

Richard Croak, Esq.
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Re: THOMAS J. NOTABARTOLO & BOBBIE JO NOTABARTOLO
CH. 13 CASE NO. 03-10777

LETTER DECISION AND ORDER

Thomas J. Notabartolo and Bobbie Jo Notabartolo (the “Debtors”) move the court for an award of compensatory and punitive damages against Household Finance Corporation (“Household”) pursuant to 11 U.S.C. § 362(h), and for civil contempt sanctions against Household pursuant to 11 U.S.C. § 105(a). The court has core jurisdiction over this proceeding pursuant to 28 U.S.C. §§ 157(a), (b)(1), (b)(2)(A), and 1334(b).

The Debtors filed a joint voluntary petition for Chapter 13 relief on February 10, 2003. On their Schedules and Statements required to be filed by 11 U.S.C. § 521 and Federal Rule of Bankruptcy Procedure 1007, the Debtors indicated that: (1) they were the joint owners of a “Single Family House” located at 40 Lafayette Avenue, Coxsackie, New York (the “Residence”), which had a fair market value of \$70,000; (2) Wells Fargo Home Mortgage (“Wells Fargo”) held a first mortgage on the Residence in the approximate principal amount of \$71,415.92 (the “First Mortgage”); (3) Household held a second mortgage on the Residence in the approximate principal amount of \$43,407.03 (the “Second Mortgage”); and (4) Household held a third mortgage on the Residence in the approximate principal amount of \$12,112.72 (the “Third Mortgage”). The docket report in this case shows that Household was served with the Notice of Chapter 13 Bankruptcy Case, Meeting of Creditors, & Deadlines. (*See* BNC Certificate of Service (No. 5).)

Household filed a secured Proof of Claim (Claim No. 2) on February 13, 2003, in the amount of \$43,962.04, arising from a January 2002 Loan Repayment and Security Agreement giving Household a security interest in the Residence, i.e., the Second Mortgage. Household filed a second

secured Proof of Claim (Claim No. 5) on February 24, 2003, in the amount of \$12,211.46, arising from a January 2002 Home Equity Credit Line Revolving Loan Agreement giving Household a security interest in the Residence, i.e., the Third Mortgage.

Together with their Schedules and Statements, the Debtors filed a Chapter 13 plan (the “Plan”) on February 10, 2003. (No. 2.) Paragraph 4 of the Plan indicated their intention to commence an adversary proceeding to modify the Second and Third Mortgages and to strip off the liens of Household as allowed by the decision of the United States Court of Appeals for the Second Circuit in *In re Pond*, 252 F.3d 122 (2d Cir. 2001) (holding that a wholly unsecured mortgage lien may be stripped off in a Chapter 13 proceeding notwithstanding the antimodification exception of 11 U.S.C. § 1322(b)(2)). The Debtors commenced the adversary proceeding by filing an adversary complaint against Household on June 19, 2003. *See Notabartolo v. Household Finance Corp.*, Ch. 13 Case No. 03-10777, Adv. No. 03-90173. Household failed to interpose an answer in the adversary proceeding, and the Debtors moved for a default judgment on August 25, 2003 (Adv. No. 4). The Debtors’ motion was granted by Order dated October 2, 2003 (the “*Pond* Order”). (Adv. No. 8.)

On February 9, 2004, the court issued a Confirmation Order.¹ (No. 25.) The Confirmation Order requires the Debtors to make direct monthly post-petition payments to Wells Fargo on the First Mortgage. On February 2, 2005, Wells Fargo filed a motion to lift the automatic stay pursuant to 11 U.S.C. § 362(d) on the basis that the Debtors had failed to make ongoing post-petition

¹ The Confirmation Order erroneously identifies Household as a secured creditor entitled to disbursements by the Debtor outside of the Plan. To bring this case administratively upright, the court will herein direct the Debtors’ counsel to seek an Amended Confirmation Order from the Standing Chapter 13 Trustee listing Household as an unsecured creditor in accordance with the *Pond* Order.

payments on the First Mortgage. (No. 32.) The Debtors opposed Wells Fargo's motion, and the parties negotiated a Conditional Order approved and entered by the court on April 19, 2005 (No. 43.)

