

MAY 31 2013

SUSAN M SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP Nos. CC-12-1059-PaMkTa
)	CC-12-1229-PaMkTa
B SQUARED, INC.,)	CC-12-1410 PaMkTa
)	(related appeals)
Debtor.)	
_____) Bankr. No. 09-12590-GM
DANNY WAYNE PRYOR,)	Adv. No. 11-01677-GM
)	
Appellant,)	
)	
v.)	M E M O R A N D U M ¹
)	
B SQUARED, INC.,)	
)	
Appellee.)	
_____)

Argued and Submitted on May 16, 2013
at Pasadena, California

Filed - May 31, 2013

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

Honorable Geraldine Mund, Bankruptcy Judge, Presiding

Appearances: _____
Appellant Danny Wayne Pryor argued pro se; Susan K. Seflin of Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP argued for appellee B Squared, Inc.

Before: PAPPAS, MARKELL and TAYLOR, 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 An alleged creditor, Danny Wayne Pryor ("Pryor"), appeals
2 three orders of the bankruptcy court²: (1) an order finding that
3 Pryor was in contempt (the "Contempt Order") for violating the
4 automatic stay and discharge injunction in the chapter 11³ case of
5 the reorganized debtor, B Squared, Inc. ("B Squared") (BAP No.
6 CC-12-1059); (2) an order denying reconsideration of an order
7 dismissing Pryor's adversary proceeding seeking revocation of
8 B Squared's plan confirmation (the "Dismissal Order") (BAP No.
9 CC-12-1229); and (3) an order denying reconsideration of an order
10 designating Pryor as a vexatious litigant (the "Vexatious Litigant
11 Order") (BAP No. CC-12-1410). We AFFIRM all three orders.

12 **FACTS**

13 Pryor is a former real estate contractor and developer in the
14 Los Angeles area. B Squared was a licensed mortgage broker in the
15 state of California.

16 The dispute between Pryor and B Squared⁴ began in 2003-2004.
17 Pryor purchased two parcels of land, one containing fourteen lots
18 and the other four lots, from the City of Lancaster, California
19 (the "Property"). Intending to develop the Property, in November
20

21 ² The record in this appeal involves numerous courts. We
22 refer to the court that entered the orders in this appeal as the
23 bankruptcy court or the court. The court hearing Pryor's
24 chapter 7 bankruptcy case is the "Pryor Bankruptcy Court." It is
usually clear in context which state court (Los Angeles Central,
Lancaster or Long Beach Division) is discussed, so they are all
referred to as the state court.

25 ³ Unless otherwise indicated, all chapter, section and rule
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
27 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037. The
Federal Rules of Civil Procedure are referred to as "Civil Rules."

28 ⁴ Reference to B Squared also includes any references to its
d.b.a., All California Funding.

1 2003, Pryor entered into a construction loan agreement with
2 B Squared for \$3,500,000, secured by a deed of trust on fourteen
3 lots of the Property ("Construction Loan 1"). In March 2004,
4 Pryor entered into a second construction loan agreement with
5 B Squared for \$900,000, secured by a deed of trust on the
6 remaining four lots ("Construction Loan 2").

7 On July 7, 2005, B Squared caused a Notice of Default to be
8 recorded concerning Construction Loan 1, based on Pryor's alleged
9 failure to pay \$130,294.75 in interest. A foreclosure sale was
10 held on January 13, 2006, at which B Squared acquired title to the
11 fourteen lots by credit bid. On June 21, 2005, B Squared recorded
12 a Notice of Default concerning Construction Loan 2, based on
13 Pryor's alleged default on his obligation to pay \$948,414.54.
14 B Squared acquired title to the four lots at a foreclosure sale on
15 November 18, 2005.

16 The Central Division Action

17 On June 6, 2006, Pryor⁵ filed an action in Los Angeles
18 Superior Court, Central Division, American Commodities Real Estate
19 Sec. v. B Squared, Inc., case no. BC353526 (the "Central Division
20 Action"). In the complaint, Pryor asserted causes of action for
21 quiet title, fraud and related claims relating to the loans and
22

23 ⁵ Over the years, Pryor has prosecuted actions and claims
24 against B Squared under the names of Danny Wayne Pryor, Dan Pryor,
25 Dan W. Pryor, Danny Pryor, Danny W. Pryor and Daniel Pryor. He
26 has also acted through his controlled businesses, American Real
27 Estate Securities, Inc. d.b.a. A.C.R.E.S., Inc., Acres Inc.,
28 ACRES, ACRES Development, Inc., ACP Development, LLC, Turnkey
Developers, and ROYRP Enterprises, LP. Although he debates the
percentage of his ownership interest in these entities, Pryor has
not challenged in this appeal that he controls these entities.
Thus, unless there is need to separately identify a particular
entity, any reference to Pryor means Pryor or Pryor acting through
his controlled entities.

1 foreclosures on the Property. The Central Division Action ended
2 on July 30, 2007, when a dismissal judgment was entered against
3 Pryor, "grant[ing] the Demurrers [of B Squared] in their entirety,
4 without leave to amend, as to all six causes of action in
5 [Pryor's] Complaint." The state court awarded B Squared
6 attorney's fees in the amount of \$743,597.

7 The Lancaster Action

8 On December 17, 2009, Pryor filed a complaint in Los Angeles
9 Superior Court, Lancaster Division, Pryor v. B Squared, Inc., case
10 no. 021132 (the "Lancaster Action"). As discussed below,
11 B Squared had been in bankruptcy for nine months when this action
12 was filed. The complaint in this suit was similar to the one he
13 filed in the Central Division Action, with the same defendants and
14 causes of action. However, Pryor filed this action in his own
15 name (as opposed to the filing of the Central Division Action by
16 ACRES, his controlled corporation) and he filed it in a different
17 court division. B Squared alleges that it was never served with
18 the summons and complaint in the Lancaster Action.

19 On March 17, 2011, Pryor filed a request for entry of a
20 default judgment in the Lancaster Action. B Squared then appeared
21 in the Lancaster Action on September 22, 2011, and moved for
22 dismissal. Pryor opposed B Squared's motion to dismiss by the
23 filing of an Opposition on October 24, 2011. On November 29,
24 2011, the state court dismissed the Lancaster Action with
25 prejudice against Pryor.

26 The April 2010 Action

27 On April 5, 2010, Pryor filed yet another complaint in Los
28 Angeles Superior Court, again in the Central Division, Pryor v.

1 B Squared, Inc., case no. 435256 (the "April 2010 Action"). The
2 parties and causes of action were the same as those in the
3 Lancaster Action, which was still open at the time of filing the
4 April 2010 Action. The state court dismissed the April 2010
5 Action on September 20, 2011, for lack of prosecution. B Squared
6 alleges that it was never served with the summons and complaint in
7 the April 2010 Action.

8 The Long Beach Action

9 As discussed below, the bankruptcy court indicated at a
10 hearing on December 28, 2011, its intention to permanently enjoin
11 any action by Pryor to collect on the debt alleged in the
12 Lancaster Action. Despite this, on January 4, 2012, Pryor filed
13 yet another action in Los Angeles Superior Court, this time in the
14 Long Beach Division, alleging the same claims asserted in the
15 Lancaster Action, and styled as Pryor v. Lyric Ave. P'ship, case
16 no. NC-57005. Although Pryor did not list B Squared as a
17 defendant in the caption of this action, the body of the complaint
18 clearly identifies B Squared as a defendant.

19 The Bankruptcy Cases

20 B Squared filed a chapter 11 bankruptcy petition on March 10,
21 2009. B Squared's Statement of Financial Affairs listed the
22 judgment in its favor and against ACRES/Pryor entered in the
23 Central Division Action of \$743,597. B Squared's Statement of
24 Financial Affairs at 2, ¶ 4. B Squared did not list Pryor or any
25 of his controlled entities as creditors in its schedules, and
26 Pryor did not participate in the chapter 11 proceedings.

27 The bankruptcy court confirmed B Squared's Second Amended
28 Plan of Reorganization at a hearing on July 22, 2010. The court

1 entered the order confirming the plan on August 20, 2010. In
2 separate Findings of Fact and Conclusions of Law in Support of
3 Confirmation of Debtor's Second Amended Chapter 11 Plan, the court
4 concluded that all claims arising prior to the date of
5 confirmation would be discharged pursuant to § 1141(d)(1).

6 A Discharge Order was entered in the B Squared bankruptcy
7 case on March 11, 2011. The Discharge Order provided, in relevant
8 part,

9 The debtor has no liability for debts discharged under
10 11 U.S.C. . . . 1141 except those debts determined by
11 order of a court with competent jurisdiction not to be
12 discharged pursuant to 11 U.S.C. section 523. . . . All
13 creditors whose debts are discharged by this order and
14 all creditors whose judgments are declared null and void
15 by this order are enjoined from instituting or
16 continuing any action or employing any process or
17 engaging in any act to collect such debts as personal
18 liabilities of the debtor.

19 In the meantime, on June 3, 2009, Pryor had filed his own
20 bankruptcy case under chapter 7. Attached to his Schedule B of
21 personal property is a "List of Secured and Unsecured Creditors"
22 in which he lists the Central Division Lawsuit as an action for
23 fraud, but with no further information or alleged value. The
24 chapter 7 trustee in Pryor's case filed a report of no
25 distribution on December 9, 2011. Pryor was granted a discharge
26 on December 13, 2011.

27 The Contempt Order

28 On November 2, 2011, B Squared filed a Motion for Entry of
Order (1) Enforcing the Discharge Injunction; (2) Permanently
Enjoining Pryor and his Entities from Attempting to Collect the
Discharged Debt; and (3) For Contempt Sanctions (the "Contempt
Motion"). Pryor filed an Opposition to the Contempt Motion on

1 November 11, 2011.

2 The bankruptcy court held hearings on the Contempt Motion on
3 November 29 and December 28, 2011. The transcripts of those
4 hearings are not in the record or the bankruptcy court's docket.
5 However, a copy of the court's tentative ruling was docketed on
6 December 28. It reported that Pryor had represented to the court
7 at the November 29 hearing that he had filed the Lancaster Action
8 on advice of his counsel, Ms. Katherine Warwick ("Warwick"), who
9 was representing him in other proceedings. At the November 29
10 hearing, the bankruptcy court ordered Pryor to provide a
11 declaration from Warwick to support that assertion. Pryor did not
12 provide a declaration, but rather submitted a series of redacted
13 emails between Pryor and Warwick.

14 The bankruptcy court, at the hearing on December 28,
15 indicated its intention to grant the Contempt Motion, including a
16 permanent injunction against any attempt by Pryor to collect on
17 any debt alleged in the Lancaster Action.⁶ A January 30, 2012
18 order entered by the bankruptcy court provided that: (1) Pryor
19 and related entities were permanently enjoined from any and all
20 attempts to collect on discharged debts, including any claim
21 allegedly arising from the Lancaster Action; (2) any claim that
22 Pryor and related entities may have had against B Squared prior to

23
24 ⁶ Recall from the discussion of the Long Beach Action above
25 that - despite the bankruptcy court's statement on December 28,
26 2011, that it would enter a permanent injunction prohibiting any
27 actions by Pryor or his entities against B Squared - Pryor filed
28 yet another action on January 3, 2012, Pryor v. Lyric Ave. P'ship,
case no. NC-57005 (Los Angeles Superior Court), this time in the
Long Beach Division, alleging the same claims asserted in the
Lancaster Action. B Squared was not named in the caption of that
action, but was clearly identified as the object of the action in
the text of the complaint.

1 the date of the confirmation of B Squared's plan of reorganization
2 was discharged pursuant to § 1141; (3) Pryor and related entities
3 had knowingly and willingly violated the automatic stay in effect
4 in B Squared's bankruptcy case under § 362(a), and knowingly and
5 willingly violated the discharge injunction under §§ 524 and 1141
6 after B Squared's plan was confirmed; (4) B Squared had been
7 forced to incur substantial expenses in connection with the
8 Lancaster Action and in prosecuting the motion to stop Pryor's
9 continuing violations of the discharge injunction;
10 (5) compensatory sanctions were awarded against Pryor and in favor
11 of B Squared in the amount of \$25,000, together with punitive
12 damages in the amount of \$10,000.

13 After the hearing, but before entry of the bankruptcy court's
14 order, on January 17, 2012, Pryor filed a motion asking the
15 bankruptcy court to reconsider the award of sanctions. The court
16 entered an order denying Pryor's motion to reconsider sanctions on
17 January 27, 2012 (the "Contempt Reconsider Order"). In the order
18 denying the reconsideration motion, the court elaborated on its
19 finding that, in suing B Squared, Pryor had not acted on advice of
20 his attorney. The bankruptcy court quoted from one email from
21 Warwick to Pryor, in which Warwick told Pryor that filing the
22 Lancaster Action was a violation of the automatic stay: "I
23 specifically remember saying that it WAS a violation of the
24 automatic stay. . . . Be perfectly clear however, I told you that
25 it was a violation of the automatic stay." Email from Warwick to
26 Pryor, December 3, 2011, quoted in Contempt Reconsider Order at 4
27 (capitalization of word "WAS" in original).

28 In fact, the declaration Warwick had submitted on January 12,

1 2012, directly contradicted Pryor's statements made to the
2 bankruptcy court on November 29 and December 28 that Warwick had
3 advised him that he would not violate the automatic stay by
4 seeking to collect from B Squared because he was not listed on
5 B Squared's schedules. Warwick instead declared that: "Because
6 [Pryor] had not been listed as a creditor in the B Squared
7 bankruptcy case and because he did not proceed otherwise against
8 B Squared in the state court litigation, he believed that he had
9 not violated the automatic stay in this Case." In short, Pryor
10 made the representation to Warwick, not vice versa. The
11 bankruptcy court summarized: "Pryor has twice attempted to get
12 Warwick to state that she told him to proceed regardless of the
13 bankruptcy and she has twice refused." Contempt Reconsider Order
14 at 4.

15 Pryor filed a timely appeal of the Contempt Order (BAP No.
16 CC-12-1059).

17 The Adversary Proceeding and the Dismissal Order

18 On December 27, 2011, Pryor filed an adversary proceeding
19 Complaint to Deny Discharge Pursuant to 11 U.S.C. § 523 and 727
20 against B Squared in the bankruptcy court. In it, Pryor generally
21 asserted the same claims that he had alleged against B Squared in
22 the Central Division and Lancaster Actions, but couched them as
23 objections to discharge and requests for exception of his claims
24 from discharge.

25 Almost immediately, on January 30, 2012, B Squared filed a
26 motion to dismiss the adversary proceeding pursuant to Civil
27 Rule 12(b)(6). B Squared argued that the complaint was
28 time-barred, too conclusory to survive a motion for dismissal

1 under Civil Rule 12(b)(6), and barred under the doctrines of
2 collateral estoppel and res judicata. Pryor responded, repeating
3 the general allegations made in the Central Division and Lancaster
4 Actions, emphasizing his allegation that B Squared had engaged in
5 fraud.

6 B Squared, through counsel, and Pryor, acting pro se,
7 appeared at the bankruptcy court hearing concerning the motion to
8 dismiss on February 28, 2012. A transcript of that hearing is in
9 the record. The court thereafter entered a Memorandum of Opinion
10 Re Defendant's Motion to Dismiss Adversary Proceeding on March 20,
11 2012. In the Memorandum, the court opined that it would not
12 consider the arguments of either party, because it had no
13 authority to grant the relief requested in the Complaint.

14 First, B Squared had been granted a discharge under § 1141,
15 and a discharged chapter 11 debtor is not subject to denial of
16 discharge under § 727.

17 Second, the bankruptcy court noted that B Squared is a
18 corporation and, with certain irrelevant exceptions, only
19 individual debtors are subject to exceptions from discharge under
20 § 523(a).

21 Finally, the bankruptcy court observed that B Squared's
22 discharge had been authorized in the Confirmation Order and that,
23 under § 1144, the court may revoke a confirmation order only if a
24 motion to revoke is filed within 180 days of the entry of that
25 order. Even if the Complaint were to be construed as a motion to
26 revoke, because it was filed on December 27, 2011, or over
27 400 days after entry of the Confirmation Order, it was
28 time barred. The bankruptcy court concluded that the 180-day rule

1 was not equitably tolled, based principally on the multiple
2 misrepresentations made to the court by Pryor.

3 The bankruptcy court granted B Squared's motion to dismiss
4 and entered an order dismissing the adversary proceeding with
5 prejudice and without leave to amend on March 20, 2012.

6 Pryor filed a Motion to Reconsider Dismissal on April 16,
7 2012, twenty-six days after entry of the Dismissal Order.⁷
8 Pryor's motion to reconsider the Dismissal Order is fifty-seven
9 pages long but, at bottom, generally complains that the bankruptcy
10 court had not considered all of the papers he submitted on the
11 motion to dismiss.

12 The bankruptcy court denied Pryor's motion to reconsider the
13 Dismissal Order without a hearing in an order entered April 20,
14 2012. In the order, the court noted that the documents that Pryor
15 asserted had not been considered did not address the basis of the
16 court's ruling and therefore made no difference in the outcome of
17 the motion to dismiss. The court also observed that at the
18 hearing on February 28, 2012, an issue had been raised as to
19 whether Pryor had standing to prosecute the adversary proceeding
20 because the claims he asserted were property of his bankruptcy
21 estate. Pryor asserted that the claims had been abandoned by the
22 bankruptcy court the previous week. Counsel for B Squared stated
23 that she had reviewed the docket of the bankruptcy case and did

24
25 ⁷ A dismissal with prejudice is a final, appealable order
26 that starts the clock on the time to appeal. Elliott v. White Mt.
27 Apache Tribal Ct., 566 F.3d 843, 846 (9th Cir. 2006). A
28 reconsideration motion under Rules 9023 and 9024 (incorporating
Civil Rules 59(e) and 60(b)(6)) will toll the time to appeal only
if filed within fourteen days of entry of the order.
Rule 8002(b)(3) and (4).

1 not find any such order. The bankruptcy court ordered Pryor to
2 submit proof that they had been abandoned. Pryor never provided
3 proof that the claims were abandoned. Therefore, the court
4 concluded that the claims Pryor asserted in his Complaint were
5 held by the chapter 7 trustee, implicitly holding that Pryor did
6 not have standing to assert them.⁸

7 Pryor filed a timely appeal of the order denying his motion
8 to reconsider the dismissal order on April 30, 2012. However, as
9 noted above, because his reconsideration motion did not toll the
10 time for an appeal of the underlying dismissal order, the
11 dismissal order is not before us in this appeal.

12 The Vexatious Litigant Order

13 B Squared filed a motion to have Pryor deemed a vexatious
14 litigant on April 26, 2012 (the "Vexatious Litigant Motion"). In
15 it, B Squared included a chart of eight cases Pryor had filed
16 which, it alleged, demonstrated that Pryor:

17 routinely forum shops, has cases dismissed and then
18 refiles, files actions after the statute of limitations
19 has run, when unsuccessful against a party refiles in
20 another court, files baseless appeals, all while not
paying a dime for any of his filings or towards the
hundreds of thousands in attorneys' fees and sanctions
that have already been awarded against him.

21 Pryor filed opposition documents on May 15, 2012, generally
22 disputing B Squared's allegations.

23
24 ⁸ The B Squared bankruptcy court was apparently not aware on
25 April 20, 2012, that the bankruptcy court in Pryor's bankruptcy
26 case had, on April 17, 2012, denied Pryor's request to order the
27 trustee to abandon the claims against B Squared. Hr'g Tr. 6:9-17,
28 April 17, 2012 (THE PRYOR BANKRUPTCY COURT: "Let me stop you
because it's obvious we're not going to get anywhere as far as
B Squared is concerned. I'm going to deny your motion to abandon
[the B Squared claims]. I'm not going to do anything to encourage
you in any way to further abuse the bankruptcy system, at least in
relationship to the B Squared action.").

1 The bankruptcy court heard arguments from B Squared and Pryor
2 on May 29, 2012. After taking the matters under submission, the
3 court entered the Vexatious Litigant Order on June 22, 2012. The
4 Vexatious Litigant Order concluded that Pryor had adequate notice
5 of, and opportunity to defend against, B Squared's motion. It
6 attached a chart listing twelve cases, motions, and events that
7 "led this Court to conclude that a vexatious litigation order is
8 necessary and appropriate as to and against the Pryor Parties."
9 It noted that Pryor had failed to pay contempt sanctions
10 previously entered against him in the B Squared bankruptcy,
11 leading the court to believe that additional monetary sanctions
12 would be ineffective. Instead, the bankruptcy court enjoined
13 Pryor from initiating any form of action against B Squared in
14 regard to the Property without obtaining the court's prior written
15 consent.

16 Pryor filed a reconsideration motion seventeen days after
17 entry of the Vexatious Litigation Order on July 9, 2012. Pryor's
18 motion alleged that the bankruptcy court was not aware that Pryor
19 had been granted a default judgment in the Long Beach Action
20 against all defendants except B Squared, and reasoned that this
21 "mooted" the Vexatious Litigation Order. The court denied the
22 motion to reconsider the Vexatious Litigation Order in an order
23 entered on August 1, 2012. The bankruptcy court found the
24 reconsideration motion simply repeated prior oppositions and
25 provided no relevant new evidence.

26 Pryor filed a timely appeal of the order denying
27 reconsideration of the Vexatious Litigant Order on August 8, 2012.

28

1 DISCUSSION

2 I.

3 The bankruptcy court did not abuse its discretion in
4 awarding monetary sanctions against Pryor for violating
5 the automatic stay and discharge injunction.

6 Although Pryor appeals the Contempt Order, it appears that he
7 only challenges in this appeal the bankruptcy court's order that
8 he pay compensatory and punitive damages. Consequently, we do
9 not review the bankruptcy court's decision to permanently enjoin
10 Pryor from seeking to collect the discharged debt from B Squared.

11 The bankruptcy court awarded \$25,000 in damages to B Squared
12 as compensation for Pryor's knowing and willful violation of the
13 automatic stay and the discharge injunction, and \$10,000 in
14 punitive damages for Pryor's knowing and willful violation of the
15 discharge injunction. Since the case law distinguishes between
16 sanction awards under these two injunctions, we must first review
17 the differences.

18 The filing of a bankruptcy petition under chapter 11 of the
19 Bankruptcy Code creates an automatic stay which prohibits, inter
20 alia, "the commencement or continuation, including the issuance or
21 employment of process, of a judicial, administrative, or other
22 action or proceeding against the debtor that was or could have
23 been commenced before the commencement of the case under this
24 title, or to recover a claim against the debtor that arose before
25 the commencement of the case under this title[.]" § 362(a)(1);
26 Snavelly v. Miller (In re Miller), 397 F.3d 726, 730-31 (9th Cir.
27 2006) ("The stay of section 362 is extremely broad in scope and
28 . . . should apply to almost any type of formal or informal action
against the debtor or property of the estate.").

1 An automatic stay arose when B Squared filed the chapter 11
2 bankruptcy petition on March 10, 2009. It is uncontested that the
3 dispute between Pryor and B Squared regarding the Property arose
4 during the period 2003-2006. The automatic stay remained in
5 effect to bar actions against B Squared until entry of the
6 discharge and discharge injunction on March 11, 2011.
7 § 362(c)(2)(C) (“[T]he stay of any other act under subsection (a)
8 of this section continues until the earliest of – . . . (c) if the
9 case is a case under . . . chapter . . . 11 . . . of this title,
10 the time a discharge is granted or denied[.]”); Zilog, Inc. v.
11 Corning (In re Zilog, Inc.), 450 F.3d, 996, 1009 (9th Cir. 2006).
12 Consequently, any attempt by Pryor to commence or continue an
13 action against B Squared to collect on an alleged debt concerning
14 the Property between March 10, 2009 and March 11, 2011 would
15 constitute a violation of the automatic stay, and any collection
16 actions against B Squared taken on or after March 11, 2011 would
17 constitute a violation of the discharge injunction.

18 The bankruptcy court imposed sanctions against Pryor for
19 violating the automatic stay and discharge injunctions based on
20 his knowing and willful actions in the Lancaster Action. Contempt
21 Order at ¶¶ 2-4. The court imposed sanctions under the authority
22 granted by § 105(a)⁹; Cal. Employment Dev. Dep't v. Taxel

23

24 ⁹ **Power of court**

25 (a) The court may issue any order, process, or judgment
26 that is necessary or appropriate to carry out the
27 provisions of this title. No provision of this title
28 providing for the raising of an issue by a party in
interest shall be construed to preclude the court from,
sua sponte, taking any action or making any

(continued...)

1 (In re Del Mission Ltd.), 98 F.3d 1147, 1152 (9th Cir. 1996)
2 (holding that damages for violation of the automatic stay of a
3 corporate debtor are properly sought under § 105(a)). The
4 propriety of an award made under § 105(a) turns not on a finding
5 of bad faith or subjective intent, but rather on a finding of
6 "willfulness," where willfulness has a particularized meaning:

7 "[W]illful violation" does not require a specific intent
8 to violate the automatic stay. Rather, the statute
9 provides for damages upon a finding that the defendant
knew of the automatic stay and that the defendant's
actions which violated the stay were intentional.

10 Havelock v. Taxel (In re Pace), 67 F.3d 187, 191 (9th Cir. 1995).

11 Pryor provided inconsistent statements in the record
12 concerning the date when he first became aware of the B Squared
13 bankruptcy case and the automatic stay. Pryor conceded in a
14 declaration submitted in the Lancaster Action on September 28,
15 2011 that he was aware of the pendency of the B Squared bankruptcy
16 case by August 3, 2010. But the bankruptcy court had evidence
17 provided by Pryor himself that he knew of the B Squared bankruptcy
18 case and existence of the automatic stay before termination of
19 that stay, and that he nonetheless knowingly and willfully
20 violated that stay.

21 At the hearing on the Contempt Motion on November 29, 2011,
22 Pryor informed the bankruptcy court that when he inquired of his
23 counsel, Warwick, who represented him in other matters, she

24

25

26 ⁹(...continued)
27 determination necessary or appropriate to enforce or
28 implement court orders or rules, or to prevent an abuse
of process.

28 § 105(a).

1 counseled him that his activities in the Lancaster Action did not
2 violate the stay. But when Pryor submitted the copies of emails
3 between himself and Warwick, she stated that: "I specifically
4 remember saying that [the Lancaster Action] WAS a violation of the
5 automatic stay. . . . Be perfectly clear however, I told you that
6 it was a violation of the automatic stay." Email from Warwick to
7 Pryor, December 3, 2011, quoted in Contempt Reconsider Order at 4.

8 Indeed, in his reply brief, Pryor cites to his testimony
9 given on April 25, 2012, before the bankruptcy court in his own
10 bankruptcy case. As shown by the transcript of that hearing in
11 the excerpts of record, in a colloquy between Pryor and the Pryor
12 Bankruptcy Court, the court suggested that Pryor was being evasive
13 on the question of when he first became aware of the B Squared
14 bankruptcy. The Pryor Bankruptcy Court then placed Pryor under
15 oath:

16 THE PRYOR BANKRUPTCY COURT: You're under oath. I'm
17 asking you directly, did you – when did you first get
18 knowledge of the B Squared bankruptcy? . . .

18 PRYOR: After December 2009.

19 THE PRYOR BANKRUPTCY COURT: After – when after?

20 PRYOR: That was – I think it was in January, right
21 around January.

22 THE PRYOR BANKRUPTCY COURT: Of 2009?

23 PRYOR: Not in 2009, but the next year.

24 THE PRYOR BANKRUPTCY COURT: 2010?

25 PRYOR: Right.

26 Hr'g Tr. 9:10-10:4, April 27, 2012.

27 Thus, the record on appeal establishes that Pryor, contrary
28 to his representation that he did not know of the B Squared

1 bankruptcy until August 3, 2010, testified that he was aware of
2 the bankruptcy filing by January 2010. And contrary to his
3 initial representation to the bankruptcy court that his counsel
4 advised him that it would not violate the stay for him to pursue
5 the Lancaster Action, he subsequently produced emails and a
6 declaration from counsel where she denies giving him that advice.
7 In the bankruptcy court's words, "Pryor has twice attempted to get
8 Warwick to state that she told him to proceed regardless of the
9 bankruptcy and she has twice refused." Contempt Reconsider Order
10 at 4.

11 But regardless of the various suspect representations by
12 Pryor, it cannot be challenged that, at some point during the
13 pendency of the B Squared bankruptcy case, Pryor became aware of
14 the automatic stay and failed to remedy his on-going stay
15 violations. In other words, whether he had knowledge of the stay
16 in August 2010, January 2010, or earlier, he was under an
17 obligation to immediately dismiss B Squared from the Lancaster
18 Action. Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178, 1192
19 (9th Cir. 2003) (upon discovery of a violation, the creditor "had
20 an affirmative duty to remedy his automatic stay violation.").
21 Even an "arguably innocent" stay violation that the creditor does
22 not attempt to remedy immediately may constitute a willful stay
23 violation. In re Ziloq, Inc., 450 F.3d at 1007.

24 Pryor never sought to stop the Lancaster Action, nor to
25 dismiss B Squared from it, for the seven months after the latest
26 possible date that he admits he was aware of B Squared's
27 bankruptcy, August 2010. And after the automatic stay terminated
28 with the entry of the discharge injunction, Pryor continued to

1 press his claims against B Squared in the Lancaster Action. On
2 March 17, 2011, Pryor sought entry of a default judgment against
3 B Squared in the Lancaster Action. Then, after B Squared finally
4 was made aware of the Lancaster Action and moved to dismiss the
5 action, Pryor opposed the motion to dismiss B Squared on
6 October 24, 2011. B Squared would only escape from the Lancaster
7 Action when the state court dismissed the proceeding with
8 prejudice against Pryor on November 29, 2011.

9 Pryor has not challenged in this appeal the calculation of
10 the amount of the bankruptcy court's award of \$25,000 in
11 compensatory damages, which the court awarded based on a detailed
12 fee and expense statement from B Squared. We therefore find that
13 the bankruptcy court did not abuse its discretion in awarding
14 compensatory damages to B Squared for expenses incurred in
15 responding to Pryor's knowing and willful violation of the
16 automatic stay and discharge injunction.

17 The bankruptcy court also awarded \$10,000 in punitive damages
18 against Pryor for his violation of the discharge injunction.
19 Section 524 of the bankruptcy code provides that a discharge
20 "operates as an injunction against the commencement or
21 continuation of an action . . . to collect, recover or offset any
22 [discharged] debt as a personal liability of the debtor."
23 § 524(a)(2). A party who knowingly violates the discharge
24 injunction can be held in contempt under § 105(a) of the
25 Bankruptcy Code. Walls v. Wells Fargo Bank, N.A., 276 F.3d 502,
26 507 (9th Cir. 2002) (holding that civil contempt is an appropriate
27 remedy for a willful violation of § 524's discharge injunction).
28 Although the bankruptcy court may not award punitive damages for

1 violation of the automatic stay under § 105(a), it may award
2 punitive damages under that section for knowing and willful
3 violations of the discharge injunction. Espinosa v. United
4 Student Aid Funds, 553 F.3d. 1193, 1205 n.7 (9th Cir. 2008). ("If
5 the bankruptcy court finds that the creditor here willfully
6 violated the injunction, it shall, at the very least, impose
7 sanctions to the extent necessary to make [debtor] whole. See
8 2 Collier Bankruptcy Manual (3d rev. ed.) ¶ 524.02[2][c] ('In
9 cases in which the discharge injunction was violated willfully,
10 courts have awarded debtors actual damages, punitive damages and
11 attorney's fees.')"). The standard in this circuit for violations
12 of the discharge injunction is that the movant must prove that the
13 creditor: (1) knew the discharge injunction was applicable and
14 (2) intended the actions which violated the injunction. Renwick
15 v. Bennett (In re Bennett), 298 F.3d 1059, 1069 (9th Cir. 2002)
16 (citing Hardy v. United States (In re Hardy), 97 F.3d 1384, 1390
17 (11th Cir. 1996)).

18 Although a bankruptcy court can infer that a creditor has
19 knowledge of a discharge injunction from the creditor's knowledge
20 of the bankruptcy case, such an inference must be proven.
21 In re Zilog, Inc., 450 F.3d at 1003. The bankruptcy court
22 conducted hearings on the contempt motion on November 29 and
23 December 28, 2011. The court considered the declarations from the
24 parties regarding the discharge injunction. In particular, in his
25 declaration, Pryor states,

26 B Squared counsel makes the claim whether I proceeded
27 against B Squared Inc. after they were discharged. This
28 is apparently "Yes." After Warwick had checked PACER
and advised me that I was not listed as a creditor, I
was under the assumption that this debt was not

1 discharged. It is clear that I was not acting without
2 the advice of an experience[d] Bankruptcy Attorney. I
3 was under the assumption that B Squared debt concerning
4 Dan Pryor and his entities were never discharged. I
would never [have] violated an automat[ic] stay of this
court or any court knowing that the claims were
discharged.

5 Declaration of Dan Pryor at 4, December 23, 2011. Pryor thus
6 concedes that he knew that there had been a discharge entered in
7 B Squared's bankruptcy case, but he disputes the consequences of
8 that discharge.

9 There was conflicting evidence whether Pryor knew of the
10 existence and effect of the discharge injunction when it was
11 entered on March 11, 2011. But the evidence is uncontested that
12 Pryor was made aware of the injunction and consequences for
13 violating it on September 19, 2011, when B Squared sent Pryor an
14 email stating:

15 Please further note that [this] email shall serve as
16 notice that, continuing to prosecute [the Lancaster
17 Action] is a clear violation of the automatic stay and
18 discharge injunction and if we are forced to do so, [we]
19 will file a motion in the Bankruptcy Court to
20 permanently enjoin you from attempting to collect on an
alleged pre-petition obligation of [] B Squared, and
will seek monetary sanctions and attorney's costs
against you for your blatant disregard of the discharge
injunction.

21 B Square email to Pryor, September 19, 2011, attached to and
22 incorporated as exh. G to the Supplemental Declaration of Simon
23 Aron in support of the Contempt Motion, December 20, 2011.

24 As mentioned earlier, the record does not include a
25 transcript of the December 28, 2011 hearing where the bankruptcy
26 court reported its reasons for awarding sanctions for violation of
27 the automatic stay and discharge injunction. However, in its
28 Contempt Reconsider Order, the court reported its credibility

1 ruling at the December 28, 2011 hearing: "Further, as I stated at
2 the December 28 hearing, I simply do not believe Pryor as to his
3 belief on the effect of the discharge." Contempt Reconsider Order
4 at 5. In this appeal, Pryor acknowledges that the court used
5 those same words at the December 28 hearing. Pryor Reply Br. at
6 28.

7 Additionally, there is a copy of the state court docket of
8 the Lancaster Action in the excerpts of record.¹⁰ The docket
9 entries include: (1) 9/12/2011, Pryor files Notice of Hearing on
10 OSC why a default judgment should not be entered against B Square;
11 (2) 9/22/2011, B Squared files declaration of Simon Aron opposing
12 entry of default judgment against B Squared; (3) 9/29/2011, Pryor
13 files Declaration in response to declaration of Aron;
14 (4) 10/19/2011, B Squared files Motion to Dismiss action against
15 B Squared; (5) 10/24/2011, Pryor files Request for Entry of
16 Default against B Squared; (6) 10/24/2011, Pryor files Opposition
17 to Motion to Dismiss of B Squared; (7) 11/29/2011, "JUDGMENT OF
18 DISMISSAL WITH PREJUDICE OF THE ACTION IN ITS ENTIRETY IS ENTERED
19 IN FAVOR OF B SQUARED."

20 In sum, the record on appeal amply demonstrates that Pryor
21 knowingly and willfully continued to prosecute the Lancaster
22 Action after Pryor had notice of the discharge injunction and the
23 consequences of violating it. Pryor has not challenged in this
24 appeal the amount of punitive damages awarded against him to

25
26 ¹⁰ A copy of the state court docket in the Lancaster Action
27 was attached to and incorporated in the Declaration of Elsa
28 Horowitz, attorney for B Squared, submitted in support of
B Squared's Vexatious Litigant Motion. Bankr. 09-12590 at dkt.
no. 597. The Vexatious Litigant Order acknowledged review of all
declarations submitted related to the Vexatious Litigant Motion.

1 B Squared. Therefore, we also conclude that the bankruptcy court
2 did not abuse its discretion in awarding \$10,000 in punitive
3 damages for Pryor's knowing and willful violation of the discharge
4 injunction.

5 II.

6 The bankruptcy court did not abuse its discretion in
7 denying Pryor's motions for reconsideration of the
8 Dismissal Order and the Vexatious Litigant Order.

9 As pointed out above, Pryor did not timely appeal the
10 Dismissal Order or the Vexatious Litigant Order. However, the
11 bulk of Pryor's arguments in these two appeals challenge the
12 merits of the bankruptcy court's decision to grant the underlying
13 orders. We may not review those orders in this appeal because we
14 do not have jurisdiction to hear them. Samson v. W. Capital
15 Partners, LLC (In re Blixseth), 684 F.3d 865, 870 (9th Cir. 2012)
16 ("A reviewing court lacks jurisdiction over an appeal that is not
17 timely filed. The requirement of a timely notice of appeal is
18 mandatory and jurisdictional.").

19 Pryor's briefs are also unclear under which provisions of the
20 Rules he sought reconsideration of these orders. His
21 reconsideration motions in the bankruptcy court sought review of
22 both orders under Civil Rules 59(e) and 60(b)(6), as incorporated
23 by Rules 9023 and 9024. But Civil Rule 59(e) was not available to
24 him because such a motion must be filed within fourteen days of
25 entry of the order sought to be reconsidered.

26 Moreover, Civil Rule 60(b)(6) imposes a very high threshold
27 of proof. Its "catch-all" provisions are available rarely, are
28 solely an equitable remedy to prevent manifest injustice, and
should be invoked only where extraordinary circumstances prevented

1 a party from taking timely action to correct an erroneous
2 judgment. United States v. Washington, 394 F.3d 1152, 1157 (9th
3 Cir 2005). As such, under Civil Rule 60(b)(6), a party seeking
4 relief must demonstrate both injury and circumstances beyond his
5 control that prevented him from proceeding with the prosecution or
6 defense of the action in a proper fashion. Id.

7 In both reconsideration appeals, Pryor argues that the
8 bankruptcy court's failure to review documents that he admittedly
9 submitted at the last minute or were somehow "lost in the mail"
10 prevented him from receiving a fair consideration of his position.
11 But Pryor asserts that the documents he submitted in seeking
12 review of the Dismissal Order were "lost in the mail" and he only
13 submitted the documents in seeking review of the Vexatious
14 Litigant Order the day before the hearing on reconsideration. In
15 other words, he provided no acceptable explanation for his failure
16 to provide the documents in sufficient time for the court to
17 consider them.

18 In its order denying reconsideration of the Dismissal Order,
19 the bankruptcy court in fact observed that it had reviewed the
20 allegedly "lost" documents and found that they "do not go to the
21 basis of the ruling and make no difference in the outcome of the
22 motion." Order Denying Motion to Reconsider Dismissal at 4,
23 April 20, 2012. Thus, Pryor cannot argue here on appeal that he
24 was prejudiced because the bankruptcy court did not examine the
25 documents. The court did examine them and rejected his arguments.
26 Based on our review of the record, we see no abuse of discretion
27 in the court's procedure.

28 As to the Vexatious Litigant Order, Pryor argues that the

1 bankruptcy court failed to consider papers he submitted the day
2 before the hearing, showing that he had submitted in the state
3 court a Motion to Consolidate the Lancaster Action with the Long
4 Beach Action. On reconsideration, the bankruptcy court did in
5 fact review those papers and ruled that "the request is
6 repetitious of prior oppositions and provides no relevant new
7 evidence." Order Denying Reconsideration of Vexatious Litigant
8 Order at 2, August 1, 2012.

9 In other words, in both appeals of reconsideration of the
10 Dismissal Order and the Vexatious Litigant Order, Pryor did not
11 demonstrate "circumstances beyond his control that prevented him
12 from proceeding with the prosecution or defense of the action in a
13 proper fashion." In one case, he submitted the documents only the
14 day before they were due; in the other they were allegedly "lost
15 in the mail." But in either case, on reconsideration the court in
16 fact reviewed the documents and thus he was not prevented from
17 proceeding with their prosecution. Thus, he cannot satisfy the
18 elements needed for extraordinary relief under Civil
19 Rule 60(b)(6).

20 Despite his extensive court experience, we recognize that
21 Pryor is a pro se litigant and not an attorney. We also
22 acknowledge our responsibility to treat his pleadings liberally.
23 King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987). Fairly
24 considering Pryor's position leads us to conclude that the most
25 appropriate statute to support his request for relief from the
26 Vexatious Litigant Order and Dismissal Order was Civil
27 Rule 60(b)(2) ("newly discovered evidence that, with reasonable
28 diligence, could not have been discovered in time to move for a

1 new trial under Rule 59(b)"). To obtain relief under Civil
2 Rule 60(b)(2), the creditor must show that the "new evidence":
3 (1) existed at the time of the trial; (2) could not have been
4 discovered through due diligence; and (3) was "of such magnitude
5 that production of it earlier would have been likely to change the
6 disposition of the case." Jones v. Aero/Chem Corp., 921 F.2d 875,
7 878 (9th Cir. 1990).

8 In Pryor's motion to reconsider the Dismissal Order,
9 according to the bankruptcy court, he attached "the schedules of
10 the debtor and the mailing matrix, the unpublished BAP opinion in
11 Pryor v. ITEC Financial [BAP No. CC-10-1258], various documents
12 from Acres Commodities Real Estate Securities v. B Squared Inc.
13 [LASC BC 353526], fictitious business name statements for Acres
14 Development and Maintenance Unlimited and Pryor's Declaration
15 dated February 27, 2007." The court also noted that Pryor failed
16 to present documentation of his bankruptcy court's alleged
17 abandonment of Pryor's claims against B Squared. The court
18 summarized its ruling on the documents:

19 The documents presented in this motion for
20 reconsideration (which Pryor seems to assert were lost
21 in the mail and not reviewed by the court prior to
22 issuance of the memorandum of opinion) do not go to the
23 basis of the ruling and make no difference in the
24 outcome of the motion. The ruling was not made without
25 full review of the filings and it was delayed some weeks
26 after oral argument. In fact, Pryor was ordered to
27 submit information proving that the abandonment had
28 taken place, which he did not do and which is not
attached to this motion because it does not exist.

25 Order Denying Reconsideration of Dismissal Order at 4. In other
26 words, the documents Pryor wanted the bankruptcy court to consider
27 were not new evidence, persuasive, or even relevant. The
28 bankruptcy court did not abuse its discretion in denying

