

2011 WL 4502060
Only the Westlaw citation is currently available.
NOT FOR PUBLICATION

**United States Bankruptcy Appellate Panel
of the Ninth Circuit.**

In re Arthur **LAWIDA** and Meredith Lawida, Debtors.
Arthur Lawida, Appellant,
v.

Richard Seyffer; Jane Doe Seyffer; Deroon & Seyffer, PC; Deborah Lewis; Paul Rubin, Appellees.

No. AZ–10–1443–DKiMy. | Bk. No. 10–10491–GBN. | Adv. No. 10–01279–GBN. | Argued and Submitted on July 22, 2011. | Filed Aug. 1, **2011**.

Appeal from the United States Bankruptcy Court for the District of Arizona, Honorable **George B. Nielsen, Jr.**, Bankruptcy Judge, Presiding.

Attorneys and Law Firms

Lawrence D. Hirsch of DeConcini McDonald Yetwin & Lacey, P.C. for Appellant; **Victoria Orze** of Hinshaw & Culbertson LLP, for Appellees.

Before **DUNN**, **KIRSCHER** and **MYERS**,² Bankruptcy Judges.

Opinion

MEMORANDUM¹

*1 The debtor, Arthur Lawida, appeals the bankruptcy court’s decision dismissing his complaint against Richard Seyffer and Deborah Lewis for an alleged willful violation of the automatic stay.³ We VACATE and REMAND.

FACTS

Eleven years before the debtor’s bankruptcy filing, the debtor and Lewis divorced. The divorce decree incorporated a separation and property settlement agreement, which included provisions for child support.

The debtor and Lewis later entered into a stipulation that created a judgment in Lewis’s favor for \$175,000 in child support arrears. The debtor sought to modify the child support payments in state court (“child support modification petition”). The state court denied the debtor’s request to modify the child support payments and awarded Lewis attorney’s fees and costs. Seyffer represented Lewis in the state court proceeding on the debtor’s child support modification petition.

The debtor filed his chapter 7 petition on April 12, 2010.⁴ He scheduled Lewis as a creditor with two priority claims: a \$175,000 claim based on the domestic support obligation (“child support claim”) and a \$4,869.50 claim based on attorney’s fees (“attorney’s fee claim”).⁵ The debtor included Seyffer as a creditor on the attorney’s fee claim.

Twenty-five days later, Seyffer filed on Lewis’s behalf a petition for an order to show cause (“OSC petition”) in state court, requesting that the debtor be held in contempt for refusing to pay child support pursuant to state court orders and that “all sanctions, including incarceration,” be imposed against him. Lewis also sought judgment against the debtor for all child support arrears. She further sought attorney’s fees and costs connected with the OSC petition. The OSC petition did not mention the debtor’s bankruptcy filing or whether it sought recovery from non-estate assets. The state court set a hearing for

August 12, 2010, on the contempt portion of the OSC petition (“state court hearing”).

Lewis served the OSC petition on the debtor at the § 341(a) meeting on May 17, 2010. The debtor subsequently sent Seyffer and Lewis a letter, dated June 15, 2010, advising them of the debtor’s bankruptcy filing. He further advised Seyffer and Lewis that they had willfully violated the automatic stay by (1) filing the OSC petition, (2) serving the OSC petition on the debtor at the § 341(a) meeting, and (3) failing to cancel the state court hearing. The debtor informed Seyffer and Lewis that he intended to seek damages for their violation of the automatic stay. Seyffer and Lewis withdrew the OSC petition on June 16, 2010. Appellee’s Response Brief at 2.

On July 12, 2010, the debtor filed a complaint against Seyffer and Lewis for willful violation of the automatic stay, seeking actual and punitive damages.⁶ The debtor acknowledged that § 362(b)(2)(A) and (B) excepted from the automatic stay the commencement or continuation of civil actions or proceedings to establish or modify an order for a domestic support obligation and the collection of a domestic support obligation from non-estate property. He contended, however, that the OSC petition did not fall within either of these exceptions because it only sought to incarcerate the debtor for non-payment of child support. The debtor pointed out that the OSC petition did not indicate whether it sought recovery from non-estate assets. He argued that the OSC petition violated the automatic stay by seeking his incarceration, instead of only seeking recovery from non-estate assets.

***2** The debtor received his chapter 7 discharge in the main bankruptcy case on July 26, 2010. The chapter 7 trustee filed a no asset report approximately a month later.

Seyffer and Lewis meanwhile moved to dismiss the complaint under Civil Rule 12(b)(6) (“motion to dismiss”),⁷ contending that they did not violate the automatic stay in filing and serving the OSC petition, as the OSC petition fell within the exceptions of § 362(b)(2)(A) and (B). They argued that the OSC petition constituted a civil proceeding to establish an unpaid child support obligation under § 362(b)(2)(A). Seyffer and Lewis also claimed that the OSC petition was excepted from the automatic stay under § 362(a)(2)(B) because it did not seek collection from estate assets, as the debtor had no nonexempt assets. They further contended that the OSC petition did not violate the automatic stay because it simply used the state’s civil contempt power, in the form of the threat of incarceration, to enforce the debtor’s child support obligations.

The debtor opposed the motion to dismiss, arguing that Seyffer and Lewis were not seeking to collect from non-estate assets but were commencing “a new civil action designed to seek a new order of civil contempt.” He claimed that the commencement of such a civil action required Seyffer and Lewis to obtain relief from the automatic stay. The debtor contended that Seyffer and Lewis failed to do so, thereby violating the automatic stay. He further argued that Seyffer and Lewis could not seek collection of child support at the time they filed the OSC petition because all of the debtor’s assets still were property of the estate, as no assets had been fully exempted yet.

The bankruptcy court held a hearing on the motion to dismiss on November 1, 2010. At the hearing, counsel for the debtor acknowledged that, had the OSC petition simply sought to collect on the child support obligation through a wage garnishment, it would have been excepted from the automatic stay under § 362(b)(2)(C). He stressed that the OSC petition instead sought to enforce payment of child support and to incarcerate the debtor. Even under the 2005 amendments to § 362(b), he argued, Seyffer and Lewis could not commence a state court action seeking sanctions against the debtor and enforcement of his child support obligation without first obtaining relief from the automatic stay.

Counsel for Seyffer contended that the debtor mischaracterized the OSC petition. She argued that the OSC petition “was not a petition for incarceration,” but a request for “a judgment for the [child support] arrearages and for our attorney’s fees, and for all other sanctions that the [state court] can give us, including incarceration.” Tr. of November 1, 2010 hr’g, 16:18, 16:22–25. The request for incarceration in the OSC petition, she continued, was “a remedy ... it’s designed to get the payor to comply with the order in the first place.” Tr. of November 1, 2010 hr’g, 26:16–18.

***3** Counsel for Seyffer claimed that the intent of the OSC petition “was not to target, and the [OSC] petition does not target in any way bankruptcy estate assets.” Tr. of November 1, 2010 hr’g, 19:14–15. She conceded, however, that the OSC petition did not specifically exclude estate assets from its request for judgment on child support arrears. Tr. of November 1, 2010 hr’g, 19:17–19. Counsel for Seyffer contended, however, that nothing in the Bankruptcy Code or in the relevant case law required the OSC petition to state that the debtor was in bankruptcy and that it only sought to collect from non-estate assets.

Counsel for Seyffer further argued that, even under the 2005 amendments to § 362(b), Lewis could seek to collect from bankruptcy estate assets to satisfy domestic support obligations.

After hearing argument from counsel, the bankruptcy court orally issued its ruling, granting the motion to dismiss with prejudice. The bankruptcy court determined that the debtor failed to state a claim on which relief could be granted because the OSC petition did not violate the automatic stay as it fell within the exceptions under § 362(b)(2)(B) and (C).

The bankruptcy court emphasized that one of the goals of the 2005 amendments to the Bankruptcy Code was “to give better support for ... the collection of domestic support obligations.” Tr. of November 1, 2010 hr’g, 29:9–11. It noted that neither the debtor nor Seyffer and Lewis disputed that “the debt being collected [from the debtor] is a [domestic support obligation] itself.” Tr. of November 1, 2010 hr’g, 30:1–2.

The bankruptcy court construed the OSC petition to be “an action collecting on a domestic support obligation” within the meaning of § 362(b)(2)(B). Tr. of November 1, 2010 hr’g, 33:13–14. It found that the “mere filing of a petition to collect a [domestic support obligation did] not violate the automatic stay.” Tr. of November 1, 2010 hr’g, 32:14–15. The bankruptcy court further determined that § 362(b)(2)(B) did not require that the OSC petition indicate that it sought to collect on child support obligations from non-estate assets.

