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Re: Edward Firnstein
Case No. 03-66792 Chapter 13

LETTER DECISION and ORDER

The Debtor, Edward Firnstein ("Firnstein" or "Debtor"), filed a motion herein pursuant to § 362(h) of the U.S. Bankruptcy Code, 11. U.S.C. §§ 101-1330 ("Code"), seeking a determination that certain post-petition collection activity engaged in by Syracuse Fire Department Employees Federal Credit Union ("EFCU") constituted a willful violation of the automatic stay imposed pursuant to Code § 362(a).

Debtor's Amended Notice of Motion was filed with this Court on January 20, 2004. It appears that the Amended Notice of Motion was served on EFCU by certified mail on January 21, 2004, to the attention of "William Ryan, CEO." *See* Certificate of Service of Natalie Johnson dated January 21, 2004. The address utilized for service on the EFCU was P.O. Box 971, Syracuse, NY 13201. The motion was made returnable before this Court on February 17, 2004.

On the return date of the motion, there was neither opposition nor appearance by the EFCU and the Court granted Firnstein's motion to the extent of finding that EFCU had willfully violated the automatic stay based on the uncontested allegations contained in the motion papers and the oral

argument of Wayne Bodow, Esq. ("Bodow"), Debtor's attorney. Because, however, the motion papers sought "actual, statutory and punitive damages," the Court scheduled an inquest to determine the total amount of damages to award.

An inquest hearing was held before this Court on May 6, 2004, at which time the Debtor appeared and testified under oath. Following the close of testimony, the Court requested that Bodow's office submit an affidavit of services in connection with this contested matter which the Court would consider in order to determine the amount of attorney's fees to be awarded. At the hearing, Firnstein testified that subsequent to the filing of his Chapter 13 bankruptcy petition on October 8, 2003, he continued to receive monthly billing statements from EFCU, which had been listed as a creditor in his bankruptcy case. He indicated that initially he thought perhaps that receipt of the monthly billings was simply due to a mixup or that his attorney had made some kind of mistake. He called EFCU and spoke with either "Lynn" or "Kiki" and was told that because he had filed a Chapter 13 bankruptcy, EFCU could continue to bill him monthly. The Debtor testified that he received both monthly billings and collection letters, all post-petition, many of which were introduced as exhibits at the hearing. He indicated that he grew anxious because he believed that post-filing he would only make one payment to the Chapter 13 Trustee. The situation was exacerbated by the Debtor having to undergo major surgery in January 2004, and it was his testimony that he and his fiancee would have periodic arguments resulting from the continued collection activity. Debtor testified that as late as May 1, 2004 he was continuing to receive monthly bills from EFCU.

Following the close of testimony, Theodore Araujo, Esq. ("Araujo"), an attorney with the Bodow Law Offices who represented Firnstein at the inquest hearing, pointed out to the Court that

there was absolutely no dispute that EFCU received notice of the Debtor's Chapter 13 filing because it had retained counsel to file a motion for relief from the automatic stay in the case in order to repossess a trailer owned by the Debtor.[1] Araujo argued that EFCU's conduct in violating the automatic stay was all the more egregious because it was fully aware of the bankruptcy case and it was represented by counsel in connection with the case. He urged the Court to consider the damages awarded by a bankruptcy court in the case of *In re McCormack*, 203 B.R. 521 (Bankr. D.N.H. 1996). Araujo also noted that in this case the Chapter 13 Trustee was claiming any damages Firnstein might obtain as "disposable income" and, thus, subject to turnover to the Trustee for distribution to his creditors. He asked, generally, that in the event the Court were to award punitive damages and were to determine that some portion of those damages did not constitute "disposable income" that that portion of the award be withheld from any payments being made to EFCU under the Debtor's Chapter 13 Plan to the extent that EFCU had not paid the award.

This Court has previously ruled in connection with a willful violation of the stay under Code § 362(h) that "actual damages for emotional distress may nonetheless be awarded 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 expert testimony regarding emotional distress, the seriousness of the continuing stay violation is obvious. Based on Debtor's conversation with representatives of EFCU, it appears that it is under some mistaken belief

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[1]The Court takes judicial notice that on October 5, 2003, EFCU, represented by the firm of Riehlman, Shafer and Shafer, filed a motion in the Chapter 13 case seeking relief from the automatic stay with regard to a PP-2002 Tracker Targo. On November 20, 2003 this Court signed an Order granting EFCU's motion.

that the chapter under which a debtor files his/her petition dictates whether or not that debtor is protected by the automatic stay imposed by Code § 362(a) post-petition. Even assuming EFCU harbors such an erroneous belief, the Court does not consider it to be a mitigating factor on the issue of actual damages. EFCU took an active role in this bankruptcy case, causing its attorneys to file a motion for relief from the automatic stay regarding an item of the Debtor's personal property. It cannot now plead ignorance of the bankruptcy laws to shield itself from actual damages.

Accordingly, the Court will award the Debtor actual damages in the sum of $10,000. In addition, the Court will award Bodow attorney's fees of $1,207.50 and reimbursement of expenses in the amount of $39.60. The Court declines to award punitive damages as it is reminded that in this Circuit such damages are available only where there is "an additional finding of maliciousness or bad faith on the part of the offending creditor." *Crysen/Montenay Energy Co. v. Esselen Assoc., Inc.* (*In re Crysen/Montenay Energy Co.*), 902 F.2d1098,1105 (2d Cir. 1990). Under all of the facts available here, the Court cannot conclude that the creditor's conduct rises to the level of maliciousness or bad faith.

IT IS SO ORDERED.

Dated at Utica, New York
this 17th day of August 2004

STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge