UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re:

CASE NO. 98-22592

WALTER J. JOHNSON,

Debtors. **DECISION & ORDER**

BACKGROUND

On July 9, 1998, Walter J. Johnson (the "Debtor") filed a petition initiating a Chapter 13 case. On the Schedules and Statements required to be filed by Section 521 and Rule 1007, the Debtor indicated that: (1) he owned five parcels of real estate in the City of Rochester, New York, including 176 Clayton Street ("Clayton Street"), his residence that had a market value of $74,000.00 and a first mortgage against it in favor of Homeside Lending, Inc. ("Homeside") in the amount of $60,000.00; (2) his other four parcels of real property had a combined market value of $210,500.00 and mortgages against them of $28,000.00, for an aggregate equity of $183,500.00; (3) the Internal Revenue Service had a priority claim of $2,700.00 for 1994 taxes; (4) the City of Rochester had a priority claim of $4,000.00 incurred from the period 1997 through 1998; (5) the County of Monroe had a priority claim in the amount of $1,500.00 incurred from the period 1997 through 1998[1]; (6) Joyce Johnson, his former spouse, had a claim for $5,000.00 for child support due for the period from December 1996 through his filing; (7) there were unsecured claims in the amount of

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[1] The matrix prepared by the Chapter 13 Trustee (the "Trustee"), which was used to notify the Debtor's creditors of his case, listed the "County of Monroe, Attn: Linda Lockhart, 39 W. Main St., Rm #B-2, Rochester, NY 14614." Room #B-2 in the County Office Building is where real estate tax bills are paid and real estate taxes are processed.

$39,000.00; (8) the current market value of his assets exceeded his total liabilities by $155,445.00; (9) he had a real estate broker's license; (10) his current monthly income of $4,500.00 ($54,000.00 annualized) exceeded his current monthly expenditures of $3,988.00 by $582.00; and (11) his annual income had dropped from an employment income of $50,000.00 for 1996 to $20,000.00 from self-employment and rental income for 1997 and $20,200.00 from self-employment and rental income for 1998 year-to-date.

On October 28, 1998, Homeside filed a motion (the "Stay Motion") that requested relief from the automatic stay so that it could continue its pre-petition mortgage foreclosure action in connection with Clayton Street. The Motion alleged that there was $2,871.41 due in post-petition mortgage arrearages because the Debtor had missed three post-petition mortgage payments. On November 12, 1998, after the Debtor had failed to interpose a Response to the Stay Motion in accordance with the Court's Default Procedures, an Order (the "Homeside Stay Order") Terminating the Stay was entered.

At a Confirmation Hearing conducted by the Court on December 7, 1998, the Court confirmed an orally amended plan (the "Plan") which: (1) set the Debtor's monthly Plan payments at $1,115.00; (2) required the sale of 164 Merrimac Street, Rochester, New York ("Merrimac Street") by August 17, 1999[2]; (3) required the payment, as a priority claim, of $10,067.00 to Joyce Johnson for pre-petition support arrearages; and (4) provided that unsecured creditors would receive a 100% dividend. At the Confirmation Hearing, the Debtor indicated that he would be: (a)

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[2] The Debtor's schedules listed Merrimac Street as having a value of $45,000.00 and no liens against it.

requesting that the Court reconsider its entry of the Homeside Stay Order; and (b) objecting to the priority claim of Joyce Johnson and to the pre-petition arrearage secured claim of Homeside.

On December 23, 1998, a Confirmation Order[3] was entered which provided that: (1) except as provided by specific order of the Court, all creditors continued to be subject to the provisions of Section 362 insofar as it imposed a stay from commencing or continuing any pre-petition proceedings or matters against the Debtor; (2) the unsecured creditors would be paid a dividend of 100% of their allowed claims plus interest at 9%, in order for the Plan to comply with the "best interests of creditors test"; and (3) the claim of Joyce Johnson was to be paid as a secured claim with interest at 9%, rather than as a priority claim, because she had obtained a September 15, 1998 Enforcement Order (the "Enforcement Order")[4] regarding pre- and post-petition support arrearages which also required the entry of a judgment for arrearages due from June 2, 1997 through September 11, 1998, and all other creditors were being paid 100% with interest at 9%.

On December 30, 1998, the Debtor, proceeding pro se, filed a motion (the "Homeside Objection") objecting to the entry of the Homeside Stay Order as a preferential transfer. On February 24, 1999, the Court entered an Order (the "Homestead Order") denying the Motion as either: (1) a claim objection, since Homeside had agreed that because the stay had been terminated allowing it to continue its mortgage foreclosure proceeding, it was no longer a creditor in the

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[3] In this District, copies of Chapter 13 confirmation orders are not served upon creditors.

[4] The Trustee and the Debtor apparently had agreed to allow this post-petition judgment, which was primarily for pre-petition support arrearages, to remain valid and not avoid it.

Debtor's Chapter 13 case for pre- or post-petition mortgage arrearages; and (2) as a motion to vacate the Homeside Stay Order, since the Debtor had not demonstrated any cause for such relief.

On March 30, 1999, the Debtor, proceeding pro se, filed a Motion Objecting to the Claim of Joyce Johnson (the "Johnson Objection"). The Objection, which was served upon Joyce Johnson and the Monroe County Child Support Enforcement Unit (the "County Support Unit"), asserted that: (1) Joyce Johnson, through the County Support Unit, had levied upon the bank accounts of the Debtor in order to collect the child support evidenced by the Enforcement Order in violation of the Court's December 22, 1998 Amended Order to the Debtor directing him to make monthly Plan payments of $1,115.00 to the Trustee; and (2) all of the Debtor's wages, rental income, and bank accounts had been seized by the New York State Department of Taxation and Finance (the "Department of Taxation"), which had left the Debtor unable to meet his Plan payments or any of his other obligations.

On April 12, 1999, a Response was interposed on behalf of Joyce Johnson, by her attorney, which indicated that it had recently come to Joyce Johnson's attention that the County Support Unit had begun to pay her not only for ongoing post-petition child support payments, but also for some pre-petition arrearages. The Response further stated that: (1) the County Support Unit should not be paying these pre-petition arrearages because they should be paid through the Plan; and (2) Joyce Johnson was taking every reasonable step to correct the situation.

At a June 9, 1999 Hearing, the Court sustained the Johnson Objection to the extent that the Court required that any payments which Joyce Johnson had received or might receive as a result of the levy made by the Department of Taxation to collect the amounts due on the Enforcement Order

be offset against her secured claim being paid by the Trustee.[5] At the Hearing, the Court also suggested to the Debtor, who was proceeding pro se and having difficulty identifying a correct procedural format for the relief he sought, compensation for alleged damages caused by reason of the levies, that he might consider a motion, pursuant to Section 362(h)[6], naming the Department of Taxation as a respondent.[7]

At the same Hearing, the County of Monroe provided the Court with a May 26, 1999 Memorandum prepared by Sherri E. Wood ("Wood"), manager of the County Support Unit, which indicated that: (1) someone had telephoned the Unit on January 19, 1999 purporting to be the Debtor and advised it of a bankruptcy and a levy by the Department of Taxation; (2) during the telephone call, the caller was asked to supply documentary proof to the Unit that the purported Debtor had in fact filed bankruptcy, which was not received until February 26, 1999; (3) the Unit had received the

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[5] This Order essentially required that the amounts collected be applied to the pre-petition support due even though the County Support Unit, by the time of the hearing, had reapplied all of the amounts received from the Department of Taxation to unpaid post-petition support.

[6] 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).

[7] The Court expressed no position on the merits of such motion if it were to be brought by the Debtor.

following payments from the Department of Taxation, all of which by May 26, 1999, it had applied or reapplied to the Debtor's unpaid post-petition support obligations:

January 25, 1999	$1,685.13
February 24, 1999	$ 524.00
March 3, 1999	$ 524.00
April 7, 1999	$ 524.00
Total	$3,257.13

On June 18, 1999, the Debtor filed a Motion for Summary Judgment (the "Department of Taxation Summary Judgment Motion") that requested a judgment, in favor of the Debtor against the Department of Taxation, pursuant to Section 362(h), for damages as the result of its wilful violation of the automatic stay. The Debtor's Affidavit asserted that: (1) the Department of Taxation had issued three warrants against the Debtor, a November 17, 1998 warrant for $13,274.00, a December 15, 1998 warrant for $502.98 and a January 12, 1999 warrant for $522.31, all by reason of a judgment entered in the County of Monroe pursuant to Section 171-i of the Tax Law; (2) these three warrants were vacated by the Department of Taxation on May 17, 1999; (3) the Department of Taxation had levied on the Debtor's bank accounts and his rental property income stream in violation of the automatic stay; (4) as a result of this levy, the Debtor had been unable to operate his business, earn a living or pay his Plan payments and other obligations; and (5) the estimated damages caused by the levy were $111,026.00.

On July 6, 1999, the Department of Taxation interposed a Response to the Department of Taxation Summary Judgment Motion which asserted that: (1) the Department of Taxation had filed liens pursuant to Section 111-b15 of the Social Service Laws and Section 171-i of the Tax Law in

order to collect child support arrears due from the Debtor; (2) the Department of Taxation was not listed as a creditor on the Debtor's schedules and statements, so it would not have received formal notice from the Bankruptcy Court of the pendency of the Debtor's case; (3) because it had not received formal notice of the Debtor's case from the Bankruptcy Court, the Department of Taxation was not liable for any violation of the stay; (4) the damages alleged by the Debtor were speculative and without any documentary or other proof; and (5) the warrants were vacated by the Department of Taxation on May 24, 1999.

At the return date of the Department of Taxation Summary Judgment Motion when the Department took the position, at least in part, that it was only acting on behalf of the County Support Unit, the Court determined that there was a need for a full evidentiary hearing and that the County Support Unit must be a respondent. The Court directed the Debtor to serve the County of Monroe and make it an additional respondent to the Department of Taxation Summary Judgment Motion.

On July 29, 1999, the Debtor filed an additional Motion for Summary Judgment (the "362(h) Motion") that requested a judgment, in favor of the Debtor against the Department of Taxation and the County Support Unit for damages in the amount of $152,884.00 as the result of their wilful violations of the automatic stay. The Motion alleged that: (1) on August 4, 1998, subsequent to the filing of the Debtor's petition, in the Chambers of a County of Monroe Family Court Hearing Officer, at which an attorney for the County Support Unit was present, the Debtor advised all parties present that he had filed for bankruptcy; (2) at a subsequent hearing before the same Hearing Officer conducted on September 15, 1998, the Debtor and his bankruptcy attorney, Jeffrey M. Jayson ("Attorney Jayson"), again advised the Hearing Examiner of his bankruptcy; (3) on or about January

19, 1999, the Debtor received a notice from his bank that his bank account had been levied against[8], and he contacted the Department of Taxation and advised it of his bankruptcy, at which time he was asked to fax the Department documentary evidence of his filing and that Joyce Johnson had been listed as a creditor; (4) on January 19, 1999, the Debtor faxed the necessary information to the Department of Taxation; (5) on or about January 20, 1999, the Debtor contacted the County Support Unit and advised it of his bankruptcy; (6) after a series of telephone calls with the County Support Unit, on or about February 19, 1999, the Debtor hand-carried documents regarding his bankruptcy to the County Support Unit[9]; (7) on or about February 22, 1999, the Debtor received an income execution from the County Support Unit[10]; (8) at the hearing on the Homeside Objection conducted February 17, 1999, the Court did not vacate the Homeside Order because the Debtor did not have the funds necessary to bring all post-petition arrearages current because of the levy by the Department of Taxation; (9) because of the levy by the Department of Taxation, the Debtor had a November 12, 1998 home maintenance and repair services contract in the gross amount of

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[8] Exhibit "B" to the 362(h) Motion included a copy of a January 11, 1999 letter to the Debtor from his bank which indicated that it had charged his account $1,685.13 as a result of the levy, and that it would hold these monies for nine days before remitting them pursuant to the levy. Although January 11, 1999 was a Monday, the Debtor has asserted that it was not until the following Wednesday, eight or nine days later, depending upon whether Monday the 11th is counted, that he claims to have received the notice and began doing anything about it. That date may have been past the nine day holding period.

[9] Exhibit "D" to the 362(h) Motion is a copy of a February 19, 1999 letter to the County Support Unit. February 19, 1999 was a Friday.

[10] Exhibit "F" to the 362(h) Motion included a copy of the income execution which was dated February 11, 1999, a date prior to February 19, 1999 when the Debtor claims to have delivered the requested documentary evidence of his filing to the County Support Unit.

$26,026.00 with Pamela Lewis (the "Lewis Contract") canceled, which put the Debtor out of business; and (10) the Debtor incurred damages because of the levy in the amount of $152,884.00 and he was homeless, without utilities and forced to rely upon family and friends for assistance.[11]

On August 12, 1999, the Department of Taxation filed a Motion which requested that the relief requested in the 362(h) Motion, an award of damages, not be granted against the Department on the ground of sovereign immunity (the "Sovereign Immunity Motion"). Although the Debtor interposed a Response to the Sovereign Immunity Motion, on August 23, 1999 the Department of Taxation withdrew the Motion. Included as an Exhibit to the Sovereign Immunity Motion was an August 26, 1999 Affidavit of Gary DeMarco (the "DeMarco Affidavit"), a tax compliance representative with the Department of Taxation Child Support Enforcement Unit. The DeMarco Affidavit alleged that the records of the Department of Taxation showed that it received a telephone call on January 19, 1999 from an individual who purported to be the Debtor, who stated that he had filed bankruptcy, but that when he was told to fax a copy of his bankruptcy information, the caller stated that he would not do this, but would handle it through other means. The Motion also included the Affidavit of Tax Compliance Manager Michael Kalin, (the "Kalin Affidavit") which included a copy of a portion of the contact log for the Debtor's case. The log indicated that after January 19, 1999, there were no further references to a bankruptcy until May 3, 1999 when a bankruptcy was confirmed by the County Support Unit.

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[11] Exhibit "G" to the 362(h) Motion was a schedule of damages which included: (1) $65,867.10 for the mortgage on Clayton Street; (2) $8,800.00 for unpaid real estate taxes on the Debtor's other four real properties; (3) $3,680.00 for child support; (4) $26,026.00 for the canceled Lewis Contract; and (5) $27,935.00 for lost rental income.

