UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

In re: Bk. No. 99-12204-JMD
Chapter 13

John P. Sherkanowski,
Debtor

John P. Sherkanowski,
Plaintiff

v. Adv. No. 00-1008-JMD

GMAC Mortgage Corp. and
Harmon Law Offices, P.C.,
Defendants

Raymond J. DiLucci, Esq.
RAYMOND J. DiLUCCI, P.A.
Attorney for Plaintiff

Daniel P. Murphy, Esq.
HARMON LAW OFFICES, P.C.
Attorney for Defendants

MEMORANDUM OPINION

I. INTRODUCTION

The Court has before it a complaint brought by John P. Sherkanowski (the "Debtor") against GMAC Mortgage Corp. ("GMAC") and its attorneys, Harmon Law Offices, P.C. ("Harmon Law Offices"), seeking damages under 11 U.S.C. § 362(h) for the Defendants' alleged violations of the automatic stay. The Court conducted a trial of this matter on July 20, 2000 and took the matter under advisement. This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the "Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire," dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. FACTS

The facts relevant to the alleged stay violations are relatively straightforward and can be separated into facts having to do with postponements of a scheduled foreclosure sale by Harmon Law Offices and facts relating to GMAC's sending of monthly mortgage account statements to the Debtor.

A. Postponements of the Foreclosure Sale

The Debtor obtained a mortgage on his home in Moultonboro, New Hampshire on July 24, 1995. The Debtor fell behind on his payments, and on June 15, 1999, Harmon Law Offices sent the Debtor a notice of mortgage foreclosure sale on behalf of its client, Capstead, Inc. ("Capstead"), the holder of the mortgage on the Debtor's home. The foreclosure sale was scheduled for July 19, 1999. In order to prevent the foreclosure, the Debtor filed for bankruptcy on July 12, 1999. Capstead was listed as a creditor on the Debtor's schedules, and on July 17, 1999, Capstead and Harmon Law Offices were served with notice of the Debtor's bankruptcy case.

On July 19, 1999, Harmon Law Offices sent a notice to Debtor's counsel informing him that the foreclosure sale scheduled for July 19, 1999 had been postponed until September 22, 1999. That same day, an auctioneer appeared at the Debtor's home and announced that the foreclosure sale was being postponed. The Debtor's wife, who was home at the time, called the Debtor at work to inform him that the auctioneer had appeared at their home.

On September 22, 1999, Harmon Law Offices sent Debtor's counsel a letter informing him that the foreclosure sale that had been postponed to September 22, 1999 had been postponed again to December 6, 1999. That same day, an auctioneer appeared at the Debtor's home and announced the postponement of the foreclosure sale. The Debtor's wife was at home at the time. After speaking with the auctioneer, she telephoned her husband at work very upset that the auctioneer had appeared at their home as the Debtor had told her that he had taken care of this matter. The Debtor then called his attorney to find out what was happening.

On October 19, 1999, Capstead filed a motion for relief with the Court alleging that the Debtor was not maintaining his mortgage payments postpetition. Until that time, no motion for relief had been filed on behalf of Capstead since the time the Debtor filed for bankruptcy on July 12, 1999. On October 21, 1999, Capstead withdrew its motion upon receipt of the Debtor's October payment and the discovery that the Debtor was in fact current postpetition except for payment of "legal fees and costs."[1]

On December 6, 1999, Harmon Law Offices sent Debtor's counsel another letter informing him that the foreclosure sale had been postponed again, this time until February 16, 2000. Again, an auctioneer appeared at the Debtor's home to announce postponement of the foreclosure sale. The Debtor's wife and children were home at the time and became upset at the auctioneer's appearance. The Debtor's wife telephoned the Debtor to question him about the foreclosure. In turn, the Debtor telephoned his attorney.

While it is unclear from the record what occurred on February 16, 2000, the last date to which the foreclosure sale was postponed, the foreclosure sale apparently was canceled. By that time, the Debtor had filed this adversary proceeding alleging that continued postponement of the foreclosure sale violated the automatic stay. It appears that neither GMAC nor Harmon Law Offices has taken any further action with respect to foreclosure of the Debtor's mortgage since February 2000.

The Debtor's wife testified that, during the eight month period during which the foreclosure sale was repeatedly postponed, notices were placed in the local newspaper notifying the public regarding the postponements. She further testified that numerous friends saw the ads and asked if they could help the Debtor and his wife. These actions caused embarrassment and emotional distress to the Debtor and his wife.

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[1] As discussed below, the servicing of the Debtor's mortgage was transferred on August 16, 1999. In connection with the transfer, there were problems in the crediting of the Debtor's August 1999 payment.

B. Mortgage Statements

From the time of the Debtor's bankruptcy filing on July 12, 1999 until February 16, 2000, the Debtor received monthly statements from his mortgage servicer. On or about August 1, 1999, the Debtor received a notice that the servicing of his mortgage was being transferred from Capstead to GMAC effective August 16, 1999. The notice indicated that all payments being made prior to August 16, 1999 should be made to Capstead and all payments being made beginning August 16, 1999 should be made to GMAC.

The Debtor received two statements from Capstead while in bankruptcy, one dated July 19, 1999 and the other dated August 5, 1999. They contained the following itemizations of amounts due on the Debtor's account:

Statement Date	7/19/99	8/5/99
Amount Past Due	$6,415.44	$5,616.18
Outstanding Late Charges	263.73	263.73
Principal and Interest	659.10	659.10
Escrow	145.50	145.50
Escrow Shortage	49.45	49.45
Previous Partial Payment	(757.02)	(7.16)
Total	6,684.51	6,726.80
Escrow Balance	(732.59)	(446.93)

The statements contained the following additional information in bold type:

> Our records indicate that you filed bankruptcy. This monthly statement is sent to you for informational purposes only. It does not alter or affect the terms of your bankruptcy proceedings. If you have any question about the status of you loan, please call us . . . . In addition, please let us know if you would like us to discontinue sending you a monthly statement.

Exhibits 9 and 13.

During the postpetition period when Capstead serviced the mortgage, the Debtor made one payment in the amount of $854.00 by check dated August 1, 1999. Apparently, the Debtor intended this check to

cover his monthly payment of $804.60 and the escrow shortage of $49.45.[2] It is unclear whether Capstead properly credited the Debtor's August 1999 payment to the Debtor's account. Capstead's statement dated August 5, 1999 shows two payments, each in the amount of $801.93, being applied on August 5, 1999 to the Debtor's December 1998 and January 1999 payments. The Debtor testified, however, that he made only one payment in August 1999.

The Debtor began receiving monthly statements from GMAC on or about August 23, 1999. The Debtor continued to receive monthly statements for the next six months, or roughly until the time the Debtor brought the instant litigation. GMAC's monthly statements contained the following itemizations of the amounts due on the Debtor's account:

Statement Date	8/23/99	9/17/99	10/16/99	11/16/99	12/16/99	1/18/00	2/16/00
Amount Past Due	$5,616.18	$5,618.85	$5,621.52	$4,822.26	$4,824.93	$4,827.60	$4,827.60
Outstanding Late Charges	263.73	296.69	329.65	362.61	362.61	362.61	362.61
Principal and Interest	659.10	659.10	659.10	659.10	659.10	659.10	659.10
Escrow	145.50	145.50	145.50	145.50	145.50	145.50	145.50
Other		(637.73)	(375.40)	44.26	2,581.98	2,579.31	2,579.31
Total	6,684.51	6,082.41	6,380.37	6,033.73	8,574.12	8,574.12	8,574.12
Escrow Balance	(446.93)	(304.10)	(163.94)	121.72	(1,305.45)	(1,162.62)	(1,017.12)

Like Capstead's statements, GMAC's statements also acknowledged the Debtor's bankruptcy. The August statement contained the following message:

> Our records indicate a Bankruptcy has been filed in connection with this account. Any questions you have regarding this statement or your account may be directed to 1-800-850-4622.

Exhibit 15. The message in the subsequent monthly statements contained an additional sentence:

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[2] It is also apparent that the Debtor's check did not cover these amounts but, rather, was five cents "short."

> Our records indicate a Bankruptcy has been filed in connection with this account. This statement is for post-petition payments only. Any questions you have regarding this statement or your account may be directed to 1-800-850-4622.

Exhibits 17, 20, 22, 25, 29, and 102 (emphasis added).

Between August 16, 1999 and February 16, 2000, the last date scheduled for the foreclosure sale, the Debtor made the following payments to GMAC:

Date of Check	Amount	Date Payment Credited	Month Applied To According to Statements
September 14, 1999	$801.93	September 17, 1999	March 1999
October 11, 1999	804.60	October 18, 1999	April 1999
November __, 1999	804.60	November 15, 1999	May 1999
December 13, 1999	804.60	December 16, 1999	June 1999
January 12, 2000	804.60	January 18, 2000	July 1999
February 13, 2000	804.60	February 16, 2000	August 1999

A representative from GMAC testified that the Debtor's payments were being applied to payments due postpetition even though the monthly statements showed the account due date advancing through the prepetition period. Thus, for example, even though the December 1999 payment appears to have been credited to the June 1999 payment, the December 1999 payment was actually credited to that month.

III. DISCUSSION

The Debtor alleges that two types of stay violations occurred in this case. First, the Debtor alleges that Harmon Law Offices violated the automatic stay by continuing to postpone the foreclosure sale that they instituted prepetition on behalf their client, Capstead. Second, the Debtor alleges that GMAC violated the automatic stay by sending him monthly statements that attempted to collect the Debtor's prepetition mortgage arrearage. The Debtor argues that both of the Defendants' actions were willful and violated the automatic stay. Accordingly, the Debtor seeks damages and attorney's fees pursuant to section 362(h) of the Bankruptcy Code.

Section 362(h) provides:

> 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). The First Circuit Court of Appeals has described the requirements for finding a willful violation of the automatic stay.

> The standard for a willful violation of the automatic stay under § 362(h) is met if there is knowledge of the stay and the defendant intended the actions which constituted the violation. In cases where the creditor received actual notice of the automatic stay, courts must presume that the violation was deliberate. The debtor has the burden of providing the creditor with actual notice. Once the creditor receives actual notice, the burden shifts to the creditor to prevent violations of the automatic stay.

Fleet Mortgage Group, Inc. v Kaneb, 196 F.3d 265, 269 (1st Cir. 1999) (citations omitted). In this case, there is no question that Capstead, GMAC, and Harmon Law Offices received notice of the Debtor's bankruptcy and that the Defendants intended the acts described above. Rather, the issue is whether the acts by Harmon Law Offices and GMAC constitute violations of the automatic stay.

A. Repeated Postponement of the Foreclosure Sale

Section 362(a)(1) of the Bankruptcy Code provides:

> Except as provided in subsection (b) of this section, a petition . . . operates as a stay, applicable to all entities, of . . . the commencement or continuation . . . of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title.

11 U.S.C. § 362(a)(1). The Debtor argues that repeated postponement of a foreclosure sale instituted pursuant to state law prepetition constitutes harassment of the Debtor and violates section 362(a)(1).

Many courts have held that postponing the date of a foreclosure sale does not violate the automatic stay. See In re Roach, 660 F.2d 1316, 1319 (9th Cir. 1981); Zeoli v. RIHT Mortgage Corp., 148 B.R. 698, 702 (D.N.H. 1993); Atlas Machine & Iron Works, Inc. v. Bethlehem Steel Corp. (In re Atlas Machine & Iron Works, Inc.), 239 B.R. 322, 332 (Bankr. E.D. Va. 1998). The rationale for such a holding is that postponing the foreclosure sale maintains the status quo between creditor and debtor as of the petition date. See Zeoli, 148 B.R. at 700. According to Zeoli, while postponement of a foreclosure sale is an "act," it is

not an act in "continuation" of a proceeding "against the debtor" prohibited by section 362(a)(1). See id. at 701. "Rather, it is more appropriately characterized as an act in preservation of a stayed proceeding." Id.

While the Court agrees with the rationale of the Roach line of cases as a general proposition, the Court finds that the facts of this case distinguish it from those other cases. The issue raised by the facts of this case is not whether a single postponement occurring close in time to the bankruptcy filing constitutes a violation of the automatic stay but, rather, whether repeated postponements occurring over a span of eight months violate the stay where it is undisputed that the Chapter 13 debtor is maintaining his postpetition payments and the creditor has no motion for relief pending before the Court.

As the Roach court stated, "[t]he purpose of the automatic stay is to give the debtor a breathing spell from his creditors, to stop all collection efforts, harassment and foreclosure actions." Roach, 660 F.2d at 1318 (citing Sen. Rep. No. 989, 95th Cong, 2d Sess. 54, reprinted in 1978 U.S.C.C.A.N. 5787, 5840). Here, an auctioneer appeared at the Debtor's home at least three times, possibly four, during the first eight months of the Debtor's bankruptcy case, each time causing distress to the Debtor's wife and children. Harmon Law Offices argues that these repeated postponements were merely maintaining the status quo and did not constitute harassment of the Debtor and his family.

The Court agrees that the first postponement on July 19, 1999 maintained the status quo. At that time, GMAC had a foreclosure sale scheduled as a result of the Debtor's prepetition default under the mortgage. The Debtor's case was only five days old, and GMAC may not have yet had time to consider filing a motion for relief to permit it to proceed with its foreclosure.

At the time Harmon Law Offices postponed the foreclosure sale for a second time on September 22, 1999, the Debtor's case had been open for approximately two and a half months and the Debtor had commenced making postpetition payments. GMAC had not yet filed a motion for relief which would provide it with the authority needed to proceed with its foreclosure. At that time there did not appear to be any basis for obtaining relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(2) as the property was necessary for the Debtor's Chapter 13 reorganization and GMAC was being adequately protected by the

Debtor's postpetition payments. In addition, the Debtor's plan filed July 26, 1999 provided for the cure of the Debtor's prepetition default in accordance with 11 U.S.C. § 1322(b)(5).

By the time of the third postponement on December 6, 1999, Harmon Law Offices had filed a motion for relief on behalf of GMAC and then withdrawn it. Despite GMAC's decision not to pursue relief under section 362(d), Harmon Law Offices postponed the foreclosure sale yet again. At that point, the Court questions what "status quo" was being maintained.

In its closing argument, Harmon Law Offices argued that creditors should be permitted to postpone pending foreclosure sales up until the time a debtor's Chapter 13 plan is confirmed without violating the automatic stay. According to Harmon Law Offices, if and when confirmation is denied, the creditor would be able to obtain relief from the automatic stay under section 362(d)(2) as the property would not be necessary for an effective reorganization. The actions taken by Harmon Law Offices in this case, however, do not support its position. Here, at the beginning of the case, the Court scheduled a hearing on confirmation of the Debtor's Chapter 13 plan for February 18, 2000. Notice of the confirmation hearing was sent to Harmon Law Offices on July 17, 1999. If Harmon Law Offices sought merely to maintain the "status quo" pending confirmation of the Debtor's plan, it would have postponed the foreclosure sale until a date after the scheduled confirmation hearing. As the record reflects, Harmon Law Offices postponed the foreclosure sale first to September 22, 1999, then to December 6, 1999, and finally to February 16, 2000. All of these dates precede the scheduled confirmation hearing.

At the time of the second postponement on September 22, 1999, some ten weeks postpetition, Harmon Law Offices knew or should of known that its client had no basis for obtaining relief from the automatic stay. No evidence was presented by Harmon Law Offices suggesting that the law firm or its client were actively reviewing the Debtor's loan or its status. In fact, the second postponement may have occurred simply because neither Harmon Law Offices nor its client was following the status of the Debtor's loan. At the time of the third postponement on December 6, 1999, Harmon Law Offices, by virtue of

having filed and immediately withdrawn a motion for relief during October 1999, had actual knowledge that its client was no longer seeking relief from the automatic stay.

Thus, given the record before it, the Court finds that the actions taken by Harmon Law Offices, in repeatedly postponing the foreclosure sale over an eight month period, when (1) the Chapter 13 Debtor was making regular postpetition payments, (2) the Debtor had filed a plan that would cure his prepetition mortgage default, and (3) the mortgagee was not actively pursuing relief from the automatic stay, effectively constituted harassment of the Debtor and his family and not the maintenance of the status quo between the Debtor and Harmon Law Offices' client. For these reasons, the Court finds that Harmon Law Offices violated the automatic stay.

B. Postpetition Mortgage Statements

The Debtor argues that GMAC's actions in sending the Debtor postpetition account statements, listing the prepetition arrearage as an "amount due," constitute violations of the automatic stay. GMAC argues that its account statement itemizations were for informational purposes only and that the payment coupons attached to the statements clearly indicated both the amount due postpetition and the account's postpetition due date.

Section 362(a)(6) prohibits any act "to collect, assess, or recover a claim against the debtor that arose before the commencement of the case." 11 U.S.C. § 362(a)(6). "Courts have uniformly refused to interpret section 362(a)(6) to prohibit a creditor from making any post-bankruptcy contact with a debtor." Sears, Roebuck and Co. v. Epperson (In re Epperson), 189 B.R. 195, 197 (E.D. Mo. 1995). "The respite is not from communications with creditors, but from the threat of immediate action by creditors, such as a foreclosure or lawsuit." Brown v. Pennsylvania State Employees Credit Union, 851 F.2d 81, 86 (3rd Cir. 1988).

