

FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF WASHINGTON

In re:

RUPANJALI SNOWDEN,

Debtor.

Chapter 7

No. 09-10318

DECISION ON MOTION FOR SANCTIONS

Debtor Rupanjali Snowden has moved for sanctions against Check Into Cash ("CIC"), from whom she got a prepetition payday loan. I conclude that CIC willfully violated the automatic stay of § 362 of the Bankruptcy Code¹ when it initiated a post-petition electronic transfer from Snowden's bank account based on information from the post-dated check she gave CIC when she got the loan.

The § 362(b)(11) exception to the stay for the presentment of negotiable instruments does not protect CIC, because the electronic transfer was not a "presentment" under the UCC. I will set an evidentiary hearing to establish damages under § 362(k)(1).

This memorandum sets forth the basis of my oral ruling in more detail.

¹ Absent contrary indication, all "Code," chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 as amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. 109-8, 119 Stat. 23. "Rule" references are to the Federal Rules of Bankruptcy Procedure, "FRCP" and "FRE" refer to the Federal Rules of Civil Procedure and of Evidence, respectively. "RCW" refers to the Revised Code of Washington, and "UCC" to the Uniform Commercial Code as enacted by Washington, RCW Title 62A.

1 I. FACTS

2 CIC made a payday loan to Snowden on 15 November 2008. The
3 transaction was documented on CIC's form Consumer Loan Agreement, and
4 she gave it her check no. 2740, dated "12/1/2008," for \$575 as
5 "security" for the loan, repayment of which was due 1 December 2008 (see
6 Exhibit A to Declaration of Eric Ratcliff). As indicated on Exhibit A
7 to her declaration, Snowden ordered her bank to stop payment on
8 26 November 2008, and on that date she also advised the employees of
9 CIC's Sequim, Washington, office that she intended to file bankruptcy.

10 CIC contacted Snowden and her attorney numerous times between
11 26 November and 30 December 2008 to ascertain if she had filed
12 bankruptcy. According to the declaration of Lauren Hosie, associate
13 general counsel for CIC, it also contacted an unspecified "bankruptcy
14 hotline" to see if a bankruptcy had been filed. On 3 January 2009, the
15 Sequim office of CIC sent Snowden's delinquent account to its corporate
16 collections department.

17 Snowden filed her chapter 7 petition on 16 January 2009, listing
18 CIC as an unsecured creditor with a claim of \$575 on Schedule F. On
19 22 January 2009 the clerk mailed (via the Bankruptcy Noticing Center)
20 the Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors &
21 Deadlines (the "Notice") to all parties on the official mailing matrix,
22 which included CIC at its Sequim address. According to Hosie, CIC's
23 collection department attempted to contact Snowden at least 16 times
24 between 21 January and 12 February 2009 to discuss payment of her
25 delinquent account; it is unclear whether contact was made. In any
26 event, according to Hosie, Debtor did not advise CIC of her bankruptcy
27 filing during this period.

1 On 19 February 2009, CIC acted to enforce the Consumer Loan
2 Agreement, which provides in part:

3 [t]he [postdated] Check is both security and payment for your
4 obligations under this Agreement. We may negotiate the Check
5 on the Payment Date or thereafter if you have not paid us in
6 cash or other immediately available funds

7 and

8 [w]hen you provide a check as payment, you authorize us
9 either to use information from your check to make a one-time
10 electronic funds transfer from your account or to process the
11 payment as a check transaction.

12 CIC opted for an electronic funds transfer, and the transaction
13 caused Snowden's account to be overdrawn, resulting in a number of
14 overdraft charges. She had to borrow to pay those fees, and had to tell
15 her daughter she could not afford to buy tennis shoes for her as
16 promised or pay for a haircut. Snowden declares that she suffered
17 mental and physical distress as a result.

18 Hosie states she has been unable to locate any documents indicating
19 that CIC received actual notice of Debtor's bankruptcy before it acted
20 to enforce the Agreement, and that CIC's collections department received
21 the Notice of the Debtor's bankruptcy on 14 April 2009. Snowden says
22 employees of CIC's Sequim office advised her on 21 February 2009 that
23 they had received the Notice and forwarded it to CIC's corporate
24 offices.

25 Upon learning of the bankruptcy filing, CIC offered to refund
26 Debtor the amount of her check, pay \$150 in bank fees charged to her as
27 a result of presentment of the check, and \$720 of her attorney's fees,
28 a total of \$1,445. Snowden rejected this offer, and countered with a
substantial demand; no settlement was reached.

Snowden now seeks an order declaring that CIC willfully violated
the automatic stay. She requests return of the funds obtained by CIC

1 and actual damages, including bank charges and her attorney's fees and
2 costs, and punitive damages under § 362(k)(1). Alternatively, she
3 requests avoidance of the transfer as an unauthorized post-petition
4 transfer under § 549.

