

U. S. BANKRUPTCY COURT
WESTERN DISTRICT OF MASSACHUSETTS

In Re)	Case No. <u>07-43128-JBR</u>
)	
Gailon Arthur Joy,)	Chapter 7
)	
Debtor.)	Adversary No. <u>07-04173</u>
)	
Gailon Arthur Joy,,)	
)	
Plaintiff,)	
)	
v.)	
)	
Three Angels Broadcasting Network,)	
Inc.,)	
)	
Danny Lee Shelton,)	
)	
John P. Pucci, Esq.,)	
)	
Jerrie M. Hayes, Esq.,)	
)	
Gerald S. Duffy, Esq.,)	
)	
Fierst, Pucci & Kane, LLP.,)	
)	
and)	
)	
Siegel Brill Gruepner Duffy & Foster)	
P. A.)	
)	
Defendants.)	
)	

MEMORANDUM IN SUPPORT OF OPPOSITION TO MOTION TO
DISMISS[#4]

NOW COMES GAILON ARTHUR JOY, CHAPTER 7 DEBTOR, through his attorney and offers the following to advise this Honorable Court why it should

deny the Motion to Dismiss[#4] of Defendants Danny Shelton and Three Angels Broadcasting Network, Inc.

I. FACTUAL BACKGROUND

1. On or about April 7, 2007, Danny Lee Shelton and Three Angels Broadcasting Network, Inc., filed suit against Gailon Arthur Joy and Robert (Bob) Pickle, alleging violation of trademark and disparagement in the Central District Court of Massachusetts ("District Court Case").
2. The Debtor, faced with a lack of income, filed for bankruptcy protection on August 14, 2007.
3. The Trustee submitted her Report of No Distribution on October 4, 2007. See Exhibit D.
4. The proceedings were initially stayed with respect to the Debtor, but after the Report of No Distribution was filed, the plaintiffs in the District Court Case began to insist on conducting discovery despite the open bankruptcy case.
5. After the plaintiffs continued prosecuting their case despite the objection of the debtor, through his counsel, in open court, the Debtor filed this Adversary Proceeding to enforce the stay and the dignity of this Court, and nominally claiming up to \$35,000 in compensatory and punitive damages.
6. The Trustee withdrew her report of no distribution on November 16, 2007.
7. Despite their accusations of commercial harm suffered by action of the Debtor, and their statements of intent, the Defendants have not as yet sought to have the Debtor or his co-defendant enjoined from any operations of the websites complained of.

II. ARGUMENT AND DISCUSSION.

8. Paragraph 18 of the combined Motion discusses Rule 7001 of the Federal Rules of Bankruptcy Procedure and its enumeration of the types of cases which make up an Adversary Proceeding. While the debtor agrees that relief for violation of the Automatic Stay may be had by motion and heard under Rule 9014 as complained of in the Motion, in the particular circumstances where it is not clear to whom liability should be apportioned and the issue of willful violations after statements of the counsel of their knowledge of the bankruptcy filing followed by their actions violating the Automatic Stay provisions both give rise to the need to take evidence and the assumption of the plaintiff debtor is that some if not all of the Rules applicable to Adversary Proceedings will apply.
9. The treatment of a contested matter under Rule 9014 and an adversary proceeding under Rule 7001 (and following) are similar if not interchangeable under the Rules. The filing fee is identical, for instance. It is also generally stated that relief for a violation of the Automatic Stay may be had as a contested matter. See, e.g. *In re Tubman*, 364 B.R. 574, 578 (note 11) (Bankr. Md. 2007). However, it is equally acceptable to bring an Adversary Proceeding to try the issue, as in *In Re Dean*, 359 B.R. 218, 222 (Bankr. C.D. Ill. 2006) ("As a general rule, damages are not available in a contested proceeding.")
10. "The main difference between an adversary proceeding and a contested matter is that an adversary proceeding must be commenced by the filing and service of a complaint that meets specific notice and formatting

requirements and which must be accompanied by a summons directed to the named defendant. FED. R. BANKR.P. 7003, 7004, 7008-7010; [In Re] *Fuller*, 255 B.R. [300,]304[(Bankr.W.D.Mich.2000)]." Id.

11. This dispute was brought as an Adversary Proceeding due to the procedural necessity to effectuate service upon the named defendants and afford them the opportunity to respond. Otherwise, these defendants have not been made parties to the underlying bankruptcy case and the requirements of due process would not have been satisfied.
12. The debtor plaintiff does not dispute that after those defendants have responded that this Court may rule that the matter is amenable to a summary disposition. Within the context of the Adversary Proceeding, however, it can be determined to what extent the Defendants Danny Shelton and Three Angels Broadcasting Network, Inc., were responsible for the intentional violation of the Automatic Stay, and what to extent their recovery of judgment from the debtor plaintiff should be limited over and above that granted by the discharge injunction.
13. Paragraph 19 of the combined Motion leaps a gap of logical fallacy when it equates the collection of electronic records with the perpetuation of the business of the debtor. The debtor requires his equipment to continue his business and the Defendants, through their attorneys, have asked that he turn that equipment over to them. See Exhibits A and B, letters of Jerrie Hayes, .
14. The Defendants claim that the information sought does not pertain to the

Debtor's business, but they omit to mention that they seek to deprive the Debtor of access to his equipment, which would prevent him from conducting his business. Furthermore, they seek to take control of computers which have confidential financial information of the Debtor's customers - and this breach of confidentiality and the consequent liability to the Debtor goes unmentioned.

