

APR 08 2010

NOT FOR PUBLICATION

SUSAN M SPRAYL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	EC-09-1281-DMkH
)		
LUCINDA K. BAUER,)	Bk. No.	09-21019
)		
Debtor.)		
_____)		
LUCINDA K. BAUER,)		
)		
Appellant,)		
)		
v.)	M E M O R A N D U M ¹	
)		
NORTHEAST NEBRASKA FEDERAL)		
CREDIT UNION,)		
)		
Appellee.)		
_____)		

Argued and Submitted on March 17, 2010
at San Francisco, California

Filed - April 8, 2010

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

Honorable Michael S. McManus, Bankruptcy Judge, Presiding.

Before: DUNN, MARKELL and HOLLOWELL, Bankruptcy Judges.

¹ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have, FRAP 32.1, it has no precedential value. See 9th Cir. BAP Rule 8013-1.

1 Appellant Lucinda K. Bauer ("Ms. Bauer") filed a motion for
2 civil contempt ("Motion") against Appellee Northeast Nebraska
3 Federal Credit Union (the "Credit Union") for alleged willful
4 violations of the automatic stay and discharge injunction in Ms.
5 Bauer's chapter 7 bankruptcy case.²

6 The bankruptcy court granted the Motion in part and struck
7 Ms. Bauer's reply as untimely. Ms. Bauer appeals the bankruptcy
8 court's award of sanctions against the Credit Union as inadequate
9 and further appeals the bankruptcy court's order striking her
10 reply. We AFFIRM.

11 I. FACTS³

12 Ms. Bauer is an attorney licensed to practice law in
13 California and Nebraska. She is a sole practitioner with
14 approximately fourteen years of experience and has a home-based
15 law practice.

16 Ms. Bauer filed her chapter 7 bankruptcy petition on
17 January 22, 2009. On the same date, she filed her schedules. In
18 her Schedule F, Ms. Bauer listed two unsecured loan debts owing
19 to the Credit Union, and in her Schedule D, she listed the Credit
20 Union as a secured creditor for an automobile loan, which was the
21

22
23 ² Unless otherwise indicated, all chapter, section and rule
24 references are to the federal Bankruptcy Code, 11 U.S.C. §§ 101-
25 1532, and to the Federal Rules of Bankruptcy Procedure, Rules
1001-9037.

26 ³ This is the second appeal by Ms. Bauer that this Panel has
27 heard. Relevant facts are included from the Panel's prior
28 unpublished Memorandum disposition in BAP No. EC-09-1154-JuMkMo,
filed on December 16, 2009.

1 subject of the prior appeal that we considered.⁴ Notice of Ms.
2 Bauer's bankruptcy filing, dated January 23, 2009, was served on
3 the Credit Union by notice sent on January 25, 2009. Ms. Bauer
4 received her discharge by order entered on April 29, 2009.

5 Following Ms. Bauer's bankruptcy filing and in spite of
6 receiving notice of her bankruptcy, the Credit Union violated the
7 automatic stay by sending postpetition notices and account
8 statements to Ms. Bauer and by withdrawing funds from her
9 account(s). On April 24, 2009, Ms. Bauer filed the Motion,
10 supported by a Memorandum of Law, her Declaration and multiple
11 exhibits. Notice of the Motion was served on the Credit Union,
12 advising of a hearing ("Preliminary Hearing") on the Motion
13 scheduled for May 26, 2009 at 9:00 a.m. However, contrary to the
14 bankruptcy court's Local Rule 9014-1(d)(3), the hearing notice
15 did not specify the filing deadline for written oppositions.

16 At the Preliminary Hearing, the bankruptcy court determined
17 that it was not necessary to convert the Motion from a contested
18 matter into an adversary proceeding but allowed the parties to
19 conduct discovery pursuant to Rule 9014(c). The bankruptcy court
20 further advised that it would set a briefing schedule for the
21

22
23 ⁴ The record in this appeal is problematic for two reasons:
24 First, Ms. Bauer did not index and submit her excerpts of record
25 ("ER") chronologically. The nonsequential ordering of documents
26 creates considerable difficulty in grasping exactly what was
27 going on before the bankruptcy court. Second, Ms. Bauer does not
28 include any of the Credit Union's submissions. The Credit Union
did us no favors in not supplementing the record on its own.
While these problems make the record more difficult to review,
there is enough here, as supplemented by documents available on
the bankruptcy court docket, to allow us an adequate review.

1 Credit Union's opposition to the Motion and Ms. Bauer's reply and
2 adjourned proceedings for a further hearing ("Final Hearing") on
3 August 17, 2009 at 9:00 a.m.

4 There is no record in the docket of Ms. Bauer's bankruptcy
5 case that the bankruptcy court subsequently entered an order
6 setting specific deadlines for filing the Credit Union's
7 opposition to the Motion or any reply by Ms. Bauer. However,
8 under the bankruptcy court's Local Rules 9014-1(f)(1)(ii) and
9 (iii), the Credit Union's opposition to the Motion was required
10 to be filed and served "at least" 14 days prior to the Final
11 Hearing date, and Ms. Bauer's reply was required to be filed and
12 served "at least" 7 days prior to the Final Hearing date.
13 Accordingly, the Credit Union's opposition to the Motion was due
14 no later than August 3, 2009, and Ms. Bauer's reply was due no
15 later than August 10, 2009.

16 The Credit Union's memorandum opposing the Motion and the
17 supporting Declaration of Susie Korth ("Korth Declaration") were
18 filed on July 27, 2009.⁵ Ms. Bauer served her reply declaration
19 ("Reply") by mail on counsel for the Credit Union on August 11,
20 2009. She drove to Sacramento on August 11, 2009, to file her
21 Reply and supporting exhibits with the bankruptcy court, but due
22 to an accident en route that diverted traffic, she was not able
23

24 ⁵ Neither Ms. Bauer nor the Credit Union included these
25 documents in Excerpts of Record. We obtained and take judicial
26 notice of these documents from the bankruptcy court's docket on-
27 line. O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.),
28 887 F.2d 955, 957-58 (9th Cir. 1989); Atwood v. Chase Manhattan
Mortgage Co. (In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP
2003).

1 to get to the bankruptcy court until after it had closed.
2 Consequently, she returned from Sacramento without having filed
3 her Reply papers with the bankruptcy court and subsequently
4 mailed them. Her Reply documents were not received by the
5 bankruptcy court until after the Final Hearing on August 17,
6 2009, and were filed by the bankruptcy court on August 18, 2009.

7 At the Final Hearing, counsel for the Credit Union appeared,
8 but Ms. Bauer did not. Ms. Bauer did not request to appear at
9 the Final Hearing by telephone. In advance of the Final Hearing,
10 the bankruptcy court had posted a tentative ruling ("Tentative
11 Ruling"), granting the Motion in part: Based on its review of
12 the evidence, the bankruptcy court tentatively determined that
13 Ms. Bauer had suffered no actual damages, as the Credit Union had
14 returned to Ms. Bauer the funds it had removed from her
15 account(s). In addition, citing Elwood v. Drescher, 456 F.3d
16 943, 947-48 (9th Cir. 2006), the bankruptcy court determined that
17 Ms. Bauer, as a pro se litigant, was not entitled to an award of
18 attorney's fees. However, finding that the Credit Union had
19 acted at least "recklessly and without regard to the debtor's
20 bankruptcy rights" in continuing to send late notices and account
21 statements to Ms. Bauer postpetition and making postpetition
22 withdrawals from her account(s), the bankruptcy court tentatively
23 awarded Ms. Bauer \$500 punitive damages.

24 At the Final Hearing, counsel for the Credit Union accepted
25 the bankruptcy court's Tentative Ruling, and Ms. Bauer did not
26 appear, nor did she object. The bankruptcy court stated on the
27 record that Ms. Bauer could lodge an order consistent with the
28 Tentative Ruling.

1 Ms. Bauer did not submit an order following the Final
2 Hearing. Instead, she filed a notice of appeal on August 27,
3 2009.

4 On September 1, 2009, the bankruptcy court issued an order
5 ("Order") granting Ms. Bauer's Motion in part, consistent with
6 its Tentative Ruling. In the Order, the bankruptcy court noted
7 that Ms. Bauer did not appear at the Final Hearing and that her
8 Reply was not filed until after the Final Hearing, in violation
9 of the requirements of the bankruptcy court's Local Rule 9014-
10 1(f)(1)(iii). Accordingly, the bankruptcy court did not consider
11 Ms. Bauer's Reply papers when it decided the Motion at the Final
12 Hearing. The Order included a provision striking Ms. Bauer's
13 Reply and confirming that her Reply was not considered by the
14 bankruptcy court. Ms. Bauer's notice of appeal is timely.⁶

15 II. JURISDICTION

16 The bankruptcy court had jurisdiction under 28 U.S.C.
17 §§ 1334 and 157(b)(2)(O). We have jurisdiction under 28 U.S.C.
18 § 158.

19 III. ISSUES

20 1. Whether the bankruptcy court denied Ms. Bauer due
21 process in striking her Reply.

22 2. Whether the bankruptcy court erred in determining that
23 Ms. Bauer had no actual damages.

24 3. Whether the bankruptcy court erred in excluding
25 emotional distress damages.

26
27 ⁶ Though premature, Ms. Bauer's notice of appeal, filed
28 August 27, 2009, is considered timely under Rule 8002(a).

1 discretion in applying their local rules). “The amount of
2 sanctions imposed for a willful violation of the stay is reviewed
3 for an abuse of discretion.” Eskanos & Adler, P.C. v. Leetien,
4 309 F.3d 1210, 1213 (9th Cir. 2002).

5 To determine whether the bankruptcy court has abused its
6 discretion, we conduct a two-step inquiry: (1) we review de novo
7 whether the bankruptcy court “identified the correct legal rule
8 to apply to the relief requested” and (2) if it did, whether the
9 bankruptcy court’s application of the legal standard was
10 illogical, implausible or “without support in inferences that may
11 be drawn from the facts in the record.” United States v.
12 Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009). “If the
13 bankruptcy court did not identify the correct legal rule, or its
14 application of the correct legal standard to the facts was
15 illogical, implausible, or without support in inferences that may
16 be drawn from the facts in the record, then the bankruptcy court
17 has abused its discretion.” USAA Fed. Sav. Bank v. Thacker (In
18 re Taylor), ___ F.3d ___, 2010 WL 1006927 (9th Cir. March 22,
19 2010), citing United States v. Hinkson, 585 F.3d at 1261-62.

20 We may affirm the bankruptcy court on any grounds supported
21 by the record. Canino v. Bleau (In re Canino), 185 B.R. 584, 594
22 (9th Cir. BAP 1995).

23 V. DISCUSSION

24 At the outset of our discussion in this appeal, it is
25 important to remember that our role as an appellate tribunal is
26 limited. We are not the trier of fact, and we do not “find”
27 facts. We review the fact findings of the trial court for clear
28 error, and we do not overturn a trial court’s fact findings as

1 clearly erroneous unless we have a "definite and firm conviction"
2 that the trial court erred. Latman v. Burdette, 366 F.3d 774,
3 781 (9th Cir. 2004). We further generally do not consider issues
4 raised for the first time on appeal, where the trial court had no
5 opportunity to consider them. See, e.g., United Student Aid
6 Funds, Inc. v. Espinosa, ___ U.S. ___, 2010 WL 1027825, Slip
7 Opinion at p. 8 n.9 (March 23, 2010) ("We need not settle that
8 question, however, because the parties did not raise it in the
9 courts below."); Scovis v. Henrichsen (In re Scovis), 249 F.3d
10 975, 984 (9th Cir. 2001) (court will not consider issue raised
11 for the first time on appeal absent exceptional circumstances).
12 In particular, we cannot consider facts that were not before the
13 trial court. See Oyama v. Sheehan (In re Sheehan), 253 F.3d 507,
14 512 n.5 (9th Cir. 2001) ("[E]vidence that was not before the
15 lower court will not generally be considered on appeal.");
16 Kirschner v. Uniden Corp. of Am., 842 F.2d 1074, 1077-78 (9th
17 Cir. 1988) (papers not filed or admitted into evidence by the
18 trial court prior to judgment on appeal were not part of the
19 record on appeal and thus stricken). As stated by the Ninth
20 Circuit in Kirschner, "'We are here concerned only with the
21 record before the trial judge when his decision was made.'" Kirschner,
22 842 F.2d at 1077 (quoting United States v. Walker, 601
23 F.2d 1051, 1055 (9th Cir. 1979)).

24 It is with these considerations in mind that we address the
25 specific issues raised in this appeal.

26 A. The Bankruptcy Court Did Not Abuse Its Discretion In
27 Striking Ms. Bauer's Reply

28 In her statement of Issues on Appeal in her opening brief,

1 Ms. Bauer states issue no. 4 as, "Whether the bankruptcy court
2 denied Bauer due process in striking her response." Appellant's
3 Opening Brief, at p. 3. However, Ms. Bauer did not present this
4 argument to the bankruptcy court and does not argue denial of due
5 process in her opening brief or in her reply brief. Accordingly,
6 this issue is waived. Golden v. Chicago Title Ins. Co. (In re
7 Choo), 273 B.R. 608, 613 (9th Cir. BAP 2002) (arguments not
8 specifically and distinctly made in an appellant's opening brief
9 are waived); Branam v. Crowder (In re Branam), 226 B.R. 45, 55
10 (9th Cir. BAP 1998), aff'd 205 F.3d 1350 (9th Cir. 1999).

11 What Ms. Bauer does argue is that her late Reply should not
12 have been stricken based on her excusable neglect. She also
13 questions the bankruptcy court's impartiality.

14 Federal Rule of Civil Procedure 60(b)(1), applicable in
15 bankruptcy cases under Rule 9024, provides that "[o]n motion and
16 just terms, the court may relieve a party or its legal
17 representative from a final judgment, order, or proceeding...."
18 (emphasis added). However, Ms. Bauer made no such motion to the
19 bankruptcy court. It is axiomatic that appellate courts will not
20 consider arguments "that are not 'properly raise[d]' in the trial
21 courts." In re E.R. Fegert, Inc., 887 F.2d at 957. Because Ms.
22 Bauer never filed a motion to vacate the portion of the order
23 striking her Reply based on excusable neglect, we will not
24 consider that argument on appeal.

25 As to any alleged prejudice against Ms. Bauer on the part of
26 the bankruptcy court, our review of the record indicates that Ms.
27 Bauer never filed a motion to recuse in the bankruptcy court.
28 Her questions as to the impartiality of the bankruptcy court

1 spring from the following comment of the bankruptcy court at the
2 Final Hearing: "And the--I will make sure, Counsel, that there
3 are no findings and conclusions in the order, just the necessary
4 order. All right?" See Appellant's Opening Brief, at p. 24. We
5 can speculate that the bankruptcy court's comment reflects
6 nothing more than its application of the "separate judgment rule"
7 from Fed. R. Civ. P. 58(a), applicable at the time of the Final
8 Hearing with respect to contested matters in bankruptcy under
9 Rule 9021, to its prospective order granting the Motion in part.⁷
10 However, as with Ms. Bauer's excusable neglect argument, there is
11 nothing in the record before us reflecting that Ms. Bauer raised
12 the issue of the bankruptcy court's alleged partiality before the
13 bankruptcy court in the first instance.

14 Although an impartiality issue can be raised at any
15 time, the timing may affect the weight ascribed to the
16 evidence said to be probative of bias or prejudice.
17 One who waits to raise an impartiality issue until
18 after adverse decisions are announced undermines the
19 weight that will be ascribed to the evidence of bias or
20 prejudice.

21 American Express Travel Related Servs. Co. v. Fraschilla (In re
22 Fraschilla), 235 B.R. 449, 459 (9th Cir. BAP 1999), aff'd 242
23 F.3d 381 (9th Cir. 2000).

24 Rule 5004(a), "Disqualification of Judge," provides that, "A
25 bankruptcy judge shall be governed by 28 U.S.C. § 455, and
26 disqualified from presiding over the proceeding, or contested
27 matter in which the disqualifying circumstance arises or, if
28 appropriate, shall be disqualified from presiding over the case."

⁷ The "separate judgment" requirement was eliminated as to
orders resolving contested matters by amendments to Rule 9021,
effective December 1, 2009.

1 Section 455 of Title 28 provides in relevant part:

2 (a) Any justice, judge, or magistrate of the United
3 States shall disqualify himself in any proceeding in
4 which his impartiality might reasonably be questioned.

5 (b) He shall also disqualify himself in the following
6 circumstances:

7 (1) Where he has a personal bias or prejudice
8 concerning a party,....

9 "Judicial impartiality is presumed." First Interstate Bank
10 of Ariz., N.A. v. Murphy, Weir & Butler, 210 F.3d 983, 987 (9th
11 Cir. 2000). "[J]udicial rulings alone almost never constitute a
12 valid basis for a bias or partiality motion.... Almost
13 invariably, they are proper grounds for appeal, not for recusal."
14 Liteky v. United States, 510 U.S. 540, 555 (1994). In addition,
15 questions of bias or prejudice are evaluated on an objective
16 basis; "whether a reasonable person with knowledge of all the
17 facts would conclude that the judge's impartiality might
18 reasonably be questioned." Seidel v. Durkin (In re Goodwin), 194
19 B.R. 214, 222 (9th Cir. BAP 1996).

20 In this appeal, Ms. Bauer's arguments raising the issue of
21 the bankruptcy court's alleged "partiality" arise from her
22 dissatisfaction with the substance of the bankruptcy court's
23 rulings and one statement from the transcript of the Final
24 Hearing which Ms. Bauer did not attend. We find nothing in the
25 record of this appeal that leads us to question the bankruptcy
26 court's impartiality in its rulings with respect to the Motion.

27 As noted above, the bankruptcy court's decisions applying
28 its local rules are reviewed for abuse of discretion. See
O'Donnell v. Vencor, Inc., 466 F.3d at 1109. "Because general
orders and local rules not only implement due process and other

1 statutory rights but also promote efficiency, we permit the
2 [bankruptcy] court broad discretion in determining their
3 requirements." United States v. DeLuca, 692 F.2d 1277, 1281 (9th
4 Cir. 1982).

5 In this case the bankruptcy court struck Ms. Bauer's Reply
6 as not timely filed pursuant to its Local Rule 9014-1(f)(1)(iii).
7 In the Order, the bankruptcy court noted that the Reply was filed
8 after the Final Hearing, and because the bankruptcy court was
9 unaware of the Reply, it did not consider the Reply in deciding
10 the Motion. The bankruptcy court further stated in the Order:

11 A declaration of [Ms. Bauer] that accompanies the late-
12 filed reply explains that she attempted to drive to
13 Sacramento in order to file the reply on August 11 but
14 a traffic mishap prevented her from reaching the court.
15 This does not excuse the lateness of the reply. Even
16 if [Ms. Bauer] had reached the court on August 11 and
17 filed her reply that day, it would have been filed
18 after its August 10 due date. Also, having failed to
19 file a timely reply, it is odd [Ms. Bauer] failed to
20 appear at the hearing to orally argue her reply. There
21 is no explanation for the failure to appear, either in
22 person or by telephone.

23 Order, at p. 2. Ms. Bauer does not argue that she was not aware
24 of the deadline to file her Reply. In fact, in her opening
25 brief, Ms. Bauer states that she "made every reasonable effort to
26 meet the bankruptcy court's filing deadline." Appellant's
27 Opening Brief, at p. 24.

28 In striking Ms. Bauer's Reply, the bankruptcy court applied
the legal standard set forth in its own Local Rule 9014-
1(f)(1)(iii). Its application of the local rule is neither
illogical, implausible nor without support in the factual record
before it. Based on the record before us, we conclude that the
bankruptcy court did not abuse its discretion in striking Ms.

1 Bauer's Reply, and we do not consider her Reply documents in this
2 appeal. See Kirschner, 842 F2d at 1077-78.

3 B. The Application Of § 362(k) Is Not In Question

4 Section 362(k) (1) provides:

5 Except as provided in paragraph 2, an individual
6 injured by any willful violation of a stay provided by
7 this section shall recover actual damages, including
8 costs and attorneys' fees, and, in appropriate
9 circumstances, may recover punitive damages.

8 Ms. Bauer questions the language used by the bankruptcy
9 court in characterizing the Credit Union's postpetition conduct
10 in its Tentative Ruling as "at the least, reckless and without
11 regard to the debtor's bankruptcy rights" and faults the
12 bankruptcy court for not making a finding that the Credit Union's
13 stay violations were "willful." See Appellant's Opening Brief,
14 at p. 18. However, the bankruptcy court's finding that the
15 Credit Union's postpetition violations of the automatic stay were
16 willful for § 362(k) purposes is implicit in the bankruptcy
17 court's award of punitive damages to Ms. Bauer. Accordingly, the
18 remaining issues in this appeal relate solely to the adequacy of
19 the remedy ordered by the bankruptcy court.

20 C. The Bankruptcy Court Did Not Clearly Err In Finding That Ms.
21 Bauer Had No Actual Damages

22 The bankruptcy court found that Ms. Bauer was not entitled
23 to an award of actual damages because the Credit Union returned
24 its postpetition withdrawals from Ms. Bauer's account(s). Ms.
25 Bauer appeals that fact finding, arguing that the bankruptcy
26 court disregarded evidence that the Credit Union charged, and Ms.
27 Bauer paid, finance charges of \$34.13 for the months of January
28 through April 2009, as to her Credit Union business loan.

1 In her Declaration supporting the Motion, Ms. Bauer states
2 that the Credit Union mailed her a "Late Notice" on her business
3 loan ("Business Loan") on February 24, 2009, assessing a \$30.00
4 postpetition late charge. In addition, she asserts that the
5 Credit Union applied dividend interest of \$.01 to her Business
6 Loan in February 2009. She further asserts that the Credit Union
7 sent her a number of "Late Notices" and assessed a series of
8 postpetition late charges on her Business Loan. She states that
9 her March statement for her Business Loan reflects postpetition
10 account withdrawals by the Credit Union of \$4.11 and \$30.00
11 respectively. Finally, she asserts that the Credit Union
12 withdrew \$.01 dividend interest from her account and applied it
13 to her Business Loan on April 11, 2009. The exhibits to Ms.
14 Bauer's Declaration in support of her Motion corroborate that a
15 number of "Late Notices" with late charges assessed were sent to
16 Ms. Bauer postpetition, but the account statements reflect a
17 total of only \$4.13 deducted postpetition from her account(s).⁸

18 In the Korth Declaration, Ms. Korth, as manager of the
19 Credit Union, confirmed that a total of \$4.13 was withdrawn from
20 Ms. Bauer's business checking account postpetition. However, she
21 further stated that the Credit Union had sent a check to Ms.
22 Bauer in the amount of \$4.13 on May 11, 2009, to refund the total
23 withdrawals. In addition, she stated:

24 [The Credit Union] did not assess a late fee of \$30.00
25 on [Ms. Bauer's] account. As noted on the transaction
26 history \$30.00 was not withdrawn from [Ms. Bauer's]

27 ⁸ To the extent Ms. Bauer argues from factual material
28 included in her stricken Reply documents, as stated above, we
have not considered any material from her Reply documents.

1 account nor was it assessed on [Ms. Bauer's] account.
2 The loan balance before the late fee note is \$5,888.27
3 and after the late fee note the balance is the same
4 \$5,888.27. A true and accurate copy of the transaction
5 history is attached hereto as Exhibit 1.

6 The attached Exhibit 1 transaction history does confirm that the
7 \$5,888.27 loan balance remained unchanged but is somewhat
8 confusing with references to a finance charge of \$34.11 and a
9 finance charge paid of \$34.12.

10 In her opening brief Ms. Bauer states that the Korth
11 Declaration, though declared "under penalty of perjury under the
12 laws of the State of California," is procedurally defective
13 "[i]nasmuch as the declaration was executed at Norfolk, Nebraska"
14 and "the declarant is not subject to California personal
15 jurisdiction, nor 'penalty of perjury'." Appellant's Opening
16 Brief, at p. 10. In her reply brief, Ms. Bauer expands that
17 assertion to an argument that the Korth Declaration is
18 "inadmissible." Appellant's Reply Brief, at pp. 4-5. Ms. Bauer
19 did not raise this issue before the bankruptcy court, even in her
20 stricken Reply. We will not consider it now. In re E.R. Fegert,
21 Inc., 887 F.2d at 957 ("The rule in this circuit is that
22 appellate courts will not consider arguments that are not
23 'properly raise[d]' in the trial courts.").

24 In the Tentative Ruling, the bankruptcy court found that the
25 Credit Union had "admitted to violations of the automatic stay by
26 sending post-petition notices and account statements, and
27 withdrawing funds from [Ms. Bauer's] account post-petition." The
28 bankruptcy court further found that the Credit Union had admitted
29 to postpetition withdrawals from Ms. Bauer's account totaling
30 \$4.13, but had returned the withdrawn funds back to Ms. Bauer.

1 Based on its review of the evidence, the bankruptcy court noted
2 that Ms. Bauer contended that the Credit Union had withdrawn a
3 further \$30 for late charges from one of her accounts but found
4 that the Credit Union had refuted that claim. Based on those
5 findings, the bankruptcy court determined that Ms. Bauer was not
6 entitled to actual damages.

7 As noted above, we review the bankruptcy court's fact
8 findings for clear error. United States Dist. Court v. Sandlin,
9 12 F.3d 861, 864 (9th Cir. 1993). "A finding is 'clearly
10 erroneous' when although there is evidence to support it, the
11 reviewing court on the entire evidence is left with the definite
12 and firm conviction that a mistake has been committed." United
13 States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1947). "Where
14 there are two permissible views of the evidence, the factfinder's
15 choice between them cannot be clearly erroneous." Anderson v.
16 City of Bessemer City, 470 U.S. 564, 574 (1984). Based on our
17 review of the record, the bankruptcy court's fact findings were
18 supported by evidence, in spite of some contradictory information
19 included in the Credit Union's "Late Notices" and account
20 statements. We do not have a "definite and firm conviction" that
21 the bankruptcy court erred in concluding that Ms. Bauer suffered
22 no actual damages from the Credit Union's postpetition activities
23 with respect to her accounts.

24 D. The Bankruptcy Court Did Not Err In Not Awarding Emotional
25 Distress Damages To Ms. Bauer

26 Ms. Bauer argues that the bankruptcy court erred in failing
27 to consider her request for emotional distress damages resulting
28 from the Credit Union's repeated violations of the automatic stay

1 and the discharge injunction. In its Order adopting the
2 Tentative Ruling, the bankruptcy court did not award Ms. Bauer
3 any emotional distress damages. However, we note that Ms. Bauer
4 did not request an award of emotional distress damages in the
5 Motion.

6 Both Ms. Bauer and the Credit Union cite Dawson v.
7 Washington Mut. Bank, F.A. (In re Dawson), 390 F.3d 1139 (9th
8 Cir. 2004), as the seminal authority in the Ninth Circuit on
9 emotional distress damages in this context. Ms. Bauer correctly
10 cites Dawson for the proposition that financial loss is not
11 required in order to claim emotional distress damages. Id. at
12 1149. However, in Dawson, the Ninth Circuit goes on to make
13 clear that not every willful violation of the automatic stay
14 “merits compensation for emotional distress.” Id. The Ninth
15 Circuit placed the burden of proof on the claimant to establish
16 “the individual suffered significant emotional harm” and the
17 “nexus between the claimed damages and the violation of the
18 stay.” Id. at 1149-50. In other words, “[t]he individual must
19 be ‘injured by’ the violation to be eligible to claim actual
20 damages.” Id. at 1150. See, e.g., Bishop v. U.S. Bank/Firststar
21 Bank, N.A. (In re Bishop), 296 B.R. 890, 895-97 (Bankr. S.D. Ga.
22 2003) (the causal connection between the stay violator’s acts and
23 the claimant’s emotional distress must be clearly established or
24 readily apparent).

25 In Dawson, the Ninth Circuit further discussed in elaborate
26 detail how a claimant could establish emotional distress damages,
27 as follows:

28 Corroborating medical evidence may be offered.

1 ...
2 Non-experts, such as family members, friends, or
3 coworkers, may testify to manifestations of mental
4 anguish and clearly establish that significant
5 emotional harm occurred.

6 ...
7 In some cases significant emotional distress may be
8 readily apparent even without corroborative evidence.
9 For example, the violator may have engaged in egregious
10 conduct. See, e.g., Wagner v. Ivory (In re Wagner), 74
11 B.R. 898, 905 (Bankr. E.D. Pa. 1987) (awarding
12 emotional distress damages, based on the debtor's
13 testimony, when a creditor entered the debtor's home at
14 night, doused the lights, and pretended to hold a gun
15 to the debtor's head). Or, even if the violation of
16 the automatic stay was not egregious, the circumstances
17 may make it obvious that a reasonable person would
18 suffer significant emotional harm. See, e.g., United
19 States v. Flynn (In re Flynn), 185 B.R. 89, 93 (S.D.
20 Ga. 1995) (affirming \$5,000 award of emotional distress
21 damages, with no mention of corroborating testimony,
22 because "it is clear that appellee suffered emotional
23 harm" when she was forced to cancel her son's birthday
24 party because her checking account had been frozen,
25 even though the stay violation was brief and not
26 egregious).

27 Id. at 1149-50.

28 We consider the evidentiary record in this appeal in light
of the foregoing standards from Dawson. First, Ms. Bauer did not
present any corroborating medical evidence in support of the
Motion. Ms. Bauer did request that the bankruptcy court take
judicial notice of an article that Ms. Bauer apparently retrieved
from the internet, "About.com Arthritis--10 Things You Should
Know About Fibromyalgia From Early Symptoms to Disease
Management," but the subject article relates generally to
fibromyalgia and does not have any specific connection either to
Ms. Bauer's condition in particular or how the actions of the
Credit Union challenged in the Motion may have affected Ms.
Bauer's condition.

Second, Ms. Bauer did not submit any declarations of family

1 members, friends or coworkers to establish any significant
2 emotional harm that may have resulted to Ms. Bauer from the
3 Credit Union's acts in violating the automatic stay or the
4 discharge injunction.

5 Third, in her declaration in support of the Motion, Ms.
6 Bauer made the following statements:

7 Because of [the Credit Union's] unauthorized
8 withdrawals from my checking account, I no longer have
9 an account wherefrom I can purchase postage online,
10 resulting in an increased cost to me at the post
11 office, nor wherefrom I can pay my PACER account such
12 that I am now unduly hindered in my ability to track
13 the docket herein as well as in my adversary
14 proceedings in the Northern District, adversary numbers
15 97-4443 and 09-04022. My limited access is
16 particularly distressing because I do not receive paper
17 filings from any defendants located in the Northern
18 District, and more often than not, do not receive
19 copies of that court's orders.

20 The additional stress of being constantly in fear
21 that I am unwittingly missing deadlines is resulting in
22 an even more emergent need to monitor dockets, and is
23 being reflected in the quality of my work, as well as
24 resulting in the need to research procedure over and
25 over again in order to determine what corrective steps
26 I need to take, beyond what is the ordinary level of
27 activity a pro se litigant would be required to do in a
28 typical Chapter 7 proceeding.

29 ...
30 It is unspeakably humiliating and extremely
31 embarrassing to bring a motion involving such nominal
32 sums to this Court's attention. I am especially
33 fearful, having first hand knowledge of [the Credit
34 Union's] organizational climate that the bringing of
35 this motion will result in even broader broadcast and
36 publication of otherwise personal and private facts, to
37 wit, its infliction of even more shame, humiliation,
38 and duress.

39 ...
40 Not only has [the Credit Union] exploited my financial
41 vulnerability in violation of the stay, it has
42 exploited my physical and emotional vulnerabilities,
43 resulting in extreme emotional distress.

44 ...
45 Prior to my filing my petition for relief, I was
46 able to work and still medically manage my condition.
47 Now, however, in addition to debilitating extreme pain,
48 I am experiencing increased short-term memory deficit
accompanied by difficulty in concentrating which

1 further impedes my ability to keep up with the press of
2 litigation matters, thereby increasing my stress to the
3 point that yesterday, I could not even remember my
4 parents' address.

5 Frankly, it is difficult to know what to make of this
6 evidence in context. On the one hand, Ms. Bauer declares that
7 the actions of the Credit Union in violation of the automatic
8 stay have subjected her to "extreme emotional distress," and she
9 has experienced "debilitating extreme pain" from an unspecified
10 medical condition(s) that may or may not have arisen as a result
11 of the Credit Union's acts in violation of the automatic stay.
12 On the other hand, she did not request an award of emotional
13 distress damages in her prayer for relief in the Motion or in her
14 supporting memorandum of law. In fact, she never quantified a
15 request for emotional distress damages in any pleading she filed
16 with the bankruptcy court. The bankruptcy court posted a
17 Tentative Ruling in advance of the Final Hearing that did not
18 include an award of emotional distress damages to Ms. Bauer, but
19 Ms. Bauer never filed a response to the Tentative Ruling.
20 Ultimately, she did not appear in person at the Final Hearing to
21 present her case, and she did not avail herself of the
22 opportunity to appear at the Final Hearing by telephone.⁹

23 ⁹ Ms. Bauer asserts that she was precluded from appearing
24 at the Final Hearing by telephone because the bankruptcy court's
25 "Telephonic Court Appearance" rules required that telephone
26 appearances be reserved 24 hours in advance. In light of her
27 difficulties experienced driving to the bankruptcy court in her
28 attempt to file her Reply and the multiple physical difficulties
to which she was subject, as described to us in her opening brief
(see Appellant's Opening Brief, at p. 8), it is difficult to
(continued...)

1 Ms. Bauer has appeared pro se before the bankruptcy court in
2 her bankruptcy case, and she stated in her declaration in support
3 of the Motion that she did not consider herself to be proficient
4 in bankruptcy law and did not "practice routinely in this area."
5 On the other hand, she did not appear at the Final Hearing on her
6 Motion. Further, she did not file any response to the bankruptcy
7 court's Tentative Ruling. On the record presented to us in this
8 appeal, we do not conclude that the bankruptcy court erred in not
9 awarding emotional distress damages to Ms. Bauer.

10 E. The Bankruptcy Court Did Not Err In Not Awarding Attorney's
11 Fees or Damages For "Diversion Of Energies" To Ms. Bauer

12 In the Tentative Ruling incorporated in its Order, the
13 bankruptcy court did not grant Ms. Bauer an award of attorney's
14 fees because she proceeded on the Motion pro se, citing Elwood v.
15 Drescher, 456 F.3d 943, 947-48 (9th Cir. 2006), and Kay v.
16 Ehrler, 499 U.S. 432 (1991). Ms. Bauer does not challenge that
17 determination directly, but rather argues that she should have
18 been awarded commensurate damages based on the diversion of her
19 energies required to prepare, file and prosecute the Motion.

20 Her argument essentially is that small business or
21 proprietorship owners, such as Ms. Bauer with her solo law
22 practice, should be compensated for their efforts to combat
23 violations of the automatic stay and the discharge injunction
24 through treatment of the time diverted from their normal business
25 endeavors as actual damages. The only case authority she cites

26
27 ⁹(...continued)
28 understand why Ms. Bauer did not reserve at least the option of
appearing at the Final Hearing by telephone 24 hours in advance.

1 in support of this argument is In re Hellen, 329 B.R. 678 (Bankr.
2 N.D. Ill. 2005), which stands for the proposition that exemption
3 statutes should be interpreted liberally in favor of debtors, but
4 otherwise does not have any bearing on the appropriate measure of
5 actual damages in cases involving willful violations of the
6 automatic stay.

7 Ms. Bauer did not articulate her "diversion of energies"
8 argument to the bankruptcy court either in her Motion or in her
9 supporting Memorandum of Law. Her argument is based on a portion
10 of a single paragraph in her Declaration in support of the Motion
11 which states:

12 31. My usual hourly rate is \$350.00 per hour in state
13 court matters, \$250.00 per hour in federal court. As a
14 result of the aggravation of my medical status as set
15 forth herein, I have spent an ordinarily-unjustifiable
16 47 hours in preparing this motion which is time
17 diverted from income producing activity. I will incur
18 costs to prepare and serve my reply pleadings....

19 The individual debtor bears the burden of proof to establish
20 her entitlement to actual damages under § 362(k) for willful
21 violations of the automatic stay. See, e.g., Dawson, 390 F.3d at
22 1149; Goichman v. Bloom (In re Bloom), 875 F.2d 224, 227-28 (9th
23 Cir. 1989). In the Tentative Ruling, the bankruptcy court did
24 not limit its determinations to concluding that Ms. Bauer, as a
25 pro se litigant, was not entitled to an award of attorney's fees.
26 The bankruptcy court went on to find that:

27 [E]ven if [Ms. Bauer] would have been entitled to
28 attorney's fees, she would have been entitled only to
reasonable fees. Spending 47 hours in the preparation
of the instant motion is hardly reasonable. If [Ms.
Bauer] had retained a bankruptcy attorney, that
attorney would have likely spent one-tenth of the 47
hours claimed by [Ms. Bauer]. And, that attorney would
have charged the same or a lesser hourly rate than the
debtor typically charges. In her declaration, she

1 states that her hourly rate in state court matters is
2 \$350 and in federal court is \$250....

3 The court also notes that it has no evidence of [Ms.
4 Bauer's] time sheets. All the court has is a statement
5 by [Ms. Bauer] that she "spent an ordinarily-
6 unjustifiable 47 hours in preparing this
7 motion."...Therefore, even if [Ms. Bauer] would have
8 been entitled to attorney's fees and she had spent less
9 than 47 hours in preparing the motion, the court still
10 does not have sufficient evidence to determine the
11 reasonableness of [Ms. Bauer's] attorney's fees.

12 Tentative Ruling, at p. 2.

13 In other words, even if the bankruptcy court had not
14 determined as a matter of law that as a pro se litigant, Ms.
15 Bauer was not entitled to an award of attorney's fees, the
16 bankruptcy court found as a matter of fact that Ms. Bauer did not
17 meet her evidentiary burden of proof to establish her entitlement
18 to an award of actual damages for the diversion of her time from
19 her professional work as a solo attorney. Without an itemization
20 in the record to evaluate the reasonableness of the time spent by
21 Ms. Bauer in preparing and prosecuting her Motion, we do not have
22 a clear and definite impression from the record in this appeal
23 that the bankruptcy court erred in that fact finding. See also
24 Sternberg v. Johnston, 595 F.3d 937 (9th Cir. 2010).

25 F. The Bankruptcy Court Did Not Abuse Its Discretion In
26 Awarding Ms. Bauer Punitive Damages Of \$500

27 As noted above, the amounts of sanctions awarded for willful
28 violations of the automatic stay are reviewed for abuse of
29 discretion. Eskanos & Adler, P.C. v. Leetien, 309 F.3d at 1213.
30 Factors to be considered in determining whether and in what
31 amount to award punitive damages are: "(1) the nature of the
32 defendants' acts; (2) the amount of compensatory damages awarded;

1 and (3) the wealth of the defendants.” Prof’l Seminar
2 Consultants, Inc. v. Sino Am. Tech. Exch. Council, Inc., 727 F.2d
3 1470, 1473 (9th Cir. 1984).

4 In this case, the Credit Union argued that the bankruptcy
5 court should not award any punitive damages at all to Ms. Bauer
6 because the funds withdrawn postpetition from Ms. Bauer’s
7 account(s) were nominal, and the Credit Union was a small
8 financial entity with only approximately 2,700 members and
9 handled an average of only three bankruptcies annually.

10 The bankruptcy court rejected those arguments, based upon
11 the repeated late notices sent to Ms. Bauer postpetition and the
12 evidence that the Credit Union continued violating the stay in
13 spite of clear evidence that it had notice of Ms. Bauer’s
14 bankruptcy.

15 [The Credit Union] sent approximately seven late
16 notices to [Ms. Bauer] post-petition, as late as April
17 2009. It also sent account statements to [Ms. Bauer]
18 for both January and February 2009. Moreover, the late
19 notices were sent to [Ms. Bauer] even after [Ms. Bauer]
20 filed a motion to avoid [the Credit Union’s] lien on
21 her vehicle and after [the Credit Union] responded to
22 that motion....Also, the facts in the record suggest
23 that [the Credit Union] did not investigate [Ms.
24 Bauer’s] allegations of stay violations until after she
25 filed the instant motion. This motion was filed on
26 April 24, but [the Credit Union] did not return the
27 funds withdrawn from [Ms. Bauer’s] account until May
28 11. [The Credit Union’s] actions were, at the least,
reckless and without regard to [Ms. Bauer’s] bankruptcy
rights.

24 Tentative Ruling, at p. 2.

25 As we concluded previously, the bankruptcy court effectively
26 found that the Credit Union had violated the automatic stay
27 willfully in Ms. Bauer’s bankruptcy case and determined under
28 those circumstances that an award of punitive damages was

1 appropriate to discourage such conduct in the future.

2 However, in deciding the amount of punitive damages, the
3 bankruptcy court considered the nominal amount of postpetition
4 withdrawals from Ms. Bauer's Credit Union account(s), the fact
5 that the Credit Union had returned the withdrawn funds, and the
6 fact that the Credit Union was a relatively small financial
7 institution with only approximately 2,700 members in determining
8 that a \$500 award was appropriate. We conclude that the
9 bankruptcy court applied the correct legal standards from Prof'l
10 Seminar Consultants in awarding punitive damages in favor of Ms.
11 Bauer in this case.

12 Ms. Bauer argues, however, that the bankruptcy court's \$500
13 punitive damages award is too small to serve adequately the
14 deterrent function of punitive damages. See, e.g., Exxon
15 Shipping Co. v. Baker, 128 S. Ct. 2605, 2621 (2008) ("Regardless
16 of the alternative rationales over the years, the consensus today
17 is that punitives are aimed not at compensation but principally
18 at retribution and deterring harmful conduct.").

19 However, as with her claim for emotional distress damages,
20 Ms. Bauer did not quantify her request for punitive damages in
21 her Motion or supporting papers. When the bankruptcy court
22 posted its Tentative Ruling concluding that punitive damages of
23 \$500 were appropriate under the circumstances, Ms. Bauer did not
24 respond. Finally, as noted previously, Ms. Bauer did not appear
25 at the Final Hearing, either in person or by telephone, to
26 contest the adequacy or appropriateness of the bankruptcy court's
27 proposed punitive damages award.

28 Based on the record in this appeal, we do not conclude that

1 the bankruptcy court's determination of punitive damages was
2 illogical, implausible or without support in the evidentiary
3 record before it. Accordingly, we conclude that the bankruptcy
4 court did not abuse its discretion in awarding punitive damages
5 of \$500 to Ms. Bauer in this case.

6 CONCLUSION

7 Based on our review of the record in this appeal in light of
8 the issues raised by Ms. Bauer, we AFFIRM.