IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In Re LOGAN T. JOHNSTON III, Debtor.	Chapter 11 Case No. 01-06221-PHX-SSC Adv. 01-885
LOGAN T. JOHNSTON III, Plaintiff, vs. PAULA PARKER, et al., Defendants.	MEMORANDUM DECISION (Opinion to Post)

INTRODUCTION

This matter comes before the Court on a "Motion (1) To Alter or Amend the Judgment; (2) For a New Trial; (3) For Relief; And/Or (4) For Reconsideration of the Court's Memorandum Decision as to Defendant Sternberg Only" ("Motion") filed on April 10, 2006, by Defendants Melvin Sternberg and Sternberg & Sternberg, Ltd. ("Defendants"). A hearing on the matter was held on May 16, 2006; thereafter the Court took the matter under advisement.

In this Memorandum Decision, the Court has now set forth its findings of fact and conclusions of law pursuant to Rule 7052 of the Rules of Bankruptcy Procedure. The issues

addressed herein constitute a core proceeding over which this Court has jurisdiction. 28 U.S.C. §§ 1334(b) and 157(b) (West 2006).

On March 31, 2006, the Court rendered a Memorandum Decision ("Decision") in the above-captioned adversary, resolving various issues remanded to the Court as a result of a decision by the Arizona Federal District Court.[1] In its Decision, this Court held that, based upon a change in Ninth Circuit case law, the Plaintiff, Logan T. Johnston III ("Plaintiff"), was entitled to assert a claim for emotional distress, such distress resulting from Defendant Sternberg's willful violation of the automatic stay. This Court further held that, as a result of the willful violation of the stay, the Plaintiff was entitled to the sum of $20,000 as damages for emotional distress, attorneys' fees and costs in the amount of $69,986, and damages in the amount of $2,883.20 for being unable to expend the usual billable hours on his major client (essentially "lost wages").

In their current Motion, the Defendants' request relief predicated upon (1) the Court's award of attorneys' fees, given the "extremely nominal award of actual damages --$2,883.20, and (2) Plaintiff's inability to meet the required evidentiary threshold to obtain any award of damages for alleged emotional distress."

DISCUSSION

Fed. R. Civ. P. 59(e) and Fed. R. Civ. P. 60(b) provide for different motions directed to similar ends.[2] Rule 59(e) governs motions to "alter or amend" a judgment; Rule 60(b) governs relief from a judgment or order for various listed reasons. Rule 59(e) generally requires a lower threshold of proof than does 60(b), but each motion seeks to erase the finality of a judgment and to allow further proceedings. Rule 59(e) contains a strict ten-day deadline, while Rule 60(b) allows a year, sometimes more. Helm v. Resolution Trust Corp. 43 F.3d 1163 (7th Cir. 1995).

Fed. R. Civ. P. 60(b) provides that on motion and just terms, the court may relieve a party

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1. A more extensive procedural outline of the matter can be found at Docket Entry No. 107; Memorandum Decision as to Defendant Sternberg Only.

2. The Rules of Bankruptcy Procedure incorporate Fed. R. Civ. P. 59(e) and Fed. R. Civ. P. 60(b) as Rules 9023 and 9024, respectively.

from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the judgment. Bankruptcy courts, as courts of equity, have power to reconsider, modify, or vacate their previous orders so long as no intervening rights have become vested in reliance on orders. In re Lenox, 902 F.2d 737 (9th Cir. 1990). Although the bankruptcy rule governing relief from judgment on grounds of mistake, inadvertence, surprise, or excusable neglect, provides that the court may relieve a party from a final order upon motion, it does not prohibit a bankruptcy judge from reviewing, sua sponte, a previous order. In re Cisneros, 994 F.2d 1462 (9th Cir. 1993).

Fed. R. Civ. P. 59(a) lists the grounds for seeking relief as being "any of the reasons for which new trials have heretofore been granted . . ." This section has generally been interpreted to provide three grounds for granting Fed. R. Civ. P. 59 motions: (1) manifest error of law; (2) manifest error of fact; and (3) newly discovered evidence. School Dist. No. IJ Multnomah County, OR v. AcandS, Inc., 5 F.3d 1255, 1263 (9th Cir. 1993); In re Gurr, 194 B.R. 474 (Bankr.D.Ariz. 1996). A motion for reconsideration is not specifically contemplated by the Federal Rules. To the extent it is considered by the Court, it is under Fed. R. Civ. P. 59(e) to alter or amend an order or judgment. In re Curry and Sorensen, Inc., 57 B.R. 824, 827 (Bankr. 9th Cir. 1986).

Reconsideration is appropriate if the court is presented with newly discovered evidence, committed clear error or the initial decision was manifestly unjust, or if there is intervening change in controlling law. School Dist. No. IJ Multnomah County, OR v. AcandS,

Inc., 5 F.3d 1255,1263 (9th Cir. 1993).

The Defendants provide no basis for this Court's vacature or reconsideration of its Decision under either Rule. The Defendants fail to point to specific errors of fact, errors of law, or any newly discovered evidence that would merit reconsideration. Furthermore, the Defendants also provide no evidence of mistake, inadvertence, surprise, or excusable neglect, or fraud that would merit vacating the Court's previous Decision.

1. Attorney fees

The Defendants argue that given the "extremely nominal award of actual damages," the Court's award of attorney fees in the amount of $69,986.00 was unreasonable. Contrary to the Defendants' assertion, the actual damages awarded in this matter were not "nominal." In addition to the $2,883.20 awarded for lost wages, the Court awarded actual damages in the amount of $20,000.00 for the emotional distress claim. The Bankruptcy Code allows for actual and punitive damages, including costs and attorney fees, as sanctions for willful violations of the automatic stay. Eskanos & Adler, P.C. v. Leetien, 309 F.3d 1210, (9th Cir. 2002). "Actual damages," such as may be recovered by any individual injured by willful violation of the automatic stay, include damages for emotional distress. In re Dawson, 390 F.3d 1139 (9th Cir. 2004), cert. denied., 126 S.Ct. 397 (2005).

The Bankruptcy Appellate Panel in Eskanos & Adler, P.C. v. Roman (In re Roman), 283 B.R. 1 (9th Cir. BAP 2002) sustained a bankruptcy court's conclusion that the debtor incurred $5.00 in actual damages in traveling to her attorney's office to retain counsel to defend against a lawsuit filed in willful violation of the stay. Id. at 8-9. The Panel then considered the bankruptcy court's award of $1,000.00 in fees. The Panel rejected the creditor's argument that the $5 actual award was too slight to support the attorney's fee award. The Court "endorse[d] the use of the principles used in § 330 as a guide for awarding attorneys' fees under § 362(h)." Id. at 11. This requires, among other things, that the services be "actually" performed and that the charge therefor is "reasonable" in amount. In re Risner, 317 B.R. 830 (Bankr. D. Idaho 2004).

Counsel for the Plaintiff presented evidence, at the remand hearing, as to the attorneys' fees and costs incurred on behalf of the Plaintiff as a result of the willful violation of the stay. This Court considered the testimony, and extensively reviewed the Exhibits admitted into evidence. The Court reviewed the Fee Applications to determine if the fees and costs were reasonable and the hourly rate reasonable, and that the fees and costs related to the litigation concerning the willful violation of the stay, and any appeal thereof. This Court went through the painstaking task of reviewing each individual billing entry to determine the reasonableness of the fees and to ensure that the services were "reasonably incurred" as a result of the violation of the stay. It is well established that the bankruptcy court has discretion to determine the reasonableness of the fees and costs and to set the amounts accordingly. In re Stainton, 139 B.R. 232 (9th Cir.BAP 1992).

The Defendants cite the Court to the decision of In re McHenry, 179 B. R. (9th Cir. BAP 1995) in support of their argument that the attorneys' fees and costs awarded to the Plaintiff are unreasonable. In McHenry, the bankruptcy court rejected the debtors' request for punitive damages based on a creditor's violation of the automatic stay. The creditor which held an interest in the debtors' car had called the Debtors to discuss their delinquent car payments, in violation of the stay. The creditor was referred to the debtors' attorney, who told the creditor that the debtors did not intend to reaffirm the debt and would surrender the vehicle to the creditor. The creditor called the debtors and made arrangements to pick up the vehicle. The debtors then filed a motion for sanctions, requesting attorneys' fees, noneconomic damages of $5,000 and punitive damages. In affirming the bankruptcy court's decision, the Bankruptcy Appellate Panel observed that there is no appropriate way to measure punitive damages when the offended party has not suffered actual damages. Id. at 169. The Panel concluded that "no punitive damages should be awarded in the absence of actual damages." Id. at 168. The Panel also recognized that the automatic stay afforded by section 362 is intended to be a shield protecting debtors and their estates, and should not be used as a sword for their enrichment. Id. at 169.

The case at bar is factually distinguishable. In McHenry, the debtors did not have any actual damages or injury due to the stay violation because their attorneys' fees were incurred in the filing of an unnecessary motion for sanctions. In this case, the Court did find that actual damages were incurred. Moreover, the reality of the situation is that this Court was presented with a unique set of facts. At the time of remand, the Ninth Circuit issued its new published opinion in In re Dawson, 390 F.3d 1139 (9th Cir. 2004), cert. denied., 126 S.Ct. 397 (2005), which significantly altered the "playing field." The Ninth Circuit effectively reversed its prior decision in Dawson v. Washingon Mutual Bank, 367 F.3d 1174 (9th Cir.), *withdrawn*, 385 F.3d 1194 (9th Cir. 2004), now providing for a cognizable claim for emotional distress. After conducting a hearing on the Defendants' Motion in Limine, this Court concluded that since it had not entered a final decision in the adversary, and the matter had been remanded to this Court to allow the Defendant to present affirmative defenses, the Court would have to allow evidence of any emotional distress that the Plaintiff might have suffered, and any damages that resulted therefrom, because of the intervening change in Ninth Circuit law. [3]

The Defendants also argue that the attorneys' fees should be limited up to the time that the alleged violation was remanded. However, the Defendants cite no authority, and the Court is not aware of any such authority, that establishes this type of time restraint in the assessment of attorney's fees in automatic stay violation litigation. Both sides expended a great deal of time and effort, incurring substantial attorneys' fees in this matter.

Based upon the foregoing, the Court concludes that the attorneys' fees and costs assessed in this matter are reasonable. The Defendants provide no basis for this Court's vacature or

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3. As part of its analysis of the Defendants' Motion in Limine, and as discussed in its Decision, this Court agreed with Defendant Sternberg that the evidence to be presented by the Plaintiff on the issue of emotional distress would be limited by prior proceedings in this adversary. For instance, Plaintiff's counsel conceded that he would not introduce any medical evidence supporting the Plaintiff's claim of emotional distress because of a prior ruling of this Court and counsel's stipulation on the record.

reconsideration of its award of attorneys' fees.

2. Damages for Emotional Distress

The Defendants acknowledge that Ninth Circuit authority provides for a cognizable claim for emotional distress; however, they argue that in the case at bar, there is no basis to assess damages for emotional distress. The Defendants set forth the three-prong test for awarding such damages, as articulated in In re Dawson, 390 F.3d 1139 (9th Cir. 2004), cert. denied., 126 S.Ct. 397 (2005), and argue that the evidence in the present case failed to satisfy the test.

