FILED

FEB 23 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NOT FOR PUBLICATION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

In re:	BAP No. AZ-05-1514-PaDS
KIMBERLY NOEL SORKILMO,	Bk. No. 04-20416
Debtor.	Adv. Pro. 05-00311
KIMBERLY NOEL SORKILMO,	
Appellant,	
v.	**M E M O R A N D U M**[1]
COUNTRYWIDE HOME LOANS, INC.,	
Appellee.	

Submitted Without Oral Argument
on January 18, 2007

Filed - February 23, 2007

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

Honorable James M. Marlar, Bankruptcy Judge, Presiding.

Before: PAPPAS, DUNN and SMITH, Bankruptcy Judges.

---

[1] 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.

This is an appeal from an order of the bankruptcy court granting Countrywide Home Loans, Inc. ("CHL")'s motion for summary judgment and dismissing the chapter 13 debtor's adversary complaint. We AFFIRM.

FACTS

On August 21, 2002, Kimberly Noel Sorkilmo borrowed $390,650.00, and secured the loan with a deed of trust on her residential property in Cave Creek, Arizona (the "Property"). CHL is the successor in interest to the original lender and beneficiary of the deed of trust.

CHL alleges that Sorkilmo defaulted in making the payments due on the note in 2003. CHL therefore caused a trustee's sale of the Property to be conducted, and the Property was sold to another party on March 10, 2004.

The day before the sale, on March 9, 2004, Sorkilmo filed a petition for relief under chapter 13[2] of the Bankruptcy Code, Case No. 04-03857, which case was assigned to Bankruptcy Judge Randolph J. Haines. At Sorkilmo's request, CHL and the trustee under the deed of trust took steps to "undo" the sale, which, as discussed below, was accomplished in May 2004.

Sorkilmo's bankruptcy case 04-03857 was dismissed three times and reinstated twice. CHL moved for relief from stay again to

---

[2] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as enacted and promulgated prior to the effective date (October 17, 2005) of most of the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, April 20, 2005, 119 Stat. 23.

foreclose on July 14, 2004. On November 4, 2004, Judge Haines finally dismissed the case because Sorkilmo had not filed an amended plan nor made any plan payments. The court denied CHL's motion for stay relief as moot.

A few weeks later, on November 23, 2004, Sorkilmo filed another chapter 13 petition commencing the instant Case No. 04-20416. This case was assigned to Judge James M. Marlar. Sorkilmo filed her chapter 13 plan on December 8, 2004. CHL objected to confirmation on the grounds that the plan would not pay the arrearages on the secured debt to CHL. CHL filed another motion for relief from stay on February 10, 2005, together with a proof of claim.

Sorkilmo filed an amended plan on March 18, 2005, followed by a second amended plan on April 14, 2005. On April 21, 2005, the bankruptcy court held a hearing on CHL's motion for stay relief and Sorkilmo's objection to CHL's proof of claim. The record does not include the transcript of this hearing, but the bankruptcy court's minute order provides:

> It is ordered that the payoff attached to the proof of claim is acceptable. The Debtor will be allowed 90 days to market and sell the house and provide the trustee with a copy of the purchase contract. If the Debtor fails to receive a contract the stay will lift without further notice with in rem relief and a 180 day bar. The Debtor will then be allowed 30 days to close the sale. . . .

This minute order also recites: "The court recessed to allow the parties to confer. Mr. Maney [the trustee] explained his conversation with the debtor during the break. He indicated that the parties agree that the payoff statement attached to the proof of claim is a valid payoff." In addition, "[t]he court noted that

this resolves the motion for relief from stay and the objection to claim."

The court issued a formal order regarding the April 21, 2005, hearing on May 25, 2005.

Immediately following the hearing on April 21, 2005, Sorkilmo filed a one-page adversary complaint against CHL entitled "Complaint under 11 U.S.C. § 362 of the Bankruptcy Code to Obtain an Injunction or Ot[h]er Equitable Relief," but containing no other text or allegations.

On June 6, 2005, Sorkilmo filed a motion for reconsideration of the court's April 21, 2005, order. The rambling motion is very difficult to understand and seems to confuse the legal issues regarding CHL's right to stay relief with her demand for damages for an alleged breach of contract by CHL in failing to timely provide payoff quotes.[3]

On May 23, 2005, CHL filed a motion to dismiss the adversary complaint. In an order on June 7, 2005, the bankruptcy court decided to treat CHL's motion as a motion for a more definite statement. See FED. R. CIV. P. 12(e), as incorporated by FED. R.

---

[3] Sorkilmo's motion for reconsideration contradicts the findings in the April 21 minute order, and in the formal order of May 25, 2005. It argues, in part,

> . . . that the dispute in regard to amount owing secured creditor by the debtor has not been resolved and was agreed all parties, chapter 13 trustee, and Judge James M. Marlar at the hearing on April 21, 2005, that dispute will be heard at the adversary complaint hearing and upon Judge James M. Marlars review of debtors material fact evidence which clearly supports debtors objection to secured creditors and its attorney Jeremy T. Bergstrom false proof of claim and additionally will support debtors request for relief and judgment for all costs, fees that the honorable court and Judge James M. Marlar deem necessary and appropriate . . . .

BANK. P. 7012. The court directed Sorkilmo to amend the complaint to allege specifically the facts upon which she based her claims against CHL, and to specify in particular the relief sought. On the same day, the bankruptcy court denied Sorkilmo's June 6 motion for reconsideration, correcting Sorkilmo's misunderstanding about the stay relief order and informing Sorkilmo that the adversary proceeding would proceed as an action for breach of contract and/or interference with efforts to sell her home.

On June 22, 2005, Sorkilmo filed an amended complaint in the adversary proceeding. The amended complaint contains the same title as the original complaint, is nearly unintelligible, and does not conform to the bankruptcy court's directions that it plead the facts and relief requested with specificity. In particular, the amended complaint does not specifically address how CHL injured her, but instead discusses the many events and problems that have occurred recently in her life and the parties whom Sorkilmo appears to blame for her mental health issues and financial losses, including, among others, CHL, the eventual purchaser of her house, and the bankruptcy judge.[4]

CHL filed an answer to the amended complaint on June 28, 2005. The court then issued an order that a trial would be conducted during the week of November 30 to December 2, 2005, and mailed a copy to Sorkilmo on July 13, 2005. The court later ordered the trial date continued to January 5, 2006, and sent a notice of the new date to Sorkilmo on November 18, 2005, by first class mail.

[4] In this sense, the amended complaint is much like the informal brief the Panel allowed Sorkilmo to file in this appeal.

In the meantime, on September 9, 2005, CHL filed a motion for summary judgment. On September 30, 2005, the court sent Sorkilmo a notice that the hearing on the motion for summary judgment would be conducted on November 30, 2005. On November 18, 2005, CHL also sent Sorkilmo a notice of the summary judgment hearing.

Sorkilmo, along with CHL's counsel, appeared at the hearing on November 30, 2005. The bankruptcy court heard arguments from both, took the issues under advisement, and on December 8, 2005, entered its memorandum decision disposing of CHL's motion for summary judgment. In its decision, the court found and concluded that:

- The record showed that any § 362 violation by CHL was "technical," and that CHL took prompt steps to reverse the trustee's sale and restore the title to the Property to its pre-bankruptcy status.
- Sorkilmo had not established that a genuine issue of fact existed concerning whether she had suffered any money damages by any such stay violation.
- Sorkilmo had failed to produce evidence that CHL had breached its contract with her by failing to provide a timely payoff upon request so she could sell the Property.
- Sorkilmo failed to show she was economically harmed by CHL's alleged breach of contract since it was undisputed that Sorkilmo later sold the Property for $124,500 more than any previous purchase offers. Even considering any additional interest that accrued on the CHL loan in the meantime, Sorkilmo still fared better, economically, as a result of the 2005 sale, and suffered no economic harm worthy of compensation.

The bankruptcy court decided that CHL's motion for summary judgment should be granted. A judgment implementing the court's decision was entered on December 13, 2005. Sorkilmo filed a timely notice of appeal on December 19, 2005.

JURISDICTION

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

ISSUES[5]

1. Whether Sorkilmo's rights to due process regarding CHL's motion for summary judgment were denied.
2. Whether CHL's violation of the automatic stay resulted in any injury to Sorkilmo.
3. Whether CHL breached its contract with Sorkilmo by failing to provide timely payoff statements and, if so, whether Sorkilmo was economically harmed.

STANDARDS OF REVIEW

Whether the bankruptcy court violated Sorkilmo's rights to due process is reviewed de novo. In re Cal. Fid., 198 B.R. 567, 571 (9th Cir. BAP 1996). Summary judgment orders are reviewed de novo. Tobin v. San Souci Ltd. P'ship, 258 B.R. 199, 202 (9th Cir. BAP 2001). We review the bankruptcy court's assessment of damages

[5] As noted above, Sorkilmo's pleadings in the bankruptcy court and in this appeal are very difficult to comprehend. Further, Sorkilmo does not provide excerpts of record. Instead, her notice of appeal attached 80 pages of material, from which we have assumed that the first attached document, the bankruptcy court's memorandum of decision, is the decision from which the appeal is taken. In her designation of items to be included in the record on appeal, Sorkilmo includes nine pages on "issues on appeal" with various issues mixed with comments and statutes. The Panel previously ordered that Sorkilmo's submissions be treated as an "informal brief." As we previously advised the parties, in addition to their submissions, we have resorted to the bankruptcy court's dockets and records in some instances. In sum, we have made our best efforts to review what we believe are Sorkilmo's claims against CHL, and have formulated the issues to reflect our understanding.

under § 362(h) for an abuse of discretion. Ozenne v. Bendon (In re Ozenne), 337 B.R. 214, 218 (9th Cir. BAP 2006). An abuse of discretion is a plain error, discretion exercised to an end not justified by the evidence, or a judgment that is clearly against the logic and effect of the facts as are found. Rahkin v. Ore. Health Sci. Univ., 350 F.3d 967, 977 (9th Cir. 2003).

DISCUSSION

1. The procedures employed by the bankruptcy court did not violate Sorkilmo's rights to due process.

When Sorkilmo arrived at the hearing on November 30, 2005, she appeared to be under the impression that there would be a trial on the merits of her complaint.[6] But the bankruptcy court informed her that the hearing, instead, concerned CHL's motion for summary judgment.

On page 12 of her informal brief in this appeal, Sorkilmo states:

> The trial dates set for November 30-December 4, 2005 again were to be for complaint filed and to be awarded the sum of monies the appellant had objected to and promised to be awarded by the judge and without notice by the court to the appellant the Nov. 30 trial date had been changed to be an oral argument for the secured creditor's Motion for Summary Judgment filed on October 2005 and the appellant's objection to the secured creditor's Motion for Summary Judgment.

While Sorkilmo was perhaps genuinely confused about the purpose of the November 30 hearing, the record does not support

[6] Sorkilmo's confusion may have resulted from the fact that, by that date, she had been sent two notices from the bankruptcy court relating to the trial date.

Sorkilmo's suggestions that she did not receive proper notice that the hearing was focused on CHL's motion for summary judgment, that she was prejudiced by what occurred, or that her rights to due process were violated.

The motion for summary judgment was filed on September 16, 2005. On September 28, 2005, the court issued an Order Setting Oral Argument and Briefing Schedule on the summary judgment motion, indicating that the hearing on the motion would be held on November 30, 2005, at 1:30 p.m. A certificate of service appears in the record indicating that Sorkilmo was served with the court's order of September 28, 2005, on September 30, 2005, by first class mail.

Sorkilmo filed a reply memorandum to the summary judgment motion on October 18, 2005. CHL also sent a notice to Sorkilmo on November 18, 2005, advising her that the November 30, 2005, hearing would be on the summary judgment motion. A certificate of service regarding that notice was also filed.

Moreover, at the hearing on November 30, 2005, the bankruptcy court offered Sorkilmo the opportunity to make additional submissions regarding her position on the motion for summary judgment. Sorkilmo also addressed the court concerning the motion.

In sum, the record shows that Sorkilmo was twice given notice by first class mail, well in advance, of the date and time for the summary judgment hearing. The notices were mailed to the same address listed on Sorkilmo's pleadings in the bankruptcy court. "The mailing of a properly addressed and stamped item creates the rebuttable presumption that the addressee received it." Morris Motors v. Peralta (In re Peralta), 317 B.R. 381, 386 (9th Cir. BAP

2004) (citing Moody v. Bucknum (In re Bucknum), 951 F.2d 204, 207 (9th Cir. 1991)). Sorkilmo filed a reply to the summary judgment motion, and submitted oral argument about the motion at the hearing. The court also provided Sorkilmo an opportunity to submit additional written arguments concerning the motion. On this record, we conclude that Sorkilmo was given an ample, fair opportunity to be heard, and that her due process rights were not violated in connection with CHL's motion for summary judgment. See Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (the fundamental right of due process is the right to be heard).

2. The bankruptcy court did not abuse its discretion in declining to award Sorkilmo damages as a result of CHL's violation of the automatic stay.

Summary judgments are governed by Fed. R. Civ. P. 56, made applicable in bankruptcy cases by Rule 7056. Rule 56(c) provides, in pertinent part, that the court shall grant the motion if there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. See In re Zupzancic, 38 B.R. 754, 757 (9th Cir. BAP 1990). See generally Celotex v. Catrett, 477 U.S. 317 (1986).

Section 362(h) provides:

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

A prima facie case for recovery of damages under § 362(h) requires a showing that the debtor was injured (i.e., suffered actual damages) as a result of "willful" violation of the automatic stay. Wolkowitz v. Shearson Lehman Bros., Inc. (In re

Weisberg), 193 B.R. 916, 927 (9th Cir. BAP 1996), rev'd in part on other grounds, 135 F.3d 655 (9th Cir. 1998). For the violation to be willful, § 362(h) requires that: (1) a creditor knows of an automatic stay; and (2) the actions that violate the stay be intentional. Assoc. Cred. Serv. v. Campion (In re Campion), 294 B.R. 313, 316 (9th Cir. BAP 2003). To show "actual damages," the debtor must articulate a tangible damage amount and provide evidence to support that claim. Fernandez v. G.E. Capital Mortgage Serv., Inc. (In re Fernandez), 227 B.R. 174, 180 (9th Cir. BAP 1998). As the Panel explained in a similar setting, "That [the debtor] may have been damaged by the foreclosure . . . does not suffice. To show injury from a violation of the stay, he would have had to show, sufficiently to raise a genuine issue of material fact, . . . that [the creditor] might not have been granted relief from the stay had [it] asked." Id. at 181. In another case, the Panel observed that it is not enough for the debtor to show she was "inconvenienced and annoyed" by a creditor's violation of the automatic stay to warrant an award of actual damages. McHenry v. Key Bank (In re McHenry), 179 B.R. 165, 168 (9th Cir. BAP 1995). The amount of damages awarded for a violation of the automatic stay is within the discretion of the bankruptcy court. Franchise Tax Bd. v. Roberts (In re Roberts), 175 B.R. 339, 343 (9th Cir. BAP 1994).

In one of the more articulate sections of Sorkilmo's amended complaint, she alleges that CHL "willingly" violated the automatic stay.

> Secured creditor willingly violated the automatic stay on March 10, 2004 and foreclosed on subject property. Debtor had contacted secured creditor on March 9th and March 10th, 2004, informing secured creditor

> that debtor filed chapter 13 bankruptcy at the UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF ARIZONA and provided the stamped information from the clerk of the court, on three calls to secured creditor, Debtor was informed foreclosure would not occur, and would be postponed until further notice.

We assume that Sorkilmo employed the term "willingly" in the same sense as the Code drafters intended when requiring that an actionable stay violation be willful. These statements in her amended complaint may therefore be sufficient to raise a fact issue whether CHL knew about her bankruptcy filing before the trustee's sale occurred on March 10, and whether CHL willfully violated the automatic stay.

However, like the bankruptcy court, we can find nothing in Sorkilmo's pleadings or the record articulating a tangible claim for actual damages, nor the amount of those damages, allegedly resulting from any CHL stay violation.

In its memorandum decision, the bankruptcy court concluded that:

> Any § 362 violation by the secured creditor was technical, and the creditor took prompt steps to place the debtor in the status quo, pre-bankruptcy.
>
> The Debtor did not establish a triable and genuine issue of fact that she suffered monetarily by any such stay violation.

Mem. Decision at 1 (December 8, 2005). The court does not indicate whether, as it describes it, CHL's "technical" stay violation was willful. However, this is of no moment because, even assuming CHL acted willfully, the court decided that CHL took "prompt steps" to undo the violation. A stay violator's "good heart" can serve as a basis to mitigate a claim for § 362 damages. In re Campion, 294 B.R. at 318.

The court's conclusion that CHL timely cured its stay violation appears undisputed in the record. CHL alleges in its Reply Brief that it filed an Affidavit of Erroneous Recording on May 13, 2004, to void the deed that had been issued on March 10, 2004. Sorkilmo refers to this Affidavit of Erroneous Recording, and that it was dated May 13, 2004, in her Memorandum in response to motion for summary judgment. The parties therefore seem to agree that the effects of the trustee's sale were reversed by mid-May 2004.

Between the date of the violation of the stay on March 10, 2004, and the filing of the Affidavit of Erroneous Recording on May 13, 2004, Sorkilmo suggests that she was damaged in mid-April when she attempted to sell her house, but could not do so because a title search disclosed that a third party was the owner of her property. Sorkilmo's attempt to sell her house in mid-April 2004 is the first of four alleged attempts that Sorkilmo made within the year. It is important for examination here because it is the only one of the attempted sales that Sorkilmo specifically alleges was impacted by CHL's stay violation. But Sorkilmo failed to establish that any triable issue of fact existed that she suffered a monetary loss as a result of the sale she allegedly lost in mid-April. Instead, the record shows that Sorkilmo sold her house a year later for $124,500[7] more than the highest amount she was

[7] Ms. Sorkilmo advised the court at the hearing on August 17, 2005, that she had sold her house to her dentist for $624,500. The record does not reflect the date of sale. Tr. Hr'g 6:16-23 (August 17, 2005).

offered in the four alleged sales in the previous year.[8]

Based on this record, and even assuming CHL acted willfully, the bankruptcy court decided that CHL's stay violation was a "technical" one, and that Sorkilmo had not shown she had suffered actual damages for purposes of her § 362(h) claim. This decision does not constitute an abuse of discretion.

3. Sorkilmo failed to show that CHL breached its contract with her by failing to provide a timely payoff, or that she was economically harmed.

The deed of trust between Sorkilmo and CHL contains a governing law clause directing application of the law of the state where the Property is located. In Arizona, in an action for breach of contract, the plaintiff has the burden of proving the existence of a contract, breach of the contract, and resulting damages. Chartone, Inc. v. Bernini, 207 Ariz. 162, 170 (Ariz. Ct. App. 2004).

It is undisputed that a contract, consisting of the note and deed of trust, existed between the parties. The bankruptcy court addressed the second and third elements concerning Sorkilmo's breach of contract claim in its memorandum decision when it decided:

> The Debtor failed to provide, by affidavit or any other competent evidence, that the

---

[8] Sorkilmo also alleged that CHL's conduct caused her emotional distress for which she should recover actual damages. While in the Ninth Circuit actual damages for violation of the automatic stay can include emotional distress, Dawson v. Wash. Mut. Bank (In re Dawson), 390 F.3d 1139, 1148 (9th Cir. 2004), the standard for proof of such a claim is high. A debtor must (1) suffer significant harm, (2) clearly establish the significant harm, and (3) demonstrate a causal connection between that significant harm and the violation of the automatic stay. Even assuming she suffered "significant" emotional distress, Sorkilmo's pleadings do not establish that her distress was particularly related to CHL's foreclosure sale. Id.

> Defendant breached its mortgage (deed of trust) contract with her by failing to provide a timely payoff upon request. Therefore, Plaintiff/Debtor has failed to present a prima facie case or factual question which requires this court to proceed to a trial on the merits.

Mem. Decision at ¶ 4 (December 8, 2005).

> The Debtor's assertion that she was economically harmed by any breach of contract concerning the creditor's failure to timely provide a payoff was not supported by evidence requiring a trial, since it is undisputed that she sold the same property, one year after the alleged incidents, for an amount $124,500 higher than the previous purchase offers. Even with the payment of accrued interest over the course of the year, she still fared better, economically, by the substantial increase in the amount for which she eventually sold the property. Thus she suffered no economic harm worthy of compensable damage.

Id. at ¶ 3.

Sorkilmo argues that CHL had a contractual duty to provide payoff statements to Sorkilmo or prospective buyers of her Property. Even assuming she is correct, however, Sorkilmo provides no specific evidence in the record as to when, or the circumstances under which, CHL allegedly failed to provide those payoff quotes. In short, we agree with the bankruptcy court that Sorkilmo failed to explain how or why CHL committed a breach of contract.

In addition, the bankruptcy court found, based on the record presented, that Sorkilmo sold the Property in 2005 for a far greater amount than she was offered in the previous year. The measure of damages in Arizona for breach of contract is the lost benefit of the bargain. Carstems v. City of Phoenix, 206 Ariz. 123, 126 (Ct. App. Ariz. 2003). Thus, even if CHL breached the contract, or in some way interfered with Sorkilmo's sale of her

house to the prospective purchasers, and even if additional interest accrued on the loan balance prior to the 2006 sale, Sorkilmo was not economically damaged (and, in fact, was materially benefitted) by the delay in sale of the house. The bankruptcy court did not err in concluding Sorkilmo has not proven she has suffered any damages as a result of CHL's alleged breach of contract.

CONCLUSION

We AFFIRM.