

**MAR 30 2007**

**HAROLD S. MARENUS, CLERK  
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**NOT FOR PUBLICATION**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.	NV-06-1154-SBN
7	CARLOS GONZALEZ,	)	Bk. No.	05-28304
8	Debtor.	)	Ref. No.	06-13
9	_____	)		
10	CARLOS GONZALEZ,	)		
11	Appellant,	)		
12	v.	)	<b>MEMORANDUM</b> <sup>1</sup>	
13	JOHN GERVAIS,	)		
14	Appellee.	)		
	_____	)		

Argued and Submitted on January 17, 2007  
at Pasadena, California

Filed - March 30, 2007

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

Hon. Linda B. Riegler, Bankruptcy Judge, Presiding

Before: SMITH, BRANDT and NAUGLE,<sup>2</sup> 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.

<sup>2</sup> Hon. David N. Naugle, United States Bankruptcy Judge for the Central District of California, sitting by designation.

1 After determining that debtor's landlord had willfully  
2 violated the automatic stay, the bankruptcy court awarded  
3 attorney fees of \$250 pursuant to § 362(k)(1)<sup>3</sup> but offset the  
4 entire award against unpaid rent. A timely notice of appeal was  
5 filed on April 14, 2006. We REVERSE and REMAND.

## 6 I. FACTS

### 7 A. The Eviction

8 On August 30, 2005, Carlos Gonzalez ("Debtor") entered into  
9 a one-year rental agreement with John Gervais ("Gervais") in  
10 which he agreed to rent a single family home at 9707 Kampsville  
11 Avenue, Las Vegas, Nevada ("residence") for \$1,450 per month. On  
12 December 21, 2005, Gervais initiated eviction proceedings due to  
13 Debtor's failure to make the rent payments. Less than two weeks  
14 later, on December 30, 2005, Debtor filed for chapter 13 relief.  
15 The state court issued an eviction order on January 3, 2006.

16 Debtor's attorney, Christopher Burke ("Burke"), faxed a copy  
17 of the notice of e-filing page and the proposed chapter 13 plan  
18 to the Justice Court of Las Vegas Township and the Constable of

---

19 <sup>3</sup> Unless otherwise indicated, all chapter, section and rule  
20 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
21 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as  
22 enacted and promulgated pursuant to The Bankruptcy Abuse  
Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub.  
L. 109-8, Apr. 20, 2005, 119 Stat. 23.

23 Code § 362(k)(1) is, in pertinent part, essentially the same  
24 as § 362(h), its predecessor under pre-BAPCPA. Consequently, the  
25 judicial decisions and commentary which discuss § 362(h) remain  
26 viable and relevant as guides for determining liability for  
27 damages for willful violations of the automatic stay under  
28 § 362(k)(1). See Midlantic Nat'l Bank v. N.J. Dept. of Env'tl.  
Prot., 474 U.S. 494, 501 (1986) ("The normal rule of statutory  
construction is that if Congress intends for legislation to  
change the interpretation of a judicially created concept, it  
makes the intent specific.").

1 Las Vegas Township office on January 4, 2006. The recipients of  
2 the fax were informed that as Debtor did not have a fax number  
3 for Gervais, Gervais would not receive notice of the bankruptcy  
4 for a few days since it was sent by mail.

5 On January 5, 2006, a sheriff from the Constable's office  
6 arrived at the residence and advised Debtor that he and his  
7 family had ten minutes to gather some belongings and vacate the  
8 premises. Debtor informed the sheriff that he had filed for  
9 bankruptcy and that a copy of his petition had been faxed to the  
10 Constable's office and Justice Court the day before.<sup>4</sup> The  
11 sheriff contacted the Constable's office, but was advised that no  
12 notice of the bankruptcy had been received and he should proceed  
13 with the eviction. Consequently, Debtor and his family were  
14 forced to leave and the residence was locked up.

15 Upon learning of the eviction, Burke's office immediately  
16 called Gervais and advised him that the eviction had occurred in  
17 violation of the automatic stay and that steps had been taken to  
18 notify him of the bankruptcy. Nevertheless, believing that he  
19 had legal possession, Gervais refused to allow Debtor back into  
20 the residence. The Constable's office and the Nevada Legal  
21 Services had both advised Gervais that he need not do anything  
22 until instructed by court order to reverse the eviction.

23 The next day, Burke left a message for Gervais regarding  
24 Debtor's bankruptcy, but Gervais failed to return the call.

25 A few days following the eviction, Gervais drove by the  
26 residence to inspect it. During the visit he discovered that the

27 \_\_\_\_\_  
28 <sup>4</sup> At the time of eviction, Debtor had not obtained a copy of  
his petition from Burke.

1 premises had been broken into and that there was a meal cooking  
2 in the kitchen. Assuming this was Debtor's handiwork and based  
3 on the advice of local police, on January 10, 2006, Gervais moved  
4 Debtor's belongings to a storage unit to reduce the motivation  
5 for further break-ins.

6 B. The Bankruptcy Case

7 On January 6, 2006, Debtor filed a "Motion for Violation of  
8 Automatic Stay and Allowing Debtor Back Into His Home" (the "stay  
9 motion"). Debtor complained Gervais had continued with the  
10 eviction process after being notified of the bankruptcy filing by  
11 both him and Burke's office. As a result, he contended Gervais  
12 had willfully violated the automatic stay imposed by § 362(a)(6),  
13 and, pursuant to § 362(h)<sup>5</sup>, was liable for sanctions, Debtor's  
14 attorney fees, and Debtor's actual expenses suffered on account  
15 of the eviction.

16 In opposing the stay motion, Gervais maintained that he had  
17 not received notice of the bankruptcy by Burke's office until  
18 after the eviction process had been completed. By that time, he  
19 believed he had legal possession of the residence. Based on this  
20 assumption, Gervais thought that only a court order reversing the  
21 eviction could require him to allow Debtor access to the  
22 residence. Therefore, he felt he had complied with the law and  
23 had acted only to protect his interest in the residence.

24 The motion was heard on January 12, 2006. In its oral  
25 ruling, the bankruptcy court found that Gervais's post-petition

---

26 <sup>5</sup> Debtor's bankruptcy was filed post-BAPCPA; however, the  
27 authority Debtor cites to support the bankruptcy court awarding  
28 sanctions, attorney fees, and actual damages is pre-BAPCPA.  
Under BAPCPA, § 362(h) was amended and is now § 362(k)(1). See  
supra note 3.

1 eviction order was void as a matter of law, having been entered  
2 in violation of the automatic stay. Further, the court found  
3 that neither exception to the stay under § 362(b) (22) or  
4 § 362(b) (23)<sup>6</sup> applied, and thus, Debtor was entitled to  
5 possession of the residence. The court thereupon ordered Gervais  
6 to restore possession of the residence to Debtor within 24 hours  
7 and to return Debtor's personal property. It also ordered Debtor  
8 to make the January 2006 rent payment in the amount of \$1,300<sup>7</sup> by  
9 January 15th and to timely pay the February 2006 rent payment.

10 \_\_\_\_\_  
11 <sup>6</sup> Sections 362(b) (22) and (b) (23) state

12 (b) The filing of a petition under section 301 . . . of  
13 this title . . . does not operate as a stay-

14 . . . .

15 (22) subject to subsection (1), under subsection  
16 (a) (3), of the continuation of any eviction . . . by a  
17 lessor against a debtor involving residential property  
18 in which the debtor resides as a tenant under a lease  
19 or rental agreement and with respect to which the  
20 lessor has obtained before the date of the filing of  
21 the bankruptcy petition, a judgment for possession of  
22 such property against the debtor;

23 (23) subject to subsection (m), under subsection  
24 (a) (3), of an eviction that seeks possession of the  
25 residential property in which the debtor resides as a  
26 tenant under a lease or rental agreement based on  
27 endangerment of such property or the illegal use of  
28 controlled substances on such property, but only if the  
lessor files with the court, and serves upon the  
debtor, a certification under penalty of perjury that  
such an eviction action has been filed, or that the  
debtor, during the 30-day period preceding the date of  
the filing of the certification, has endangered  
property or illegally used or allowed to be used a  
controlled substance on the property[.]

<sup>7</sup> The normal monthly rental amount was \$1,450; however, the  
court reduced the January rental amount to \$1,300 to compensate  
Debtor for the damages he suffered during the eviction.

1 As for damages, the court set an evidentiary hearing forty-five  
2 days out to allow Debtor time to cure the outstanding rent and  
3 prove up the damage amount.

4 On February 16, 2006, Debtor filed a motion which detailed  
5 the damages sought for Gervais's stay violation (the "damages  
6 motion"). The damages motion requested \$1,616.70 in attorney  
7 fees and \$1,000 in punitive damages and was supported by an  
8 affidavit filed by Burke which provided a time record of his  
9 services.

10 Following an evidentiary hearing on the matter, on February  
11 22, 2006, the court awarded attorney fees in the amount of \$250  
12 to Burke. However, the court reserved the right to setoff the  
13 fee award based upon the outcome of Gervais' relief from stay  
14 hearing that was to be held on March 13, 2006.

15 At the relief from stay hearing, Gervais provided evidence  
16 that Debtor had failed to pay any of the outstanding rent,  
17 including the three months that had become due post-petition. As  
18 a result, the court lifted the stay and entered an order on April  
19 4, 2006, awarding fees of \$250 for Gervais' stay violation, but  
20 offsetting the entire amount against the unpaid rent (the  
21 "damages order").

22 Debtor appeals.

## 23 **II. JURISDICTION**

24 The bankruptcy court had jurisdiction under 28 U.S.C.  
25 §§ 1334 and 157(b)(1). We have jurisdiction under 28 U.S.C.  
26 §§ 158(b)(1) and (c)(1).



1. The Awarding of Attorney Fees Under § 362(k)(1)

Section 362(a) imposes an affirmative duty on Gervais to discontinue collection actions upon the filing of a bankruptcy petition. See 11 U.S.C. § 362(a); Eskanos & Adler, P.C. v. Leetien, 309 F.3d 1210, 1215 (9th Cir. 2002). Under § 362(k)(1), “[a]n individual injured by any willful violation of a stay . . . shall recover actual damages, including costs and attorneys’ fees, and, in appropriate circumstances, may recover punitive damages.”

Gervais admits to being informed about the bankruptcy, but chose to proceed with the eviction, based on advice provided by the Constable’s office and the Nevada Legal Services. Therefore, he maintains that he did not willfully violate the stay. This argument does not suffice.

“[T]he willfulness test for automatic stay violations merely requires that: (1) the creditor know of the automatic stay; and (2) the actions that violate the stay be intentional.” Morris v. Peralta, 317 B.R. 381, 389 (9th Cir. BAP 2004); see also Pinkstaff v. United States (In re Pinkstaff), 974 F.2d 113, 115 (9th Cir. 1992). Once a creditor has knowledge of the bankruptcy, he is deemed to have knowledge of the automatic stay. Ramirez v. Fuselier (In re Ramirez), 183 B.R. 583, 589 (9th Cir. BAP 1995), appeal dismissed, 201 F.3d 444 (9th Cir. 1999) (table). While notice is relevant to the question of willfulness, it does not matter that the creditor did not receive formal notice of the petition from the court. See Peralta, 317 B.R. at 389. Likewise, a creditor’s good faith belief that it had a right to the property at issue is irrelevant to determining whether the

1 violation was willful or compensation should be awarded. Id.;  
2 Ramirez, 183 B.R. at 589. Cf. In re Taylor, 884 F.2d 478, 483  
3 (9th Cir. 1989) (good faith reliance on the advice of counsel is  
4 not a defense); Williams v. Levi (In re Williams), 323 B.R. 691,  
5 701 (9th Cir. BAP 2005) (reliance on a state court's determination  
6 cannot be a defense).

7 Here, the evidence establishes that Gervais had knowledge of  
8 the bankruptcy and automatic stay at the time of the eviction.  
9 It also supports a finding that Gervais intentionally refused to  
10 allow Debtor back into the residence after being notified of the  
11 stay violation. Thus, the bankruptcy court properly found  
12 Gervais's stay violation willful.

13 Section 362(k) provides little guidance as to the standard a  
14 bankruptcy court should apply in awarding actual damages. Roman,  
15 283 B.R. at 11. Nevertheless, based upon the reasonableness  
16 analysis employed by the Ninth Circuit and courts in other  
17 circuits, we have determined that § 362(k)(1) "requires that the  
18 injured party be awarded the entire amount of actual damages  
19 reasonably incurred as a result of a violation of the automatic  
20 stay.'" Id. (citing Stainton v. Lee (In re Stainton), 139 B.R.  
21 232, 235 (9th Cir. BAP 1992)). In deciding what is "reasonable",  
22 we endorse the use of the principles found in § 330 as a guide  
23 for awarding attorney fees. Id. An award for a stay violation  
24 will be "reasonable" provided it is supported by the evidence and  
25 not "grossly excessive, monstrous, or shocking to the  
26 conscience." Computer Commc'ns, Inc. v. Codex Corp. (In re  
27 Computer Commc'ns, Inc.), 824 F.2d 725, 731 (9th Cir. 1987) (a  
28 contempt action for a stay).

1 Here, Debtor sought attorney fees in the amount of  
2 \$1,616.70. These fees represented time spent by Burke and his  
3 paralegal in 1) notifying the Constable's office, the Justice  
4 Court, and Gervais of the bankruptcy; 2) preparing and filing the  
5 order shortening time related to the stay motion, the stay  
6 motion, and the damages brief; and 3) attending the hearings  
7 related to the stay motion and damages motion. Many, if not all,  
8 of the services listed appear to represent reasonable fees  
9 incurred in connection with the stay violation. Nevertheless,  
10 the bankruptcy court apparently found only \$250 of the \$1,616.70  
11 to be reasonable.

12 While we recognize that the bankruptcy court is in the best  
13 position to determine in the first instance the reasonableness of  
14 the attorney fees sought, the court in this case provided  
15 insufficient findings as to how it arrived at the amount it  
16 awarded. In order for us to exercise our review function, some  
17 explanation is necessary. Bernardi v. Yeutter, 951 F.2d 971, 974  
18 (9th Cir. 1991). We will therefore reverse the order and remand.

19 2. Recipient of the Award

20 In this case, although the damages order awards the \$250  
21 directly to Burke, § 365(k)(1) allows for recovery of actual  
22 damages incurred by the injured individual. The injured  
23 individual is, of course, Debtor. Burke has cited no authority  
24 supporting a direct award of fees to the injured party's counsel.  
25 Thus, Debtor is the party to whom the fees may be awarded,  
26 despite the fact they ultimately were meant for payment to Burke.

1 3. The Offsetting of the Attorney Fees Award

2 As the offset question may arise on remand, we will address  
3 it. Section 105(a) provides a bankruptcy court with the power to  
4 take whatever action is appropriate or necessary in aid of the  
5 exercise of its jurisdiction over the administration of a title  
6 11 case. 11 U.S.C. § 105(a); Roman, 283 B.R. at 13. This  
7 equitable power must be exercised within the confines of the  
8 Bankruptcy Code, Norwest Bank Worthington v. Ahlers, 485 U.S.  
9 197, 206 (1988), and "is limited to those situations where it is  
10 a means to fulfill some specific Code provision." Graves v.  
11 Myrvang (In re Myrvang), 232 F.3d 1116, 1124-25 (9th Cir.  
12 2000) (citing In re Fesco Plastics Corp., 996 F.2d 152, 154 (7th  
13 Cir. 1993)).

14 Prior to entering the damages order, the bankruptcy court  
15 entered an order which required Debtor to make the January and  
16 February 2006 post-petition rental payments (the "rental order").  
17 Debtor failed to make any of the payments.

18 Under § 105(a), the court has the ability to take whatever  
19 action is necessary to aid in its administration of the case.  
20 The court had ordered payment of the post-petition rent, which  
21 Gervais was entitled to as an administrative claim pursuant to  
22 § 503. See Microsoft Corp. v. DAK Indus., Inc. (In re DAK  
23 Indus., Inc.), 66 F.3d 1091, 1094 (9th Cir. 1995). Debtor failed  
24 to comply with the rental order, thus the court had the power to  
25 enforce it by setting off the rental amounts due with the damages  
26 awarded to Debtor under § 365(k)(1). Courts have long recognized  
27 that the Bankruptcy Code does not "abrogate the common law right  
28 of setoff", and therefore, post-petition obligations owed by a

1 creditor may be setoff against post-petition obligations owed by  
2 the debtor. In re Seal, 192 B.R. 442, 457 (Bankr. W.D. Mich.  
3 1996); In re Gorden Sel-Way, Inc., 239 B.R. 741, 750-751 (E.D.  
4 Mich. 1999).

5 Debtor relies on In re Stainton, 139 B.R. 232 (9th Cir. BAP  
6 1992), arguing that the court erred by offsetting the fees. The  
7 court here did not award part of the attorney fees to be paid by  
8 Debtor or the estate. The bankruptcy court in Stainton awarded  
9 \$6,973.10 in attorneys fees to the debtor for a party's willful  
10 violation of the stay. 139 B.R. at 234. In awarding the fees,  
11 the court required the violating party to pay only \$1,495 of the  
12 fees with the balance to be borne by the bankruptcy estate. Id.  
13 On appeal, we emphasized that the "plain language of the statute  
14 requires that the injured party be awarded the entire amount of  
15 actual damages reasonably incurred as a result of a violation of  
16 the automatic stay." Id. at 235. Accordingly, we found the  
17 court's apportioning of the actual damages to be inconsistent  
18 with the language of the statute and thus improper. Id.  
19 Stainton does not address the question of setoff; instead, it  
20 stands for the principle that a debtor damaged by a stay  
21 violation is to recover actual damages, not something different,  
22 such as an award partially against the estate, rather than the  
23 violator.

24 As Debtor is the appropriate recipient of the damages award,  
25 the bankruptcy court had the power under § 105(a) to offset that  
26 award with the rental amount Debtor owed Gervais. The bankruptcy  
27 court did not err in offsetting the rent against the damages  
28 award.

**VI. CONCLUSION**

For the foregoing reasons, we REVERSE and REMAND for further proceedings.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28