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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In Re

LOGAN T. JOHNSTON III,

Debtor.

LOGAN T. JOHNSTON III,

Plaintiff,

vs.

PAULA PARKER, et al.,

Defendants.

Chapter 11

Case No. 01-06221-PHX-SSC

Adv. 01-885

MEMORANDUM DECISION

I. PRELIMINARY STATEMENT

On July 12, 2010, Melvin Sternberg (“Sternberg”), the remaining defendant in the adversary proceeding commenced by Logan T. Johnston III (“Johnston”), filed a motion for partial summary judgment (“Motion”).¹ Because of certain matters that were pending on appeal, but had not yet been remanded to this Court, Mr. Johnston’s counsel did not initially respond to the Motion. However, Mr. Johnston’s counsel filed a response to the Motion on September 9,

1. Adversary Proceeding No. 2:01-ap-00885, Docket Entry No. 278.

1 2009 (“Response”).² The Court conducted a hearing on the Motion on September 16, 2010,
2 although no reply had been filed by Mr. Sternberg to the Motion. After oral argument, the
3 parties requested that this Court take the matter under advisement.³ To the extent that the Court
4 is able, on this record, it now renders its findings of fact and conclusions of law on the Motion.
5 Fed. R. Civ. P. 52, Bankruptcy Rule 7052. The Court has jurisdiction over this matter, and this
6 is a core proceeding. 28 U.S.C. §§ 1334 and 157 (West 2010).

7 8 **II. ISSUES PRESENTED**

9 The parties have framed the issues narrowly.

10 A. In light of the recent decision of the Ninth United States Circuit Court of
11 Appeals (“Ninth Circuit”), may this Court limit the attorneys’ fees and costs to be reviewed by it
12 on remand to only those fees incurred from (1) July 30, 2001, the date on which Mr. Sternberg
13 filed his response to Mr. Johnston’s petition for a special action before the Arizona Court of
14 Appeals, to (2) July 31, 2001, when this Court entered orders vacating the Minute Entry of the
15 Arizona trial court as a violation of the automatic stay imposed in the bankruptcy case filed by
16 Mr. Johnston. *See Sternberg v. Johnston*, 595 F.3d 937 (9th Cir. 2010).

17 B. Although not fully briefed by the parties, Mr. Johnston has raised another
18 issue related to a footnote that may be found in the recent Ninth Circuit decision. Since the
19 Ninth Circuit only focused on whether Mr. Johnston’s counsel could recover attorneys’ fees
20 under Section 362(k)(1) of the Bankruptcy Code, Mr. Johnston’s counsel now requests that this

21
22 **2.** On September 9, 2010, Mr. Johnston’s counsel also filed the transcript from the oral
23 argument before the Ninth Circuit on March 6, 2009, concerning the legal issues decided in
24 *Sternberg v. Johnston*, 595 F.3d 937 (9th Cir. 2010). This Court has reviewed the Ninth Circuit
transcript for purposes of this Decision. *See* Docket Entry No. 282 in the adversary proceeding.

25 **3.** The Court had scheduled a trial on the merits in the adversary proceeding for October
26 27, 2010. The Court was advised at the September 16 hearing that the trial needed to be vacated,
27 since Mr. Johnston would not be released from prison until October 27, 2010. Apparently he
had been convicted of an aggravated driving under the influence offense and was sentenced to
four months in jail.

1 Court consider whether counsel may recover a discretionary award of his attorneys' fees under
2 this Court's inherent civil contempt power, which allows for the imposition of sanctions,
3 including attorneys' fees, for violations of the automatic stay. *See Sternberg v. Johnston*, 595
4 F.3d 937, 946 n.3 (9th Cir. 2010).

5
6 **III. FACTUAL DISCUSSION.**

7 The Debtor and Paula Parker ("Parker") were divorced in 1996. The Debtor was
8 ordered to pay spousal maintenance as part of the property settlement. In January of 2001,
9 Parker, through her attorney, Melvin Sternberg ("Sternberg"), moved the Maricopa County
10 Superior Court to hold the Debtor in contempt for non-payment of spousal maintenance, and that
11 the Debtor be, among other things, incarcerated if he failed to pay the amount due in full.

12 On May 14, 2001, the Debtor filed a Chapter 11 bankruptcy petition. On May 17,
13 2001, the Superior Court conducted an evidentiary hearing on the contempt and maintenance
14 issues. The Debtor informed the court 15 minutes into the hearing that he had filed for Chapter
15 11 protection. The court nonetheless proceeded with the hearing.

16 On July 13, 2001, the Superior Court filed a Minute Entry ordering that the
17 Debtor violated the divorce decree. The court found Debtor in contempt, and awarded Parker
18 \$87,525.60 plus interest. The court ordered that if the Debtor did not pay that amount by August
19 1, 2001, he would be incarcerated until it was paid in full.

20 The Debtor quickly filed a motion for stay in the Superior Court, but the hearing
21 was set for the day after Debtor's deadline under the Minute Entry. The Debtor wrote Sternberg
22 and told him he was in violation of the stay and needed to take appropriate remedial measures,
23 but Sternberg did not respond.

24 The Debtor then filed a petition in the Arizona Court of Appeals, Division One,
25 asking the court to stay and vacate the order. On July 30, 2001, Sternberg filed a Response to
26 Debtor's Petition for Special Action.

1 As usual, the parties disagree as to whether the issues presented are purely legal
2 in nature or whether this Court must conduct some type of evidentiary hearing on the matters.

3
4 **A. The Relevant Time Period to be Considered by this Court Concerning the**
5 **Attorneys' Fees Incurred by Mr. Johnston's Counsel.**

6 As to the first issue Mr. Sternberg argues that the Ninth Circuit was concerned
7 with his failure to alert the Arizona Court of Appeals that the Arizona Superior Court had
8 potentially entered a Minute Entry in violation of the automatic stay in the Chapter 11
9 proceedings that had been recently filed by Mr. Johnston. *See Sternberg v. Johnston*, 595 F.3d
10 937, 945 (9th Cir. 2010). Mr. Sternberg claims that any such violation of the automatic stay was
11 remedied by him the next day, July 31, 2001, when the Arizona Court of Appeals and this Court
12 entered orders staying the effect of or vacating the Minute Entry of the Arizona Superior Court.
13 Thus, Mr. Sternberg argues that this Court need only review the attorneys' fees and costs
14 incurred by Mr. Johnston's counsel for the period from July 30, 2001, when Mr. Sternberg filed
15 his response to the petition before the Arizona Court of Appeals, to July 31, 2001, when any
16 violation of the automatic stay by him was remedied. Mr. Sternberg requests partial summary
17 judgment as follows: (1) that the automatic stay was violated by Mr. Sternberg on July 30, 2001,
18 when he filed his response to Mr. Johnston's petition for special action in the Arizona Court of
19 Appeals, and (2) that the automatic stay violation was remedied on July 31, 2001, when the
20 Arizona Court of Appeals and this Court, respectively, entered orders staying the effect of the
21 Superior Court's Minute Entry or vacating the Minute Entry. Mr. Johnston argues that the
22 violation of the automatic stay did not end on July 31, 2001. Mr. Sternberg joined with another
23 creditor in a motion for reconsideration as to this Court's vacatur of the Arizona Superior Court
24 Minute Entry and pursued various appeals in a number of courts over a number of years. Mr.
25 Johnston points out that he incurred attorneys' fees as a result of these actions by Mr. Sternberg.

26 In analyzing whether Mr. Sternberg had committed a willful violation of the
27 automatic stay, the Ninth Circuit stated, in pertinent part,

1 . . . Sternberg had an “affirmative duty” to conform his conduct to the automatic
2 stay once Johnston filed for bankruptcy. The district court found that Sternberg
3 violated this duty because he “w[as] required to take affirmative action to stay or
4 vacate the state court’s . . . Order” and failed to do so. Johnston II, 321 B.R. at
5 286.

6 We do not fault Sternberg for anything he did at the May 17 state court hearing,
7 because the news of Johnston’s bankruptcy filing came as a surprise to him. The
8 state court’s July 13 order also surprised him, and Sternberg cannot be held
9 responsible for the order. Within a reasonable time after that, however, the law
10 required Sternberg to take corrective action. He did not, and he affirmatively
11 opposed Johnston’s effort to obtain relief from the state appellate court.
12 Sternberg v. Johnston, 595 F.3d at 944.

13 The Ninth Circuit was concerned that rather than notify the Arizona Appellate
14 Court as to the filing of Mr. Johnston’s bankruptcy petition, Mr. Sternberg “offered a complete
15 defense” to the petition filed by Mr. Johnston, seeking to stay or set aside the Minute Entry of
16 the Arizona Superior Court. The Ninth Circuit stated “Sternberg’s defense of the order was
17 absolute. He did not try to parse the valid from the invalid, but instead defended the order in its
18 entirety, including the command that Johnston pay the arrears or go to jail, and without limiting
19 the source of payment to non-estate property.” Id. As to Mr. Sternberg’s argument that he was
20 “compelled” to defend the order in its entirety because it was not completely invalid, the Ninth
21 Circuit concluded that Sternberg missed the point. It succinctly stated that what Sternberg was
22 compelled to do “was comply with the automatic stay.” Id.

23 As to how Mr. Sternberg was to comply with his “affirmative duty,” the Ninth
24 Circuit stated

25 . . . Sternberg needed to do what he could to relieve the violation. He could not
26 simply rely on the normal adversarial process. [Citation omitted.] At a minimum,
27 he had an obligation to alert the state appellate court to the conflicts between the
28 order and the automatic stay...’[t]he automatic stay is intended to give the debtor
breathing spell from his creditors. [Citation omitted.] The state court order
intruded upon Johnston’s ‘breathing spell.’ Sternberg did not act to try to fix that
problem. Sternberg v. Johnston, 595 F.3d at 945.

Because Mr. Sternberg did not alert the Arizona Appellate Court as to the
“obvious conflicts between the [State Court] order and the [automatic] stay,” Mr.
Sternberg willfully violated the automatic stay. Id.

1 However, the Ninth Circuit next considered to what extent Mr. Johnston could
2 recover the attorneys' fees he incurred in this adversary proceeding. Unlike the rule in Great
3 Britain, the American Rule was that unless Congress provided otherwise, the parties were to bear
4 their own attorneys' fees in litigation which was pursued in the United States. Mr. Johnston's
5 counsel argued that Section 362(k)(1) provided the exception necessary to allow for the recovery
6 of his attorneys' fees. Turning to the applicable section of the Bankruptcy Code, the Ninth
7 Circuit stated

8
9 an individual injured by any willful violation of a stay.... shall recover
10 actual damages, including costs and attorneys' fees, and, in appropriate
11 circumstances, may recover punitive damages.

12 Sternberg v. Johnston, 595 F.3d at 946, citing to 11 U.S.C. § 362(k)(1). The Ninth Circuit
13 concluded that Congress had determined that a party could recover attorneys' fees as "damages"
14 to prevent violations of the automatic stay. Such recovery of attorneys' fees as damages was not
15 unprecedented. However, the Ninth Circuit distinguished between the "initial fees" or
16 "corrective fees" that a plaintiff might incur in pursuing a legal remedy versus the "litigation
17 fees" incurred by a plaintiff to prosecute the matter.⁴ Id. Although counsel would be entitled to
18 recover the fees for initial or corrective action, counsel could not recover those fees incurred in
19 the litigation. In other examples, the Ninth Circuit relied on a California appellate decision and
20 opined that an insured might be required to sue an insurer to obtain the benefits under a policy
21 not provided because of the insurer's tortious conduct and could recover for the attorneys' fees
22 incurred to obtain such benefits, since the attorneys' fees were an "economic loss-damages-

23 **4.** For instance, the Ninth Circuit reviewed the attorneys' fees incurred by a successful
24 plaintiff in a legal malpractice action. The plaintiff could recover the "initial fees a plaintiff pays
25 to an attorney for legal services that were negligently performed" and "corrective fees incurred
26 by the plaintiff for work performed to correct the problem caused by the negligent lawyer," but
27 not "litigation fees, which [were] legal fees paid by the plaintiff to prosecute the malpractice
28 action against the offending lawyer." See Sternberg v. Johnston, 595 F.3d at 946 (citing John
Kohl & Co. v. Dearborn & Ewing, 977 S.W.2d 528 (Tenn. 1998)).

1 proximately caused by the tort,” but could not recover the attorneys’ fees incurred “to bring the
2 bad faith action itself.” In yet another example, the Ninth Circuit relied on a Colorado appellate
3 decision to distinguish between the recovery of attorneys’ fees “incurred in defending against the
4 prior wrongful litigation” versus the denial of attorneys’ fees incurred “in bringing the . . .
5 prosecution or abuse of process action itself.” Id.

6 Although the Ninth Circuit held that Section 362(k)(1) mandated an award of
7 actual damages for a willful violation of the automatic stay, it conceded that the term “actual
8 damages” was ambiguous. Id. at 947. In declining to follow previous rulings of the Ninth
9 Circuit Bankruptcy Appellate Panel on the issue, the Ninth Circuit stated:

10
11 The dictionary defines ‘actual damages’ as [a]n amount awarded . . . to
12 compensate for a proven injury or loss; damages that repay actual losses.
13 [Citation omitted.] Following this definition, the proven injury is the injury
14 resulting from the stay violation itself. Once the violation has ended, any fees the
15 debtor incurs after that point in pursuit of a damage award would not be to
16 compensate for ‘actual damages’ under § 362(k)(1). Under the American Rule, a
17 plaintiff cannot
18 ordinarily recover attorney fees spent to correct a legal injury as a part of his
19 damages, even though it could be said he is not made whole as a result. *See, e.g.,*
20 Restatement (Second) of Torts §914(1) (1979) (‘The damages in a tort action do
21 not ordinarily include compensation for attorney fees or other expenses of the
22 litigation.’) The same is true here. The context and goals of the automatic stay
23 support this narrower understanding, and it is the one we adopt.

24
25 Sternberg v. Johnston, 595 F.3d at 947. The reasoning of the Ninth Circuit was that the purposes
26 of the automatic stay were twofold: enabling the debtor to reorganize during a break from
27 collection efforts from creditors, and protecting creditors by preventing one creditor from
28 pursuing its own remedies to the detriment of all other creditors. Id. Allowing a recovery of
attorneys’ fees to the Debtor in prosecuting a damages action did not promote either of these
purposes. Moreover, the Debtor should have been focusing his efforts on reorganization, not on
pursuing more litigation. The stay should have been used as a shield, not a sword. Id. at 947-
948. As a result, the Ninth Circuit concluded that a damages action for an automatic stay
violation was akin to an ordinary damages action, for which attorneys’ fees were not available

1 under the American Rule.

2 What has been remanded to this Court is a determination of the attorneys' fees
3 incurred by Mr. Johnston's counsel to "enforce the automatic stay and prevent enforcement of
4 the state court order that violated the stay." The Ninth Circuit has disallowed all attorneys' fees
5 related to proving Mr. Johnston's damages pursuant to the American Rule. This Court concludes
6 that it must deny Mr. Sternberg's Motion, but shall provide guidance to the parties as to the
7 evidentiary issues that must be considered by this Court on remand. The attorneys' fees that
8 must now be reviewed by this Court fall into two general categories.

9
10 Category A. After the Arizona Superior Court issued its Minute Entry on July 13,
11 2001, Mr. Johnston's counsel sent facsimiles and attempted to communicate with
12 the State Court and Mr. Sternberg concerning a violation of the automatic stay.
13 There may have been other services performed by Mr. Johnston's counsel in July
14 2001, along similar lines, up to the point when this Court vacated the Arizona
15 Superior Court Minute Entry on July 31, 2001.

16 Category B. This Court's Order on July 31, 2001, vacating the Superior Court
17 Minute Entry was not final. A motion for reconsideration was filed by Mr.
18 Sternberg, along with Ms. Parker, a creditor and ex-spouse of Mr. Johnston.
19 After this Court entered its decision on the Motion for Reconsideration, Mr.
20 Sternberg filed at least one interlocutory appeal concerning the Bankruptcy Court
21 Order. The Court does not recall any further efforts by Mr. Sternberg to enforce
22 the Superior Court Minute Entry.⁵ At some point, Mr. Sternberg's request for an
23 interlocutory appeal was denied by the appellate court. Once that appeal was
24 denied, any further efforts by Mr. Johnston and his counsel no longer focused on
25 enforcing the automatic stay or preventing enforcement of the Arizona Superior
26 Court Minute Entry. Those efforts were solely to collect damages for lost wages
27 and emotional distress.

28 Within 21 days of the date of this Decision, Mr. Johnston's counsel shall file an
29 exhibit with this Court outlining the attorneys' fees of his firm which fall into either Category

30 **5.** Mr. Sternberg's counsel argues that in August 2001, the parties obtained relief from
31 the automatic stay from this Court and returned to the Arizona Superior Court to re-litigate to
32 what extent Mr. Johnston was in arrears on his non-dischargeable support obligations to Ms.
33 Parker. This Court has a general recollection of these events. However, Mr. Johnston's counsel
34 may present evidence to this Court to the extent to which Mr. Sternberg sought to enforce the
35 void Arizona Superior Court Minute Entry in the State Court.

1 outlined above. Within 35 days of the date of this Decision, Mr. Sternberg and his counsel shall
2 file an exhibit accepting the attorneys' fees outlined by Mr. Johnston's counsel, or outlining to
3 which attorneys' fees an objection is interposed, and the nature of the objection.

4
5 **B. To What Extent Should this Court Consider Imposing Civil Contempt**
6 **Sanctions Against Mr. Sternberg Pursuant to the Inherent Power of this**
7 **Court and 11 U.S.C. § 105.**

8 This issue was raised by Mr. Johnston's counsel in his pleading filed on
9 September 9, 2010. Mr. Sternberg did not file a separate written response to the pleading, but
10 did present general argument on the point at the hearing on September 16, 2010.

11 Once again this Court is confronted with a change in Ninth Circuit law while
12 matters in this adversary proceeding are on appeal. A similar issue arose several years ago.
13 While the Arizona District Court was considering whether Mr. Sternberg had willfully violated
14 the automatic stay, the Ninth Circuit rendered the decision of Dawson v. Washington Mutual
15 Bank (In re Dawson), 390 F.3d 1139 (9th Cir. 2004), which allowed a debtor to recover
16 emotional distress damages for a willful violation of the automatic stay. When the mandate was
17 entered by the Arizona District Court returning the adversary proceeding to this Court for further
18 review and analysis, this Court concluded that it should consider the emotional damage issue for
19 the first time at a trial to be conducted before it.⁶ Based upon the evidence presented, this Court
20 entered an emotional distress damage award to be paid by Mr. Sternberg to Mr. Johnston. That
21 award has become final.

22 Given the recent decision from the Ninth Circuit as to what constitutes "actual
23 damages" concerning a willful violation of the automatic stay, this Court concludes that it must
24 once again consider to what extent, based on the evidentiary record before it, Mr. Johnston is
25

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27

⁶. See March 31, 2006 Memorandum Decision at Docket Entry No.197.

1 entitled to a discretionary award of attorneys' fees, under 11 U.S.C. § 105, as sanctions for Mr.
2 Sternberg's willful violation of the automatic stay.

3 The Court must be clear on several points. First, Mr. Johnston's counsel has not
4 asked to reopen the evidentiary record, so the review by this Court will be whether there is an
5 alternative discretionary basis to award the attorneys' fees already requested by Mr. Johnston's
6 counsel. Both Mr. Johnston and Mr. Sternberg will be given the opportunity to present
7 memoranda of law on whether this record supports the entry of any type of civil contempt award
8 for Mr. Sternberg's willful violation of the automatic stay.

9 Second, the cases which have previously considered the issue in the Ninth Circuit
10 have focused on trustees in bankruptcy who have sought such awards because they could not
11 claim to be an "individual" entitled to relief under Section 362(k).⁷ Thus, the Court needs
12 additional briefing from the parties as to why this Court should expand the scope of relief that
13 may be accorded to an individual debtor from the specific provision, Section 362(k), to a more
14 general provision that is generally utilized as "necessary or appropriate to carry out other
15 provisions of[title 11]." Why is such relief appropriate for this individual debtor given what
16 Congress has already specifically authorized?

17 The parties shall have 21 days from the date of this Decision to provide this Court
18

19 **7.** Under Section 362(k), which was previously Section 362(h) until the enactment of the
20 Bankruptcy Abuse And Consumer Protection Act of 2005, the Ninth Circuit had strictly
21 interpreted the language to allow only an individual, not a bankruptcy trustee, to recover
22 damages for a willful violation of the automatic stay. For instance, the Bankruptcy Code
23 definition of "entity" referred to "person," which, in turn, included an "individual, partnership,
24 and corporation." *See* 11 U.S.C. § 101(15) and (41). Section 362(h), and later Section 362(k),
25 simply referred to the term "individual." This seemed to indicate Congressional intent to allow a
26 mandatory recovery for a willful violation of the stay to only those individual debtors so
27 affected. In other words, Congress interpreted the term "individual" to have the ordinary,
28 customary meaning. Section 105 was later utilized by the courts to provide some relief to a
bankruptcy trustee that might be affected by a creditor's willful violation of the stay, but such an
award was a sanction for the creditor's behavior, which was in civil contempt of the court's
order. In re Roman, 283 B.R. 1 (9th Cir. BAP 2002); In re Del Mission Limited, 98 F.3d 1147
(9th Cir. 1996).

1 with memoranda of law in support of the issue outlined in Part B of this Decision. The parties
2 shall have 35 days from the date of this Decision to provide any response that they may have to
3 the issues raised in the initial memoranda of law.

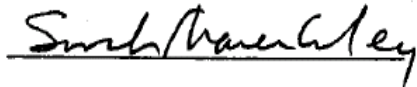
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5 **V. CONCLUSION.**

6 Based upon the foregoing, the Court concludes that further briefing is necessary
7 before it can enter a ruling on the narrow issues presented. Therefore, within 21 days of the date
8 of this Decision, Mr. Johnston's counsel shall file an exhibit with this Court outlining the
9 attorneys' fees of his firm which fall into either Category A and/or B as outlined above. Within
10 35 days of the date of this Decision, Mr. Sternberg and his counsel shall file an exhibit accepting
11 the attorneys' fees outlined by Mr. Johnston's counsel, or outlining to which attorneys' fees an
12 objection is interposed, and the nature of the objection.

13 In addition, the parties shall have 21 days from the date of this Decision to
14 provide this Court with simultaneous memoranda of law in support of the issue outlined in Part
15 B of this Decision. The parties shall have 35 days from the date of this Decision to provide
16 simultaneous responses, if any, that they may have to the issues raised in the initial memoranda
17 of law.

18 The Court will set a further 7016 hearing through a separate notice of the Court.

19
20 DATED this 21st day of January, 2011.

21 

22
23 Honorable Sarah Sharer Curley
U. S. Bankruptcy Judge

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26 BNC TO NOTICE
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