On August 16, 1999, Wood, on behalf of the County of Monroe, interposed an Affidavit in Response to the 362(h) Motion which asserted that: (1) there were no proceedings held before the Hearing Examiner on August 4, 1998, and no attorney represented the County of Monroe or the County Support Unit in connection with the hearings that resulted in the Enforcement Order; (2) the first notice that the County Support Unit received that the Debtor may have filed bankruptcy was January 19, 1999, which was when an employee also advised the telephone caller that he must provide the Unit with documentation to support his claim that the Debtor had filed bankruptcy; (3) on February 3, 1999, an individual purporting to be Attorney Jayson left a voice mail message that the Debtor had in fact filed bankruptcy and had listed Joyce Johnson as a creditor; (4) on or about February 3, 1999, a County Support Unit examiner contacted the Bankruptcy Court and was told that the Debtor's attorney was going to add the Unit as a creditor and that it would be receiving formal notice from the Bankruptcy Court[12]; (5) on February 26, 1999, the Unit was finally supplied with written proof of the Debtor's bankruptcy, and the following week, the automated management system was adjusted to suspend all collections on his pre-petition support arrearages; (6) all of the monies that the Unit had received as a result of the levy by the Department of Taxation had been applied to the Debtor's post-petition support obligations, and the Debtor was then still $1,843.70 in arrears on his post-petition support obligations; and (7) there had been no effective notice to the Unit of the Debtor's bankruptcy until February 26, 1999.

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[12] The Kalin Affidavit indicated that: (1) the Department of Taxation received a $524.00 check from the Rochester Housing Authority on each of February 3, 1999, March 1, 1999 and April 6, 1999; and (2) after May 3, when it received notice of the Debtor's bankruptcy from the County Support Unit, it returned what appears to have been a May check from the Rochester Housing Authority.

On September 15, 1999, the Trustee filed a Motion to Dismiss the Debtor's Chapter 13 case (the "Motion to Dismiss") because he had failed to sell Merrimac Street by August 17, 1999 and was $8,232.58 in arrears on his Plan payments.[13] At the return date of the Motion to Dismiss, after the Debtor failed to appear or otherwise interpose a Response, the Court granted the Motion to Dismiss for cause, pursuant to Section 1307, without prejudice to the completion of the "Evidentiary Hearing" on the 362(h) Motion which had previously been scheduled for September 29, 1999.

At the Evidentiary Hearing the Debtor, Attorney Jayson and Wood testified. The oral testimony and documentary evidence presented at the Hearing indicated that: (1) at the post-petition hearing before the Hearing Examiner which resulted in the Enforcement Order, the Debtor and Attorney Jayson appeared, there was no representative from the County of Monroe or the County Support Unit, but the state court attorney for Joyce Johnson, "Attorney Perticone" was present[14]; (2) even though it was a post-petition hearing which dealt primarily with pre-petition arrearages, Attorney Jayson allowed the hearing to go forward in order to fix the pre-petition arrearages so that they could be paid as a priority or secured claim as part of the Debtor's Plan; (3) prior to February 3, 1999, Attorney Jayson never orally or in writing notified the County of Monroe, the County Support Unit or the Department of Taxation that the Debtor had filed bankruptcy, and he never had a specific conversation with a representative of the County Support Unit regarding the Debtor's pre-petition support arrearages and the fact that the Debtor's Plan provided for the payment of those

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[13] The failure to sell Merrimac Street did not in anyway appear to result from the damages the Debtor alleged to have suffered because of the Department of Taxation levy.

[14] On August 12, 1998, Attorney Perticone had filed a proof of claim on behalf of Joyce Johnson (the "Johnson Claim").

arrearages by the Trustee; (4) although the Department of Taxation was not scheduled as a creditor by the Debtor, and never received formal notice from the Bankruptcy Court that the Debtor had filed bankruptcy, at a post-petition Department of Taxation hearing regarding the Debtor's 1994 personal income taxes, the Debtor did advise a representative of the Department that he had filed Chapter 13; (5) as a result of the oral notice the Debtor gave to the representative at the tax hearing, on October 30, 1998, the Department of Taxation filed a proof of claim, dated October 26, 1998, for unpaid 1994 income taxes; (6) on August 4, 1998, the County of Monroe filed a proof of claim in the Debtor's case for $1,719.94 plus interest, for unpaid real estate taxes on four of the Debtor's real properties; (7) the Support Collection Unit of the Department of Taxation (the "State Support Unit") had no record of ever having received documentary proof from the Debtor, by fax on January 19, 1999 or otherwise, that he had filed bankruptcy, but learned of the bankruptcy on or about May 3, 1999 from the County Support Unit's notation to the automated collection database; (8) because support obligors sometimes advise a Support Unit that they have filed bankruptcy when they have not, it is a procedure of the Support Units of both Monroe County and the Department of Taxation to require documentary proof of the filing of a bankruptcy; (9) even though: (a) the statutes that permit the referral of child support obligations to the Department of Taxation for collation, which only became effective on December 1, 1996; and (b) the regulations and procedures of the Department of Taxation when collecting on these obligations, require that a series of written notices be given to the support obligor, the Debtor testified that he never received any of the various notices routinely given by the Department of Taxation to support obligors; (10) although the Debtor testified that Pamela Lewis terminated the Lewis Contract, because a $3,000.00 check she delivered to the

Debtor pursuant to the contract cleared but the Debtor never received the proceeds as they were paid over pursuant to the levy by the Department of Taxation, the Debtor provided no proof from his bank that the proceeds of the Pamela Lewis check were in fact paid over pursuant to the levy, and neither the Department of Taxation nor the County Support Unit had any record of receiving these funds; (11) even though the Debtor testified that the Lewis Contract was terminated by Pamela Lewis because of the loss of her funds to the levy of the Department of Taxation, he provided no proof from Pamela Lewis that the Contract was in fact terminated for this reason; (12) for at least one year prior to the filing of his petition, the Debtor would have received a monthly Summary of a Support Account Statement (a "Support Statement"), mailed to his Clayton Street residence by the State Support Unit in Albany, New York, which advised him to make support payments by check or money order payable to the County Support Unit, and mailing it to that Unit at P.O. Box 15326, Albany, New York[15]; (13) the State Support Unit is different from the unit at the Department of Taxation which collects taxes, and their computer systems do not fully access all of the information on the other unit's system; and (14) except for the acknowledgment by the Department of Taxation and the County of Monroe that they had collected $3,257.13, the Debtor had provided no: (a) documentary proof to support any of his other alleged monetary damages; and (b) explanation as to why the collection of these monies over a four-month period from January 25, 1999 through April 7, 1999 could have resulted in the monetary damages that he alleged.

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[15] Plaintiff's Exhibit "A" provided by the Debtor, was an August 1999 Support Statement which also indicated an account number and that support was due to Joyce Johnson. This statement also notified the Debtor that "failure to make support payments on time will result in further enforcement action including garnishment of your driver's and/or professional licenses and seizure of your personal property."

DISCUSSION

I. Preliminary Overview

What is most striking about the facts and circumstances of this case is that neither the Child Support Collection Unit within the County of Monroe nor the Department of Taxation received any notice whatsoever of the Debtor's bankruptcy until at the earliest, January 19, 1999, a date more than seven months after the Debtor filed his petition. In most cases where a Chapter 13 debtor has pre-petition support arrearages due which are being aggressively collected by a county support unit: (1) Debtors list the unit on their schedules and matrix, even though the unit is not technically a creditor,[16] in order to insure that the unit receives timely notice of the bankruptcy and immediately terminates all collection activities; (2) the attorneys for such debtors contact the unit directly by telephone or letter immediately after the petition is filed to insure that all collection activities are terminated and to make it clear that all pre-petition support arrearages will now be paid in full as part of the debtor's Chapter 13 plan[17]; (3) a support obligee, such as Joyce Johnson, or their attorney, such as Attorney Perticone, upon receiving notice of the support obligor's bankruptcy, will immediately contact the unit, which is acting on their behalf, to advise it of the bankruptcy and determine how they will coordinate their efforts in the bankruptcy proceeding to insure that the arrearages are paid in full; (4) debtors who receive any post-petition correspondence or contact from

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[16] In the Debtor's case, the Support Statements clearly indicate that the support is due to Joyce Johnson but that payments are to be mailed to the State Support Unit.

[17] Section 1322(a)(2) requires that all claims entitled to priority under Section 507 be paid in full. Section 507(a)(7) makes a claim for child or spousal support a priority claim.

an unscheduled unit, immediately contact it inquiring why the unit is still attempting to collect pre-petition arrearages that are going to be paid in full through the plan; (5) confirmation of such a debtor's Chapter 13 plan providing, as required, for the full payment of the pre-petition arrearages usually occurs relatively soon after the filing, and payments commence to the unit which results in notice to the unit that there has been a bankruptcy filing even if it was unscheduled[18]; and (6) after confirmation of a Chapter 13 plan providing for the full payment of pre-petition arrearages, debtors or their attorney will often again contact the support obligee and the unit, if neither participated in the confirmation process, to insure that they are both aware that a plan was confirmed and that the required payments will be forthcoming.

In this case, not only did the Debtor, his attorney, Joyce Johnson and her attorney fail to take any of the above steps to insure that the County Support Unit received notice and had knowledge of the Debtor's bankruptcy, there were several additional missed opportunities for the Debtor or his attorney or Joyce Johnson's attorney to have provided notice and knowledge to the Support Units of Monroe County and the Department of Taxation. After the appearance before the Family Court Hearing Examiner in September 1998, when Attorney Perticone was present and the Debtor and his attorney advised the Hearing Examiner of the Debtor's bankruptcy, the Debtor, Attorney Jayson or Attorney Perticone might have made a direct contact with the County Support Unit, which is not a part of the Family Court but which had been designated to collect all support payments by the

[18] The Debtor's confirmation was delayed because he wished to make a number of claim objections.

Enforcement Order.[19] Also, if the Debtor received the statutorily required written notices from the Department of Taxation, post-petition and prior to its levy, which notified him that the Department was about to take collection actions against him[20]: (1) if they were received before his income tax hearing when he attended the hearing and notified the Department's representative of his bankruptcy, he could have suggested that the representative insure that the Department also not take any further collection efforts with regard to his support obligations; and (2) if they were received after the hearing, he could have contacted the Department immediately and advised it of his bankruptcy.

An important question raised by the facts and circumstances of this case is whether Joyce Johnson as a pre-petition creditor and a support obligee who received actual notice of the Debtor's bankruptcy from the Bankruptcy Court, on whose behalf the County and State Support Units were acting essentially as agents, could be found to have wilfully violated the stay provided for by Section 362 by not taking the steps necessary to insure that post-petition her agents did not continue their activities to collect a pre-petition debt on her behalf.

Another important question raised by the facts and circumstances of this case is whether the Debtor suffered any actual damages that he could be compensated for pursuant to Section 362(h) if

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[19] Attorney Jayson testified at the Evidentiary Hearing that he allowed the Hearing in Family Court to go forward to fix the pre-petition support arrearages. How was the County Support Unit to know that it would be paid these through the Plan?

[20] I believe that the statutorily required notices were sent to him at Clayton Street, since his address was the same at all times from the period from one year prior to the filing of the petition through the time of the levy, and I did not find the Debtor's testimony on the matter credible. However, the Department of Taxation never provided any proof that the notices were sent and at the Evidentiary Hearing the Debtor denied that he received any such notices.

the Court were to find that there had been one or more wilful violations of the Stay. The Debtor failed to provide any credible proof of damages. He simply asserted that the $3,257.13 collected on a pre-petition obligation by the Department of Taxation should not have been collected. However, all of those monies were applied or reapplied to nondischargeable post-petition support obligations that were due and unpaid by the Debtor to Joyce Johnson, and which benefitted the Debtor directly, dollar for dollar.

II. Wilful 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) wilful 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 wilful 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 not a specific intent to violate the automatic stay, *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.

B. Joyce Johnson

Joyce Johnson: (1) was a creditor of the Debtor; (2) was included on the Debtor's schedules and on the matrix filed with the Bankruptcy Court; (3) received formal notice from the Bankruptcy Court upon the filing of the Debtor's petition; (4) filed the Johnson Claim in August 1998; (5) knew that the Enforcement Order required weekly support payments due from the Debtor to be made payable through the County Support Unit with her as beneficiary; (6) knew from Attorney Perticone of the September 1998 hearing before the Family Court Hearing Examiner which took place post-petition; (7) knew that the County Support Unit was taking any and all steps necessary to collect child support arrearages due her at the time of the petition; (8) signed a petition which was filed in the Monroe County Family Court on April 30, 1998 which requested that the Monroe County Department of Motor Vehicle suspend the Debtor's driving privileges pursuant to Section 458-a of the Family Court Act, and that the New York State Department of State, or their appropriate authority, commence proceedings to suspend the Debtor's real estate broker's license pursuant to Section 458-b of the Family Court Act; and (9) took no steps before April 12, 1999 to advise the County Support Unit, which was acting on her behalf, of the filing of the Debtor's

bankruptcy, by which time the last of the monies paid over pursuant to the Department of Taxation's levy had been forwarded to the County Support Unit.

I believe that the failure of Joyce Johnson to advise the County Support Unit of the filing of the Debtor's bankruptcy, knowing that it was taking steps to collect pre-petition arrearages on her behalf, which ultimately allowed the levy by the Department of Taxation to be unnecessarily made, was a wilful violation of the Automatic Stay. She clearly failed to take the necessary steps to discontinue the collection activities being taken against the Debtor on her behalf by the County and State Support Units. See *Sucre*. However, because: (1) the Court does not believe that the Debtor suffered any actual damages[21]; (2) this is not a case where it would be appropriate to award punitive damages; (3) the Debtor has not requested Section 362(h) relief as to Joyce Johnson who was not a respondent in connection with the 362(h) Motion; and (4) the Debtor's case has now been dismissed, the Court does not believe that it can award any damages against Joyce Johnson.

C. The New York State Department of Taxation

As an organization, the Department of Taxation clearly had knowledge of the Debtor's bankruptcy by October 26, 1998 when it filed its proof of claim for income taxes that included the Debtor's Chapter 13 case number.[22] Therefore, in November 1999 when the Department of Taxation levied to collect the primarily pre-petition child support arrearages

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[21] The Debtor was not required to pay any filing fee in connection with his motions and since he was operating pro se, having had approximately two years of law school training, he did not even incur any attorney fees.

[22] The Department of Taxation must have confirmed this with a call to the Bankruptcy Court or through its access to the Court's PACER system, unless the Debtor specifically gave it the bankruptcy case number.

evidenced by the Enforcement Order and the resulting judgment, it did so as an organization with some organizational knowledge that the Debtor was in Chapter 13 and that there was a stay regarding the collection of pre-petition debts.[23]

However, the issue for the Court under Section 362(h) is whether the Department of Taxation had sufficient notice and knowledge of the Debtor's bankruptcy with respect to the pre-petition support arrearages it was collecting on behalf of Joyce Johnson, that its deliberate acts of levying and collecting monies paid over pursuant to the levy constituted wilful violations of the Stay?

There does not appear to have been anything in the oral notice that the Debtor gave to the Department's representative prior to the levy and at the income tax hearing which would have alerted that representative to the fact that the State Support Unit may have been pursing the Debtor on behalf of a former spouse. In addition, no other notice was given to the Department of Taxation prior to the levy by the Debtor, the Debtor's attorney, the Bankruptcy Court, the County Support Unit or Joyce Johnson which would have alerted it to the fact that its Support Unit was engaged in collection activities regarding unpaid support due from the Debtor.

It could be argued that despite the internal procedures of the Department of Taxation which require formal documentary proof of bankruptcy when it receives a call from a purported support obligee advising the Department that they have filed a bankruptcy case, the Department has

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[23] Even if the Department of Taxation may have believed that since the Enforcement Order and resulting judgment were entered post-petition the debt evidenced by the judgment was for post-petition support, since the Debtor was in Chapter 13 and all of his earnings were property of the estate, it still would need to obtain relief from the Stay in order to collect support from post-petition earnings. See *Carver v. Carver*, 954 F.2d 1573, 1577 (11th Cir. 1992) ("*Carver*").

an obligation to contact the Bankruptcy Court and determine whether the named support obligee has in fact filed bankruptcy before it proceeds at its own risk and possibly violates the stay or the provisions of a confirmation order by engaging in further collection activities. I believe that because: (1) it is so easy for a Debtor or their attorney to supply proof of filing when it is reasonably requested; and (2) it is reasonable for a governmental unit collecting unpaid support to request such proof,[24] that the actions taken by the Department of Taxation before it received the formal proof of filing requested, when it had no other knowledge or notice of the Debtor's bankruptcy, did not constitute a wilful violation of the Stay.

Because: (1) before it levied and made collections on that levy through April 1999, the Department of Taxation never received effective notice from the Bankruptcy Court, the Debtor, the County Support Unit or Joyce Johnson, on whose behalf it was acting, which indicated that the Debtor it was pursuing for child support arrearages had filed a Chapter 13 bankruptcy; (2) as discussed above and in more detail in this Decision & Order, it does not appear that the Debtor suffered any actual damages, or that this is a case where an award of punitive damages would be appropriate; and (3) the Department of Taxation ceased all collection activities as soon as it received confirmation that the Debtor had filed bankruptcy from the County Support Unit, the Court will not award damages against the Department pursuant to Section 362(h).

However, in the future this Court will expect that when the New York State Department of Taxation files a proof of claim for any unpaid taxes against an individual who has

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[24] The testimony of Wood at the Evidentiary Hearing indicated that it is not uncommon for support obligees to make a false assertion that they have filed bankruptcy.

filed a Chapter 13 case in this Court, it will: (1) also check the records of its Support Unit to determine whether it is pursuing that same debtor for unpaid support arrearages; and (2) if it is, take no further steps to collect any support arrearages, whether pre-petition or post-petition, without taking the necessary steps to insure that it does not violate the automatic stay or any confirmation or other order entered in the case. Although the Department of Taxation, when it is a creditor is entitled to assume that a Debtor will properly schedule it for any taxes that may be due with sufficient detail so that the Department can identify which taxes may be due (sales, income, withholding, etc.) and participate in the case, as essentially a collection agent for support, it is not a creditor, and there does not appear to be a legal duty in either the Bankruptcy Code or the Rules for a debtor to schedule it. Furthermore, the facts and circumstances of this case illustrate very clearly that the Department of Taxation cannot always rely upon the support obligee who has received a formal notice of a bankruptcy to notify the Department or even a collecting county support unit.[25]

D. County of Monroe

An argument could also be made that when the County of Monroe filed its proof of claim for unpaid real estate taxes on August 4, 1998 that, as an organization, it had knowledge of the Debtor's Chapter 13 case, and that thereafter it should have insured that all of its agencies, including the County Support Unit, were made aware of the Debtor's bankruptcy. This would have resulted in the termination of further efforts to collect pre-petition support arrearages. However, in

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[25] 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).

this case, the County of Monroe received a formal notice from the Trustee's office which was specifically directed to that department within the County that deals with real estate taxes, and the Debtor had outstanding real estate taxes due on several of his properties. I do not believe that when a scheduled creditor receives such a specific notice that it is then required to insure that all of its departments and agencies are made aware of the bankruptcy. A debtor should know if there are multiple obligations due to a county and the debtor should either give it a general notice, addressed to the County Executive or the County Attorney, or a series of specific and comprehensive notices addressed to the appropriate departments. A general notice to the County Executive or County Attorney should always result in all agencies and departments being notified of the bankruptcy. However, as with the Department of Taxation, as this case shows, a county cannot rely on: (1) the Debtor to schedule it in connection with support arrearages, because a county and its support unit are not technically creditors with respect to these arrearages but are only acting as a collection agent; or (2) the support obligee notifying it.

However, in the future, this Court will expect, as with the Department of Taxation, that when the County of Monroe files a proof of claim for unpaid taxes or any other indebtedness against an individual who has filed a Chapter 13 case in this Court, it will: (1) also check the records of its Support Unit to determine whether it is pursuing that same debtor for unpaid support arrearages; and (2) if it is, take no further steps to collect any support arrearages, whether pre-petition or post-petition, without taking the necessary steps to insure that it does not violate the automatic stay or any confirmation or other order entered in the case.

Once again, the argument could be made that on January 19, 1999, after it received a call from an individual who purported to be the Debtor, that the County Support Unit had an obligation to contact the Bankruptcy Court and determine if in fact a bankruptcy case had been filed. For the same reasons that I have expressed regarding the Department of Taxation with respect to support arrearages, I do not believe that the telephone call of January 19, 1999 was sufficient and effective notice of the Debtor's bankruptcy regarding the County's support collection activities.

In any event, on February 3, 1999, after receiving a telephone message from Attorney Jayson, when a representative of the County Support Unit contacted the Bankruptcy Court and determined that the Debtor had filed, the County of Monroe as an organization and the County Support Unit, in particular, clearly had knowledge and notice of the Debtor's bankruptcy and knowledge that there was a stay in place with regard to the collection of support arrearages. The County at that point could no longer insist upon receiving written confirmation of the bankruptcy or copies of the promised amended schedules or matrix, and it proceeded at its own peril. Its failure to take any action to immediately insure that the Department of Taxation terminated its collection activities constituted a wilful violation of the Stay.[26] Again, however, because the Court does not believe that the Debtor suffered any actual damages, and because this is not a case where it would

[26] If the County that day had contacted the State Support Unit, it appears that it would have returned the February check received from the Housing Authority and would not have collected the March and April payments.

be appropriate to award punitive damages, the Court does not believe that it can award damages to the Debtor against the County of Monroe pursuant to Section 362(h).[27]

III. Damages

On the facts and circumstances of this case, and the evidence presented in the pleadings and at the Evidentiary Hearing, it does not appear that the Debtor had any actual damages which the Court could compensate him for, even though the Court believes that the County of Monroe wilfully violated the Automatic Stay after February 3, 1999, which resulted in $1,626.00 being collected from the Rochester Housing Authority which should not have been collected.

The Debtor did not have to pay any filing fees in connection with the Motions he filed, and, since he proceeded pro se, he did not incur any attorney fees in prosecuting his Motions.

Furthermore, the Debtor has not demonstrated that he lost any income as a result of his having to appear in Court and prosecute his Motions.

As set forth previously in this Decision & Order, the Debtor has failed to provide any proof that the $3,000.00 deposit allegedly paid by Pamela Lewis was paid over to the Department of Taxation or the County of Monroe as a result of the levy by the Department of Taxation, and the Department of Taxation and the County of Monroe have specifically denied receiving such monies. Furthermore, the Debtor has provided no proof that Pamela Lewis otherwise terminated the Lewis Contract because of the levy by the Department of Taxation. Therefore, the damages of $26,026.00 which the Debtor has alleged resulted from the cancellation of the Lewis Contract and put him out

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[27] The U.S. Court of Appeals for the Third Circuit in *Carver* cautioned courts as to making awards under Section 362(h) for the collection of support arrearages. See *Carver*, at 1578.

of business have not been proven to have resulted from the levy or any other collection activities of the Department of Taxation or County of Monroe.

If the only wilful violation of the Stay by the Department of Taxation or the County of Monroe occurred after February 3, 1999, and it only resulted in three monthly payments of $542.00 due from the Rochester Housing Authority to the Debtor being collected on the levy by the Department of Taxation, by that time: (1) the Stay had already been lifted on Clayton Street because of the Debtor's failure to pay post-petition mortgage payments; and (2) the Debtor was significantly in arrears on his post-petition support payments. What is evident from the facts, circumstances and evidence presented is that the Debtor simply did not have the cash-flow, irrespective of the $3,257.13 collected on the Department of Taxation levy, to pay his Plan payments and his other post-petition obligations, including the mortgage payments which became due on Clayton Street, the real estate taxes which became due on his rental properties, his ongoing support obligations, and various insurance requirements. Even if he had received all of the monies collected on the Department of Taxation levy when they were due to him, the Debtor could never realistically have paid all of the unpaid obligations which he set forth in his 362(h) Motion as his damages.

The Debtor has failed to prove that the Department of Taxation levy was the proximate cause of any of the alleged damages that he has requested, with the exception of the charges which he incurred at Fleet Bank as the result of the levy. However, those charges were incurred in January 1999, at a time when the Court has determined that neither the Department of Taxation nor the County of Monroe had sufficient and effective knowledge and notice of the Debtor's bankruptcy

regarding their support collection activities so that their actions could be considered to have been wilful violations of the Stay.

In addition, as set forth previously in this Decision & Order, the $1,626.00 collected from the Rochester Housing Authority was applied or reapplied to the Debtor's post-petition support obligations, and even after that application, the Debtor was in excess of $1,800.00 in arrears on his post-petition support obligations.

Therefore, the Court does not believe that the Debtor has adequately demonstrated that he had any compensatory damages that the Court could award to him pursuant to Section 362(h), and this is not a case where an award of punitive damages would be appropriate.

CONCLUSION

The Debtor's request for an Order pursuant to Section 362(h) awarding him compensatory or punitive damages against the New York State Department of Taxation and Finance or the County of Monroe is in all respects denied.[28]

IT IS SO ORDERED.

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

Dated: December 3, 1999

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[28] Because the Court has found that the Department of Taxation did not wilfully violate the Stay, it does not have to address its Sovereign Immunity arguments.