UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

CORI L. COOGAN — CASE NO. 01-67198

Debtor — Chapter 13

APPEARANCES:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Presently under consideration by the Court is a motion filed by Cori L. Coogan ("Debtor") on July 31, 2004, on shortened notice, seeking damages and attorney's fees for an alleged violation by the Law Offices of Jordan S. Katz, P.C. ("Katz"), as purported attorney for The Upstate National Bank ("Upstate"), of the automatic stay pursuant to § 362(h) of the United States Bankruptcy Code, 11 U.S.C. § 101-1330 (the "Code"), as well as an alleged violation of the codebtor stay provided by Code § 1301(a) . The alleged violations concerned the institution

of a lawsuit ("State Court Action") by Upstate against "Patrick J. Coogan, Ford Motor Credit Company and 'John Doe' and 'Jane Doe', the last two names being fictitious, said parties intended being tenants or occupants, if any, having or claiming an interest in, or lien upon the premises described in the complaint." Opposition to the Debtor's motion was filed on August 20, 2004, by Katz on behalf of Fairbanks Capital Corp., servicing agent for Greenwich Capital ("Respondent"). On September 27, 2004, the Debtor filed her reply.

In the interim, on or about August 3, 2004, counsel representing Upstate wrote a letter to Katz indicating that Katz did not represent Upstate in connection with the State Court Action or the pending Code § 362(h) motion. Katz responded by letter dated August 6, 2004, indicating that due to a failure to record the assignment of a mortgage of Upstate to Premier Mortgage Corp. ("Premier"),[1] subsequently known as Fairbanks Capital Corp., Upstate was incorrectly listed as the plaintiff in the State Court Action. By stipulation, filed with this Court on November 15, 2004, the Debtor's motion was amended to substitute Greenwich Capital and Select Portfolio Servicing, Inc., f/k/a Fairbanks Capital Corp., as the "Respondent." In addition, under the terms of the stipulation, Katz was dismissed as named respondent in connection with the Debtor's motion.

A hearing on the Debtor's motion was held at the Court's regular motion term in Syracuse, New York, on November 16, 2004. Following oral argument, the Court agreed to

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[1] The original mortgage document, dated May 8, 1997 and executed on May 9, 1997, actually identifies the lender as "Premier Mortgage Corp., d/b/a PMC Mortgage Co." *See* Debtor's Exhibit 2. However, in the letter dated August 3, 2004, Upstate's counsel refers to an "attached" Assignment of Mortgage dated April 25, 2000, allegedly assigning the mortgage to Premier. No assignment is attached to the letter (Docket No. 55). The discrepancy of these assertions has no bearing on the matter herein.

schedule an evidentiary hearing for January 19, 2005. The evidentiary hearing was adjourned several times at the request of one or both parties. Ultimately, a hearing was held on September 28, 2005. The matter was submitted for decision on November 28, 2005.

JURISDICTIONAL STATEMENT

This Court has core jurisdiction over the parties and subject matter of this contested matter pursuant to 28 U.S.C. §§ 1334, 157(a), (b)(1) and (2)(O).

FACTS

The Debtor filed a voluntary petition ("Petition") pursuant to chapter 13 of the Code on December 7, 2001. An Order ultimately confirming the Debtor's chapter 13 plan was signed on December 31, 2002. In the interim, the Debtor commenced an adversary proceeding against Premier Mortgage Corp. on May 16, 2002 (Adv. Pro. No. 02-80113) by the filing of a complaint against Premier, Greenwich Capital and Olympus Servicing, L.P., f/k/a Calmco Servicing L.P. (the "Defendants").

According to papers filed in the adversary proceeding, the Debtor and her spouse, Patrick Coogan, executed a note and mortgage with Premier on May 9, 1997, securing a loan of $85,000 ("1997 Note and Mortgage"). *See* Debtor's Exhibits 2 and 3. Allegedly, the loan was later assigned in May 2000 to Greenwich Capital and serviced by Calmco Servicing, L.P. in May 2000. Calmco Servicing allegedly later changed its name to Olympus Servicing. According to

the declaration of Katz, sworn to on April 2, 2004, in September 2002, Fairbanks Capital Corp., now known as Select Portfolio Servicing, Inc., acquired the 1997 Note and Mortgage from Greenwich as its servicing agent.

Upon the Defendants' failure to answer the complaint in the adversary proceeding, on May 7, 2003, this Court issued a Memorandum-Decision and Order ("May 2003 Order") in which it vacated the 1997 Note and Mortgage, and expunged the claim filed by Greenwich Capital for prepetition arrears in the sum of $16,393.76. *See* Debtor's Exhibit 6. On May 13, 2003, the Court entered a judgment against the Defendants in the amount of $20,000, which was comprised of $5,000 in actual damages and $15,000 in punitive damages.[2]

On April 8, 2004, Katz filed a motion on behalf of Greenwich Capital and Olympus Servicing seeking to have the Order and Judgment vacated pursuant to Rule 9024 of the Federal Rules of Bankruptcy Procedure. Said motion was denied by Order of this Court, dated August 2, 2004, following a hearing held on July 27, 2004.

In the interim, the State Court Action was commenced by Katz on or about June 29, 2004, against Patrick Coogan seeking to foreclose on the real property deeded to the Debtor and Patrick Coogan on May 8, 1997 (the "Premises"). *See* Debtor's Exhibit 1. At the evidentiary hearing conducted on September 28, 2005, the Debtor identified a complaint ("2004 Complaint") she was served with in connection with the State Court Action. *See* Debtor's Exhibit 7. She could not recall the date on which she had been served, other than that it was during the week in the early evening. *See* Tr. at 21, Lines 17-24. It was the Debtor's testimony that it was the same document

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[2] The Debtor testified that as of the date of the hearing no payment had been made by Greenwich Capital or any of the defendants in the adversary proceeding of the $20,000. *See* Transcript ("Tr.") of the hearing on September 28, 2005, at 15, Lines 8-10.

as one previously served on her in connection with a 2003 foreclosure action (*see* Debtor's Exhibit 4), except that the caption of the 2004 Complaint did not include the name of "Cori Coogan." *See id.* at 16, Lines 7-14. According to the Debtor, a woman knocked at her door and indicated that she wanted to serve Patrick Coogan. After indicating that her husband was out in the barn, the Debtor testified that the woman gave her the 2004 Complaint, as well as a Notice of Pendency. *Id.* at 17-18. The Debtor acknowledged that she was given only one complaint, that being the one for Patrick. *Id.* at 18, Lines 3-7. According to the Debtor, the woman told her that she knew that the Debtor was in bankruptcy. *Id.* at 19, Line 4.

On cross-examination, the Debtor acknowledged that there was no demand for money or payment from her individually in the 2004 Complaint. *Id.* at 23, Lines 1-6. Upon review of the 2004 Complaint, the Debtor further testified there was no reference to a note and mortgage debt owed by her individually.

The Debtor testified that she was angry, mad and confused and "just didn't understand why I was getting served papers all over again if everything had been vacated and taken away." *Id.* at 19-20, Line 25 and Lines 1-2, respectively. On further cross-examination, the Debtor testified that she had not missed any work as a result of the service of the 2004 Complaint and Notice of Pendency, and she had not sought any medical attention as a result of having been served with the papers. *Id.* at 28-29, Lines 21-24 and 1-2, respectively. According to the Debtor, the stress and anxiety she felt arose prior to the service of the 2004 Complaint at a time when she and her husband had attempted to refinance their mortgage and the prior foreclosure action had been commenced. *Id.* at 34, Lines 1-7.

It is the Debtor's position that in naming "Jane Doe" in the caption of the 2004 Complaint

in the State Court Action and serving the summons and complaint on the Debtor, on behalf of her husband, the Respondent violated the automatic stay by attempting to collect a debt from the Debtor, as well as from the codebtor, namely Debtor's spouse, despite the fact that the underlying mortgage was discharged by virtue of this Court's May 2003 Order. At the hearing, Katz acknowledged having written in his affirmation in opposition to the motion herein that "[a]lthough Cori Coogan was served with the summons and verified complaint for the action against Patrick Coogan, she was served merely as a tenant of the premises and received such papers as a Jane Doe." *Id.* at 43, Lines 3-7. Katz testified that at the time of service, he had no idea "whether or not Cori Coogan, or for that matter anybody, lived in the subject premises." *Id.*, Lines 14-15. At the hearing, he admitted that he now considered her to be a tenant in the property. *Id.* at 44, Lines 3-5. Katz took the position that "there is a valid interest which can be foreclosed, which interest is owed by Patrick Coogan individually" and that after researching the issue, he concluded that there was no need to seek relief from the automatic stay to foreclose on that interest. *Id.* at 45-46, Lines 19-25, 1-2, respectively. He also testified that he had concluded that Patrick Coogan was not a codebtor as defined in Code § 1301. *Id.* at 50, Lines 11-15. He based this conclusion on the premise that "by vacating the individual obligation of Cori Coogan, vacated the joint obligation, or the codebt, of Cori and Patrick and because Cori Coogan no longer owned [sic] that debt." *Id.* at 51.