5 At the initial hearing I requested supplemental briefing, which the
6 parties provided, and at a further hearing they stipulated that there
7 are no factual issues on the question of violation of the stay or not.
8

9 II. JURISDICTION

10 This is a core proceeding within this court's jurisdiction.
11 28 U.S.C. § 1334(a) and (b), and 157(a) and (b)(2)(O); LGR 7, part I,
12 Local Rules, W.D. Washington.
13

14 III. ISSUE

15 Did CIC willfully violate the automatic stay of § 362(a)?
16

17 III. DISCUSSION

18 A. Willful Violation?

19 Section 362(a) stays the commencement or continuation of an action
20 to recover a pre-petition claim against a debtor. It provides in
21 relevant part:

22 Except as provided in subsection (b) of this section, a
23 petition filed under section 301, 302, or 303 of this title .
24 . . operates as a stay, applicable to all entities, of--

25 (3) any act to obtain possession of property of the estate or
26 of property from the estate or to exercise control over
27 property of the estate;
28 . . .

1 (6) any act to collect, assess, or recover a claim against the
2 debtor that arose before the commencement of the case under
this title

3 And § 362(k) creates a private right of action for willful
4 violations of the automatic stay, providing:

5 [A]n individual injured by any willful violation of a stay
6 provided by this section shall recover actual damages,
including costs and attorneys' fees, and, in appropriate
7 circumstances, may recover punitive damages.

8 A party willfully violates the stay when it knows of the automatic stay
9 and its actions in violation are intentional. Eskanos, 309 F.3d at
10 1215; In re Ozenne, 337 B.R. 214, 220 (9th Cir. BAP 2006). No specific
11 intent to violate the stay is required; a good faith belief that the
12 stay is not being violated is not relevant to the inquiry into
13 willfulness, or to the award of damages. In re Peralta, 317 B.R. 381,
14 389 (9th Cir. BAP 2004); Ozenne, 337 B.R. at 221. A creditor has an
15 affirmative duty to discontinue any post-petition collection actions,
16 Sternberg v. Johnston, 582 F.3d 1114, 1119 (9th Cir. 2009); Eskanos &
17 Adler, P.C. v. Leetien, 309 F.3d 1210, 1213-14 (9th Cir. 2002), and
18 exceptions to the automatic stay are strictly construed. Hillis Motors,
19 Inc. v. Hawaii Auto. Dealers Ass'n, 997 F.2d 581, 590 (9th Cir. 1993).

20 Although CIC asserted in its initial response to the motion that it
21 had no actual notice of Snowden's bankruptcy filing when it enforced the
22 agreement, the Bankruptcy Noticing Center's affidavit of mailing
23 indicates the Notice of Bankruptcy was mailed to CIC at its branch
24 office in Sequim on 22 January 2009.

25 Mail properly addressed, stamped, and deposited in an appropriate
26 receptacle creates a rebuttable presumption of its receipt:

27 A presumption of receipt is established by showing of proper
mailing. Lewis v. U.S., 144 F.3d 1220, 1222 (9th Cir. 1998);
28 In re De la Cruz, 176 B.R. 19, 22 (9th Cir. BAP 1994). Mere

1 denial of receipt is insufficient to rebut the presumption;
2 clear and convincing evidence is required. In re Bucknum, 951
F.2d 204, 206-07 (9th Cir. 1991).

3 In re State Line Hotel, Inc., 323 B.R. 703, 709 (9th Cir. BAP 2005),
4 vacated as moot, 242 Fed. Appx. 460 (9th Cir. 2007) (plan confirmed, all
5 assets distributed, and final decree entered while appeal to that court
6 pending). Service by mail is complete upon mailing. Rule 7005; FRCP
7 5(b).

8 Moreover, it is undisputed that Snowden had informed CIC employees
9 that she intended to file bankruptcy, and CIC contends that it followed
10 up by contacting Snowden, her counsel, and the court several times
11 before taking enforcement action. It provides no specifics regarding
12 any contact with the court, nor does it claim to have made any formal
13 inquiry or docket search.

14 CIC does not dispute that it acted intentionally, and under the
15 mailbox presumption, which CIC has not rebutted or even challenged, CIC
16 is presumed to have received the notice. As CIC's enforcement action
17 was collection of a prepetition debt, the elements of a willful stay
18 violation are met.

19
20 **B. Exception?**

21 The automatic stay does not apply to:

22 [t]he presentment of a negotiable instrument and the giving of
23 notice of and protesting dishonor of such an instrument.

24 § 362(b)(11). To avail of this exception, the creditor must establish
25 that it presented a negotiable instrument. In re Hines, 198 B.R. 769,
26 772 (9th Cir. BAP 1996), reversed on other grounds, 147 F.3d 1185 (9th
27 Cir. 1998).

1 **1. Presentment**

2 Washington's UCC defines "presentment" in RCW § 62A.3-501(a) as "a
3 demand made by or on behalf of a person entitled to enforce an
4 instrument . . ." and RCW § 62A.3-501(b)(1) provides:

5 Presentment may be made at the place of payment of the
6 instrument and must be made at the place of payment if the
7 instrument is payable at a bank in the United States; may be
8 made by any commercially reasonable means, including an oral,
9 written, or electronic communication; is effective when the
demand for payment or acceptance is received by the person to
whom presentment is made; and is effective if made to any one
of two or more makers, acceptors, drawees, or other payors.

10 RCW § 62A.4-110(a) provides in relevant part:

11 presentment of an item may be made by transmission of an image
12 of an item or information describing an item ('presentment
notice') rather than delivery of the item itself.

13 Under the Agreement, Snowden authorized CIC to use information from
14 her check to make a one-time electronic funds transfer from her account
15 or to process the payment as a check transaction. CIC chose the former.
16 The declaration of Pawel Blaz, Manager of Marketing for Gulf Management
17 Systems, Inc. ("GMS"), the third party service provider CIC uses for
18 electronic, or automatic clearing house ("ACH"), transactions sets out
19 how GMS handles ACH transactions generally, and how the CIC-Snowden
20 transaction was handled in particular. A primer on ACH transactions,
21 the source of the capitalized terms in this section, is an exhibit to
22 the supplemental declaration of CIC's counsel.

23 GMS uses Affirmative Technologies, Inc., ("ATI"), for internet
24 service, allowing its customers to initiate ACH transactions by entering
25 the necessary information into an online electronic form. ATI uses that
26 information to create an ACH entry for each transaction, which it
27 transmits to GMS. GMS combines the ACH entries into a single file,
28

1 which it transmits to the Originating Depository Financial Institution
2 (the "ODFI").

3 A debit transaction is initiated when the Originator, here CIC,
4 transmits a debit entry to the ODFI, in this case Mercantile Bank. The
5 ACH debit entry is the electronic record containing the information
6 necessary to transfer funds out of the Receiver's (Snowden's) account.
7 The debit entry CIC used was a Prearranged Payment and Deposit ("PPD")
8 which requires the consumer to have granted the Originator authority to
9 initiate a charge to her account. CIC has submitted a copy of the
10 electronic record summarizing the ACH transaction involving Debtor. Ex.
11 B to Ratcliff declaration; a copy is attached as Exhibit A to this
12 Decision.

13 CIC's ACH transactions are processed by a private operator, the
14 Electronic Payment Network ("EPN"). In this instance, according to the
15 Blaz declaration, after receiving from Mercantile Bank the PPD
16 containing information from Snowden's check, EPN transmitted it to
17 Snowden's bank, U.S. Bank, which debited Debtor's bank account and
18 credited the Mercantile Bank's Federal Reserve account. The transaction
19 was completed when the Mercantile Bank credited CIC's account.

20 Snowden contends that CIC's Electronic Funds Transfer ("EFT") was
21 not a negotiable instrument because the EFT was not a signed written
22 instrument. She asserts that CIC has blurred the distinction under the
23 UCC between an "item" and an "instrument," arguing that the fact that an
24 electronic debit entry is an "item" under Article 4 does not make it an
25 "instrument" under Article 3. "Item" under RCW 62A.4-104(a)(9) includes
26 "an instrument or promise or order to pay money handled by a bank for
27 collection or payment." RCW 62A.3-104(b) defines "instrument" as a
28 negotiable instrument, and the Official Comment to this section states

1 that a "negotiable instrument" is limited to a signed writing that
2 orders or promises payment of money.

3 CIC argues that this is a distinction without a difference, that
4 the ACH debit entry was merely the means by which CIC presented the
5 negotiable instrument. RCW 62A.3-501(b)(1), quoted above, specifically
6 authorizes presentment by any commercially reasonable means, including
7 electronic communication. The statute does not explicitly require the
8 transmittal of a copy of the check, nor does RCW 62A.4-110(a), also
9 quoted above, but the requirements are that:

10 . . . the person making presentment must (i) exhibit the
11 instrument, (ii) give reasonable identification and, if
12 presentment is made on behalf of another person, reasonable
13 evidence of authority to do so, and (iii) sign a receipt on
the instrument for any payment made or surrender the
instrument if full payment is made.

