

**JAN 17 2006**

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

**ORDERED PUBLISHED**

**UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT**

6 In re: ) BAP No. CC-04-1456-BMoH  
7 GARY L. OZENNE, )  
8 Debtor. ) Bk. No. RS 04-18301-MJ  
9 \_\_\_\_\_ )  
10 GARY L. OZENNE, )  
11 Appellant, )  
12 v. ) **O P I N I O N**  
13 SANDRA L. BENDON, Trustee; )  
14 DOLLAR STORAGE; MIKE OZENNE, )  
15 Executor for the Estate of )  
16 Pearl Ozenne; STEPHEN C. )  
17 DURINGER, )  
18 Appellees. )  
19 \_\_\_\_\_ )

Argued and Submitted on October 19, 2005 at  
Los Angeles, California

Filed - January 17, 2006

Appeal from the United States Bankruptcy Court  
for the Central District of California

Honorable Meredith A. Jury, Bankruptcy Judge, Presiding.

BEFORE: BRANDT, MONTALI, and HAINES,<sup>1</sup> Bankruptcy Judges.

<sup>1</sup> Hon. Randolph J. Haines, United States Bankruptcy Judge for  
the District of Arizona, sitting by designation.

1 BRANDT, Bankruptcy Judge:

2  
3 Gary Ozenne filed a chapter 7<sup>2</sup> petition to forestall the scheduled  
4 sale of the contents of a mini-storage unit for delinquent rent, and  
5 advised the storage operator. The operator nevertheless sold his  
6 personal property at an auction the next day. Ozenne moved for  
7 sanctions for violation of the stay. The bankruptcy court denied that  
8 motion, concluding that because state law was unclear, the stay  
9 violation was not willful. Debtor appealed.

10 As the bankruptcy court applied an incorrect legal standard in  
11 reaching its conclusion, we REVERSE and REMAND.

12 **I. FACTS**

13 In early 2003, Ozenne moved his personal and business property (the  
14 "Property") into storage units #329 and #462 at Dollar Self Storage #3,  
15 205 N. Lincoln, in Corona, California ("Dollar"). After he fell  
16 several months behind on his rent, in April 2004 Dollar served a three-  
17 day pay or quit notice under CCP § 1161. It apparently commenced a  
18 state court unlawful detainer action, and obtained a default judgment in  
19 May 2004, awarding Dollar possession of the storage units, money  
20 damages, and ordering a sheriff's lock-out.

21 Approximately one week prepetition, Dollar wrote Ozenne a letter  
22 informing him that that it had run the statutory newspaper notifications  
23

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24 <sup>2</sup> Absent contrary indication, all "Code," chapter and section  
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 prior to  
26 its amendment by the Bankruptcy Abuse Prevention and Consumer  
27 Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23, as the case from  
28 which this appeal arises was filed before its effective date  
(generally 17 October 2005). Section 362(h), as it was previously  
codified, is now largely codified as § 362(k)(1). All "Rule"  
references are to the Federal Rules of Bankruptcy Procedure; "FRCP,"  
to the Federal Rules of Civil Procedure; and "FRE," to the Federal  
Rules of Evidence. "CCC" references are to the California Civil Code  
and "CCP" references are to the California Code of Civil Procedure.

1 and intended to proceed with a sale of the Property. Ozenne tried to  
2 work out a repayment arrangement, and on 9 July tendered to Dollar \$999  
3 toward the judgment and retrieved some of the contents of the small  
4 storage unit. But Dollar demanded full payment of the \$2900 owing  
5 (including late fees and legal fees) for the larger unit.

6 To stop the sale of the contents of that unit, Ozenne, d/b/a  
7 Residential Fire Sprinklers, filed a chapter 7 petition on 14 July 2004,  
8 indicating that the Property was located in Dollar's storage units. He  
9 personally delivered a copy of the petition to Dollar's manager the same  
10 day.

11 Without seeking relief from the automatic stay, Dollar proceeded  
12 with the scheduled auction the next day. In his 20 July 2004 letter to  
13 Ozenne, Dollar's manager explained:

14 This letter is to inform you that storage unit #329 was sold  
15 at public auction on Thursday, July 15, 2004. The attorneys  
16 representing our owners, Stadium Properties, reviewed the  
17 application for bankruptcy you delivered to Dollar Self  
Storage #3 on July 14th. I was instructed to proceed with the  
sale of unit #329 based on their review.

18 Meanwhile, Ozenne filed his schedules; on his personal property  
19 schedule he listed the Property and valued it at \$55,000. He also  
20 scheduled Dollar having a storage lien claim of "\$>60,000," and listed  
21 in his statement of financial affairs Dollar's "seizure" of tools,  
22 materials, cash, inventories, furnishings, appliances, and computers  
23 with a total value of \$67,000. Ozenne claimed a personal property  
24 exemption under CCP § 704.020 et seq.; it is unclear how much of the  
25 exempt property was in the storage units.

26 Ozenne sought a determination that the sale was void as a stay  
27 violation, citing In re Schwartz, 954 F.2d 569, 571 (9th Cir. 1992), and  
28 moved for an order staying the resale of the Property and for sanctions

1 against Dollar. Dollar, represented by counsel, responded that it  
2 should have been named as "Corona Lincoln Partners, LLC d/b/a Dollar  
3 Self Storage," but did not argue insufficiency of process or lack of  
4 personal jurisdiction. Dollar denied that it violated § 362, arguing  
5 that the automatic stay was not in effect because, under state law,  
6 Ozenne had abandoned the Property prepetition. It did not seek  
7 annulment of the stay to validate the sale.

8 The bankruptcy court concluded that the stay had been violated  
9 because Ozenne had up until the time of sale to reclaim the Property.  
10 However, the court found the stay violation was not willful because "the  
11 law is far from crystal clear as to who owned the property" and the  
12 "appropriate remedy is to find a mechanism by which the net proceeds  
13 from the sale are returned to essentially Mr. Ozenne or the trustee."  
14 Transcript, 1 September 2004 at 15. The bankruptcy court's minute  
15 entry regarding the motion states "granted in part. Lessor to provide  
16 account and check."

17 Ozenne appealed. In response to our preliminary determination that  
18 the minute order was interlocutory, the bankruptcy court entered its  
19 Order on Motion for Damages and Sanctions on 7 July 2005, which  
20 provided:

- 21 1. The landlord's sale [of the contents of storage unit  
22 #329] was a violation of the automatic stay.
- 23 2. The violation was not willful because of the lack of  
24 clarity of California law. No sanctions will be awarded.
- 25 3. Creditor Corona Lincoln Partners shall tender to the  
26 chapter 7 trustee a check which represents the net proceeds  
27 from the sale, as determined by an accounting from the  
28 auctioneer and creditor.

No appellee filed a brief or argued.



1 bankruptcy court necessarily abuses its discretion if it bases its  
2 decision on an erroneous view of the law or clearly erroneous factual  
3 findings. Cooter & Gell, 496 U.S. at 405.

#### 4 **V. DISCUSSION**

5 Preliminarily, we must determine whether we have an adequate record  
6 for appellate review. In re Massoud, 248 B.R. 160, 163 (9th Cir. BAP  
7 2000). Ozenne has barely met his burden of presenting a proper record.  
8 In re Kritt, 190 B.R. 382, 387 (9th Cir. BAP 1995).

9 We make reasonable allowance for pro se litigants and construe  
10 their papers liberally, In re Kashani, 190 B.R. 875, 883 (9th Cir. BAP  
11 1995), and will exercise our discretion to examine what record has been  
12 provided. We do have the schedules and take judicial notice of the  
13 bankruptcy court's order and of its docket, which indicates the case is  
14 closed. FRE Rule 201; In re E.R. Fegert, Inc., 887 F.2d 955, 957-58  
15 (9th Cir. 1989). That order contains the critical finding that Dollar  
16 violated the stay and the conclusion that the violation was not willful  
17 because of the "lack of clarity of California law."

#### 18 **A. Stay Violation**

19 The filing of a petition for bankruptcy relief automatically stays  
20 both the continuation of proceedings against the debtor and the  
21 commencement of any act to obtain possession of, or enforce a lien  
22 against, property of the debtor or of the estate.<sup>3</sup> We look to state law

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23  
24 <sup>3</sup> § 362(a)(1), (3), (4), and (5) provide:

25 Except as provided in subsection (b) of this section, a petition filed  
26 under section 301, 302, or 303 of this title, . . . operates as a  
stay, applicable to all entities, of-

27 (1) the commencement or continuation, including the issuance or  
28 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;

(continued...)

1 to ascertain what legal and equitable interests the debtor had at the  
2 start of the case, and thus determine the extent of "property of the  
3 estate" subject to the automatic stay. Butner v. U.S., 440 U.S. 48, 54  
4 (1979); In re Lowenschuss, 170 F.3d 923, 929 (9th Cir. 1999).

5 Generally, collection of a prepetition debt from a debtor/tenant or  
6 continuation of any legal action to evict a debtor/tenant is a stay  
7 violation. See In re Williams, 323 B.R. 691, 699 (9th Cir. BAP  
8 2005) (both possessory interest in residential real property and  
9 equitable interest in property under an unrecorded deed were property of  
10 the estate); see also In re Butler, 271 B.R. 867, 875-76 (Bankr. C.D.  
11 Cal. 2002) (interpreting CCC § 1006, a debtor/tenant whose lease of  
12 residential real property has expired but is still in the premises has  
13 an equitable right of possession protected by the automatic stay).

14 We must consider the state's statutory scheme, which clearly  
15 applies to the rental of the storage units, because Dollar falls within  
16 the definition of "landlord" under CCC § 1980(a), as an "operator . . .  
17 of any furnished or unfurnished premises for hire," and Ozenne is a  
18 "tenant," which includes a "paying . . . lessee . . . of any premises  
19 for hire." CCC § 1980(e).

20 After a tenancy is "terminated," the landlord must (if the stored  
21 property is believed worth more than \$300) give the tenant 15 days'

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23 <sup>3</sup>(...continued)

24 . . . .

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

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

28 (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 . . . .

1 written notice, CCC § 1983(a) and (b), in substantially the following  
2 form:

3 Unless you pay the reasonable cost of storage for all the  
4 above-described property, and take possession of the property  
5 which you claim, not later than (insert date . . .) this  
property may be disposed of pursuant to Civil Code Section  
1988.

6 CCC § 1984(a).

7 A tenant who does not take possession by the date specified in the  
8 notice may still claim the personal property, and the landlord must  
9 release it, up until the sale:

10 Where personal property is not released . . . and the notice  
11 stated that the personal property would be sold at public  
12 sale, the landlord shall release the personal property to the  
13 former tenant if he claims it prior to the time it is sold and  
pays the reasonable cost of storage, advertising and sale  
incurred prior to the time the property is withdrawn from  
sale.

14 CCC § 1987(b) (emphasis added). Dollar argued to the bankruptcy court  
15 that, after expiration of the 15-day period, Ozenne's failure to pay in  
16 accordance with the notice was an abandonment by operation of law of his  
17 interest in the Property, so it never became "property of the estate"  
18 under § 541(a)(1). It cited no authority for this proposition.

19 Dollar further argued that the landlord has a statutory right to  
20 convert the stored property into cash and be reimbursed for the costs  
21 incurred in doing so. CCC § 1988. Finally, it relied on another notice  
22 provision, which states:

23 If you fail to reclaim the property, it will be sold at a  
24 public sale after notice of the sale has been given by  
25 publication. You have the right to bid on the property at  
26 this sale. After the property is sold and the cost of  
27 storage, advertising, and sale is deducted, the remaining  
28 money will be paid over to the county. You may claim the  
remaining money at any time within one year after the county  
receives the money.



1 CCC § 1984(b) (1) (emphasis added). Dollar contended that, if the tenant  
2 must bid on the property at the sale, that tenant's ownership interest  
3 must logically have already been terminated.

4 We disagree: CCC §§ 1980-1991 unambiguously preserve the (now  
5 former) tenant's ownership interest by providing an exclusive right to  
6 cure and claim the personal property at any time up to the sale. Thus,  
7 when Ozenne filed his bankruptcy petition, the Property was his, and  
8 became property of the estate.<sup>4</sup>

9 We need not determine whether Dollar's conducting of the sale was  
10 the continuation of an action or proceeding against Ozenne (as distinct  
11 from the Property) and thus a violation of § 362(a) (1), for its actions  
12 transgressed both § 362(a) (3), staying "any act to obtain possession of  
13 property of the estate or property from the estate, or to exercise  
14 control over property of the estate," and § 362(a) (4), staying "any act  
15 to . . . enforce [a] lien against property of the estate." Further, to  
16 the extent any of the Property was exempt, § 362(a) (5) stays "any act to  
17 create, perfect or enforce against property of the debtor any lien to  
18 the extent that such lien secures a claim that arose before the  
19 commencement of the case . . . ."

20 **B. Willful?**

21 The bankruptcy court correctly concluded that Dollar's actions  
22 violated the automatic stay; the dispositive issue is whether the  
23 bankruptcy court clearly erred in finding that Dollar did not willfully  
24

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25 <sup>4</sup> Section 541(a) (1) provides:

26 The commencement of a case under section 301, 302, or 303 of this  
27 title creates an estate. Such estate is comprised of all the  
28 following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c) (2) of this  
section, all legal or equitable interests of the debtor in property as  
of the commencement of the case.

1 do so. "[T]he 'willfulness test' for automatic stay violations merely  
2 requires that: (1) the creditor know of the automatic stay; and (2) the  
3 actions that violate the stay be intentional." In re Peralta, 317 B.R.  
4 381, 389 (9th Cir. BAP 2004) (citations omitted); see also In re  
5 Pinkstaff, 974 F.2d 113, 115 (9th Cir. 1992).

6 Dollar admitted in its 20 July letter that it had received a copy  
7 of the face-page filing the day before the sale. Knowledge of the  
8 bankruptcy filing is the legal equivalent of knowledge of the automatic  
9 stay. In re Ramirez, 183 B.R. 583, 589 (9th Cir. BAP 1995), appeal  
10 dismissed, 201 F.3d 444 (9th Cir. 1999) (table). While notice is  
11 relevant to the question of willfulness, it does not matter that Dollar  
12 did not receive formal notice of the petition from the court. Peralta,  
13 317 B.R. at 389.

14 Likewise, whether Dollar believed in good faith that it had a right  
15 to the Property is irrelevant: "No specific intent is required; a good  
16 faith belief that the stay is not being violated 'is not relevant to  
17 whether the act was "willful" or whether compensation must be  
18 awarded[,]'" Id. (citation omitted); In re Taylor, 884 F.2d 478, 483  
19 (9th Cir. 1989), nor is good faith reliance on the advice of counsel a  
20 defense, Williams, 323 B.R. at 701; nor is reliance on a state court's  
21 determination.

22 Dollar evinced no concern about the scope of the automatic stay,  
23 foregoing any attempt to seek relief from the stay under § 362(d).<sup>5</sup> See

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24  
25 <sup>5</sup> Which provides:

26 On request of a party in interest and after notice and a hearing,  
27 the court shall grant relief from stay provided under subsection (a)  
28 of this section, such as by terminating, annulling, modifying, or  
conditioning such stay-

(1) for cause, including the lack of adequate  
protection of an interest in property of such party in  
(continued...)

1 Algeran, Inc. v. Advance Ross Corp., 759 F.2d 1421, 1424-25 (9th Cir.  
2 1985) (rejecting argument that creditor had unclean hands where it  
3 sought relief from automatic stay to validate sale). Dollar did not  
4 bother, and a "cavalier approach to the bankruptcy laws [may] subject [a  
5 creditor] to serious consequences, even monetary sanctions." Williams,  
6 323 B.R. at 701.

7 And Dollar had an affirmative duty to discontinue its postpetition  
8 collection actions: "[a] party violating the automatic stay, through  
9 continuing a collection action in a non-bankruptcy forum, must  
10 automatically dismiss or stay such proceeding or risk possible sanctions  
11 for willful violations pursuant to § 362(h) . . . ." Eskanos, 309 F.3d  
12 at 1214; that Dollar's actions were nonjudicial proceedings is no  
13 distinction. See In re Abrams, 127 B.R. 239, 243 (9th Cir. BAP 1991)  
14 (creditor which repossessed a debtor's car post-petition also violated  
15 the stay by failing to take any reasonable steps to remedy its action).

16 The bankruptcy court found that Dollar's violation of the stay was  
17 not willful because of unclear state law. That was an error of law,  
18 predicated on the incorrect legal premise that legal uncertainty could  
19 transmute Dollar's intentional sale of the Property into something other  
20 than a willful violation of the stay, and was clearly erroneous. See  
21 Power, 655 F.2d at 1382-83 (finding is clearly erroneous if induced by  
22 an erroneous view of the law).

23 Accordingly, we must reverse.

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25 <sup>5</sup>(...continued)  
26 interest,

27 (2) with respect to a stay or an act against property  
under subsection (a) of this section, if -

28 (A) the debtor does not have equity in such property;  
and

(B) such property is not necessary to an effective  
reorganization . . . [.]

1 **C. Damages**

2 We turn now to § 362(h), which provides:

3 An individual injured by any willful violation of a stay by  
4 this section shall recover actual damages, including costs and  
5 attorneys' fees, and, in appropriate cases, may recover  
6 punitive damages.

7 See also In re Fernandez, 227 B.R. 174, 180-181 (9th Cir. BAP 1998),  
8 aff'd, 208 F.3d 220 (9th Cir. 2000) (table) (outlining elements of a prima  
9 facie case under § 362(h)). Ozenne, representing himself, made no claim  
10 for attorneys' fees.

11 Having erred in determining there was no willfulness, the  
12 bankruptcy court abused its discretion in predicating its denial of  
13 sanctions on that determination. Cooter & Gell, 496 U.S. at 405. And  
14 as chapter 7 trustee Sandra Bendon filed her no asset report in October  
15 2004 and the bankruptcy case has been closed, the estate's interests in  
16 the Property and any claim for damages are abandoned to Ozenne.  
17 § 554(c);<sup>6</sup> In re DeVore, 223 B.R. 193, 197 (9th Cir. BAP 1998).

18 We note the obvious connection between Dollar's willful disregard  
19 of the automatic stay and Ozenne's injury. Although he does not allege  
20 that he incurred damages in any particular amount, nor does he direct us  
21 to any supporting evidence in the record, he scheduled the Property's  
22 value as \$55,000, and noted Dollar's seizure of tools, materials, etc.  
23 worth \$67,000 in his statement of financial affairs.

24 Because Ozenne claimed that the Property was "all he had left" and  
25 that he suffered from depression after the sale, he may also be entitled  
26 to compensatory, punitive, and emotional distress damages. In re  
27 Dawson, 390 F.3d 1139, 1146-1151 (9th Cir. 2004), cert. denied, \_\_\_ U.S.

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28 <sup>6</sup> Which provides: "Unless the court orders otherwise, any  
property scheduled under section 521(1) of this title not otherwise  
administered at the time of the closing of a case is abandoned to the  
debtor . . . ."

1 \_\_\_\_, 126 S. Ct. 397 (2005) (allowing emotional distress damages under  
2 § 362); In re Johnston, 321 B.R. 262, 275 (D. Ariz. 2005) (discussing  
3 damages for willful stay violations).

4 In any event, we must remand for the determination of his damages.  
5 The court's order required Dollar to tender the net proceeds of the sale  
6 to the Trustee; nothing in the excerpts of record discloses whether that  
7 was ever done. We leave it to the bankruptcy court on remand to  
8 determine whether those proceeds, if any, should be factored into the  
9 § 362(h) analysis.

#### 10 VI. CONCLUSION

11 Parties enforcing prepetition obligations postpetition without  
12 relief from the automatic stay proceed at their peril.

13 Under state law, the Property was Ozenne's until the moment of  
14 sale, and his interest became property of the bankruptcy estate,  
15 protected by the automatic stay, the moment he filed his petition. The  
16 bankruptcy court's conclusion that Dollar had not willfully violated the  
17 stay rested on an erroneous legal premise and thus was clear error. It  
18 follows that denying Ozenne's claim for damages was an abuse of  
19 discretion.

20 We REVERSE and REMAND.  
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