

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

In re:

RICHARD DAVID CROCKER and
KATHY ROBIN CROCKER,

Case No. SK 00-06479
Chapter 7

Debtors.

NOTICE: It is the policy of the United States Bankruptcy Court for the Western District of Michigan that its unpublished bankruptcy opinions and/or orders shall not be cited or used as precedent except to support a claim of *res judicata*, collateral estoppel or law of the case in any federal court within this Circuit.

NOT FOR PUBLICATION

OPINION

The principal issues before this Court are whether Richard H. Mylin III (Mylin) violated the Fair Debt Collection Practices Act and whether H. Stanley Rebert (Rebert) and Evelyn Rapp (Rapp) were in contempt of court when they pursued a criminal case against Kathy Crocker (Crocker or Debtor) in York County, Pennsylvania.

In June of 1998, Rapp and Crocker entered into an agreement for the purchase of a female Maine Coon cat in which Crocker would retain one-half interest until such time as the cat had kittens. Once this condition subsequently occurred, Rapp agreed that Crocker could have the pick of the litter and Crocker agreed to sign over to Rapp full ownership of the female Maine Coon cat.

Eventually, Rapp voluntarily returned the female cat and a male cat later purchased from Crocker on the condition that the female would be returned when it became pregnant and a suitable substitute for

the male cat could be located.

Upon further examination, Crocker found the cats to be emaciated and neglected. Both Crocker and her husband testified that they attempted to negotiate with Rapp regarding a money settlement but ultimately decided to invoke the negligence clause of the contract which stated that Rapp would surrender the cats without compensation if they were found to be neglected.

Rapp hired Attorney Mylin who sent a letter dated September 24, 1999, requesting the return of the cats or the purchase price. Dissatisfied with the response she received from the Debtor Rapp went to the Pennsylvania State Police where a warrant was issued for Crocker's arrest.

Without knowledge of the pending arrest warrant, Crocker traveled to Pennsylvania where she was lured by Rapp for the express purpose of being arrested. She was subsequently incarcerated for approximately four days partly due to her husband's difficulty in raising bail because of a pending bankruptcy filed on April 6, 2000 in the Western District of Michigan.

Crocker was charged with theft, receiving stolen property and deception by the York County District Attorney's Office. After returning numerous times to Pennsylvania for her arraignment and pre-trial hearings, the Debtors filed their "Motion for Contempt and Other Relief."

Although the parties were properly served by the Bankruptcy Court, only the Crockers and their attorney appeared at the hearing held on May 10, 2001. The Court, the Crockers and their attorney adjourned into chambers and contacted York County District Attorney Rebert by telephone. Rebert agreed to dismiss the pending criminal prosecution against Crocker.

Some hours later however, Rebert notified the Court that he intended to rescind his agreement to dismiss and proceed with the criminal prosecution. This caused the Court to issue an order permanently enjoining Rebert and Rapp from proceeding against Crocker finding that the criminal prosecution was

nothing more than an effort to obtain payment of a dischargeable debt.

On August 22, 2001, the Debtors filed a “Supplemental Motion for Contempt and Other Relief” alleging that Rebert was in contempt of court because the criminal proceedings were not immediately dismissed but adjourned until August when they were finally removed from the York County court calendar.

The Debtors also claim that Rapp was in contempt for violating the automatic stay by continuing to attempt to collect the debt after they had filed bankruptcy.

And, finally, they alleged that Attorney Mylin was in contempt for sending the September 24, 1999 collection letter. The Debtors later agreed that this was a very tenuous claim admitting there was insufficient evidence to support this allegation.¹ They continued, however, to assert that Mylin violated the Fair Debt Collection Practices Act.