DISCUSSION

At the completion of the testimony at the hearing on September 28, 2005, the Court

specified three issues to be addressed by the parties:

(1) whether or not the commencement of the State Court Action against Patrick Coogan violated Code § 1301;

(2) whether the commencement of the State Court Action, including the service of the Summons and 2004 Complaint, as well as the Notice of Pendency, on the Debtor, and the inclusion of "John and Jane Doe" in the caption, violated Code § 362(a); and

(3) whether the Debtor's testimony was sufficient to establish actual damages resulting from the actions of the Respondent addressed in (1) and (2).

Code § 1301(a)

Relevant to the matter herein, Code § 1301(a) prohibits a creditor from commencing "any civil action, to collect all or any part of a consumer debt of the debtor from any individual that is liable on such debt with the debtor." Pursuant to the Court's May 2003 Order, "the Note and Mortgage between Cori L. Coogan and Premier Mortgage Corp. d/b/a PMC Mortgage Co. dated May 2, 1997, and apparently thereafter assigned to Greenwich Capital, be and hereby is vacated." Accordingly, the debt owed by the Debtor in connection with the 1997 Note and Mortgage, including prepetition arrears in the sum of $16,393.76, was expunged.

The Debtor argues that by virtue of the Court's May 2003 Order, the Note and Mortgage was also vacated as to Patrick Coogan. In *In re Spires*, Case No. 90-10115, Adv. Pro. 90-1078, 1991 WL 11002451, at *1 (Bankr. S.D. Ga. Feb. 21, 1991) the debtor requested a declaration by the court that the right of the creditor to collect the underlying debt from the codebtor be forfeited as a result of its violation of the stay in contacting the codebtor to exert pressure on the debtor to pay the debt. The court awarded damages pursuant to Code § 362(h) and enjoined the creditor

from any further "direct or indirect contact" with the debtor or the codebtor. *Id.* at *3. However, it declined to declare the creditor's right to collect the debt from the codebtor forfeited, noting that "[t]his court cannot order such an impairment of the rights of [the creditor] as the debtor's plan cannot extend a codebtor protection beyond the limited protection provided in the Bankruptcy Code." *Id.* The same holds true with respect to this Court's authority pursuant to Code § 105, which is limited to the parameters of the Code, as well.[3] *See In re United Health Care Org.*, 210 B.R. 228, 232 (S.D.N.Y. 1997).

Accordingly, at the time the State Court Action was commenced, there was no consumer debt[4] owing by the Debtor for which collection was being sought. Therefore, the only individual liable on the debt at the time the State Court Action was commenced was Patrick Coogan, whose name also appeared on the 1997 Note and Mortgage. Thus, the Court concludes that the actions taken by Respondent to enforce the 1997 Note and Mortgage as against Patrick Coogan did not violate the codebtor stay pursuant to Code § 1301(a).[5]

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[3] In this case, the Debtor has not moved pursuant to Code § 105 to have the Respondent stayed from proceeding with its foreclosure against a nondebtor, namely Patrick Coogan. Thus, the Court need not discuss whether there is a basis for such relief under the circumstances.

[4] The legislative history indicates that "'consumer debt does not include a debt to any extent that debt is secured by real property.'" *In re Bertolami*, 235 B.R. 493, 495 (Bankr. S.D. Fla. 1999), quoting 124 Cong. Rec. H11090 (daily ed. Sept. 28, 1978); S17406 (daily ed. Oct. 6, 1978). While there is case law to the effect that debts secured by real property are not consumer debts, this Court agrees with those cases holding to the contrary. *Bertolami*, 235 B.R. at 496 (reviewing the line of cases holding that such debts are consumer debts and declining to rely simply on the "stray comments" of individual legislators).

[5] The Court would also note that even if the codebtor stay existed, the Code does not provide for the award of damages and attorney's fees upon its violation. *See In re Hughes*, Case No. B0580389C13D, 2005 WL 1293982, at *1 (Bankr. M.D.N.C. May 2, 2005); *see also Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 257-262 (1975) (indicating that in the absence of statutory authorization, a prevailing party is not entitled to an award of attorney's fees); *but see In re Bertolami*, 235 B.R. 493, 498 (Bankr. S.D. Fla. 1999) (reserving jurisdiction

Code § 362(a)

The next issue concerns whether the commencement of the State Court Action, including the service of the Summons and 2004 Complaint, as well as the Notice of Pendency, on the Debtor, and the inclusion of "John and Jane Doe" as tenants of the subject premises, violated Code § 362(a). In this regard, the Debtor acknowledged that there was no demand for money or payment from her individually in the 2004 Complaint and no reference to a note and mortgage debt owed by her individually. According to her testimony, the process server served the Debtor with a single complaint for her husband who was not in the house at the time.

