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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NOT FOR PUBLICATION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.	NV-05-1275-SMaMo
7	AZRA INVESTMENT CORP.,)	Bk. No.	02-18301-BAM
8	Debtor.)	Ref. No.	05-18
9	_____)		
10	A&E HOLDINGS, et al.,)		
11	Appellants,)		
12	v.)	MEMORANDUM¹	
13	AZRA INVESTMENT CORP.,)		
14	Appellee.)		
	_____)		

Argued and Submitted on May 18, 2006
at Las Vegas, Nevada

Filed - June 7, 2006

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

Honorable Bruce A. Markell, Bankruptcy Judge, Presiding

Before: SMITH, MARLAR, and MONTALI, Bankruptcy Judges.

¹ This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case, issue preclusion or claim preclusion. See 9th Cir. BAP Rule 8013-1.

1 Appellants² appeal two orders. The first order imposed
2 sanctions against them and their attorney for civil contempt
3 arising out of their failure to vacate a state court default
4 judgment obtained in violation of the automatic stay. The second
5 order denied reconsideration of the first order. A timely notice
6 of appeal was filed on June 23, 2005. We AFFIRM.

7 **I. FACTS**

8 On July 23, 2002, Azra Investment Corp. ("Debtor") commenced
9 a chapter 11 case³ that was later converted to a chapter 7. On

10 ² Appellants are investors who invested funds with Debtor to
11 develop property referred to as Azra Assisted Living Center (the
12 "Azra Property") in Las Vegas, Nevada, and are comprised of the
13 following: A&E Holdings; Everett B. Cook and Alice V. Cook, as
14 Trustees for the Cook Family Trust dated 09/22/97; James Abbey;
15 Coleen Abbey; Robert A. Anderson; John Carney; Curtis F. Clark;
16 First Trust Company of Onaga c/f Curtis F. Clark dated 12/04/97;
17 Anthony Della; Calvin Dull; Gregory Dull; Perlita Dull; Delores
18 A. Flood; Richard L. Flood; Alan Frankel; Blaine W. Frew; Edmond
19 Garfield; Gail Garfield; Gilfada, L.L.C.; Robert Leroy Gooch;
20 Maude Gooch; Robert Leroy Gooch and Maude Margaret Gooch, as
21 Trustees for the Gooch Living Trust dated 12/06/91; Janet Hagin;
22 Dick Sander; Stanley S. Hall and Jeannine M. Hall, as Trustees of
23 the Stanley S. and Jeannine M. Hall Living Trust dated 03/07/00;
24 Darlene J. King; Brett Lauren; Scott Lauren; Marvin Lauren; Diane
25 Lauren; Marvin Lauren and Diane Lauren, as Trustees of the Lauren
26 Living Trust dated 04/25/90; Anthony Madonia; Jeannie Madonia;
27 Anthony Madonia, Sr.; Lynn Madonia; Ray Millisor; Lonnie Moon;
28 Yvonee Moon; Sol Munn and Evelyn Munn, as Trustees of the Munn
Trust of 1975 dated 05/23/75; Lewis Panozzo; William Powers;
Pearl Rosen; Geraldine Schoen; Donald Schoen; Betty Shields;
George Swartz and Mildred Swartz, as Trustees of the MSG Trust
dated 10/24/89; Elaine Taylor; Jan Uhler; John Walters; Elaine
Walters; Clifford Wiehe, Jr. and E. Jeanette Wiehe; Clifford
Wiehe, Jr. and E. Jeanette Wiehe, as Trustees of the John and
Lorraine Walters Trust dated 09/03/98; Mike Young; Linda Zieff;
Paul Benedict; Phyllis Jacobson; Karen O'Connell; and DOES 1-50;
and, ROES 1-50.

³ 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,

(continued...)

1 May 14, 2003, unaware of the pending bankruptcy and without first
2 obtaining relief from the automatic stay, Appellants and their
3 counsel, Mont E. Tanner ("Tanner"), filed a complaint in Nevada
4 District Court alleging that Debtor engaged in acts of fraud,
5 misrepresentation, and embezzlement with regard to a pre-petition
6 promissory note that was signed between Debtor and Pacific West
7 Mortgage on behalf of Appellants (the "state court action").⁴ As
8 a result of Debtor's failure to respond to the state court action
9 (allegedly because it was not served with notice), a default
10 judgment in the amount of \$5.4 million was entered on February 9,
11 2004.

12 On March 17, 2004, a final decree in the bankruptcy was
13 entered, the trustee was discharged, and the case was closed.
14 Thereafter, on June 21, 2004, Debtor's then litigation counsel,
15 Scott A. Meehan ("Meehan"), telephoned and faxed Tanner to notify
16 him of the bankruptcy and to inform him that the state court
17 action and the entry of default judgment occurred during the
18 pendency of the bankruptcy in violation of the automatic stay.
19 Meehan demanded that Appellants and Tanner dismiss the complaint
20 and set aside or vacate the default judgment. Tanner did
21 nothing. A week later, on June 28, 2004, Meehan made a second
22 request for the default to be vacated. Again, Tanner took no
23 action.

24 _____
25 ³(...continued)
26 2005) of The Bankruptcy Abuse Prevention and Consumer Protection
27 Act of 2005, Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

28 ⁴ Appellants loaned a total of \$5.9 million plus interest at
the rate of 14% to Debtor that was secured by the Azra Property.
Debtor defaulted on its obligations and the property was sold at
a trustee's sale on October 23, 2002 for \$2 million.

1 In December 2004, Debtor successfully moved the court to
2 reopen the bankruptcy case. Debtor then filed a motion for an
3 order to show cause why Tanner should not be held in contempt and
4 sanctioned for willful violation of the automatic stay and why
5 the default judgment should not be vacated (the "OSC").⁵

6 Appellants opposed the OSC,⁶ arguing that at the time the
7 complaint was filed and default judgment entered, they were not
8 aware of the bankruptcy, hence, their conduct was not intentional
9 nor willful to justify sanctions. Appellants further asserted
10 that the filing of the OSC was merely an attempt to wrongfully
11 avoid an otherwise nondischargeable debt (the state court having
12 found Debtor engaged in fraudulent conduct), and that setting
13 aside the default judgment would have the unfair effect of
14 rewarding Debtor for its bad acts.⁷ In the alternative,
15 Appellants requested that the bankruptcy court permit an
16 adversary proceeding to be filed.

17 The matter was heard on April 15, 2005, at which time the
18 bankruptcy court reprimanded Tanner for his failure to
19 voluntarily set aside or vacate the default judgment after
20 becoming aware of the bankruptcy. Appellants, through Tanner,
21 argued that they acted in good faith because they were under the
22 belief that judgments based on fraud were automatically
23 considered nondischargeable and not subject to the automatic

24 ⁵ The request for sanctions was directed solely against
25 Tanner and not against Appellants.

26 ⁶ Tanner filed the opposition on behalf of Appellants only,
and not on behalf of himself.

27 ⁷ Apparently, Appellants' counsel was not aware that a
28 chapter 7 corporate debtor is not entitled to a discharge under
§ 727.

1 stay. The bankruptcy court rejected the argument, and admonished
2 Tanner further for his failure to adequately research applicable
3 bankruptcy law:

4 The Court: I take as a given that the
5 complaint and the filing of the complaint and
6 the obtaining of the default judgment were
7 done without the subjective knowledge of the
8 filing of the bankruptcy.

9 Notwithstanding that, I find that subsequent
10 to that at some point in time that has
11 occurred within the last six months, it has
12 come to the notice and attention of Mr.
13 Tanner's clients and Mr. Tanner that, in
14 fact, it was in violation of the stay.

15 At that point, any well-advised and competent
16 attorney would have either moved to set aside
17 actions that had been pointed out to be taken
18 in violation of the automatic stay which
19 operates without regard to notice and/or come
20 back into this court and seek an order
21 annulling the automatic stay.

22 Transcript of Proceedings, April 15, 2005, p. 15-16.

23 Appellants were ordered to dismiss the complaint and set
24 aside or vacate the default judgment. In addition, Appellants
25 and Tanner were found to be in civil contempt of the court and
26 jointly and severally liable to Debtor for sanctions in the
27 amount of \$11,025.44.⁸ On April 26, 2005, the parties executed a
28 stipulation to set aside the default judgment.⁹

 Appellants timely moved the court to amend its order to
vacate the award of sanctions, or in the alternative, to annul

⁸ Although the OSC was brought directly against Tanner, the
bankruptcy court found both Appellants and Tanner jointly and
severally liable. As Appellants never challenged the sufficiency
of the notice of the OSC as to them, we presume without deciding
that any issue regarding service was waived.

⁹ The stipulation was not filed with the Nevada District
Court until May 10, 2005, over three weeks after the parties were
ordered to do so by the bankruptcy court.

1 the automatic stay (the "motion to amend"). They sought
2 amendment on the grounds that 1) Debtor lacked standing to bring
3 the OSC because at the time it was filed, its corporate charter
4 had been revoked¹⁰; 2) Debtor suffered no actual damages as a
5 result of the stay violation; and 3) Debtor brought the OSC for
6 retaliatory purposes. Alternatively, Appellants claimed that
7 though they did not expressly move for annulment of the automatic
8 stay at the OSC hearing, the request was implicit from the facts,
9 and the court should have granted annulment of the automatic stay
10 because the equities justified such relief.

11 In opposition, Debtor countered that under Nevada state law,
12 a revoked corporation can only act through its directors as
13 trustee for the corporation and that it had acted properly
14 through its director/trustee Salim Rana. More importantly,
15 Debtor urged that the Appellants' request to retroactively lift
16 the stay was not for the intended purpose of the law - to justify
17 the continuation of the state court action - but instead was a
18 tactic to set aside the award of sanctions.

19 The hearing on the motion to amend was held on June 8, 2005.
20 The court determined

21 The Court: In my prior order based on the
22 evidence and the facts that were presented
before me, I ordered sanctions.

23 The motion that has been brought before me
24 today with respect to amend the judgment or
to go back is nothing more than an improper
25 attempt to reconsider either the same
arguments raised the last time with respect
26 to the annulment of the stay or to introduce
evidence that should have and could have been

27 ¹⁰ As evidence that Debtor's corporate charter was revoked,
28 Appellants submitted a "screen shot" of Tanner's computer that
reflected the Nevada Secretary of State website.

1 produced if it was relevant at the first time
2 that this was considered.

3 Moreover, even if I go beyond that and look
4 at it, there is absolutely no evidence
5 presented by the moving parties here as to a
6 disabling status of Azra Investments.

7 All they have presented is a screen shot from
8 the Secretary of State's Web site that is
9 insufficient, especially in light of the fact
10 that I do have before me admissible evidence
11 in the form of the declaration of Mr. Rana
12 that he was a director at all relevant times;
13 thus, I am denying the motion for
14 reconsideration.

15 Transcript of Proceedings, June 8, 2005, p. 14-15.

16 Appellants appeal.¹¹

17 **II. JURISDICTION**

18 The bankruptcy court had jurisdiction under 28 U.S.C. § 1334
19 and §§ 157(b) (1) and (b) (2) (G). We have jurisdiction under 28
20 U.S.C. §§ 158(b) (1) and (c) (1).

21 **III. ISSUES**

- 22 A. Whether the bankruptcy court abused its discretion in
23 issuing sanctions based on a violation of the automatic
24 stay.
- 25 B. Whether the bankruptcy court abused its discretion in
26 denying annulment of the automatic stay.

27 **IV. STANDARD OF REVIEW**

28 A violation of the automatic stay provisions of § 362(a) is
a question of law reviewed de novo. In re Eskanos & Adler, P.C.,

¹¹ We assume that this appeal is brought by Tanner on behalf
of himself as well as Appellants (as Debtor has not questioned
Tanner's status as an appellant though the response to the OSC
and the subsequent reconsideration motion were brought only by
Appellants).

1 309 F.3d 1210, 1213 (9th Cir. 2002); In re Del Mission, 98 F.3d
2 1147, 1150 (9th Cir. 1996). Whether a party has willfully
3 violated the automatic stay is a question of fact reviewed for
4 clear error. Fed. R. Bankr. P. 8013; In re Eskanos & Adler,
5 P.C., 309 F.3d at 1213; In re McHenry, 179 B.R. 165, 167 (9th
6 Cir. BAP 1995). It is clear error where there is a definite and
7 firm conviction that a mistake has been committed. In re Roman,
8 283 B.R. 1, 7 (9th Cir. BAP 2002). The bankruptcy court's
9 imposition of sanctions is reviewed for abuse of discretion. In
10 re Fjelsted, 293 B.R. 12, 19 (9th Cir. BAP 2003). A court's
11 decision to deny retroactive annulment of the automatic stay is
12 reviewed for an abuse of discretion. Id. at 18; In re Nat'l
13 Envtl. Waste Corp., 129 F.3d 1052, 1055 (9th Cir. 1997). A
14 denial of a motion for reconsideration is also reviewed under the
15 abuse of discretion standard. In re Ankeny, 184 B.R. 64, 69 (9th
16 Cir. BAP 1995).

17 V. DISCUSSION

18 Appellants contend that the bankruptcy court abused its
19 discretion in awarding sanctions and not annulling the stay.
20 They assert, for the first time on appeal, that an order vacating
21 the automatic stay was entered prior to the filing of the state
22 court complaint and the entry of the default judgment. As a
23 result, Appellants maintain that the award of sanctions should be
24 vacated and either the prior order granting relief from the
25 automatic stay be applied to them as a safe harbor, or the
26 bankruptcy court be directed to annul the automatic stay. We
27 disagree.

28

1 A. The Failure to Discontinue the State Court Action Was a
2 Wilful Violation of the Automatic Stay Pursuant to § 362(a)

3 Section 362(a) (1) automatically stays

4 the commencement or continuation, including
5 the issuance or employment of process, of a
6 judicial, administrative, or other action or
7 proceeding against the debtor that was or
8 could have been commenced before the
9 commencement of the case under this title, or
10 to recover a claim against the debtor that
11 arose before the commencement of the case
12 under this title.

13 11 U.S.C. § 362(a).

14 The statute is clear. The plain language of § 362(a) (1)
15 prohibits the commencement and maintenance of judicial actions.
16 See In re Eskanos & Adler, P.C, 309 F.3d at 1214. In Eskanos &
17 Adler, P.C., the Ninth Circuit held

18 The maintenance of an active collection
19 action alone adequately satisfies the
20 statutory prohibition against "continuation"
21 of judicial actions. Consistent with the
22 plain and unambiguous meaning of the statute,
23 and consonant with Congressional intent, we
24 hold that § 362(a) (1) imposes an affirmative
25 duty to discontinue post-petition collections
26 actions.

27 Id. at 1215 (emphasis added).

28 Notwithstanding Appellants' ignorance of Debtor's pending
bankruptcy,¹² the court determined that they violated the stay
when they failed to promptly dismiss the state court action or
set aside the default judgment upon becoming aware of the
bankruptcy. Though Appellants now acknowledge that they had an
affirmative duty to discontinue prosecution of the state court

¹² As noted in the quoted excerpt of the transcript of April
25, 2005, supra, the bankruptcy court concluded without inquiry
that Appellants did not have subjective knowledge of the
bankruptcy at the time the state court action was filed and the
default judgment was entered.

1 action, which led to the default judgment, they implore the panel
2 to consider that their conduct was neither willful nor in bad
3 faith.

4 Appellants argue that their motives for filing the state
5 court action and obtaining entry of a default judgment was based
6 on a mistaken understanding of the application of the automatic
7 stay. They believed that because Debtor was found in the state
8 court action to have acted fraudulently, the subsequent default
9 judgment was not subject to the automatic stay. As they
10 proceeded in a honest, but mistaken manner, their actions should
11 not be considered willful.

12 A willful action is deemed to have occurred when a party
13 knows about the automatic stay and acts intentionally. Id.; In
14 re Pinkstaff, 974 F.2d 113, 115 (9th Cir. 1992). A good faith
15 mistake of law or a legitimate dispute as to legal rights does
16 not relieve a willful violator of the consequences of his act.
17 In re Ramirez, 183 B.R. 583, 589 (9th Cir. BAP 1995); In re
18 Johnston, 321 B.R. 262, 281 (Bankr. D. Ariz. 2005). This
19 includes a failure to undo an act after the violation has been
20 committed. In re Eskanos & Adler, P.C., 309 F.3d at 1215.

21 As Appellants refused to dismiss the complaint or vacate the
22 default judgment after becoming aware of the bankruptcy, their
23 conduct, as the bankruptcy court correctly found, was in
24 violation of the automatic stay. Their mistaken understanding of
25 the application of the automatic stay did not justify their
26 actions. Consequently, we find that the bankruptcy court did not
27 err in determining that Appellants wilfully violated the
28 automatic stay.

1 B. The Bankruptcy Court Did Not Abuse Its Discretion in
2 Awarding Sanctions

3 Section 105(a) provides

4 The court may issue any order, process, or
5 judgment that is necessary or appropriate to
6 carry out the provisions of this title. No
7 provision of this title providing for the
8 raising of an issue by a party in interest
9 shall be construed to preclude the court
10 from, sua sponte, taking any action or making
11 any determination necessary or appropriate to
12 enforce or implement court orders or rules,
13 or to prevent an abuse of process.

14 11 U.S.C. § 105(a).

15 An injured corporation may recover damages caused by willful
16 violation of the automatic stay under the theory of ordinary
17 civil contempt. In re Goodman, 991 F.2d 613, 620 (9th Cir.
18 1993); In re Chugach Forest Prods., Inc., 23 F.3d 241, 244 (9th
19 Cir. 1994); In re Roman, 283 B.R. 1, 14 (9th Cir. BAP) ("Since the
20 enactment of § 362(h), damages for a violation of the automatic
21 stay are ordinarily recovered under § 362(h), but if that statute
22 is inapplicable, for example because the debtor is a corporation
23 and not an individual, then § 105(a) provides relief to injured
24 parties."). As Appellants wilfully violated the automatic stay,
25 we find the award of sanctions to be appropriate.

26 C. The Bankruptcy Court Did Not Abuse Its Discretion In Denying
27 Annulment of the Automatic Stay

28 Appellants argue that although they made no express request
to annul the automatic stay in connection with the hearing on the
OSC, because such a request was "implicit" in their opposition
papers, and because the equities weighed in favor of granting
annulment, the court abused its discretion when it did not do so

1 sua sponte. As such, Appellants request that the panel direct
2 the bankruptcy court to annul the automatic stay.¹³

3 Though the bankruptcy court observed at the OSC hearing that
4 Appellants could have promptly sought annulment of the stay,
5 thereby possibly avoiding the consequences of violating the stay,
6 they did not do so. The bankruptcy court was certainly under no
7 duty, statutorily or otherwise, to annul the stay on its own.

8 Apparently emboldened by the court's comments at the OSC
9 hearing, Appellants formally requested annulment of the stay for
10 the first time as part of their motion for reconsideration of the
11 sanctions award. The request was not, however, presented for the
12 purpose of validating the state court judgment but, rather, as a
13 defense to the award of sanctions.

14 Pursuant to Fed. R. Bankr. P. 9023, which incorporates Fed.
15 R. Civ. P. 59, the grounds for granting a motion for
16 reconsideration include where there exists a manifest error of
17 law or fact, or where evidence is newly discovered. Fed. R.
18 Bankr. P. 9023; In re Ankeny, 184 B.R. 64, 73 (9th Cir. BAP
19 1995). As the bankruptcy court correctly determined, Appellants
20 failed to satisfy either of these requirements. They could and
21 should have raised all defenses to the stay violation at the
22 hearing on the OSC. Because they failed to do so, the court
23 properly determined that the annulment "defense" could not be
24 raised for the first time in a motion for reconsideration.

25
26 ¹³ The purpose of Appellants' request to annul the automatic
27 stay is not to retroactively validate the prosecution of the
28 state court action and subsequent entry of default judgment, but
to vitiate the basis for the award of sanctions entered against
them.

1 D. The Order Vacating the Automatic Stay Obtained by Former
2 Counsel Did Not Provide Relief For Appellants' Actions

3 In their reply brief on appeal, Appellants allege for the
4 first time that an order granting relief from stay was entered
5 prior to the state court action and the entry of default
6 judgment. They advise that subsequent to the entry of the order
7 granting relief, they hired new counsel (Tanner), who was not
8 informed of the bankruptcy filing nor the stay order. Moreover,
9 as the order was entered by former bankruptcy Judge Robert Clive
10 Jones, who had left the bankruptcy bench prior to the filing of
11 the OSC¹⁴, the court itself was not aware that relief from stay
12 had already been granted.¹⁵ As such, Appellants now maintain
13 that there was no violation of the automatic stay and that the
14 award of sanctions based on an "erroneous" assumption should be
15 vacated.

16 This argument is eviscerated by the plain language of the
17 stay order itself:

18 IT IS HEREBY ORDERED, ADJUDGED AND DECREED
19 that the Automatic Stay in the above-entitled
20 bankruptcy proceeding vacates and
21 extinguishes on October 21, 2002 for all
22 purposes^[16] as to Secured Creditor MARCH 27,
23 2000 \$5,930.000 [sic] SECURED PROMISSORY
24 NOTE, its assignees and/or successors in

22 ¹⁴ Judge Jones was appointed to the United States District
23 Court, District of Nevada, on December 1, 2003.

24 ¹⁵ The bankruptcy court docket reflects that an order
25 granting relief from the automatic stay with regard to the Azra
26 Property was entered on November 7, 2002.

26 ¹⁶ During oral argument, Appellants asserted that the stay
27 order covered the state court action focusing on the phrase "for
28 all purposes." However, it is clear from a review of the order
in its entirety that the relief granted was limited to conducting
a foreclosure sale of the Azra Property.

1 interest, and Secured Creditor may proceed
2 with a foreclosure of and hold a Trustee's
3 Sale of the subject property scheduled on
4 October 22, 2002 at 10:00 a.m,[sic] upon
5 property referred to as the AZRA ASSISTED
6 LIVING CENTER in Las Vegas, Nevada, pursuant
7 to applicable State Laws, and thereafter
8 commence any action necessary to obtain
9 complete possession of the subject Property.

10 Order Vacating Automatic Stay, October 22, 2002, p. 1 (emphasis
11 added).

12 In accordance with the order, Appellants foreclosed and sold
13 the Azra Property at a trustee's sale on October 23, 2002.

14 However, Appellants never sought, and the stay order does not
15 provide for, relief from the stay to prosecute a state court
16 action for money damages based in tort (misrepresentation and
17 fraud). That being the case, the Appellants' continued
18 prosecution of the state court action was neither protected nor
19 authorized by the stay order.

20 **VI. CONCLUSION**

21 For the foregoing reasons, we AFFIRM the bankruptcy court's
22 award of sanctions.
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