

MAR 25 2005

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

ORDERED PUBLISHED

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

In re:) BAP No. CC-04-1033-BKPa
)
G. GREGORY WILLIAMS,) Bk. No. LA 03-35597-SB
)
Debtor.)

G. GREGORY WILLIAMS,)
)
Appellant,)

v.)

O P I N I O N

ELI LEVI; PETER GORDON, Esq.;)
AARON BOVSHOW, Esq.; FRANKLIN)
TOWERS HOMEOWNERS ASSOCIATION,)
INC.,)
Appellees.)

Argued and Submitted on November 17, 2004
at Pasadena, California

Filed - March 25, 2005

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

Honorable Samuel L. Bufford, Bankruptcy Judge, Presiding.

Before: BRANDT, KLEIN, and PAPPAS,¹ Bankruptcy Judges.

¹ Hon. Jim D. Pappas, Bankruptcy Judge for the District of
Idaho, sitting by designation.

1 BRANDT, Bankruptcy Judge:

2
3 This automatic stay appeal involves the interplay between the
4 second and third of three chapter 13² bankruptcy cases filed by the
5 appellant debtor within the space of thirteen months.

6 When the second case was filed, the appellant debtor had a
7 possessory interest, and an equitable ownership interest pursuant to an
8 unrecorded deed, in a condominium unit titled in the name of a third
9 person. Two days after the second case was filed, the appellee
10 homeowners association, with knowledge of that bankruptcy case and of
11 appellant's claims regarding the property, foreclosed its lien on the
12 condominium without first obtaining relief from the automatic stay.

13 In the third case - which followed dismissal of the second case and
14 was assigned to the same judge - the debtor sought to recover the
15 premises and stay-violation damages on account of the putative stay
16 violation that occurred in the second case. The bankruptcy court,
17 without reopening the second case, entered an order in the third case
18 retroactively annulling the stay in the second case. The court did not
19 address the questions of whether the stay had been violated or appellant
20 should recover stay-violation damages.

21 We AFFIRM the order annulling the stay but REMAND, without
22 suggesting any view as to the merits, so that the bankruptcy court may
23 decide whether stay-violation damages may be appropriate notwithstanding
24 the annulment of the stay. In addition, we DISMISS AS MOOT the debtor's

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26
27 ² Absent contrary indication, all chapter and section
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330; all
"Rule" references are to the Federal Rules of Bankruptcy Procedure,
and all "FRCP" references are to the Federal Rules of Civil Procedure.

1 appeal from the bankruptcy court's denial of his motion to stay the
2 related state-court eviction action.

3
4 **I. FACTS**

5 Debtor, G. Gregory Williams, who describes himself as a "retired
6 attorney," lived with his fiancée, P. Toi Polpantu, at 7250 Franklin
7 Avenue, Unit 207, Los Angeles, California, a condominium unit. Williams
8 purchased the condo in 1995. By deed recorded 21 April 1999, Williams
9 transferred title to Polpantu. By another deed, also dated
10 21 April 1999, but not recorded until 4 April 2003, Polpantu quitclaimed
11 title back to Williams.

12 When approximately \$11,000 in dues went unpaid, appellee Franklin
13 Towers Homeowners Association, Inc.,³ gave notice of its intent to
14 conduct a non-judicial foreclosure sale of the condo on 3 April 2003.

15 On 1 April 2003 Williams filed a chapter 13 bankruptcy petition,
16 his second in recent times.⁴ It was a so-called "face sheet" or
17 "skeleton" filing of a petition without accompanying schedules,
18 statement of financial affairs, or a proposed plan. Nothing filed on
19 1 April 2003 indicated that Williams claimed an interest in the condo.

20 The scheduled non-judicial sale was conducted on 3 April 2003, and
21 appellee Eli Levi⁵ was the successful purchaser in competitive bidding
22 with his bid of \$215,000. Although Levi was not a creditor, he does not

23
24 ³ Of the appellees, only Eli Levi briefed or argued.

25 ⁴ Case No. LA 03-18775-SB. Our review of the bankruptcy
26 court's records shows Williams had filed a prior bankruptcy in the
27 same district, No. LA 02-31997-KM, on 5 August 2002. It was dismissed
28 and does not figure in this appeal.

⁵ Levi owns other units in the condo building, but is
allegedly not an Association board member and has no management
authority. Williams implies some wrongdoing or collusion occurred
between Levi and a broker, Roland Watkins, but the bankruptcy court
made no findings on this point, and we need not address it.

1 contest that Williams had given him notice of the filing of the chapter
2 13 petition before the sale occurred.

3 Williams recorded the four year old Polpantu to Williams quitclaim
4 deed on 4 April 2003, after having filed his petition, and after the
5 foreclosure sale.

6 On 8 April 2003, Levi filed and served on Polpantu a statutory
7 notice to quit. Although Williams did not avail himself of his right
8 under California law to file a notice of right to claim possession of
9 the premises, Levi does not dispute that he knew Williams was living
10 there. A foreclosure trustee's deed in favor of Levi was recorded on
11 11 April 2003. On 22 April Levi filed an unlawful detainer action
12 against Polpantu in state court. Levi v. Polpantu, Los Angeles County
13 Superior Court, Case 03U408.

14 A series of legal maneuvers in the state and bankruptcy courts
15 followed. There was a state court unlawful detainer action that
16 Williams attempted to remove to federal court, but which resulted in
17 judgment for Levi after the state court reasoned that the attempt to
18 remove was unsuccessful. An eviction was scheduled. The state court
19 apparently rejected an attempt by Williams to enjoin the eviction. Levi
20 apparently took possession of the premises for about a week until the
21 bankruptcy court issued an order that enabled Williams to return to the
22 premises.

23 In August 2003, Williams' second bankruptcy case was dismissed for
24 his failure to comply with chapter 13 requirements, thus terminating the
25 automatic stay. After this dismissal, Levi filed an action in state
26 court (Los Angeles County Superior Court No. BA-311463), seeking to
27 cancel Williams' deed, quiet title, and obtain damages.

1 On 1 October 2003, Williams filed his third bankruptcy case, again
2 under chapter 13, No. LA03-35597SB, which was assigned to the same judge
3 who presided over his second bankruptcy case. Two days later, Williams
4 asked the bankruptcy court to stay the eviction.

5 On 24 October Levi moved for relief from stay in the third
6 bankruptcy case "to obtain possession of the residential or
7 nonresidential premises at 7250 Franklin Avenue, No. 207, Los Angeles .
8 . . ." Levi argued that the automatic stay did not affect him because
9 the premises did not belong to Williams and were not property of the
10 estate in either the second or third bankruptcy cases. He also argued
11 that, even if the automatic stay was in effect, it should be annulled to
12 permit Levi to continue his unlawful detainer action in state court.

13 Williams opposed the motion, arguing that Levi violated the
14 automatic stay by purchasing the premises at the foreclosure sale after
15 receiving notice of his second bankruptcy filing and by commencing the
16 eviction action. Williams sought monetary stay-violation damages but
17 did not ask the bankruptcy court to rule that either the sale or the
18 unlawful detainer action were void.

19 After a number of continuances, the bankruptcy court heard both
20 motions on 23 December. Although concluding the hearing by indicating
21 he intended to reassign the matter to another judge, on 31 December 2003
22 the judge issued a written order annulling the stay and denying
23 Williams' motion to stop the eviction, stating in part:

24
25 Notwithstanding that the foreclosure sale may be void
26 under Ninth Circuit law, the debtor has taken no action,
27 either in this case or in the prior case, to set aside the
28 sale. Levi now moves for relief from stay to proceed with
eviction of the debtor from the condominium.

Because the debtor has not taken any such action,
notwithstanding that the foreclosure occurred almost eight
months ago, the court finds that the debtor has unduly delayed

1 and that relief from stay should be granted and the purchaser
2 should not be further inhibited from obtaining possession of
the property.

3 ACCORDINGLY, IT IS ORDERED that the relief from stay
4 motion is granted retroactively to April 1, 2003 and the
motion to stay eviction is denied.⁶

5 Williams timely appealed, and moved for a stay pending appeal,
6 which we denied.

7 Williams' third bankruptcy case was dismissed on 11 February 2004.
8 Williams responded (twice) to our clerk's order suggesting that the
9 dismissal of the bankruptcy case might have mooted the appeal. Levi
10 replied with a motion to dismiss the appeal. Our order re mootness,
11 entered 13 July 2004, limited review in this appeal to the order
12 annulling the stay,⁷ noting that it was not moot because Williams sought
13 damages for a violation of the stay.

14 15 **II. ISSUES**

16 A. Whether the denial of Williams' motion to stay the eviction
17 action is moot;

18 B. Whether the bankruptcy court abused its discretion in
19 annulling the stay; and

20 C. Whether Williams may be entitled to damages under § 362(h).
21
22

23 ⁶ Although the parties argued the issues, the bankruptcy court
24 did not address the priority, validity, or effect of the Polpantu to
25 Williams deed, or of the foreclosure trustee's deed, under state law.
Those issues are not before us.

26 ⁷ In his responses to our clerk's order, Williams also
27 asserted that other orders entered by the bankruptcy court after the
28 one attached to his notice of appeal were also on appeal. Although
Williams' notice of appeal listed three orders supposedly entered that
day, only one is disclosed in the bankruptcy court's docket, and that
is the order attached to the notice of appeal.

1 that, after the dismissal of his third chapter 13 case, Levi proceeded
2 with the unlawful detainer action, obtained possession of the property,
3 and commenced a quiet title action in state court. Because there was no
4 automatic stay then in effect, Levi was free to take such actions. See
5 § 362(c) (providing that the automatic stay terminates upon dismissal of
6 the bankruptcy case).

7 We presume, but cannot tell from the record, that Levi obtained a
8 new writ of eviction, rather than relying upon the writ that the
9 bankruptcy court stayed in its 25 June 2003 order. If not, we express
10 no opinion about the continued efficacy of that order after dismissal of
11 both the chapter 13 case in which it was issued and the case from which
12 the order on appeal arose, because our conclusion would be of no moment.
13 Levi's freedom to commence an entirely new unlawful detainer action to
14 evict Williams after dismissal of the third bankruptcy case moots this
15 part of the appeal. We could afford no effective relief to Williams
16 with respect to possession of the condo; this aspect of the appeal is
17 moot and must therefore be dismissed.

18 But, as our motions panel noted, although Williams' third
19 bankruptcy case has been dismissed, his request for monetary damages for
20 Levi's alleged willful violation of the automatic stay is not moot. In
21 re Davis, 177 B.R. 907, 911 (9th Cir. BAP 1995).

22 **B. The Record and Appellee's Motion to Supplement**

23 It is not clear whether the parties followed the designation of
24 record process set forth in Rule 8006. Levi's brief as originally filed
25 included a request for judicial notice, noting that Williams had omitted
26 from the excerpts of record essentially all of his pleadings filed after
27 Levi's motion for relief from stay. We did not grant Williams' motion
28 to strike Levi's brief, but instead ordered Levi to file a motion to

1 supplement the record, and allowed Williams additional time to file his
2 reply brief. Levi filed a motion to supplement the record, which we now
3 grant.

4 **C. The Merits**

5 1. Entry of the order for relief from stay in the dismissed case.

6 Williams contends the bankruptcy court had no jurisdiction to enter
7 an order in the third bankruptcy case that, in effect, retroactively
8 annulled the automatic stay that arose in the dismissed second
9 bankruptcy case. This is not so. In considering Levi's motion to annul
10 the stay, the bankruptcy court was properly interpreting and
11 effectuating the automatic stay, within its ancillary jurisdiction from
12 the second case, which survived dismissal. In re Aheong, 276 B.R. 233,
13 239-40 (9th Cir. BAP 2002) (citing In re Taylor, 884 F.2d 478, 481 (9th
14 Cir. 1989)). See also In re Carraher, 971 F.2d 327, 328 (9th Cir.
15 1992); In re Giddens, 298 B.R. 329, 337 (Bankr. N.D. Ill. 2003).

16 Moreover, the provisions of the Bankruptcy Code authorize the
17 relief granted in this case. Upon the filing of a bankruptcy petition,
18 § 362(a)(1) provides:

19 (a) . . . a petition filed under section 301 . . .
20 operates as a stay, applicable to all entities, of -

21 (1) the commencement or continuation, including the
22 issuance or employment of process, of a judicial,
23 administrative, or other action or proceeding
24 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

25 See also Celotex Corp. v. Edwards, 514 U.S. 300, 302 (1995) (automatic
26 stay prevents commencement of any act to possess property of the
27 debtor). But § 362(d) provides:

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

3 (1) for cause, including the lack of adequate
4 protection of an interest in property of such party
in interest;

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

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

7 (B) such property is not necessary to an
8 effective reorganization

9 As can be seen, § 362(d) authorizes the bankruptcy court to enter
10 an order annulling the stay "provided under subsection (a)" of § 362.
11 In turn, subsection (a) refers to the stay that arises upon the filing
12 of "a petition." Nothing in the language of § 362(d) restricts the
13 reach of a stay relief order to the particular bankruptcy case in which
14 that relief is sought. The bankruptcy court may therefore properly
15 grant relief from a stay that arose under subsection (a) in a prior,
16 different bankruptcy case before the same court. (We are not here
17 presented with bankruptcy cases before different judges or in different
18 districts, as in In re Miller, 397 F.3d 726 (9th Cir. 2005)).

19 The bankruptcy court's approach is also consistent with traditional
20 rules pertaining to obtaining relief from an order entered in a prior,
21 different action:

22 § 80. Relief in the Course of a Subsequent Action

23 When a judgment is relied upon as the basis of a
24 claim or defense in a subsequent action, relief
25 from the judgment may be obtained by appropriate
26 pleading and proof in that action if other means of
27 obtaining relief from the judgment are unavailable
to the applicant or the convenient administration
of justice would be served by determining the
question of relief in the course of the subsequent
action.

28 Restatement (Second) of Judgments, § 80 (1982).

1 Since the same bankruptcy judge presided over both cases, the
2 convenient administration of justice was served by the procedure
3 followed here. Although Williams' second bankruptcy case could have
4 been reopened and the order issued with that caption, any error could be
5 corrected under FRCP 60(a) or (b) (which allows relief by independent
6 action), applicable via Rule 9024, and is, in any event, harmless.

7
8 2. Applicability of the automatic stay.

9 The legal and equitable interests of a debtor at the start of a
10 case are determined according to state law. Butner v. United States,
11 440 U.S. 48, 55 (1979). On the petition date, Williams had no recorded
12 interest in the property. But he lived in the condo, and his possessory
13 interest was property of the bankruptcy estate under § 541(a) and
14 § 1306. In re Butler, 271 B.R. 867, 876-77 (Bankr. C.D. Cal. 2002) (a
15 debtor-tenant's mere physical possession of apartment premises after
16 writ of possession had issued in favor of landlord in unlawful detainer
17 action is an equitable interest in property, protected by automatic
18 stay). See also In re Di Giorgio, 200 B.R. 664 (C.D. Cal. 1996),
19 judgment vacated, 134 F.3d 971 (9th Cir. 1998). Likewise, both
20 Williams' possessory interest and his equitable interest in the property
21 under the unrecorded (as of the petition date in the second bankruptcy
22 case) Polpantu to Williams deed were property of the estate.

23 So some precision about what conduct might implicate the stay is in
24 order. As noted, Williams was not in title to the condo when he filed
25 his petition, so record ownership of the property was not protected by
26 the stay. And, under California law, nonjudicial foreclosure affects
27 only legal title, and not any possessory right. In re Torrez, 132 B.R.
28 924, 939 (Bankr. E.D. Cal. 1991).

1 Nor was Levi's purchase at the foreclosure sale, without more, an
2 obvious violation of the stay. The Association was acting to enforce an
3 obligation, and against the property, but Levi was not. Even if the
4 sale were unambiguously of estate property, and void, In re Schwartz,
5 954 F.2d 569, 571 (9th Cir. 1992), it would take an adversary proceeding
6 to establish that as against a third party purchaser. Rule 7001(2).
7 While Polpantu's interest presumably was protected by the co-debtor stay
8 of § 1301 (assuming Williams, not in title, had an obligation to pay
9 dues), she is not a party to this appeal, and Williams has no apparent
10 standing to appeal on her behalf.

11 Williams' wide-ranging arguments are founded on the premise that
12 the foreclosure sale was void, as the bankruptcy court indicated might
13 be the case. But since the property foreclosed upon – the record
14 interest of Polpantu – was not property of the estate or Williams on his
15 petition date, that is not self-evident, and, as indicated above, would
16 require an adversary proceeding to establish, either as a matter of
17 state law or under § 549. Among the issues to be decided in such an
18 action would be the priority between the foreclosure trustee's deed and
19 the Polpantu to Williams deed: presumably Levi will argue that the
20 trustee's deed relates back to the sale date under California Civil Code
21 § 2924(c), and that date is prior to the recording of Williams' deed.

22 But Williams has never asked the bankruptcy court to declare the
23 foreclosure sale or eviction action void, and we need not decide those
24 possible issues. Instead, in this appeal, we focus on whether the
25 bankruptcy court's decision retroactively to annul the automatic stay
26 was an abuse of discretion.

1 3. Annulment of the automatic stay.

2 Postpetition actions taken in violation of the automatic stay, even
3 those undertaken by an actor with knowledge of the bankruptcy filing,
4 may be validated by annulment of the stay. In Algeran, Inc. v. Advance
5 Ross Corp., 759 F.2d 1421, 1425 (9th Cir. 1985), the Ninth Circuit held:

6 Algeran's position that an automatic stay cannot be
7 lifted so as to validate a [postpetition foreclosure] sale
8 made while the stay was in force, is without merit. Section
9 362(d) of Title 11 empowers the court to grant relief from the
10 automatic stay The district judge annulled the
11 automatic stay as to the sale of AMI shares, as he was
12 entitled to do under the statute and the facts of this case.
13 With the automatic stay annulled, the sale that occurred
14 cannot be said to be invalid.

15 While Levi did not specifically request annulment of the stay in
16 Williams' second bankruptcy case, the bankruptcy court assumed the
17 request was to annul the stay as of 1 April, when the events that are at
18 the heart of this controversy unfolded. The bankruptcy court did not
19 specify which subsection of § 362(d) authorized annulment, but its
20 reasoning fits into the broad category of "cause" under § 362(d)(1), as
21 in Algeran.

22 Whether to grant retroactive relief from the automatic stay under
23 § 362(d) is a decision committed to the discretion of the bankruptcy
24 court. Nat'l Env'tl. Waste, 129 F.3d at 1054. In Nat'l Env'tl. Waste,
25 the Ninth Circuit adopted a balancing of equities approach for analyzing
26 a request for retroactive stay relief, and identified two factors to be
27 considered by the bankruptcy court: (1) whether the creditor was aware
28 of the bankruptcy petition; and (2) whether the debtor engaged in
unreasonable or inequitable conduct, or prejudice would result to the
creditor. Id. at 1055-56.

 In In re Fjeldsted, 293 B.R. 12, 24-25 (9th Cir. BAP 2003),
following Nat'l Env'tl. Waste, we approved consideration of additional

1 factors by the bankruptcy court, including: the number of filings; the
2 extent of any prejudice, including to a bona fide purchaser; the
3 debtor's overall good faith; the debtor's compliance with the Code; how
4 quickly the creditor moved for annulment; and how quickly the debtor
5 moved to set aside the sale. But because a mechanistic application of
6 "factors" is inappropriate in making the determination of whether to
7 annul the stay, in Fjeldsted, we observed that:

8 Mindful that such lists [of factors] are capable of being
9 misconstrued as inviting arithmetic reasoning, we emphasize
10 that these items are merely a framework for analysis and not
11 a scorecard. **In any given case, one factor may so outweigh
12 the others as to be dispositive.**

13 293 B.R. at 25 (emphasis added).

14 It is difficult to review the decision here because the bankruptcy
15 court made no detailed findings of fact and conclusions of law. Rule
16 9014 incorporates the provisions of Rule 7052 and FRCP 52, requiring
17 findings and conclusions in any contested matter, which are essential to
18 appellate review. In re Harris, 279 B.R. 254, 260 (9th Cir. BAP 2002)
19 (findings required in contested matters involving disputed issues of
20 fact); Halas v. Platek, 239 B.R. 784, 793 (N.D. Ill. 1999).

21 Effective review should not depend upon the intuition of the
22 appellate judges or their ability to divine the critical facts or trial
23 court's reasons for its judgment. Here, while the pickings in the order
24 are indeed slim, there is enough in its statement of undisputed facts
25 and the legal justification for the decision to allow our review of the
26 bankruptcy court's exercise of discretion in annulling the stay.

27 Recall, while Williams had filed for Chapter 13 relief three times,
28 and through one legal maneuver after another in both state and
bankruptcy court had resisted Levi's attempts to evict him from the
condo, he had never properly asked the bankruptcy court to void the

1 foreclosure sale through which Levi asserted title to the property. The
2 validity of the foreclosure sale was, and continues to be, the lynchpin
3 to the parties' disputes. If the sale was conducted in violation of the
4 automatic stay, it, and Levi's title, are void. Schwartz, 954 F.2d at
5 571.

6 And while arguments about whether the stay was in force and
7 prohibited Levi from acquiring good title were and could be asserted in
8 the state courts, it is for the bankruptcy court finally to resolve
9 these questions. In re Dunbar, 245 F.3d 1058, 1063-64 (9th Cir. 2001)
10 (with respect to interpreting the scope of the automatic stay, federal
11 courts have final authority); In re Gruntz, 202 F.3d 1074, 1087 (9th
12 Cir. 2000) ("bankruptcy courts have the ultimate authority to determine
13 the scope of the automatic stay").

14 Although substantial time had passed and Williams had employed a
15 variety of litigation tactics in his two bankruptcy cases, the
16 bankruptcy court was apparently frustrated that the critical issue had
17 never been presented. As a result, the bankruptcy court presumably
18 decided the equities favored Levi. While Williams protested Levi's
19 efforts to evict him from the property, and asked for monetary sanctions
20 on account of Levi's conduct, Williams had not commenced an appropriate
21 adversary proceeding pursuant to Rule 7001 to declare the foreclosure
22 sale⁸ and subsequent actions taken by Levi void. This failure, viewed
23 together with Williams' serial filings, his repeated requests to stay
24 the eviction action, his ill-advised attempt to "remove" that action to
25 the bankruptcy court, and his inability to obtain confirmation of a plan

27
28 ⁸ Obviously, the Association, as the foreclosing creditor and likely the foreclosure trustee, would have been a necessary party to an action to void the foreclosure sale. Its absence from this litigation would prevent the bankruptcy court from rendering any final judgment concerning the validity of the sale in the context of Levi's or Williams' motions.

1 in his second chapter 13 case, apparently motivated the bankruptcy court
2 to conclude that, as between Williams and Levi, Levi should have relief.

3 Levi's conduct can also be criticized. Until Williams' third
4 bankruptcy case was filed, Levi seemed unconcerned about the scope of
5 the automatic stay, to the point of forgoing any attempts to obtain a
6 ruling from the bankruptcy court blessing his efforts to evict Williams.
7 To the extent that Levi's conduct constituted a willful disregard of the
8 automatic stay that caused Williams damage, the consequences of his
9 cavalier approach to the bankruptcy laws could subject him to serious
10 consequences, even monetary sanctions. See § 362(h).

11 But the bankruptcy court was apparently more concerned with
12 Williams' lack of diligence than Levi's disregard of the stay. And even
13 were we to reach a different conclusion about the equities on this
14 record, in deciding that Williams had engaged in unreasonable delay in
15 failing promptly to attack the sale, the bankruptcy court correctly
16 focused on appropriate factors under the case law: whether Williams
17 engaged in inequitable conduct, Nat'l Env'tl. Waste, 129 F.3d at 1055,
18 and whether he promptly moved to have the foreclosure's validity
19 determined, Fjeldsted, 293 B.R. at 25. That the bankruptcy court did
20 not discuss its consideration of other relevant factors in its order is
21 not fatal: as we indicated in Fjeldsted, one factor in the analysis may
22 sufficiently outweigh all others and justify annulment.

23 The bankruptcy court did not abuse its discretion when it annulled
24 the stay.

25 4. Monetary sanctions.

26 Section 362(h) provides:

27 An individual injured by any willful violation of a stay
28 provided by this section shall recover actual damages,
including costs and attorneys' fees, and in appropriate
circumstances, may recover punitive damages.

1 "Willfulness" in this context requires that the actor know of the
2 existence of the stay and that the actions taken in violation of the
3 stay be intentional. Eskanos & Adler, P.C. v. Leetien, 309 F.3d 1210,
4 1215 (9th Cir. 2002); In re Fernandez, 227 B.R. 174, 180 (9th Cir. BAP
5 1998), aff'd, 208 F.3d 220 (9th Cir. 2000) (table).

6 Levi argues that Williams was required to commence an adversary
7 proceeding to claim damages, and cites Davis, 177 B.R. at 911. We
8 disagree: Rule 7001 requires an adversary proceeding when a debtor is
9 seeking a finding of contempt; a motion is otherwise proper. In re
10 Zumbrun, 88 B.R. 250, 252-53 (9th Cir. BAP 1988); In re Forty-Five
11 Fifty-Five, Inc., 111 B.R. 920, 922-23 (Bankr. D. Mont. 1990).

12 We cannot tell from the bankruptcy court's order whether the court
13 intended implicitly to deny relief to Levi under § 362(h). Williams'
14 declaration addressing the prejudice he suffered from being evicted,
15 even temporarily, from his residence during the pendency of the
16 bankruptcy case gives rise to factual issues we are not free to resolve
17 on appeal. See In re Thomas, 287 B.R. 782, 786 (9th Cir. BAP 2002)
18 (remanding for determination of good faith, observing that an appellate
19 court is ill-equipped to make findings on fact-intensive questions). It
20 may be that, even though the equities favor retroactive relief from the
21 automatic stay in favor of the actor, a debtor's request for damages
22 under § 362(h) for the actor's willful violation of the stay before that
23 annulment should be granted.

24 As we have noted, an action taken in violation of the automatic
25 stay, though void, may be validated by the bankruptcy court through a
26 grant of retroactive relief from the stay. Algeran, 759 F.2d at 1425.
27 But case law has not yet definitively addressed whether an action taken
28 in violation of the stay, validated by annulment after the fact, may

1 nonetheless serve as the basis for an award of money damages if the
2 debtor has suffered an injury. Compare In re Edisto Res. Corp., 158
3 B.R. 954, 958-59 (Bankr. D. Del. 1993) (stating that once the creditor
4 paid the debtor's legal fees associated with defending against
5 litigation that violated the automatic stay, cause would exist to annul
6 the stay), and In re Thompson, 182 B.R. 140, 155 (Bankr. E.D. Va. 1995)
7 aff'd, 92 F.3d 1182 (4th Cir. 1996) (table) (holding that annulling the
8 automatic stay precludes an award of damages for a stay violation).

9 Thus, we remand to the bankruptcy court to decide whether Williams
10 is entitled to § 362(h) damages in this case. While it is not before us
11 for decision, we note that it is far from clear that annulment of the
12 stay should preclude damages for violation of the stay before the
13 annulment: the principle that one may be held in contempt
14 notwithstanding the reversal of the order violated, Worden v. Searls,
15 121 U.S. 14 (1887); U.S. v. United Mine Workers of America, 330 U.S.
16 258, 294 (1946), or even its unconstitutionality, Walker v. City of
17 Birmingham, 388 U.S. 307 (1967), seems an appropriate analogy.

18 VI. CONCLUSION

19 We AFFIRM the bankruptcy court's decision to annul the automatic
20 stay retroactively, REMAND for consideration of Williams' claim for
21 § 362(h) damages, and DISMISS as moot Williams' appeal from the
22 bankruptcy court's denial of a stay of the eviction action.

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24
25 KLEIN, Bankruptcy Judge, concurring and dissenting:

26
27 I join the majority with respect to affirming the annulment of the
28 automatic stay and the denial of the stay eviction order.

1 While I accept in principle that a stay violation can be punished
2 under § 362(h) in appropriate circumstances notwithstanding subsequent
3 annulment of the stay, I construe the trial judge's decision in this
4 constellation of facts to be an implicit rejection of stay violation
5 damages. Even though the trial judge did not explicitly discuss
6 imposing such a remedy notwithstanding the annulment of the stay, I
7 regard any error as harmless in this instance and would not remand. To
8 that extent, I DISSENT.

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