

APR 15 2014

NOT FOR PUBLICATION

SUSAN M. SPRAUL, CLERK  
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.

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\* 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 § 362<sup>1</sup> 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'

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27 <sup>1</sup> 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").<sup>2</sup> 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.<sup>3</sup> 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,"<sup>4</sup> and that she received  
20 notices and telephone calls from "multiple businesses purporting  
21

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22 <sup>2</sup> 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 <sup>3</sup> At oral argument in this appeal, Debtor's counsel  
27 conceded that title remained in Debtor's name.

28 <sup>4</sup> 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  
29       attributed to Nationstar or Quality. The only evidence  
30       submitted by Debtor regarding any of this  
31       correspondence is a one-page occupancy request notice  
32       delivered by a company called the Vatsu (sic) Preferred  
33       Team. Debtor has failed to present any supporting  
34       evidence to show that Quality and/or Nationstar  
35       willfully violated the automatic stay.

26 ECF No. 71 at 4.

27       After hearing oral argument, the bankruptcy court placed  
28 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).<sup>5</sup> 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.

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26  
27 <sup>5</sup> 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.<sup>6</sup> 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.

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25  
26 <sup>6</sup> 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.