The Debtor does not claim that the sending of the statements themselves violated the automatic stay. Rather, the Debtor argues that GMAC violated the stay by sending statements listing the prepetition arrearage as an amount due. The Debtor presented no evidence, however, that he was confused by

GMAC's statements such that he believed GMAC was attempting to collect the prepetition arrearage on his mortgage. The Debtor did not testify that he felt threatened that GMAC would take immediate action to collect the prepetition debt if he did not pay those amounts. To the contrary, the evidence in the record suggests that the Debtor was aware that he should pay only the regular monthly payment, consisting of principal, interest, and the real estate tax escrow. From August 1999 through at least May 2000, the Debtor made regular payments roughly in the amount due postpetition. While GMAC's statements could have been drafted to better reflect the difference between the amounts due prepetition, which will be paid through the Debtor's Chapter 13 plan, versus the amounts due postpetition, which will be paid by the Debtor outside of the plan, the Court finds that GMAC did not violate the automatic stay.

C. Recovery of Damages

Section 362(h) of the Bankruptcy Code provides for the recovery of both actual and punitive damages for violations of the automatic stay. "The words 'shall recover' indicate that Congress intended that the award of actual damages, costs and attorney's fees be mandatory upon a finding of a willful violation of the stay." Ramirez v. Fuselier (In re Ramirez), 183 B.R. 583, 589 (B.A.P. 9th Cir. 1995) (cited in Federal Home Loan Mortgage Corp. v. McCormack, 1996 WL 753938, Civil No. 96-81-SD (D.N.H. Sept. 3, 1996)). Actual damages should be awarded, however, only if there is evidence supporting the award of a definite amount. See McCormack, 1996 WL 753938 at *5.

The Debtor argues that he is entitled to actual damages for embarrassment and loss of reputation in the community which resulted from the actions of Harmon Law Offices. While the First Circuit Court of Appeals has held that emotional damages qualify as "actual damages" under section 362(h), see Kaneb, 196 F.3d at 269, the Debtor has failed to present any evidence as to extent of those damages. See A & J Auto Sales, Inc. v. United States (In re A & J Auto Sales, Inc.), 210 B.R. 667, 671 (Bankr. D.N.H. 1997). Accordingly, the Court will not award any damages to the Debtor for emotional distress.

The Debtor is entitled to an award of attorney's fees and costs however. "The whole point of the § 362(h) provision is to discourage violations of the automatic stay by appropriate sanctions–and litigation to

determine and enforce the sanctions is necessarily implied." Joslyn v. Ford Motor Credit Corp. (In re Joslyn), 75 B.R. 590, 593 (Bankr. D.N.H. 1987). Accordingly, the Debtor's attorney shall file a fee application with the Court and obtain a hearing date from the calender clerk at which time the Court will determine the amount of fees and costs to be recovered by the Debtor from Harmon Law Offices for the firm's willful violation of the automatic stay. The Court notes that the fees awarded will be reviewed for reasonableness. See Putnam v. Rymes Heating Oils (In re Putnam), 167 B.R. 737, 741 (Bankr. D.N.H. 1994) ("Courts which have awarded fees under section 362(h), however, have tempered such awards by a reasonableness standard.").

In addition to actual damages, debtors are entitled to an award of punitive damages if a defendant's conduct was "malicious, wanton, or oppressive." McCormack, 1996 WL 753938 at *6. "Unlike an award of actual damages, any award for punitive damages is within the sound discretion of the court." Id. Factors that may be considered in determining whether to award punitive damages include (1) the nature of the creditor's conduct; (2) the creditor's ability to pay damages; (3) the creditor's motive; and (4) any provocation by the debtor. See id. In this case, the Court finds no basis for awarding punitive damages to the Debtor given the state of the law regarding postponement of foreclosure sales prior to this Court's opinion on the matter.

IV. CONCLUSION

For the reasons outlined above, the Court holds that Harmon Law Offices violated the automatic stay by repeatedly postponing a foreclosure sale scheduled prepetition. Accordingly, the Debtor is entitled to recover his reasonable attorney's fees and costs in bringing this action pursuant to section 362(h). The Court further finds that GMAC's monthly statements, although not a model of clarity, were not an attempt by GMAC to collect on a prepetition debt in violation of section 362(a)(6). Therefore, the Court holds that GMAC did not violate the automatic stay.

This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate order consistent with this opinion.

DATED this 15th day of August, 2000, at Manchester, New Hampshire.

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J. Michael Deasy
Bankruptcy Judge