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NOT FOR PUBLICATION

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

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. CC-13-1419-TaDKi
)
 MARIA JUANA DUARTE,) Bk. No. 12-24527-MW
)
 Debtor.)
)
 _____)
 MARIA JUANA DUARTE,)
)
 Appellant,)
)
 v.) **MEMORANDUM***
)
 NATIONSTAR MORTGAGE, LLC and)
 QUALITY LOAN SERVICE CORP.,)
)
 Appellees.)
 _____)

Argued and Submitted on March 20, 2014
at Pasadena, California

Filed - April 15, 2014

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

Honorable Mark S. Wallace, Bankruptcy Judge, Presiding

Appearances: Hector C. Perez, Esq. for Appellant Maria Juana
 Duarte; Adam N. Barasch, Esq. of Severson & Werson
 for Appellee Nationstar Mortgage, LLC; and Melissa
 Robbins Coutts, Esq. of McCarthy & Holthus, LLP
 for Appellee Quality Loan Service Corporation.

Before: TAYLOR, DUNN, and KIRSCHER, Bankruptcy Judges.

* 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 **INTRODUCTION**

2 Appellant, chapter 7 Debtor Maria Juana Duarte, appeals from
3 the bankruptcy court's denial of her motion seeking damages for
4 violations of the § 362¹ automatic stay. She based her motion on
5 the postpetition foreclosure sale of her home. The bankruptcy
6 court found, however, that the violation was not willful as
7 neither of the Appellees had appropriate notice of Debtor's
8 bankruptcy filing before the foreclosure sale went forward. The
9 bankruptcy court also found that Debtor failed to establish any
10 entitlement to damages under § 362(k) where Appellees, upon
11 learning of the filing, took immediate corrective action. We
12 AFFIRM.

13 **FACTS**

14 Appellee Nationstar Mortgage, LLC ("Nationstar") is the
15 beneficiary of a deed of trust recorded against Debtor's home.
16 Appellee Quality Loan Service Corporation ("Quality") is the
17 substituted trustee under the deed of trust. Due to mortgage
18 defaults, Quality noticed a trustee's sale of Debtor's home for
19 December 28, 2012, at 12:00 p.m. At 11:48 a.m. on the scheduled
20 sale date, Debtor filed a skeletal bankruptcy petition which did
21 not list Nationstar as a creditor. At 11:52 a.m. she sent notice
22 of the filing by facsimile to Quality. The foreclosure sale,
23 however, went forward on the courthouse steps at 12:10 p.m.
24 Nationstar was the highest bidder through a credit bid.

25 In her bankruptcy case, Debtor moved for rescission of the
26 foreclosure and recovery of damages under § 362(k) for Appellees'

27 ¹ Unless specified otherwise, all chapter and section
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

1 violation of the automatic stay ("Sanctions Motion").² Debtor
2 argued that Appellees received effective facsimile notice of the
3 bankruptcy filing on the day of sale, but nonetheless proceeded
4 with the foreclosure, and, thus, willfully violated the automatic
5 stay. Debtor also alleged that at an unspecified time Quality
6 acknowledged notice of the bankruptcy filing.

7 Debtor alleged in a declaration that as a result of the
8 foreclosure she no longer owned her home.³ She also alleged that
9 post-foreclosure she "received a request for property occupancy"
10 and condition information from Appellees' agents. ECF No. 62-1
11 at 3. To support this allegation, she filed a copy of a "Notice"
12 and a business card of Victor Vasu, Executive Director of The
13 Vasu Preferred Team. Debtor's counsel's paralegal alleged that
14 in response to this Notice, he called Quality, told them about
15 the information request, and obtained acknowledgment that the
16 sale violated the stay as well as a promise to rescind the
17 foreclosure. Debtor further alleged that Nationstar contacted
18 her "to determine what [her] plans are to relocate now that the
19 mortgage has been foreclosed upon,"⁴ and that she received
20 notices and telephone calls from "multiple businesses purporting
21

22 ² The bankruptcy court granted this initial Sanctions
23 Motion, based, in part, on lack of opposition by either
24 Nationstar or Quality. The order was subsequently set aside on
25 Nationstar's motion and after the bankruptcy court determined
26 that Debtor failed to properly serve Nationstar and Quality.
27 Debtor thereafter re-filed and served her Sanctions Motion,
28 denial of which is at issue in this appeal.

26 ³ At oral argument in this appeal, Debtor's counsel
27 conceded that title remained in Debtor's name.

28 ⁴ Debtor does not allege when this contact occurred or by
what method.

1 to provide post foreclosure assistance." Id. She finally
2 asserted that she never received a notice of rescission and
3 argued that she should have.

4 As damages, Debtor alleged generally that she suffered
5 "emotional distress, including increased heart palpitations,
6 headaches, anxiety, sleeplessness, stomach aches, stress, and
7 depression" as a result of Appellees' stay violation. Id. at 4.
8 In addition, she alleged that she incurred \$7,200 in attorney's
9 fees for legal assistance to obtain rescission of the foreclosure
10 and to file her bankruptcy petition.

11 Appellees opposed the Sanctions Motion, primarily on two
12 grounds. First, they asserted that violation of the stay was not
13 willful; Quality received the facsimile notice so close in time
14 to the scheduled time of sale that Quality was not able to review
15 it in time to stop a sale that took place at another location
16 18 minutes later. The record before the bankruptcy court
17 contained unchallenged declaratory evidence from Quality's
18 bankruptcy supervisor that on the day of the sale, she personally
19 reviewed all the bankruptcy notices in the bankruptcy
20 department's fax inbox, which averaged between 100 and 150 faxes
21 per day. She testified that the notice of Debtor's filing showed
22 that it came in at 11:53:58 a.m., and she attached a copy of the
23 facsimile to her declaration. She further testified that she
24 contacted the sales company after processing the information
25 contained in the Debtor's facsimile, but that the sale had
26 already been cried. She finally testified that at 12:59 p.m.
27 that same day, she contacted Quality's foreclosure unit, advising
28 them that the sale violated the stay and would need to be

1 rescinded.

2 Appellees also emphasized that upon review of the bankruptcy
3 notice later that same day, and after recognizing that the sale
4 was void, Quality took steps to rescind the sale and did not
5 prepare or record a trustee's deed upon sale. Appellees argued
6 that, as no trustee's deed upon sale was ever issued, the sale
7 was not effective and an order of rescission was unnecessary.
8 Appellees' evidence generally described in-house procedures and
9 specifically identified call records and actions taken on the
10 sale date and afterwards. Based on this evidence, Appellees
11 argued that after the void sale, they committed no further
12 violation of the automatic stay and that Debtor failed to prove
13 otherwise.

14 As to communications allegedly received by Debtor, Appellees
15 argued that Debtor failed to specify a date or time of the call
16 allegedly confirming Quality's receipt of the bankruptcy notice.
17 Quality provided evidence that its call records reflected that
18 only one call was received, on January 3, 2013, days after the
19 sale. And, as to other alleged notices, calls, and
20 correspondence after foreclosure, Appellees argued that none of
21 the activity was attributable to either of them and that Debtor's
22 evidence did not show otherwise.

23 Appellees finally asserted that even if Debtor established
24 that the stay violation was willful, she failed to prove
25 recoverable damages. Appellees acknowledged that Debtor likely
26 suffered emotional distress in the days that led to her
27 bankruptcy and the foreclosure, but she did not establish any
28 particular emotional distress caused by postpetition actions

1 taken by Appellees. As to recovery of attorney's fees, Appellees
2 argued that, pursuant to Sternberg v. Johnson, 595 F.3d 937, 948
3 (9th Cir. 2010), attorney's fees incurred after remedy of the
4 stay violation are not recoverable under § 362(k). Further, they
5 noted that while Debtor failed to break down the attorney's fees
6 by date incurred, the fee request included \$3,953 more than the
7 \$3,000 amount claimed in the first Sanctions Motion and appeared
8 to include fees and costs totally unrelated to the stay
9 violation, such as fees to defend against Nationstar's motion to
10 set aside the order on the first Sanctions Motion (for improper
11 service) and Debtor's bankruptcy filing costs. The bankruptcy
12 court issued a lengthy tentative ruling in advance of the
13 hearing. In its tentative ruling, the bankruptcy court
14 preliminarily found, in part, that:

15 Neither Quality nor Nationstar [] had appropriate
16 notice of Debtor's bankruptcy filing prior to the
17 foreclosure sale. As soon as Quality determined the
18 foreclosure sale had proceeded in violation of the
19 automatic stay, the appropriate people within Quality
20 were informed and no Trustee['s] Deed Upon Sale was
21 ever produced. Neither Quality nor Nationstar have
22 taken any further action in violation of the automatic
23 stay. Aside from the foreclosure sale that occurred on
24 December 28, 2012, Debtor has not provided any evidence
25 of violations of the automatic stay. While Debtor
26 claims to have received numerous telephone calls and
27 correspondence from a business purporting to provide
28 post-foreclosure assistance, these cannot be directly
attributed to Nationstar or Quality. The only evidence
submitted by Debtor regarding any of this
correspondence is a one-page occupancy request notice
delivered by a company called the Vatsu (sic) Preferred
Team. Debtor has failed to present any supporting
evidence to show that Quality and/or Nationstar
willfully violated the automatic stay.

ECF No. 71 at 4.

After hearing oral argument, the bankruptcy court placed
additional comments and findings on the record. It found that

1 Appellees "act[ed] pretty quickly" by voiding the sale within
2 less than an hour, considering that facsimile notice was received
3 only minutes before the lunch hour. Hr'g Tr. (July 29, 2013) at
4 14:21-25, 15:1-3. The bankruptcy court, thus, held that the
5 short-lived stay violation was not the type of violation to "give
6 rise to damages." Id. at 15:1. And even if it were, the
7 bankruptcy court found that Debtor suffered no actual damages in
8 the "intervening hour." Id. at 15:3. The bankruptcy court
9 adopted its tentative ruling as its final ruling and denied the
10 Sanctions Motion, with prejudice.

11 Debtor timely appealed.

12 **JURISDICTION**

13 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
14 §§ 1334 and 157(b) (2). We have jurisdiction under 28 U.S.C.
15 § 158.

16 **ISSUES**

17 1. Whether the bankruptcy court committed reversible error
18 when it found that neither Nationstar nor Quality willfully
19 violated the automatic stay.

20 2. Whether the bankruptcy court committed reversible error
21 when it found that debtor failed to establish entitlement to any
22 damages under § 362(k).

23 **STANDARD OF REVIEW**

24 We review the bankruptcy court's factual finding that a
25 creditor did not willfully violate the automatic stay under the
26 clearly erroneous standard. See Sternberg v. Johnston, 595 F.3d
27 at 943; Ozenne v. Bendon (In re Ozenne), 337 B.R. 214, 218 (9th
28 Cir. BAP 2006). A court's findings of fact are clearly erroneous

1 if they are illogical, implausible, or without support in the
2 record. Retz v. Sampson (In re Retz), 606 F.3d 1189, 1197 (9th
3 Cir. 2010).

4 We review the bankruptcy court's assessment of damages under
5 § 362(k) for an abuse of discretion. See Sternberg, 595 F.3d at
6 945; Eskanos & Adler, P.C. v. Leetien, 309 F.3d 1210, 1213 (9th
7 Cir. 2002).⁵ We apply a two-part test to determine whether the
8 bankruptcy court abused its discretion. First, we review de novo
9 whether the bankruptcy court selected the correct legal standard
10 to apply. United States v. Hinkson, 585 F.3d 1247, 1261-63 (9th
11 Cir. 2009) (en banc). Second, if the bankruptcy court selected
12 the correct legal standard, we consider whether the court's
13 findings and its application of those findings to the correct
14 legal standard were illogical, implausible or without support in
15 the record. Id. at 1262.

16 **DISCUSSION**

17 To find a willful stay violation, the bankruptcy court must
18 conclude that the creditor knew of the bankruptcy filing and
19 intended the actions that violated the stay. See Knupfer v.
20 Lindblade (In re Dyer), 322 F.3d 1178, 1191 (9th Cir. 2003)
21 (citing Pinkstaff v. United States (In re Pinkstaff), 974 F.2d
22 113, 115 (9th Cir. 1992)). In the event of a willful stay
23 violation, an individual injured thereby "shall recover actual
24 damages, including costs and attorneys' fees, and, in appropriate
25 circumstances, may recover punitive damages." 11 U.S.C.

26
27 ⁵ As part of the Bankruptcy Abuse Prevention and Consumer
28 Protection Act of 2005, Pub.L. 109-8, 119 Stat. 23, § 362(h) was
redesignated as § 362(k).

1 § 362(k)(1).

2 **A. The bankruptcy court did not clearly err when it found that**
3 **the foreclosure sale was not a willful violation of the**
4 **automatic stay.**

5 The bankruptcy court and the parties acknowledged that the
6 foreclosure sale violated the automatic stay. The bankruptcy
7 court found, however, that the violation was not willful because,
8 although the foreclosure sale was an intentional act, the
9 facsimile notice sent by Debtor arrived less than 8 minutes
10 before the scheduled sale and at the lunch hour. Quality,
11 therefore, did not have actual or effective notice of the filing.

12 On appeal, Debtor argues that Appellees acted willfully by
13 going forward with the sale when Quality received the facsimile
14 notice a full 17 minutes before the sale was actually cried at
15 12:10 p.m.

16 We determine that the bankruptcy court's finding is not
17 clearly erroneous. Based on this record, and, in particular on
18 the evidence provided by Quality's bankruptcy supervisor, we
19 determine that the bankruptcy court's finding is well supported
20 by the record and is not illogical or implausible.

21 **B. The bankruptcy court did not clearly err when it found that**
22 **Appellees did not otherwise willfully violate the automatic**
23 **stay.**

24 Even a non-willful stay violation becomes willful if the
25 creditor fails to remedy the violation after receiving notice of
26 the stay. See Eskanos & Adler, P.C., 309 F.3d at 1213 (section
27 362(a) imposes an affirmative duty to cease actions); Goodrich v.
28 Union Planters Mortg. (In re Goodrich), 196 Fed. App'x. 586, 587
(9th Cir. 2006) (foreclosing lender has a duty to promptly
rescind a trustee's deed of sale upon learning of the pre-sale

1 bankruptcy filing).

2 Debtor here testified that she never received notice of the
3 rescission of the foreclosure. She also presented declaratory
4 testimony from her attorney's paralegal, however, that Quality
5 acknowledged the ineffectiveness of the foreclosure sale during a
6 phone call. Appellees argued that because no trustee's deed upon
7 sale ever issued or recorded, title did not transfer and the sale
8 had no effect - citing without discussion California Civil Code
9 §§ 1091 and 2924.

10 The bankruptcy court found that Appellees took steps to
11 correct their wrongful sale and did so promptly after learning
12 that Debtor filed bankruptcy. We determine that this finding is
13 not clearly erroneous.

14 The Appellees' characterization of the effect of the
15 trustee's deed of sale misinterprets the governing statute.
16 Section 2924h(c) of the California Civil Code provides that for
17 the purposes of finalizing a trustee's sale, "the sale shall be
18 deemed final upon the acceptance of the last and highest bid."
19 It then discusses perfection of the sale, which is based on
20 recordation of the trustee's deed within 15 days. Cal. Civ. Code
21 § 2924h(c). Here, title technically transferred even without
22 recordation of a trustee's deed on sale.

23 Nonetheless, the bankruptcy court could appropriately
24 determine that Appellees decided to rescind within an hour of the
25 sale and took all appropriate action in connection with this
26 decision. Section 2924h(c) provides that a "sale is subject to
27 an automatic rescission for a failure of consideration"
28 All the trustee is required to do in the event of failed

1 consideration, is to send a notice of rescission to the "last and
2 highest bidder" whose consideration failed. Cal. Civ. Code
3 § 2924h(c). Notice to the owner of the property subject to
4 foreclosure is not required.

5 When the foreclosing party's credit bid is the highest bid,
6 the determination that a credit bid was ineffective given the
7 pendency of the automatic stay is equivalent to a failure of a
8 third party bidder to timely tender funds; debt is not repaid and
9 the foreclosure is not finalized. The California foreclosure
10 statutes do not require any formal notice of rescission in this
11 circumstance. Again, notice to the property owner, here the
12 Debtor, is not required, and Appellants provided evidence that
13 they recognized and internally communicated the need for
14 rescission promptly.

15 Thus, under California's comprehensive foreclosure statute,
16 nothing else was required under the circumstances. There
17 certainly are consequences once the sale is rescinded: a new
18 notice of sale must issue and a new reinstatement period arises.
19 See Cal. Civ. Code § 2924c. Debtor offered no evidence, however,
20 that Appellees took any positions inconsistent with their
21 internal decision to rescind the ineffective sale.⁶ Therefore,
22 the record supports the bankruptcy court's finding that Appellees
23 did not further violate the stay by failing to promptly remedy
24 the wrongful foreclosure.

25
26 ⁶ After completion of briefing on this appeal, Nationstar
27 sought authority from the bankruptcy court to proceed to notice a
28 new foreclosure sale, by way of a motion for relief from stay
filed in October 2013. At oral argument, the parties' counsel
conceded that Appellees obtained relief from stay but have not as
yet issued a new notice of sale.

1 The bankruptcy court also found that Debtor failed to
2 provide any evidence that would support holding either Nationstar
3 or Quality responsible for the allegedly numerous telephone calls
4 and correspondence from businesses purporting to provide post-
5 foreclosure assistance. The one document submitted in evidence,
6 on its face, contains no reference to either Nationstar or
7 Quality, and Debtor offered no evidence from which the bankruptcy
8 court could reasonably attribute it to either appellee.
9 Therefore, on this record, we conclude that the bankruptcy court
10 did not commit error.

11 **C. Even if the violation was willful, Debtor suffered no**
12 **damages as a result thereof.**

13 As the bankruptcy court also found, even if it determined
14 that Appellees had adequate notice before the foreclosure sale,
15 Debtor failed to provide evidence of damages suffered during the
16 49 minutes that elapsed between the time of sale and Quality's
17 determination to rescind the sale. And the record reflects that
18 no trustee's deed upon sale ever issued. The stay violation was
19 short-lived, and Appellees promptly remedied the wrongful
20 foreclosure on their own. Debtor failed to establish any actual
21 damages. Therefore, even if the notice was deemed to be
22 adequate, the bankruptcy court did not abuse its discretion when
23 it denied Debtor's Sanctions Motion.

24 **CONCLUSION**

25 For the reasons set forth above, we AFFIRM the bankruptcy
26 court.