15. The issue of actual damages suffered to date by the violations of the Automatic Stay is similarly a conclusion for which the predicate argument is missing. One could respond that prior to the presentation of evidence it would appear that there are no actual damages - because the evidence has not made its appearance, because in turn it has not become time yet to present it. Unmentioned is the allegation that there are actual damages and the appropriate evidence will be presented as the proceedings require.
16. The statement in Paragraph 21 of the Motion that "the Debtor did not specify with detail any harm that was allegedly caused by the actions of Defendants" is again putting the arguments out of order. The Defendants have not acquiesced on the issue of liability and asked to proceed to proof of damages. Instead they are denying that any liability exists.
17. A party can be found to have willfully violated the Automatic Stay without a finding of an intent to violate the Stay. The Defendants argue that it is necessary to establish a willful violation. They again do so at the outset of the case. The Exhibits to the Complaint do indeed establish willful violation of the Stay with respect to the Other Defendants. The Defendants are then liable by *respondeat superior* for the actions of their agents.

However, the question of their own intent to violate the stay, and thus merit punitive damages, can only be discovered, as they have chosen to speak and act in violation of the Stay through their mouthpieces. The Debtor Plaintiff deserves his opportunity to develop that proof, as it would be unfair for the agents to be held liable when it was at the behest of the principals.

18. In Paragraph 22, the Defendants advise the Court, without attribution, that the District Court had made a ruling "while aware of the Chapter 7 case". This should really have been corrected by the movant, particularly in light of further developments. Following the filing of this Adversary Proceeding, the same magistrate judge ruled that the matter was indeed stayed until the Bankruptcy Court had had its opportunity to rule. See Exhibit C. It does not appear to be correct that the District Court ruling had been made with an eye to the rights of the debtor to have the protection of the Bankruptcy Court.
19. It is also most untrue that the Debtor participated in the November 13, 2007 status conference in the District Court, and particularly not pro se. Counsel appeared in the District Court for the sole point of objecting to the proceedings as a violation of the Automatic Stay. Following this objection, the magistrate judge questioned the Debtor and elicited the location of his equipment and ordered him to make it available for copying under seal. Counsel for the Debtor offered to make his office available for the purposes of the copying, and, in a corollary to the principle that sending a letter to counsel for a debtor is not a violation of the Automatic

Stay, it is contended here that the creditors would not have violated the Stay had they appeared as they agreed and made electronic copies in the office of the debtor's counsel. Counsel made the offer to negate, rather than enhance, any possibility of further violations of the Automatic Stay.

20. The statement in Paragraph 23 that this counsel said nothing to the Court regarding the Automatic Stay is, as mentioned above, particularly untrue and the use of counsel's hearsay is reprehensible. This should be retracted immediately before a transcript of the hearing is brought to this Court and the deliberate misstatement of what opposing counsel has said is exposed for the false statement and breach of professional responsibility which it is.

21. The further statements in the Motion are repetitive and, as mentioned above, seek to put the cart before the horse, or, perhaps, the escape hatch before the sanctions. Since the Motion misquotes this Counsel, the use of the assent of the other parties is hardly proper, particularly since it was not denoted as having been brought in their behalf.

III. CONCLUSION AND RELIEF SOUGHT

22. The Adversary Proceeding was properly brought as the required procedure of serving the defendants not already party to the bankruptcy proceeding was available under Rule 7004.

23. Whether the decision on the matter should be streamlined and ruled upon as a contested matter is something to be decided at a later date.

24. At the current time the Defendants dispute the facts which the Debtor contends comprise breaches of the Automatic Stay and indicate that the willful violation was in fact intentional and planned. He deserves his

chance to discover the truth of the matter.

25. The Defendants are attempting to avoid making any answer at all by first contesting the facts the Complaint's allegations are based on and even distort what was placed on the public record during hearings, but this is out of order, as this is not a motion for failure to state a claim upon which relief may be granted or for a more definite statement.

26. Should there be no real dispute of fact or of liability the matter can and should be disposed of summarily, whether by Rule 9014 or 56, but until it is resolved just which issues are disputed, deciding to proceed as a contested matter is certain to leave some of those issues unresolved and this is doubtless what the Defendants hope for, and equally certain what this Court, in order to protect its own dignity and the sanctity of the Automatic Stay, should refuse to allow

RESPECTFULLY SUBMITTED on this 30th day of November, 2007.

Gailon Arthur Joy, Debtor,
By His Attorney,

/s/ Laird J. Heal
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