

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF NORTH CAROLINA  
GREENSBORO DIVISION

ENTERED

JAN 02 2004

U.S. BANKRUPTCY COURT  
MDNC - SH

IN RE: )  
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Doran Coley and ) Case No, 03-13234C-7G  
Tracy A. Coley, )  
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Debtors. )  
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ORDER

This case came before the court on December 16, 2003, for hearing upon a motion by Debtors for sanctions against the North Carolina Department of Revenue for violation of the automatic stay. J. Gordon Boyett appeared on behalf of the Debtors. No appearance was made on behalf of the North Carolina Department of Revenue ("Department of Revenue"). Having considered the motion, the evidence offered by the Debtors, and matters of record in this case, the court finds and concludes as follows:

1. This Chapter 7 **case** was filed on September 26, 2003.
2. On the petition date, the Debtors were indebted to the Department of Revenue for unpaid income taxes for the years 1997 and 1998. The North Carolina Department of Revenue was listed as a priority creditor in the Debtors' schedules and was served with a Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, and Deadlines on September 26, 2003.
3. Prior to the petition date, the Department of Revenue had a tax levy in effect under which the male Debtor's employer was

deducting sums from the male Debtor's wages on a bi-weekly basis and remitting such sums to the Department of Revenue.

4. Since the filing of this case, the Department of Revenue has continued to collect sums from the male Debtor's employer pursuant to its tax levy. The amounts collected by the Department of Revenue include the sum of \$102.54 for the pay period ending October 5, 2003, the sum of \$89.77 for the pay period ending October 19, 2003, and the sum of \$88.41 for the pay period ending November 2, 2003.

5. Pursuant to § 362(h) of the Bankruptcy Code, an individual injured by a willful violation of the stay is entitled to recover actual damages sustained as a result of the violation. However, even if it is assumed that the continuing levy upon the male Debtor's wages constituted a willful violation of the automatic stay<sup>1</sup>, it does not follow that the Debtors are entitled to any

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<sup>1</sup>The Debtors apparently rely upon § 362 (a) (6) of the Bankruptcy Code which provides that any act to collect a claim against the debtor that arose before the commencement of the case is automatically stayed when a bankruptcy petition is filed. The prohibition against "any act" to collect a pre-petition debt contained in § 362 is broad enough to include the failure to stop action such as a payroll deduction that **was** initiated prior to the bankruptcy filing even though no affirmative action is taken after the commencement of the case. See In re Hellums, 772 F.2d 379 (7th Cir. 1985), and 3 COLLIER ON BANKRUPTCY ¶ 362.03[8] [a] (15th ed. rev. 2003). "To constitute a willful act, the creditor need not act with specific intent but must only commit an intentional act with knowledge of the automatic stay." In re Strumpf, 37 F.3d 155, 159 (4th Cir. 1994). And, while § 362(b) (9) excepts from the stay a tax audit, the issuance of a notice of tax deficiency, a demand for tax returns and the assessment of taxes, "[o]ther tax assessment and collection procedures are stayed under other

recovery from the Department of Revenue because the Debtors failed to establish that they were actually damaged by any such violation. The only evidence of damages offered by the Debtors was the evidence that the Department of Revenue collected \$280.72 from the male Debtor's wages after this case was filed. However, the male Debtor testified that the Debtors have never filed income tax returns with the Department of Revenue for 1997 and 1998 as required under North Carolina law. As a result, § 523(a) (1)(B)(i) is applicable to the taxes which admittedly are owed by the Debtors for 1997 and 1998. Under this provision, a debtor is not discharged from liability for a tax for which a return **was** required but not filed. See e.g. In re Bergstrom, 949 F.2d 341, 342-43 (10th Cir. 1991) ("An individual's tax liability is nondischargeable in bankruptcy when the liability results from the individual's failure to file a return"); In re Spain, 182 B.R. 233, 235 (Bankr. S.D. Ill. 1995); In re Pruitt, 107 B.R. 764, 766 (Bankr. D. Wyo. 1989) ; In re Haywood, 62 B.R. 482, 485 (Bankr. N.D. Ill. 1986); and generally 4 COLLIER ON BANKRUPTCY ¶ 523.07[h] [3] [a] (15th ed. rev. 2003). The result in the present case is that the 1997 and 1998 taxes listed in the Debtors' schedules are nondischargeable and are a continuing liability of the Debtors. Hence, the Debtors were not damaged when the Department of Revenue collected and applied the

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provisions of section 362(a)." 3 COLLIER ON BANKRUPTCY ¶ 362.05[9] (15th ed. rev. 2003).

\$280.72 to the 1997 and 1998 taxes since such collection and application reduced the Debtors' continuing tax indebtedness for the 1997 and 1998 income taxes. See In re Mathews, 209 B.R. 218 (6th Cir. BAP 1997). Nor will the court impose punitive damages in this case, Under § 362(h) an award of punitive damages is within the discretion of the trial court and proper only in appropriate circumstances. See Davis v. IRS, 136 B.R. 414, 423 fn.20 (E.D. Va. 1992) . Appropriate circumstances ordinarily are those in which the creditor has demonstrated egregious, vindictive or intentional misconduct. See Lovett v. Honeywell, 930 F.2d 625, 628 (8th Cir. 1991) ; In re McHenry, 179 B.R. 165, 168 (9th Cir. BAP 1995). No such showing was made in the present case. Accordingly, the Debtors' motion for sanctions will be denied.

IT IS SO ORDERED.

This 29<sup>th</sup> day of December, 2003.

**William L. Stocks**

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WILLIAM L. STOCKS  
United States Bankruptcy Judge