Analysis

The purpose of civil contempt sanctions is to compensate the complainant for losses and expenses it incurred because of a contemptuous act, and to coerce the contemnor into complying with the court order. Jove Engineering Inc. v. IRS, 92 F.3d 1539 (11th Cir. 1996). Civil contempt serves to either: 1) compel or coerce obedience to a court order, or 2) compensate parties for another’s noncompliance with the court’s order. In re Burkman Supply, Inc., 217 B.R. 223 (W.D. Mich. 1998).

A party must establish two elements in order for a creditor to be found in civil contempt: 1) there

¹Since the Debtors’ bankruptcy was filed on April 6, 2000, and Mylin’s letter was dated September 24, 1999, we fail to see how the letter could have violated the automatic stay.

must exist a specific and definite court order which has been violated and 2) the person who violated the order must have prior knowledge of it. In re Fidelity Mortgage Investors, 550 F.2d 47

(2d. Cir. 1976); In the Matter of Sielaff, 164 B.R. 560 (Bankr. W.D. Mich. 1994); In re Miel, 134 B.R. 229 (Bankr. W.D. Mich. 1991); In re Reed, 11 B.R. 258 (Bankr. D. Utah 1981).

Rebert

Actions Taken Prior to the May 10, 2001 Injunction Order

Criminal charges were filed against Kathy Crocker in February of 2000. The bankruptcy was filed on April 6, 2000. Because the filing of the criminal charges was well before the filing of the bankruptcy, Rebert could not be in contempt of court for having filed the charges. In addition, 11 U.S.C. §362(b)(1) states that the filing of a petition does not operate to stay the commencement or continuation of a criminal action or proceeding against a debtor.

In a letter dated July 11, 2001 and in his affidavit, Rebert states that he never received a copy of the original notice of bankruptcy. No evidence was introduced contravening Rebert's affidavit. In order for Rebert to be in contempt of the Bankruptcy Court, he must have knowledge of the bankruptcy filing. Apparently he did not. Even though we have determined that the action initiated by Rapp was little more than an attempt to collect a debt, a District Attorney is duty bound to prosecute a criminal case when he perceives that the facts presented would support such a claim.² Consequently, we find that Rebert was not in contempt of court prior to our May 10, 2001 Order.

²Although Rebert and his representative continue to assert that the facts presented to the York County District Attorney's Office were "somewhat different" than those presented to the Bankruptcy Court, neither Rebert nor Rapp responded to or appeared at the Bankruptcy Court hearing. Therefore, we are unable to discern whether the facts presented to Rebert do in fact solely support a criminal charge and exclude a finding that the Debtors were being harassed and coerced into paying a prepetition, dischargeable debt.

Actions Taken After the May 10, 2001 Injunction Order

Nor do we find Rebert's actions after May 10, 2001 contemptuous. Once Rebert received the May 10, 2001 Order, he simply adjourned the hearing in order to weigh his options. No further action was taken against Crocker. She incurred no further expense or inconvenience other than attorney's fees incurred for attending the hearing where the case was adjourned. What may have been fear of further prosecution in the mind of the Debtor should have been quelled by the existence of the Bankruptcy Court Order permanently enjoining the District Attorney.

Contempt also serves to compensate parties for another's noncompliance with a court order. In this case, there were no further trips to Pennsylvania and after the initial hearing to adjourn the case, no further attorney's fees incurred in regard to the criminal action. Since we have previously determined that Rebert complied with the court order, he can not be charged with any expenses, even those attributed to the adjournment hearing.

Rapp

Rapp first contacted State Representative Todd Platts (now Congressman Platts) on or about May of 1999. Congressman Platts referred Rapp to the Pennsylvania State Police who investigated her allegations and filed criminal charges in February 2000. A warrant for Crocker's arrest was issued on March 15, 2000. The Crockers filed bankruptcy on April 6, 2000. Rapp filed a proof of claim in the Crocker bankruptcy on May 22, 2000. Kathy Crocker was lured to Pennsylvania by Rapp and arrested on November 12, 2000.

