UNITED STATES BANKRUPTCY COURT

DISTRICT OF ARIZONA

In Re DOROTHY JONES, Debtor.	Chapter 13 No 02-01h i5-PHX-GBN
DOROTHY JONES, Plaintiff/Debtor, vs. SCOTT E. WILLIAMS, WILLIAMS & ASSOCIATES, et al.. Defendants. **and** MAURICE HOUGLAND. et al.. Parties in Interest.	Adv. No. 02-0791 FINDINGS OF FACT. CONCLUSIONS OF LAW AND ORDER

Plaintiffs cornplaint for violation of the automatic stay of 11 U S.C. § 362(a) was tried to the court as a bench trial on March 25 and April 28. 2003. Closing argument was presented on May *27.2003.*

The court has considered the joint pretrial statement of March 21, 2003, sworn witness testimony, admitted exhibits and the facts and circumstances of this case. The following findings and conclusions are hereby entered:

FINDINGS OF FACT

1. Plaintiff Dorothy Jones ("debtor") filed a chapter 13 bankruptcy case in the District of Arizona on February 1, 2002. *In re Dorothy Jones*, 02-01635-PHX-GBN. The reorganization was unsuccessful and debtor's case was dismissed on January 10, 2003 for her failure to comply with the case trustee's requirements. Dismissal order at administrative docket entry ("dkt") 62.

2. While the bankruptcy was pending and the automatic stay of § 303 (a) was in effect, the record property owner of the premises at 8415 East Emile Zola Avenue in Peoria, Arizona, retained attorney Scott E. Williams of Williams & Associates ("Williams" or "defendant") to eject debtor and another from the property.

3. When debtor ignored a May 31, 2002 written demand to surrender possession, sent by both regular and certified mail, Williams instituted an ejectment suit against debtor in the Peoria precinct Justice Court on June 4, 2002, without first investigating whether debtor was in bankruptcy. Exhibits E, 2; testimony ("test.") of Denice W. Wynn, test. of Scott E. Williams of March 25, 2003.

4. Upon receipt of the Justice Court papers, debtor frantically contacted her bankruptcy counsel on June 6. Counsel dictated and signed a notice of bankruptcy for filing in state court. That court received the notice on June 10. The document contains a slight error in the docket number and is not to be found in the state court's official case file. Bankruptcy counsel did not place a telephone call to defendant Williams, even though defendant's telephone number was listed on the served court papers. However, counsel did direct that a copy of the notice be mailed to defendant. Bankruptcy Counsel doesn't know if a copy was properly mailed or if the envelope was properly typed. Exhibits A, 2, 3; test. of Jay S. Volquardsen.

5. Defendant, unaware that plaintiff was in bankruptcy, proceeded through attorney Andrew M. Hull to obtain a judgment for restitution of the premises on June 10, 2002. Neither debtor nor her attorneys appeared at the state court hearing. Nothing arising at the

hearing or in the case file indicated debtor was in bankruptcy. Exhibit A, Test. of Andrew M. Hull.

6. A writ of restitution was issued by the Justice Court on June 18, 2002. A second notice of bankruptcy, this time including the correct docket number, was served by bankruptcy counsel on June 20.2002. Williams can't recall whether he received this notice. IS he did. he would have sent it to the client's bankruptcy counsel. The justice court judge, reacting to the notice. *sua sponte* on June 20 issued an order suspending all action in the case pending order from the bankruptcy court. Exhibits 4,5. Nothing further occurred in the state case until. approximately six months later. debtor's counsel stated in a letter of December 12. 2002 that he wanted the state case dismissed and had filed a motion to dismiss. Although debtor's motion to dismiss docs not appear in the Justice Court file. defendant Williams filed his own motion to dismiss the action on December 23. The State Court granted defendant's motion on January 10. 2003, vacating the June 10 judgment *nunc pro tunc*. Exhibits A. 7. March 25 test. of Williams.

7. Defendant Williams did not learn that plaintiff was in bankruptcy until his employee Denice Wynn received **a** telephone call from the state court on approximately June 20 advising the June 18 writ would not be executed because of the June 20 bankruptcy notice. Neither Williams nor Ms. Wynn has any recollection of receiving the June 6 bankruptcy notice. Williams has practiced law since 1988 and has handled an estimated 5-7.000 ejectment cases. While he is aware of the automatic stay of bankruptcy, he does not have a practice of investigating whether a party is in bankruptcy before bringing litigation. Defendant is not aware of an attorney who does this.

He receives approximately one bankruptcy notice a month in his practice. Typically either the bankruptcy debtor or debtor's attorney will call or fax bankruptcy case information. That did not occur here. Upon learning of a bankruptcy, defendant's practice is to inform the debtor there is no **need** to appear at the justice court. if an action **has** been tiled. If no action is pending at the time defendant learns of the bankruptcy. no action will be filed. Williams

will notify the justice court. if the debtor hasn't already done so. and recommend his client retain bankruptcy counsel. Once the justice court judges learn of a bankruptcy filing. most automatically enter a standard form order staying the case. as was done in this case. However. Williams' experience is that approximately 30% of the judges automatically dismiss the action upon learning of bankruptcy. Others may place the case on an inactive status to be dismissed in 120 days if nothing further occurs. Defendant rarely has any input on whether the case will be simply stayed or actually dismissed–the judges tend to act on their own. Williams doesn't recall ever being named as a defendant previously in a stay violation action. He is surprised debtor's counsel didn't simply call and inform him of the bankruptcy.

If the case has not been dismissed, but only stayed and bankruptcy counsel obtains a stay lift order from the bankruptcy court. defendant will cause a new summons to be issued and obtain a new hearing date. No request was received from debtor's counsel to dismiss the stayed *Junes* action until her counsel wrote the December 12 letter. Attorney Hull has identical office procedures in the event of bankruptcy. Hull, a landlord and tenant attorney since 1977, **also** does not investigate for a bankruptcy before bringing litigation. Test. of Hull. Williams and Wynn. The Court finds the above testimony credible. Plaintiff presented no controverting evidence.

8. On July 9. 2002 debtor brought this litigation against defendant and others. alleging defendant had willfully violated the automatic stay by proceeding with the justice court action after receiving notice of the bankruptcy. Complaint at Count II. Adversary dkt 1. Debtor has reached settlement with the other defendant parties and has agreed to leave the residence. Dkt. 32.

9. To the extent any of the following conclusions of law should be considered findings of fact, they are hereby incorporated by reference.

Conclusions of law

1. To the extent any of the above findings of fact should be considered conclusions of law, they are hereby incorporated by reference.

2. Pursuant to 28 U.S.C. § 1334 **(a).** jurisdiction of the above bankruptcy case is vested in the United States District Court for the District of Arizona. That court has referred. through 28 U.S.C. §157(a), all cases under title 11 of the United States Code and all adversary proceedings arising under title 11 or related to a bankruptcy case to this court. Amended District General Order of May 20, 1985. The proceeding having been appropriately referred, this court has jurisdiction to determine whether defendant willfully violated the automatic bankruptcy stay. No party has argued to the contrary.

3. Conclusions of law are reviewed *de novo* Factual findings are reviewed for clear error. *American Law Center P.C. v. Stanley (In re Jastrem),* 253 F. 3d 438. 441 (9th Cir. 2001).

4. The bankruptcycode provides a remedy for willful violations of the automatic stay. An individual injured by any willful violation of a stay provided by §362 shall recover actual damages, including costs and attorneys' fees and, in appropriate circumstances. punitive damages. 11 U.S.C. §362 (h). Debtor bears the burden of proof by a preponderance of the evidence. *In re Steenstra,* 280 B.R. 560, 569 (Bankr. Mass 2002) (citing cases).

5. An award of damages under §362(h) requires a showing by the debtor that she sustained an injury from a "willful" violation of the stay. A willful violation does not require specific intent to violate the stay. A violation is willful if a party (1) knew of the stay and (2) the party's actions which violated the stay were intentional. *Eskanos & Adler, P.C. v. Roman (In re Roman)* 283 B.R. 1, 7-**R** (9th Cir. Bankr 2002). This fact finder concludes that plaintiff failed to prove by a preponderance of the evidence that defendant's actions in sending the demand letter. filing suit, serving process and obtaining a judgment was done with knowledge of the pending bankruptcy. *See* finding of fact 7. *c.f. Roman* at 7-10 (awarding attorney's fees on a showing of

slight actual damages when defendant clearly had knowledge of the bankruptcy prior to bringing suit).

6. Certainly had defendant first investigated, he probably would have learned of debtor's pending Chapter 13 case. Such prior investigation could well be a wise policy. Regardless. plaintiff produced no binding authority for the proposition that litigants are legally required to first research whether *the* potential defendant is in bankruptcy before sending demand letters or commencing suit.

7. Plaintiffs principal argument is that defendant was mandated to dismiss the stayed justice court action upon learning oithe bankruptcy. That is not the law. A party violating the automatic stay. through continuing or commencing a collection action in a non bankruptcy forum, must automatically dismiss or *stay* such proceeding or risk possible sanctions for willful violations pursuant to §362 (h). *Eskanos & Adler, P.C. v. Leetien* 309 F. 3d 1210, 1214 (9th Cir. 2002) (emphasis added) (finding liability when creditor failed to either dismiss or stay the state court action. but instead simply stated it would refrain from persisting in the action "...until bankruptcy proceedings sort itself out."). That is not this case. Here the litigation was automatically stayed by the state court itself. There was nothing further for defendant to do. Unlike the circumstances in *Eskanos*, here there was no maintenance of an active collection/enforcement action in state court.

Imposing a duty of mandatory dismissals of stayed litigation would interfere with the bankruptcy court's power *to* annul the automatic stay by granting retroactive stay relief to validate an otherwise invalid action. *Schwartz v. United States (In re Schwartz)* 054 F. 2d 569. 572-73 (9th Cir. 1992). Thus defendant's prompt dismissal of the stayed action when debtor belatedly demanded this was a courtesy. not a legal duty.

8. Plaintiff has not proven her case of a willful stay violation. much less any showing of **actual** damages. The court notes a §362 (h) cause of action should only be used by debtors as a shield. not a sword. *Roman* at 11.

Order

The Court finds for defendants and against plaintiff. Plaintiff's complaint and cause of action will bc dismissed with prejudice.

Dated this 5th day of June, 2003.

George B. Nielsen. Jr.

United States Bankruptcy Judge

copy mailed this 5th **day** of June, 2003, to:

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