

At its regular motion term in Syracuse, New York, on September 18, 2001, oral argument was heard by the Court from Paul T. Lutz (“Debtor”) and 5 Star Business Enterprises of CNY, Inc. (“5 Star”) regarding Debtor’s motion for contempt for violation of the automatic stay. At the close of oral argument, the Court reserved decision on the issue of whether 5 Star’s actions constituted a willful violation of § 362(h) of the Bankruptcy Code. Additionally, an evidentiary hearing was scheduled for November, 8, 2001.

Argument was made on behalf of 5 Star that the pending State Court contempt proceedings are criminal in nature and are, therefore, excepted from the automatic stay pursuant to Code § 362(b)(1). The distinction between civil and criminal contempt was set forth by the Second Circuit in *United States v. Wendy*, 575 F.2d 1025, 1030 n.13 (2d Cir. 1978). According to the *Wendy* case, “[t]he traditional distinction between civil and criminal contempt has been the difference between refusing to do what has been ordered (civil) and doing what has been prohibited (criminal).” *Wendy*, 575 F.2d at 1030 n.13. In the matter presently before this Court, Debtor’s alleged failure to comply with the State Court injunction is a refusal to do what has been ordered, thus constituting civil contempt. Courts have also distinguished between civil and criminal contempt by noting that civil contempt is used to induce a party to comply with a court order, whereas criminal contempt is a vehicle for punishing a party after the harm has been done. *See Id.* at 1030 n.13; *Intern Distrib. Centers, Inc. v. Walsh Trucking Co.*, 62 B.R. 723, 727-28 (S.D.N.Y. 1986). Although the contempt proceedings initiated against the Debtor in the present matter demonstrate an attempt by the state court to vindicate its authority, that alone will not turn the civil contempt proceedings criminal. *See Wendy*, 575 F.2d at 1030 n.13. Finally, according to the Second Circuit in *Wendy*, [there is a] presumption in favor of finding civil as opposed to criminal contempt where there is some doubt as to the nature of the contempt . . . .” *Id.*

Consequently, the Court is persuaded that the pending State Court contempt proceedings are civil, rather than criminal, in nature.

Unlike criminal contempt proceedings, which are undisputedly excepted from the automatic stay by Code § 362(b)(1), jurisdictions are split regarding the application of the automatic stay to civil contempt proceedings. Three separate lines of analysis regarding this issue were described in *In re Rook*, 102 B.R. 490, 493-94 (Bankr. E.D. Va. 1989). The first line of cases views the language of Code § 362(b)(1) to except only criminal contempt proceedings from the automatic stay. *See Rook*, 102 B.R. at 493. Second, some jurisdictions distinguish between contempt proceedings initiated to satisfy a judgment and those commenced for the purpose of punishing. *See id.* The third view focuses on the circumstances of the individual case, rather than its initial label as civil or criminal. *See id.* at 493-94. Given the foregoing, various courts have concluded that certain civil contempt proceedings fall outside the scope of the automatic stay. *See Booth v. Wilson*, 964 F.Supp. 757, 761 (S.D.N.Y. 1997) (holding civil contempt order not stayed by Code § 362(a) in order to vindicate integrity of court); *Stovall v. Stovall*, 126 B.R. 814, 816 (N.D. Ga. 1990) (holding civil contempt orders outside scope of stay insofar as necessary to punish for refusal to comply with previous order); *US Sprint Comm. Co. v. Buscher*, 89 B.R. 154, 156-57 (D. Kan. 1988) (holding that civil contempt proceedings for failure to comply with district court pre-petition injunction and failure to appear for hearing not stayed by Code § 362); *Intern. Distrib. Centers v. Walsh Trucking Co.*, 62 B.R. 723, 729-30 (S.D.N.Y. 1986) (holding that civil contempt proceedings to uphold order of court and not collect on debt are not stayed); *In re Dumas*, 19 B.R. 676, 678 (9th Cir. BAP 1982) (concluding that state court did not violate automatic stay by issuing contempt order for debtor's failure to answer pre-petition subpoena regarding sentencing hearing); *David v. Hooker, Ltd.*, 560 F.2d 412, 418

(9th Cir. 1977) (holding that automatic stay did not preclude district court from compelling debtor to answer interrogatories pursuant to district court order entered before bankruptcy petition filed). Other courts, however, have held that once a debtor files a bankruptcy petition, Code § 362 automatically stays civil contempt proceedings. *See In re Maloney*, 204 B.R. 671, 674 (Bankr. E.D.N.Y. 1996) (stating that “[c]ourts have consistently held that civil contempt orders fall within the scope of the automatic stay under 362(a) of the Bankruptcy Code, but that criminal contempt orders do not”); *In re Allison*, 182 B.R. 881, 886 (Bankr. N.D. Ala. 1995) (holding that if state court finds contempt proceedings to be civil in nature then state court is “of course” precluded by automatic stay from proceeding); *In re Mickman*, 1993 WL 128147, at \*1 (Bankr. E.D. Pa. 1993) (holding that civil contempt proceedings are stayed under Code § 362 and relief from stay only granted under “balance of hardships” test); *Cherry v. Cherry*, 78 B.R. 65, 69-70 (Bankr. E.D. Pa. 1987) (concluding that Code § 362 creates exemption to automatic stay for criminal contempt proceedings but not for not civil); *In re Dervaes*, 81 B.R. 127, 129-30 (Bankr. S.D. Fl. 1987) (noting that exceptions to automatic stay under Code § 362(b)(1) should be strictly construed).

Although extensive authority exists regarding the various views noted herein, this Court is most persuaded by the case law holding that the automatic stay of Code § 362 applies to all civil contempt proceedings. The rationale in *Cherry v. Cherry*, 78 B.R. 65, 69-70 (Bankr. E.D. Pa. 1987) is particularly convincing on this issue. According to the *Cherry* court, only those exemptions specifically listed in Code § 362(b) should be recognized. *See Cherry*, 78 B.R. at 70. Court created exemptions are unacceptable. *See id.* Additionally, the *Cherry* case highlights the extreme power of the automatic stay and its provision for few exceptions. *See id.* Consequently, the *Cherry* court was reluctant to follow an exception without any justification in the Code. *See*

*id.* Given this rationale, this Court is persuaded that Code § 362 automatically stays civil contempt proceedings, and a trial court's authority may be vindicated by seeking relief from the stay as provided for in Code § 362(d).

Based on the foregoing analysis, the Court concludes that 5 Star's pursuance of civil contempt proceedings in State Court after the filing of Debtor's bankruptcy petition is a willful violation of the automatic stay, pursuant to Code § 326(h). The evidentiary hearing, scheduled for November 8, 2001, will proceed for a determination of Debtor's damages. Additionally, the Court will consider Debtor's motion to deny 5 Star's claim and 5 Star's cross-motion for relief from the automatic stay.

IT IS SO ORDERED.