Although the original warrant was issued prior to the bankruptcy, Rapp should have pursued legal

action through the Bankruptcy Court once she had notice of the filing. Rapp properly filed a proof of claim, but should have also filed an adversary proceeding to determine dischargeability of the debt under 11 U.S.C. §523.

However, even after Rapp received notice of the bankruptcy, she apparently lured Crocker into the jurisdiction to insure Crocker was arrested.³ This action violated the automatic stay because it was no more than an attempt to collect a debt.

This conclusion is supported by a conversation the Crockers had with Mylin in September of 1999, where Mylin indicated that the Crockers were to pay Rapp \$3850.00 in cash or he would have Kathy put in jail.⁴ The Debtors also testified that they were contacted on numerous occasions by Trooper Miller of the Pennsylvania State Police in which he attempted to negotiate on Rapp's behalf. Specifically, he told the Crockers that Rapp would accept \$2050.00 in settlement but would entertain a counter-offer.

The Crockers were also told by their criminal attorney in Pennsylvania after the arrest that he had been in contact with Rapp and she was willing to take \$400.00 and a cat in exchange for dropping the criminal case.

This is clearly a violation of the stay. Rapp initiated the criminal proceedings in hope of strong-arming the Debtors into returning either the money or the cats. She continued her attempts to collect the debt well after she had notice of the bankruptcy and had actually filed a claim.

As a result of these collection efforts the Debtors have incurred numerous expenses. Crocker

³Because the charges were misdemeanors, Crocker had to be in Pennsylvania to be arrested. Had the charges been felonies, she could have been arrested in Michigan.

⁴The Court is unclear how Rapp and/or Mylin came up with this figure since Rapp paid a total of \$1050.00 for both cats.

testified that the travel expenses of her initial trip to Pennsylvania where she was arrested, were \$250.00. Next, because the Debtors were in bankruptcy, Mr. Crocker was required to find a bondsman in Michigan who charged him not only for a Michigan bond, but also for a Pennsylvania bond and a transfer fee, for a total of \$1200.00. Next, the Crockers were required to hire a criminal attorney in Pennsylvania who charged them \$1500.00. In addition, there was the plane fare back to Michigan after Crocker's arrest which cost \$260.00; a return trip to Pennsylvania for a pre-trial hearing and a trial that was subsequently adjourned. These two trips totaled \$500.00.

We find that Rapp is directly responsible for all of these expenses due to her willful violation of the automatic stay. Consequently, Rapp shall pay the expenses incurred by the Debtors.

In addition, Rapp is also responsible for the reasonable attorney's fees and expenses incurred by bankruptcy attorney, Daniel B. Hess, Esq. who filed the Motion for Contempt. As requested by the Court, Mr. Hess has filed a pleading entitled "Attorney's Itemized List of Services Rendered in Reference to Motion for Contempt" in which he seeks to recover some \$4,660.52 in fees and expenses. The Court has thoroughly reviewed that pleading and determined that Mr. Hess should be awarded a total of \$4,000.00 which includes \$295.52 in expenses and \$3,704.48 in reasonable attorney's fees.

As stated in 11 U.S.C. §362(h) "An individual injured by any willful violation of a stay . . . may recover punitive damages." The Debtors have requested that punitive damages be awarded for the emotional distress caused by Kathy Crocker's time incarcerated. A "willful violation" does not require a specific intent to violate the stay; a violation may be "willful" if the defendant knew of the stay and her actions were intentional. In re Bloom, 875 F.2d 224 (9th Cir. 1989).

Rapp knew of the bankruptcy filing because she filed a claim. Regardless, she lured Crocker to

Pennsylvania in order to be arrested. She then attempted to negotiate the collection of the debt through various parties. Consequently, we find that Rapp knew of the bankruptcy stay and acted intentionally in order to collect her debt. Accordingly, we award punitive damages to the Crockers in the amount of \$100.00.

Mylin

The Debtors claim that Mylin violated the Fair Debt Collection Practices Act by failing to include several key phrases required by the Act.

