UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re:

CASE NO. 99-20946

GERTRUDE ENGEL,

Debtor. **DECISION & ORDER**

GERTRUDE ENGEL,

Plaintiff,

v.

VISA INTERNATIONAL CORP., and ROCHESTER UKRAINIAN FEDERAL CREDIT UNION,

Defendants.

BACKGROUND

On April 1, 1999, Gertrude Engel (the "Debtor") filed a petition initiating a Chapter 7 case. On the Schedules and Statements required to be filed by Section 521 and Rule 1007, the Debtor indicated that she was indebted to the Rochester Ukranian Federal Credit Union (the "Credit Union") by reason of two separate mortgages on her residence and a credit card account (the "Account") with an unpaid balance of $3,500.00.

On April 9, 1999, the office of the Chapter 13 Trustee (the "Trustee") mailed all of the Debtor's creditors a Chapter 13 Bankruptcy Case Meeting Of Creditors Notice (the "Case Notice") which, among other information, advised the creditors that "the filing of the bankruptcy case automatically stays certain collection and other actions against the debtor, the debtor's property and

certain co-debtors. If you attempt to collect a debt or take other action in violation of the Bankruptcy Code you may be penalized." An Affidavit of Service filed with the Court indicated that three copies of the Case Notice were mailed to the Credit Union.

On September 13, 1999, the Debtor filed a motion (the "Contempt Motion") which requested that compensatory and punitive damages be awarded against the Credit Union and Visa International Corporation ("Visa") pursuant to Section 362(h)[1] for their alleged willful violations of the stay imposed by Section 362. The Motion alleged that: (1) on April 19, 1999, the Credit Union filed a formal written proof of claim with the Bankruptcy Court for the balance due on the Account; (2) on May 28, 1999, the Debtor received a billing statement for the balance due on the Account, which listed the name and address of the Credit Union in several places on the statement and indicated that payments should be made payable to the Credit Union, but mailed to Visa, P.O. Box 15413, Wilmington, Delaware; (3) on June 9, 1999, the attorney for the Debtor sent a letter to Visa at the address shown on the billing statement (the "Attorney Notice"), with a copy to the Credit Union, which specifically advised them both that the Debtor had filed bankruptcy on April 1, 1999 and requested that they discontinue further action against the Debtor pursuant to the automatic stay; and (4) on June 28, 1999 and July 29, 1999, notwithstanding that the Credit Union had: (a) received

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[1] Section 362(h) provides that:

> (h) 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.

11 U.S.C. § 362(h) (1999).

three copies of the Case Notice; (b) filed a proof of claim on April 19, 1999; and (c) received the Attorney Notice, additional billing statements were mailed to the Debtor.

On September 28, 1999, the Credit Union interposed Opposition to the Contempt Motion which asserted that: (1) the mailing of the billing statements to the Debtor was inadvertent and caused by a miscommunication between the Credit Union and the Visa servicing center as to which entity had the responsibility for making the necessary computer entry in the shared database to insure that the mailing of billing statements was discontinued; (2) the responsible employee at the Credit Union believed that the Visa service center was going to enter the appropriate code to insure that the mailing of billing statements was discontinued, so the employee only entered a code in the shared database that would insure that additional interest was not accrued on the Account; and (3) the proper computer codes had now been entered and the mailing of billing statements had been completely discontinued.

At the return date of the Contempt Motion on October 6, 1999, it was confirmed that Visa had not interposed any opposition to the Motion, and the Court required the attorney for the Debtor to re-serve Visa at the inquiry address set forth on the billing statement rather than at the address where payments were to be sent. At that same hearing, the attorney for the Debtor indicated that he would be filing a motion for partial summary judgment which would request that the Court make a determination as to issues of liability under Section 362(h), while reserving the issue of damages for a later hearing.

On November 16, 1999, after Visa had been re-served and still failed to interpose any opposition to the Contempt Motion, the Debtor filed a Motion for Summary Judgment (the "Summary Judgment Motion") which reasserted the same information that had been set forth in the

Contempt Motion, but in addition alleged that: (1) an additional billing statement had been forwarded to the Debtor on August 27, 1999, which was what finally prompted the Debtor to bring the Contempt Motion in early September 1999, since the Case Notice and the Attorney Notice had not resulted in the Credit Union and Visa ceasing their willful violations of the stay by sending out billing statements to the Debtor.

On November 30, 1999, the Credit Union interposed an Answer to the Summary Judgment Motion in the form of an Affidavit from Ann Oksana Lonkewycz (the "Lonkewycz Affidavit") which asserted that: (1) the Opposition was being interposed on behalf of both the Credit Union and its contract indemnitee,[2] Visa; (2) the Credit Union had a contract with an unnamed servicing agent which issued credit cards, maintained account balances and mailed out billing statements on behalf of the Credit Union; (3) the Debtor's case was only the second Chapter 13 case that the Credit Union had been involved in where the debtor-member had a Visa balance and was proposing a dividend to its unsecured creditors; (4) there was internal confusion as to how to properly account in the computer database for a case where there would be a dividend unlike in the more familiar Chapter 7 case where the credit card account would be immediately written off and the mailing of billing statements discontinued; (5) the entry initially made by the Credit Union in the computer database was one that would insure that interest would no longer be accrued on the Account; (6) when the Credit Union received its copy of the Attorney Notice, which indicated that the original had been forwarded to the Visa servicing agent at its Delaware address, the Credit Union believed that the servicing agent would take the steps necessary to discontinue the mailing of billing statements; (7)

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[2] Because the Credit Union has taken responsibility for the actions of its servicing agent, the Court will not separately address any liability it may have under Section 362(h).

the Credit Union heard nothing further from the Debtor, the attorney for the Debtor, or the servicing agent regarding any additional billing statements being sent until it received its copy of the Contempt Motion; (8) upon receiving the Contempt Motion, the Credit Union immediately contacted its VISA servicing agent and was: (a) given proper instructions as to what computer code it was required to enter in order to discontinue the mailing of billing statements; and (b) advised by the VISA servicing agent that under their agreement the Credit Union was the sole party responsible for entering that computer code into the shared database; (9) no one at the Credit Union had any desire to harm, annoy, harass or embarrass the Debtor or to obtain property of the bankruptcy estate or to collect, assess or recover a claim against the Debtor other than by filing a proof of claim; and (10) the mailings of the billing statements was wholly inadvertent.

DISCUSSION

I. Willful Violation of the Stay

a. Case Law

We know from cases in the Second Circuit that: (1) any deliberate act taken in violation of a stay, which the violator knows to be in existence, justifies an award of actual damages, and an additional finding of maliciousness or bad faith on the part of the violator warrants the further imposition of punitive damages. See *Crysen/Montenay Energy Co.* 902 F.2d 1098, 1104 (2nd Cir. 1990) ("*Crysen/Montenay*"); (2) the standard laid down by the United States Court of Appeals for the Second Circuit in *Crysen/Montenay* encourages would-be violators to obtain declaratory judgments before seeking to vindicate their interests in violation of an automatic stay, and thereby protects debtors' estates from incurring potentially unnecessary legal expenses prosecuting stay violations, *Crysen/Montenay* at 1104; (3) willful violations of the automatic stay provision can occur

whenever a party with actual notice of the commencement of bankruptcy proceedings violates the automatic stay provision, See *In re Chateaugay Corp.*, 112 B.R. 526, 530 (Bankr. S.D.N.Y.), *rev'd* on other grounds 920 F.2d 183 (2nd Cir. 1990) ("*Chateaugay*"); (4) knowledge of bankruptcy proceedings plus actions violative of the automatic stay constitutes willful violations of the stay, so all that is required is a general intent to take action which has the effect of violating the automatic stay, but a specific intent to violate the automatic stay is not required, *Chateaugay* at 530; and (5) upon receiving actual notice of the commencement of the bankruptcy case, a creditor has an affirmative duty under Section 362 to take the necessary steps to discontinue its collection activities against the debtor. See *In re Sucre,* 226 B.R. 340, 347 (Bankr. S.D.N.Y. 1998) ("Sucre") and the cases cited therein.

