

FEB 23 2007

NOT FOR PUBLICATION

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

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

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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.)	<u>MEMORANDUM</u> 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.

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

5
6 **FACTS**

7 On August 21, 2002, Kimberly Noel Sorkilmo borrowed
8 \$390,650.00, and secured the loan with a deed of trust on her
9 residential property in Cave Creek, Arizona (the "Property"). CHL
10 is the successor in interest to the original lender and
11 beneficiary of the deed of trust.

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

16 The day before the sale, on March 9, 2004, Sorkilmo filed a
17 petition for relief under chapter 13² of the Bankruptcy Code, Case
18 No. 04-03857, which case was assigned to Bankruptcy Judge Randolph
19 J. Haines. At Sorkilmo's request, CHL and the trustee under the
20 deed of trust took steps to "undo" the sale, which, as discussed
21 below, was accomplished in May 2004.

22 Sorkilmo's bankruptcy case 04-03857 was dismissed three times
23 and reinstated twice. CHL moved for relief from stay again to
24

25 ² Unless otherwise indicated, all chapter, section and rule
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
27 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as
28 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.

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

5 A few weeks later, on November 23, 2004, Sorkilmo filed
6 another chapter 13 petition commencing the instant Case No. 04-
7 20416. This case was assigned to Judge James M. Marlar. Sorkilmo
8 filed her chapter 13 plan on December 8, 2004. CHL objected to
9 confirmation on the grounds that the plan would not pay the
10 arrearages on the secured debt to CHL. CHL filed another motion
11 for relief from stay on February 10, 2005, together with a proof
12 of claim.

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

19 It is ordered that the payoff attached to the
20 proof of claim is acceptable. The Debtor will
21 be allowed 90 days to market and sell the
22 house and provide the trustee with a copy of
23 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. . . .

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

1 this resolves the motion for relief from stay and the objection to
2 claim.”

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

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

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

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

20
21 ³ Sorkilmo’s motion for reconsideration contradicts the
22 findings in the April 21 minute order, and in the formal order of
23 May 25, 2005. It argues, in part,
24 . . . that the dispute in regard to amount
25 owing secured creditor by the debtor has not
26 been resolved and was agreed all parties,
27 chapter 13 trustee, and Judge James M. Marlar
28 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

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

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

20 CHL filed an answer to the amended complaint on June 28,
21 2005. The court then issued an order that a trial would be
22 conducted during the week of November 30 to December 2, 2005, and
23 mailed a copy to Sorkilmo on July 13, 2005. The court later
24 ordered the trial date continued to January 5, 2006, and sent a
25 notice of the new date to Sorkilmo on November 18, 2005, by first
26 class mail.

27
28 ⁴ In this sense, the amended complaint is much like the
informal brief the Panel allowed Sorkilmo to file in this appeal.

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

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

- 12 • The record showed that any § 362 violation by CHL was
13 "technical," and that CHL took prompt steps to reverse the
14 trustee's sale and restore the title to the Property to its
15 pre-bankruptcy status.
- 16 • Sorkilmo had not established that a genuine issue of fact
17 existed concerning whether she had suffered any money damages
18 by any such stay violation.
- 19 • Sorkilmo had failed to produce evidence that CHL had breached
20 its contract with her by failing to provide a timely payoff
21 upon request so she could sell the Property.
- 22 • Sorkilmo failed to show she was economically harmed by CHL's
23 alleged breach of contract since it was undisputed that
24 Sorkilmo later sold the Property for \$124,500 more than any
25 previous purchase offers. Even considering any additional
26 interest that accrued on the CHL loan in the meantime,
27 Sorkilmo still fared better, economically, as a result of the
28 2005 sale, and suffered no economic harm worthy of
compensation.

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

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

7
8 **DISCUSSION**

9
10 1. The procedures employed by the bankruptcy court did not
11 violate Sorkilmo's rights to due process.

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

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

19 The trial dates set for November 30-December
20 4, 2005 again were to be for complaint filed
21 and to be awarded the sum of monies the
22 appellant had objected to and promised to be
23 awarded by the judge and without notice by the
24 court to the appellant the Nov. 30 trial date
25 had been changed to be an oral argument for
26 the secured creditor's Motion for Summary
27 Judgment filed on October 2005 and the
28 appellant's objection to the secured
29 creditor's Motion for Summary Judgment.

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

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

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

5 The motion for summary judgment was filed on September 16,
6 2005. On September 28, 2005, the court issued an Order Setting
7 Oral Argument and Briefing Schedule on the summary judgment
8 motion, indicating that the hearing on the motion would be held on
9 November 30, 2005, at 1:30 p.m. A certificate of service appears
10 in the record indicating that Sorkilmo was served with the court's
11 order of September 28, 2005, on September 30, 2005, by first class
12 mail.

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

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

22 In sum, the record shows that Sorkilmo was twice given notice
23 by first class mail, well in advance, of the date and time for the
24 summary judgment hearing. The notices were mailed to the same
25 address listed on Sorkilmo's pleadings in the bankruptcy court.

26 "The mailing of a properly addressed and stamped item creates the
27 rebuttable presumption that the addressee received it." Morris
28 Motors v. Peralta (In re Peralta), 317 B.R. 381, 386 (9th Cir. BAP

1 2004) (citing Moody v. Bucknum (In re Bucknum), 951 F.2d 204, 207
2 (9th Cir. 1991)). Sorkilmo filed a reply to the summary judgment
3 motion, and submitted oral argument about the motion at the
4 hearing. The court also provided Sorkilmo an opportunity to
5 submit additional written arguments concerning the motion. On
6 this record, we conclude that Sorkilmo was given an ample, fair
7 opportunity to be heard, and that her due process rights were not
8 violated in connection with CHL's motion for summary judgment.
9 See Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314
10 (1950) (the fundamental right of due process is the right to be
11 heard).

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

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

21 Section 362(h) provides:

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

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

1 Weisberg), 193 B.R. 916, 927 (9th Cir. BAP 1996), rev'd in part on
2 other grounds, 135 F.3d 655 (9th Cir. 1998). For the violation to
3 be willful, § 362(h) requires that: (1) a creditor knows of an
4 automatic stay; and (2) the actions that violate the stay be
5 intentional. Assoc. Cred. Serv. v. Champion (In re Champion), 294
6 B.R. 313, 316 (9th Cir. BAP 2003). To show "actual damages," the
7 debtor must articulate a tangible damage amount and provide
8 evidence to support that claim. Fernandez v. G.E. Capital
9 Mortgage Serv., Inc. (In re Fernandez), 227 B.R. 174, 180 (9th
10 Cir. BAP 1998). As the Panel explained in a similar setting,
11 "That [the debtor] may have been damaged by the foreclosure . . .
12 does not suffice. To show injury from a violation of the stay, he
13 would have had to show, sufficiently to raise a genuine issue of
14 material fact, . . . that [the creditor] might not have been
15 granted relief from the stay had [it] asked." Id. at 181. In
16 another case, the Panel observed that it is not enough for the
17 debtor to show she was "inconvenienced and annoyed" by a
18 creditor's violation of the automatic stay to warrant an award of
19 actual damages. McHenry v. Key Bank (In re McHenry), 179 B.R.
20 165, 168 (9th Cir. BAP 1995). The amount of damages awarded for a
21 violation of the automatic stay is within the discretion of the
22 bankruptcy court. Franchise Tax Bd. v. Roberts (In re Roberts),
23 175 B.R. 339, 343 (9th Cir. BAP 1994).

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

27 Secured creditor willingly violated the
28 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

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

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

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

19 In its memorandum decision, the bankruptcy court concluded
20 that:

21 Any § 362 violation by the secured creditor was
22 technical, and the creditor took prompt steps to
23 place the debtor in the status quo, pre-bankruptcy.

24 The Debtor did not establish a triable and genuine
25 issue of fact that she suffered monetarily by any
26 such stay violation.

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

1 The court's conclusion that CHL timely cured its stay
2 violation appears undisputed in the record. CHL alleges in its
3 Reply Brief that it filed an Affidavit of Erroneous Recording on
4 May 13, 2004, to void the deed that had been issued on March 10,
5 2004. Sorkilmo refers to this Affidavit of Erroneous Recording,
6 and that it was dated May 13, 2004, in her Memorandum in response
7 to motion for summary judgment. The parties therefore seem to
8 agree that the effects of the trustee's sale were reversed by mid-
9 May 2004.

10 Between the date of the violation of the stay on March 10,
11 2004, and the filing of the Affidavit of Erroneous Recording on
12 May 13, 2004, Sorkilmo suggests that she was damaged in mid-April
13 when she attempted to sell her house, but could not do so because
14 a title search disclosed that a third party was the owner of her
15 property. Sorkilmo's attempt to sell her house in mid-April 2004
16 is the first of four alleged attempts that Sorkilmo made within
17 the year. It is important for examination here because it is the
18 only one of the attempted sales that Sorkilmo specifically alleges
19 was impacted by CHL's stay violation. But Sorkilmo failed to
20 establish that any triable issue of fact existed that she suffered
21 a monetary loss as a result of the sale she allegedly lost in mid-
22 April. Instead, the record shows that Sorkilmo sold her house a
23 year later for \$124,500⁷ more than the highest amount she was

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27 ⁷ Ms. Sorkilmo advised the court at the hearing on August
28 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).

1 offered in the four alleged sales in the previous year.⁸

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

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

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

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

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

23 ⁸ Sorkilmo also alleged that CHL's conduct caused her
24 emotional distress for which she should recover actual damages.
25 While in the Ninth Circuit actual damages for violation of the
26 automatic stay can include emotional distress, Dawson v. Wash.
27 Mut. Bank (In re Dawson), 390 F.3d 1139, 1148 (9th Cir. 2004), the
28 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.

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

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

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

23 Id. at ¶ 3.

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

32 In addition, the bankruptcy court found, based on the record
33 presented, that Sorkilmo sold the Property in 2005 for a far
34 greater amount than she was offered in the previous year. The
35 measure of damages in Arizona for breach of contract is the lost
36 benefit of the bargain. Carstems v. City of Phoenix, 206 Ariz.
37 123, 126 (Ct. App. Ariz. 2003). Thus, even if CHL breached the
38 contract, or in some way interfered with Sorkilmo's sale of her

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

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CONCLUSION

We AFFIRM.