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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	MT-10-1334-HJuMk
)		
EDRA D. BLIXSETH,)	Bk. No.	09-60452
)		
Debtor.)		
_____)		
RICHARD J. SAMSON, Chapter 7)		
Trustee,)		
)		
Appellant,)		
)		
v.)	O P I N I O N	
)		
WESTERN CAPITAL PARTNERS, LLC,)		
)		
Appellee.)		
_____)		

Argued and Submitted on March 16, 2011
at Pasadena, California

Filed - May 25, 2011

Appeal from the United States Bankruptcy Court
for the District of Montana

Hon. Ralph B. Kirscher, Chief Bankruptcy Judge, Presiding.

Appearances: _____
Bradley R. Duncan of Davis Wright Tremaine LLP,
argued for the Appellant; Robert W. Hatch, II, of
Hatch Halstead LLC, argued for the Appellee.

Before: _____
HOLLOWELL, JURY, and MARKELL, Bankruptcy Judges.

1 HOLLOWELL, Bankruptcy Judge.

2
3 The Bankruptcy Code requires an individual debtor in a
4 chapter 7¹ case to undertake certain obligations with respect to
5 personal property that secures a debt. 11 U.S.C. § 521(a)(2). A
6 debtor must file a statement of intention indicating whether she
7 intends to surrender or retain such property and must file and
8 perform on her intention within a certain time frame. 11 U.S.C.
9 § 521(a)(2)(A). If a debtor fails to timely meet those
10 obligations, the automatic stay terminates and the property is
11 removed from the estate unless the chapter 7 trustee obtains a
12 determination that the property is of consequential value or
13 benefit to the estate. 11 U.S.C. §§ 521(a)(2)(C), 362(h)(1) and
14 (2).

15 In this case, the debtor did not file a statement of
16 intention with respect to personal property that was pledged to a
17 creditor and the chapter 7 trustee did not seek a determination
18 that the property was of value or benefit to the estate.
19 However, the chapter 7 trustee appeals the bankruptcy court's
20 ruling that § 362(h) terminated the automatic stay on all of the
21 debtor's personal property secured by the creditor's claim and
22 not just on personal property scheduled as securing the claim.
23 We AFFIRM.

24
25
26 _____
27 ¹ Unless otherwise indicated, all chapter and section
28 references in the text are to the Bankruptcy Code, 11 U.S.C.
§§ 101-1532. All "Rule" references are to the Federal Rules of
Bankruptcy Procedure, Rules 1001-9037.

1 valued at \$76 million.

2 On May 29, 2009, the case was converted to chapter 7 and
3 Richard Samson was appointed the chapter 7 bankruptcy trustee
4 (the Trustee). The Debtor amended her Schedules on June 14, 2009
5 (the Amended Schedules) to, among other things, correct the list
6 of personal property assets to reflect a value of \$69,216,315.
7 The Amended Schedules did not alter the description of Western
8 Capital's debt or the \$2 million value given to the Collateral.

9 On June 30, 2009, the chapter 7 § 341 meeting of creditors
10 was held.³ By that date, the Debtor had not filed a statement of
11 intention regarding the Collateral, as required by
12 § 521(a)(2)(A).⁴ The Trustee did not move for a determination of
13 consequential value or benefit under § 362(h)(2) or for an
14 extension of time to do so.⁵

15 During the bankruptcy case, Western Capital filed three
16 motions for relief from the automatic stay (the Stay Relief

17
18 ³ A previous § 341 meeting of creditors was held in the
chapter 11 case on May 15, 2009.

19
20 ⁴ A debtor is required to file a statement of intention
indicating whether she will surrender or retain personal property
21 pledged to secure a debt within 30 days after filing a petition
under chapter 7 or on or before the date of the § 341 meeting of
22 creditors, whichever is earlier, or within such additional time
as the court, for cause, fixes. 11 U.S.C. § 521(a)(2)(A).

23
24 When a case has been converted to chapter 7, the statement
of intention must be filed within 30 days after entry of the
25 order of conversion or before the first date set for the meeting
of creditors, whichever is earlier, or within an extended time if
26 sought and granted. Rule 1019(1)(B).

27
28 ⁵ The consequential value or benefit motion must be made
"before the expiration of the applicable time set by
§ 521(a)(2)." 11 U.S.C. § 362(h)(2).

1 Motions). The Stay Relief Motions sought relief under
2 § 362(d)(2) and were filed on May 1, 2009 (pre-conversion), June
3 30, 2009, and August 24, 2009. In its May 1, 2009 Stay Relief
4 Motion, Western Capital sought relief from the stay in order to
5 liquidate the Debtor's stock in BLX Group, Inc. (BLX).

6 In its June 30, 2009 Stay Relief Motion, Western Capital
7 sought relief in order to liquidate the Debtor's fine art,
8 furnishings, collectibles, jewelry and other personal property
9 located at the Debtor's California residence, known as Porcupine
10 Creek, in Rancho Mirage, California. In its August 24, 2009 Stay
11 Relief Motion, Western Capital sought relief in order to
12 liquidate some of the Debtor's jewelry. The Trustee did not file
13 objections to the Stay Relief Motions.

14 On October 6, 2009, the bankruptcy court held a hearing on
15 Western Capital's May 1, 2009 and August 24, 2009 Stay Relief
16 Motions.⁶ Western Capital and the Trustee both attended the
17 hearing. Western Capital argued that, notwithstanding its
18 request for relief under § 362(d)(2), it was additionally
19 entitled to relief under § 362(h) since the Debtor had not timely
20 filed a statement of intention regarding the Collateral. The
21 bankruptcy court agreed and entered an order granting Western
22 Capital's two Stay Relief Motions on October 6, 2009 (the Order
23 Granting Relief). The Order Granting Relief found that:

- 24 (1) the Debtor had not filed a statement of intention; and
25 (2) the Trustee had not objected to the Stay Relief Motions

26
27 ⁶ The June 30, 2009 Stay Relief Motion regarding the
28 property located at Porcupine Creek was continued to November and
later withdrawn by Western Capital.

1 "indicating to this Court that the bankruptcy estate has
2 determined that Debtor's personal property is of inconsequential
3 value to the bankruptcy estate." The bankruptcy court held that
4 § 362(h) provided Western Capital mandatory relief.

5 Western Capital subsequently filed various notices of UCC
6 sales to liquidate the Collateral. The sales were postponed
7 while Western Capital and the Trustee worked to resolve the
8 Trustee's concerns regarding the sales, including the Trustee's
9 assertion that the sales violated the automatic stay. However,
10 on March 22, 2010, Western Capital moved forward with a sale of
11 BLX stock, which was the subject of the Order Granting Relief
12 (the March Sale). The March Sale also sold the Debtor's interest
13 in two entities and various accounts receivable, which were not
14 the subject of the Order Granting Relief. Western Capital was
15 the successful bidder at the sale for \$250,000.

16 On May 3, 2010, Western Capital filed a notice of sale (the
17 May Sale) that proposed to sell some of the Debtor's contract
18 rights. The May Sale was postponed several times at the request
19 of the Trustee but was ultimately scheduled for August 11, 2010.
20 On August 4, 2010, the Trustee filed a Motion to Enforce the
21 Automatic Stay Against Western Capital (Motion to Enforce) in
22 order to stop the May Sale.

23 In his Motion to Enforce, the Trustee contended that the May
24 Sale proposed to sell property that was protected by the
25 automatic stay because the automatic stay never terminated under
26 § 362(h) on all of the Collateral, but only terminated on
27
28

1 personal property identified on the Debtor's Schedules.⁷ The
2 Trustee interpreted the Schedules as limiting the Collateral to
3 the Debtor's personal property located at the "Family Compound
4 [at] Yellowstone Mountain Club." Because the contract rights
5 referenced in the May Sale notice were not located at the
6 Yellowstone Mountain Club, the Trustee argued they remained under
7 the protection of the automatic stay.

8 Western Capital filed an objection to the Motion to Enforce,
9 contending that § 362(h) applied to all the Collateral securing
10 the Loan. On August 10, 2010, the bankruptcy court held a
11 hearing on the Motion to Enforce. It issued a Memorandum of
12 Decision on August 16, 2010, holding that § 362(h) terminated the
13 automatic stay on the Collateral regardless of whether it was
14 listed on the Schedules. An order denying the Motion to Enforce
15 was entered the same day (the Order Denying Enforcement). On
16 August 30, 2010, the Trustee filed a notice of appeal.

17 **II. JURISDICTION**

18 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
19 § 157(b)(2)(A). We address our jurisdiction under 28 U.S.C.
20 § 158 below.

21 **III. ISSUE**

22 Whether § 362(h) terminates the automatic stay on all
23 personal property of the estate pledged to secure a scheduled
24 debt or only terminates the stay on personal property
25 specifically identified in a debtor's schedules as securing the
26 debt.

27
28 ⁷ The Schedules and Amended Schedules are collectively
referred to in this Opinion as the Schedules.

1 **IV. STANDARDS OF REVIEW**

2 We review issues of statutory construction and conclusions
3 of law, including the bankruptcy court's interpretation of the
4 Bankruptcy Code, de novo. Am. Express Bank, FSB v. Smith (In re
5 Smith), 418 B.R. 359, 364 (9th Cir. BAP 2009); Dumont v. Ford
6 Motor Credit Co. (In re Dumont), 383 B.R. 481, 484 (9th Cir. BAP
7 2008), aff'd, 581 F.3d 1104 (9th Cir. 2009).

8 **V. DISCUSSION**

9 **A. Jurisdiction**

10 We lack jurisdiction over an appeal that is not timely
11 filed. Saunders v. Band Plus Mortg. Corp. (In re Saunders), 31
12 F.3d 767 (9th Cir. 1994) (requirement of timely notice of appeal
13 is mandatory and jurisdictional). Western Capital contends that
14 this appeal is untimely. See Rule 8002 (a notice of appeal must
15 be filed within 14 days of the date of the entry of the judgment
16 or order). According to Western Capital, the Order Granting
17 Relief, entered on October 16, 2009, determined that the
18 automatic stay terminated under § 362(h) on the Collateral, and
19 therefore, the Trustee should have appealed that order.

20 Although the bankruptcy court granted relief pursuant to
21 § 362(h), the Trustee's argument that § 362(h) applies only to
22 personal property identified by the Debtor on her Schedules was
23 not at issue. The Trustee did not object to the Stay Relief
24 Motions because the personal property subject to the Stay Relief
25 Motions was either scheduled or the Trustee had determined it was
26 of no value to the estate. When Western Capital refused to
27 postpone the May Sale of personal property, which was not the
28 subject of the Order Granting Relief or among that described on

1 the Schedules, the Trustee filed the Motion to Enforce.⁸ The
2 bankruptcy court's subsequent ruling in the Order Denying
3 Enforcement essentially amended the Order Granting Relief and was
4 a final disposition on the question of what property was subject
5 to § 362(h). The Trustee timely filed his notice of appeal
6 within 14 days from the Order Denying Enforcement. As a result,
7 the appeal is timely and we have jurisdiction to address its
8 merits.

9 **B. Merits**

10 The Trustee contends that when the Debtor did not file a
11 statement of intention, § 362(h) terminated the automatic stay
12 only on the personal property identified on the Debtor's
13 Schedules as securing Western Capital's claim. According to the
14 Trustee, § 362(h)'s application was limited to personal property
15 located at the Family Compound at Yellowstone Mountain Club
16 because the Debtor's Schedules identified Western Capital's claim
17 as having a value well below the total value of all of the
18 Debtor's personal property and because the Schedules referenced
19 the "Yellowstone Mountain Club" in the description of Western
20 Capital's security interest.

21 Admittedly, the description of Western Capital's secured
22 claim, "ALL PERSONAL PROPERTY OWED [sic], FAMILY COMPOUND AT
23 YELLOWSTONE MOUNTAIN CLUB," is unclear. However, as we explain
24

25
26 ⁸ We note that the Trustee's position on appeal is somewhat
27 inconsistent with his prior conduct. The March Sale included a
28 sale of some Collateral not identified on the Debtor's Schedules
or covered by the Order Granting Relief, but the Trustee did not
seek to enforce the stay until the May Sale.

1 below, the effects of § 362(h) and § 521(a)(2) do not depend on
2 how (or even if) personal property securing a debt is scheduled.

3 Because this case presents a question of statutory
4 interpretation, "our interpretation of the Bankruptcy Code starts
5 'where all such inquiries must begin: with the language of the
6 statute itself.'" Ransom v. FIA Card Servs., N.A. (In re
7 Ransom), - U.S. -, 131 S. Ct. 716, 723-24 (2011) quoting United
8 States v. Ron Pair Enters., Inc., 489 U.S. 235, 241 (1989).

9 Section 362(h) terminates the automatic stay "with respect
10 to personal property of the estate or of the debtor securing in
11 whole or in part a claim . . . if the debtor fails within the
12 applicable time set by section 521(a)(2) . . . to file timely any
13 statement of intention required under § 521(a)(2)" indicating
14 whether she will surrender or retain such personal property.⁹ 11
15 U.S.C. § 362(h)(1).

16 _____
17 ⁹ Section 362(h):

18 (1) In a case in which the debtor is an individual, the
19 stay provided by subsection (a) is terminated with respect to
20 personal property of the estate or of the debtor securing in
21 whole or in part a claim, . . . and such personal property shall
22 no longer be property of the estate if the debtor fails within
23 the applicable time set by section 521(a)(2) - -

24 (A) to file any statement of intention required under
25 section 521(a)(2) with respect to such personal
26 property or to indicate in such statement that the
27 debtor will either surrender . . . or retain it .

28 . . .

(B) to take timely the action specified in such
statement

(2) Paragraph (1) does not apply if the court determines,
on the motion of the trustee filed before the expiration of the
applicable time set by 521(a)(2), after notice and a hearing,
that such personal property is of consequential value or benefit
to the estate,

1 Section 362(h) applies to personal property of the estate
2 securing a claim. "Property of the estate" is defined in
3 § 541(a) as all of a debtor's legal or equitable interests in
4 property, wherever located, as of the commencement of the case,
5 and includes nine non-exclusive subcategories of property. 11
6 U.S.C. § 541(a)(1)-(a)(9). Nothing in § 541 limits property of
7 the estate to property scheduled by a debtor. Moreover, property
8 of the estate includes non-debtor interests in property recovered
9 or recoverable through the Bankruptcy Code's transfer and lien
10 avoidance provisions. 11 U.S.C. § 541(a)(3), (4); Owen v. Owen,
11 500 U.S. 305, 308 (1991). Property of the estate, therefore,
12 includes property not identified or listed on the bankruptcy
13 schedules.

14 When language is used in one section of a statute and the
15 same language is used in another section, we "can infer that
16 Congress intended the same meaning." Consol. Freightways Corp.
17 of Del. v. Aetna, Inc. (In re Consol. Freightways Corp. of Del.),
18 564 F.3d 1161, 1165 (9th Cir. 2009); N. Sports, Inc. v. Knupfer
19 (In re Wind N' Wave), 509 F.3d 938, 944 (9th Cir. 2007)
20 ("identical words used in different parts of the same act are
21 intended to have the same meaning"). We assume, therefore, that
22 when a debtor fails to timely file her statement of intention,
23 § 362(h) terminates the stay on "property of the estate" as
24 defined by § 541.

25 The Trustee asserts that because § 362(h) refers to
26 § 521(a)(2), there is a requirement that personal property
27 subject to § 362(h) be scheduled. He focuses on the following
28 language of § 521(a)(2) to support his argument: "if an

1 individual debtor's schedule of assets and liabilities includes
2 debts which are secured by property of the estate" then a debtor
3 must timely file a statement of intention with regard to "such
4 property."¹⁰ The Trustee contends that the word "if" is "the
5 most essential part of the statute because it means that section
6 362(h) does not have any effect unless and until the predicate
7 condition is satisfied: the appearance of property on the
8 schedules."

9 The language of § 521(a)(2) requires that the secured debt
10 be listed but does not require that the property securing the
11 debt be scheduled: "if a debtor's schedule of assets and
12 liabilities includes debts secured by property of the estate . .
13 . ." 11 U.S.C. § 521(a)(2) (emphasis added). The reference to
14 "such property" in the statute refers to the "property of the
15 estate" that secures the debt. Where the language is plain and
16 does not lead to absurd or impractical consequences, the words
17 are taken as the final expression of the meaning intended. In re
18 Dumont, 581 F.3d at 1111.

20
21 ¹⁰ Section 521(a)

22 (2) if an individual debtor's schedules of assets and
23 liabilities includes debts which are secured by property of the
24 estate-

25 (A) within thirty days after the date of the filing of
26 a petition under chapter 7 of this title or on or before the date
27 of the meeting of creditors, whichever is earlier, or within such
28 additional time as the court for cause within such period fixes,
the debtor shall file with the clerk a statement of his intention
with respect to the retention or surrender of such property and,
if applicable, specifying that such property is claimed as
exempt, that the debtor intends to redeem such property, or that
the debtor intends to reaffirm debts secured by such property.

1 The combined effect of §§ 362(h) and 521(a)(2) is to lift
2 the stay and remove personal property from the estate when no
3 timely statement of intention is filed and a trustee fails to
4 timely file a motion to determine the value or benefit of the
5 property. The result may be harsh but is not absurd. Lamie v.
6 United States Trustee, 540 U.S. 526, 538 (2004) (a plain, non-
7 absurd meaning is enforceable even if outcome is harsh).

8 Because § 362(h) is not ambiguous and its effect is not
9 absurd, we need not look to legislative history to inform our
10 analysis. See Joye v. Franchise Tax Bd. (In re Joye), 578 F.3d
11 1070, 1076 (9th Cir. 2009). Even if were we to do so, the
12 legislative history does not support the Trustee's limited
13 interpretation.

14 Section 362(h) was added to the Bankruptcy Abuse Prevention
15 and Consumer Protection Act of 2005 (BAPCPA) as part of the
16 amendments characterized as "Protections for Secured Creditors."
17 H.R. REP. NO. 109-31(I), 109th Cong., 1st Sess. 2005, reprinted in
18 2005 U.S.C.C.A.N. 88, 103. Section 362(h) was intended to
19 provide greater protection to creditors by terminating the
20 automatic stay with respect to personal property of the debtor if
21 the debtor failed to timely reaffirm the underlying obligation or
22 redeem the property. Id.; see also In re Dumont, 581 F.3d at
23 1111 (secured creditors have been the subject of particular
24 congressional solicitude in BAPCPA). Under the Trustee's
25 interpretation, secured creditors would not be afforded the
26 protection of the 2005 amendments because the deadlines of
27 §§ 362(h) and 521(a)(2) would never be triggered if a debtor
28 failed to properly describe, or schedule, personal property

1 securing a scheduled debt.

2 The Trustee asserts that if § 362(h) is interpreted to apply
3 to unscheduled property, it will harm the bankruptcy system
4 because trustees, creditors, and the courts would remain
5 "entirely ignorant of the existence of property that would be
6 removed from the estate." The Trustee argues that trustees would
7 be compelled in every case to move for blanket protection under
8 § 362(h) to "guard against the possibility that some property has
9 been left off the schedules."

10 The Trustee ignores that §§ 521(a)(2) and 362(h) apply only
11 if the schedules list debts secured by personal property. As
12 long as a debt is scheduled as secured, it provides notice to
13 other creditors and the trustee that there is a creditor with a
14 security interest in personal property of the estate. If there
15 is a concern about the benefit that property may have for the
16 estate, the trustee has the ability to keep the property
17 protected by filing a motion under § 362(h).¹¹

18
19 ¹¹ On appeal, the Trustee urges us to adopt the holding of
20 Noland v. HSBC Auto Fin., Inc. (In re Baine), 393 B.R. 561, 568
21 (Bankr. S.D. Ohio 2008) that § 362(h)(1)'s removal of property
22 from the estate is tantamount to abandonment because it "divests
23 the estate of all its interests in the property." He contends
24 that because there is a long line of authority holding that a
25 failure to schedule an asset does not result in its abandonment
26 when a case is closed, only scheduled property is subject to
27 § 362(h). We decline to address the Trustee's abandonment
28 argument because it was not squarely raised before the bankruptcy
court. Moldo v. Matsco, Inc. (In re Cybernetic Servs., Inc.),
252 F.3d 1039, 1045 n.3 (9th Cir. 2001) (appellate court need not
explore ramifications of argument not raised below). While the
Trustee argued that it was against public policy to permit
unscheduled assets to be removed from the estate, he did not
(continued...)

1 The Trustee also suggests that the failure to adopt his
2 interpretation of § 362(h) will permit debtors and secured
3 creditors to collude to deprive unsecured creditors of valuable
4 assets. We disagree, but even if it were so, there are remedies
5 for such conduct. If a debtor fraudulently completes her
6 schedules, a trustee or creditor may seek to deny her a discharge
7 under § 727(a)(4). Furthermore, if a debtor and a creditor
8 collude to mischaracterize a claim or collateral, they may be
9 subject to prosecution under 18 U.S.C. § 152.

10 Accordingly, we conclude that the plain language of § 362(h)
11 and § 521(a)(2) does not lead to an absurd result. Under the
12 unambiguous language of § 362(h), all personal property secured
13 by a scheduled debt is released from the automatic stay if a
14 debtor fails to timely file and comply with her statement of
15 intention.

16 VI. CONCLUSION

17 For the reasons given above, we AFFIRM.
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22 ¹¹(...continued)
23 assert that § 362(h) is effectively equivalent to abandonment
24 under § 554. In any event, In re Baine is unpersuasive. See
25 generally, Neil C. Gordon, Section 362(h) Does Not Deprive a
Trustee of Standing to Avoid a Lien, 29-Jan. AM. BANKR. INST. J. 50
26 (2010); see also, 11 U.S.C. § 521(a)(2)(C) (except for
27 § 362(h)(1), a trustee's rights to the property are otherwise
28 unaltered); Catalano v. Comm'r, 279 F.3d 682, 687 (9th Cir. 2002)
("[P]roperty is not considered abandoned from the estate unless
the procedures specified in § 554 are satisfied.").