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Memorandum

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Hon. Michael S. McManus
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re
MICHELLE VENTURA-LINENKO,

Debtor.

Case No. 09-51044

MEMORANDUM

Chapter 13 debtor Michelle Ventura-Lineno moves for sanctions against Page Ventures, LLC, and its attorney due to their unauthorized post-petition attempts to dispossess her from her Reno home in violation of the automatic stay. See 11 U.S.C. § 362(a), (k). Her motion will be granted in part.

I

This case was filed on April 13, 2009. On that date, all creditors were automatically stayed from commencing or continuing any judicial action against the debtor on a claim that arose

1 prior to the bankruptcy case. See 11 U.S.C. § 362(a)(1).
2 Creditors were also barred from doing anything to obtain
3 possession of property of the bankruptcy estate. See 11 U.S.C. §
4 362(a)(3).

5 The filing of the bankruptcy case was preceded by a March
6 18, 2009 nonjudicial foreclosure of the debtor's home by Litton
7 Loan Servicing LP. Page Ventures, LLC, purchased the home at the
8 sale and its deed was recorded on March 25. It then began the
9 process to evict the debtor by filing an action in Nevada state
10 court. On April 7, Page's attorneys asked the state court to
11 issue an order directing the debtor to show cause why she should
12 not be removed from the property.

13 Before the state court acted on Page's request, the debtor
14 filed her chapter 13 petition. Debtor's counsel gave notice on
15 April 14 to the state court and to counsel for Page advising them
16 that the petition had been filed. However, because Page and its
17 attorneys did not affirmatively request that the state court not
18 issue the order to show cause, the state court issued that order
19 on April 29.¹ The order to show cause indicated that a hearing
20 would be held in state court on June 4 to consider dispossessing
21 the debtor.

22 Even though an action had already been filed to dispossess
23 the debtor, on May 8 Nevada Court Services, acting for Page and

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26 ¹Counsel for Page signed the order to show cause before
27 lodging it with the state court. His signature is undated.
28 However, paragraph 5 of his June 12, 2009 affidavit filed in
response to the sanction motion makes clear that he requested the
order to show cause before the bankruptcy petition was filed.
The state court issued it on April 29. April 29 is not the date
counsel requested the order to show cause.

1 its attorneys, personally served the debtor with a five-day
2 notice to quit the premises.

3 The foregoing prompted the debtor to contact her bankruptcy
4 attorney. Her attorney in turn sent a May 11 letter advising
5 Page and its attorney that their efforts to dispossess the debtor
6 were being taken in violation of the automatic stay. The letter
7 promised that sanctions would be sought if further effort was
8 taken to evict the debtor.

9 The effort did not end. On May 20, the debtor was served by
10 Page's attorney with the state court order to show cause and was
11 told it would be considered by the state court on June 4.

12 The next day, the debtor's attorney sent a second letter to
13 Page's attorney. It requested confirmation by May 22 that the
14 June 4 hearing had been vacated. If it was not, the debtor
15 intended to seek sanctions for violation of the automatic stay.

16 Counsel for Page did not meet the May 22 deadline and a
17 motion for sanctions was filed on May 26. However, on May 29,
18 after service of the sanction motion, counsel for Page asked the
19 state court to vacate the June 4 hearing. The debtor asserts
20 that this was too late. By then she had suffered considerable
21 emotional distress and incurred significant attorneys' fees.

22 II

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24 Because the debtor was not dispossessed by Page, the
25 sanction motion does not seek any damages related to the use and
26 enjoyment of the debtor's home. Instead, the debtor seeks
27 damages for the emotional distress caused by the threatened
28 eviction, attorney's fees, and punitive damages.

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The debtor maintains that she suffered emotional distress and was upset because of her threatened eviction. She demands damages for this injury. The evidence of this injury is brief yet credible, and it is uncontradicted.

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In the months leading up to bankruptcy, the debtor was diagnosed with cancer. Her treatment prevented her from working. Her husband was also dealing with significant injuries incurred in an accident that prevented him from working.

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These health and employment problems are at the root of the financial problems that caused the debtor to default on her home loan. The extent and nature of this default were the subject of state court litigation filed by the debtor and removed to this court immediately after the filing of the petition.

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As the debtor notes, the prospect of losing one's home is one of the most stressful calamities that can befall anyone. Here, the debtor was not only dealing with this stress, but also coping with severe health issues that were causing serious financial problems. In short, it is entirely believable that Page's threats to dispossess the debtor and her family would cause significant emotional distress.

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The debtor complains that the threat of dispossession caused insomnia, loss of energy, and depression, conditions corroborated by her doctor who prescribed medication to deal with them.

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In In re Dawson, 390 F.3d 1139 (9th Cir. 2004), the Ninth Circuit held that damages for emotional distress are recoverable

1 for a violation of the automatic stay.² The court held:

2 [W]e must determine whether Congress intended the
3 term "actual damages" in § 362(h) to include damages
4 for emotional distress. We begin with the text of the
5 statute, but it does not provide a definition for
6 "actual damages." There is a contextual clue, however,
7 that lends support to Plaintiffs' theoretical position.

8 Congress chose the term "individual" to describe
9 those who are eligible to claim actual damages under §
10 362(h). The statute allows any "individual," including
11 a creditor, to recover damages. So, for example, if a
12 willful violation of the automatic stay damages some
13 portion of the bankruptcy estate, both the debtor and
14 an individual creditor of the now less-valuable estate
15 may recover actual damages. [Citations omitted.] But
16 corporations, whether debtors or creditors, are not
17 "individuals" for the purposes of this statute.
18 [Citations omitted.] By limiting the availability of
19 actual damages under § 362(h) to individuals, Congress
20 signaled its special interest in redressing harms that
21 are unique to human beings. One such harm is emotional
22 distress, which can be suffered by individuals but not
23 by organizations.

24 . . .

25 Reading the legislative history as a whole, we are
26 convinced that Congress was concerned not only with
27 financial loss, but also - at least in part - with the
28 emotional and psychological toll that a violation of a
stay can exact from an . . . individual. Because
Congress meant for the automatic stay to protect more
than financial interests, it makes sense to conclude
that harm done to those non-financial interests by a
violation are cognizable as "actual damages." We
conclude, then, that the "actual damages" that may be
recovered by an individual who is injured by a willful
violation of the automatic stay, [footnote omitted] 11
U.S.C. § 362(h), include damages for emotional
distress.

23 In re Dawson, 390 F.3d at 1146, 1148.

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27 ²Dawson discusses whether emotional distress damages were
28 recoverable as actual damages under 11 U.S.C. § 362(h). Since
the enactment of the Bankruptcy Abuse Prevention and Consumer
Protection Act of 2005, section 362(k)(1) is the relevant
section.

1 prosecuting the motion under section 362(k), however, to recover
2 those damages are not also recoverable.

3 The debtor's attorney's declaration includes his
4 contemporaneous time records. A review of them reveals that his
5 services relate primarily to prosecuting this motion. These
6 fees cannot be recovered. The only fees incurred that can be
7 characterized as to "fixing" Page's attempt to evict the debtor
8 allegedly in violation of the automatic stay are for the .50,
9 .40, and .10 hours billed for services on May 11, 21, and 22.
10 These services were geared toward warning Page to cease and
11 desist its efforts to evict the debtor. While Page's counsel
12 did not act by the May 22 deadline set by the debtor's attorney,
13 the debtor was not required to appear in state court. Before an
14 appearance was necessary, Page's counsel vacated the June 4
15 hearing and came to this court for relief from the automatic
16 stay.

17 If Page violated the automatic stay, reasonable fees for
18 the 1.0 of services may be recovered. The hourly rate charged
19 by the debtor's attorney, \$350, is reasonable considering his
20 experience in the field of bankruptcy law and it is comparable
21 to the rate charged by other attorneys in this district.

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23 C

24 Section 362(k)(1) specifically directs the court to grant
25 punitive damages "in appropriate circumstances." The
26 appropriate circumstances, however, entail more than a showing
27 that there has been a willful violation of the automatic stay.
28 Punitive damages may not be awarded absent some showing of

1 reckless or callous disregard for the law or rights of others.
2 See Protectus Alpha Navigation Co. v. North Pacific Grain
3 Growers, Inc., 767 F.2d 1379, 1385 (9th Cir. 1985). Further,
4 punitive damages cannot be awarded absent appreciable, actual
5 damages. See McHenry v. Key Bank (In re McHenry), 179 B.R. 165,
6 168 (B.A.P. 9th Cir. 1995).

7 The debtor has demanded \$50,000 in punitive damages.

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9 III

10 The foregoing discussion of damages assumes there has been
11 a willful violation of the automatic stay.

12 A

13 Page contends that its actions did not violate the
14 automatic stay because it purchased the debtor's home at a pre-
15 petition foreclosure sale. As a result, it could take
16 possession of that home because it was no longer property of the
17 bankruptcy estate.

18 This position is belied by the fact that, eventually, Page
19 cancelled the hearing in state court and sought relief from the
20 automatic stay as a condition to retaking possession.

21 Not only is its position contradicted by its eventual
22 behavior in this court, it is not supported by the cases
23 interpreting the extent of the protection afforded by the
24 automatic stay. For instance, Williams v. Levi (In re
25 Williams), 323 B.R. 691, 699 (B.A.P. 9th Cir. 2005), the panel
26 considered a case where the debtor's interest in a condominium
27 had been foreclosed by a homeowner's association. The debtor,
28 however, was in possession of the condominium when a chapter 13

1 petition was filed. The panel held:

2 The legal and equitable interests of a debtor at the
3 start of a case are determined according to state law.
4 Butner v. United States, 440 U.S. 48, 55, 99 S.Ct.
5 914, 59 L.Ed.2d 136 (1979). On the petition date,
6 [the debtor] had no recorded interest in the Property.
7 But he lived in the condo, and his possessory interest
8 was property of the bankruptcy estate under § 541(a)
9 and § 1306. In re Butler, 271 B.R. 867, 876-77
10 (Bankr. C.D. Cal. 2002) (a debtor-tenant's mere
11 physical possession of apartment premises after writ
12 of possession had issued in favor of landlord in
13 unlawful detainer action is an equitable interest in
14 property, protected by automatic stay). See also In
15 re Di Giorgio, 200 B.R. 664 (C.D. Cal. 1996), judgment
16 vacated, 134 F.3d 971 (9th Cir. 1998).

17 Id.

18 Hence, the debtor's mere possession of real property is
19 protected by the automatic stay.

20 Any argument that 11 U.S.C. § 362(b)(22) provides an
21 exception of the automatic stay is without merit. Section
22 362(b)(22) provides that when a "lessor" obtains a judgment for
23 possession in an unlawful detainer (or similar) action before
24 the filing of the bankruptcy, 30 days after the filing of the
25 petition and if the debtor fails to satisfy the requirements of
26 11 U.S.C. § 362(1), the lessor may take possession of the
27 property without first obtaining relief from the automatic stay.

28 This exception to the automatic stay is not applicable
because Page did not lease the subject property to the debtor
and it had not obtained a judgment for possession prior to the
filing of the bankruptcy petition.

B

If the automatic stay is applicable, Page next argues that
it did nothing to take possession of the property once the

1 petition was filed. Rather, it requested the order to show
2 cause from the state court before the bankruptcy case was filed.
3 Without any post-petition activity on the part of Page's
4 attorneys, the state court chose to act on the pre-petition
5 request after the case was filed.

6 There are two problems with this argument.

7 First, Page did take action after the petition was filed to
8 prosecute the state court action. It caused a five-day notice
9 to quit to be served on the debtor and it served the order to
10 show cause on the debtor after the state court set a hearing on
11 June 4.

12 Second, when the state court set a post-bankruptcy hearing
13 on the order to show cause, Page and its attorneys were required
14 to immediately arrange for that hearing to be vacated. They
15 could not let the hearing remain pending. While the hearing was
16 eventually vacated, the first response of Page's attorney was to
17 allow the June 4 hearing to remain pending while he sought
18 relief from the automatic stay. Only after the sanction motion
19 was filed did he vacate the June 4 hearing.

20 It was not incumbent on the debtor or her attorney to stir
21 Page to more prompt action. Having initiated a legal proceeding
22 that was pending when the petition was filed, that proceeding
23 had to be dismissed or stayed by Page and its attorneys. They
24 had an obligation to make sure that the state court did not move
25 forward on the complaint and the order to show cause while the
26 automatic stay was effective. See Eskanos & Adler, P.C. v.
27 Leetien, 309 F.3d 1210, 1213-15 (9th Cir. 2002). This was not
28 done.

1 Once a creditor becomes aware of the filing of the
2 bankruptcy petition, any intentional act that violates the
3 automatic stay is willful. See Goichman v. Bloom (In re Bloom),
4 875 F.2d 224, 227 (9th Cir. 1989) ("A 'willful violation' does
5 not require a specific intent to violate the automatic stay.
6 Rather, the statute provides for damages upon a finding that the
7 defendant knew of the automatic stay and that the defendant's
8 actions which violated the stay were intentional. Whether the
9 party believes in good faith that it had a right to the property
10 is not relevant to whether the act was 'willful' or whether
11 compensation must be awarded." INSLAW, Inc. v. United States
12 (In re INSLAW, Inc.), 83 B.R. 89, 165 (Bankr. D.D.C. 1988).")
13 Once a creditor knows that the automatic stay exists, the
14 creditor bears the risk of all intentional acts that violate the
15 automatic stay, regardless of whether the creditor means to
16 violate the automatic stay. Id. at 317-18.

17 Here, the act was a failure to act. Once notice was
18 received that a petition was filed, Page was required to dismiss
19 or stay the state court proceeding. Its failure to do so was a
20 calculated intentional decision.

21 It is not helpful to Page's defense that it consulted
22 attorneys who advised it that it could go forward with the
23 eviction. Advice of counsel is not a defense. As observed by
24 the Ninth Circuit in Tsifaroff v. Taylor (In re Taylor), 884
25 F.2d 478, 483 (9th Cir. 1989):

26 '[T]he stay is a broad provision which requires a
27 creditor to seek a *judicial* determination of its right
28 to proceed.' (Emphasis added.) It would contravene a
fundamental policy of federal bankruptcy law to allow
creditors to proceed with actions possibly subject to
the stay merely upon the advice of an attorney that

1 they are entitled to proceed. Accordingly, because
2 'good faith reliance on the advice of counsel' is not
3 a defense, Taylor is entitled to an award of actual
4 damages, costs, and attorney fees to the extent she
5 was injured by the 'willful violation.' [Quoting
6 trial court.]

5 IV

6 The court concludes that the failure of Page and its
7 attorney to immediately dismiss or stay the state court action
8 to evict the debtor was a violation of the automatic stay. This
9 violation was intentional and willful. Because of their failure
10 to promptly vacate the June 4 hearing, the debtor suffered
11 emotional distress and incurred attorney's fees. The court
12 awards \$3,500 of the emotional distress and \$350 for the fees
13 related to her attorney's effort to cancel the June 4 hearing.

14 That leaves the issue of punitive damages. Because of the
15 willful violation of the automatic stay, the debtor has
16 sustained appreciable, actual damages. But, to recover punitive
17 damages, the debtor must also demonstrate that Page and its
18 attorneys acted with a reckless or callous disregard for her
19 rights as a bankruptcy debtor.

20 On the one hand, Page did not actually dispossess the
21 debtor and it eventually vacated the June 4 hearing. Further,
22 the service of a second five-day notice appears to have been
23 done by an agent acting without knowing that the petition had
24 been filed.

25 On the other hand, getting the June 4 hearing cancelled
26 required the debtor to incur significant attorney's fees, only a
27 fraction of which are compensable under section 362(k)(1). Even
28 more disturbing, it appears to the court that Page's reticence

1 to back off in the eviction proceeding was motivated by a desire
 2 to coerce the debtor to back off her pending litigation to set
 3 aside Litton's foreclosure as not being in accord with the deed
 4 of trust and Nevada law.

5 The automatic stay is central to any bankruptcy case. It
 6 is important, not only to the debtor, but to the court in its
 7 effort to give the debtor a fresh start while insuring that
 8 creditors receive the maximum possible dividend. A creditor may
 9 not ignore the automatic stay for strategic gain in a dispute
 10 with the debtor. When it does, it not only hampers a debtor's
 11 ability to reorganize, but it also impairs the ability of the
 12 court to protect the debtor and other creditors.

13 Therefore, with the amount of damage sustained by the
 14 debtor in mind, the court awards \$3,500 in punitive damages.

15 Counsel for the debtor shall lodge a conforming order
 16 within 14 days.

I certify that this is a true copy:

Attest: *Elizabeth Weider*
 Deputy Clerk, Bankruptcy Court

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