UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

JOSEPH L. HAFELE
MARY L. HAFELE

CASE NO. 99-63036

Chapter 13

Debtors

APPEARANCES:

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

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

Under consideration by the Court is a motion filed by Joseph L. Hafele and Mary L. Hafele ("Debtors") on July 19, 2001, pursuant to § 362(h)[1] of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code"). Debtors seek a determination by the Court that G.E. Capital Mortgage Services, Inc. ("G.E. Capital"), Home Loan and Investment Association ("HL&IA"), and Wells Fargo Home Mortgage, Inc. ("Wells Fargo") (hereinafter jointly referred to as "Respondents") violated the automatic stay and that they are entitled to an award of actual and punitive damages, as well

[1] Debtors' motion also refers to Code §§ 362, 541, 542 and 544. In this regard and based on the evidence presented and the arguments made by Debtors' counsel, the Court will limit its discussion to Code § 362(h).

as costs and attorney's fees. Debtors also request an accounting and reconciliation in connection with the mortgage on their residence held by Wells Fargo.[2] Opposition to the Debtors motion was filed on August 20, 2001.

The motion was scheduled to be heard on August 21, 2001, in Binghamton, New York. After three consensual adjournments, oral argument on the motion was finally heard on November 13, 2001. At that time, the Court indicated that it would schedule an evidentiary hearing to resolve the matter.

The evidentiary hearing was scheduled for February 12, 2002, and was adjourned to March 20, 2002. On March 20, 2002, the Court heard testimony from Debtor Joseph L. Hafele ("Hafele"). The Respondents did not present the testimony of any witnesses. The Court requested that counsel provide it with memoranda of law in lieu of any closing arguments by April 24, 2002. On or about April 23, 2002, Debtors' counsel requested a one week extension on consent of G.E. Capital-Wells Fargo's counsel, which the Court granted. The matter was submitted for decision on May 1, 2002.

JURISDICTIONAL STATEMENT

The 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), (b)(2)(A) and (O).

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[2] In responding to the Debtors' motion herein, Wells Fargo Home Mortgage identifies itself as the "successor in interest to GE Capital Mortgage Services, Inc." *See* Debtors' Exhibit 1.

FACTS

According to Hafele, the Debtors purchased their residence on December 10, 1994, subject to a mortgage originally held by Home Credit Corporation and assigned to HL&IA that same day in the original amount of $75,200. *See* Exhibit "A" attached to Debtors' Exhibit 3 (Motion for Order Granting Relief from Automatic Stay, filed by HI&LA on June 13, 2000). Under the terms of the note executed along with the mortgage on December 10, 1994, the Debtors were obligated to pay $723.29 per month in principal and interest beginning January 15, 1995, over a period of twenty years. *See id.*

On or about February 25, 1999, Debtors received an Annual Escrow Account Disclosure Statement - Projections for Coming Year - New Payment Calculation from G.E. Capital Mortgage Services, Inc. ("G.E. Capital"). *See* Debtors Exhibit 8. According to the Disclosure Statement, a deficiency of $5,234.16 existed in the Debtors' escrow account. *Id.* It calculated that the Debtors' monthly payment would need to be increased from $878.24, covering $723.29 in principal and interest and $154.95 in monthly escrow, to $1,126.55, effective with the April 15, 1999 payment. *Id.*

Debtors filed a voluntary petition pursuant to chapter 13 of the Code on June 2, 1999. In their schedules, the Debtors identified G.E. Capital as having a secured claim of $69,796.69. *See* Schedule D. According to the Debtors' plan ("Plan"), also filed on June 2, 1999, they proposed to pay G.E. Capital's arrears and unpaid escrow of approximately $5,000 through the plan. They also agreed to make monthly payments of $878.24 "under the Mortgage and Mortgage Note, with said monthly payment applying $723.29 to principal and interest, and $154.95 to a monthly escrow

account, as set forth in the analysis of G.E. Capital provided Debtors." *See* Debtors' Plan at ¶ 2(b)(2).

HL&IA filed a proof of claim[3] on July 6, 1999, in the amount of $76,497.63, including $2,353.10 in arrears for April and May 1999, based on monthly payments of $1,126.55, and an escrow shortage of $6,700.94. By letter dated October 13, 1999, and directed to the Courtroom Services Manager, Fred Grimaldi, HL&IA indicated that they were withdrawing their objection to the Debtors' Plan and agreed "that the correct regular monthly payment amount is $878.24. Home Loan will amend their claim to $6,204.32, which reflects said amount. The debtors' [sic] will provide for Home Loan's claim in full and will be filing an amended plan accordingly." *See* Letter contained in Debtors' Exhibit 2 from Joseph Pelo the law firm of Polk, Scheer & Prober. However, a Bankruptcy Payment Coupon, included with a letter from G.E. Capital, addressed to the Debtors and dated October 20, 1999, continued to reflect a monthly payment of $1,126.55 due October 15, 1999. *See* Debtors' Exhibit 6. The letter states that "You will be receiving this letter in place of your normal monthly statement. * * * THIS LETTER IS BEING SENT AS A COURTESY AND IN NO WAY MODIFIES OR WAIVES ANY EXISTING ORDERS ENTERED BY THE BANKRUPTCY COURT, OR ANY RIGHTS SET FORTH BY THE DEED OF TRUST." *Id.*

The Order confirming the Plan was signed on January 31, 2000, and provides for the payment of $6,700.94 escrow shortage on HL&IA/G.E. Capital's first mortgage by the chapter

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[3] The proof of claim, as well as later amended proofs of claim, identify the creditor as HL&IA with a mailing address of "G.E. Capital Mortgage Services, Inc., 4680 Hallmark Parkway, San Bernardino, CA 92407." According to a "Special Notice," included in Debtors' Exhibit 2, which was received by the Court by stipulation of the parties, G.E. Capital was the servicing agent for HL&IA.

13 Trustee. As noted above, the Plan also provided for monthly payments of $878.24 by the Debtors outside of the Plan.

According to Bankruptcy Payment Coupons sent to the Debtors with payment due dates of February 15, 2000, and April 15, 2000, respectively, Debtors were again notified by G.E. Capital that they were required to pay $1,126.55. *See* Debtors' Exhibit 2. However, correspondence from G.E. Capital, dated August 1, 2000, and addressed to the Debtors, identifies a "New Monthly Payment Amount" of $723.29 in principal and interest, effective April 15, 1999. *See id.* The amount does not include any payment of escrow, however. *Id.*

In the interim, on June 13, 2000, HL&IA filed a motion seeking relief from the automatic stay, alleging that the Debtors had failed to make payments from February 2000 through June 2000 of $878.24 per month. *See* Debtor's Exhibit 3. The Debtors filed opposition to the motion on July 5, 2000, indicating that the Debtors were current with their payments both to HL&IA and to the Trustee. *See* Debtors' Exhibit 4. On August 10, 2000, the Debtors filed a supplementary answer in opposition to HL&IA's motion, with proof of their payments from August 6, 1999 through June 28, 2000. *See* Debtors' Exhibit 5. As a result, the motion was marked off the Court's calendar on August 15, 2000. On October 30, 2000, HL&IA filed an amended proof of claim in the amount of $76,001.01, including $1,756.48 in arrears for April and May 1999, based on monthly payments of $878.24.[4]

In January 2001, Hafele testified that he was notified that Wells Fargo had succeeded G.E.

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[4] According to the Court's file in this case, on March 26, 2002, after the evidentiary haring, HL&IA, including "its assignees and/or successors in interest," filed a second amended proof of claim in the amount of $76,414.40, including arrears for April to June 1999 of $2,169.87, based on monthly payments of $723.29, and an escrow shortage of $4,447.84 or a total of $6,617.71.

Capital as mortgagee. He received correspondence from Wells Fargo that its records showed that it had not received a new or renewal insurance policy covering the Debtors' residence. *See* Wells Fargo's Exhibit A. The letter states that Wells Fargo had obtained temporary insurance coverage which would be canceled upon receipt of a copy of any policy the Debtors might have. *See id.* Hafele testified that he and his wife had maintained continuous insurance coverage on their residence since 1994. On or about April 19, 2001, he obtained a letter from his insurance agent, Eggelton & McNee Insurance Agency, confirming that they actually had insured the Debtors since 1986 through New York Central Mutual Insurance Company on a continuous basis. *See* Debtors' Exhibit 11. Hafele testified that he kept a copy of the letter for his records and provided one to his attorney. He could not recall whether he had sent a copy to Wells Fargo, but he thought he must have.

The Bankruptcy Payment Coupon sent to the Debtors with a payment due date of February 15, 2001, from Wells Fargo shows a payment due of $723.29. *See* Debtors' Exhibit 14. Another Bankruptcy Payment Coupon sent to the Debtors by Wells Fargo with a payment due date of March 15, 2001, also shows a payment due of $723.29. *See* Debtors' Exhibit 2.

According to Hafele, he called Wells Fargo and spoke to a Mr. O'Hady in March 2001. *See* Letter of Hafele, addressed to Debtors' counsel, James Collins, dated March 14, 2001, included in Debtors' Exhibit 2. Hafele testified that he was concerned about the billing statements he had been receiving which indicated an amount due of $723.29 when he had been making monthly payments of $878.24 per month under the terms of the Plan. He wanted to assure himself that the additional amount of $154.95 was being applied to the Debtors escrow account. It was Hafele's testimony that Mr. O'Hady indicated that the Debtors' account did not include an escrow

component and that the additional monies had been applied to interest on the mortgage.

Real property taxes on the Debtors' residence for tax year 2001 were due January 31, 2001, without penalty or interest, totaling $1,027.31 on two parcels. *See* Debtors' Exhibit 12. According to a facsimile transmittal from the Delaware County Treasurer and dated March 15, 2002, Wells Fargo did pay real property taxes on the Debtors' residence on August 20, 2001, in the amount of $1,115.33. *See id.* Despite payment of those taxes, Hafele testified that they received notice of a balance due for real property taxes. In order to prevent the advertisement of the unpaid amount of 2001 taxes by the local newspaper, which employed Mrs. Hafele, the Debtors paid the balance due of $41.49. *See id.*

DISCUSSION

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." The Court of Appeals for the Second Circuit in *Crysen/Montenay Energy Co. v. Esselen Assoc., Inc. (In re Crysen/Montenay Energy Co.)*, 902 F.2d 1098 (2d Cir. 1990) set forth the standard for awarding damages pursuant to Code § 362(h). According to the Second Circuit, "[a]ny deliberate act taken in violation of a stay, which the violator knows to be in existence, justifies an award of actual damages." *Id.* at 1105. Furthermore, "[a]n 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)." *Id.*

In this case, there is no dispute that G.E. Capital, as servicing agent of HL&IA, and its successor in interest, Wells Fargo, had actual notice of the Debtors' bankruptcy filing. Not only did HL&IA file an objection to the Debtors' Plan, it also filed a motion for relief from the automatic stay in June 2000. Wells Fargo, through its counsel, acknowledges that "due to a misunderstanding regarding the escrow nature of the loan that it sent statements that did not accurately reflect the escrow portion of the payment for a brief period before Debtors contacted it and it confirmed its mistake." *See* Post-Hearing Memorandum in Response to Motion . . ., filed May 2, 2002. While acknowledging "inadvertent mistakes in the handling of payments," Wells Fargo contends that the Debtors have failed to establish any damages. Furthermore, it asserts that "[i]t would be wholly inappropriate to award any damages beyond actual damages where the action was totally innocent and inadvertent." *Id.*

Code § 362(a)(3) stays "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3). Code § 362(a)(6) stays "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). On at least three occasions, the Debtors received Bankruptcy Payment Coupons with due dates of October 15, 1999, February 15, 2000 and April 15, 2000 from G.E. Capital, showing a monthly payment of $1,126.55 due. Debtors' Plan, which was confirmed on January 31, 2000, provided for the payment of $6,700.94, covering arrears and a shortfall in the Debtors' escrow account. It also provided for monthly payments directly by the Debtors of $878.24, including $723.29 in principal and interest, as well as $154.95 in escrow payments. In requesting that the Debtors pay $1,126.55, Respondents were seeking to recover the shortfall in the Debtors' escrow account,

which represented a prepetition debt for which Respondents were to receive payments from the chapter 13 trustee through the Plan. This constituted a willful violation of the automatic stay. *See In re Draper*, 237 B.R. 502, 505 (Bankr. M.D. Fla. 1999) (noting that "[a]ny act taken by a creditor designed to collect a prepetition debt violates the stay if it amounts to pressure on the debtor to pay." (citations omitted)).

It also appears that Wells Fargo/G.E.Capital violated the automatic stay by improperly exercising control over that portion of the monthly payments that was to be applied to the escrow account. *See In re Nield*, 95 B.R. 259 (Bankr. D.Me. 1989). Hafele testified that he had been informed by O'Hady that the monies paid by the Debtors in excess of the $723.29 in principal and interest were being applied to interest and that the records indicated that the Debtors' account did not include an escrow component. In *Nield* the bank had charged the debtors' escrow account for attorney's fees. The court noted that

> [t]he estate retained an important interest in that escrow account: that the funds be used for the purpose that they were intended . . . . Any other use, without prior notice to the debtors, the standing Chapter 13 trustee, and, if necessary, approval of the court, was not only a violation of the automatic stay but probably also a violation of the bank's duty as escrow agent.

Id. at 261.

The evidence does not support any violation of the automatic stay with regard to the insurance coverage on the Debtors' residence. While they did receive notice from Wells Fargo that its records did not indicate any insurance on the Debtors' residence, there was no evidence that Wells Fargo ever charged the Debtors for the insurance binder. Indeed, the notice sent to the Debtors specifically indicates that "[i]f evidence of acceptable coverage is received during this

binder period, you will not be charged for any lapse in coverage. * * * This coverage will be canceled back to the original effective date, without a premium charge applying, should duplicate coverage exist with a policy you may have, provided a copy has been sent to us as verification." *See* Debtors' Exhibit 2. Hafele testified that he thought he had forwarded a copy of a letter from his insurance agent confirming coverage and the fact that G.E. Capital was listed on the policy. *See* Debtors' Exhibit 11.

Having concluded that Respondents did willfully violate the automatic stay by sending statements to the Debtors seeking to collect a prepetition debt and by misapplying the amounts earmarked for the Debtors' escrow account, the Court must then determine an award of damages, given the facts in this case. As noted in a recent decision of this Court,

> "[o]nce the Court has found that there is a willful violation, the Debtor still must establish that there are actual damages, even though the damage provisions of section 362(h) of the [Code] are mandatory." (citation omitted). Courts do not award damages pursuant to Code § 362(h) "where the debtor has not been injured by issuance of collection correspondence."

In re Ficarra, Case No. 00-62714, slip op. at 9 (Bankr. N.D.N.Y. April 17, 2000), quoting *In re Flack*, 239 B.R. 155, 163 (Bankr. S.D. Ohio 1999).

There was no evidence of any actual damages in connection with Respondents' violation of the automatic stay pursuant to Code § 362(a)(6). Hafele testified that although the statements indicated a payment in excess of $878.24, he never paid anything more than the amount provided for in the Plan. He expressed aggravation at having to address the demands of the Respondents for payment of the $1,126.55, including having to oppose HL&IA's motion for relief from the automatic stay, which ultimately was withdrawn once the Debtors established that they were

current with their payments. However, Debtors presented no evidence which would warrant an award of actual damages for emotional distress.

With respect to Code § 362(a)(3), the Debtors did offer evidence that as a result of Respondents' failure to correctly apply the monies to the escrow account they were forced to pay the balance due of $41.49 in real property taxes in order to avoid the embarrassment of publication of the delinquency in the local newspaper, which employed Mrs. Hafele.[5] This obviously stressful situation, along with the frustration and aggravation experienced by Hafele in attempting to resolve the matter, warrants an additional award of $200 for emotional distress and aggravation under these circumstances. There was no medical testimony introduced that would indicate that either he or his wife suffered any serious emotional distress which would warrant an additional award for Respondents' violation of the automatic stay pursuant to Code § 362(a)(3).

The Court also will require Respondents to provide the Debtors with an accounting beginning April 1, 1999, to the present, giving a clear and full explanation of monies received from the Debtors and/or the chapter 13 trustee and how they have been applied. The Court finds that the Debtors are also entitled to reasonable attorneys' fees in connection with their motion. However, because no time records have been filed with the Court, a determination regarding the amount of attorney's fees, as well as costs, to be awarded is not possible at this time. The Court will require the submission of time records in order for the determination to be made.

Finally, the Court must consider whether an award of punitive damages is warranted. The

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[5] Although it appears that $129.51 in interest and penalties were incurred in connection with the late payment of the real estate taxes, there was no evidence presented to explain the delay or that the delay violated the automatic stay. Thus, the Court is without statutory authority to award damages in that regard..

Second Circuit Court of Appeals has held that the there must be "[a]n additional finding of maliciousness or bad faith on the part of the offending creditor . . ." in order for there to be an award of punitive damages pursuant to Code § 362(h). *Crysen/Montenay Energy Co.*, 902 F.2d at 1105. As noted by the Court at the end of the evidentiary hearing, what occurred may simply be "something endemic to the mortgage market and the transfer of mortgages" from one entity to another. However, it should not be individuals such as the Debtors who suffer as a result of these types of "snafues" by entities which are in an economically superior financial position. Nevertheless, given the facts of this case and the evidence presented the Court concludes that the actions taken by Respondents were not malicious or done in bad faith so as to warrant an award of punitive damages.

Based on the foregoing, it is hereby

ORDERED that the Debtors' request for actual damages in the amount of $241.49, as determined by the Court, pursuant to Code § 362(h), is granted; it is further

ORDERED that the Debtors' request for an accounting is granted to the extent discussed above; it is further

ORDERED that the Debtors' request for costs and attorney's fees is granted in an amount to be determined by the Court upon receipt of pertinent time records, which shall be filed with the Court and served upon the Respondents no later than fifteen (15) days from the date of this Decision; and it further

ORDERED that the Debtors' request for punitive damages is denied.

Dated at Utica, New York

this 19th day of August 2002

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge