**NOT FOR PUBLICATION**

**UNITED STATES BANKRUPTCY APPELLATE PANEL**

**OF THE NINTH CIRCUIT**

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| In re: | BAP No. AZ-10-1358-JuMkPa |
| DAVID LEONARD HARRIS and DOLORES A. HARRIS, | Bk. No. 10-13866-GBN |
| Debtors. | Adv. No. 10-00880-GBN |
| DAVID LEONARD HARRIS; DOLORES A. HARRIS, | |
| Appellants, | |
| v. | **M E M O R A N D U M**[*] |
| STACY JOHNSON, | |
| Appellee. | |

Submitted Without Oral Argument
on February 18, 2011

Filed - April 7, 2011

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

Hon. George B. Nielsen, Jr., Bankruptcy Judge, Presiding.

Appearances: David L. Harris and Dolores A. Harris pro se on brief
Eric C. Anderson, City Attorney for the City of Scottsdale, on brief for Appellee Stacy Johnson

Before: JURY, MARKELL, and PAPPAS, Bankruptcy Judges.

[*] This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

Appellants, chapter 11[1] debtors David L. Harris ("David") and Dolores A. Harris (collectively, "Debtors"), appeal the bankruptcy court's order granting summary judgment to Stacy Johnson ("Johnson") and denying Debtors' motion for summary judgment.

The order was entered in an adversary proceeding in which Debtors alleged that Johnson, who was a police detective for the City of Scottsdale Police Department, violated the automatic stay and Debtors' constitutional rights by allegedly inducing third parties to repossess vehicles owned by Debtors. Based on the pleadings and record before us, we AFFIRM.

## I. FACTS

The events leading up to the alleged stay violation stem from Johnson's fraud investigation in connection with Debtors' purchase of a residence in Scottsdale, Arizona.

In early April 2010 Debtors agreed to purchase a residence from James and Michele Wilcox for $1.7 million dollars. David gave the Wilcoxes a signed letter from Wells Fargo Bank ("Wells Fargo") showing that he had several million in his bank account. David also offered the Wilcoxes a "personal guarantee" for the purchase in the form of jewelry and a Colt revolver which he represented to be worth $3 million and $90,000, respectively. David showed the Wilcoxes both items which were in a briefcase that he handed over to them. Based on David's purported wealth,

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[1] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

the Wilcoxes agreed to allow Debtors to move into the residence by April 6, 2010, if they paid an initial amount. The closing was scheduled for July.

Debtors and their two adult sons, quickly moved into the residence. Debtors did not pay the Wilcoxes any money on April 6, 2010 or anytime after that. The Wilcoxes contacted Wells Fargo and learned that the letter they had received from David was forged and that he had no accounts at the bank. They further learned that the jewelry was costume jewelry and had minimal value, as did the revolver. The Wilcoxes informed the Scottsdale police regarding their discoveries, which prompted an investigation.

On May 3, 2010, Johnson was assigned to assist with the investigation. Johnson discovered that David had forged numerous documents regarding his wealth and also that he had used the documents in connection with the purchase of another residence in Scottsdale from which he and his family had been evicted. She also uncovered other evidence of fraud.

On May 6, 2010, Johnson arrested David for fraud schemes and forgery. He was booked and released. Also on May 6, 2010, Debtors filed their chapter 11 petition.

On May 12, 2010, Johnson learned that David had three vehicles registered in his name, all of which were subject to liens in favor of Auto Cash Title Loans ("Auto Cash"). Johnson called Auto Cash and informed the manager, Jamie Reyes ("Reyes"), that she was investigating David's use of forged documents to obtain goods. Reyes faxed Johnson the documents David had provided to Auto Cash to obtain the loans from Auto

Cash on the three vehicles, including a Wells Fargo letter stating that David had $20 million in an account. There was also some discussion about Reyes initiating the repossession of the vehicles. Johnson told Reyes the location of the vehicles, which she had learned through her investigation.

On the same day, Reyes requested Extreme Enterprises, Inc. ("Extreme") to repossess the vehicles. Extreme contacted Johnson who confirmed the location of the vehicles. Extreme repossessed the vehicles.

On May 17, 2010, Debtors filed a complaint against Auto Cash, Extreme and Johnson, alleging all three had willfully violated the automatic stay by repossessing Debtors' vehicles. In the complaint, Debtors alleged that Johnson had "instructed Auto Cash Title Loans . . . to violate an automatic [s]tay and provided the location of the automobiles for repossession." They further alleged that Johnson described their bankruptcy to Reyes as "fraudulent" and "said the court ordered [a]utomatic [stay], is to be disregarded and the 3 Harris autos are to be repossessed and impounded pending further investigation." Finally, they alleged that despite showing Extreme a copy of their bankruptcy petition, Extreme informed Debtors' sons that "[it] was picking up the cars at the direction of the Scottsdale Police Department for impound and they were to produce all the cars or be arrested."

On June 4, 2010, Debtors filed a document entitled "Complaint Cause of Action Willful Violation of Automatic Stay Stipulation for Dismissal." Debtors again alleged that Johnson claimed their bankruptcy filing was a fraud and that she had

"compelling evidence" as her basis and authority to violate the automatic stay "but provided nothing in terms of due process or a valid court order to work with the loan and repossession companies in seizure of properties, and acted in violation of color of law, civil rights, under the 4th amendment of the US Constitution." The document further stated that Debtors had settled with Auto Cash and purported to dismiss Auto Cash from the adversary proceeding based on a stipulation which was never presented to the bankruptcy court. Attached to the pleading was an email letter from Reyes which stated that Johnson had called Auto Cash and informed them about the location of the vehicles and her investigation regarding the possible fraud.

On June 17, 2010, Debtors filed a document entitled "Cause of Action, Willful Violation of Automatic Stay, Stipulation of Dismissal, Request for Summary Judgment." Debtors alleged that Johnson acted outside the scope of her authority by assisting Auto Cash in moving property from a place against the wishes of an interested party. They further contend Johnson "induced" Auto Cash and Extreme to violate the automatic stay. Debtors requested summary judgment based on the submitted evidence and documentation.

The document also purported to dismiss Extreme from the adversary proceeding. Attached was an email letter from Jay Miller of Extreme which states that Johnson advised him to pick up the vehicles and if they were not picked up they would be impounded.

On July 20, 2010, Johnson filed a "Response To Motion For Summary Judgment And Cross-Motion For Summary Judgment."

Johnson argued that her conduct was excepted from the operation of the automatic stay under § 362(b)(4) unless Debtors could show the action was to enforce a money judgment. She maintained that they could not make such a showing since the government was not a creditor and her investigation was in the furtherance of public policy. Johnson further contended that providing the location of the vehicles was not the proximate cause of Debtors' vehicles being repossessed. According to Johnson, all she did was to inform Auto Cash about the location of the vehicles that were directly linked to her fraud investigation. For all these reasons, Johnson argued that she was entitled to summary judgment as a matter of law.

On July 28, 2010, Debtors filed a "Response and Opposition To Cross Motion For Summary Judgment." In that document, Debtors argued for a trial and alleged that Johnson used her police power to violate the automatic stay by using a third party under color of law. Debtors relied on the email letters from Reyes and Jay Miller to support their view that there were triable issues of fact regarding the extent of Johnson's involvement in the repossession and stay violation.

On September 13, 2010, the bankruptcy court conducted a hearing and ruled orally. In granting summary judgment for Johnson, the court found that Debtors' email letters were not authenticated and thus inadmissible for purposes of summary judgment. Moreover, the court found that even if the emails were admissible, it was not clear "how Detective Johnson actively encouraged a stay violation and provided the directions here." The court further concluded that Johnson's activities

were excepted from the stay under § 362(b)(1) and (4). Last, the court concluded that "it's up to the creditors, as independent parties, to make their own decisions about whether or not they're going to take a chance and violate the automatic stay." The order reflecting the court's ruling was entered on September 16, 2010. Debtors filed this timely appeal.

## II. JURISDICTION

The bankruptcy court had jurisdiction over this proceeding under 28 U.S.C. §§ 1334 and 157(b)(2)(A). We have jurisdiction under 28 U.S.C. § 158.

## III. ISSUE

Whether the bankruptcy court erred in granting summary judgment for Johnson.

## IV. STANDARD OF REVIEW

We review an order granting a motion for summary judgment de novo. Lopez v. Emergency Serv. Restoration, Inc. (In re Lopez), 367 B.R. 99, 103 (9th Cir. BAP 2007).

## V. DISCUSSION

### A. Standards for Summary Judgment

In reviewing the bankruptcy court's decision on a motion for summary judgment, we apply the same standards as the bankruptcy court. Summary judgment is properly granted when no genuine and disputed issues of material fact remain, and when, viewing the evidence most favorably to the non-moving party, the movant is entitled to prevail as a matter of law. Fed. R. Civ. P. 56 (made applicable by Rule 7056); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

The moving party bears the initial burden of showing that

there is no material factual dispute. Where the moving party does not bear the burden of proof on an issue at trial, "the moving party may discharge its burden of production by either of two methods." Nissan Fire & Marine Ins. Co., Ltd., v. Fritz Cos., Inc., 210 F.3d 1099, 1106 (9th Cir. 2000). "The moving party may produce affirmative evidence negating an essential element of the nonmoving party's case, or, after suitable discovery, the moving party may show that the nonmoving party does not have enough evidence of an essential element of its claim or defense to carry its ultimate burden of persuasion at trial." Id.

If the moving party meets its initial burden, the burden then shifts to the non-moving party to set out, by affidavits or admissible discovery material, specific facts showing a genuine issue for trial. Fed. R. Civ. P. 56(e)(2). "A trial court can [ ] consider [only] admissible evidence in ruling on a motion for summary judgment." Orr v. Bank of Am., NT & SA, 285 F.3d 764, 773 (9th Cir. 2002). Moreover, we regard as true the non-moving party's evidence, if supported by affidavits or other evidentiary material. Celotex, 477 U.S. at 324.

**B. Debtors' Prima Facie Case Under § 362(k)**

When Debtors filed their bankruptcy petition, they were immediately protected by the automatic stay under § 362(a), which operates as a stay of, among other things,

> any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate; any act . . . to enforce any lien against property of the estate; and any act . . . to enforce against property of the debtor any lien to the extent such lien secured a claim that arose before the commencement of the case . . . .

§ 362(a)(3), (4), (5). The stay does not, however, prevent

> the commencement or continuation of a criminal action or proceeding against the debtor; . . . or the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit's . . . police and regulatory power, including the enforcement of a judgment other than a money judgment action . . . .

§ 362(b)(1), (4).

Nevertheless, "[t]he scope of protections embodied in the automatic stay is quite broad, and serves as one of the most important protections in bankruptcy law." Eskanos & Adler, P.C. v. Leetien, 309 F.3d 1210, 1214 (9th Cir. 2002). Because of these protections, Congress gave a debtor the right to sue for violations of the stay under § 362(k). Debtors had the burden of proof under § 362(k), which requires a showing (1) by an individual debtor of (2) injury from (3) a willful (4) violation of the stay. Fernandez v. G.E. Capital Mortg. Servs. (In re Fernandez), 227 B.R. 174, 180 (9th Cir. BAP 1998). Therefore, Debtors would have the ultimate burden of proof at trial on each of these elements.

**C. Summary Judgment As to the Fourth Element: Violation of the Stay**

As the party moving for summary judgment on her cross motion, Johnson bore the initial burden of showing that there was no material factual dispute. Johnson provided her sworn declaration which provides in relevant part:

> Following the interview [with Harris], Detective Johnson continued investigation of fraudulent activity by Harris. She became aware that Harris had several vehicles registered in his name upon which a lien was registered to Auto Cash Title Loans in Tucson . . . .
>
> Detective Johnson contacted Auto Cash to investigate

> whether the apparent loans by Auto Cash were obtained under false pretenses as well. Detective Johnson then learned that some of the same fraudulent documentation passed by Harris to Wilcox was also provided to Auto Cash by Harris to obtain the loans. Detective Johnson provided Auto Cash with the location of the vehicles during this contact.
>
> In speaking with Jamie Reyes of Auto Cash, Detective Johnson first learned that Harris had filed a petition in bankruptcy. Detective Johnson informed Reyes that there was reason to believe the bankruptcy documents contained false information. She did not inform Reyes that the bankruptcy petition itself was a forgery nor did she give Reyes any instructions regarding retrieval of the vehicles. To the contrary, she informed Reyes that she did not know what ramifications, if any, may result from the bankruptcy and that she should contact the business owner or an attorney for advice on that.
>
> Detective Johnson was later contacted by a repossession company and asked to confirm the location of the vehicles. Detective Johnson confirmed the location of the vehicles, but did not otherwise advise or instruct the repossession company regarding the vehicles.
>
> Detective Johnson played no part in the repossession of Harris's vehicles other than provide Auto Cash with the location of the vehicles as a courtesy.

We agree with the bankruptcy court's assessment that based on Johnson's declaration there could not be a stay violation. Johnson's testimony shows that the alleged infraction amounted to no more than her providing the location of the vehicles to Auto Cash and Extreme during the course of a criminal investigation regarding David's alleged fraud.

Once Johnson met her initial burden on summary judgment, the burden then shifted to Debtors as the non-moving parties to set out, by affidavits or admissible discovery material, specific facts showing a genuine issue for trial. Fed. R. Civ. P. 56(e)(2). The only evidence Debtors submitted were the email letters from Reyes and Jay Miller.

Reyes stated:

> On May 12, 2010, [we] received a phone call from Detective Stacy Johnson . . . informing [us that] she was investigating David L. Harris for fraud . . . during the course of the investigation, she became aware that our business had liens against Harris's vehicles. That it is possible that forged documents were also presented to us to obtain the loans with our business. Also that [Harris] was in the process of moving as we spoke and we may want to secure our interest. She also said that forged documents may have been use[d] to file bankruptcy. [David] was arrested on 05/06/10, just after filing the bankruptcy documents. So we picked the cars up.

Jay Miller stated:

> Jamie Reyes with Auto Cash advised us that a detective Stacy Johnson with the Scottsdale Police Department has given us a location where to secure the 3 vehicles . . . . We called Johnson at Scottsdale police department who advised us David Harris is being arrested for giving fraudulent documents to the bankruptcy court and to come pick these vehicles up at 28850 n. [sic] 76th Scottsdale, AZ. Stacy Johnson said if we don't come get the cars now that they will be impounded by the city [sic] of Scottsdale . . . .

The record shows that these email letters were obtained by Debtors' son, Toby, through Michael D. Miller, the attorney for Auto Cash and Extreme. An email from Toby to Attorney Miller dated May 26, 2010, states:

> You indicated your client is willing to return the vehicles to avoid court enforcement of the Automatic Stay, and penalties for the "contempt of court act" of violating said court order.
>
> Your client and Extreme Enterprises, Inc. both indicated that they were told by Scottsdale Detective Stacy Johnson to ignore the stay because she believed it was an act of fraud.

Toby goes on:

> We are interested in settling, and offer simple terms to resolve the issue:
>
> 1. A signed and dated (By attorney as witness and owner) written declaration from your client which

> outlines why the Detective instructed your client to Violate the Stay, what she said, and why your client felt the need to comply with the demands of the police.
>
> . . . .
>
> Upon completion, we will sign off on all further liabilities and release your client, and withdrawal [sic] the adversary complaint against your client. The same offer extends to Extreme Enterprises, Inc. if you also represent that party.

The bankruptcy court correctly observed that the email letters from Reyes and Jay Miller were not authenticated and thus not admissible for purposes of summary judgment. Orr, 285 F.3d at 773. The standard governing admissibility of these documents is as follows: "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Fed. R. Evid. 901(a). Because the email letters were not authenticated, the bankruptcy court had no means of assessing their reliability.

Even assuming the documents were admissible, we conclude that Debtors still failed to meet their burden of producing evidence that set forth specific facts showing a genuine issue for trial as required under Fed. R. Civ. P. 56(e). We agree with the bankruptcy court that Jay Miller's email letter said nothing more than Johnson provided the location of the vehicles for the repossession. Moreover, drawing all reasonable inferences in Debtors' favor with respect to Reyes's email letter, it does not support the conclusion that Debtors suggest; namely, that Johnson told Reyes to violate the stay because Debtors' bankruptcy case was a fraud. In short, other than the

self-serving email letters, which lack any detailed facts or supporting evidence, Debtors presented no evidence to show a question of material fact exists with respect to Johnson's involvement in the repossession. See Soremekun v. Thrifty Payless, Inc., 509 F.3d 978, 984 (9th Cir. 2007) ("Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment.").

Further, the factual context of the record before us renders Debtors' claim against Johnson implausible. As the bankruptcy court observed, the City was not a creditor and had no financial interest in Debtors' vehicles. Other than Debtors' unsupported arguments, there is no evidence in the record that shows Johnson had any interest in Debtors' vehicles being repossessed. See British Airways Bd. v. Boeing Co., 585 F.2d 946, 952 (9th Cir. 1978) (legal memoranda and oral argument are not evidence and cannot create issues of fact capable of defeating otherwise valid motion for summary judgment). In short, Debtors' speculative causation theory that Johnson "induced" Auto Cash and Extreme to violate the stay does not take the place of reliable evidence.[2]

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[2] The inconsistency between Johnson's declaration and her police report regarding when she learned of Debtors' bankruptcy filing is also irrelevant, contrary to Debtors' assertions. Johnson's declaration states that she learned of the bankruptcy on May 12th when speaking to Reyes while in her police report Johnson indicates it was on May 10th when she was speaking to Mr. Wilcox. At the motion hearing in the bankruptcy court, Johnson's counsel stipulated that Johnson knew of the bankruptcy during her discussion with Reyes. Accordingly, that (continued...)

Like the bankruptcy court, we conclude there were no genuine issues of material fact regarding the alleged stay violation. The record shows that Johnson simply informed Auto Cash and Extreme about the location of the vehicles. Standing alone, this communication hardly amounts to a stay violation. Therefore, Johnson was entitled to judgment as a matter of law on this element of Debtors' claim.

**D. The Exceptions To the Automatic Stay Under § 362(b)(1) and (4) Apply**

Even if the stay did apply, Johnson's communications were excepted from the scope of the automatic stay. It is undisputed that Johnson's communications to Auto Cash and Extreme regarding the location of Debtors' vehicles were made while she was investigating David's alleged fraud. Thus, as a matter of law, the communications were excepted from the stay under § 362(b)(1). See Gruntz v. Cnty. of L.A. (In re Gruntz), 202 F.3d 1074, 1085 (9th Cir. 2000).

Further, police and regulatory activities are excepted from the automatic stay under § 362(b)(4) unless the debtor can show that the actions were to enforce a money judgment. Johnson's communications had nothing to do with enforcing a money judgment. Thus, her communications would also be excepted from the stay under § 362(a)(4). See Universal Life Church v. United States (In re Universal Life Church, Inc.), 128 F.3d 1294, 1297 (9th Cir. 1997).

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[2](...continued)
fact was before the court when it made its ruling.

**E. Debtors Do Not Have A Claim Under 42 U.S.C. § 1983**

Last, Debtors raise numerous issues that relate to violation of their constitutional rights arising from the automatic stay violation and Johnson's alleged involvement in the repossession. Debtors' constitutional claims are based on 42 U.S.C. § 1983 which provides a remedy for civil rights violations.[3] Since their claim under the statute depends upon Johnson's alleged violation of the automatic stay, it collapses in the face of the conclusion we reach above. Without a violation of the stay, there can be no cognizable claim under 42 U.S.C. § 1983. The reverse is also true. As a matter of law, a 42 U.S.C. § 1983 claim cannot be based on an alleged violation of the stay under § 362(k). Periera v. Chapman, 92 B.R. 903 (C.D. Cal. 1988).

## VI. CONCLUSION

For the reasons discussed above, we AFFIRM.

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[3] This section provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, . . . .