

MAR 25 2005

HAROLD S. MARENUS, CLERK  
U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT

## ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE NINTH CIRCUIT

In re: ) BAP No. CC-04-1033-BKPa  
)  
G. GREGORY WILLIAMS, ) Bk. No. LA 03-35597-SB  
)  
Debtor. )

G. GREGORY WILLIAMS, )  
)  
Appellant, )

v. )

## O P I N I O N

ELI LEVI; PETER GORDON, Esq.; )  
AARON BOVSHOW, Esq.; FRANKLIN )  
TOWERS HOMEOWNERS ASSOCIATION, )  
INC., )

Appellees. )

Argued and Submitted on November 17, 2004  
at Pasadena, California

Filed - March 25, 2005

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

Honorable Samuel L. Bufford, Bankruptcy Judge, Presiding.

Before: BRANDT, KLEIN, and PAPPAS,<sup>1</sup> Bankruptcy Judges.

<sup>1</sup> Hon. Jim D. Pappas, Bankruptcy Judge for the District of  
Idaho, sitting by designation.

1 BRANDT, Bankruptcy Judge:

2  
3 This automatic stay appeal involves the interplay between the  
4 second and third of three chapter 13<sup>2</sup> bankruptcy cases filed by the  
5 appellant debtor within the space of thirteen months.

6 When the second case was filed, the appellant debtor had a  
7 possessory interest, and an equitable ownership interest pursuant to an  
8 unrecorded deed, in a condominium unit titled in the name of a third  
9 person. Two days after the second case was filed, the appellee  
10 homeowners association, with knowledge of that bankruptcy case and of  
11 appellant's claims regarding the property, foreclosed its lien on the  
12 condominium without first obtaining relief from the automatic stay.

13 In the third case - which followed dismissal of the second case and  
14 was assigned to the same judge - the debtor sought to recover the  
15 premises and stay-violation damages on account of the putative stay  
16 violation that occurred in the second case. The bankruptcy court,  
17 without reopening the second case, entered an order in the third case  
18 retroactively annulling the stay in the second case. The court did not  
19 address the questions of whether the stay had been violated or appellant  
20 should recover stay-violation damages.

21 We AFFIRM the order annulling the stay but REMAND, without  
22 suggesting any view as to the merits, so that the bankruptcy court may  
23 decide whether stay-violation damages may be appropriate notwithstanding  
24 the annulment of the stay. In addition, we DISMISS AS MOOT the debtor's  
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27 <sup>2</sup> Absent contrary indication, all chapter and section  
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330; all  
"Rule" references are to the Federal Rules of Bankruptcy Procedure,  
and all "FRCP" references are to the Federal Rules of Civil Procedure.

1 appeal from the bankruptcy court's denial of his motion to stay the  
2 related state-court eviction action.

### 4 I. FACTS

5 Debtor, G. Gregory Williams, who describes himself as a "retired  
6 attorney," lived with his fiancée, P. Toi Polpantu, at 7250 Franklin  
7 Avenue, Unit 207, Los Angeles, California, a condominium unit. Williams  
8 purchased the condo in 1995. By deed recorded 21 April 1999, Williams  
9 transferred title to Polpantu. By another deed, also dated  
10 21 April 1999, but not recorded until 4 April 2003, Polpantu quitclaimed  
11 title back to Williams.

12 When approximately \$11,000 in dues went unpaid, appellee Franklin  
13 Towers Homeowners Association, Inc.,<sup>3</sup> gave notice of its intent to  
14 conduct a non-judicial foreclosure sale of the condo on 3 April 2003.

15 On 1 April 2003 Williams filed a chapter 13 bankruptcy petition,  
16 his second in recent times.<sup>4</sup> It was a so-called "face sheet" or  
17 "skeleton" filing of a petition without accompanying schedules,  
18 statement of financial affairs, or a proposed plan. Nothing filed on  
19 1 April 2003 indicated that Williams claimed an interest in the condo.

20 The scheduled non-judicial sale was conducted on 3 April 2003, and  
21 appellee Eli Levi<sup>5</sup> was the successful purchaser in competitive bidding  
22 with his bid of \$215,000. Although Levi was not a creditor, he does not

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24 <sup>3</sup> Of the appellees, only Eli Levi briefed or argued.

25 <sup>4</sup> Case No. LA 03-18775-SB. Our review of the bankruptcy  
26 court's records shows Williams had filed a prior bankruptcy in the  
same district, No. LA 02-31997-KM, on 5 August 2002. It was dismissed  
and does not figure in this appeal.

27 <sup>5</sup> Levi owns other units in the condo building, but is  
28 allegedly not an Association board member and has no management  
authority. Williams implies some wrongdoing or collusion occurred  
between Levi and a broker, Roland Watkins, but the bankruptcy court  
made no findings on this point, and we need not address it.

1 contest that Williams had given him notice of the filing of the chapter  
2 13 petition before the sale occurred.

3 Williams recorded the four year old Polpantu to Williams quitclaim  
4 deed on 4 April 2003, after having filed his petition, and after the  
5 foreclosure sale.

6 On 8 April 2003, Levi filed and served on Polpantu a statutory  
7 notice to quit. Although Williams did not avail himself of his right  
8 under California law to file a notice of right to claim possession of  
9 the premises, Levi does not dispute that he knew Williams was living  
10 there. A foreclosure trustee's deed in favor of Levi was recorded on  
11 11 April 2003. On 22 April Levi filed an unlawful detainer action  
12 against Polpantu in state court. Levi v. Polpantu, Los Angeles County  
13 Superior Court, Case 03U408.

14 A series of legal maneuvers in the state and bankruptcy courts  
15 followed. There was a state court unlawful detainer action that  
16 Williams attempted to remove to federal court, but which resulted in  
17 judgment for Levi after the state court reasoned that the attempt to  
18 remove was unsuccessful. An eviction was scheduled. The state court  
19 apparently rejected an attempt by Williams to enjoin the eviction. Levi  
20 apparently took possession of the premises for about a week until the  
21 bankruptcy court issued an order that enabled Williams to return to the  
22 premises.

23 In August 2003, Williams' second bankruptcy case was dismissed for  
24 his failure to comply with chapter 13 requirements, thus terminating the  
25 automatic stay. After this dismissal, Levi filed an action in state  
26 court (Los Angeles County Superior Court No. BA-311463), seeking to  
27 cancel Williams' deed, quiet title, and obtain damages.

1        On 1 October 2003, Williams filed his third bankruptcy case, again  
2 under chapter 13, No. LA03-35597SB, which was assigned to the same judge  
3 who presided over his second bankruptcy case. Two days later, Williams  
4 asked the bankruptcy court to stay the eviction.

5        On 24 October Levi moved for relief from stay in the third  
6 bankruptcy case "to obtain possession of the residential or  
7 nonresidential premises at 7250 Franklin Avenue, No. 207, Los Angeles .  
8 . . ." Levi argued that the automatic stay did not affect him because  
9 the premises did not belong to Williams and were not property of the  
10 estate in either the second or third bankruptcy cases. He also argued  
11 that, even if the automatic stay was in effect, it should be annulled to  
12 permit Levi to continue his unlawful detainer action in state court.

13        Williams opposed the motion, arguing that Levi violated the  
14 automatic stay by purchasing the premises at the foreclosure sale after  
15 receiving notice of his second bankruptcy filing and by commencing the  
16 eviction action. Williams sought monetary stay-violation damages but  
17 did not ask the bankruptcy court to rule that either the sale or the  
18 unlawful detainer action were void.

19        After a number of continuances, the bankruptcy court heard both  
20 motions on 23 December. Although concluding the hearing by indicating  
21 he intended to reassign the matter to another judge, on 31 December 2003  
22 the judge issued a written order annulling the stay and denying  
23 Williams' motion to stop the eviction, stating in part:

24                Notwithstanding that the foreclosure sale may be void  
25 under Ninth Circuit law, the debtor has taken no action,  
26 either in this case or in the prior case, to set aside the  
27 sale. Levi now moves for relief from stay to proceed with  
28 eviction of the debtor from the condominium.

              Because the debtor has not taken any such action,  
notwithstanding that the foreclosure occurred almost eight  
months ago, the court finds that the debtor has unduly delayed

1 and that relief from stay should be granted and the purchaser  
2 should not be further inhibited from obtaining possession of  
the property.

3 ACCORDINGLY, IT IS ORDERED that the relief from stay  
4 motion is granted retroactively to April 1, 2003 and the  
motion to stay eviction is denied.<sup>6</sup>

5 Williams timely appealed, and moved for a stay pending appeal,  
6 which we denied.

7 Williams' third bankruptcy case was dismissed on 11 February 2004.  
8 Williams responded (twice) to our clerk's order suggesting that the  
9 dismissal of the bankruptcy case might have mooted the appeal. Levi  
10 replied with a motion to dismiss the appeal. Our order re mootness,  
11 entered 13 July 2004, limited review in this appeal to the order  
12 annulling the stay,<sup>7</sup> noting that it was not moot because Williams sought  
13 damages for a violation of the stay.

## 14 15 II. ISSUES

16 A. Whether the denial of Williams' motion to stay the eviction  
17 action is moot;

18 B. Whether the bankruptcy court abused its discretion in  
19 annulling the stay; and

20 C. Whether Williams may be entitled to damages under § 362(h).  
21  
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23 <sup>6</sup> Although the parties argued the issues, the bankruptcy court  
24 did not address the priority, validity, or effect of the Polpantu to  
25 Williams deed, or of the foreclosure trustee's deed, under state law.  
Those issues are not before us.

26 <sup>7</sup> In his responses to our clerk's order, Williams also  
27 asserted that other orders entered by the bankruptcy court after the  
28 one attached to his notice of appeal were also on appeal. Although  
Williams' notice of appeal listed three orders supposedly entered that  
day, only one is disclosed in the bankruptcy court's docket, and that  
is the order attached to the notice of appeal.

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The bankruptcy court had jurisdiction via 28 U.S.C. § 1334 and § 157(a), (b)(1), and (b)(2)(G). We do under 28 U.S.C. § 158(c).

## 5

We review an order to annul the stay for an abuse of discretion. In re Nat'l Envtl. Waste Corp., 129 F.3d 1052, 1054 (9th Cir. 1997).

We may consider any issue evident on the record, and may affirm on any basis supported by the record, even where the issue was not expressly considered by the bankruptcy court. In re E.R. Fegert, Inc., 887 F.2d 955, 957 (9th Cir. 1989).

We do not reverse for errors not affecting substantial rights of the parties, and as noted, may affirm for any reason supported by the record. 28 U.S.C. § 2111; FRCP 61, incorporated by Rule 9005; In re Maximus Computers, Inc., 278 B.R. 189, 194 (9th Cir. BAP 2002), citing Dittman v. California, 191 F.3d 1020, 1027 n.3 (9th Cir. 1999).

## 8

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"The doctrine of mootness precludes federal court decision of questions that cannot affect the rights of litigants in the case before them . . . . [A]n actual controversy must be extant at all stages of review . . . . Whenever an action loses its character as a present live controversy during the course of litigation, federal courts are required to dismiss the action as moot." In re Di Giorgio, 134 F.3d 971, 974 (9th Cir. 1998) (citations and quotation marks omitted).

The bankruptcy court's order denied Williams' motion to stay the state court eviction action. Williams indicates in his opening brief

1 that, after the dismissal of his third chapter 13 case, Levi proceeded  
2 with the unlawful detainer action, obtained possession of the property,  
3 and commenced a quiet title action in state court. Because there was no  
4 automatic stay then in effect, Levi was free to take such actions. See  
5 § 362(c) (providing that the automatic stay terminates upon dismissal of  
6 the bankruptcy case).

7 We presume, but cannot tell from the record, that Levi obtained a  
8 new writ of eviction, rather than relying upon the writ that the  
9 bankruptcy court stayed in its 25 June 2003 order. If not, we express  
10 no opinion about the continued efficacy of that order after dismissal of  
11 both the chapter 13 case in which it was issued and the case from which  
12 the order on appeal arose, because our conclusion would be of no moment.  
13 Levi's freedom to commence an entirely new unlawful detainer action to  
14 evict Williams after dismissal of the third bankruptcy case moots this  
15 part of the appeal. We could afford no effective relief to Williams  
16 with respect to possession of the condo; this aspect of the appeal is  
17 moot and must therefore be dismissed.

18 But, as our motions panel noted, although Williams' third  
19 bankruptcy case has been dismissed, his request for monetary damages for  
20 Levi's alleged willful violation of the automatic stay is not moot. In  
21 re Davis, 177 B.R. 907, 911 (9th Cir. BAP 1995).

22 **B. The Record and Appellee's Motion to Supplement**

23 It is not clear whether the parties followed the designation of  
24 record process set forth in Rule 8006. Levi's brief as originally filed  
25 included a request for judicial notice, noting that Williams had omitted  
26 from the excerpts of record essentially all of his pleadings filed after  
27 Levi's motion for relief from stay. We did not grant Williams' motion  
28 to strike Levi's brief, but instead ordered Levi to file a motion to



1 supplement the record, and allowed Williams additional time to file his  
2 reply brief. Levi filed a motion to supplement the record, which we now  
3 grant.

4 **C. The Merits**

5 1. Entry of the order for relief from stay in the dismissed case.

6 Williams contends the bankruptcy court had no jurisdiction to enter  
7 an order in the third bankruptcy case that, in effect, retroactively  
8 annulled the automatic stay that arose in the dismissed second  
9 bankruptcy case. This is not so. In considering Levi's motion to annul  
10 the stay, the bankruptcy court was properly interpreting and  
11 effectuating the automatic stay, within its ancillary jurisdiction from  
12 the second case, which survived dismissal. In re Aheong, 276 B.R. 233,  
13 239-40 (9th Cir. BAP 2002) (citing In re Taylor, 884 F.2d 478, 481 (9th  
14 Cir. 1989)). See also In re Carraher, 971 F.2d 327, 328 (9th Cir.  
15 1992); In re Giddens, 298 B.R. 329, 337 (Bankr. N.D. Ill. 2003).

16 Moreover, the provisions of the Bankruptcy Code authorize the  
17 relief granted in this case. Upon the filing of a bankruptcy petition,  
18 § 362(a)(1) provides:

19 (a) . . . a petition filed under section 301 . . .  
20 operates as a stay, applicable to all entities, of -

21 (1) the commencement or continuation, including the  
22 issuance or employment of process, of a judicial,  
23 administrative, or other action or proceeding  
24 against the debtor that was or could have been  
commenced before the commencement of the case under  
this title, or to recover a claim against the  
debtor that arose before the commencement of the  
case under this title . . . .

25 See also Celotex Corp. v. Edwards, 514 U.S. 300, 302 (1995) (automatic  
26 stay prevents commencement of any act to possess property of the  
27 debtor). But § 362(d) provides:

1           On request of a party in interest and after notice and a  
2           hearing, the court shall grant relief from the stay provided  
3           under subsection (a) of this section, such as by terminating,  
4           annulling, modifying, or conditioning such stay-

5           (1) for cause, including the lack of adequate  
6           protection of an interest in property of such party  
7           in interest;

8           (2) with respect to a stay or an act against property  
9           under subsection (a) of this section, if -

10           (A) the debtor does not have equity in such  
11           property; and

12           (B) such property is not necessary to an  
13           effective reorganization . . . .

14           As can be seen, § 362(d) authorizes the bankruptcy court to enter  
15           an order annulling the stay "provided under subsection (a)" of § 362.  
16           In turn, subsection (a) refers to the stay that arises upon the filing  
17           of "a petition." Nothing in the language of § 362(d) restricts the  
18           reach of a stay relief order to the particular bankruptcy case in which  
19           that relief is sought. The bankruptcy court may therefore properly  
20           grant relief from a stay that arose under subsection (a) in a prior,  
21           different bankruptcy case before the same court. (We are not here  
22           presented with bankruptcy cases before different judges or in different  
23           districts, as in In re Miller, 397 F.3d 726 (9th Cir. 2005)).

24           The bankruptcy court's approach is also consistent with traditional  
25           rules pertaining to obtaining relief from an order entered in a prior,  
26           different action:

27           § 80. Relief in the Course of a Subsequent Action

28           When a judgment is relied upon as the basis of a  
            claim or defense in a subsequent action, relief  
            from the judgment may be obtained by appropriate  
            pleading and proof in that action if other means of  
            obtaining relief from the judgment are unavailable  
            to the applicant or the convenient administration  
            of justice would be served by determining the  
            question of relief in the course of the subsequent  
            action.

Restatement (Second) of Judgments, § 80 (1982).

1 Since the same bankruptcy judge presided over both cases, the  
2 convenient administration of justice was served by the procedure  
3 followed here. Although Williams' second bankruptcy case could have  
4 been reopened and the order issued with that caption, any error could be  
5 corrected under FRCP 60(a) or (b) (which allows relief by independent  
6 action), applicable via Rule 9024, and is, in any event, harmless.

7  
8 2. Applicability of the automatic stay.

9 The legal and equitable interests of a debtor at the start of a  
10 case are determined according to state law. Butner v. United States,  
11 440 U.S. 48, 55 (1979). On the petition date, Williams had no recorded  
12 interest in the property. But he lived in the condo, and his possessory  
13 interest was property of the bankruptcy estate under § 541(a) and  
14 § 1306. In re Butler, 271 B.R. 867, 876-77 (Bankr. C.D. Cal. 2002) (a  
15 debtor-tenant's mere physical possession of apartment premises after  
16 writ of possession had issued in favor of landlord in unlawful detainer  
17 action is an equitable interest in property, protected by automatic  
18 stay). See also In re Di Giorgio, 200 B.R. 664 (C.D. Cal. 1996),  
19 judgment vacated, 134 F.3d 971 (9th Cir. 1998). Likewise, both  
20 Williams' possessory interest and his equitable interest in the property  
21 under the unrecorded (as of the petition date in the second bankruptcy  
22 case) Polpantu to Williams deed were property of the estate.

23 So some precision about what conduct might implicate the stay is in  
24 order. As noted, Williams was not in title to the condo when he filed  
25 his petition, so record ownership of the property was not protected by  
26 the stay. And, under California law, nonjudicial foreclosure affects  
27 only legal title, and not any possessory right. In re Torrez, 132 B.R.  
28 924, 939 (Bankr. E.D. Cal. 1991).

1 Nor was Levi's purchase at the foreclosure sale, without more, an  
2 obvious violation of the stay. The Association was acting to enforce an  
3 obligation, and against the property, but Levi was not. Even if the  
4 sale were unambiguously of estate property, and void, In re Schwartz,  
5 954 F.2d 569, 571 (9th Cir. 1992), it would take an adversary proceeding  
6 to establish that as against a third party purchaser. Rule 7001(2).  
7 While Polpantu's interest presumably was protected by the co-debtor stay  
8 of § 1301 (assuming Williams, not in title, had an obligation to pay  
9 dues), she is not a party to this appeal, and Williams has no apparent  
10 standing to appeal on her behalf.

11 Williams' wide-ranging arguments are founded on the premise that  
12 the foreclosure sale was void, as the bankruptcy court indicated might  
13 be the case. But since the property foreclosed upon – the record  
14 interest of Polpantu – was not property of the estate or Williams on his  
15 petition date, that is not self-evident, and, as indicated above, would  
16 require an adversary proceeding to establish, either as a matter of  
17 state law or under § 549. Among the issues to be decided in such an  
18 action would be the priority between the foreclosure trustee's deed and  
19 the Polpantu to Williams deed: presumably Levi will argue that the  
20 trustee's deed relates back to the sale date under California Civil Code  
21 § 2924(c), and that date is prior to the recording of Williams' deed.

22 But Williams has never asked the bankruptcy court to declare the  
23 foreclosure sale or eviction action void, and we need not decide those  
24 possible issues. Instead, in this appeal, we focus on whether the  
25 bankruptcy court's decision retroactively to annul the automatic stay  
26 was an abuse of discretion.

1           3.   Annulment of the automatic stay.

2           Postpetition actions taken in violation of the automatic stay, even  
3 those undertaken by an actor with knowledge of the bankruptcy filing,  
4 may be validated by annulment of the stay. In Algeran, Inc. v. Advance  
5 Ross Corp., 759 F.2d 1421, 1425 (9th Cir. 1985), the Ninth Circuit held:

6                 Algeran's position that an automatic stay cannot be  
7                 lifted so as to validate a [postpetition foreclosure] sale  
8                 made while the stay was in force, is without merit. Section  
9                 362(d) of Title 11 empowers the court to grant relief from the  
10                automatic stay . . . . The district judge annulled the  
                automatic stay as to the sale of AMI shares, as he was  
                entitled to do under the statute and the facts of this case.  
                With the automatic stay annulled, the sale that occurred  
                cannot be said to be invalid.

11           While Levi did not specifically request annulment of the stay in  
12 Williams' second bankruptcy case, the bankruptcy court assumed the  
13 request was to annul the stay as of 1 April, when the events that are at  
14 the heart of this controversy unfolded. The bankruptcy court did not  
15 specify which subsection of § 362(d) authorized annulment, but its  
16 reasoning fits into the broad category of "cause" under § 362(d)(1), as  
17 in Algeran.

18           Whether to grant retroactive relief from the automatic stay under  
19 § 362(d) is a decision committed to the discretion of the bankruptcy  
20 court. Nat'l Envtl. Waste, 129 F.3d at 1054. In Nat'l Envtl. Waste,  
21 the Ninth Circuit adopted a balancing of equities approach for analyzing  
22 a request for retroactive stay relief, and identified two factors to be  
23 considered by the bankruptcy court: (1) whether the creditor was aware  
24 of the bankruptcy petition; and (2) whether the debtor engaged in  
25 unreasonable or inequitable conduct, or prejudice would result to the  
26 creditor. Id. at 1055-56.

27           In In re Fjeldsted, 293 B.R. 12, 24-25 (9th Cir. BAP 2003),  
28 following Nat'l Envtl. Waste, we approved consideration of additional

1 factors by the bankruptcy court, including: the number of filings; the  
2 extent of any prejudice, including to a bona fide purchaser; the  
3 debtor's overall good faith; the debtor's compliance with the Code; how  
4 quickly the creditor moved for annulment; and how quickly the debtor  
5 moved to set aside the sale. But because a mechanistic application of  
6 "factors" is inappropriate in making the determination of whether to  
7 annul the stay, in Fjeldsted, we observed that:

8 Mindful that such lists [of factors] are capable of being  
9 misconstrued as inviting arithmetic reasoning, we emphasize  
10 that these items are merely a framework for analysis and not  
11 a scorecard. **In any given case, one factor may so outweigh  
the others as to be dispositive.**

11 293 B.R. at 25 (emphasis added).

12 It is difficult to review the decision here because the bankruptcy  
13 court made no detailed findings of fact and conclusions of law. Rule  
14 9014 incorporates the provisions of Rule 7052 and FRCP 52, requiring  
15 findings and conclusions in any contested matter, which are essential to  
16 appellate review. In re Harris, 279 B.R. 254, 260 (9th Cir. BAP 2002)  
17 (findings required in contested matters involving disputed issues of  
18 fact); Halas v. Platek, 239 B.R. 784, 793 (N.D. Ill. 1999).

19 Effective review should not depend upon the intuition of the  
20 appellate judges or their ability to divine the critical facts or trial  
21 court's reasons for its judgment. Here, while the pickings in the order  
22 are indeed slim, there is enough in its statement of undisputed facts  
23 and the legal justification for the decision to allow our review of the  
24 bankruptcy court's exercise of discretion in annulling the stay.

25 Recall, while Williams had filed for Chapter 13 relief three times,  
26 and through one legal maneuver after another in both state and  
27 bankruptcy court had resisted Levi's attempts to evict him from the  
28 condo, he had never properly asked the bankruptcy court to void the

1 foreclosure sale through which Levi asserted title to the property. The  
2 validity of the foreclosure sale was, and continues to be, the lynchpin  
3 to the parties' disputes. If the sale was conducted in violation of the  
4 automatic stay, it, and Levi's title, are void. Schwartz, 954 F.2d at  
5 571.

6 And while arguments about whether the stay was in force and  
7 prohibited Levi from acquiring good title were and could be asserted in  
8 the state courts, it is for the bankruptcy court finally to resolve  
9 these questions. In re Dunbar, 245 F.3d 1058, 1063-64 (9th Cir. 2001)  
10 (with respect to interpreting the scope of the automatic stay, federal  
11 courts have final authority); In re Gruntz, 202 F.3d 1074, 1087 (9th  
12 Cir. 2000) ("bankruptcy courts have the ultimate authority to determine  
13 the scope of the automatic stay").

14 Although substantial time had passed and Williams had employed a  
15 variety of litigation tactics in his two bankruptcy cases, the  
16 bankruptcy court was apparently frustrated that the critical issue had  
17 never been presented. As a result, the bankruptcy court presumably  
18 decided the equities favored Levi. While Williams protested Levi's  
19 efforts to evict him from the property, and asked for monetary sanctions  
20 on account of Levi's conduct, Williams had not commenced an appropriate  
21 adversary proceeding pursuant to Rule 7001 to declare the foreclosure  
22 sale<sup>8</sup> and subsequent actions taken by Levi void. This failure, viewed  
23 together with Williams' serial filings, his repeated requests to stay  
24 the eviction action, his ill-advised attempt to "remove" that action to  
25 the bankruptcy court, and his inability to obtain confirmation of a plan  
26

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27  
28 <sup>8</sup> Obviously, the Association, as the foreclosing creditor and  
likely the foreclosure trustee, would have been a necessary party to  
an action to void the foreclosure sale. Its absence from this  
litigation would prevent the bankruptcy court from rendering any final  
judgment concerning the validity of the sale in the context of Levi's  
or Williams' motions.

1 in his second chapter 13 case, apparently motivated the bankruptcy court  
2 to conclude that, as between Williams and Levi, Levi should have relief.

3 Levi's conduct can also be criticized. Until Williams' third  
4 bankruptcy case was filed, Levi seemed unconcerned about the scope of  
5 the automatic stay, to the point of forgoing any attempts to obtain a  
6 ruling from the bankruptcy court blessing his efforts to evict Williams.  
7 To the extent that Levi's conduct constituted a willful disregard of the  
8 automatic stay that caused Williams damage, the consequences of his  
9 cavalier approach to the bankruptcy laws could subject him to serious  
10 consequences, even monetary sanctions. See § 362(h).

11 But the bankruptcy court was apparently more concerned with  
12 Williams' lack of diligence than Levi's disregard of the stay. And even  
13 were we to reach a different conclusion about the equities on this  
14 record, in deciding that Williams had engaged in unreasonable delay in  
15 failing promptly to attack the sale, the bankruptcy court correctly  
16 focused on appropriate factors under the case law: whether Williams  
17 engaged in inequitable conduct, Nat'l Env'tl. Waste, 129 F.3d at 1055,  
18 and whether he promptly moved to have the foreclosure's validity  
19 determined, Fjeldsted, 293 B.R. at 25. That the bankruptcy court did  
20 not discuss its consideration of other relevant factors in its order is  
21 not fatal: as we indicated in Fjeldsted, one factor in the analysis may  
22 sufficiently outweigh all others and justify annulment.

23 The bankruptcy court did not abuse its discretion when it annulled  
24 the stay.

25 4. Monetary sanctions.

26 Section 362(h) provides:

27 An individual injured by any willful violation of a stay  
28 provided by this section shall recover actual damages,  
including costs and attorneys' fees, and in appropriate  
circumstances, may recover punitive damages.



1 "Willfulness" in this context requires that the actor know of the  
2 existence of the stay and that the actions taken in violation of the  
3 stay be intentional. Eskanos & Adler, P.C. v. Leetien, 309 F.3d 1210,  
4 1215 (9th Cir. 2002); In re Fernandez, 227 B.R. 174, 180 (9th Cir. BAP  
5 1998), aff'd, 208 F.3d 220 (9th Cir. 2000) (table).

