UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GAILON ARTHUR JOY,	)	
	)	
Plaintiff,	)	
	)	**Civil Action No.**
v.	)	**08-40090-FDS**
	)	
DANNY LEE SHELTON; THREE ANGELS BROADCASTING NETWORK, INC.; JOHN P. PUCCI; JERRIE M. HAYES; GERALD S. DUFFY; FIERST, PUCCI, & KANE, LLP; and SIEGEL BRILL GREUPNER DUFFY & FOSTER P.A.,	)	
	)	
Defendants.	)	

MEMORANDUM & ORDER ON
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

SAYLOR, J.

This is an action brought by a Chapter 7 debtor in bankruptcy alleging violation of the automatic stay imposed by 11 U.S.C. § 362. Plaintiff Gailon Arthur Joy filed a voluntary petition for Chapter 7 bankruptcy on August 14, 2007. At the time of the filing, he was a co-defendant in an action brought in this Court by Three Angels Broadcasting Network, Inc., and Danny Lee Shelton, which claimed, among other things, trademark violation and defamation (the "initial action"). Joy contends that Three Angels and Shelton, along with their lawyers—all of whom are defendants in the present action—violated the automatic stay by continuing to pursue the initial action against him after the filing of the petition. *See* 11 U.S.C. § 362(a)(1). Defendants contend that they were continuing to proceed against Joy's co-defendant, Robert Pickle, and sought only to preserve the relevant evidence in Joy's possession.

Defendants have moved for summary judgment, and their motion is unopposed. For the reasons that follow, the motion will be granted.

I. Background

Typically, when a party moves for summary judgment, this Court will view "the facts in the light most favorable to the non-moving party." *Velez v. Thermo King de Puerto Rico, Inc.*, 585 F.3d 441, 444 (1st Cir. 2001). Where, however, the motion is unopposed, the "[m]aterial facts of record set forth . . . by the moving party . . . will be deemed for the purposes of the motion to be admitted." Local Rule 56.1; *see NEPSK, Inc. v. Town of Houlton*, 283 F.3d 1, 7 (1st Cir. 2002).

On August 6, 2007, Three Angels and Shelton filed the initial action against Joy and Pickle in this Court. *See* Civil Action No. 07-cv-40098-FDS. Three Angels and Shelton were represented by attorneys Gerald Duffy and Jerrie Hayes of the firm Siegel, Bill, Gruepner, Duffy, & Foster, P.A., and by attorney John Pucci of the firm Fierst, Pucci, & Kane, LLP. The initial action asserted claims for trademark infringement, trademark dilution, defamation, and intentional interference with advantageous relationships. Three Angels, which was founded by Shelton, operates a Christian television and radio broadcast ministry. (Docket No. 10-3 at 26). Shelton is its president, and serves as an on-air minister. (*Id.*) Three Angels and its acronym, 3ABN, are registered trademarks. (*Id.* at 27). The initial complaint alleges that Joy and Pickle operated a website with the domain name of "www.save3ABN.org" that disparaged Three Angels and its founder. The website allegedly contained untrue allegations that Three Angels and Shelton had engaged in criminal and otherwise embarrassing conduct. Joy defended himself *pro se*, and his co-defendant Pickle was represented by attorney Laird Heal.

In August 2007, the initial action was in the discovery stage. On August 9, 2007, the Magistrate Judge held a hearing concerning the discovery of electronically-stored information. (*See* Civ. Act. No. 07-40098, Docket Notes at 08/09/07). On August 13, 2007, the Magistrate Judge issued an order requiring the parties to submit a proposed order "with respect to the format that any electronically stored information shall be provided to the opposing party." (*See* Civ. Act. No. 07-40098, Electronic Order at 08/13/07).

The next day, on August 14, 2007, Joy filed a voluntary petition for Chapter 7 bankruptcy protection. He listed his electronic office equipment—including computers—as personal assets that, upon the filing, became assets of the bankrupt estate. Section 362 of the Bankruptcy Code provides that when a debtor files a voluntary bankruptcy petition, any action currently pending against the debtor is stayed, along with any act to recover a claim against the debtor that arose before the petition. *See* 11 U.S.C. §§ 362(a)(1), (a)(6). On August 27, 2007—notwithstanding the automatic stay—Joy filed a proposed discovery order in the initial action. (*See* Civ. Act. No. 07-40098, Docket No. 26).

Joy did not inform defendants in the present action that he had filed for bankruptcy. It is, however, clear from the record that they knew of Joy's filing at some point before October 24, 2007. On that date, Three Angels and Shelton filed a motion requesting a status conference in the initial action. (Docket No. 2-9 at 2). The motion—which attached Joy's bankruptcy petition as an exhibit—indicated that Joy's bankruptcy filing gave rise to two issues affecting the initial action. First, "Joy . . . listed 'electronic office equipment' as a personal property asset," and there was "a very real possibility that the computer equipment [containing crucial evidence relevant to the initial action] . . . w[ould] be seized and sold by the Trustee in satisfaction of []

Joy's obligations." (*Id.* at 2-3). Three Angels and Shelton therefore sought "authorization to image the computer hard-drives in question as soon as [possible]." (*Id.* at 3). Second, Pickle's counsel in the initial action was also serving as Joy's counsel in his bankruptcy proceedings, which created a potential conflict of interest. As Three Angels and Shelton pointed out, "in bankruptcy, [] Joy[] seeks to discharge any and all liability [arising from the initial action], which would have the effect of shifting full liability for damages onto . . . Pickle." (*Id.* at 3). Because both issues were recent developments in the case, Three Angels and Shelton sought a conference to bring them to the Court's attention.

The Magistrate Judge granted the motion. He also ordered Joy to "[p]rovide . . . a listing of all electronic equipment" under his control, and to "[m]ake that equipment available to a forensic computer examiner" for mirror imaging by November 9, 2009. (Civ. Act. No. 07-40098, Docket No. 30-2). Any costs associated with the mirror-imaging process were to be borne by Three Angels and Shelton. (*Id.*)

On November 5, 2007, Haynes (who was acting as the attorney for Three Angels and Shelton) faxed a letter to Heal, who was acting as Joy's bankruptcy attorney. (Docket No. 2-12 at 3). The letter stated that, by order of the Magistrate Judge, "Joy is to make all electronic equipment within his . . . control available for imaging . . . on or before November 9, 2007." (*Id.* at 3). The corresponding order was attached. The letter further stated that Hayes would be contacting Joy "separately to arrange for the date and time for the data imaging." (*Id.*) Hayes proceeded to do just that, sending letters to Joy on November 6 and November 9. (Docket No. 2-11 at 3; Docket No. 2-13 at 3). The first letter was an attempt to "schedule a time for the court-ordered imaging of the electronic equipment" in Joy's control. (Docket No. 2-11 at 3). The

second letter indicated that Joy had not responded to the earlier letter, and stated that Hayes would be "contact[ing Joy] in the future concerning arrangements for the data preservation ordered by" the Magistrate Judge. (Docket No. 2-13 at 3).

On the morning of November 13, 2007, Three Angels and Shelton filed a motion in Bankruptcy Court seeking relief from the automatic stay "for the purpose of obtaining injunctive relief" in the initial action. (Docket No. 10-3 at 17). Specifically, Three Angels and Shelton sought permission to continue their efforts to end Joy's use of their trademarks and to discontinue his website. (*Id.*)[1] Later that day, Three Angels and Shelton, along with their attorneys, appeared at a status conference in the initial action. (Civ. Act. No. 07-40098, Docket Notes at 11/13/07). The conference addressed the preservation of electronic evidence and the potential conflict of interest in Heal's continued representation of Pickle. In addition, attorneys Duffy and Pucci advised the Magistrate Judge that they had filed a motion for relief from the automatic stay in the Bankruptcy Court earlier that day. Joy was present at the status conference, and so too was Heal, who withdrew as Pickle's counsel. (*See id.*).

The following day, November 14, Joy filed this action in Bankruptcy Court. This action seeks damages under 11 U.S.C. § 362(k), which provides that "an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages."[2] The

[1] Joy opposed the lifting of the automatic stay, but the Bankruptcy Court granted the motion, allowing Three Angels and Shelton to continue to seek injunctive relief in the initial action. (*See* Docket No. 10-3 at 55). This Court dismissed the initial action on November 3, 2008. (*See* Civ. Act. No. 07-40098, Docket Notes at 11/03/08). Joy and Pickle filed a number of post-dismissal motions, all of which were denied.

[2] On November 16, the Magistrate Judge issued an order in the initial action concerning the parties' discovery dispute. The order stated that neither "party's electronically stored information [is required to be] reproduced [by] mirror imag[ing] of [its] respective hard drives or storage devices. . . . If issues arise wherein either party feels that imaging of storage devises is appropriate they may make application to the [C]ourt." (Civ. Act. No.

initial complaint was dismissed on February 1, 2008, because it failed to state a claim, *see* Fed. R. Civ. P. 12(b)(6), but Joy filed an amended complaint on February 11, 2008. The amended complaint contends that defendants committed six intentional violations of the automatic stay, and that Joy incurred $250 in damages responding to those violations. (Docket No. 2-8 at 6). It further alleged that Joy incurred $1,593.60 in attorneys fees and costs, and that he should be awarded $30,000 in punitive damages—that is, $5,000 per violation. (*Id.*)[3]

Defendants filed a motion to dismiss the amended complaint in Bankruptcy Court. After holding a hearing on the motion, the Bankruptcy Court determined that the issue of whether the automatic stay had been violated implicated matters pending in this Court. Accordingly, the matter was withdrawn to this Court on May 12, 2008. This Court referred the pending motion to dismiss to the Magistrate Judge, who filed a report and recommendation stating that it should be denied. (Docket No. 6). The Magistrate Judge noted that "any violation of the automatic stay [described by Joy] would be, *at best*, a technical one," but that "such determination is best made on a motion for summary judgment. (*Id*. at 7, 8 (emphasis added)). The parties did not object to the report and recommendation, and it was adopted by this Court on March 25, 2009. Since that time, defendants have filed an unopposed motion for summary judgment.

II. Analysis

A. Jurisdiction

07-40098, Docket No. 33-2 at 7). The Magistrate Judge noted that his November 2 order was to the contrary, but that its purpose—"to prevent the loss of any relevant information" (*id.*)—remained in effect. Thus, pursuant to the Magistrate Judge's order of November 16, Joy was no longer required to make his electronic office equipment available for mirror-imaging. He continued, however, to be under Court order to preserve the information held in that equipment.

[3] The complaint is inconsistent in its request for punitive damages. It alleges six violations of the automatic stay and demands $5,000 in punitive damages per violation, but calculates the total punitive damages sought to be $35,000. (*See* Docket No. 2-8 at 6-7).

As a threshold matter, the Court has jurisdiction over this action because 11 U.S.C. § 362(k) provides a private right of action that may be asserted in the Bankruptcy or District Court. *See Halas v. Platek*, 239 B.R. 784, 788 (N.D. Ill. 1999).[4]

B. Standard of Review

Summary judgment is appropriate when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). "Essentially, Rule 56(c) mandates the entry of summary judgment 'against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" *Coll v. PB Diagnostic Sys.*, 50 F.3d 1115, 1121 (1st Cir. 1995) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

Joy's failure to respond to defendants' motion "does not in itself justify [granting] summary judgment." *Lopez v. Corporacion Azucarera de Puerto Rico*, 938 F.2d 1510, 1516 (1st Cir. 1991) (quotation marks and citation omitted). "Rather, the court must determine whether summary judgment is 'appropriate,' which means that it must assure itself that the moving party's submission shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *NEPSK*, 283 F.3d at 7. Yet, where the non-moving party fails to question the moving party's statement of facts, those facts may be accepted as true. *See id.* For that reason, "[i]n most cases, a party's failure to oppose summary judgment is fatal to its case." *Perez-Cordero v. Wal-Mart Puerto Rico*, 440 F.3d 531, 534 (1st

[4] The 2005 Amendments to 11 U.S.C. § 362 redesignated former subsection (h) as subsection (k) and inserted a new subsection (h). *See* Pub. L. 109-8, § 305(1)(B)-(C). Accordingly, cases concerning violations of the automatic stay decided before those amendments went into effect will refer to § 362(h).

Cir. 2006).

C. Elements of an Action Brought Under 11 U.S.C. § 362(k)

The automatic stay "is one of the fundamental protections that the Bankruptcy Code affords to debtors." *In re Jamo*, 283 F.3d 392, 398 (1st Cir. 2002). "As its name suggests, the stay springs into effect upon the filing of a bankruptcy petition . . . giving the debtor breathing room." *Id.* Its function "is to protect the bankrupt's estate from being eaten away by creditors' lawsuits and seizures of property before the trustee has had the opportunity to marshal the estate's assets and distribute them equitably among the creditors." *In re Nelson*, 994 F.2d 42, 45 (1st Cir. 1993).

Section 362(k) provides an avenue of relief for violations of the stay. By its terms, "there are three elements that must be established before damages will be awarded for violation of the automatic stay: (1) the violation must have occurred, (2) the violation must have been committed willfully, and (3) the violation must have injured the individual seeking damages." *In re Adams*, 212 B.R. 703, 708 (Bkrtcy. D. Mass. 1997). "If all three elements are met, the [C]ourt must award actual damages and then decide whether punitive damages are appropriate." *Id.*

Here, the Court's inquiry turns on the first and third elements. "The standard for a willful violation of the automatic stay under § 362[(k)] is met if there is knowledge of the stay and the defendant intended the actions which constituted the violations." *Fleet Mortg. Group, Inc. v. Kaneb*, 196 F.3d 265, 269 (1st Cir. 1999). Because the record is clear that defendants were aware of the stay, their actions were willful. *See id.* The question is whether violations occurred, and if so, whether they caused actual damages.

1. Purported Violations of the Stay

Whether the automatic stay was violated is a question of law. *See In re Ocasio*, 272 B.R. 815, 822 (1st Cir. B.A.P. 1999). Joy alleges six violations of the stay, although the nature of the six violations is not exactly clear from the amended complaint. The alleged violations appear to be: (1) the October 24, 2007 motion for a status conference; (2) the Magistrate Judge's order of November 2, 2007, requiring Joy to make his electronic office equipment available for mirror imaging; (3-5) the letters dated November 5, 6, and 9, 2007, from Hayes to Joy or his bankruptcy attorney, detailing the Magistrate Judge's order; and (6) the November 13, 2007 status conference.[5]

Not one of the six actions violated the automatic stay. Where a defendant files for bankruptcy but his co-defendant remains solvent, plaintiffs are free to continue to pursue their action against the co-defendant. *See Austin v. Unarco Indus. Inc.*, 705 F.2d 1, 4 (1st Cir. 1983) ("the automatic stay provisions of 11 U.S.C. § 362(a) apply *only* to the bankrupt debtor" (emphasis added)); *In re Christakis*, 291 B.R. 9, 17 (Bkrtcy. D. Mass. 2003) ("The stay applies only to the debtor and not to co-defendants"). Three Angels and Shelton were therefore free to proceed against co-defendant Pickle, and to attempt to discover material from Joy relevant to their action. *Cf. Christakis*, 291 B.R. at 18 ("debtors continue to have a responsibility to serve as witnesses in non-bankruptcy court litigation filed or continuing against non-debtor parties unless and until a bankruptcy court says otherwise").

By October 24, 2007, it was clear to all parties, including the Magistrate Judge, that Joy had filed for bankruptcy and that the initial action would not be continuing against him until the

[5] It is unclear, to say the least, how an order by the Magistrate Judge could constitute a violation of the automatic stay by *defendants*. Nonetheless, the Court will assume a causative relationship between the order and the defendants' actions after the filing of the petition.

stay was lifted. Indeed, the motion for a status conference filed by Three Angels and Shelton on that date *attached* the bankruptcy petition and stated that Joy had "filed for bankruptcy protection." (*See* Docket No. 2-9 at 2). The purpose of the requested status conference was to assess the consequences of that filing—specifically, to address a potential conflict of interest created by the bankruptcy filing, and to ensure that information relevant to the initial action would be preserved before Joy's bankruptcy estate was dissolved. The fact Joy received service of the motion—which concerned evidence in his possession—is insufficient to establish that it violated the stay. *See Christakis*, 291 B.R. at 18 ("there is no per se violation of the stay in serving notice to the debtor of actions taking place in litigation to which the debtor was formerly an active party").

The Magistrate Judge's order requiring Joy to detail, and make available, his electronic office equipment likewise did not violate the stay. The Bankruptcy Appellate Panel of the Ninth Circuit addressed an analogous circumstance in *In re Miller*, 262 B.R. 499 (9th Cir. B.A.P. 2001). There, the Court analyzed whether the "automatic stay protected a debtor from complying with discovery requests in a multi-defendant case where the debtor is a defendant . . . ." *Id.* at 504. The debtor was a corporation, and plaintiffs in a pre-petition action sought to depose a number of its employees, issuing a number of third-party witness subpoenas to that effect. *Id.* at 503. The Court found continued discovery to be permissible. It stated: "Information is information, and we believe the discovery of it as part of the development of a case against non-debtor parties is permissible, even if that information could later be used against the party protected by the automatic stay." *Id.* at 504. That reasoning applies equally here. The stay did not free Joy from having to provide information through the discovery

process, or from complying with discovery orders. *See In re Mahurkar Double Lumen Hemodialysis Catheter Patent Litig.*, 140 B.R. 969, 977 (N.D. Ill. 1992) (Easterbrook, J., sitting by designation) (debtor "has no ground to interfere with or disrupt discovery that is calculated to lead to evidence admissible against" his solvent co-defendant). It follows that Hayes's three letters notifying Joy and his bankruptcy counsel of the Magistrate Judge's order also did not violate the stay.

The record also indicates that Joy's appearance at the November 13 status conference was voluntary, and he has submitted nothing to indicate otherwise. When a debtor appears and fails to argue for the "application of the automatic stay, then [he] waives" any objection to his appearance based on the automatic stay. *See In re Cobb*, 88 B.R. 119, 121 (Bkrtcy. W.D. Tex 1998); *cf. In re Clayton*, 235 B.R. 801, 807 (Bkrtcy. M.D.N.C. 1998) ("The automatic stay was not designed to be used as a kind of spring-loaded gun against creditors who wander into traps baited by the debtor").

Finally, the Court notes that the stay automatically imposed by 11 U.S.C. § 362(a) precludes anyone with a claim against a debtor from continuing "proceedings against the debtor," *see id.*, § 362(a)(1), and from attempting to recover "against the debtor." *See id.*, § 362(a)(6). Here, defendants did neither. Moreover, the purpose of "the automatic stay provision is . . . to forfend against the disorderly, piecemeal dismemberment of the debtor's estate outside the bankruptcy proceedings." *See Mann v. Chase Manhattan Mortg. Corp.*, 316 F.3d 1, 3 (1st Cir. 2003). Defendants' actions were not at all inconsistent with that purpose. Joy cannot establish that defendants deprived him of the protections afforded by 11 U.S.C. § 362(a), and therefore cannot recover under § 362(k).

2. Alleged Damages

Even if the Court were to determine that defendants' actions had violated the automatic stay, Joy cannot establish that he suffered actual damages. " For § 362[(k)] purposes, actual damages should be awarded only if there is concrete evidence supporting the award of a definite amount." *In re Heghmann*, 316 B.R. 395, 405 (1st Cir. B.A.P. 2004); *see In re Sumpter*, 171 B.R. 835, 844 (Bkrtcy. N.D. Ill. 1994) ("a damage award [for violation of the automatic stay] cannot be based on mere speculation, guess or conjecture"). Joy contends that he expended ten hours of time responding to defendants' actions.[6] There is, however, no evidence in the record that Joy spent any time responding to either defendants' motion or the Magistrate Judge's order, other than voluntarily appearing at the status conference. "Debtors are indeed under a duty to mitigate their damages resulting from automatic stay violations." *In re Rosa*, 313 B.R. 1, 9 (Bkrtcy. D. Mass. 2004). That duty has not been met where a debtor voluntarily participates in an action without so much as mentioning the automatic stay. Joy's claimed damages are therefore unsubstantiated. *Cf. In re Flack*, 239 B.R. 155, 163 (Bkrtcy. S.D. Ohio 1999) ("[s]anctions are not imposed for willful violations where the debtor has not been injured").

Joy also asserts that he is owed attorneys' fees and punitive damages. His claim for the former is insufficient as a matter of law, because he represented himself in the initial action and any fees were incurred only in pursuing this action. *See Shadduck v. Rodolakis*, 221 B.R. 573, 585 (D. Mass. 1998) ("where the only damages to the debtor are the attorneys' fees related to bringing a contempt motion, courts have ruled that such damages are insufficient to satisfy the

[6] Joy contends that and that he formerly—most recently, in 1993 (*see* Docket No. 10-3 at 69)—performed work as a paralegal where he was compensated at a rate of $25 per hour. (Docket No. 2-8 at 3).

damages element of 11 U.S.C. § 362(h) unless the debtor attempts to resolve the dispute with the [creditor] prior to filing a[n action] for contempt and sanctions"). Punitive damages under 11 U.S.C. § 362(k) are reserved only for the most egregious violations, *see In re Osario*, 272 B.R. 815, 826 (1st Cir. B.A.P. 1999) (upholding the award of punitive damages where creditor's actions were "reprehensible," "vulgar, demeaning, and threatening"), and the violations alleged here plainly do not rise to that level.

III. Conclusion

For the foregoing reasons, defendants' motion for summary judgment is GRANTED.

So Ordered.

/s/ F. Dennis Saylor
F. Dennis Saylor IV
United States District Judge

Dated: December 8 2009