ORDERED in the Southern District of Florida on JUL 02 2009

A. Jay Cristol, Chief Judge Emeritus
United States Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

In re: CLAUDIA HERNANDEZ

CASE NO. 09-14639-BKC-AJC

Debtor.

Chapter 13

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ORDER GRANTING EMERGENCY MOTION FOR SANCTIONS AGAINST CREDITOR, OLGA BETH PINEDA

THIS CAUSE came before the Court for hearing on May 21, 2009 and again on June 2, 2009 upon the motion filed by the Debtor, CLAUDIA HERNANDEZ, for sanctions against Creditor, OLGA BETH PINEDA, for violation of the automatic stay. Debtor seeks sanctions against the creditor for willful violation of the automatic stay for her failure to voluntarily dissolve and/or stay a Continuing Writ of Garnishment issued and served on the garnishee before the filing of the bankruptcy petition. For the reasons set forth below, the Emergency Motion for Sanctions against Creditor is *granted.*

FACTS

A Final Judgment against the Debtor had been entered in the County Court in and for Miami-Dade County, Florida on January 6, 2009 in the amount of $19,068.82. PINEDA obtained a Writ of Garnishment for Salary or Wages on February 27, 2009, and served it upon Debtor's employer, TENET HEALTH SYSTEMS, INC. on March 13, 2009. On March 18, 2009, the Debtor filed her petition under Chapter 13 of the Bankruptcy Code. On March 20, 2009, Debtor's paycheck was issued, reflecting garnished wages in the amount of $435.89 that were retained by TENET and are being held post-petition. According to Debtor's pleadings, TENET has continued garnishing wages post-petition, but according to the Creditor, TENET has not remitted any of the garnished funds to Creditor.

After the filing of the petition, the Debtor made demand upon PINEDA that she release the garnishment in light of the automatic stay. PINEDA refused. This Emergency Motion for Sanctions Against Creditor followed. The employer, Garnishee, TENET was not served with the Motion for Sanctions and is not before the Court.

ISSUE

Under the circumstances of this case, is the refusal of PINEDA to voluntarily release or affirmatively attempt to stay a Writ of Garnishment against the wages of the Debtor that was served on the garnishee pre-petition a violation of the automatic stay?

ANALYSIS

The Court has jurisdiction of this matter pursuant to 28 U.S.C. § 1334. In accordance with 28 U.S.C. §157(b)(3), this is a core proceeding under 28 U.S.C. §157(b)(2)(A),(B), and (O).

The Creditor relies on *In re Giles,* 271 B.R. 903 (Bankr. M.D. Fla. 2002) to support her argument that she need do nothing to release, halt or otherwise stay the garnishment proceedings.

In *Giles*, the creditor obtained a judgment pre-petition and served a Writ of Garnishment upon Debtor's bank account(s) pre-petition. After filing for relief under Chapter 13, the debtor made demand upon its creditor to release the garnishment. When the creditor refused, the debtor sought an order to show cause why the creditor should not be sanctioned for violation of the automatic stay. Judge Williamson denied the relief requested, holding that the creditor's refusal to release the garnished accounts to the detriment of lien rights which it acquired pre-petition was not violative of the automatic stay. *Id.* at 907. *Giles* focused on the language of the then-newly amended Florida Statute §77.06, which provides that service of a writ of garnishment creates a lien upon funds or property belonging to a debtor in the hands of a third-party garnishee. *Id.* at 905-06. The court concluded that failure of a creditor to release a garnished account to the detriment of its lien rights does not violate the automatic stay.

The Court finds the facts of this case distinguishable from those in *Giles* and more analogous to the facts in *In re Iwan*, 2008 WL 321507 (Bankr. M.D. Fla.), as no lien rights were created pre-petition in this case. In *Iwan*, a creditor of a Chapter 7 debtor obtained a continuing writ of garnishment pre-petition and served it on the debtor's employer pre-petition. *Id.* at 1. The debtor's employer subsequently issued, post-petition, a check for wages covering a pre-petition employment period. *Id.* The post-petition check reflected a garnishment of wages on behalf of the creditor. *Id.* The *Iwan* court determined that "[t]he threshold issue for determination is whether the service of the writ of garnishment created a lien on the garnished funds." *Id.* The court concluded that "the employer had no property of the Debtor in its possession or control when the writ of garnishment was served. No property of the Debtor, specifically, her wages, came into the employer's possession or control until post-petition . . . when the Debtor's paycheck was issued." *Id.* Thus, the *Iwan* court concluded that the creditor

held no garnishment lien on the debtor's property on the petition date pursuant to Fla. Stat. §77.06(1), and the creditor's post-petition actions were in violation of the automatic stay pursuant to 11 U.S.C. §362(a).

So too, in this case, no garnishment lien was created pre-petition upon property of the Debtor. TENET held no property of the Debtor in its possession or control on March 13, 2009 when the writ of garnishment was served or on March 18, 2009 when the bankruptcy petition was filed. No property of the Debtor, to wit, her wages, came into the employer's possession or control until post-petition when the Debtor's paycheck was in fact issued.* Accordingly, failure of Creditor to release the garnishment or to otherwise seek a stay of the garnishment, when such release or stay does not affect her rights, is a violation of the automatic stay.

This Court believes this Creditor has an affirmative duty to stop, halt or stay the garnishment proceedings when they are in violation of the automatic stay. In *In re Briskey*, the court held that "the creditor must not only cease from taking any affirmative action which would violate the automatic stay, [but] it must also take all necessary affirmative action to *stop proceedings* which are in violation of the automatic stay." 258 B.R. 473, 477 (Bankr. M.D. Ala. 2001). In *In re Mims*, the court declared that, "after learning of the bankruptcy, [the] Creditor had a duty to take affirmative action to stop the garnishment." 209 B.R. 746, 748 (Bankr. M.D. Fla. 1997). Moreover, the creditor is required to notify the garnishee/employer of the effect of the automatic stay, seek dismissal of the garnishment, and direct the garnishee/employer to release the frozen funds. *Id.* at 748. "[T]he automatic stay is . . . one of the most important benefits

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*It has been represented to the Court that TENET was not holding any funds of the Debtor's and did not come into possession of Debtor's funds until the garnishment of the March 20, 2009 paycheck. If those representations are not accurate, the parties should seek reconsideration.

provided to debtors." *Id.* Therefore, bankruptcy courts must strictly enforce the automatic stay to insure that debtors receive the protection to which they are entitled. In this case, while the Debtor made attempts to contact the Creditor's counsel and Debtor's employer to request they halt the garnishment of Debtor's wages, this Creditor admitted she made no effort to halt the garnishment and the employer continues to garnish the Debtor's wages.

To comply with the automatic stay, a creditor who has initiated garnishment proceedings against the wages of a debtor has an affirmative duty to stop the garnishment. *In re Buchanan*, 273 B.R. 749 (Bankr. M.D. Ga. 2002); *Elder v. City of Thomasville (In re Elder)*, 12 B.R. 491, 494 (Bankr. M.D. Ga. 1981). When a garnishment has been filed pre-petition, creditor can satisfy its duty to comply with the automatic stay by dismissing the garnishment or by staying it. *Id.* at 749; *Ameron Protective Coatings Div. V. Georgia Steel, Inc. (In re Georgia Steel)*, 25 B.R. 781, 786 (Bankr. M.D. Ga. 1982). Thus, the Creditor herein having stipulated that she took no affirmative action to stop the garnishment of Debtor's wages, the Court finds she failed to fulfill her duty to comply with the requirements of 11 U.S.C. §362(a) and violated the automatic stay, and such inaction is sanctionable under 11 U.S.C. §362(a).

The Creditor having violated the automatic stay by failing and refusing to release or stay her writ of garnishment obtained and served pre-petition, but which garnishment did not create a pre-petition lien on the Debtor's wages, the Court concludes, based upon the authority cited herein, that the Debtor is entitled to sanctions against PINEDA. The parties are urged to contact each other to discuss a reasonable sanction and determine if an agreement can be reached as to an appropriate sanction, in which case the parties may submit an agreed order. If no agreement can be reached, a further hearing will be held.

For these reasons set forth in this order, it is

ORDERED AND ADJUDGED that the Emergency Motion for Sanctions Against Creditor is **GRANTED**. A further hearing is scheduled for July 29, 2009 at 10:30 AM/PM in Courtroom 1410 to determine the appropriate sanction to be awarded. If the parties have agreed on a reasonable and appropriate sanction, they shall submit a proposed agreed order to the Court for entry and the Court will cancel the hearing.

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