UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

WILLIAM P. LEE	CASE NO. 03-67143
Debtor	Chapter 7

APPEARANCES:

BODOW LAW FIRM, PLLC Attorney for Debtor 1925 Park Street Syracuse, NY 13208	THEODORE LYONS ARAUJO, ESQ. Of Counsel

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

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

William P. Lee ("Debtor") filed a voluntary petition pursuant to chapter 7 of the Bankruptcy Code on October 23, 2003. According to the case docket, the notice of the filing was sent to all creditors, including Capital One Bank ("Capital One"), on October 25, 2003. By motion, dated November 11, 2003, the Debtor sought damages from Capital One for an alleged violation of the automatic stay pursuant to § 362(h)of the United States Bankruptcy Code, 11 U.S.C. §§ 101-1330 ("Code"). The Debtor requested $100,000 in actual, statutory and punitive damages. The motion alleged that after the bankruptcy filing by the Debtor, Capital One "did continue to [sic] collection activity against the debtor by posting a judgment against the debtor in the Syracuse Herald American on November 3, 2003, in the amount of $3,366.00." *See* Debtor's Motion, filed November 12, 2003, at ¶ 9. The motion was served on Richard D. Fairbank, Chairman and CEO, Capital One Financial Corporation, 1680 Capital One Drive,

Suite 1400, McLean, Virginia 22102, by certified mail on November 12, 2003.

The motion was heard on December 2, 2003, at the Court's regular motion term in Syracuse, New York. Neither Capital One, nor its counsel Rubin & Rothman, P.C., appeared in opposition to the motion. As a result, the Court orally granted the motion by default to the extent of finding a willful violation of the stay and requested that the Debtor's counsel submit an order granting the relief and scheduling the matter for an inquest hearing to determine damages. No such order was submitted by Debtor's counsel. Notice of said inquest hearing was ultimately issued by the Court, and served on the Debtor's counsel, as well as on the Debtor, on July 15, 2004. A hearing was conducted on September 16, 2004 in Utica, New York ("Hearing").

At the Hearing, the Debtor testified that he was born in Laos and resided in an Asian community in Syracuse, New York. Prior to filing his bankruptcy petition, he had experienced some financial difficulties and, according to the Debtor, had considered suicide as his only avenue of escape from his debts. The Debtor testified that he was working 70-80 hours a week and was having difficulty paying his bills, including the one owed to Capital One. He explained that a man who was unable to support himself and his family was considered a disgrace in the Asian community and that it was unheard of for an Asian man to file bankruptcy. However, in October 2003 he contacted Wayne Bodow, Esq. to inquire about his options. The Debtor testified that he was told that everything would be handled confidentially and that no one in his family or community had to know about his filing a bankruptcy petition, except his father, who was to be listed as a creditor in his bankruptcy schedules as a result of a loan of $5,000 he had made to the Debtor.

According to the Debtor, in reliance on the representations of counsel, he agreed to file a bankruptcy petition. He testified that after having settled one account with Capital One, he contacted Rubin & Rothman to notify them, as agent for Capital One, that he had filed bankruptcy and would not be making any further payments to them.

It was the Debtor's testimony that he was approached by a co-worker with a copy of the listing of Capital One's judgment against the Debtor, which had appeared in the Syracuse Herald American ("Syracuse newspaper") on November 3, 2003. Apparently, surprised to see an Asian listed, the man inquired whether it was the Debtor. Later that same afternoon his cousin, who worked in management for the same company as the Debtor and lived downstairs from the Debtor's parents, asked him about the judgment which had been brought to his attention. Despite the fact that the Debtor had allegedly requested that he not mention it to anyone, according to the Debtor his cousin told his own wife, who in turn "spread the word." The Debtor testified that his stepmother threatened to divorce the Debtor's father upon learning of the loan to the Debtor and the fact that he would not receive full repayment. She had not been aware of the loan and Debtor explained that in the Asian community keeping such secrets from your spouse was a very serious matter. She allegedly contacted her family "leader" in California, who in turn contacted the leader of the Debtor's family in Minnesota. The latter, who was Debtor's uncle, in turn contacted the Debtor's father seeking an explanation, concerned about the reputation of the family. Ultimately, the uncle contacted one of the Debtor's brothers demanding that he pay $1,000, the amount outstanding on the loan, to the Debtor's stepmother. This put a strain on the brother's relationship with his own wife when she was told that her husband was going to have to pay $1,000 on behalf of his brother. According

to the Debtor, the entire Asian community in Syracuse now knows of his problems and "everything's going down." He no longer has the respect of the Asian community and everyone views him as poor and without money and financially irresponsible.

Counsel inquired of the Debtor whether he was aware of any listing of his bankruptcy in the Syracuse newspaper. He testified that he was not. He explained that if anyone in the Asian community had seen it, it would have been considered rude for any of them to question him about it.

DISCUSSION

According to the Certificate of Service, filed on November 12, 2003, Capital One was properly served by certified mail with a copy of the notice and motion seeking damages pursuant to Code § 362(h). In his motion, the Debtor alleged that Capital One in "posting" a judgment against the Debtor in the Syracuse newspaper on November 3, 2003, violated the automatic stay.[1] [2] As a result of Capital One's default, the allegations contained in the Debtor's motion are to be taken as true. Accordingly, at the hearing on December 2, 2003, the Court granted the Debtor's motion on default. The Debtor now asks the Court to award actual

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[1] Based on the facts presented, it does not appear that there was any violation of the automatic stay with respect to the actual filing of the judgment in the Onondaga County Clerk's office, which occurred prepetition on October 21, 2003, according to the article in the Syracuse newspaper.

[2] The motion also alleges a "continued garnishment of her [sic] wages after having filed Chapter 7 Bankruptcy . . . ." *See* Debtor's Motion at ¶ 18. However, there was no proof of any such garnishment elicited at the Hearing.

damages, including attorney's fees, as well as punitive damages, in the amount of $100,000.

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. 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.*

As noted by this Court in a prior decision, "'[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). *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, no proof was offered by the Debtor as to any economic loss he may have suffered as the result of the posting of the judgment in the Syracuse paper. He did, however, offer testimony concerning the loss of his reputation in the local Asian community, as well as in the eyes of members of his family. Debtor testified that no one had mentioned anything to him about seeing a posting in the local newspaper of his having filed a bankruptcy petition. However, it appears that the posting of the

judgment was the catalyst for the emotionally distressing and disturbing situation in which the Debtor then found himself. It apparently served to bring to light the Debtor's precarious financial condition and ultimately resulted in the disclosure of his having filed a bankruptcy petition.

According to the Debtor, he felt embarrassment and shame when confronted by a fellow employee and by his cousin with the notice in the newspaper of the judgment taken against him. Due to the nature of the Debtor's culture, matters obviously escalated, ultimately resulting in the Debtor's loss of reputation in the community given his acknowledged inability to support himself financially, despite his working 70-80 hours per week. Arguably, most individuals raised in a western culture, confronted with a similar situation, would not have been so seriously impacted by the revelation of their inability to support themselves financially. Based on the Debtor's testimony, however, the Court believes that the emotional distress experienced by the Debtor warrants an award of actual damages, despite the fact that there is no evidence of any physical injury or corroborating medical testimony or significant economic loss. *See Fleet Mortgage Group, Inc. v. Kaneb (In re Kaneb),* 196 F.3d 265, 270 (1st Cir. 1999) (affirming award of $25,000 in damages for mental anguish of 85 year old widower who was shunned by his neighbors in a retirement community on learning of a foreclosure action brought against him in violation of the automatic stay); *In re Bishop*, 296 B.R. 890, 895 (Bankr. S.D.Ga. 2003) (finding that "[a] bankruptcy court may award damages attributed to emotional distress if a preponderance of the evidence shown that emotional harm occurred and that the defendant's conduct in willfully violating the stay was the cause of that harm). Accordingly, the Court will award the Debtor $5,000 in actual damages based on a finding of emotional distress caused by

the posting of the judgment.

With respect to the Debtor's request for punitive damages, there is no evidence that Capital One's conduct was malicious and in callous disregard for the rights of the Debtor. *Id.* at 898, citing *Crysen/Montenay Energy,* 902 F.2d at 1105. The Court's finding of a willful violation of the automatic stay is based solely on undisputed allegations in the Debtor's motion that Capital One had posted the judgment in the Syracuse newspaper, which the Court had no choice but to consider as true given Capital One's failure to respond to the Debtor's motion. While taking exception to what it considers Capital One's total disregard for the lawful processes of this Court in failing to defend its actions, the Court concludes that there is no basis for awarding punitive damages under these circumstances. The Court will not award any attorney's fees or costs due to the failure of Debtor's counsel to submit an affidavit of services requested by the Court at the conclusion of the Inquest Hearing on September 16, 2004, and again requested by letter dated November 4, 2004.

IT IS SO ORDERED.

Dated at Utica, New York

this 1st day of December 2004

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge