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Re: John F. House
Case No. 03-67056 Chapter 7

LETTER DECISION AND ORDER

John F. House ("Debtor") filed a voluntary petition pursuant to chapter 7 of the Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code"), on October 20, 2003. According to the case docket, the notice of the filing was sent to all creditors, including Chase Manhattan Bank, c/o Barry Feerst, Esq. ("Feerst"), on October 23, 2003. By motion, dated April 15, 2004, the Debtor sought sanctions against Feerst for an alleged violation of the automatic stay pursuant to Code § 362(h). The Debtor requested attorney's fees, as well as actual and punitive damages. The motion alleged that after the bankruptcy filing by the Debtor, Feerst, on behalf of United Debt Management, assignee of the claim of Chase Manhattan Bank, failed to remove a freeze placed on the Debtor's bank account with M&T Bank on or about May 30, 2003, in connection with a judgment obtained against the Debtor prior to the commencement of the case. *See* Debtor's Exhibit D.

The motion was heard on May 25, 2004 at the Court's regular motion term in Utica, New York. Feerst failed to appear in opposition to the motion, and the Court granted the motion. On May 27, 2004, the Court signed an Order finding that Feerst had willfully violated the automatic stay and awarding actual damages and costs and attorney's fees to the Debtor. The Court also ordered that an inquest on damages be held to determine the amount of said damages and to determine if the

imposition of punitive damages was appropriate.

The Court originally scheduled the hearing for September 16, 2004, and adjourned it to February 10, 2005 at the request of Debtor's counsel. At the hearing on February 10th, the Debtor testified that he received notice on or about May 30, 2003, approximately five months prepetition, that his checking account with M&T Bank was to be frozen as a result of a judgment obtained against him in the approximate amount of $3,653.70. *See* Debtor's Exhibit D. The Debtor testified that he had not opened another checking account because of his concerns that it also would be frozen. Instead, he has paid his bills using money orders. Debtor estimated that on the average he obtained 7-10 money orders per month, at a cost of $.75-$1.00 per money order. According to the Debtor, at the time his checking account was frozen he had approximately $87.00 on deposit in the account, but that that amount had diminished as a result of service charges applied by M&T Bank against the account after it had been frozen for 60 days.

The Debtor testified that having his checking account frozen was a matter of inconvenience. He no longer was able to use the debit card associated with the account. He traveled extensively in connection with his employment as a mortgage broker and was forced to carry cash with him to cover expenses such as gas purchases, restaurant charges, etc. In response to a question by the Court, he testified that he did not use a credit card for such purchases because of the interest charges.

Debtor's counsel wrote Feerst on October 24, 2003, notifying him of the bankruptcy case and requesting that Feerst discontinue any collection efforts and take whatever steps were necessary "to restore matters to how they existed before you commenced your collection efforts." *See* Debtor's Exhibit E. According to notations made by counsel's secretary, a detailed message was

left with Feerst's secretary on January 29, 2004, but as of February 20, 2004, the restraint was still on the account. *Id.* On March 19, 2004, Debtor's counsel made a second written demand asking that the restraint on the Debtor's checking account be removed. *See* Debtor's Exhibit F.

On April 13, 2004, Feerst was sent via certified mail a copy of the Debtor's motion, alleging a willful violation of the automatic stay and the Debtor's discharge and requesting damages.[1] *See* Debtor's Exhibit H. Feerst neither opposed the motion nor appeared at the hearing on May 25, 2004. As noted above, the Court granted relief to the Debtor in an Order, dated May 27, 2004. *See* Debtor's Exhibit I. By letter dated June 17, 2004, Feerst requested that Debtor's counsel furnish him with "such documents for signature, as you require to release your client's bank account." *See* Debtor's Exhibit J. Debtor's counsel responded on or about July 7, 2004, that Feerst did not need any documents from Debtor's counsel's office in order to release the freeze on the Debtor's checking account. *See* Debtor's Exhibit K.

According to the Debtor, he had sporadically checked with the local office of M&T Bank in Camden, New York, to find out if the restraint on his account had been removed and, as recently as November 2004, he had been told that he still did not have access to the funds. However, it was the Debtor's testimony that on the morning of the hearing he had spoken with a representative of M&T Bank in Buffalo, New York, who informed him that the restraint had been removed in May 2004, a year after it had been placed on the account because no renewal had been requested, as was the bank's policy. This was contrary to what the Debtor had been told by bank representatives at the local office.

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[1] The Notice of Motion only references Code § 362(h). The first reference to Code § 524(a)(2) is made in the final paragraph of the motion. The motion does not request that Feerst be required to remove the freeze on the Debtor's checking account.

DISCUSSION

According to the Certificate of Service, filed on April 15, 2005, Feerst was properly served by first class mail with a copy of the notice and motion seeking sanctions pursuant to Code § 362(h). *See* Debtor's Exhibit H. In his motion, the Debtor alleged that Feerst violated the automatic stay by failing to remove the restraint on the Debtor's checking account.

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). 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. As previously noted, this Court made a finding that Feerst willfully violated the automatic stay.

"Once 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). *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). In this case, the Debtor testified that he had incurred costs associated with having to obtain money orders to pay his bills over a postpetition period of seven months (November 2003 - May 2004). According to the Debtor, on the average he had obtained 7-10 money orders per month at a cost of between $.75 and

$1.00 per money order. Based on this testimony, the Court will award $70 in actual damages (7 months x 10 money orders/month x $1.00/money order). The Debtor also testified that the $87 on deposit in the account at the time it had been frozen was no longer available due to the imposition of service charges by M&T Bank. In addition, while courts have often declined to award damages in instances of minor aggravation or inconvenience arising from an entity's willful violation of the automatic stay, *see, e.g., In re McHenry*, 179 B.R. 165, 168 (9th Cir. BAP 1995); *In re Crispell*, 73 B.R. 375, 380 (Bankr. E.D.Mo. 1987), this Court believes that Feerst's failure to take steps to have the freeze on the Debtor's account removed, despite requests by Debtor's counsel, resulted in more than minor inconvenience and aggravation given that it continued for over seven months postpetition. Under these circumstances, the Court deems it appropriate to make an additional award of damages of $700. *See In re Cohen,* Case No. 01-65784, slip op. at 19 (Bankr. N.D.N.Y. May 10, 2002) (awarding $220 in damages for the inconvenience of being without hot water for eleven days); *In re Davis*, 201 B.R. 835, 837 (Bankr. S.D. Ala. 1996) (making an award of 150% of out of pocket expenses based on the inconvenience and embarrassment experienced by the debtor as a result of a levy by the Internal Revenue Service on the debtor's bank account two months postpetition). Accordingly, the Court will award a total of $857 ($70 + $87 + $700) in actual damages to the Debtor.

In addition, Debtor's counsel has submitted an affirmation indicating $1,622 in attorney's fees and $159.88 in costs and disbursements, consisting of a filing fee of $155.00 and $4.88 in postage. The Court has reviewed counsel's time records and finds the fees, based on 9.33 hours, to be reasonable. It also finds the costs and disbursements to be reasonable. Accordingly, the Court will award $1,622 in attorney's fees and $159.88 in costs and disbursements.

Debtor's counsel has also asked that the Court make an award of $50 per day from October 23, 2003, through the date of the hearing, as punitive damages based on Feerst's blatant disregard for the automatic stay in this case. In order for the Court to award punitive damages, it must find maliciousness or bad faith on the part of the offending creditor. *Crysen/Montenay Energy Co.,* 902 F.2d at 1105. 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 Klein*, 226 B.R. 542, 547 (Bankr. D.N.J. 1998), quoting RESTATEMENT (SECOND) OF TORTS § 908 (1979). 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. *Klein*, 226 B.R. at 547.

In *Klein* a creditor had obtained a judgment against the debtor and subsequently the creditor filed a notice restraining three of the debtor's accounts, including his personal account, as well as a client escrow account and an account used in the debtor's law practice. *Id.* at 546. On that same day, the debtor filed a chapter 13 petition and apprized the creditor, as well as his bank, that he had filed a bankruptcy petition. A week later the debtor wrote to the creditor and his bank stating his intent to sue both for violation of the automatic stay unless the accounts were released. The debtor filed a motion pursuant to Code § 362(h), seeking an order releasing the accounts, attorney's fees and punitive damages. *Id.* The court awarded attorney's fees to the debtor in his representation of himself in the amount of $4,791.30. The court declined to award punitive damages, noting that the accounts had been frozen for less than a month and that the award of attorney's fees constituted sufficient deterrence to any future conduct by the creditor. *Id.* at 547.

In this case, the Debtor testified that he was inconvenienced by not having access to his checking account. However, at the time it was frozen there was only $87 on deposit in it and

nothing prevented him from opening a checking account elsewhere. There was no evidence of any threats on the part of Feerst or his client or any further actions taken to collect on the prepetition judgment against the Debtor. The fact that Feerst apparently ignored the requests of Debtor's counsel to remove the restraint on the Debtor's checking account for over a year and failed to appear and defend his actions indicate a callous disregard for the automatic stay, as well as the lawful processes of this Court. *See In re Layton*, 220 B.R. 508, 518 (Bankr. N.D.N.Y. 1998); *In re Lee*, Case No. 03-67143, slip op. at 7 (Bankr. N.D.N.Y. Dec. 1, 2004). However, it does not, in the opinion of the Court, reach the level of "maliciousness" or "bad faith," so as to warrant an award of punitive damages.

IT IS SO ORDERED.

Dated at Utica, New York

this1st day of April 2005

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge