UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GAILION ARTHUR JOY, Plaintiff, vs. DANNY LEE SHELTON, THREE ANGELS BROADCASTING NETWORK, INC, JOHN P. PUCCI, JERRIE M. HAYES, GERALD S. DUFFY, FIERST, PUCCI & KANE, LLP, SIEGEL BRILL GREUPNER DUFFY & FOSTER P.A., Defendants.	)	**CIVIL ACTION** **08-40090-FDS**

Report and Recommendation
March 10, 2009

Hillman, M.J.

Nature of the Proceeding

By Order of Reference dated May 21, 2008, the following motions have been referred to me for a Report and Recommendation pursuant to 28 U.S.C. § 636(b): 1) Motion To Dismiss Amended Complaint, Or In The Alternative, To Treat Adversary Proceeding As A Contested Matter Under Federal Rule of Bankruptcy Procedure 9014 (Docket No. 3), filed by Three Angels Broadcasting Network, Inc. and Danny Lee Shelton; and 2) Motion to Dismiss Amended Complaint, or in the Alternative, to Treat Adversary Proceeding as a Contested Matter Under Federal Rule of Bankruptcy Procedure 9014 by John P. Pucci, Esquire and Fierst, Pucci & Kane LLP (Docket No. 4).

Nature of the Case

Gailon Arthur Joy has commenced this action against Three Angels Broadcasting Network, Inc ("3ABN"), Danny Lee Shelton, John P. Pucci, Jerrie M. Hayes, Gerald S. Duffy, Fierst, Pucci & Kane, LLP, and Siegel Brill Greupner Duffy & Foster. Joy, who filed a voluntary petition for bankruptcy under Chapter 7 of the U.S. Bankruptcy Code ("Petition") on August 14, 2007, alleges that the defendants have violated the Bankruptcy Code's automatic stay provision, 11 U.S.C. § 362(a), by continuing to prosecute a pre-Petition civil action against him for trademark infringement and defamation. Joy further alleges that as a result of defendants' violation of the automatic stay, he is entitled to recover actual damages, including costs and attorneys' fees, and, if deemed appropriate, punitive damages. *See* 11 U.S.C. §362(k)[1].

Background

On August 6, 2007, 3ABN and Shelton filed a complaint in this Court against Joy and Robert Pickle asserting claims for trademark infringement and defamation. *See* Civ. Act. No. 07-40098-FDS ("Original District Court Case"). On August 18, 2007, Joy filed his Petition with the Bankruptcy Court, *see BK Docket No. 07-43128-JBR* ("Bankruptcy Case"). Joy listed the Original District Court Case in his Petition under the section requesting a description of all suits to which the debtor is/was a party within a year preceding the filing of the Petition. On October 24, 2007, 3ABN and Shelton filed a motion for a status conference in the Original District Court Case to address: (1) their assertion that information which Joy included in his bankruptcy petition contradicted representations he made to this Court concerning electronic discovery, and (2) a potential conflict of interest issue concerning Pickle's attorney, who was representing Joy

[1]Plaintiff brings this action for violation of 11 U.S.C. § 362(h). However, the statute was amended in 2005 and at that time, subsection (h) was redignated as subsection (k).

in the Bankruptcy Case. On November 13, 2007, 3ABN and Shelton filed a motion in the Bankruptcy Case seeking relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(1) for the purpose of obtaining injunctive relief in the Original District Court Case. Also on November 13, 2007, this Court held a status conference in the Original District Court Case which primarily addressed whether attorney Heald, who represents Joy in the Bankruptcy Case, was representing any parties in the case before this Court[2]. On November 14, 2007, Joy filed a complaint in the Bankruptcy Court alleging that the defendants had knowingly and willfully violated the automatic stay by (1) filing the motion for status conference on October 24, 2007; (2) by attempting to enforce a subsequent court-ordered discovery order requiring that he (Joy) produce electronic equipment in his possession for data imaging; and (3) by failing to terminate the proceedings against him at and by participating in the November 13, 2007 status conference. Joy sought actual and punitive damages, injunctive relief and attorney's fees and costs.

On November 20, 2007, defendants, 3ABN, Shelton, Pucci and Fierst, Pucci & Kane LLP, filed motions to dismiss Joy's complaint against them for violation of the automatic stay, for, among other reasons, failing to detail any harm suffered as the result of the alleged violations.[3]

On November 21, 2007, the Bankruptcy Court granted 3ABN's and Shelton's motion for relief from the automatic stay, which permitted them to pursue their claims against Joy in the District Court Case to the extent that they were seeking injunctive relief.

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[2] Attorney Heald stated that he was not representing either Joy or Pickle in this Court and thereafter, he filed a notice of withdrawal of appearance,which was allowed on November 21, 2007.

[3]Hereinafter, "defendants" shall refer to those defendants party to the motions to dismiss.

On February 1, 2008, the Bankruptcy Court allowed the defendants' motion to dismiss the complaint on the grounds that the plaintiff failed to allege all of the elements of a claim under 11 U.S.C. § 362(k) in accordance with standard set forth by the Supreme Court in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 1965 (2007)(complaint must contain factual allegations sufficient to raise right to relief above speculative level). The court gave Joy time to file an amended complaint.

On February 11, 2008, Joy filed an amended complaint in the Bankruptcy Court. On February 21, 2008, defendants filed motions to dismiss the amended complaint (or, in the alternative, to treat the adversary proceeding as a contested matter in accordance with the rules of the Bankruptcy Court). After holding a hearing on the motions to dismiss, the Bankruptcy Court determined that the issue of whether the Defendants had violated the automatic stay imposed by 11 U.S.C. § 362(a) implicated matters pending in this Court and the matter was ultimately transferred to this Court.[4]

Discussion

In his amended complaint (Docket Nos. 2-8 through 2-13), Joy alleges that defendants knowingly and willfully violated the Bankruptcy Code's automatic stay provision, specifically Section 362(a)(5)[5], by pursuing their claims against him in the Original District Court case after

[4] Procedurally, the Bankruptcy Court filed a Request For Withdrawal Of Reference, which was allowed by this Court (Saylor, D.J.).

[5]Joy alleges that defendants' actions violated Section 362(a)(5). However, it is clear that he is actually assering a violation of Section 362(a)(6). Furthermore, it appears that the alleged violations would more likely constitute a violation of Section 362(a)(1)(automatic stay of continuation of judicial proceedings against debtor commenced before bankruptcy case to recover claim against debtor which arose before bankruptcy). Joy does, throughout his amended complaint, make references to defendants' continuing to participate in the prosecution of the case-- whether such allegations are sufficient to constitute a claim for violation of Section 362(a)(1) is unclear. However, the defendants have focused on whether Joy has alleged actual damages and not whether Joy has properly asserted a claim under Section 362(a)(6), or Section 362(a)(1), as the case may be, and, therefore, I will not address

the filing of his Petition and before the Bankruptcy Court granted relief therefrom. More specifically, Joy alleges that: (1) defendants were aware that he had filed his Petition no later than September 13, 2007; (2) Shelton and 3ABN did not file their motion seeking relief from the automatic stay until November 13, 2007; (3) the Bankruptcy Court did not grant relief from the automatic stay until November 21; and (4) during the pendency of the automatic stay, defendants' actions caused him injury, including the incurrence of legal costs and fees. Defendants seek to dismiss the amended complaint for failure to meet *Bell Atlantic's* heightened pleading requirements and for failing to allege any actual injury sufficient to trigger liability under 11 U.S.C. § 362(k). Defendants further argue that the matter is not an adversary proceeding under Federal Rule of Bankruptcy 7001 because Joy is, essentially, seeking sanctions rather than compensation for any monetary injury. In the alternative, Defendants request that if the matter is not dismissed, the Court treat it as a contested matter pursuant to Federal Rule of Bankruptcy 9014, which would permit the matter to be resolved expeditiously and inexpensively.

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the issue any further.

Whether the Complaint Should Be Dismissed[6]

To survive a motion to dismiss, Joy's amended complaint must set forth more than mere conclusions, or a blanket assertion of entitlement to relief. *Bell Atlantic*, 127 S.Ct. at 1965. "[L]abels and conclusions, and a formulaic recitation of the elements of a cause of action will not do". *Id.*, at 1964-65. Rather, the "factual allegations must be enough to raise a right to relief above the speculative level." *Id*., at 1965.

Under Section 362(a)(6), the filing of a bankruptcy petition operates as a stay of nearly all non-criminal actions against the debtor, the debtors property, or the property of the estate. To recover damages for violation of automatic stay under §362(k), the moving party must demonstrate (1) that a stay violation occurred; (2) that it was committed willfully by the defendant; and (3) that moving party was damaged. *In Re Steenstra*, 280 B.R. 560, 566 (Bkrtcy. D. Mass., 2002).

Joy claims that the defendants violated the automatic stay by sending him a letter requesting that he produce equipment and submit to an examination in accordance with a prior order issued by this Court, by filing a motion for a further status conference during the pendency of the stay and by failing to terminate the proceedings against him. Joy alleges that as a result of the defendants' violation of the automatic stay, he was forced to expend time answering messages, attending a status conference hearing, and preparing to meet the orders of the District Court.

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[6]Defendants, Fierst, Pucci & Kane LLP and John Pucci have filed both an answer and a motion to dismiss. To the extent these defendants have filed an answer, their motion to dismiss is more properly considered a motion for judgment on the pleadings and will be treated as such. *See* Fed.R.Civ.P. 12(c); *Aponte-Torres v. Univ. of Puerto Rico*, 445 F.3d 50, 54 (1st Cir. 2006). At the same time, "[t]he two motions are ordinarily accorded much the same treatment," except that a Rule 12(c) motion "implicates the pleadings as a whole." *Id.* Given that in this case, the relevant facts are contained in the amended complaint, these defendants' characterization of their motion is immaterial.

Judge Rosenthal found that the original complaint did not meet *Bell Atlantic's* "heightened" pleading requirements because it failed to allege all elements of a claim under Section 362(k). Both the original complaint and the amended complaint allege sufficient facts to assert a claim for a *technical* violation of the automatic stay[7]. Joy's amended complaint also includes his estimate of costs incurred in connection with defendants' alleged violation of the automatic stay. While he alleges that he cannot quantify his lost profits, he has done some paralegal work in the past and has been compensated at $25.00 per hour and thus, he calculates that he suffered lost earnings of at least $250.00. The plaintiff further alleges he incurred $1,593.60 in legal costs and fees at 7.85 plus hours plus costs, prior to the filing of the adversary proceeding. Yet, prior to the stay being lifted, Joy never complied with the defendants' requests that he turn over his equipment or submit to an examination. Therefore, any claims for damages relating to such requests appear spurious. On the other hand, the defendants did file a motion requesting that the Court hold a status conference which was held on November 13, 2007. It is true that Joy did appear for that hearing. While I share defendants' skepticism concerning whether such allegations will be sufficient to establish that Joy suffered an injury in fact, where a party has alleged imprecise damages as opposed to no damages, such determination is best made on a motion for summary judgment. For this reason, I cannot find that the amended complaint should be dismissed.

Defendants' Request To Treat Adversary Proceed Pursuant To Fed.R.Bankr.P. 9014

[7]The Pucci defendants admit that they received constructive notice of Joy's bankruptcy filing around August 29, 200, and 3ABN and Shelton stated in their motion for a status conference that Joy had filed for bankruptcy protection in August 2007. The standard for willful violation of the stay under Section 362(k) is met where a creditor acts deliberately with knowledge of the bankruptcy petition; it does not require that the creditor have intended to violate the stay.

As part of their motions to dismiss, the defendants have requested that this proceeding be treated as a contested matter pursuant to Fed.R.Bankr.P. 9014, so that it may be resolved expeditiously and inexpensively. Since the referral to the bankruptcy court has been vacated, this request must be denied for obvious reasons. That being said, any violation of the automatic stay by the defendants would be, at best, a technical one. For this reason, this matter should be concluded expeditiously and inexpensively. Therefore, in the interest of justice, I **strongly** encourage the parties to consider resolving this matter without any further involvement of the Court, or to agree to submit the matter to the Court for final disposition by motion for summary judgment.

Conclusion

It is recommended that:

1. the Motion To Dismiss Amended Complaint, Or In The Alternative To Treat Adversary Proceeding As A Contested Matter Under Federal Rule of Bankruptcy Procedure 9014 (Docket No. 3) be ***denied;***

2. the Motion to Dismiss Amended Complaint, or in the Alternative to Treat Adversary Proceeding as a Contested Matter Under Federal Rule of Bankruptcy Procedure 9014 by John P. Pucci, Esquire and Fierst, Pucci & Kane LLP (Docket No. 4) be ***denied***.

Notice to the Parties

The parties are advised that under the provisions of Rule 3(b) of the Rules for United States Magistrates in the United States District Court for the District of Massachusetts, any party who objects to these proposed findings and recommendations must file a written objection thereto with the Clerk of this Court WITHIN 10 DAYS of the party's receipt of this Report and

Recommendation. The written objections must specifically identify the portion of the proposed findings, recommendations, or report to which objection is made and the basis for such objection. The parties are further advised that the United States Court of Appeals for this Circuit has indicated that failure to comply with this rule shall preclude further appellate review by the Court of Appeals of the District Court's order entered pursuant to this Report and Recommendation. *See United States v. Valencia-Copete*, 792 F.2d 4 (1st Cir. 1986); *Scott v. Schweiker*, 702 F.2d 13, 14 (1st Cir. 1983); *United States v. Vega*, 678 F.2d 376, 378-379 (1st cir. 1982); *Park Motor Mart,Inc. v. Ford Motor Co.*, 616 F.2d 603 (1st Cir. 1980). *See also, Thomas v. Arn*, 474 U.S. 140, 106 S.Ct. 466 (1985).

/**S**/ Timothy S. Hillman
TIMOTHY S. HILLMAN
MAGISTRATE JUDGE