6 Levi argues that Williams was required to commence an adversary  
7 proceeding to claim damages, and cites Davis, 177 B.R. at 911. We  
8 disagree: Rule 7001 requires an adversary proceeding when a debtor is  
9 seeking a finding of contempt; a motion is otherwise proper. In re  
10 Zumbrun, 88 B.R. 250, 252-53 (9th Cir. BAP 1988); In re Forty-Five  
11 Fifty-Five, Inc., 111 B.R. 920, 922-23 (Bankr. D. Mont. 1990).

12 We cannot tell from the bankruptcy court's order whether the court  
13 intended implicitly to deny relief to Levi under § 362(h). Williams'  
14 declaration addressing the prejudice he suffered from being evicted,  
15 even temporarily, from his residence during the pendency of the  
16 bankruptcy case gives rise to factual issues we are not free to resolve  
17 on appeal. See In re Thomas, 287 B.R. 782, 786 (9th Cir. BAP 2002)  
18 (remanding for determination of good faith, observing that an appellate  
19 court is ill-equipped to make findings on fact-intensive questions). It  
20 may be that, even though the equities favor retroactive relief from the  
21 automatic stay in favor of the actor, a debtor's request for damages  
22 under § 362(h) for the actor's willful violation of the stay before that  
23 annulment should be granted.

24 As we have noted, an action taken in violation of the automatic  
25 stay, though void, may be validated by the bankruptcy court through a  
26 grant of retroactive relief from the stay. Algeran, 759 F.2d at 1425.  
27 But case law has not yet definitively addressed whether an action taken  
28 in violation of the stay, validated by annulment after the fact, may

1 nonetheless serve as the basis for an award of money damages if the  
2 debtor has suffered an injury. Compare In re Edisto Res. Corp., 158  
3 B.R. 954, 958-59 (Bankr. D. Del. 1993) (stating that once the creditor  
4 paid the debtor's legal fees associated with defending against  
5 litigation that violated the automatic stay, cause would exist to annul  
6 the stay), and In re Thompson, 182 B.R. 140, 155 (Bankr. E.D. Va. 1995)  
7 aff'd, 92 F.3d 1182 (4th Cir. 1996) (table) (holding that annulling the  
8 automatic stay precludes an award of damages for a stay violation).

9 Thus, we remand to the bankruptcy court to decide whether Williams  
10 is entitled to § 362(h) damages in this case. While it is not before us  
11 for decision, we note that it is far from clear that annulment of the  
12 stay should preclude damages for violation of the stay before the  
13 annulment: the principle that one may be held in contempt  
14 notwithstanding the reversal of the order violated, Worden v. Searls,  
15 121 U.S. 14 (1887); U.S. v. United Mine Workers of America, 330 U.S.  
16 258, 294 (1946), or even its unconstitutionality, Walker v. City of  
17 Birmingham, 388 U.S. 307 (1967), seems an appropriate analogy.

## 18 VI. CONCLUSION

19 We AFFIRM the bankruptcy court's decision to annul the automatic  
20 stay retroactively, REMAND for consideration of Williams' claim for  
21 § 362(h) damages, and DISMISS as moot Williams' appeal from the  
22 bankruptcy court's denial of a stay of the eviction action.

23  
24  
25 KLEIN, Bankruptcy Judge, concurring and dissenting:  
26

27 I join the majority with respect to affirming the annulment of the  
28 automatic stay and the denial of the stay eviction order.

1       While I accept in principle that a stay violation can be punished  
2 under § 362(h) in appropriate circumstances notwithstanding subsequent  
3 annulment of the stay, I construe the trial judge's decision in this  
4 constellation of facts to be an implicit rejection of stay violation  
5 damages. Even though the trial judge did not explicitly discuss  
6 imposing such a remedy notwithstanding the annulment of the stay, I  
7 regard any error as harmless in this instance and would not remand. To  
8 that extent, I DISSENT.