

MARK A. WOLBER, ESQ.  
239 Genesee Street, Suite 307  
Utica, New York 13501

Re: GARRETT GONYEA  
CASE NO. 97-61219

### **LETTER DECISION and ORDER**

The Debtor, Garrett Gonyea (“Debtor”), filed a motion herein pursuant to 11 U.S.C. § 362(h) seeking a determination that a certain post-petition judgment in the amount of \$21,010.68 entered by Northeast Arrhythmia Associates (“Northeast”) on July 21, 1997, constituted a willful violation of the automatic stay imposed by 11 U.S.C. § 362(a). The Debtor seeks actual and punitive damages, as well as attorney’s fees.

Debtor’s motion was filed with this Court on October 22, 2003. The motion was made returnable before the Court on December 23, 2003. It appears that the Motion was served on Northeast by service upon Hayt, Hayt, & Landau, the law firm that entered the judgment on behalf of Northeast, by first class mail, on October 27, 2003. *See* Affirmation of Service of Mark A. Wolber (“Wolber”) dated October 27, 2003. The address utilized for service on Hayt, Hayt & Landau was 600 Northern Boulevard, Great Neck, New York. The Court finds that service of the motion was in compliance with Federal Rule of Bankruptcy Procedure 7004(b)(3). *See In re MS. Interpret*, 222 B.R. 409, 416 (Bankr. S.D.N.Y. 1998).<sup>1</sup>

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<sup>1</sup>The Court also notes that the Notice of Inquest Hearing on Damages was served by the Clerk of this Court on Hayt, Hayt & Landau and Northeast by first class mail on December 30, 2003. *See* Certificate of Mailing by Donna Eggleston, Deputy Clerk dated December 30, 2004 (sic).

On the return date of the motion, there was neither opposition nor appearance by Northeast or Hayt, Hayt & Landau and at that time the Court granted Debtor's motion to the extent of finding that Northeast had willfully violated the automatic stay based on the uncontested allegations contained in the motion papers and the oral argument of Wolber. The Court also vacated the judgment. Because, however, the motion papers did not quantify the amount of damages, and the fact that punitive damages were sought, the Court scheduled an inquest to determine the amount of damages.

An inquest hearing was held before the Court on March 4, 2004, at which Debtor testified under oath. Following the close of the testimony, the Court requested that Wolber submit an affidavit of services in connection with this contested matter, which the Court would consider in determining the amount of attorney's fees to be awarded. At the hearing, Debtor testified that subsequent to the filing of the judgment, he had applied unsuccessfully for several credit cards and, notwithstanding the fact that he had filed bankruptcy, he was repeatedly told that the reason for the credit rejection was the existence of the Northeast judgment. He also testified that he and his wife attempted to refinance their current home mortgage, which is only in his non-debtor wife's name, to take advantage of the lower interest rates, but they were turned down. The pending Northeast judgment was given as the primary reason. The Debtor estimated that he and his wife could have saved approximately \$40,000 in interest over the life of the current 30 year mortgage if they could have refinanced. The Debtor indicated that he had most recently been turned down for a loan needed to finance repairs to his furnace. Finally, it was his testimony that he was also turned down for auto insurance by several carriers due to the existence of the open judgment.

Debtor testified that approximately a year after the filing of his bankruptcy case, he personally contacted Northeast by telephone on three occasions in an effort to have the judgment

removed. Initially, he contacted the cardiology department, using the only phone number he had available, and was told to contact the credit department. He then contacted the credit department and was advised that they would have to locate his records. When he again contacted the credit department, he was advised that the judgment was his problem and that it would not be voluntarily removed by Northeast.

Though the Debtor did not provide any testimony regarding the emotional impact that Northeast's actions had upon him, this Court has previously ruled in connection with a willful violation of the stay under § 362(h) that, "actual damages for emotional distress may nonetheless be granted where other corroborating evidence is presented or the circumstances of the stay violation are so egregious that they obviously merit emotional distress damages." *See In re Ficarra*, Case No. 00-62714, slip op. at 14 (Bankr. N.D.N.Y. April 17, 2000). Here, while the Debtor provided no actual medical testimony or similar proof, the seriousness of the stay violation is obvious. Northeast chose to completely ignore the automatic stay statutorily imposed upon the filing of the Debtor's bankruptcy case and proceeded to enter a judgment based upon a pre-petition debt. Such conduct cannot be tolerated. Debtors should be entitled to the protection of the automatic stay until such time as it is modified, lifted or terminated by operation of law. They should not be harassed by creditors relying on some ill-conceived notion that they are not impacted by the automatic stay. It is clear from the proof presented that Northeast ignored the automatic stay, even though they were clearly listed as an unsecured creditor in Debtor's chapter 7 bankruptcy petition, which was filed with this Court on March 6, 1997. The Debtor did not identify the specific time frames within which he experienced repeated credit rejections, however, the Court can presume that attempted mortgage refinance occurred fairly recently given that interest rates are currently available at record low levels. If that is the case, it would lend much credence to Debtor's assertion that the primary reason

for at least the mortgage refinance rejection was due to the existence of the judgment, and his having filed bankruptcy some seven years earlier was not a contributing factor. While the Court does not reach the conclusion that all of Debtor's post-petition credit rejection was solely the result of the Northeast judgment, it certainly was a serious impediment to the so called "fresh start" to which the chapter 7 discharge entitled him.

Accordingly, this Court will award Debtor actual damages in the sum of \$20,000. In addition, the Court will award Wolber attorney's fees in the sum of \$2,100. With regard to an award of punitive damages, the Court is reminded that such damages are available where there is "an additional finding of maliciousness or bad faith on the part of the offending creditor....." *Crysen/Montenay (In re Crysen/Montenay Energy Co.)*, 902 F.2d 1098,1105(2d.Cir.1990). Here, while Northeast has displayed a complete disregard for the statutory stay imposed by § 362(a), this Court cannot conclude that its conduct rises to the level of maliciousness or bad faith. Thus, the Court declines to award punitive damages.

**IT IS SO ORDERED.**

Dated at Utica, New York

this 29th day of April 2004

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STEPHEN D. GERLING  
Chief U.S. Bankruptcy Judge