Code § 362(h) provides that "[a]n individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorney's fees, and, in appropriate circumstances, may recover punitive damages." 11 U.S.C. § 362(h). Thus, in order for sanctions to be imposed pursuant to Code § 362(h), the Debtor must establish (1) that the action taken violated the automatic stay; (2) the violation was willful; and (3) the debtor was injured as a result of the violation. *In re Clayton*, 235 B.R. 801, 806 (Bankr. M.D.N.C. 1998).

Recognizing that the Debtor no longer was liable on the 1997 Note and Mortgage, Katz testified that the State Court Action sought only to foreclose on Patrick Coogan's interest in the premises as a tenant by the entirety. In *Matter of Cameron*, 164 B.R. 428 (Bankr. D. Conn. 1994), the court concluded that in a chapter 13[6] the debtor remains in possession of all property

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to award compensatory damages, fees and costs to the debtor for violation of the codebtor stay); *Matter of Sommerdorf*, 139 B.R. 700, 702 (Bankr. S.D. Ohio 1991) (finding a violation of the codebtor stay and awarding reasonable attorney fees to the debtors).

[6] This is to be distinguished from the situation in which the debtor filed a petition pursuant to chapter 11 or chapter 7 in which the interest in the entireties property transfers to the debtor in possession or trustee, respectively. *See Cameron*, 164 B.R. at 430 (distinguishing cases

of the estate pursuant to Code § 1306(b). Included in property of the estate was the debtor's right of survivorship. The court, applying Connecticut law, found that foreclosure of the nondebtor's interest in the property would destroy the right of survivorship and affect property of the estate, which is prohibited pursuant to Code § 362(a)(3). *Id.* at 430.

Under New York law, however, the Debtor's right to occupy the Premises, as a tenant by the entirety, is unaffected by a judgment of foreclosure and ultimate sale of the nondebtor's interest in the real property. *See Berlin v. Herbert*, 48 Misc.2d 393, 395 (N.Y. Dist. Ct.1965); *Humes*, 163 Misc. at 855. Her right of survivorship continues and in the event that her husband, Patrick Coogan, were to die before her, the Premises would become completely hers, "unaffected by the lien of the judgment against her." *Id.* Furthermore, any purchaser of the interest of Patrick Coogan in the Premises at a foreclosure sale would be subject to the Debtor's right of survivorship. *See Berlin*, 48 Misc.2d at 395. Thus, the Debtor's right to occupy the Premises continues during her natural life to the exclusion of any purchaser "on the execution sale of her husband's interest." *Id.* In addition, she is entitled to have her husband reside with her on the Premises as her guest. *See id.* at 395-96. However, should the Debtor die prior to her husband, title to the entire property would vest in the purchaser. *Humes*, 163 Misc. at 855. Accordingly,

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in which the debtor had filed a chapter 7 petition). The Respondent, in making its argument, cites to this Court's decision in *In re Lyons*, 177 B.R. 767, 770 (Bankr. N.D.N.Y. 1994), *aff'd*, 177 B.R. 772 (N.D.N.Y. 1995). That case involved a chapter 11 case in which the ownership in the property, which was comprised of rents generated by the real property held by the debtor and nondebtor spouse, was converted into a tenancy in common, held by the debtor in possession and the nondebtor spouse by virtue of the bankruptcy filing. *See, generally, Finnegan v. Humes*, 163 Misc. 840, 854 (N.Y. Sup. 1937), *aff'd*, 252 A.D. 385 (N.Y. App. Div.), *aff'd*, 277 N.Y. 682 (N.Y. 1938), citing *Hiles v. Fisher*, 144 N.Y. 306 (N.Y. 1895); *see also In re Tyson*, 48 B.R. 412 (Bankr. C.D. Ill. 1985) (applying Illinois law and holding that a filing of a chapter ll severs the joint tenancy held by the debtor and his non-debtor spouse).

the Court concludes that the commencement of the State Court Action, including the naming of "John and Jane Doe" as fictitious occupants of the Premises and the service of the 2004 Complaint on the Debtor, did not violate the automatic stay because it did not seek to collect a debt from the Debtor and because it did not affect the Debtor's interest in the Premises, namely her right of survivorship.

Because the Court concludes that the Respondent did not violate the codebtor stay set forth in Code § 1301(a) or the automatic stay set forth in Code § 362(a), it is unnecessary to address the third issue involving whether an award of damages and attorney's fees to the Debtor is warranted.

Based on the foregoing, it is hereby

ORDERED that the Debtor's motion seeking damages for an alleged violation of the codebtor stay pursuant to Code § 1301(a) is denied; and it is further

ORDERED that the Debtor's motion seeking damages pursuant to Code § 362(h) for an alleged violation of to automatic set forth at Code § 362(a) is denied.

Dated at Utica, New York

this 28th day of March 2006

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge