

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

IN RE:

Charles P. McCree

Debtor.

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Case No. 98-51230C-13

**ORDER GRANTING DEBTOR'S MOTION FOR SANCTIONS AGAINST
LAVONNE MCCREE AND DENYING DEBTOR'S MOTION FOR AN
ORDER DISMISSING PENDING EQUITABLE DISTRIBUTION ACTION**

THIS MATTER came on for hearing before the undersigned bankruptcy judge on March 21, 2001, in Winston-Salem, North Carolina upon the Debtor's Motion for Sanctions against LaVonne McCree and David Pat Mast, Jr. and for an Order dismissing a pending equitable distribution action. A. Carl Penney appeared on behalf of the Debtor, David Pat Mast appeared on behalf of LaVonne McCree, and Vernon Cahoon appeared on behalf of the Chapter 13 Trustee.

This court has jurisdiction over the subject matter of this proceeding pursuant to 28 U.S.C. §§ 1334 and 157(a) and the General Order of Reference entered by the United States District Court for the Middle District of North Carolina on August 15, 1984. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) which this court may hear and determine.

After considering the arguments of counsel and reviewing the file, the court makes the following:

FINDINGS OF FACT

1. This Chapter 13 case was filed on July 8, 1998. An Order Confirming Plan was entered on September 30, 1998.

2. When the petition was filed, the Debtor was married to and living with LaVonne McCree. The Debtor and Ms. McCree subsequently separated in December, 1998.

3. On or about September 15, 2000, the Debtor filed an action in the Forsyth County District Court for absolute divorce, case no. 00 CVD 9185. While that case was pending, Ms. McCree filed a pro se action seeking equitable distribution of the martial assets, case no. 00 CVD 11469. Ms. McCree served a copy of the complaint and summons in the equitable distribution action on the attorney representing the Debtor in the divorce action in November, 2000, the same day the divorce hearing was held. Ms. McCree and the Debtor's counsel advised the Judge in the domestic case that the equitable distribution action had been filed. The Judge delayed the signing of the divorce judgment and ordered that the divorce judgment recite that an equitable distribution was pending.

4. In early February 2001, the Debtor advised his bankruptcy counsel that he had received notice of hearing in the equitable distribution action and that Ms. McCree was being represented by Winston-Salem attorney David Pat Mast, Jr.. Debtor's counsel advised Mr. Mast of the Debtor's bankruptcy status. Debtor's counsel further informed Mr. Mast that service had not been obtained on the Debtor and that relief from the stay was required prior to filing an equitable distribution action or obtaining service. Debtor's counsel requested that Mr. Mast suggest to Ms. McCree that she dismiss her action. Mr. Mast was never made attorney of record in the equitable distribution action.

5. On February 2, 2001, Debtor's counsel filed a motion seeking dismissal of the equitable distribution action and served a copy on Mr. Mast.

6. On February 9, 2001, Mr. Mast assisted Ms. McCree in preparing and having issued an alias summons, which Ms. McCree delivered to the Forsyth County Sheriff's office

and cause to be served on the Debtor shortly thereafter.

DISCUSSION

Equitable distribution is a statutory right granted to spouses under N.C.G.S. § 50-20 which vests at the time of separation. The failure to specifically apply for equitable distribution prior to a judgment of absolute divorce will destroy the statutory right to equitable distribution under N.C.G.S. § 50-11 (e). The only way Ms. McCree could preserve her statutory right to equitable distribution was if she raised it prior to the entry of the divorce decree. Counsel for Ms. McCree argues that since the separation occurred after the filing of the bankruptcy, that a motion to lift stay to pursue equitable distribution was not required. The court disagrees.

In a Chapter 13 proceeding, property of the estate as defined in 11 U.S.C. § 1306 includes all property specified in section 541 and in addition all property the debtor acquires after the commencement of the case but before the case is closed, dismissed or converted to a case under Chapter 7, 11 or 12 and earnings from services performed by the debtor after the commencement of the case. North Carolina courts have held that equitable distribution does “not create any vested rights on particular marital property; [rather] it create[s] a right in equitable distribution of that property whatever the court should determine that property is.” Wilson v. Wilson, 73 N.C. App. 96, 99, 325 S.E.2d 668, 670, disc. rev. denied, 314 N.C. 121, 332 S.E.2d 490 (1985). The Debtor’s interest in marital property is an asset of the Chapter 13 estate over which the bankruptcy court has exclusive jurisdiction.

The right to equitable distribution is a claim as defined under the Bankruptcy Code in that “a claim for equitable distribution is a claim against property of the estate.” See e.g. Perlow v. Perlow, 128 B.R. 412, 416 (E.D.N.C. 1981). Section 362(a) provides that the filing of a petition under §§ 301, 302, or 303 initiates the operation of the automatic stay of the following:

(1) the commencement or continuation, including the issuance or employment of process, 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;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

See 11 U.S.C. § 362(a).

The initiation of an equitable distribution action after the filing of the bankruptcy by LaVonne McCree is considered an “act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.” The equitable distribution of marital assets is stayed by the filing of the bankruptcy petition. See In re Robbins, 964 F.2d 342, 344 (4th Cir. 1992). However, bankruptcy courts typically find cause to grant

relief from the automatic stay to commence a claim for equitable distribution in state court. Federal courts give deference to the expertise of state courts in matters involving domestic law. Justice v. Justice, 123 N.C. App. 733, 738, 475 S.E.2d 225, 230 (1996); In re Robbins, 964 F.2d at 345; Caswell v. Long, 757 F.2d 608, 610-11 (4th Cir. 1985).

Ms. McCree's actions were in violation of the automatic stay pursuant to section 362 (a). Pursuant to 11 U.S.C. § 362 (h), "[a]n 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." A violation of the automatic stay is "willful" if there is evidence that (a) the creditor knew of the pending bankruptcy petition, and (2) the creditor's actions were intentional. Hamrick v. United States (In re Hamrick), 175 B.R. 890, 892 (Bankr. W.D.N.C. 1994) (quoting Budget Serv. Co. v. Better Homes of Va. Inc., 804 F.2d 289, 292-293 (4th Cir. 1986)). It is undisputed that Ms. McCree knew of the filing of the bankruptcy petition and that her acts were intentional. It is not required that the Debtor prove that the creditor had the specific intent to violate the stay. In re Clayton, 235 B.R. 801, 806 (Bankr. M.D.N.C. 1998). There is a violation regardless of a "good faith" belief that the act was justified. In re University Medical Center, 973 F.2d 1065 (3rd Cir. 1992). A party may knowingly violate the stay on the erroneous belief that its action is permitted. In re Wills, 226 B.R. 369 (Bankr. E.D. Va. 1998). This court finds a willful violation of the automatic stay.

The Code requires that an individual injured by a willful violation shall recover damages including attorney fees and costs. The debtor has the burden to prove damages and must show the amount of damages with reasonable certainty. In re Matthew, 184 B.R. 594 (Bankr. S.D. Ala. 1995). The court cannot award damages, costs or fines where none have been proven. In re Clayton, 235 B.R. at 810; see also In re Alberto, 119 B.R. 985 (Bankr. N.D. Ill. 1990).

In the present case, the Debtor was present at the hearing but gave no testimony as to damages. No evidence was presented as to time lost from work or as to the attorney time involved in this matter. The court is aware of the Debtor's employment as a wage deduction is in place so payments can be made to the Chapter 13 Trustee. The Debtor did miss work to attend the hearing, and the court will therefore award nominal damages in the amount of \$50.00. Additionally, the court has reviewed the pleadings in this matter and considered the time expended in court and finds that attorney fees should be awarded in the amount of \$200.00. The Debtor made no specific request for punitive damages. Punitive damages are only appropriate when the violation of the automatic stay reflects egregious, intentional misconduct. No such facts have been alleged or offered into evidence.

Therefore, IT IS ORDERED, ADJUDGED AND DECREED that LaVonne McCree is found to have violated the automatic stay of 11 U.S.C. § 362 and that the Debtor has been injured by the willful violation. It is therefore ORDERED, ADJUDGED AND DECREED that LaVonne McCree is required to pay the Debtor the sum of \$50.00 and Debtor's counsel, A. Carl Penney, the sum of \$200.00 within thirty (30) days following the entry of this Order. It is further ORDERED, ADJUDGED AND DECREED that the Debtor's motion for an order dismissing the pending equitable distribution action is denied. However, the continuation of said action is stayed until such time as a motion for relief from stay to proceed has been heard and determined by this court.

This the 9 day of April, 2001.

~~CATHARINE R. CARRUTHERS~~

Catharine R. Carruthers
United States Bankruptcy Judge