

SO ORDERED.

SIGNED this 6th day of January, 2015.



Catharine R. Aron

UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

In re:

Charles Howard Drake and
Brandy Helms Drake

Debtors.

Case No. 09-52371

MEMORANDUM OPINION AND ORDER

THIS MATTER came before the Court on November 12, 2014, upon the debtors' Motion for Sanctions. Appearing before the Court were Charles Drake and his attorney, Stafford Peebles; Leta Banner, bankruptcy specialist for creditor Truliant Federal Credit Union and its attorney, Rayford Adams. After considering the motion, arguments of both attorneys, and the record in this case, the Court finds that the Debtors' Motion should be granted.

JURISDICTION

This Court has jurisdiction over the parties and subject matter of this proceeding pursuant to 28 U.S.C. §§ 151, 157, and 1334 and Local Rule 83.11 entered by the United States District Court for the Middle District of North Carolina. This is a core proceeding, within the meaning of

28 U.S.C. § 157(b)(2), which this Court has jurisdiction to hear and determine.

FINDINGS OF FACT

Charles and Brandy Drake (collectively, “the debtors”) filed for bankruptcy under Chapter 13 on November 23, 2009. The debtors own a 2009 Hyundai Sonata that was subject to a lien held by Truliant Federal Credit Union (“Truliant”). At the time the debtors filed their Chapter 13 petition, they owed \$16,017.99 to Truliant. Pursuant to the Debtor’s confirmed plan, the Chapter 13 Trustee (“Trustee”) disbursed monthly payments to Truliant on its secured claim. The Trustee completed payments to Truliant on March 30, 2014.

Despite receiving final payment from the Trustee, Truliant sent further billing notices to the debtors. On June 23, 2014, the debtors received a billing notice from Truliant for \$309.53. After the debtors’ attorney contacted the Trustee, the Trustee sent a letter to Truliant on August 14, 2014, stating that the June 23rd billing notice was a violation of the automatic stay and asked that no further billing notices be sent to the debtors. A week and a half later, on August 25, 2014, Truliant sent another billing notice to the debtors for \$637.24. The debtors filed a Motion for Sanctions on September 5, 2014, and an amended Motion on September 9, 2014, alleging that Truliant’s communications with the debtors constituted a willful violation of 11 U.S.C. § 362(a)(3) and of the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*¹

One day before the debtors filed their amended Motion for Sanctions, Mr. Drake received a notification through a credit monitoring service that Truliant reported a delinquency on his account. After receiving this notification, Mr. Drake obtained his credit report from two different credit bureaus: Experian and Equifax. The Experian report stated that Truliant last reported an outstanding balance of \$626.00 in October 2014, representing the debtor’s auto loan. The

¹ No testimony or argument was made during the hearing regarding the alleged violation of the Fair Credit Reporting Act. Accordingly, this Court finds that the debtors did not carry their burden of proof on this claim.

Equifax report similarly stated that Truliant reported a past due balance of \$626.00 in October 2014.

Truliant relies on its internal procedures to comply with the Bankruptcy Code. Truliant has a general mailbox that collects all of its mail. Its employees sort the mail from the general mailbox and forward it to the appropriate division. Bankruptcy related mail is forwarded to the Collections Department, where it is opened and sorted according to priority. As part of its internal procedures Truliant enters a specific code, called a mail hold, into its customers' accounts that prevents those who have filed for bankruptcy from receiving automated billing notices from Truliant. The mail hold setting is also tied to Truliant's reports to credit bureaus in order to prevent Truliant from incorrectly reporting a delinquency.

At the hearing on the debtors' Motion for Sanctions, Mr. Drake testified that he continued to receive billing notices from Truliant after filing for bankruptcy but that the notices did not concern him because he owed money on the loan and it was being paid by the Trustee. The billing notices started to concern him only after the Trustee made the final payment to Truliant. Truliant disagreed and claimed that the debtors began receiving billing notices in 2011 due to an internal computer glitch. According to Truliant, the credit union transitioned all of its accounts and records into a new computer system in 2011. For reasons unknown, the specific mail hold code did not transition to every customer's account that was in bankruptcy. Leta Banner, a bankruptcy specialist with Truliant, testified that the debtors' account was purportedly affected by this error. Truliant admitted that it violated the automatic stay but disputed that its actions merited sanctions.

There are several discrepancies in Truliant's version of events. Truliant claims to not have received the Trustee's August 14th letter for nearly three weeks, until September 3, 2014;

however, Truliant's general mailing address and the Trustee's office are both in Winston-Salem, North Carolina. Ms. Banner testified that it is not normal for mail to take nearly three weeks to be sorted and delivered to the collections department. Truliant claims that it re-entered the mail hold on the debtors' account the following day and that the mail hold setting also stops the reporting of delinquent debt to all credit bureaus. However, both credit reports from Experian and Equifax show that Truliant reported delinquent debt a month later in October. Lastly, Truliant claimed that it sent an update to Experian and Equifax to reflect the debtors' zero balance, but as of November 5, 2014, both credit bureaus continued to reflect the same delinquency.

Mr. Drake sought out the assistance of his attorney due to Truliant's communications with the debtors. Mr. Drake used a portion of his vacation time to spend roughly six hours away from his work. Although he is a salaried employee, Mr. Drake estimated that his salary is the equivalent to earning \$25.00 per hour. While he has not attempted to apply for credit since Truliant noted a delinquency, he hopes to co-sign a student loan for his son in the coming months.

DISCUSSION

The automatic stay is one of the most crucial components of the Bankruptcy Code. Once a debtor files a petition, a stay is operated "to all entities, of any act to obtain possession of property of the estate" 11 U.S.C. § 362(a)(3). Those who are injured "by any willful violation of a stay . . . shall recover actual damages, including costs and attorneys' fees, and in appropriate circumstances, may recover punitive damages." 11 U.S.C. § 362(k)(1). In order to recover damages under § 362(k)(1), a debtor must prove that "1) the actions taken are in violation of the automatic stay; 2) the violation was willful; and 3) the debtor was injured as a

result of the violation.” *In re Clayton*, 235 B.R. 801, 806 (Bankr. M.D.N.C. 1998). A willful violation occurs when “[t]here is ample evidence in the record to support the conclusion that [the creditor] knew of the pending petition and intentionally attempted to [continue collection procedures] in spite of it.” *In re Hamrick*, 175 B.R. 890, 892 (W.D.N.C. 1994) (quoting *Budget Serv. Co. v. Better Homes of Va. Inc.*, 804 F.2d 289, 292 (4th Cir. 1986)). An intentional act is one that that is done with “determination to act in a certain way or to do a certain thing” *Hamrick*, 175 B.R. at 892 (quoting *Black’s Law Dictionary* (5th ed. 1979)). A debtor must establish the requirements of § 362(k)(1) by the preponderance of the evidence. *See Clayton*, 235 B.R. at 806.

The first requirement for sanctions is easily satisfied as there is no disagreement that Truliant violated the automatic stay. Both the first and second billing notices were an attempt to collect a pre-petition debt after the debtors had filed for bankruptcy. At the hearing Truliant admitted to violating the automatic stay and instead argued that its violation was not willful. This Court disagrees.

The debtors proved that Truliant’s stay violation was willful. There is no dispute that Truliant had actual notice of the debtors’ bankruptcy because it filed a proof of claim and was paid by the Trustee on a monthly basis until March 30, 2014. Instead, Truliant disputes that it committed an intentional action to violate the automatic stay because the billing notices were sent out due to a computer glitch. Truliant’s argument is misplaced. Truliant created and continues to utilize its computer system to, among other things, efficiently send billing notices to its customers. The purpose of sending billing notices is for Truliant to collect payments from its customers. Truliant determined to collect money from its customers through the billing notices sent by its computer system. While the first billing notice may not have been intentionally sent,

the second billing notice was intentionally sent because of the Trustee's letter. The Trustee's letter sufficiently put Truliant on notice that it violated the automatic stay by sending the first billing notice. This Court rejects Truliant's testimony that it never received the Trustee's letter until September 3, 2014, due to the numerous discrepancies in its version of events. The second billing notice was sent to intentionally collect a debt from someone that Truliant actually knew to be in bankruptcy and therefore was a willful violation of the automatic stay.

Truliant's failure to explain its tardy receipt of the Trustee's letter compels this Court's ruling. Truliant simply did not put forth any reason for why it did not receive and respond to the Trustee's letter in a timely manner. Ms. Banner testified that she did not know when the letter was actually received by Truliant or what happened to the letter before she opened it. There was no testimony that the letter was lost in the mail, that it was sent to the wrong address, or that it was mishandled by an employee. *See, e.g. In re Hamrick*, 175 B.R. at 893 (finding a creditor did not act willfully when an untrained employee failed to recognize a bankruptcy code). Truliant has a mail collection and distribution system in place to sort mail by department and priority, but it did not explain how its system would allow for a letter sent from the Trustee's office in Winston-Salem, North Carolina, to be received in its P.O. Box in the same city and then forwarded to the appropriate department nearly three weeks later. Offering only mystery and uncertainty as to the letter's whereabouts for nearly three weeks does not give Truliant the freedom to disregard the letter's contents. For such a lapse in time to occur, either Truliant's mail system has a serious deficiency or the Trustee's letter was somehow deemed a low priority. Both scenarios are inexcusable and showcase, at a minimum, a reckless disregard for the automatic stay. *See In re Shealy*, 90 B.R. 176, 180 (Bankr. W.D.N.C. 1988) (finding that sanctions are appropriate when a creditor's inaction amounted to a reckless disregard for the automatic stay).

Truliant’s argument that its violation of the automatic stay was a product of a computer glitch is not persuasive. This Court does not find that Truliant’s willful violation was due to a computer glitch, although other courts have rejected such a defense. *See In re Wingard*, 382 B.R. 892, 902 (Bankr. W.D. Penn. 2008) (quoting *McCormack v. Fed. Home Loan Mortg. Corp. (In re McCormack)*, 203 B.R. 521, 524 (Bankr. D.N.H. 1996) (rejecting the “computer did it defense” and finding that creditors “have a clear obligation to adjust their programming and procedures and their instructions to employees to handle complex matters correctly”)). Instead, this Court finds that Truliant knew or should have known from the Trustee’s letter that it violated the automatic stay and yet sent a second billing notice. Stated differently, the computer glitch would have been immaterial if Truliant timely acted on the Trustee’s letter. Because Truliant did not timely act on the Trustee’s letter, its inaction amounts to a willful violation.

Truliant’s inaction is magnified by how it reported the debtors’ “delinquency” to the credit bureaus. According to Truliant, Ms. Banner manually re-entered a mail hold on the debtors’ account on September 4, 2014, one day after Truliant claims to have received the Trustee’s letter. The mail hold setting is supposed to stop errant reporting to the credit bureaus, but Mr. Drake’s credit reports show that Truliant reported a past due account in October 2014. Ms. Banner testified that she personally sent an update on October 9, 2014, over a month after she claimed she received the Trustee’s letter, to all credit bureaus stating that Mr. Drake’s account was paid in full. However, as of November 5, 2014, the delinquency was still reported on his credit report. While it may not have the ability to control what the credit bureaus choose to report, Truliant can control what information it reports to the credit bureaus and the speed at which it corrects its own mistakes. Truliant’s failure to correct a false report for over a month

after it received notice of its stay violation evidences a pattern of sluggishness and disorganization, and further supports this Court's finding of a willful violation.²

The last requirement for establishing sanctions under § 362(k)(1) is that the debtor must be injured. While the Bankruptcy Code does not define "injury," it is generally defined as "a violation of another's legal right." *In re Preston*, 333 B.R. 346, 350 (Bankr. M.D.N.C. 2005) (quoting *Black's Law Dictionary* 801 (8th ed. 2004)); see also *In re Johnston*, 362 B.R. 730, 740 (Bankr. N.D. W.Va. 2007). Section 362(a) affords all debtors the legal right to be, among other things, free from collection activity on debt that arose before filing for bankruptcy. When Truliant mailed the debtors two bills that showed past-due balances, it simultaneously violated the automatic stay under § 362(a) and injured the debtors under § 362(k)(1). Therefore, the debtors' were injured under § 362(k)(1).

Under § 362(k), an injured individual "shall recover actual damages, including costs and attorneys' fees and, in appropriate circumstances, may recover punitive damages." 11 U.S.C. § 362(k)(1). Mr. Drake testified that he spent six hours during his normal work time dealing with the present action, and he estimated that based on his salary he receives \$25.00 per hour for a total of \$150.00. The debtors' attorney submitted an affidavit for attorney fees incurred in the prosecution of this motion in the amount of \$5,025.00, which this Court finds to be reasonable. Furthermore, this Court considers the inaccurate information that Truliant reported to the credit bureaus as particularly troublesome. While Mr. Drake has not yet suffered any damages due to the incorrect delinquency report, it could negatively impact him in the near future when he does apply for credit. To ensure that Truliant corrects its error, it will have thirty (30) days from the

² It is not this Court's position that Truliant violated the automatic stay by reporting inaccurate information to the credit bureaus but only that its inaccurate reporting supports its finding that Truliant willfully violated the automatic stay. While there is some authority for assessing § 362(k)(1) sanctions on the basis of inaccurate reporting to credit bureaus, the debtors did not raise this issue. See *In re Singley*, 233 B.R. 17 (Bankr. S.D. Ga. 1999).

entry of this opinion and order to correct its reporting of a past due amount with all credit bureaus. If Truliant fails to correct this error, it will be assessed \$1,000.00 in punitive damages for each month that it does not comply with this Court's Order.

Based on the foregoing, the court finds that cause exists grant the debtors' Motion for Sanctions and

IT IS ORDERED, ADJUDGED AND DECREED THAT Truliant Federal Credit Union shall pay \$5,175.00 to the debtors for actual damages and attorney fees;

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED THAT Truliant Federal Credit Union is required to correct the inaccurate information regarding the debtors' delinquency within thirty (30) days of this Order. Failure to correct the inaccurate information will result in the Court assessing punitive damages in the amount of \$1,000.00 for every month that it does not comply with this Court's order.

END OF DOCUMENT

SERVICE LIST

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