In its Decision, the Court analyzed, in detail, the three-prong test set forth in Dawson. Pursuant to Dawson, to be entitled to damages for an emotional distress claim, the debtor must "(1) suffer significant harm, (2) clearly establish the significant harm, and (3) demonstrate a causal connection between that significant harm, and the violation of the automatic stay. . ." Id. at 1149. "Fleeting or trivial anxiety or distress does not suffice to support an award; instead, an individual must suffer significant emotional harm. (Citation omitted.)" Id. Moreover, the Ninth Circuit concluded that there were a number of ways, from an evidentiary standpoint, to show such harm. The debtor could (1) present corroborating medical evidence,[4] (2) have non-experts, such as family members, friends, or co-workers, testify as to the "manifestations of mental anguish and clearly establish that significant emotional harm occurred,"[5] or (3) simply rely on the fact that the emotional distress was readily apparent.[6] Id. at 1149-50. As this Court noted in its Decision, under the third prong, the Ninth Circuit opined that even if the violation of the stay were not egregious, the very circumstances might make it obvious that a reasonable person

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4. In re Briggs, 143 B.R. 438, 463 (Bankr.E.D.Mich.1992).

5. Varela v. Ocasio (In re Ocasio), 272 B.R. 815, 821-22 (1st Cir. BAP 2002).

6. Wagner v. Ivory (In re Wagner), 74 B.R. 898, 905 (Bankr.E.D.Pa.1987).

would suffer significant harm.[7] Id. at 1150. Even if significant harm had been clearly established, the debtor must also show that there was a nexus between the claimed damages and the violation of the stay. Such a causal connection must be clearly established or readily apparent. Id.

This Court did conclude that Defendant Sternberg's failure to take affirmative action was not egregious.[8] The Court also concluded that the Plaintiff had shown a significant harm to himself. The threat of being incarcerated, with the fear of losing his major client and law practice if he were incarcerated, would have caused even a reasonable person to suffer significant harm. As a result, the Court concluded that the Plaintiff established a claim for emotional distress. Moreover, as articulated by the Court:

> It is also clear that Defendant Sternberg's failure to take affirmative action, based upon the facts of this case, led to the Plaintiff's injury. The causal link between Defendant Sternberg's failure to have the Minute Entry Order rescinded, or to request that the State Court action be stayed, and the harm to the Plaintiff is readily apparent. Hence, the Plaintiff is entitled to damages for the emotional distress that he suffered.

Decision, p. 33.

In assessing damages, the Court relied, in part, on the Decision of United States v. Flynn (In re Flynn), 185 B.R. 89, 93 (S.D.Ga.1995), a case also cited with approval by the court in Dawson. In Flynn, the court awarded the debtor $5,000 in emotional distress damages after, as a result of the violation of the automatic stay and the IRS freezing her bank account, she was forced to cancel her son's birthday party. In this case, the threat of incarceration, with the fear of losing his law practice and livelihood, warranted a more significant assessment of damages. Therefore, the Court awarded the Plaintiff $20,000.

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7. United States v. Flynn (In re Flynn), 185 B.R. 89, 93 (S.D.Ga.1995).

8. Although Defendant Sternberg was essentially out of the office from July 13 to July 31, the Plaintiff expected Defendant Sternberg or his firm to take affirmative action to vacate the Minute Entry Order, which they failed to do.

Contrary to the Defendants' assertions, the substantiated evidence in this case, as well as the holding of Dawson, compel this Court to conclude that the Plaintiff established a claim for emotional distress, and is entitled to damages as a result. A motion for reconsideration should not be used to ask the court to rethink what the court has already thought through, rightly or wrongly. In re America West Airlines, Inc., 240 B.R. 34 (Bankr.D.Ariz.1999). Accordingly, a motion for reconsideration may properly be denied when the motion fails to state new law or facts. In re St. Paul Self Storage Ltd. Partnership, 185 B.R. 580 (9th Cir.BAP 1995).

CONCLUSION.

Based upon the foregoing, the Court concludes that the attorneys' fees and costs assessed in this matter are reasonable and consistent with Ninth Circuit law. Moreover, the Plaintiff is entitled to recover for his emotional distress pursuant to In re Dawson, 390 F.3d 1139 (9th Cir. 2004), cert. denied., 126 S.Ct. 397 (2005). The Defendants have provided no basis for this Court's vacature or reconsideration of its Decision. The Defendants' Motion is, therefore, DENIED.

DATED this 27th day of July, 2006.

Honorable Sarah Sharer Curley
U. S. Bankruptcy Judge