

MAY 30 2014

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

ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

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In re:	)	BAP No.	CC-13-1328-KiTad
	)		
SHOLEM PERL,	)	Bk. No.	13-26126-NB
	)		
Debtor.	)		
_____	)		
EDEN PLACE, LLC	)		
	)		
Appellant,	)		
	)		
v.	)	<b>O P I N I O N</b>	
	)		
SHOLEM PERL,	)		
	)		
Appellee.	)		
_____	)		

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

Filed - May 30, 2014  
Ordered Published - June 5, 2014

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

Honorable Neil W. Bason, Bankruptcy Judge, Presiding

Appearances: Ronald N. Richards, Esq. of the Law Offices of  
Ronald Richard & Associates, APC argued for  
appellant Eden Place, LLC; Appellee failed to file  
a brief and waived right to oral argument.

Before: KIRSCHER, TAYLOR and DUNN, Bankruptcy Judges.

1 KIRSCHER, Bankruptcy Judge:

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3 Appellant Eden Place, LLC ("Eden Place") appeals an order  
4 from the bankruptcy court that determined, in part, that the  
5 postpetition lockout/eviction by the Los Angeles County Sheriff's  
6 Department ("Sheriff") of the debtor from his residence on  
7 June 27, 2013, made at the request of Eden Place violated the  
8 automatic stay. Based on the Panel's decision in Williams v. Levi  
9 (In re Williams), 323 B.R. 691, 699 (9th Cir. BAP 2005), aff'd,  
10 204 F. App'x 582 (9th Cir. 2006),<sup>1</sup> we AFFIRM.

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### I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

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#### A. Prepetition events

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Appellee-debtor Sholem Perl ("Perl") and a joint tenant  
(collectively, "Perls") owned a single-family duplex in Los  
Angeles, California ("Residence"). In 2005, Perls refinanced  
their mortgages in connection with the Residence; in 2009, Perls  
fell behind in their mortgage payments.

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After recording a notice of default and a notice of trustee's  
sale, Bank of America sold the Residence on March 20, 2013 to Eden  
Place. Eden Place timely recorded the trustee's deed on March 29,  
2013.

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Perls failed to vacate the Residence after being served with  
a 3-day notice to quit; Eden Place filed two identical complaints  
(one for each side of the duplex) for unlawful detainer on

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<sup>1</sup> We acknowledge Eden Place submitted a letter under Fed. R.  
App. P. 28(j). We discussed some of Eden Place's cited  
authorities, specifically In re Williams, with its counsel at the  
time of oral argument and were familiar with its other cited BAP  
authorities.

1 March 26, 2013 ("UD Actions").

2 On April 12, 2013, the Perls filed a complaint in state court  
3 against Eden Place (and others) to set aside the sale. Perls  
4 alleged claims for (1) wrongful foreclosure, (2) violation of the  
5 Homeowner Bill of Rights, (3) unfair business practices and  
6 (4) breach of contract ("Complaint to Set Aside Sale"). Eden  
7 Place filed a cross-complaint on May 7, 2013, for (1) holdover  
8 damages, (2) trespass and (3) interference with prospective  
9 economic advantage ("Cross-Complaint"), as well as a motion to  
10 expunge the lis pendens filed by the Perls.

11 On June 11, 2013, the state court entered an unlawful  
12 detainer judgment in favor of Eden Place (including a judgment for  
13 possession and restitution of \$11,700) in the UD Actions ("UD  
14 Judgment"). The state court entered a Writ of Possession in favor  
15 of Eden Place on June 14, 2013. Sometime between June 14 and  
16 June 24, 2013, the Sheriff posted the lockout notice.

17 On June 19, 2013, the state court heard Perls' motion to stay  
18 the UD Judgment and set various requirements for a stay, which  
19 Perls failed to satisfy. Consequently, a second scheduled hearing  
20 for June 26 was taken off calendar; the state court did not stay  
21 the UD Judgment. Eden Place contends that when Perls failed to  
22 obtain a stay of the UD Judgment, the Sheriff was on "auto pilot"  
23 to complete the eviction.

24 **B. Postpetition events**

25 On June 20, 2013, Perl, acting pro se, filed a "skeletal"  
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1 chapter 13<sup>2</sup> bankruptcy petition. Perl needed to file his  
2 schedules, statement of financial affairs, chapter 13 plan and  
3 other required documents by July 5, 2013. Although not listed as  
4 a creditor, Eden Place received notice of Perl's bankruptcy  
5 filing. On June 24, 2013, Perl's counsel faxed a letter to Eden  
6 Place's counsel and to the Sheriff's department informing them of  
7 the bankruptcy filing. In the letter, Perl's counsel asserted  
8 that no landlord-tenant relationship existed between Perl and Eden  
9 Place, so any exceptions to the automatic stay provided in  
10 § 362(b)(22) did not apply. He also asserted, citing to Westside  
11 Apartments, LLC v. Butler (In re Butler), 271 B.R. 867, 876  
12 (Bankr. C.D. Cal. 2002), that CAL. CODE CIV. P. § 715.050<sup>3</sup> operated  
13 in contravention to the Code and was therefore unconstitutional.

14 On June 24, 2013, Perl filed a notice to remove the three  
15 state court actions – the Complaint to Set Aside Sale, the  
16 Cross-Complaint and the UD Actions ("Removed Actions"). Prior to  
17 Perl filing this notice of removal, the state court scheduled a  
18 hearing on June 25, 2013, to consider Eden Place's motion to  
19 expunge the lis pendens Perls had recorded against the Residence.

20 Later on June 24, 2013, Eden Place moved to remand the  
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23 <sup>2</sup> Unless specified otherwise, all chapter, code and rule  
24 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and  
the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

25 <sup>3</sup> CAL. CODE CIV. P. § 715.050 provides, in relevant part:

26 Except with respect to enforcement of a judgment for  
27 money, a writ of possession issued pursuant to a  
28 judgment for possession in an unlawful detainer action  
shall be enforced pursuant to this chapter without  
delay, notwithstanding receipt of notice of the filing  
by the defendant of a bankruptcy proceeding.

1 Removed Actions ("Motion for Remand") and filed its application  
2 for an order shortening time. The bankruptcy court scheduled the  
3 Motion for Remand for hearing on June 28, 2013. Also on June 24,  
4 Eden Place filed a motion in bankruptcy court for relief from stay  
5 ("Stay Relief Motion"), pursuant to the provisions of § 362(d)(1)  
6 and (2). Alternatively it asserted that the automatic stay did  
7 not apply. Eden Place asserted that it purchased the Residence at  
8 the March 20, 2013 prepetition foreclosure sale, that the  
9 trustee's deed had been properly recorded, that the UD Judgment  
10 had been obtained as well as a Writ of Possession and that the  
11 Residence was not property of Perl's bankruptcy estate. The  
12 bankruptcy court set a hearing on the Stay Relief Motion for  
13 July 9, 2013.

14 Notwithstanding the bankruptcy filing and Eden Place's  
15 pending Stay Relief Motion, the Sheriff proceeded with Perls'  
16 lockout on June 27, 2013, thereby evicting the Perls. Some of  
17 Perls' personal belongings remained inside the Residence at the  
18 time of the eviction.

19 Perl, with the assistance of counsel, filed his Amended  
20 Emergency Motion to Enforce the Automatic Stay, Set Aside the  
21 Eviction and for Order in Contempt ("Emergency Motion to Enforce  
22 Stay") and his application for order shortening time. Perl  
23 asserted that by continuing the eviction process against him and  
24 eventually evicting him, Eden Place had violated the automatic  
25 stay pursuant to § 362(a)(1)-(3). Specifically, Perl asserted  
26 that his possessory interest in the Residence constituted an  
27 equitable interest under § 541(a) protected by § 362(a)(3), citing  
28 In re Butler and Di Giorgio v. Lee (In re Di Giorgio), 200 B.R.

1 664, 670 (C.D. Cal. 1996), vacated on mootness grounds, 134 F.3d  
2 971 (9th Cir. 1998). Perl also asserted that his pending  
3 litigation to set aside the sale and his dispute over the validity  
4 of the UD Judgment created a protected equitable interest in the  
5 Residence. Perl requested that his Emergency Motion to Enforce  
6 Stay be heard on June 28 along with Eden Place's Motion for  
7 Remand. A few hours later, Eden Place filed an objection to  
8 Perl's Emergency Motion to Enforce Stay, contending that it was  
9 moot and procedurally defective.

10 On June 27, 2013, the bankruptcy court entered its order  
11 setting the hearing on Perl's Emergency Motion to Enforce Stay and  
12 on Eden Place's Stay Relief Motion for June 28, 2013.

13 Just hours before the scheduled hearing, Eden Place filed  
14 another objection to Perl's Emergency Motion to Enforce Stay.  
15 Eden Place argued that, under California law, once the foreclosure  
16 occurred and Eden Place recorded its trustee's deed on March 29,  
17 2013, Perl had no legal or equitable interest in the Residence  
18 protected by the automatic stay at the time of the eviction on  
19 June 27, 2013; he was merely a squatter or trespasser with no  
20 cognizable interest. Eden Place further argued that Perl's motion  
21 failed to recognize ample authority which supports the position  
22 that continued enforcement of a prepetition unlawful detainer  
23 judgment is not a violation of the automatic stay. Citing Lee v.  
24 Baca, 73 Cal. App. 4th 1116, 1117-18 (1999), a case involving a  
25 residential tenant and landlord, Eden Place argued that an  
26 unlawful detainer judgment extinguishes the residential tenant's  
27 interest in the property and that a postjudgment bankruptcy filing  
28 does not affect the landlord's right to regain possession of the

1 property because it is not, at that point, property of the  
2 tenant-debtor's estate. Eden Place also cited Marquand v. Smith  
3 (In re Smith), 105 B.R. 50, 53-54 (Bankr. C.D. Cal. 1989), which  
4 held that a debtor-tenant has no legal or equitable interest in  
5 rented property once a judgment for possession has been entered in  
6 favor of the landlord. Based on these authorities, Eden Place  
7 argued that Perl lost whatever possessory interest he might have  
8 had in the Residence upon entry of the UD Judgment, so the  
9 Sheriff's execution of the Writ of Possession did not affect  
10 property of the estate. Eden Place also took the position that  
11 once the UD Judgment and Writ of Possession were issued, the  
12 Sheriff had no choice but to proceed with the eviction.

13 Eden Place acknowledged the holdings of In re Butler and  
14 In re Di Giorgio, but argued that both cases were inapplicable  
15 because they were "tenant" cases, not "squatter" cases. Eden  
16 Place further argued that these cases were weakened with the  
17 addition of § 362(b)(22) under the amendments of the Bankruptcy  
18 Abuse Prevention and Consumer Protection Act of 2005, which  
19 clarifies that residential tenants, subject to certain  
20 limitations, are not protected by the automatic stay. Eden Place  
21 contended that no federal courts of appeals have ever ruled that a  
22 squatter who loses an unlawful detainer action still has a  
23 cognizable property interest that would warrant invoking the  
24 automatic stay. Alternatively, Eden Place argued that cause  
25 existed to annul the stay retroactively to June 20, 2013.

26 The hearing on the Emergency Motion to Enforce Stay, the Stay  
27 Relief Motion and the Motion for Remand proceeded on June 28,  
28 2013. Counsel for both parties appeared. Before the parties

1 presented oral argument, the bankruptcy court opined that the  
2 postpetition enforcement of the Writ of Possession on June 27  
3 "seem[ed] to be something that would violate the automatic stay."  
4 Hr'g Tr. (June 28, 2013) 2:19-20. After hearing brief argument  
5 from counsel for Eden Place, the bankruptcy court made its initial  
6 findings with respect to whether Eden Place violated the automatic  
7 stay:

8 THE COURT: Okay. Well, let's back up a moment here. As  
9 of the petition date, before the sheriff went in and  
10 evicted, there was a possessory interest, correct, or am  
11 I misunderstanding the facts?

12 MR. RICHARDS: Well, there was a possessory interest of  
13 naked possession, yes.

14 THE COURT: Okay.

15 . . .

16 MR. RICHARDS: So other than a naked possessory interest,  
17 that's all there was.

18 THE COURT: I understand. I do not follow In re Smith.

19 MR. RICHARDS: Okay.

20 THE COURT: And in my view, the bare possessory interest,  
21 coupled with the possibility of some sort of relief, may  
22 be sufficient to give the bankruptcy estate a protected  
23 interest that is subject to the automatic stay.

24 Id. at 5:3-10, 15-23. The court also noted that despite Eden  
25 Place's argument respecting a residential tenant under  
26 § 362(b)(22), this was not a rental situation. Id. at 5:24-6:15.  
27 Counsel then noted that In re Butler was also a landlord-tenant  
28 case and not a case that dealt with squatters who lose their house  
to foreclosure. Id. at 7:6-9.

After hearing further argument from the parties, the  
bankruptcy court took a brief recess to review the cases cited by  
the parties. However, before the recess, the court opined:

1 I will note that the automatic stay is a little broader  
2 than just a property interest.

3 It's not just any act to obtain possession of the  
4 property of the estate or to exercise control over  
5 property of the estate, an enforcement against the debtor  
6 or against property of the estate of a judgment obtained  
7 before commencement of the case.

8 Now, when we're talking about a cause of action or claims  
9 or defenses such as an assertion of a right to  
10 possession, even if that's after a writ of possession,  
11 there are still claims there.

12 Any by - if - it may be that the automatic stay applies  
13 even to the more limited bundle of rights that still  
14 exists. It may not even be a bundle. It might just be  
15 the opportunity to seek some relief.

16 Id. at 34:17-35:7.

17 Upon further review of the cases cited by the parties, the  
18 bankruptcy court determined that the eviction was a violation of  
19 the automatic stay and was therefore void. The bankruptcy court  
20 granted Eden Place's Motion for Remand and Eden Place's Stay  
21 Relief Motion prospectively, modifying the automatic stay to  
22 permit Perl until July 12, 2013, to seek relief from the state  
23 court and denied Eden Place's request to annul the stay  
24 retroactively. The bankruptcy court entered an order after the  
25 hearing containing the following relevant part: "The eviction of  
26 the debtor by the Sheriff, at the request of the movant, after the  
27 bankruptcy petition was filed violated the automatic stay and is  
28 void[.]" June 28, 2013 Order ("Order").

29 The bankruptcy court declined to impose any contempt  
30 sanctions against Eden Place for the stay violation because Perl  
31 had not yet offered any evidence of damages due to the eviction.  
32 Sanctions would be decided at a later hearing, after the state  
33 court had an opportunity to rule on Perl's claims. The bankruptcy

1 court directed the parties to file a status report informing it of  
2 the state court proceedings.

3 Eden Place filed a status report on July 15, 2013.<sup>4</sup> Despite  
4 extensions to file his schedules and other required documents,  
5 Perl never filed anything further in his bankruptcy case. The  
6 case was ultimately dismissed on August 8, 2013, for Perl's  
7 failure to appear at the scheduled § 341(a) meeting of creditors.

8 Eden Place timely appealed the Order.

## 9 **II. JURISDICTION**

10 The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334  
11 and 157(b)(2)(G). We have jurisdiction under 28 U.S.C. § 158.<sup>5</sup>

## 12 **III. ISSUE**

13 Did the bankruptcy court err when it determined that Eden  
14 Place violated the automatic stay with the postpetition eviction  
15 of Perl?

## 16 **IV. STANDARD OF REVIEW**

17 Whether the automatic stay provisions of § 362 have been  
18 violated is a question of law we review de novo. McCarthy,  
19 Johnson & Miller v. N. Bay Plumbing, Inc. (In re Pettit), 217 F.3d  
20 1072, 1077 (9th Cir. 2000) (citing Cal. v. Taxel (In re Del

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21  
22 <sup>4</sup> According to Eden Place, the Perls' lis pendens was  
23 expunged. The UD Actions were closed. Perl's counsel filed a  
24 state court appeal. Eden Place transferred the Residence to a new  
25 owner. Perl was allowed access to the Residence to remove some of  
his remaining personal belongings, but he also allegedly removed  
certain fixtures from the property, including two dishwashers, two  
cooktops and their hoods.

26 <sup>5</sup> On January 9, 2014, a motions panel determined that this  
27 appeal was not moot, despite the dismissal of Perl's bankruptcy  
28 case, because Eden Place could still be subject to a claim for  
damages at some point in the future based on the Order. We agree.  
Therefore, we have jurisdiction over this appeal.

1 Mission Ltd.), 98 F.3d 1147, 1150 (9th Cir. 1996)).

2 **V. DISCUSSION**

3 The sole issue in this appeal is whether, at the time Perl  
4 filed his bankruptcy petition, he had any remaining interest in  
5 the Residence protected by the automatic stay. Eden Place  
6 contends that he did not and that the bankruptcy court erred in  
7 determining that Perl's possessory interest was a sufficient  
8 estate interest to trigger the protections of the automatic stay  
9 under § 362(a).

10 **A. The bankruptcy court did not err when it determined that Eden  
11 Place had violated the automatic stay.**

12 "The automatic stay under § 362 is designed to give the  
13 bankruptcy court an opportunity to harmonize the interests of both  
14 debtor and creditors while preserving the debtor's assets for  
15 repayment and reorganization of his or her obligations."  
16 In re Pettit, 217 F.3d at 1077 (citation omitted). The stay is  
17 self-executing, effective upon the filing of the bankruptcy  
18 petition, and sweeps broadly. Id. It stays the "commencement or  
19 continuation . . . or other action or proceeding against the  
20 debtor that was or could have been commenced before the [filing of  
21 the bankruptcy]," as well as the enforcement of a prepetition  
22 judgment against the debtor or property of the estate.  
23 § 362(a)(1) & (2).

24 It also stays actions to "obtain possession of property of  
25 the estate or of property from the estate or to exercise control  
26 over property of the estate." § 362(a)(3). "Property of the  
27 estate" is also broadly defined to include all of the debtor's  
28 legal and equitable interests in property as of the commencement

1 of the case, wherever located and by whomever held. § 541(a).  
2 See also Ramirez v. Fuselier (In re Ramirez), 183 B.R. 583, 587  
3 (9th Cir. BAP 1995) (automatic stay protects property of the  
4 estate in which the debtor has a legal, equitable or possessory  
5 interest) (citing Interstate Commerce Comm'n v. Holmes Transp.,  
6 Inc., 931 F.2d 984, 987 (1st Cir. 1991)). Bankruptcy courts must  
7 look to state law to determine whether and to what extent the  
8 debtor has any legal or equitable interests in property as of the  
9 commencement of the case. Butner v. United States, 440 U.S. 48,  
10 54-55 (1978).

11 Actions taken in violation of the automatic stay are void.  
12 Griffin v. Wardrobe (In re Wardrobe), 559 F.3d 932, 934 (9th Cir.  
13 2009) (citing Gruntz v. Cnty. of Los Angeles (In re Gruntz), 202  
14 F.3d 1074, 1082 (9th Cir. 2000) (en banc)).

15 In determining whether Eden Place violated the automatic stay  
16 by proceeding with the eviction of Perl, we must determine whether  
17 Perl had any remaining interest in the Residence on the date he  
18 filed bankruptcy. Because the Residence is located in California,  
19 California law controls this determination. Here, it is  
20 undisputed that Eden Place purchased the Residence and timely  
21 recorded its trustee's deed prepetition. Under CAL. CIV. CODE  
22 § 2924h(c), "the trustee's sale shall be deemed final upon the  
23 acceptance of the last and highest bid, and shall be deemed  
24 perfected as of 8 a.m. on the actual date of sale if the trustee's  
25 deed is recorded within 15 calendar days after the sale[.]" "The  
26 purchaser at a nonjudicial foreclosure sale receives title under a  
27 trustee's deed free and clear of any right, title or interest of  
28 the trustor. A properly conducted nonjudicial foreclosure sale

1 constitutes a final adjudication of the rights of the borrower and  
2 lender." Wells Fargo Bank v. Neilsen, 178 Cal. App. 4th 602, 614  
3 (2009) (citations and quotation marks omitted). See also 4 Miller  
4 & Starr, Cal. Real Estate § 10:208 (3d ed. 2009) (Under California  
5 law, "[t]he purchaser at the foreclosure sale receives title free  
6 and clear of any right, title, or interest of the trustor or any  
7 grantee or successor of trustor."). Accordingly, title to the  
8 Residence passed to Eden Place free and clear of any right, title  
9 or interest of Perl's about three months before he filed his  
10 chapter 13 bankruptcy petition. Thus, Perl's ownership interest  
11 in the Residence was eliminated prepetition. Therefore, to find  
12 that Eden Place violated the automatic stay, we must determine  
13 whether Perl held some other sort of interest in the Residence  
14 recognized by California law at the time he filed bankruptcy.

15 Prepetition, Eden Place had successfully obtained the  
16 UD Judgment, and Perl's efforts to stay that judgment failed. A  
17 Writ of Possession in favor of Eden Place was also issued  
18 prepetition. It is undisputed that Perl was in possession of the  
19 Residence at all relevant times. We often cite the following  
20 passage from a well-known treatise in cases where the order on  
21 appeal concerns the bankruptcy court's decision to grant relief  
22 from stay so that the purchaser may proceed with its eviction  
23 action against the holdover debtor-borrower:

24 Where a real property nonjudicial foreclosure was  
25 completed and the deed recorded prepetition, the debtor  
26 has neither legal nor equitable title to the property at  
27 the time the bankruptcy petition is filed. Although the  
28 debtor may still be in possession of the premises, his or  
her status is essentially that of a "squatter." The  
mortgagee (or purchaser at the foreclosure sale) is  
entitled to the property and thus relief from the stay  
should be granted.

1 Kathleen P. March and Alan M. Ahart, CALIFORNIA PRACTICE GUIDE:  
2 BANKRUPTCY ¶ 8:1196 (2009) (emphasis in original). See Wells Fargo  
3 Bank v. Edwards (In re Edwards), 454 B.R. 100, 106 (9th Cir. BAP  
4 2011), as just one of many examples.

5 We have determined in cases with facts such as these that  
6 "cause" was established to grant relief from stay because the  
7 debtor, hence the estate, no longer had any interest in the real  
8 property at issue when he or she filed for bankruptcy. Id. at  
9 107. See also Nyamekye v. Wells Fargo Bank (In re Nyamekye), 2011  
10 WL 3300335, at \*5-6 (9th Cir. BAP Feb. 15, 2011) (determining that  
11 because an unlawful detainer judgment and writ of possession had  
12 been obtained by the creditor prepetition, neither the holdover  
13 debtor-borrower nor her estate had any ownership interest or right  
14 in the property; therefore cause was shown to grant relief from  
15 stay).

16 A distinction exists between the analyses required for stay  
17 relief matters and violation of stay matters. In the former, the  
18 creditor is summarily attempting to establish a colorable claim in  
19 terms of an interest in a debtor's secured note or an interest in  
20 debtor's property. In considering the interest in debtor's  
21 property, an analysis is made as to the strength of debtor's  
22 interest vis-a-vis creditor's interest in the same property.  
23 Consequently, terms like "owner" and "squatter" appear. See  
24 In re Edwards, 454 B.R. at 105-06. In the latter, the debtor is  
25 attempting to establish that the creditor is violating the  
26 automatic stay by taking some action against the debtor or against  
27 property of the estate. In this instance, the strength of one's  
28 interest is not determinative; but more importantly, if debtor or

1 the estate has "any" interest the question becomes: is the  
2 creditor's action violative of the stay. Creditor's action may be  
3 violative even if a minimal interest, such as a squatter's or  
4 possessory interest, is held by the debtor or the estate. See  
5 In re Di Giorgio, 200 B.R. at 672-74.

6 In a case factually similar to Nyamekye concerning whether a  
7 party had violated the automatic stay, we held that a debtor-  
8 borrower had a possessory interest in the real property at issue  
9 by virtue of his or her physical occupancy. In re Williams,  
10 323 B.R. at 699. In In re Williams, we cited In re Butler, 271  
11 B.R. at 876-77, with approval and for the proposition that under  
12 California law a debtor-tenant's mere physical possession of  
13 apartment premises after writ of possession had issued in favor of  
14 landlord in unlawful detainer action is an equitable interest in  
15 the property, protected by the automatic stay. In other words, we  
16 extended the holding of In re Butler to include a debtor-former  
17 homeowner as opposed to only a debtor-tenant under a residential  
18 lease. We also cited In re Di Giorgio, which similarly held that  
19 under California law mere possession of real property, even after  
20 a writ of possession has issued, creates a protected equitable  
21 interest subject to the automatic stay. 200 B.R. at 671-73.  
22 Granted, In re Di Giorgio, a case from 1996, involved a  
23 residential tenant as opposed to a former homeowner, and, as we  
24 discuss below, residential tenants are no longer given the  
25 protection of the automatic stay if certain limitations are  
26 satisfied. However, the holding in In re Di Giorgio appears  
27 broad, and the district court did not limit its analysis as to  
28 what constitutes a "possessory interest" under California law

1 strictly to residential tenants under a lease. "Under California  
2 law, mere possession of real property creates a protected  
3 interest." Id. at 671 (citing to CAL. CIV. CODE § 1006, which  
4 states: "Occupancy for any period confers a title sufficient  
5 against all except the state and those who have title . . . .").  
6 "[T]he mere possession of real estate is constantly treated as  
7 property which may be purchased and sold, and for the recovery of  
8 which an action may be maintained against one having no better  
9 title." King v. Goetz, 70 Cal. 236, 240, 11 P. 656, 658 (1886).  
10 See 12 WITKIN ON REAL PROP., SUMMARY 10TH (2005) § 208 (possession  
11 gives possessor substantial right).

12 In In re Williams, the debtor had transferred record title to  
13 his condominium to his girlfriend prepetition, but was still  
14 occupying the condo when he filed bankruptcy and at the time the  
15 homeowners association foreclosed its lien on the property.  
16 Recognizing that the debtor had no recorded interest in the condo  
17 on the petition date, we determined that he nonetheless held a  
18 possessory interest in it that was property of the estate under  
19 § 541(a) and protected by the automatic stay. 323 B.R. at 699.  
20 We remanded that portion of the order to have the bankruptcy court  
21 determine whether any stay violation damages were appropriate.  
22 Id. at 702.

23 Eden Place had not cited to In re Williams in its brief and  
24 appeared to be unaware of it at the time of oral argument.  
25 Instead, Eden Place argues that the bankruptcy court erred by not  
26 following In re Smith and contends that we should adopt it, and  
27 further contends that we should reject In re Butler. In  
28 In re Smith, the bankruptcy court held that where a residential

1 landlord obtained an unlawful detainer judgment prepetition, the  
2 debtor-tenant has no legal or equitable interest in the property  
3 protected by the automatic stay. 105 B.R. at 54. The court  
4 further held that the debtor-tenant's physical possession of the  
5 property was not a property interest recognized by law. Id.  
6 Notably, it did not cite to any California authority for this  
7 proposition. The court went on to conclude that it was not  
8 necessary for the movant to obtain relief from stay in order to  
9 regain possession of the apartment. Id.

10 We decline to adopt In re Smith for two reasons. First, it  
11 is contrary to our holding in In re Williams, and we are bound by  
12 our precedent. Gaughan v. The Edward Dittlof Revocable Trust  
13 (In re Costas), 346 B.R. 198, 201 (9th Cir. BAP 2006) (absent a  
14 change in the law, we are bound by our precedent). For that same  
15 reason, we are not inclined to reject In re Butler. Second, the  
16 concerns expressed by the bankruptcy court in In re Smith  
17 regarding what it viewed as a lack of power of residential  
18 landlords have been addressed with the addition of § 362(b)(22).<sup>6</sup>  
19 Under that provision, absent certain limitations not relevant

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21 <sup>6</sup> Section 362(b)(22) provides that the filing of a  
22 bankruptcy petition does not create a stay "subject to subsection  
23 (1), under subsection (a)(3), of the continuation of any eviction,  
24 unlawful detainer action, or similar proceeding by a lessor  
25 against a debtor involving residential property in which the  
debtor resides as a tenant under a lease or rental agreement and  
with respect to which the lessor has obtained before the date of  
the filing of the bankruptcy petition, a judgment for possession  
of such property against the debtor[.]"

26 Section 362(1) provides, however, that a 30-day stay shall  
27 apply if there is a rent default by a debtor-tenant, where the  
debtor certifies with the bankruptcy petition that he or she can  
28 cure the default and deposits with the clerk the amount of rent  
due for the next 30 days.

1 here, the automatic stay does not apply to cases under which the  
2 debtor resides as a tenant under a lease or rental agreement and  
3 where the lessor has obtained before the bankruptcy filing a  
4 judgment for possession. As the bankruptcy court observed in the  
5 instant case, we do not have a rental property situation, and  
6 clearly, we have no lease or rental agreement between the parties.

7       Eden Place argues that In re Smith is consistent with  
8 California law, where a judgment for possession has issued. CAL.  
9 CODE CIV. P. § 715.050 provides, in relevant part, that "a writ of  
10 possession issued pursuant to a judgment for possession in an  
11 unlawful detainer action shall be enforced pursuant to this  
12 chapter without delay, notwithstanding receipt of notice of the  
13 filing by the defendant of a bankruptcy proceeding." In other  
14 words, CAL. CODE CIV. P. § 715.050 provides that a writ of  
15 possession obtained in an unlawful detainer action must be  
16 executed despite a defendant's filing of a postjudgment bankruptcy  
17 petition. Two courts have held that this statute is preempted by  
18 federal bankruptcy law and is therefore unconstitutional on its  
19 face. In re Di Giorgio, 200 B.R. at 675; In re Butler, 217 B.R.  
20 at 876. One California Court of Appeal has held to the contrary.  
21 See Lee, 73 Cal. App. 4th at 1119-20 (relying on In re Smith to  
22 hold that CAL. CODE CIV. P. § 715.050 survives a preemption attack).  
23 We are not persuaded by Lee and agree with the reasoning of  
24 In re Butler and In re Di Giorgio. Clearly, with the statute's  
25 express reference to the filing of a bankruptcy petition, its  
26 purpose is to carve out an exception to the automatic stay  
27 provided by federal law. This exception is preempted by § 362(a).  
28 While state law determines the existence and scope of a debtor's

1 interest in property, federal law determines whether that property  
2 interest is protected by the automatic stay. In re Di Giorgio,  
3 200 B.R. at 673 n.4; In re Gruntz, 202 F.3d at 1082 (“The  
4 automatic stay is an injunction issuing from the authority of the  
5 bankruptcy court, and bankruptcy court orders are not subject to  
6 collateral attack in other courts.”).

7 Finally, Eden Place argues that the eviction did not violate  
8 the automatic stay because it was a “ministerial act,” and that  
9 the Sheriff was on “auto pilot” and had no choice but to execute  
10 the Writ of Possession. We fail to see where Eden Place raised  
11 this argument before the bankruptcy court. We generally do not  
12 consider arguments raised for the first time on appeal, and we do  
13 not exercise our discretion to do so in this case. O’Rourke v.  
14 Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957  
15 (9th Cir. 1989). See also Moldo v. Matsco, Inc. (In re Cybernetic  
16 Servs., Inc.), 252 F.3d 1039, 1045 n.3 (9th Cir. 2001) (appellate  
17 court will not explore ramifications of argument because it was  
18 not raised below and, accordingly, was waived).

19 We conclude that, based on our holding in In re Williams,  
20 Perl’s physical occupation of the Residence conferred a possessory  
21 interest under California law that was protected by the automatic  
22 stay. Even Eden Place must have thought that Perl possibly had  
23 some sort of interest or it would not have filed the Stay Relief  
24 Motion.

25 To “willfully” violate the automatic stay, the alleged  
26 violator must have knowledge of the automatic stay and have  
27 intentionally violated the stay. Ozenne v. Bendon (In re Ozenne),  
28 337 B.R. 214, 220 (9th Cir. BAP 2006). The record reflects that

1 Eden Place was on notice of Perl's bankruptcy filing prior to the  
2 eviction on June 27, 2013, even if notice was only based on  
3 counsel's faxed letter. "Knowledge of the bankruptcy filing is  
4 legal equivalent of knowledge of the automatic stay." Id. (citing  
5 In re Ramirez, 183 B.R. at 589). Informal notice suffices. In re  
6 Ozenne, 337 B.R. at 220 (citing Morris v. Peralta (In re Peralta),  
7 317 B.R. 381, 389 (9th Cir. BAP 2004)). Further, the acts here  
8 were intentional. Whether Eden Place believed in good faith that  
9 it had a right to the Residence is irrelevant to the analysis of  
10 whether its act was intentional. Id. at 221 (citations omitted).  
11 Accordingly, we conclude that Eden Place violated the automatic  
12 stay when it did not advise the Sheriff to desist in its efforts  
13 to lock out and evict Perl from the Residence. We further note  
14 that changing the locks on the Residence, locking inside Perl's  
15 personal property, which was also property of the estate, was an  
16 act to exercise control over property of the estate in violation  
17 of § 362(a)(3). See In re Gagliardi, 290 B.R. 808, 815 (Bankr. D.  
18 Colo. 2003).

## 19 VI. CONCLUSION

20 Based on the foregoing reasons, we AFFIRM the portion of the  
21 Order ruling that the postpetition lockout/eviction by the Sheriff  
22 of the debtor from his residence on June 27, 2013, violated the  
23 automatic stay and is void.

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