We also know that Bankruptcy Courts have uniformly required that entities establish appropriate internal procedures to avoid violations of the stay. See *In Re Santa Rosa Truck Stop, Inc.*, 74 B.R. 641, 643 (Bankr. N.D. Fla. 1987).

b. The Credit Union

It is undisputed that in April 1999, more than a month before the initial billing statement was sent to the Debtor in May 1999, the Credit Union, upon receiving the Trustee Notice, had actual notice and knowledge not only of the filing of the Debtor's bankruptcy case, but, because of the specific language of the Notice, notice and knowledge of the imposition of the automatic stay of any and all collection activities.[3]

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[3] Neither the Contempt Motion or the Motion for Summary Judgement indicated whether an April 1999 billing statement was received by the Debtor. It would appear that if one was received, both the Debtor and the attorney for the Debtor acknowledge that an initial billing statement after a bankruptcy is filed, depending upon the billing cycle of the creditor, is not uncommon, can be considered to be inadvertent, and would not justify making a request for damages

It is also undisputed that the Credit Union had failed to establish proper internal procedures to insure that its servicing agent was properly notified of the Debtor's bankruptcy and directed to discontinue the mailing of all billing statements. As a result, the May 1999 billing statement was sent out to the Debtor.

In addition, it is undisputed that the Credit Union and the servicing agent received the Attorney Notice in time to have insured that the June, July and August 1999 billing statements were not sent to the Debtor if, once again, the Credit Union and its servicing agent had established proper and effective internal procedures between themselves.

The mailing of the billing statements after the receipt of the Trustee Notice and the Attorney Notice were deliberate acts on the part of the servicing agent to collect the balance due on the account, and were in violation of the stay. See *Crysen/Montenay*. The Credit Union, as the creditor, must assume responsibility for the deliberate acts of its servicing agent that are in violation of the stay.

Consumer credit lending has become a very profitable activity for many financial institutions. In determining whether to engage in consumer credit lending, institutions make extensive cost-benefit and risk-reward analyses. Part of that analysis includes determining how much time and expense should be devoted to effectively handling charge-offs and bankruptcies by establishing proper internal procedures and assigning the necessary human and other resources to this task. It appears that the Credit Union did not devote sufficient resources, human and otherwise, to handling bankruptcy cases in its consumer lending portfolio. What is most inexcusable on the facts and circumstances of this case is that even after the receipt of the Attorney Notice, the Credit

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pursuant to Section 362(h).

Union personnel did not take the Notice seriously enough to insure that everything was done which needed to be done in order to discontinue the mailing of billing statements to the Debtor. Rather, the Credit Union personnel assumed that the servicing agent was going to take care of the matter.

In addition, if financial institutions are going to rely on computers and automation, they must insure that: (1) their systems are reliable; (2) the personnel involved in operating and monitoring the systems are properly trained; and (3) all of their departments are in effective communication with each other. In this Court's view, a breakdown in an automation system does not make a resulting act inadvertent or not deliberate for purposes of Section 362(h).

CONCLUSION

The Credit Union, in its actions and inactions, willfully violated the stay since it did not take any and all necessary and reasonable steps to insure that billing statements did not continue to be sent to the Debtor after it received the Trustee Notice, filed its proof of claim, and received the Attorney Notice. This matter will be called on the Court's January 19, 2000 Evidentiary Hearing Calendar at 9:00 a.m. to schedule an Evidentiary Hearing date to determine damages.

IT IS SO ORDERED.

_____/s/_____
HON. JOHN C. NINFO, II
CHIEF U.S. BANKRUPTCY JUDGE

Dated: January 4, 2000