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

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UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

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In re:)	BAP No.	NV-11-1429-PaDKi
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IRENE MICHELLE SCHWARTZ-TALLARD,)	Bk. No.	07-11730-LBR
)		
Debtor.)		
)		
IRENE MICHELLE SCHWARTZ-TALLARD,)		
)		
Appellant,)		
)		
v.)		
)		
AMERICA'S SERVICING COMPANY,)		
)		
Appellee.)		
)		

O P I N I O N

Argued and Submitted on June 15, 2012,
at Las Vegas, Nevada

Filed - June 28, 2012

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

Honorable Linda B. Riegler, Bankruptcy Judge, Presiding

Appearances: Christopher Burke, Esquire argued for appellant
Irene Michelle Schwartz-Tallard; Andrew Martin
Jacobs, Esquire of Snell & Wilmer LLP argued for
Appellee America's Servicing Company.

Before: PAPPAS, DUNN and KIRSCHER, Bankruptcy Judges.

1 PAPPAS, Bankruptcy Judge:

2

3 Chapter 13¹ debtor Irene Michelle Schwartz-Tallard ("Debtor")
4 appeals the order of the bankruptcy court denying her Motion for
5 Attorney Fees and Costs from America's Servicing Company ("ASC")
6 for Defending Appeal. We REVERSE and REMAND.

7

I. FACTS

8 Debtor filed a chapter 13 petition on March 30, 2007. Among
9 Debtor's listed secured creditors was ASC, a company that serviced
10 a loan secured by a mortgage on Debtor's home in Henderson, Nevada
11 (the "Property"). Though Debtor had made all post-petition
12 monthly mortgage payments, on February 27, 2009, ASC filed a
13 motion for relief from the automatic stay in the bankruptcy case,
14 erroneously claiming Debtor owed mortgage payments for January and
15 February 2009. Debtor, who was not informed about ASC's stay
16 relief motion by her former counsel, did not oppose the motion,
17 and the bankruptcy court entered an order terminating the
18 automatic stay on April 6, 2009.

19 When Debtor attempted to make her April 2009 mortgage
20 payment, ASC returned it with a letter indicating her loan was in
21 "foreclosure status." Debtor called ASC, and its representative
22 told her the loan status changed when she missed the January and
23 February payments. Debtor challenged ASC's assertion that she had
24 defaulted, and provided ASC's representative with the check
25 numbers she used to make the January and February payments. With

26

27 ¹ Unless otherwise indicated, all chapter, section and rule
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and
to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

1 those numbers, ASC's representative located a record of the
2 payments and admitted a mistake had been made.

3 After retaining new counsel, Debtor filed a motion to set
4 aside the stay relief order and to reinstate the stay in the
5 bankruptcy court on May 6, 2009. ASC did not oppose, and the
6 bankruptcy judge orally granted Debtor's motion at a hearing held
7 on May 13, 2009, at which ASC did not appear. On May 14, Debtor
8 sent ASC checks for the April and May 2009 mortgage payments,
9 along with an explanation that the bankruptcy court had reinstated
10 the stay on May 13. ASC returned those checks on May 18, stating
11 it could not accept them because the funds were not certified. On
12 May 20, ASC caused the Property to be sold at a trustee's
13 foreclosure sale. The bankruptcy court entered an order
14 reinstating the stay on June 3, 2009.

15 On June 9, Debtor filed a motion seeking monetary sanctions
16 against ASC for its willful violation of the automatic stay (the
17 "Sanctions Motion"). Debtor's sole argument² was that sanctions
18 were appropriate under § 362(k) because ASC had willfully violated
19 the stay by selling Debtor's home at the trustee's sale on May 20,
20 even though the bankruptcy court, on May 13, had orally granted

21
22 ² Debtor's argument in the Sanctions Motion was somewhat
23 vague. In identifying how she believed ASC had violated the stay,
24 Debtor alleged:

25 In this matter, though as of May 13, 2009 [, ASC]
26 clearly had actual notice that it was the Court's intent
27 that the automatic stay be reinstated, [it] blatantly
28 disregarded the court's instruction and continued
foreclosure efforts. This type of callous disregard to
the authority of the court and clear mandates of the
statutes as set forth in the Bankruptcy Code cannot and
should not be tolerated.

28 Debtor's Motion for Sanctions at 7.

1 her motion to reinstate the stay. Debtor attached to her motion a
2 copy of a May 28, 2009, Three Day Notice to Quit served on her by
3 ASC; a May 28, 2009, Notice of New Ownership that ASC had posted
4 on the Property; and her affidavit describing how the Notice of
5 New Ownership had affected her family. Debtor's motion and
6 supporting documents did not indicate that she was seeking
7 sanctions under any authority other than § 362(k).

8 In response to Debtor's Sanctions Motion, ASC argued that the
9 stay had not been reinstated until June 3, 2009, when the
10 bankruptcy court entered the order reinstating the stay.
11 Therefore, ASC contended, its actions targeted by Debtor, which
12 occurred between May 13 and June 3, were not taken in violation of
13 the stay.

14 The bankruptcy court conducted the hearing on Debtor's
15 Sanctions Motion on January 7, 2010. At the hearing, it came to
16 light that during the eight months since the bankruptcy court's
17 stay-reinstatement hearing, ASC had taken no action to set aside
18 the foreclosure sale or to reconvey the Property to Debtor.³ At
19 the conclusion of the January 7 hearing, the bankruptcy court
20 found ASC had violated the automatic stay. The court decided
21 that, even if ASC did not learn of the stay reinstatement until
22 June 3, when the reinstatement order was entered, ASC violated the
23 stay by not acting to reconvey the Property to Debtor once ASC
24 discovered that the foreclosure sale had occurred in violation of
25 the stay. The bankruptcy court concluded that imposition of

26
27 ³ The lender credit bid at the May 20, trustee's sale, and
28 held title to the Property on January 7. The Property was finally
reconveyed to Debtor on March 3, 2010.

1 sanctions against ASC was appropriate under § 362(k).

2 In addition, the bankruptcy court awarded sanctions against
3 ASC under Rule 9011. Because Debtor had made her January and
4 February 2009 mortgage payments, and because ASC's stay relief
5 motion represented that those payments had not been made, the
6 bankruptcy court found that ASC had engaged in sanctionable
7 conduct under Rule 9011 by filing and pursuing a "false motion."⁴

8 On February 17, 2010, the bankruptcy court entered an order
9 (the "Stay Violation Order") incorporating its January 7 oral
10 findings of fact and conclusions of law.⁵ According to the
11 court's Stay Violation Order, because ASC violated the automatic
12 stay and Rule 9011, Debtor was entitled to recover \$40,000 for
13 emotional distress and economic damages; \$20,000 for punitive

14 _____
15 ⁴ At the hearing on Debtor's Sanctions Motion, the
16 bankruptcy court mistakenly indicated that Rule 9011 had been
17 alleged in Debtor's motion as one source for the court's authority
18 to impose sanctions. Debtor's attorney indicated he had asked for
19 Rule 9011 sanctions in his "pretrial brief." To be precise,
20 however, the brief, filed a mere three days before the hearing on
21 Debtor's Sanctions Motion, contended that the bankruptcy court
22 could "hold a separate hearing and impose sanctions under
23 Rule 9011(c)(1)(B), if Rule 9011(b) is violated." Pretrial Brief
24 in Support of Motion for Contempt for Violation of the Automatic
25 Stay at 7, Bankr. No. BK-S-07-11739-LBR, Dkt. No. 100 (emphasis
26 added). It therefore appears clear that ASC did not have
27 effective notice that Rule 9011 may be invoked by Debtor as a
28 potential legal basis for imposing sanctions against ASC at the
January 7 hearing.

23 ⁵ The Stay Violation Order, submitted by Debtor's counsel,
24 was docketed as an order concerning "Debtor's Motion for Contempt
25 for Violation of the Automatic Stay and Violation of
26 F.R.B.P. 9011." Of course, no such motion had ever been filed
27 with the bankruptcy court. While the bankruptcy court imposed
28 sanctions against ASC under both § 362(k) and Rule 9011, Debtor's
motion never referenced Rule 9011. The District Court, in
reviewing an appeal of the Stay Violation Order, also found that
"[t]he motion itself nowhere mentions Rule 9011, but only § 362."
America's Servicing Co. v. Schwartz-Tallard, 438 B.R. 313, 320 (D.
Nev. 2010).

1 damages; and \$20,000 in attorneys' fees. ASC was also ordered to
2 reconvey the Property to Debtor within two days.

3 ASC appealed the Stay Violation Order on March 2, 2010, to
4 the District Court. The District Court entered its decision on
5 September 14, 2010. See Schwartz-Tallard, 438 B.R. 313. In
6 regard to the stay violation, the District Court decided that ASC
7 knew, or had received notice, that the stay had been ordered
8 reinstated by the bankruptcy court by May 17, 2009, and that ASC's
9 act of causing the foreclosure sale to occur on May 20, and all
10 its subsequent actions, were a violation of the stay. See id. at
11 317-19. According to the District Court, from and after the time
12 the sale occurred, ASC had an ongoing duty to see that the
13 Property was reconveyed to Debtor, and to mitigate Debtor's
14 damages. Id. at 320.

15 However, the District Court concluded that the bankruptcy
16 court's award of damages to Debtor for violating Rule 9011 was
17 inappropriate because the court had not followed the procedure
18 required by the Rule.⁶ Id. at 320. The District Court remanded
19 this aspect of the matter to the bankruptcy court, so that if it
20 elected to do so, proper notice could be given to ASC, and further
21 proceedings concerning Rule 9011 could be conducted. See id. at
22 323.

23 In addition, while § 362(k) authorized an award to Debtor for
24 attorneys' fees as damages, because the bankruptcy court had not

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26 ⁶ The District Court stated that the bankruptcy court could
27 still "impose attorney's fees under Rule 9011 if it follow[ed] the
28 requirements of that rule." Schwartz-Tallard, 438 B.R. at 323.
The bankruptcy court chose not to follow the Rule 9011 procedural
requirements, and, on remand, ASC was sanctioned pursuant to
§ 362(k) only.

1 specifically found that the amount it awarded had been actually
2 incurred by Debtor, the District Court also remanded that issue to
3 the bankruptcy court. Id. at 320-23.

4 The bankruptcy court held an evidentiary hearing to determine
5 the actual amount of Debtor's attorneys' fees on January 13, 2011.
6 After that hearing, the bankruptcy court entered a judgment
7 awarding Debtor attorneys' fees of \$20,115.40 "under 11 U.S.C.
8 § 362(k)." ASC did not appeal that order.

9 On February 26, 2011, Debtor filed a motion in the bankruptcy
10 court under § 362(k), seeking an award of attorneys' fees and
11 costs incurred by Debtor for defending ASC's appeal of the Stay
12 Violation Order to the District Court (Debtor's "Appellate
13 Attorneys' Fees"). ASC opposed Debtor's motion, arguing that
14 Debtor's request for Appellate Attorneys' Fees pursuant to
15 § 362(k) was prohibited under the Ninth Circuit's decision in
16 Sternberg v. Johnston, 595 F.3d 937 (9th Cir. 2010), cert. denied
17 131 S. Ct. 102 (2010). In reply, Debtor argued that Sternberg did
18 not limit her ability to recover Appellate Attorneys' Fees
19 pursuant to § 362(k) because she participated in the appeal as an
20 appellee. In addition, she asserted that her Appellate Attorneys'
21 Fees were also recoverable pursuant to Rule 9011 and the
22 bankruptcy court's § 105(a) inherent sanctioning authority.

23 The hearings on Debtor's motion for Appellate Attorneys' Fees
24 took place on March 30 and July 12, 2011. After hearing the
25 parties' arguments at the March 30 hearing, the bankruptcy court
26 denied Debtor's motion at the July 12 hearing for the sole reason
27 that, as contended by ASC, Sternberg prevented the court from
28

1 awarding Appellate Attorneys' Fees under § 362(k).⁷

2 The bankruptcy court entered an order denying Debtor's motion
3 for Appellate Attorneys' Fees on July 26, 2011, "for the reasons
4 set forth on the record." Debtor filed a timely appeal on
5 August 8, 2011.

6 II. JURISDICTION

7 The bankruptcy court had jurisdiction under 28 U.S.C.
8 §§ 1334(b) and 157(b)(2)(A). We have jurisdiction under 28 U.S.C.
9 § 158.

10 III. ISSUES

11 1. Whether the bankruptcy court erred in deciding that
12 Sternberg bars Debtor's request to recover her Appellate
13 Attorneys' Fees pursuant to § 362(k).

14 2. Whether the bankruptcy court abused its discretion in not
15 awarding Debtor's Appellate Attorneys' Fees pursuant to Rule 9011.

16 3. Whether the bankruptcy court abused its discretion in not
17 awarding Debtor's Appellate Attorneys' Fees pursuant to the
18 court's § 105(a) authority.

19 IV. STANDARD OF REVIEW

20 We review a bankruptcy court's attorneys' fees decision for
21 an abuse of discretion. State of Cal. Emp't Dev. Dep't v. Taxel
22 (In re Del Mission Ltd.), 98 F.3d 1147, 1152 (9th Cir. 1996). In
23 determining whether a bankruptcy court abused its discretion, we
24 review whether the bankruptcy court applied the correct rule of
25 law. United States v. Hinkson, 585 F.3d 1247, 1262 (9th Cir.
26 2009) (en banc). We then determine whether the court's

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28 ⁷ In its July 12, 2011, oral decision, the bankruptcy court did not mention § 105(a) or Rule 9011.

1 application of that rule was illogical, implausible, or without
2 support in inferences that may be drawn from the facts in the
3 record. Id. (quoting Anderson v. City of Bessemer City, N.C.,
4 470 U.S. 564, 577 (1985)).

5 **V. DISCUSSION**

6 On appeal, Debtor argues that she may recover her Appellate
7 Attorneys' Fees pursuant to § 362(k) despite the ruling in
8 Sternberg. In the alternative, Debtor asserts that she may be
9 awarded Appellate Attorneys' Fees pursuant to Rule 9011 and § 105.

10 ASC, on the other hand, argues that, per Sternberg, Debtor's
11 Appellate Attorneys' Fees are not "actual damages" under § 362(k)
12 and therefore may not be recovered. ASC also asserts that,
13 because the District Court and the bankruptcy court determined
14 that the Stay Violation Order sanctions were based on § 362(k),
15 and not Rule 9011, that Rule cannot now serve as a basis for an
16 award of Debtor's Appellate Attorneys' Fees. Finally, ASC
17 contends that a finding of contempt is a prerequisite to an award
18 of attorneys fees pursuant to § 105(a), and, since there was no
19 finding of contempt in this case, § 105(a) does not support a
20 grant of Debtor's Appellate Attorneys' Fees.

21 Proceedings in the federal courts are typically governed by
22 the so-called American Rule, which provides that parties must bear
23 their own attorneys' fees. See Fogerty v. Fantasy, Inc., 510 U.S.
24 517, 533 (1994). There are, however, limited exceptions to this
25 general rule against shifting responsibility for attorneys' fees.
26 See id.; see also Chambers v. NASCO, Inc., 501 U.S. 32, 45-46
27 (1991). For example, attorneys' fees may be awarded to a
28 prevailing party when authorized by a statute. Fogerty, 510 U.S.

1 at 533 (citing Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,
2 421 U.S. 240, 247-62 (1975)). In addition, a court may award a
3 prevailing party attorneys' fees when another party has "acted in
4 bad faith, vexatiously, wantonly, or for oppressive reasons."
5 Chambers, 501 U.S. at 45-46 (internal quotations omitted).

6 Here, Debtor contends her Appellate Attorneys' Fees should be
7 shifted to ASC as statutorily authorized by § 362(k). She also
8 argues recovery under Rule 9011 and § 105(a) are justified because
9 ASC acted in bad faith. See Alyeska Pipeline Serv. Co., 421 U.S.
10 at 247-62; Chambers, 501 U.S. at 45-46. ASC responds that none of
11 these grounds justifies an award of Debtor's Appellate Attorneys'
12 Fees. We examine each in turn.

13
14 **A. Sternberg did not bar the bankruptcy court from awarding
Debtor her Appellate Attorneys' Fees pursuant to § 362(k).**

15 The bankruptcy court awarded Debtor damages resulting from
16 ASC's stay violation pursuant to § 362(k).⁸ Debtor asserts her
17 Appellate Attorneys' Fees are part of those damages and are
18 likewise legislatively authorized pursuant to that statute.
19 Section 362(k)(1) provides, in part:

20 an individual injured by any willful violation of a stay

21
22 ⁸ Debtor repeatedly asserts that the District Court also
23 upheld the bankruptcy court's award of sanctions pursuant to
24 Rule 9011. We disagree. The District Court concluded that the
25 bankruptcy court had not followed Rule 9011's procedural
26 requirements and, therefore, the bankruptcy court's sanctions were
27 not supported by Rule 9011. Schwartz-Tallard, 438 B.R. at 320.
28 The District Court indicated that, on remand, if the bankruptcy
court chose to follow the Rule 9011 requirements, it may impose
sanctions pursuant to that Rule. See id. at 323. Providing an
option to the bankruptcy court to conduct further, procedurally
proper, proceedings is not the same as endorsing the bankruptcy
court's Rule 9011 sanctions award. In the end, the bankruptcy
court did not elect to follow Rule 9011 procedures and did not
award sanctions pursuant to that Rule.

1 provided by this section shall recover actual damages,
2 including costs and attorneys' fees, and, in appropriate
circumstances, may recover punitive damages.

3 ASC, however, argues that, according to the Ninth Circuit's
4 interpretation of § 362(k) "actual damages" in Sternberg, an award
5 of Debtor's Appellate Attorneys' Fees is prohibited. To
6 understand how the Sternberg decision applies to this case, it is
7 helpful to review the complicated history of the controversy
8 involved in that case.

9 In Sternberg, the debtor filed two concurrent stay-related
10 actions: a motion asking the bankruptcy court to vacate a state
11 court order that he argued was issued in violation of the stay,
12 and a stay violation adversary proceeding against his ex-wife and
13 her counsel for not acting to remedy the state court's stay-
14 violating order. 595 F.3d at 941. In response to the debtor's
15 motion, and after a hearing, the bankruptcy court granted the
16 debtor's request to deem the state court order ineffective,
17 thereby remedying the stay violation caused by the state court
18 order. Id. at 941-42.

19 Later, even though the stay violation by the debtor's ex-wife
20 and her counsel had been addressed,⁹ the bankruptcy court held a
21 trial in the adversary proceeding to determine whether the
22 debtor's ex-wife and her counsel had, at some point, violated the
23 stay, and, if they had, what damages and sanctions were
24 appropriate. Id. at 942. Although the bankruptcy court ruled in

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26 ⁹ As a practical matter, since the bankruptcy court
27 invalidated the state court's order, the debtor's ex-wife and her
28 counsel could no longer act to "remedy" the state court's stay
violation. The debtor's argument that they were violating the
automatic stay by not acting to address the state court's stay
violation was, therefore, mooted.

1 favor of the debtor's ex-wife and her counsel, the debtor
2 appealed, and the district court determined the ex-wife and her
3 counsel had indeed violated the stay. Id. On remand, the
4 bankruptcy court awarded the debtor \$92,869.20 in damages on
5 account of his ex-wife's attorney's conduct in violating the
6 stay.¹⁰ Id. Debtor's ex-wife's counsel appealed that damages
7 award. Id. The Ninth Circuit, in Sternberg, addressed whether
8 the bankruptcy court erred in calculating the damages awarded to
9 the debtor. Id. at 943.

10 As acknowledged in the Sternberg decision, Congress clearly
11 intended to allow a party to recover, as damages, the attorneys'
12 fees incurred by a debtor to enforce the automatic stay. Id. at
13 946-48. Such an award is different, however, from allowing the
14 recovery, as damages, of attorneys' fees incurred in a debtor-
15 initiated court action for damages resulting from a stay
16 violation.¹¹ See id. at 946-47. Per Sternberg, in such instances,
17 any fees incurred "in pursuit of a damage award would not be to
18 compensate for 'actual damages' under § 362(k)(1)," and would not
19 be allowable. Id. at 947 (emphasis added).

20 Sternberg explained that whether a debtor may recover
21 attorneys' fees under § 362(k) hinges on the distinction between
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23
24 ¹⁰ After the stay violation issue was remanded by the
25 district court, and before the bankruptcy court determined the
debtor's damages, the debtor's ex-wife settled with the debtor.
Sternberg, 595 F.3d at 942.

26 ¹¹ Because in Sternberg the stay violation had been remedied
27 prior to the bankruptcy court's consideration of the debtor's
28 adversary proceeding, the Ninth Circuit viewed the adversary
proceeding as "akin to an ordinary damages action." 595 F.3d at
948.

1 an action to enforce the automatic stay, and a debtor's pursuit of
2 stay violation damages, and implicates the context and purposes of
3 the automatic stay. Id. at 947-48. The court observed that the
4 stay has two primary purposes: (1) to enable a debtor to try and
5 reorganize during a break from collection efforts, and (2) to
6 protect creditors by preventing each from pursuing its own
7 remedies at the expense of all other creditors. Id. at 947
8 (citing Dawson v. Wash. Mut. Bank, F.A. (In re Dawson), 390 F.3d
9 1139, 1147 (9th Cir. 2004)). Those purposes promote both
10 financial and non-financial goals. Id. at 947-48 (quoting In re
11 Dawson, 390 F.3d at 1147). "[O]ne aim of the automatic stay is
12 financial[, as] the stay gives the debtor time to put finances
13 back in order, . . . [b]ut another purpose is to create a
14 breathing spell' for a debtor from his creditors." Id. at 948
15 (quoting In re Dawson, 390 F.3d at 1147).

16 The court in Sternberg decided that "[p]ermitting a debtor to
17 collect attorney fees incurred in prosecuting a damages action
18 would further neither the financial nor the non-financial goals of
19 the automatic stay." Id. at 948. Prosecuting a damages action
20 would not further the financial goal of the stay because the
21 debtor's goal was to "pursu[e] his creditors," rather than to
22 reorganize his finances. Id. ("We have never said the stay should
23 aid the debtor in pursuing his creditors, even those creditors who
24 violate the stay. The stay is a shield, not a sword." (emphasis
25 added)). Such an action would also not further the stay's non-
26 financial goal, because it would not result in a breathing spell
27 for the debtor, since a damages action requires the debtor to
28 pursue litigation during the intended respite afforded by the

1 automatic stay. Id. Thus, Sternberg determined that while
2 recovery of attorneys' fees is allowed pursuant to § 362(k) when
3 related to enforcement of the automatic stay, the attorneys' fees
4 incurred in a debtor's pursuit of a "damages action for a stay
5 violation" may not be recovered. Id.

6 In this case, Debtor's defense of ASC's appeal of the
7 bankruptcy court's decision is fundamentally different from the
8 damages action in Sternberg, where the Ninth Circuit noted that
9 the debtor was pursuing a damages action even though the subject
10 stay violation had been remedied. Here, when ASC appealed the
11 Stay Violation Order to the District Court, Debtor was required to
12 defend the bankruptcy court's decision, not only to protect the
13 award of damages, but also to uphold the bankruptcy court's
14 determination that ASC had, indeed, violated the stay. See
15 Schwartz-Tallard, 438 B.R. at 317.

16 Moreover, Debtor's defense of ASC's appeal was consistent
17 with the goals of the automatic stay identified by the court in
18 Sternberg. First, defending the bankruptcy court's order assisted
19 Debtor in her efforts to reorganize her finances. Had she been
20 required to pay the attorneys' fees she incurred in remedying
21 ASC's wrongful foreclosure, Debtor's completion of her chapter 13
22 plan may have been jeopardized.

23 In addition, Debtor was clearly not using the automatic stay
24 as a sword to pursue damages from ASC. Debtor likely would have
25 been content to let the bankruptcy court's award of damages stand.
26 On appeal, Debtor merely defended those damages, and in doing so
27 incurred the subject attorneys' fees, when ASC appealed the Stay
28 Violation Order and attacked the bankruptcy court's enforcement of

1 the automatic stay and its award of stay-enforcement damages. As
2 can be seen, in this instance, Debtor's defensive position in the
3 appeal did not run afoul of Sternberg's concern for debtors using
4 the stay to pursue damages instead of reorganizing their finances.

5 Second, rather than allow Debtor the benefit of the stay's
6 breathing spell, ASC continued its attack on the bankruptcy
7 court's determination that Debtor's automatic stay had been
8 violated and that Debtor had incurred damages in enforcing the
9 stay. As the Ninth Circuit noted, "[m]ore litigation is hardly
10 consistent with the concept of a 'breathing spell' for the
11 debtor." Sternberg, 595 F.3d at 948. In other words, an appeal
12 by a stay violator, which requires a bankruptcy debtor to continue
13 to participate in litigation to defend her stay and properly
14 awarded stay-enforcement damages, deprives the debtor of the
15 benefits of her automatic stay. Simply put, Debtor's defense of
16 the bankruptcy court's decision was an extension of her efforts to
17 enforce her automatic stay.

18 At bottom, Sternberg determined that the attorneys' fees
19 sought by the debtor were not part of the debtor's damages
20 resulting from the stay violation as required by § 362(k). Id. at
21 945-48. In doing so, the Sternberg panel found the term "actual
22 damages" to be ambiguous. Id. at 947. For a meaning, the court
23 adopted a definition from Black's Law Dictionary specifying that
24 actual damages are "[a]n amount awarded . . . to compensate for a
25 proven injury or loss; damages that repay actual losses." Id.
26 (quoting BLACK'S LAW DICTIONARY 416 (8th ed. 2004)). As Sternberg
27 continued, in stay violation settings, the "proven injury is the
28 injury resulting from the stay violation itself." Id. Once a

1 stay violation has been remedied, "any fees the debtor incurs
2 after that point in pursuit of a damage award would not be to
3 compensate for 'actual damages' under § 362(k)(1)." Id.

4 Of course, in Sternberg, the point at which the stay
5 violation had been "remedied" was clear. Id. at 941-42. The
6 debtor's ex-wife did not appeal the bankruptcy court's vacation of
7 the state court's order, and the primary issue remaining in the
8 debtor's adversary proceeding was the amount of damages
9 attributable to the conduct of debtor's ex-wife and her counsel.

10 Id. In contrast, here, while the Property was finally reconveyed
11 to Debtor the day after ASC filed its notice of appeal, Debtor was
12 forced to defend that appeal to validate the bankruptcy court's
13 ruling that ASC had violated the stay, and to preserve her right
14 to collect the pre-remedy damages awarded by the bankruptcy court.

15 "Clearly, fees and costs experienced by an injured party in
16 resisting the [stay] violator's appeal are part of the damages
17 resulting directly from the stay violation." Beard v. Walsh

18 (In re Walsh), 219 B.R. 873, 878 (9th Cir. BAP 1998).¹² Put

19 another way, Debtor's Appellate Attorneys' Fees, incurred to
20 ensure the continuity of the stay, and to protect her stay-
21 enforcement damage award, are no less damages "resulting from the
22 stay violation itself" merely because she had to defend their
23 enforcement at the appellate level rather than the bankruptcy
24 court, and because the appeal took place after the Property was

25
26 ¹² Sternberg admittedly rejected the BAP's determination in
27 Walsh that § 362(k)'s predecessor, § 362(h), required an injured
28 party to be made whole. Sternberg, 595 F.3d at 947. At the same
time, Sternberg did not invalidate Walsh's finding that damages
incurred on appeal are actual damages directly resulting from the
stay violation itself. See id.

1 reconveyed to her.

2 In sum, the attorneys' fees incurred by Debtor in defending
3 the bankruptcy court's Stay Violation Order on appeal were actual
4 damages pursuant to § 362(k)(1). The bankruptcy court therefore
5 abused its discretion when it decided that Sternberg prohibited
6 recovery of those fees. We REVERSE the bankruptcy court's
7 decision.

8 **B. The bankruptcy court did not abuse its discretion in not
9 awarding Debtor Appellate Attorneys' Fees pursuant to
Rule 9011.**

10 On appeal, the District Court concluded that the bankruptcy
11 court awarded Debtor damages pursuant to § 362(k)(1). Schwartz-
12 Tallard, 438 B.R. at 320. At the same time, the District Court
13 decided that Rule 9011 was not an appropriate basis for recovery
14 of Debtor's damages in this case because the bankruptcy court did
15 not adhere to the Rule's procedural requirements. Id. If the
16 bankruptcy court so desired, however, the District Court
17 authorized it, on remand, to invoke proper Rule 9011 procedures
18 and, after further notice and a hearing, to award sanctions
19 pursuant to that Rule. Id. at 323. However, the bankruptcy court
20 chose not to do so, and, ultimately, no Rule 9011 damages were
21 awarded.

22 On this record, we find no abuse of discretion in the
23 bankruptcy court's decision to decline to award Debtor her
24 Appellate Attorneys' Fees pursuant to Rule 9011. Moreover,
25 Rule 9011 does not authorize this Panel to award Debtor her
26 Appellate Attorneys' Fees.

27 ///

28 ///

1 **C. The bankruptcy court did not abuse its discretion in not**
2 **awarding Debtor's Appellate Attorneys' Fees pursuant to its**
3 **inherent sanctioning authority under § 105(a).**

4 Section 105(a) authorizes a bankruptcy court to "issue any
5 order, process, or judgment that is necessary to carry out the
6 provisions of [title 11]." Neither the bankruptcy court nor the
7 District Court found that the damages imposed against ASC were
8 appropriate as § 105(a) contempt sanctions. Even so, Debtor now
9 asks this Panel to hold that § 105(a) authorizes Debtor's
10 Appellate Attorneys' Fees.

11 In exceptional circumstances, where an appellate court first
12 determines that all other statutory or rule sources authorizing
13 damages are not "up to the task," the court may find that awarded
14 sanctions were justified under § 105(a). See Miller v. Cardinale
15 (In re Deville), 280 B.R. 483, 494-97 (9th Cir. BAP 2002), aff'd
16 361 F.3d 539 (9th Cir. 2004) (awarding damages as § 105(a)
17 sanctions after finding the bankruptcy court's only other
18 potential source for awarding damages, Rule 9011, inapplicable due
19 to a failure to follow the Rule's procedural requirements).
20 However, the prerequisites to invoking § 105(a) are not met here.
21 For example, an award pursuant to a bankruptcy court's § 105(a)
22 power is typically not appropriate if another statute or the Rules
23 otherwise support a sanctions award. Chambers, 501 U.S. at 50.
24 Here, as we hold above, the bankruptcy court may award Debtor her
25 Appellate Attorneys' Fees pursuant to § 362(k). As a result,
26 there is no reason for this Panel to consider whether sanctions
27 are somehow justified pursuant to § 105(a).

28 Also, prior to invoking § 105(a), a bankruptcy court must
determine that the party to be sanctioned was provided sufficient

1 notice of the potential sanctions to satisfy due process. In re
2 Deville, 280 B.R. at 496-97. "Generally, the notice regarding
3 sanctions must specify the authority for the sanction, as well as
4 the sanctionable conduct." Id. at 496. Debtor's Sanctions Motion
5 was based on § 362(k) only; it did not mention Rule 9011 or
6 § 105(a). Yet, a motion may also be sufficient to satisfy due
7 process as to § 105(a) if it informs a party that sanctions are
8 pursued for actions taken for "improper purposes," and that the
9 sanctions are sought in addition to those sought under otherwise
10 specified authority. In re Deville, 280 B.R. at 497. Debtor's
11 Sanctions Motion did not assert that ASC had acted in bad faith,
12 vexatiously, wantonly, for oppressive reasons, or for other
13 improper purposes. Because Debtor did not provide ASC with
14 sufficient notice to allow it to present objections to the
15 imposition of § 105(a) sanctions, we will not now conclude that
16 the bankruptcy court should have relied upon § 105(a) as a basis
17 for awarding Debtor her Appellate Attorneys' Fees.

18 **VI. CONCLUSION**

19 Because Debtor was forced to defend ASC's appeal to preserve
20 the benefit of the bankruptcy court's ruling remedying the ASC
21 stay violation and awarding her damages, Sternberg did not
22 preclude the bankruptcy court from awarding Debtor her Appellate
23 Attorneys' Fees. The attorney's fees Debtor incurred on appeal
24 were a portion of Debtor's stay-enforcement damages for purposes
25 of § 362(k) actual damages. We therefore REVERSE the decision of
26 the bankruptcy court denying Debtor's request for an award of
27 attorney's fees, and REMAND this matter to the bankruptcy court

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1 for further proceedings consistent with this decision.¹³

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¹³ ASC contends no award of Appellate Attorney's Fees is appropriate in this case because it prevailed on two of the three issues it raised on appeal to the District Court. Since this argument implicates the amount of Debtor's damages incurred on appeal, this argument is one properly made to the bankruptcy court on remand.