, however, list each of the Respondents as creditors on her schedule of general unsecured creditors.

On August 17, 2002, the Notice of Commencement of Case was served on all creditors scheduled by the Debtor.

On September 23, 2002, the State Court in Indiana entered an "Order Regarding Attorney Fees Said Order Attaching Judgment to Run with the Land." It appears that the Order was entered pursuant to a Motion for Attorneys Fees filed on October 30, 2001, prior to the filing of the Debtor's bankruptcy petition. (Doc. 350, Exhibit A).

In any event, the Order provided that the Debtor and the other State Court Defendants owed Ross the sum of \$2,309.75, representing a portion of the fees incurred by the State Court Plaintiffs in the action. The Order further provided that the award would attach to the land and could be collected by any legal means available to the State Court Plaintiffs. (Doc. 350, Exhibit B).

On November 20, 2002, one month after the entry of the Order, a Suggestion of Bankruptcy was filed in the State Court action. (Doc. 350, Exhibit A).

On March 9, 2004, the Chapter 7 Trustee in the Debtor's bankruptcy case filed a Complaint to avoid the Debtor's transfer of the Meridian Street property to the Easom Trust as a fraudulent transfer. (Adv. 04-144).

On April 6, 2004, the Debtor voluntarily converted her Chapter 7 case to a case under Chapter 13 of the Bankruptcy Code. (Doc. 99).

On the same day, April 6, 2004, the Debtor filed a "Motion to Cite Plaintiffs in a Civil Case and their Attorneys for Contempt of Court." (Doc. 103). The Motion was directed to the Respondents, and also to other Plaintiffs in the State Court action. In the Motion, the Debtor alleged that the Respondents had violated the automatic stay by continuing to prosecute the State Court action in Indiana.

Based on the Debtor's Motion, the Court issued an Order to Show Cause on July 9, 2004. (Doc. 134). In the Order, the Court directed Ross to file a written response explaining why she should not be held in contempt for violating the automatic stay.

On September 30, 2004, Ross filed a Response to the Debtor's Motion to Cite Plaintiff. (Doc. 168). In the Response, Ross notes that the Debtor had transferred her interest in the Meridian Street property in December of 2000, and that "since receiving the bankruptcy notice, all pleadings, hearings and proceedings in the matter have related to the current owners of the property and not Debtor, Linda Morrison Boczar." (Doc. 168, p. 9).

On December 29, 2004, the Debtor's bankruptcy case was re-converted from a Chapter 13 case to a case under Chapter 7. (Doc. 187). The Order re-converting the case provided that all pending motions were denied. Consequently, the Debtor's original Motion to Cite Plaintiffs was not resolved on its merits.

On April 29, 2005, the Court entered a Judgment in the fraudulent transfer action commenced by the Chapter 7 Trustee. The Judgment provided that the transfer of the Meridian Street property to the Easom Trust was a fraudulent transfer, and that title to the property would be vested in the Chapter 7 Trustee upon recordation of the Judgment. (Adv. No. 04-144, Doc. 21).

On July 26, 2005, the Chapter 7 Trustee filed an Emergency Motion to Sell the Meridian Street property. (Doc. 246). The Motion to Sell was granted on August 15, 2005, and the Trustee was ultimately authorized to sell the property. (Docs. 271, 290, 296, 315).

On April 3, 2006, the State Court in Indiana entered a "Determination of Final Attorney Fees Based upon Disposition of Case Through Bankruptcy." The Order provided:

The Court does hereby find that Plaintiffs incurred fees to litigate this matter in the amount of Nineteen Thousand Three Hundred and Sixty-Seven Dollars and Ninety-Two Cents (\$19,367.92). Court further finds that James John Boczar, Linda Morrison Boczar, and the Easom Trust, caused these fees to be incurred and that Plaintiffs recourse should be to attempt to collect them from the United States Bankruptcy Court, Florida.

The Court finds that the Federal Bankruptcy Court, Tampa Division, assumed jurisdiction over the property subject to this

lawsuit during the bankruptcy of Linda Boczar and ordered said property sold to satisfy debts of the debtor.

This Court finds that the attorney fees in this matter preceded Boczar's bankruptcy and as with the previous order of September 2002, would have been attached to the property had it not been taken by the Bankruptcy Court.

The Court instructs Attorney Ross, counsel for the plaintiffs, to seek a remedy from the United States Bankruptcy Court, Middle District of Florida, Tampa Division with this order advising that said fees would also have attached to the real estate as had the previous fees. The Court would request that the Florida Court consider these fees secured for purposes of distribution of assets from the estate.

(Doc. 350, Exhibit I).

On May 10, 2006, Meridian Street Foundation filed Proof of Claim Number 17 in the amount of \$19,367.92 in the Debtor's bankruptcy case. A copy of the April 3, 2006, Order was attached to the Claim. Additionally, on the same date, Ross filed Proof of Claim Number 18 in the amount of \$2,331.01 in the Debtor's bankruptcy case. A copy of the September 23, 2002, Order Regarding Attorney Fees was attached to Claim Number 18.

Discussion

On May 8, 2006, the Debtor filed the Motion for Contempt that is currently under consideration. (Doc. 343). In the Motion, the Debtor primarily asserts that the Respondents obtained the "Determination of Final Attorney Fees" on April 3, 2006, in violation of the automatic stay.

At the hearing on the Motion, the Debtor further asserted in general terms that the Respondents had continued to litigate the State Court action throughout the bankruptcy case in violation of the automatic stay. Consequently, the Debtor asks the Court to sanction the Respondents, and to award her monetary damages as compensation for the violations.

It is generally accepted that a violation of the automatic stay may be sanctioned as a contempt of court. In re Novak, 223 B.R. 363, 367 (Bankr. M.D. Fla. 1997)(citing In re Jove Engineering, 92 F.3d 1539, 1546 (11th Cir. 1996)).

"Section 362 also provides an explicit damage remedy for an individual injured by violation of the stay." In re Novak, 223 B.R. at 367.

Former §362(h) of the Bankruptcy Code, as applicable to this case, provides:

11 U.S.C. §362. Automatic stay

...

(h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorney's fees, and, in appropriate circumstances, may recover punitive damages.

11 U.S.C. §362(h)(Emphasis supplied). For a debtor to be entitled to the remedy provided by former §362(h), therefore, the violation of the stay must be "willful."

A creditor's conduct is "willful" if he "engages in a deliberate act that is done in violation of the automatic stay with knowledge that the debtor has filed a petition in bankruptcy." In re Craine, 206 B.R. 594, 597 (Bankr. M.D. Fla. 1997)(quoting In re Washington, 172 B.R. 415, 419 (Bankr. S.D. Ga. 1994)). In other words, conduct is "willful" if "(1) the creditor knew that the automatic stay was invoked; and (2) the creditor intended the actions which violated the stay." In re Craine, 206 B.R. at 597(citing In re Jove Engineering, 92 F.3d at 1555).

"Willfulness generally connotes intentional action taken with at least callous indifference for the consequences." In re Novak, 223 B.R. at 367(citing In re Jove Engineering, 92 F.3d at 1555(quoting Sizzler Family Steak House, Inc. v. Western Sizzlin Steak House, 793 F.2d 1529, 1535 (11th Cir. 1986)).

In this case, the Court finds that the Debtor's Motion for Contempt should be denied because she has not shown that the Respondents "willfully" violated the automatic stay.

A. The April 2006 Order

First, it does not appear that the "Determination of Final Attorney Fees" that was entered on April 3, 2006, resulted from an effort by the Respondents to circumvent the automatic stay. As set forth above, the 2006 Order awarded attorneys fees to Ross in the amount of \$19,367.92, and provided that she should collect them through the Bankruptcy process.

The State Court in Indiana had been aware of the Debtor's bankruptcy case, of course, since at least

November of 2002 when the Suggestion of Bankruptcy was filed in the pending State Court case. Further, by April of 2006, the State Court also was aware that the Chapter 7 Trustee had recovered the Meridian Street property for the bankruptcy estate, and that the Chapter 7 Trustee had been authorized to sell the property by the Bankruptcy Court.

The record does not reflect that the Respondents attempted to conceal the Debtor's bankruptcy from the State Court before the Order was entered on April 3, 2006.

Additionally, the Order contemplates the collection of the fees only through the bankruptcy process. The Order states, for example, that the Bankruptcy Court had assumed jurisdiction over the Meridian Street property that was the subject of the State Court action, and that the Respondents' recourse is through the Bankruptcy Court. Finally, the State Court expressly instructs Ross to seek her remedy from the Bankruptcy Court.

In this regard, it is noteworthy that Ross filed Proofs of Claim in the Debtor's bankruptcy case shortly after the Order was entered, in accordance with the State Court's instructions. There is no evidence, and the Debtor did not allege, that Ross has attempted to collect the fees awarded in the Order by any means other than the bankruptcy claims.

Although the entry of the Order may constitute a technical violation, the Debtor did not show that the Respondents willfully violated the automatic stay by seeking the entry of the April 3, 2006, Order.

B. The continued litigation

Second, the Debtor asserts that the Respondents continued to litigate the State Court action throughout her bankruptcy case in violation of the automatic stay. She contends, for example, that "motions were continually filed up in the Court," and that she "kept getting cards from the Court up there addressed to me and my husband." (Transcript, p. 7).

It appears undisputed that the subject of the State Court action was the Meridian Street property. It also appears undisputed that the Debtor had transferred her interest in the Meridian Street property prior to the filing of her bankruptcy petition. Consequently, the property was not property of the estate when the bankruptcy case was filed, and was not protected by the automatic stay at that time. In re Murray, 214 B.R. 271, 279 (Bankr. D. Mass. 1997)(quoting In re Saunders, 101 B.R. 303, 305 (Bankr. N.D. Fla. 1989))(Property that was fraudulently

transferred is not property of the estate until it is recovered pursuant to a judicial determination).

In response to the Debtor's allegations, Ross asserts that the Debtor was not involved in any pleadings or proceedings in the State Court action after the Suggestion of Bankruptcy was filed in the case. According to Ross, the action proceeded only as to the property and its nondebtor owners after the Suggestion was filed. (Doc. 168, pp. 8-9; Transcript, p. 10).

The Court cannot determine from the record that the continued litigation included actions against the Debtor, individually, or against her property. The State Court action admittedly proceeded against the property previously transferred by the Debtor, as well as against that property's nondebtor owners. The Debtor has not shown, however, that the continued litigation also included actions taken by the Respondents against the Debtor individually, as distinguished from actions taken by the Respondents against the Meridian Street property and its nondebtor owners.

The Debtor did not establish that the Respondents willfully violated the automatic stay by continuing to pursue the State Court action in Indiana.

Conclusion

The Debtor did not establish that the Respondents "willfully" violated the automatic stay in this case. The "Determination of Final Attorney Fees" entered on April 3, 2006, expressly invoked the Bankruptcy Court's jurisdiction and procedures, and the Debtor did not otherwise show that the Respondents continued to prosecute the State Court action against her individually in violation of the automatic stay.

Accordingly:

IT IS ORDERED that the Motion for Contempt of Court against Roberta Ross, Meridian Kessler Neighborhood Association, Alice Berger and David Berger, filed by the Debtor, Linda M. Boczar, is denied.

DATED this 21st day of February, 2007.

BY THE COURT

/s/ Paul M. Glenn
PAUL M. GLENN
Chief Bankruptcy Judge