On March 28, 2005, the Debtors moved for an order of contempt against Household (No. 37), alleging that Household continued to contact the Debtors in violation of 11 U.S.C. § 362, and in so doing, Household ignored the *Pond* Order.² The Debtors' motion further alleged that the Debtors had continued to make payments to Household on the Second Mortgage as a result of Household's "harassment," causing the Debtors to fall behind on their First Mortgage. According to the Certificate of Service, filed on March 28, 2005 (No. 38), Household was properly served by certified mail with a copy of the Debtors' notice and motion. Household failed to respond to the Debtors' motion, and the court granted the motion on a default basis by Order dated May 5, 2005 (No. 45). The court issued an Amended Order for Contempt on July 6, 2005 (the "Contempt Order") (No. 47), directing Household to (1) cease all contact with the Debtors, (2) provide an accounting of all money paid to Household by the Debtors on the Second and Third Mortgages since October 2, 2003, and (3) appear at an inquest hearing on November 7, 2005. The court, therefore, issued a Scheduling Order setting the matter down for trial on November 7, 2005. (No. 44.)

The Debtors filed a pre-trial statement setting forth two contested material facts: (1) the appropriate amount of damages to be awarded for Household's 11 U.S.C. § 362 violation; and (2) the appropriate amount of sanctions to be awarded for Household's failure to comply with the

² Although the Debtors' did not separately plead for relief under 11 U.S.C. §§ 105(a) and 362(h), they did request damages for both Household's alleged civil contempt of the *Pond* Order, which falls under the former statute, and Household's alleged continued violation of the automatic stay, which falls under the latter statute. The court, therefore, believes that Household was on notice of both claims being made against it such that relief may be granted to the Debtors on either basis.

Contempt Order. On November 7, 2005, the court heard the testimony of Mr. Notabartolo. Household did not appear on that date.

Mr. Notabartolo testified that: (1) he was contacted by Household via telephone after his bankruptcy filing and told by a Household representative that Household “wasn’t participating in his bankruptcy case” and he, therefore, had to pay Household or it would take action against his home; (2) he received a letter from Household on November 9, 2004, advising “Counsel” that the Debtors were past due on the Second Mortgage (Pl.’s Ex. A); (3) he received another letter from Household on March 8, 2005, again advising “Counsel” that the Debtors were past due on the Second Mortgage (Pl.’s Ex. B); (4) although both letters were addressed to “Counsel,” they were hand-delivered directly to the Debtors by a DHL carrier in a yellow envelope; (5) both letters were signed by Ms. Virginia Rodgers, Bankruptcy Specialist for Household/Beneficial/HSBC; (6) he believed the letters were originals because Ms. Rodgers’ signature, at least on one of the letters, was done in blue ink; (7) he borrowed money from his mother in order to pay Household the alleged past due amount; (8) he received monthly contact from Household either by letter or telephone; (9) he authorized Household on numerous occasions to directly withdraw money from his bank account; (10) he paid Household approximately \$11,432; (11) he and his wife were not contacted by any other creditors during the pendency of their bankruptcy case; (12) he struggled to continue making payments to both Household and Wells Fargo; (13) he often times chose to pay Household before Wells Fargo, causing him to accrue late charges on the First Mortgage; and (14) he received a check from Household dated April 12, 2005, in the amount of \$10,974.72, which was accompanied by a check stub indicating that the monies were being refunded to the Debtors.

The Debtors’ counsel, Richard Croak, Esq., advised the court that his office did not learn of

Household's alleged stay violations until Wells Fargo moved in February 2005 to lift the automatic stay for post-petition defaults by the Debtors on the First Mortgage. Although the letters received by the Debtors from Household were addressed to Counsel, Attorney Croak indicated that his office never received either written or verbal communications from Household. Attorney Croak does not dispute that Household is entitled to some distribution as an unsecured creditor holding a claim in the approximate amount of \$40,000; under the Plan, he estimates that Household is entitled to approximately \$4,500.

Attorney Croak argues, however, that Household should have to pay the Debtors' legal costs in the amount of \$2,776.25 as compensatory damages for its stay violation, and actual damages in the amount \$156.30, which represent late fees paid to Wells Fargo. In addition, he argues that Household should be liable to the Debtors for an unspecified amount of attorney's fees and costs paid by the Debtors to Wells Fargo in connection with Wells Fargo's lift stay motion. Finally, with respect to Household's 11 U.S.C. § 362(a) violations, Attorney Croak argues that the Debtors should be awarded punitive damages in an amount equal to or greater than the total paid by the Debtors to Household post-petition, or \$11,432. In a breakdown attached to the Debtors' pre-trial statement, Attorney Croak requests the following awards: (1) punitive damages in the amount of \$500 for Household's telephone calls and written communications to the Debtors in violation of the automatic stay; (2) punitive damages in the amount of \$1,000 for Household's attempt to mislead the court by directing letters to Counsel, but sending them instead to the Debtors; (3) punitive damages of \$500 for Household's failure to comply with the Contempt Order; (4) punitive damages in the amount of \$1,000 for Household's failure to appear at trial; and (5) punitive damages in the amount of \$10,000 for Household's malicious, bad faith violations of the automatic stay.

When a bankruptcy petition is filed, it operates as an automatic stay which, *inter alia*, prohibits creditors from taking “any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title.” 11 U.S.C. § 362(a)(6). Based on the record before it and Mr. Notabartolo’s testimony, the court finds that Household willfully violated the automatic stay by repeatedly contacting the Debtors post-petition, threatening legal action against the Residence if certain payments were not remitted to Household despite the court’s issuance of the *Pond* Order, sending two letters addressed to “Counsel” directly to the Debtors, and electronically withdrawing funds from the Debtors’ bank account.

As recourse for a violation of the automatic stay provision, a debtor shall recover actual damages, including costs and attorney’s fees, and, in appropriate circumstances, punitive damages.

Id. § 362(h). The Second Circuit has set the standard governing 11 U.S.C. § 362(h):

any deliberate act taken in violation of a stay, which the violator knows to be in existence, justifies an award of actual damages. An additional finding of maliciousness or bad faith on the part of the offending creditor warrants the further imposition of punitive damages pursuant to 11 U.S.C. § 362(h). This standard encourages would-be violators to obtain declaratory judgments before seeking to vindicate their interests in violation of an automatic stay, and thereby protects debtors’ estates from incurring potentially unnecessary legal expenses in prosecuting stay violations.

In re Crysen/Montenay Energy Co., 902 F.2d 1098, 1105 (2d Cir. 1990). In making a determination of whether a creditor’s stay violation was malicious and in bad faith, courts generally consider the (1) nature of the creditor’s conduct, (2) nature and extent of harm to the debtor, (3) creditor’s ability to pay, (4) motives of the creditor, and (5) any provocation by the debtor. *Genesee Court Householders Ass’n, Inc. v. Cohen (In re Cohen)*, Ch. 7 Case No. 01-65784, Adv. No. 01-80197, slip. op. at 19 (Bankr. N.D.N.Y. May 10, 2002) (citing *In re Shade*, 261 B.R. 213, 216 (Bankr. C.D. Ill. 2001)).

In the instant case, the Debtors have established that Household received notice of their bankruptcy filing: Household was listed as a creditor on the Debtors' Schedules and Statements; Household received official notice of the Debtors' filing; and the Debtors notified Household's representatives that they had filed for bankruptcy protection when Household contacted them via telephone post-petition. Moreover, once Attorney Croak became aware of the situation, his office contacted Ms. Rodgers and certain other Household representatives. Household was properly served with the Debtors' *Pond* motion, *Pond* Order, contempt motion, and Contempt Order. There is, therefore, no doubt that Household knew of the Debtors' bankrupt status. Even so, Household continued for approximately two years to collect monthly payments from the Debtors on the Second Mortgage. The Debtors were forced to make the difficult choice each month between paying their First Mortgage on time, or postponing payment to Wells Fargo at the risk of accruing late fees so that they could afford to pay Household and avoid Household's threat of legal action. Given Household's continued silence, the only explanation for its violation of the automatic stay can be malice or bad faith. Accordingly, the court finds that both actual and punitive damages are appropriate.

Mr. Notabartolo was a very credible witness. He testified that the Debtors' purported injuries were purely economic; he and his wife are not alleging any emotional harm for which they could be compensated despite that they struggled to pay Household at a time when they should have had breathing room to reorder their financial affairs. In accordance with the court's directive at the close of the trial on November 7, 2005, the Debtors' attorney has submitted an itemized time sheet showing aggregate legal fees of \$2,776.25 for the period of June 17, 2005 through November 15, 2005 (14.5 hours at a blended hourly rate of approximately \$191.47). After reviewing the time

entries and determining that litigation was unavoidable due to Household's failure to respond to motions and court orders, the court finds that the majority of the fees requested are both reasonable and necessary. *See In re Robinson*, 228 B.R. 75, 85 (Bankr. E.D.N.Y. 1998) (reasonable fee standard is consistent with the remedial nature of section 362(h)). The fee request includes the Debtors' legal costs in defending Wells Fargo's lift stay motion; in light of Mr. Notabartolo's testimony that Household's violation of the stay caused him to make late payments on the First Mortgage, the court concludes that these fees are properly included here. The court, however, reduces the attorney's fees by \$95 (.5 hours at an hourly rate of \$190) for a duplicate entry on November 7, 2005 for Attorney Sandra Poland-Demars' attendance at the damages trial. The court, therefore, finds a fee award of \$2,681.25 to be reasonable under the circumstances.

In addition to the costs of litigation, the Debtors have paid late charges to Wells Fargo in the amount of \$156.30. Accordingly, the court will award an additional \$156.30 in actual damages to the Debtors, bringing their total actual damages award to \$2,837.55. Although the Debtors also requested an additional \$457.28 in actual damages for a monthly payment made by them post-petition and allegedly retained by Household, they have not introduced any evidence to prove that Household's refund check was inadequate. The Debtors did not introduce cancelled checks or any other form of proof of payment at trial. Consequently, this request is denied.

In addition to an award of actual damages, the Debtors' counsel has asked the court to award a sizeable amount to the Debtors for punitive damages. "An award of punitive damages is intended to punish a person for his outrageous conduct and to deter him and others like him from similar conduct in the future." *In re House*, Ch. 7 Case No. 03-67056, slip. op. at 6 (Bankr. N.D.N.Y. Apr. 1, 2005) (internal quotation marks and citation omitted). "Of import in considering whether to

award punitive damages is the gravity and duration of the offense and the extent of the harm caused by the creditor's actions." *Id.* (citing *In re Klein*, 226 B.R. 542, 547 (Bankr. D.N.J. 1998)). In this case, Mr. Notabartolo testified that the duration of Household's violation exceeded two years. Moreover, he testified that Household did threaten to take legal action against the Residence if he failed to pay the Second Mortgage. Household's conduct is particularly egregious in light of its failure to defend the Debtors' *Pond* motion; the evidence clearly shows that Household was served with the *Pond* Order and it, therefore, should have been apprised of its unsecured status so long as the Debtors remained in bankruptcy and completed the Plan. Accordingly, the court awards the Debtors punitive damages of \$2,500.

Despite Household's actions in this case, however, the court does not believe that there is any basis for a finding of civil contempt. "A court may hold a party in civil contempt for failure to comply with an order where (1) the order is clear and unambiguous, (2) proof of noncompliance is clear and convincing, and (3) the party has not been reasonably diligent in attempting to accomplish what was ordered." *In re Stockbridge Funding Corp.*, 158 B.R. 914, 917 (S.D.N.Y. 1993). In this case, the court issued the Contempt Order on March 28, 2005. Household did cease all contact with the Debtors once Attorney Croak became involved and, on April 12, 2005, rather than provide an accounting as directed, Household issued a refund check to the Debtors in the amount of \$10,10,974.72. Thus, Household complied with the spirit if not the letter of the Contempt Order.³

Based on the foregoing, it is hereby

ORDERED, that the Debtors' counsel shall seek an Amended Confirmation Order from the

³ Household cannot be held in contempt for failing to appear at the damages trial on November 7, 2005; as a respondent, Household simply chose not to appear at its own peril.

Standing Chapter 13 Trustee listing Household as an unsecured creditor in accordance with the *Pond* Order; and it is further

ORDERED, that the Debtors' motion for relief pursuant to 11 U.S.C. § 362(h) is granted; and it is further

ORDERED, that the Debtors are awarded \$2,837.55 in actual damages to be paid by Household pursuant to 11 U.S.C. § 362(h); and it is further

ORDERED, that the Debtors are awarded \$2,500 in punitive damages to be paid by Household pursuant to 11 U.S.C. § 362(h); and it is further

ORDERED, that the Debtors' motion to hold Household in civil contempt pursuant to 11 U.S.C. § 105(a) is denied.

Dated: 2/16/06
Albany, New York

/s/ Robert E. Littlefield, Jr.

Hon. Robert E. Littlefield, Jr.
United States Bankruptcy Judge