

MARK A. WOLBER, ESQ.  
*Attorney for Debtor*  
239 Genesee Street  
Suite 307  
Utica, New York 13501

MARK W. SWIMELAR, ESQ.  
*Chapter 13 Trustee*  
250 South Clinton Street  
Suite 203  
Syracuse, New York 13202

DAVID G. GOLDBAS, ESQ.  
*Attorney for Gwen Deragon*  
258 Genesee Street  
Utica, New York 13502

RE: Phillip Burkart, Sr., Case No. 08-61077

### **LETTER DECISION AND ORDER**

The Court will assume familiarity with the facts of this case. By way of background, the Court sets forth that on January 8, 2009, Phillip Burkart Sr. (“Debtor”) filed a motion pursuant to § 362(k) of the U.S. Bankruptcy Code, 11 U.S.C. §§ 101-1532 (“Code”), alleging a violation of the automatic stay by Gwen Deragon (“Deragon”), Administratrix for the Estate of Ivan Chrisman, and requested damages in the amount of \$21000 and attorney’s fees of \$7,000. Opposition to the motion was filed on January 20, 2009, in the form of an affidavit by David G. Goldbas, Esq. (“Goldbas”), Deragon’s attorney. On January 27, 2009, the Honorable Stephen D. Gerling concluded that there had been a willful violation of the automatic stay and indicated that an evidentiary hearing would be scheduled on the issue of damages. On February 4, 2009, Deragon filed a motion to reconsider the Court’s finding, which was scheduled to be heard on February 24, 2009, which motion Judge Gerling on that date. In the interim, Judge Gerling signed an Order on February 19, 2009, scheduling a hearing to determine the amount of damages and attorney’s fees to be awarded to the

Debtor.

A status conference was held on July 20, 2009, and adjourned to August 11, 2009. At the conference held on August 11, 2009, Goldbas raised the issue of impleading Citizen's Bank with the intent of seeking indemnification should there be an award of damages against Deragon. The Court expressed concerns about its jurisdiction over Citizen's Bank if impleaded by Deragon. Accordingly, the Court requested that Goldbas file a memorandum of law in support of his request by September 11, 2009. The Court indicated that any responses to the request be filed by September 18, 2009.

Deragon filed a memorandum of law on September 11, 2009 (Dkt. No. 77) and served a copy on Debtor's counsel, Mark A. Wolber, Esq., and "co-counsel," David Giglio, Esq., as well as on the chapter 13 trustee, Mark W. Swimelar, Esq. It appears from the Certificate of Service (Dkt. No. 78), that Citizen's Bank was not served with a copy of the memorandum of law. As of today's date, no response to Deragon's memorandum of law has been filed.

Deragon asserts that the Court should exercise jurisdiction over a third party action by Deragon against Citizen's Bank "because there is a significant connection between the action and the Debtor's estate," citing *In re Cuyahoga Equipment Corp.*, 980 F.2d 110, 114 (2d Cir. 1992). Deragon also argues that the inclusion of Citizen's Bank will "preserve judicial resources by consolidating and adjudicating at once all claims related to the alleged stay violation."

The issue of a bankruptcy court's subject matter jurisdiction over a claim for contribution and indemnity in connection with an action to recover damages for a willful violation of the automatic stay was addressed by the Fifth Circuit Court of Appeals in *In re Walker*, 51 F.3d 562 (5<sup>th</sup> Cir. 1995). In that case, the debtor commenced an adversary proceeding against Cadle Company

alleging a violation of the automatic stay. Cadle Company, which held a security interest on the debtor's mobile home, initiated a third party action contribution and/or indemnification for any damages assessed against Cadle Company. The bankruptcy court found that both Cadle Company and the third party defendant had violated the automatic stay and awarded damages against both. On appeal, the district court concluded that the bankruptcy court did not have subject matter jurisdiction over Cadle Company's claim for contribution and indemnity and reversed the bankruptcy court. *Id.* at 563. The Court of Appeals for the Fifth Circuit affirmed the district court's decision.

The court in *Walker* began its discussion by noting that the U.S. Supreme Court "has concluded that 'a right to contribution may arise in either of two ways: first, through the affirmative creation of a right of action by Congress, either expressly or by clear implication; or, second through the power of federal courts to fashion a federal common law of contribution.'" *Id.* at 566, quoting *Texas Indus. v. Radcliff Materials*, 451 U.S. 630, 638 (1981). The court in *Walker* observed that Code § 362 provides no express right to contribution, and the court found no legislative history indicating a congressional intent to create such a cause of action. *Id.* It stated that "[t]here is nothing in the legislative history of § 362 or in the case law interpreting the history to indicate that § 362(h) [the predecessor of § 362(k)] is designed to protect creditors who ignore the automatic stay." *Id.* Nor did the court find an implied right of contribution in the Code. *Id.* at 566-67. In addition, it concluded that there was "no basis on which a right of indemnification or contribution can be found under federal common law." *Id.* at 567.

In its discussion of the bankruptcy court's jurisdiction over the third-party claim, the court in *Walker* acknowledged that it is rooted in 28 U.S.C. § 1334. *Id.* at 568. In *Walker* Cadle

Company argued that the court should consider its third-party claim as being “related to” the debtor’s case, the same argument being made by Deragon’s counsel. However, as pointed out by the court in *Walker*, such jurisdiction is not limitless. *Id.*, citing *Celotex Corp. v. Edwards*, 115 S. Ct. 1493 (1995), a case also cited by Deragon. Indeed, the court in *Walker*, again citing to *Celotex*, pointed out that the bankruptcy court has no jurisdiction over proceedings that have no effect on the debtor. *Id.* at 569. The court concluded that Cadle Company’s claim against the third party defendant would in no way alter the debtor’s rights. *Id.* The court held that the bankruptcy court was without subject matter jurisdiction pursuant to 28 U.S.C. § 157 over Cadle Company’s claim for contribution and/or indemnification. *Id.* at 570.

This Court finds no basis under the circumstances of the matter before it to distinguish the holding in *Walker*. Accordingly, the Court concludes that it lacks jurisdiction over the proposed third party action by Deragon against Citizen’s Bank. The evidentiary hearing in this matter is scheduled for Monday, November 9, 2009, at 1:00 p.m. to address the issue of damages.

IT IS SO ORDERED.

Dated at Utica, New York

this 5th day of October 2009

/s/ Diane Davis  
DIANE DAVIS  
U.S. Bankruptcy Judge