

11 U.S.C. § 106  
11 U.S.C. § 362(a)  
11 U.S.C. § 362(h)  
Fed. R. Bankr. P. 9020

Burpo v. State, Adv. No. 92-6134-R  
In re Burpo, Case No. 688-63653-R13

10/13/93

ELP

unpublished

The court granted summary judgment for the debtors as to liability in their claim for damages for violation of the automatic stay. The court determined that the post-petition collection activities of the Oregon Department of Revenue ("ODR") violated section 362(a)(1) and (a)(6) and that, even if there are equitable exceptions to the stay, the debtors' conduct in failing to file tax returns, failing to list the ODR as a creditor and failing to inform revenue agents of the bankruptcy did not excuse the violation or preclude their damage claim where the ODR had actual notice of the bankruptcy.

The court determined that damages could be recovered under section 362(h), but exercised its discretion to deny a civil contempt claim because it is duplicative of the section 362(h) claim and would require further judicial proceedings involving the district court under Fed. R. Bankr. P. 9020.

The court determined that the ODR has waived any sovereign immunity claim by filing a proof of claim and actively participating in the case with regard to the claim it sought to collect.

E93-9(9)

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

|                         |   |                        |
|-------------------------|---|------------------------|
| In re                   | ) | Case No. 688-63653-R13 |
|                         | ) |                        |
| DONALD R. BURPO and     | ) |                        |
| BONNIE J. BURPO,        | ) |                        |
|                         | ) |                        |
| Debtors.                | ) |                        |
|                         | ) |                        |
|                         | ) |                        |
| DONALD R. BURPO and     | ) | Adversary Proceeding   |
| BONNIE J. BURPO,        | ) | No. 92-6134-R          |
|                         | ) |                        |
| Plaintiffs,             | ) |                        |
|                         | ) |                        |
| v.                      | ) |                        |
|                         | ) |                        |
| STATE OF OREGON, OREGON | ) | MEMORANDUM OPINION     |
| DEPARTMENT OF REVENUE,  | ) |                        |
|                         | ) |                        |
| Defendant.              | ) |                        |

This adversary proceeding is an action by the plaintiff-debtors ("debtors") against the Oregon Department of Revenue ("ODR") under 11 U.S.C. § 362(h)<sup>1</sup> and for civil contempt because of the ODR's alleged violations of the automatic stay. The

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<sup>1</sup>All section references are to the Bankruptcy Code, 11 U.S.C. § 101 et. seq. unless the context indicates otherwise.

debtors moved for partial summary judgment on the issue of liability. ODR filed a cross-motion for summary judgment.

### **Factual Background**

The following facts are undisputed. The debtors filed their Chapter 13 petition on December 1, 1988. On or about December 15, 1988, the Bankruptcy Unit, Program Support, Collection Division, of the Oregon Department of Revenue ("Bankruptcy Unit"), received actual notice from the bankruptcy court of the filing of the debtors' petition. At the time of bankruptcy the debtors had not filed Oregon income tax returns for 1983, 1984, 1985 and 1986.

On February 21, 1989, the Bankruptcy Unit filed a "precautionary proof of claim" in the debtors' bankruptcy case in the amount of \$2,603.84 based on the debtors' failure to file 1985 and 1986 tax returns. The debtors objected to the claim and a hearing on the objection was held June 5, 1990 in which the ODR, through Mr. Hicks of the Oregon Department of Justice, participated. The court entered an order sustaining the objection on July 13, 1990.

On May 22, 1990, ODR Revenue Agent Vicki Crawford sent Mrs. Burpo a letter demanding payment of her 1986 assessed tax liability and threatening to file a lien and garnish her wages if the payment was not received. Agent Crawford did not personally know that the debtors had filed bankruptcy. On November 5, 1990,

ODR Revenue Agent Donna Bordges of the Collection Division of the ODR, attempted to garnish the wages of Mrs. Burpo by issuing Notices of Continuous Garnishment to Track City Track Club, Inc. and Mt. Hood Nordic Ski Foundation, her employer, and filing a tax warrant for unpaid and assessed 1986 income taxes. Agent Bordges did not personally know of the debtors' bankruptcy. On November 20, 1990, Agent Bordges received a letter from Mt. Hood Nordic Ski Foundation informing her that Mrs. Burpo was in bankruptcy and that the Foundation would not honor the garnishment. Agent Bordges then released the garnishments.

On March 26, 1991, Jean Wolfe, of the Audit Division of the ODR sent Mr. Burpo four form letters informing him that the ODR was aware that he not filed tax returns for 1983, 1984, 1985 and 1986, demanding that he file them within 30 days and informing him that if he did not do so it would assess taxes and penalties and interest. Ms. Wolfe did not personally know that the debtors had filed bankruptcy.

### **Issues**

1. Whether the post bankruptcy collection activities of the ODR violated the automatic stay provided by § 362(a).
2. If the ODR violated the automatic stay, whether the ODR should be held in civil contempt in addition to having damages awarded under § 362(h).

## Discussion<sup>2</sup>

### 1. Violation of the Automatic Stay.

It is well settled law that a willful violation does not require a specific intent to violate the automatic stay. In re Bloom, 875 F.2d 224 (9th Cir. 1989). All that is required for a creditor who knows of a debtor's bankruptcy to be liable for damages under Section 362(h) is that the creditor intentionally take actions which have the effect of violating the automatic stay.

The ODR's collection activities violated § 362(a)(1) and (6). The ODR argues that it should be able to avoid liability because it had implemented reasonable procedures and it would not have violated the stay if the debtors had fulfilled their legal obligations to file the income tax returns or list the ODR as a creditor. In essence, the ODR argues that there is an equitable exception to the automatic stay when the debtor's conduct is a substantial contributing factor to the creditor violating the stay. For the sake of analysis I will assume, without deciding,

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<sup>2</sup>The ODR has not raised the issue of sovereign immunity. See 11 U.S.C. § 106; Hoffman v. Connecticut Dept. of Income Maintenance, 492 U.S. 96, 109 S.Ct. 2818, 106 L.Ed.2d 76 (1989). However, because the ODR filed a proof of claim and has otherwise actively participated in the bankruptcy case with regard to its claim (for the taxes it here sought to collect), it has waived its immunity. In re Pinkstaff, 974 F.2d 113 (9th Cir. 1992); In re Town & Country Home Nursing Services, Inc., 963 F.2d 1146 (9th Cir. 1992); see 11 U.S.C. § 106(a).

that the automatic stay is subject to equitable exceptions.<sup>3</sup>

In order to determine whether the debtors' conduct contributed to the stay violations, one must understand the procedures the ODR followed at the pertinent time. All Oregon taxpayers with unpaid, assessed tax liability were entered into ODR's accounts receivable ("A/R") computer program. When the bankruptcy unit got a filing it would check the A/R program. If the debtor-taxpayer was in the A/R program the ODR would make a notation regarding the bankruptcy on the taxpayer's A/R record. However, if the debtor-taxpayer was not in the A/R program (that is, the debtor-taxpayer did not have unpaid, assessed taxes) no bankruptcy notation was made. Audit, collection and revenue agents would check the A/R program before they undertook any collection activity. However, if the taxpayer did not have unpaid, assessed tax liability or, like these debtors, had not filed income tax returns, no bankruptcy filing notation would be in the A/R system. The system apparently had no provision for entering the names of debtors who had filed bankruptcy petitions but had not filed income tax returns or otherwise had unassessed, unpaid tax liability. As a result, the system did not effectively prevent collection activities for pre-bankruptcy tax

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<sup>3</sup>This assumption is questionable. The accuracy of this assumption need not be resolved in order to decide the issues before the court in this adversary proceeding.

claims against taxpayers who had not filed returns.<sup>4</sup>

The ODR first argues that its system broke down because the debtors did not file income tax returns as required by law, and that, in essence, it was the debtors' fault that the ODR violated the automatic stay. An organization may not hide behind the shield of "complexity" to avoid liability for a violation of the automatic stay, In re Shafer, 63 B.R. 194 (Bankr. D. Kan. 1986), and must establish procedures which will provide for the contingency of an automatic stay. In re Stucka, 77 B.R. 777 (Bankr. C.D.Cal. 1987). The ODR acknowledges this, but argues that the court should apply some standard of "reasonableness." It argues that its procedures were reasonable because it would not have violated the stay if the debtors had carried out their statutory duty to file tax returns. The ODR has not cited any authority which supports this proposition.

The ODR's second argument is that the debtors should be estopped from recovering damages because of their own "bad acts" of failing to file tax returns, failing to inform the revenue agents of their bankruptcy and failing to list the ODR as a creditor. However, none of the cases cited by the ODR support that proposition. In In re Smith Corset Shops, Inc., 696 F.2d

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<sup>4</sup>Given the facts in this case, it appears that ODR did not enter a bankruptcy notation in the system when it assessed taxes post-bankruptcy for a pre-bankruptcy period and/or filed a proof of claim in a debtor's bankruptcy case.

971 (1st Cir. 1982), the debtor hid the fact of its bankruptcy filing until after the complained about actions. In Matthews v. Rosene, 739 F.2d 249 (7th Cir. 1984), the court found the debtor, who initiated the state court action while in Chapter 13 proceedings, and who "unreasonably and inexcusably delayed asserting his [automatic stay] claim," guilty of laches which prevented the court from nullifying the three-year-old state order in favor of the creditor. The Court in Easley v. Pettibone Mich. Corp. 990 F.2d 905 (6th Cir. 1993), discussed both Smith and Matthews and the concept of an equitable exception to the operation of the automatic stay, in the context of its discussion regarding whether actions in violation of the stay are void or voidable. The case raises an interesting question of whether in Circuits such as the Ninth which hold violations of the stay void, not voidable, equitable exceptions to the stay are conceptually appropriate. Stuhley v. Hyatt, 667 F.2d 807 (9th Cir. 1982), did not involve violations of the automatic stay.

In this case the ODR admits that it had actual notice of the bankruptcy proceeding. The debtors' previous failure to file tax returns did not nullify the notice the ODR admits it received. The ODR's procedure only recognized the importance of the notice of the bankruptcy if its records revealed that taxes had been assessed and were owing. Otherwise, receiving actual notice of the bankruptcy made no difference to the ODR;



collection actions proceeded unabated. Given this deficiency, the ODR's system was insufficient to provide a defense to stay violations.

Third, the ODR complains that the debtors failed to inform the audit and revenue agents of their bankruptcy after they received the warning letters. However, the initial actions of three different revenue agents violated the automatic stay. There is no evidence that a response by the debtors to the initial actions [demand letter to pay 1986 taxes (Crawford), garnishment of wages (Bordges) or demand for filing 1983 - 1986 tax returns (Wolfe)] would have prevented the actions of the other agents. It is these initial actions which I find violated the stay. The debtors' failure to respond may have a bearing on damages because the debtors have an obligation to mitigate damages if possible. That can be considered later.

Finally, even if the debtors had listed the ODR on their schedules, it does not appear that this would have made any difference to the ODR because the debtors' names would still not have been added to the ODR's A/R system. The ODR got actual notice of the bankruptcy (the notice of 341(a) meeting), despite the fact that it was not listed as a creditor.

## 2. Civil Contempt.

Violations of the automatic stay may be remedied by

ordinary civil contempt. In re Goodman, 991 F.2d 613 (9th Cir 1993).

The primary difference between proceeding on the basis of the language of § 362(h) on one hand, and civil contempt on the other, is the mandatory nature of an award of damages as to the former compared to the permissive nature of such an award under the latter. Pursuant to § 362(h), an individual injured "shall" recover damages; pursuant to civil contempt, whether damages shall be awarded is discretionary.

Id., at p. 620-621. Because the civil contempt claim is duplicative of the § 362(h) claim and would require further judicial proceedings involving the district court, Fed. R. Bnkr. P. 9020, I exercise my discretion to deny relief under the civil contempt claim.

### **Conclusion**

The actions of the ODR violated the automatic stay. The plaintiffs' motion for summary judgment as to liability on the § 362(h) claim will be granted. The defendant's motion for summary judgment on the § 362(h) claim will be denied. The plaintiffs' motion for summary judgment on the civil contempt claim will be denied. The defendant is granted summary judgment on the civil contempt claim. A further hearing will be set to hear evidence regarding damages caused by the stay violations.

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ELIZABETH L. PERRIS  
Bankruptcy Judge