Under 15 U.S.C. §1692k(d) of the Fair Debt Collection Act, an action to enforce liability must be brought within one year of the date on which the violation occurs. However, under the Bankruptcy Code, 11 U.S.C. §108(a)(2) states:

- (a) If applicable nonbankruptcy law, an order entered in a nonbankruptcy proceeding, or an agreement fixes a period within which the debtor may commence an action , and such period has not expired before the date of the filing of the petition, the trustee may commence such action only before the later of –
 - (2) two years after the order for relief.

Because Mylin sent his letter on September 24, 1999 and the bankruptcy intervened on April 6, 2000, the time to file such an action under the Fair Debt Collection Practices Act, was extended to April 6, 2002.

Although Mylin's letter did fail to include the disclosure that the Debtors could, within thirty days

after receipt of the notice: dispute the validity of the debt;⁵ obtain verification of the debt and have it mailed to them;⁶ and provide the Debtors with the name and address of the creditor;⁷ and that the Debtors were put on notice that Mylin was attempting to collect a debt and any information obtained would be used for that purpose,⁸ the statute provides wide discretion by the court in determining damages. To wit, 15 U.S.C. §1692k(b)(1) states:

In determining the amount of liability in any action under subsection (a) of this section, the court shall consider, among other relevant factors—

- (1) in any individual action under subsection (A)(2)(A) of this section, the frequency and persistence of noncompliance by the debt collector, the nature of such noncompliance, and the extent to which such noncompliance was intentional;

Mylin sent one letter. In it he stated that he was representing Rapp with whom the Debtors had had much communication. He demanded the return of the cats. Consequently, they knew her name, address and motives. The Crockers already disputed the debt and also understood the theory under which Rapp was proceeding. Therefore, although Mylin's letter technically did not comply with the Fair Debt Collection Practices Act, the Debtors were aware of the facts not touched on in the letter.

15 U.S.C. §1692k(a) states in pertinent part:

⁵15 U.S.C. §1692g(3)

⁶15 U.S.C. §1692g(4)

⁷15 U.S.C. §1692g(5)

⁸15 U.S.C. §1692e(11)

[A]ny debt collector who fails to comply with any provision of this subchapter with respect to any person is liable to such person in an amount equal to the sum of—

- (1) any actual damage sustained by such person as a result of such failure;
- (2)(A) in the case of any action by an individual, such additional damages as the court may allow, but not exceeding \$1000;

For the reasons stated above, we find that the Debtors sustained no actual damage as a result of Mylin's letter. We also decline to award any additional damages under 15 U.S.C. §1692k(a)(2)(A).

Dated: October 5, 2001

Honorable Jo Ann C. Stevenson
United States Bankruptcy Judge

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ORDER

At a session of said Court held in and for said District, at the United States Bankruptcy Court, Federal Building, Grand Rapids, Michigan this 5th day of October, 2001

PRESENT: HONORABLE JO ANN C. STEVENSON
United States Bankruptcy Judge

NOW, THEREFORE IT IS HEREBY ORDERED as follows:

1. Debtors' Motion for Contempt and Other Relief against H. Stanley Rebert is DENIED;
2. Debtors' Motion for Contempt and Other Relief against Evelyn Rapp is GRANTED in the amount of \$7,810.00.
3. Debtors Motion for Contempt and Other Relief against Richard H. Mylin III is DENIED.

IT IS FURTHER ORDERED that a copy of this Opinion and Order shall be sent by first class United States mail, postage prepaid upon Richard David and Kathy Robin Crocker, Daniel B. Hess Sr., H. Stanley Rebert, Esq., Evelyn Rapp, Richard H. Mylin III and Marcia R. Meoli, Chapter 7 Trustee.

Dated: October 5, 2001

Honorable Jo Ann C. Stevenson
United States Bankruptcy Judge

Served as ordered:
