



SO ORDERED.

SIGNED this 21 day of May, 2007.

ROBERT E. NUGENT
UNITED STATES CHIEF BANKRUPTCY JUDGE

NOT DESIGNATED FOR PUBLICATION

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

IN RE:

**JUSTIN WAYNE SPOONEMORE,
CASSANDRA KATHALEEN SPOONEMORE,

Debtors.**

**Case No. 05-17380
Chapter 7**

**ORDER DENYING CREDITOR CIT GROUP/CONSUMER FINANCE, INC.'S
MOTION TO DISMISS THE TRUSTEE'S TURNOVER MOTION**

Before the Court today is the motion of CIT Group/Consumer Finance, Inc ("CIT")¹ to dismiss for lack of standing the Trustee's motion to turnover certain real property and, in particular, the trustee's attendant claim within that motion that CIT violated the automatic stay and should be

¹ Dkt. 63.

sanctioned for its conduct.² The issue presented by CIT's motion is whether the bankruptcy trustee is an "individual" within the meaning of 11 U.S.C. § 362(h) (Thomson/West 2005) who is entitled to recover damages, costs and attorney's fees for willful stay violations.

Factual Background

The factual and procedural setting giving rise to this motion are set out in the Court's Order denying CIT's motion for summary judgment entered this same day; that treatment of the governing facts is incorporated herein by reference as if set out in full and parrot some of the factual allegations contained in the trustee's Turnover Motion.³ CIT and the trustee entered into an Agreed Order lifting the stay with respect to debtors' non-exempt real property (the Property), conditioned upon the trustee being included in a state court foreclosure case as an *in rem* party defendant.⁴ CIT failed to make the trustee a party in the foreclosure case and prosecuted the foreclosure to judgment without notice to her. During the pendency of the foreclosure case, CIT took a post-petition deed (purportedly a deed-in-lieu of foreclosure) from the debtors and changed the locks on the Property. CIT subsequently vacated its foreclosure judgment and dismissed the foreclosure case. These events precipitated the trustee's Turnover Motion wherein she alleges that CIT's actions have precluded her from renting the Property to "renters standing by to rent" the Property.

A great deal of acrimonious litigation and discovery on the Turnover Motion has ensued,

² Dkt. 28 (hereafter referred to as the "Turnover Motion").

³ The remaining factual contentions that the Court found to be controverted by the trustee are not particularly germane to the instant motion, but in any event, the Court accepts as true the allegations contained in the trustee's Turnover Motion as it is required to do when considering a motion to dismiss. *See Holt v. United States*, 46 F.3d 1000, 1002-03 (10th Cir. 1995).

⁴ Dkt. 15.

including two dispositive motions filed by CIT. Part and parcel of the trustee's Turnover Motion is her request for sanctions for CIT's alleged violation of the stay under § 362(h)⁵:

Pursuant to 11 U.S.C. § 362(k)(1) [sic] the trustee is entitled to recover actual damages for the rental costs she has lost, and for her attorneys fees and any other costs incurred. Further, the trustee is entitled to recover punitive damages for CIT's willful violation of the stay provisions of the Bankruptcy Code.⁶

That section provided that an "individual" injured by a wilful stay violation "shall recover actual damages, including costs and attorneys fees, and in appropriate circumstances, may recover punitive damages."

CIT moves to dismiss the trustee's Turnover Motion, or at least that part of it that seeks sanctions and damages for the alleged stay violation, on the basis that trustees are not "individuals" for the purpose of former § 362(h) and, therefore, the trustee has no standing to bring this contested matter.

The trustee's Turnover Motion is a contested matter. While Fed. R. Bankr. P. 9014(c) does not expressly make Fed. R. Bankr. P. 7012(b) or Fed. R. Civ. P. 12(b)-(h) applicable to contested matters, the Court is inclined to follow and apply those standards in deciding CIT's motion here. Rule 12(b)(1) provides for dismissal for lack of subject matter jurisdiction, which includes a plaintiff's lack of standing to assert the claims. As the court noted in *Holt v. United States*,⁷ Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction take two forms: (1) a facial attack on the sufficiency of the allegations as to subject matter jurisdiction; and (2) a challenge to the facts

⁵ Section 362(h) contained the remedy for violations of the automatic stay, as read prior to October 17, 2005. With the enactment of BAPCPA, the provision, in modified form, is now found at § 362(k)(1).

⁶ Dkt. 28, p. 3, ¶ 11.

⁷ 46 F.3d 1000, 1002-03 (10th Cir. 1995).

upon which subject matter jurisdiction depends. In reviewing a facial attack, the court must accept the allegations in the complaint as true.⁸ But, when reviewing a factual attack on subject matter jurisdiction, the court need not accept the allegations as true and has wide discretion to consider evidence outside of the pleadings.⁹ A court's reference to such additional evidence does not convert the motion to a Rule 56 motion for summary judgment.¹⁰ The court perceives CIT's motion to be a facial attack on the trustee's invocation of jurisdiction and therefore, for the purpose of deciding this motion, deems the allegation of trustee's Turnover Motion to be true.

Thus, if it is presumed true that CIT committed the acts described above, the question is whether the trustee is authorized to bring a motion for turnover of the purloined asset and to enforce the stay. Nothing in CIT's present motion addresses why the trustee would lack standing to seek turnover of estate property. This is eminently within the trustee's powers and duties as prescribed by § 704(a)(1) (collect and reduce to money the property of the estate). Instead, CIT argues that the trustee lacks standing to enforce the automatic stay because, acting in her trust capacity, she is not an "individual."

In taking this position, CIT relies on the Ninth Circuit's opinion in *In re Pace*, where that court held that a trustee is not an "individual" who may claim actual damages, punitive damages, or attorneys fees for stay violations.¹¹ In *Pace*, the debtors' personal injury attorneys, with full knowledge of the pendency of their clients' cases, openly breached the stay by prosecuting the

⁸ *Id.* at 1002.

⁹ *Id.* at 1003.

¹⁰ *Id.*, citing *Wheeler v. Hurdman*, 825 F.2d 257, 259 n. 5 (10th Cir. 1987), *cert. denied*, 484 U.S. 986, 108 S.Ct. 503, 98 L.Ed.2d 501 (1987).

¹¹ 67 F.3d 187 (9th Cir. 1995).

settlement of a state court personal injury claim that was estate property and attempting to take possession of part of its proceeds notwithstanding the trustee's express contrary demands – a factual scenario similar to that at bar. The bankruptcy court concluded that the conduct of the attorneys was indeed egregious and violated the stay. That court awarded actual damages, a punitive sanction, and attorneys fees to the trustee. The Ninth Circuit reversed, however, concluding that it could not find that the trustee had suffered injury *as an individual*. Notwithstanding that holding, the *Pace* panel also held that actual damages and attorneys fees would be an appropriate remedy for the attorneys' contempt in violating the stay and that the bankruptcy court had adequate authority to exact that remedy under § 105(a):

It is clear that, even though a trustee does not qualify as an “individual” for purposes of section 362(h), a trustee can recover damages in the form of costs and attorney's fees under section 105(a) as a sanction for ordinary civil contempt. *See United States v. Arkison (In re Cascade Roads, Inc.)*, 34 F.3d 756, 767 (9th Cir.1994) (damages not otherwise available to a corporate debtor under section 362(h) for a creditor's willful violation of the automatic stay were nevertheless available under section 105(a) as a sanction for ordinary civil contempt; distinguishing *In re Goodman*, supra). It is equally clear that, while an award of damages under section 362(h) is mandatory, an award of damages under section 105(a) is discretionary. *Id.*; *In re Pace*, 159 B.R. at 904.¹²

The five circuits that have ruled on this issue are closely divided. The Third and Fourth Circuits have adopted a reading of the subsection that supports trustees or other non-natural persons receiving remedies.¹³ Along with the Ninth Circuit, the Second Circuit and the Eight Circuit have held to the contrary, that the word “individual” in § 362(h) should be so narrowly construed as to

¹² 67 F.3d at 193.

¹³ *See In re Atlantic Business & Community Corp.*, 901 F.2d 325, 328 (3d Cir.1990); *Budget Service Co. v. Better Homes of Virginia, Inc.*, 804 F.2d 289, 292 (4th Cir.1986) (§ 362(h) applies to corporate debtors).

limit that subsection's remedies to natural persons.¹⁴ Both the Eight and Ninth Circuits note that, notwithstanding the availability of § 362(h) sanctions, trustees may invoke and the court may enforce contempt sanctions under § 105(a).

Collier's bankruptcy treatise deems the *Pace* court's formulation the "better view," stating that this subsection was enacted as part of the 1984 consumer amendments intended only to deal with individual consumer bankruptcies and that only a "tortured reading of the statute" provides the trustee with this particular remedy.¹⁵ Yet even *Collier's* recognizes that bankruptcy courts have recourse to other means of sanctioning this kind of conduct.

The Tenth Circuit has yet to decide this issue. In an opinion issued shortly after *Pace* was handed down, U. S. District Judge Julie Robinson, then sitting as a bankruptcy judge in this Division, held that dictionary definitions of the word "individual" supported the view that these remedies are not necessarily limited to natural persons.¹⁶ She stated:

This Court agrees with the opposing views expressed in *Pace*, and finds that the term "individual" in § 362(h) includes trustees incurring damages on behalf of the estate. Where the statute's language is plain, "the sole function of the courts is to enforce it according to its terms." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241, 109 S.Ct. 1026, 1030, 103 L.Ed.2d 290 (1989) (citations omitted). The term "individual" has been defined as including, in proper cases, artificial persons. Black's Law Dictionary 773 (6th ed. 1990). The Court finds that this is a proper case in which "individual" should include the trustee on behalf of the bankruptcy estate.¹⁷

Several other courts have adopted the same view, employing *Ron Pair* and the dictionary to

¹⁴ See *In re Chateaugay Corp.*, 920 F.2d 183, 185-86 (2d Cir.1990); *In re Just Brakes Corporate Systems, Inc.*, 108 F.3d 881, 884-86 (8th Cir.1997).

¹⁵ 3 COLLIER ON BANKRUPTCY, ¶ 362.11(3) (15th ed. rev. 2006).

¹⁶ *Fisher v. St. Joseph Medical Center, Inc. (In re Fisher)*, 194 B.R. 525 (Bankr. D. Kan. 1996), *aff'd* 1996 WL 695401, slip op. (Nov. 27, 1996 D. Kan.).

¹⁷ 194 B.R. at 533.

afford trustees relief under this section. An example of this reasoning is found in *Matter of Garafalo's Finer Foods, Inc.*, where the bankruptcy judge relied on both Black's Law Dictionary definition of "individual" and that found in Webster's dictionary to conclude that "the definition of 'individual' is more encompassing than a 'natural person.'"¹⁸ Black's Law Dictionary defines "individual" as follows:

As a noun, this term denotes a single person as distinguished from a group or class, and also, very commonly, a private or natural person as distinguished from a partnership, corporation, or association, but it is said that this restrictive signification is not necessarily inherent in the word, and that it may, in proper cases, include artificial persons.¹⁹

Webster's Dictionary similarly defines "individual" as a "a single or particular being or thing or group of beings or things: as a: a particular being or thing as distinguished from a class, species, or collection ..."²⁰ The *Garafalo* court stated that, "Under these more expansive definitions, a chapter 7 trustee may properly be considered an "individual" since the trustee always files an adversary action on behalf of an artificial entity (*i.e.*, the bankruptcy estate) rather than in his individual capacity. Under these special circumstances, it is appropriate to define an 'individual' less restrictively than a natural person."²¹

This Court concludes for the purposes of this motion that a trustee may well be an "individual" for § 362(h) purposes and be permitted to seek stay violation sanctions, including punitive damages, separate and apart from those afforded in other sections of the Code.

¹⁸ 186 B.R. 414, 437-39 (Bankr. N.D. Ill.1995).

¹⁹ BLACK'S LAW DICTIONARY 696 (5th ed. 1979).

²⁰ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1152 (1961).

²¹ 186 B.R. 414, 437-39.

Even if a trustee is not entitled to punitive damages under § 362(h), she is not deprived of standing to bring an action to determine whether the stay has been breached. It is abundantly clear that, under Tenth Circuit precedent, a bankruptcy court has statutory contempt authority to determine whether the stay has been violated and administer appropriate sanctions including actual damages and attorneys fees and costs.²² The Tenth Circuit held:

While bankruptcy courts do not have inherent civil contempt power, *see Plastiras v. Idell (In re Sequoia Auto Brokers, Ltd.)*, 827 F.2d 1281, 1284 (9th Cir.1987), we conclude that Congress has granted them civil contempt power by statute. This statutory authority derives from 11 U.S.C. § 105 and 28 U.S.C. § 157.²³

The trustee who is burdened with the statutory duty to marshal and realize the assets of the estate for the benefit of the creditors has standing to ask this court to enforce the stay. Were the stay unenforceable by trustees, it would serve little purpose. CIT's suggesting otherwise is simply insupportable.

As noted above, for this motion's purposes, the court assumes the facts as pleaded in the trustee's Turnover Motion to be true. On those facts, the Court would have little hesitation holding that when CIT, for whatever reason, omitted to include the trustee as a party in its foreclosure case, and compounded its omission by taking possession of non-exempt estate property post-petition, it violated the stay. Given the sequence of events, a court could also conclude that it did so willfully. This court has seen enough of the turnover litigation to date to be certain that the trustee has been put to considerable expense and effort in performing her duty to protect and preserve this asset. This court construes the trustee's well-pleaded Turnover Motion to seek relief for CIT's stay violation.

²² *In re Skinner*, 917 F.2d 444 (10th Cir. 1990).

²³ 917 F.2d at 447.

Whether that relief was sought under § 362(h) or § 105(a), this Court always has authority to act in protection of its jurisdiction. When a creditor openly flouts the jurisdiction and authority of this Court, as the trustee alleges (again, taken as true for purposes of a Rule 12(b)(1) motion), this Court may vindicate its authority via the exercise of its statutory powers under § 105(a) even if it is later demonstrated that the trustee may not receive punitive damages under § 362(h).

CIT's Motion to Dismiss the trustee's Turnover Motion is DENIED.²⁴

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²⁴ CIT is admonished that further dispositive motions are discouraged until such time as discovery has closed. Motions to reconsider should be filed within ten days of the entry of this order and shall be limited to five pages in length.