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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

6	In re:	)	BAP No.	NC-07-1324-JuMkK
		)		
7	STEVE BELL,	)	Bk. No.	05-34212
		)		
8	Debtor.	)		
		)		
9	STEVE BELL,	)		
		)		
10	Appellant,	)		
		)		
11	v.	)	<b>MEMORANDUM<sup>1</sup></b>	
		)		
12	CLINICAL LABORATORIES OF	)		
		)		
13	HAWAII, LLP,	)		
		)		
14	Appellee.	)		
		)		

Argued and Submitted on January 24, 2008  
at San Francisco, California

Filed - February 11, 2008

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

Honorable Thomas E. Carlson, Bankruptcy Judge, Presiding

Before: JURY, MARKELL and KLEIN, Bankruptcy Judges.

<sup>1</sup> 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.

1 **I. INTRODUCTION**

2 Chapter 13<sup>2</sup> debtor filed a § 362(h) motion seeking damages  
3 from Clinical Laboratories of Hawaii, LLP ("CLH") for its stay  
4 violations. The bankruptcy court denied debtor's request for  
5 damages, including his attorney's fees. Debtor timely appealed  
6 only the denial of his attorney's fees.

7 For the reasons set forth below, we vacate the portion of  
8 the order denying debtor his attorney's fees and remand for a  
9 determination of the amount of debtor's actual damages under  
10 § 362(h).

11 **II. FACTS**

12 On October 12, 2005, debtor filed a voluntary chapter 13  
13 bankruptcy petition. Debtor listed CLH as an unsecured creditor  
14 in his schedules. CLH received notice of debtor's bankruptcy  
15 case, but continued to send debtor collection notices (the  
16 "notices") for prepetition debt after his filing. Debtor  
17 received over seventeen notices from CLH starting on January 10,  
18 2006 and continuing to March 12, 2007.<sup>3</sup>

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20 <sup>2</sup> Unless otherwise indicated, all chapter, section and rule  
21 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and  
22 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037, as  
23 enacted and promulgated prior to the effective date of The  
24 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,  
Pub. L. 109-8, 119 Stat. 23, because the case from which this  
appeal arises was filed before its effective date (generally  
October 17, 2005).

25 <sup>3</sup> CLH turned the account over to a collection agency, NCO  
26 Financial Systems, Inc. ("NCO"), which also sent debtor a  
27 collection notice dated March 12, 2007. NCO subsequently phoned  
28 the debtor in an effort to collect the debt. NCO also reported  
negative information about the CLH account to the major credit  
reporting agencies. Debtor subsequently entered into a

(continued...)

1 Debtor paid off his plan early and received his discharge on  
2 March 13, 2007. His case was closed on May 24, 2007.

3 **A. Debtor's Motion for Damages for Violation of Stay**

4 On May 25, 2007, debtor filed a Motion for Damages for  
5 Violation of Stay (the "Motion") seeking damages from CLH for its  
6 stay violations.<sup>4</sup> Debtor sought \$500 for each postpetition  
7 statement or collection notice sent by CLH, \$2,000 for additional  
8 travel expenses and \$4,200 for his attorney's fees.<sup>5</sup>

9 Concerning his additional travel expenses, debtor alleged  
10 that as a direct result of a low credit score and recent  
11 collection referral by CLH to credit reporting firms, he was  
12 unable to rent an apartment near San Jose which was close to his  
13 business activities. As a result of living further away, debtor  
14 maintained he incurred additional travel expenses driving to San  
15 Jose three times a week. He contends these expenses would not  
16 have occurred "but for" CLH's postpetition collection actions.

17 Debtor also requested an order requiring CLH to delete from  
18 his credit reports any negative information it gave to the  
19 reporting agencies after he filed his petition.

20 On July 3, 2007, after a duly-noticed hearing, the  
21 bankruptcy court found CLH had violated the stay and set a trial  
22 date regarding debtor's damages.

23  
24 <sup>3</sup>(...continued)  
25 confidential settlement with NCO which was not disclosed during  
the trial on damages.

26 <sup>4</sup> Because debtor filed his Motion one day after his case  
27 closed, he was forced to file a motion to reopen his case. The  
court granted debtor's motion to reopen on June 18, 2007.

28 <sup>5</sup> Debtor's attorney did not provide time records in support  
of her request.

1 **B. The Trial on Damages**

2 Only the debtor testified at trial. He stated that he had  
3 discussions with his counsel in late 2005 or early 2006 regarding  
4 the notices from CLH and was told to "send the bills back, write  
5 on them and, you know, collect the invoices." Debtor claimed he  
6 returned some of the correspondence to CLH with a handwritten  
7 notation "Please don't send any more bills. This was part of my  
8 Chapter 13 bankruptcy case." Debtor testified that he included  
9 his bankruptcy case number, phone number and name on the bills he  
10 sent back to CLH and that he thought CLH would eventually stop  
11 sending him bills. Debtor also testified that he started  
12 throwing some of the bills away since they came so often.

13 Debtor stated that his credit rating prior to his filing was  
14 "very good" for close to thirty years, around the 800 level.  
15 When debtor last checked his credit rating it was 655 or 660.

16 Debtor also testified about his difficulties in renting an  
17 apartment close to his business activities. After being turned  
18 down numerous times, debtor eventually ended up in Berkeley with  
19 a friend who allowed him to stay in his living room for free  
20 while debtor trained him in the trading business. When the  
21 friend's roommate was transferred, debtor was able to assume the  
22 sublease after explaining his bankruptcy to the landlord. Debtor  
23 testified that later he was able to rent an apartment closer to  
24 work after showing the manager the Motion involved in this appeal  
25 to prove that the debt to CLH on his credit report was not  
26 legitimate.

27 At the trial, the court made findings pursuant to Rule  
28 56(c). The trial judge found debtor's testimony regarding his

1 difficulties in renting an apartment "too general." The court  
2 noted that debtor was looking for a job and had filed bankruptcy;  
3 it was more likely that these factors contributed to his  
4 difficulties in renting an apartment. The court then expressed  
5 its views regarding the lack of evidence regarding debtor's  
6 damages that occurred as a result of his receiving the notices  
7 and implied that it would award no damages due to this lack of  
8 evidence.<sup>6</sup> The court took under submission the question of  
9 whether debtor should be awarded his attorney's fees.

10 On August 20, 2007, the court filed its findings of fact and  
11 conclusions of law denying debtor his attorney's fees as damages  
12 under § 362(h). Relying upon In re Risner, 317 B.R. 830 (Bankr.  
13 D. Idaho 2004), the court found the fees unreasonable:

14 Given how long the stay violation had been occurring,  
15 the absence of any exigency or egregious conduct, and  
16 that debtor's counsel could not file the stay-violation  
17 motion without reopening the bankruptcy case, counsel  
18 should have sought an informal resolution before filing  
19 a formal motion. Specifically, counsel should have  
20 written a letter to the creditors, notifying them of  
21 their stay violation and providing the facts needed to  
22 link the debt with debtor's bankruptcy...The filing of  
23 the motion created debtor's only provable damage, and  
24 may never have been needed.

25 Debtor timely appeals from the order incorporating these  
26 findings and conclusions.

### 27 **III. JURISDICTION**

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

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<sup>6</sup> Debtor does not dispute those findings in this appeal.

1 **IV. ISSUE**

2 Whether the court abused its discretion by denying debtor's  
3 request for his attorney's fees, as actual damages, pursuant to  
4 § 362(h).

5 **V. STANDARDS OF REVIEW**

6 We review the court's assessment of damages under § 362(h)  
7 for an abuse of discretion. Eskanos & Adler, P.C. v. Roman (In  
8 re Roman), 283 B.R. 1, 7 (9th Cir. BAP 2002). A bankruptcy court  
9 necessarily abuses its discretion if it bases its decision on an  
10 erroneous view of the law or clearly erroneous factual findings.  
11 Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990). Under  
12 the abuse of discretion standard, we must have a definite and  
13 firm conviction that the bankruptcy court committed a clear error  
14 of judgment in the conclusion it reached before reversal is  
15 proper. AT&T Universal Card Serv. v. Black (In re Black), 222  
16 B.R. 896, 899 (9th Cir. BAP 1998) (citations and quotation marks  
17 omitted).

18 **VI. DISCUSSION**

19 The record in this appeal demonstrates that CLH had violated  
20 the automatic stay on numerous occasions, even though it had been  
21 listed in debtor's schedules and had notice of debtor's  
22 bankruptcy. Besides sending the notices to debtor in an attempt  
23 to collect a prepetition debt, CLH turned over debtor's account  
24 to NCO who reported the account to the major credit reporting  
25 agencies postpetition with negative information. Accordingly,  
26 the court found CLH had willfully violated the automatic stay.

27 Once the court finds that a willful stay violation has  
28 occurred, damages, including attorneys' fees, are nominally

1 mandatory under § 362(h). See 11 U.S.C. § 362(h);<sup>7</sup> Roman, 283  
2 B.R. at 11 citing Stainton v. Lee (In re Stainton), 139 B.R. 232,  
3 235 (9th Cir. BAP 1992) (noting that the "plain language of the  
4 statute requires that the injured party be awarded the entire  
5 amount of actual damages reasonably incurred as a result of a  
6 violation of the stay.") (emphasis in original). The court may  
7 award attorneys' fees and costs as actual damages in the absence  
8 of other damages. Roman, 283 B.R. at 10 n. 10. We have noted,  
9 however, that more scrutiny is warranted where "the debtor's only  
10 injuries are those incurred in litigating the motion for  
11 sanctions, and where there exist no circumstances warranting  
12 punitive damages." Id.

13 Although the bankruptcy court found that debtor's Motion was  
14 likely unnecessary because he did not mitigate his damages by  
15 sending a letter to CLH prior to his Motion, filed May 25, 2007,  
16 this finding is undermined by the court's order entered August  
17 21, 2007 that included (1) a provision ordering CLH to take all  
18 necessary action to correct the information regarding the  
19 prepetition debt that it or its agent, NCO, provided postpetition  
20 to credit agencies and (2) a second provision that left open the  
21 option for the court to enter a further order to determine  
22 whether CLH is liable for damages in the event it did not comply.

23 The record further shows that CLH did not immediately  
24 rectify the inaccuracies in debtor's credit reports once debtor  
25 filed his Motion on May 25, 2007. At the trial, the court noted  
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27 <sup>7</sup> Under the Bankruptcy Abuse Prevention and Consumer  
28 Protection Act of 2005 the subsection that addresses damages for  
a willful stay violation is now (k).

1 that the failure to correct the credit reports was a "temporally-  
2 separate" violation that had to be taken care of. The court's  
3 order, entered on August 21, 2007, gave CLH until September 14,  
4 2007 to correct the debtor's credit reports. On September 17,  
5 2007, CLH filed a Statement of Compliance with the court, showing  
6 that it did not send letters to the credit reporting agencies to  
7 correct the negative information until September 10, 2007, twenty  
8 days after the court order and almost four months after debtor  
9 filed his Motion.

10 While the court found that the negative information on  
11 debtor's credit reports did not have the necessary causal nexus  
12 to his inability to rent an apartment close to his work, it was  
13 necessary for debtor to have his credit reports corrected to  
14 prevent any prospective harm. Apparently the only way to get CLH  
15 to correct his credit reports was to obtain a court order  
16 requiring CLH to do so. Debtor's Motion was therefore necessary;  
17 a simple letter to CLH would not have afforded him this relief,  
18 since CLH acted only after the court issued its order.

19 Accordingly, we find that debtor did incur attorney's fees  
20 as actual damages as a result of CLH's willful stay violations  
21 that included its agent, NCO, making negative postpetition  
22 reports regarding CLH's debt to the credit agencies. Those  
23 damages are directly related to his judicial remedy. See Roman,  
24 283 B.R. at 7-8 (noting that "[a]n award of damages under  
25 § 362(h) requires a showing by the debtor that [he] sustained an  
26 injury from a 'willful' violation of the stay.")

27 We recognize the bankruptcy court noted that debtor's  
28 damages, if any, should be offset by his settlement with NCO, the



1 amount of which was confidential and not disclosed during the  
2 trial on damages. However, the record demonstrates that debtor  
3 continued to incur attorney's fees after his settlement with NCO  
4 due to CLH's failure to correct his credit reports even though  
5 the court found CLH had willfully violated the stay in July 2007.  
6 Therefore, at minimum, debtor is entitled to his attorney's fees  
7 from the time of the settlement until the time CLH corrected  
8 debtor's credit reports.

9 In sum, we find on this record the bankruptcy court abused  
10 its discretion in finding that debtor did not suffer any actual  
11 damage due to CLH's willful violation of the stay.

#### 12 **VII. CONCLUSION**

13 For the reasons set forth above, we vacate the portion of  
14 the order denying debtor his attorney's fees and remand for a  
15 determination of the amount of debtor's actual damages under  
16 § 362(h).

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