14 RCW 62A.3-501(b)(2).

15 The record of the ACH transaction provided by CIC, Exhibit A to
16 this Decision, identifies Snowden's bank's routing number, her account
17 number, her name, a check date, and an amount. It does not specify the
18 check number (2740); in fact, a "0" appears in the space for that
19 number. The check date was stated as "02/19/2009," the date the
20 electronic transaction was initiated--not "12/1/2008," the date written
21 on the check. CIC did not surrender Snowden's check, nor is it apparent
22 how that could be done electronically.

23 The electronic record does not specifically identify Debtor's
24 check: even if the date were correct, the amount would be insufficient,
25 for Snowden's bank had no way of knowing whether she might have written
26 multiple checks in that amount on that day. It follows that the
27 electronic transfer was not presentment of Snowden's check. As noted,
28 the Agreement allowed CIC either to process the payment as a check

1 transaction or to "use information from [Debtor's] check to make a one-
2 time electronic funds transfer from [Debtor's] account." CIC chose the
3 latter and made a one-time electronic funds transfer; it did not present
4 the check electronically. One of the consequences of this choice was,
5 apparently, that it rendered Debtor's stop-payment order to her bank
6 ineffective. Another is that the EFT in this instance was not
7 "presentment" as contemplated in Article 3 of the UCC.

8 This is not to say that an EFT could never be presentment, but it
9 would necessarily have to specify the particular instrument, and could
10 not be some other transaction authorized by the parties' agreement.
11 Although a check might provide the basis and the necessary information
12 for the transaction, there can be no "presentment" without specific
13 identification of the particular instrument, even if surrender could be
14 overlooked.

15 There is another reason why § 362(b)(11)'s exception may be
16 inapplicable here: as noted above, exceptions to the stay are narrowly
17 construed, Hillis Motors, 997 F.2d at 590, and anything CIC did beyond
18 the statutory requirements of presentation would violate the stay.
19 Arguably, even indorsement of a paper check for deposit into the payee's
20 or holder's account, with attendant warranties, RCW 62A.3-417, is
21 outside the strict requirements of presentment, and thus outside the
22 exception. If, under the contractual provisions governing the ACH
23 system or the rules of that system by which CIC agreed to be bound, any
24 warranties or other actions beyond exhibiting and surrendering the
25 instrument would also seem to fall outside the exception's ambit. But
26 neither the agreements by which CIC joined the ACH system, nor the rules
27 of that system, are in evidence, so that question must await another
28 case.

1 Because there was here no presentment as defined by the UCC, and
2 thus the transaction was not within the stay exception of § 362(b)(11),
3 I need not address Snowden's contention that CIC could not enforce her
4 check because the underlying debt was dischargeable. See Hines, 198
5 B.R. at 772. But I will note that the criticism that Hines conflates
6 "discharge" and "dischargeability," and perhaps Hines itself, seems
7 tangential to the central issue: does the automatic stay of § 362(a)
8 take the payee or holder of a debtor's prepetition check out of the
9 category of one "entitled to enforce" and thus eligible to present an
10 instrument under RCW 62A.9-501(a). If so, does § 362(b)(11) eliminate
11 the problem? Or is that criterion simply a reference to the UCC and
12 state law? RCW 62A.3-301 provides:

13 "Person entitled to enforce" an instrument means (i) the
14 holder of the instrument, (ii) a nonholder in possession of
15 the instrument who has the rights of a holder, or (iii) a
16 person not in possession of the instrument who is entitled to
17 enforce the instrument . . . A person may be a person entitled
18 to enforce the instrument even though the person is not the
19 owner of the instrument or is in wrongful possession of the
20 instrument.

21 To the extent entitlement to enforce in the stay relief context
22 contemplates something beyond the identity of the would-be presenter,
23 required by state law, it is not clear why the automatic stay should
24 have any less efficacy than the discharge - both are federal injunctions
25 against collection and enforcement of prepetition obligations. Section
26 524; see In re Henry, 266 B.R. 457, 468 (Bankr. C.D. Cal. 2001)
27 (automatic stay is a combination of temporary restraining order and
28 preliminary injunction); see also In re McGhan, 288 F.3d 1172, 1179-1180
(9th Cir. 2002) (holding that state courts do not have power to modify
either the stay or the discharge injunction). This question also
remains for another day and another case.

1 IV. CONCLUSION

2 As CIC did not enforce Snowden's Agreement via presentation of an
3 instrument, the § 362(b)(11) stay exception is inapplicable, and as CIC
4 had notice of Snowden's bankruptcy, CIC intentionally violated the
5 automatic stay. Snowden is entitled to damages. An evidentiary hearing
6 will be set to determine those damages, as well as any resulting from
7 CIC's repeated post-petition contacts with Snowden, and whether punitive
8 damages are appropriate.

9 /// - END OF ORDER - ///



10 United States Bankruptcy Judge
11 (Dated as of Entered on Docket date above)

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16 Served via BNC
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