The bankruptcy court also determined that, under § 362(b)(2)(C), the automatic stay no longer prohibited withholding from income that was estate property or the debtor’s property to pay a domestic support obligation, so long as a judicial order or a statute authorized such withholding. The bankruptcy court reasoned that such authorization implied employing means to effectuate the withholding, such as filing a contempt action and seeking sanctions for non-payment of domestic support obligations. It opined that “if it’s permissible to collect from a stay property to pay the domestic support obligation, but there is no teeth in the requirement because sanctions are denied the collecting spouse, then we really haven’t exempted the collection very—very effectively in the statute.” Tr. of November 1, 2010 hr’g, 8:21–25.

The bankruptcy court determined that, through the OSC petition, Seyffer and Lewis were “attempting to utilize the State Court system to enforce the withholding of income, payment of income, even though it’s bankruptcy estate property, for payment of a domestic support obligation.” Tr. of November 1, 2010 hr’g, 6:24–25, 7:1–3. It believed that “the threatened incarceration [was] an attempt to enforce the payment of the domestic support obligation” and was “the use of the contempt power.” Tr. of November 1, 2010 hr’g, 8:7–9.

*4 The bankruptcy court entered final judgment, consistent with its oral ruling, on November 10, 2010. The debtor timely appealed.

JURISDICTION

The bankruptcy court had jurisdiction under [28 U.S.C. §§ 1334](#) and [157\(b\)\(2\)\(O\)](#). We have jurisdiction under [28 U.S.C. § 158](#).

ISSUES

- (1) Did the bankruptcy court err in granting the motion to dismiss?
- (2) Did the bankruptcy court err in finding that Seyffer and Lewis **did not violate the automatic stay?**

STANDARDS OF REVIEW

We review de novo the bankruptcy court’s grant of a Civil Rule 12(b)(6) motion to dismiss. [Movsesian v. Victoria Versicherung AG](#), 629 F.3d 901, 905 (9th Cir.2010). De novo means we look at the matter anew, as if it had not been heard before, and as if no decision had been rendered previously, giving no deference to the bankruptcy court’s determinations.

Freeman v. DirecTV, Inc., 457 F.3d 1001, 1004 (9th Cir.2006).

“When ruling on a motion to dismiss, we accept all factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party.” *Movsesian*, 629 F.3d at 905 (quoting *Knievel v. ESPN*, 393 F.3d 1068, 1072 (9th Cir.2005)(quotation marks omitted)). To survive a motion to dismiss, the complaint must state sufficient facts to state a claim for relief that is plausible on its face. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009)(quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 129 S.Ct. at 1949 (citation omitted). The “plausibility standard ... asks for more than the sheer possibility that a defendant acted unlawfully.” *Id.*

We review de novo issues involving whether the automatic stay has been violated. *Sternberg v. Johnston*, 595 F.3d 937, 943 (9th Cir.2010). “Whether a party has willfully violated the automatic stay is a question of fact reviewed for clear error.” *Id.*

We may affirm on any ground supported by the record. *Shanks v. Dressel*, 540 F.3d 1082, 1086 (9th Cir.2008).

DISCUSSION

When a debtor files a bankruptcy petition, all collection and enforcement activities against the debtor, her property and property of the estate are stayed immediately. *See* § 362(a). The automatic stay “freezes” the status quo by barring and nullifying postpetition actions in nonbankruptcy fora against the debtor or property of the estate. *Hillis Motors, Inc. v. Hawaii Auto. Dealers’ Ass’n*, 997 F.2d 581, 585 (9th Cir.1993).

The automatic stay provides broad protection. *Id.* It generally ensures that all claims against the debtor will be considered in a single forum (i.e., the bankruptcy court). *Id.* The automatic stay protects the debtor by giving her a breathing spell from her creditors so she can put her finances back in order. *Id.* It “also protects creditors as a class from the possibility that one creditor will obtain payment on its claim to the detriment of all others.” *Id.*

*5 However, certain types of actions are excepted from the automatic stay. *See* § 362(b). *See also* *Sherman v. SEC (In re Sherman)*, 491 F.3d 948, 971 (9th Cir.2007). Section 362(b) lists these exceptions. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”) modified certain exceptions and added new exceptions permitting the continuation or commencement of certain proceedings related to the enforcement of a domestic support obligation. 3 *Collier on Bankruptcy* ¶ 362.05[2] (Alan N. Resnick and Henry J. Sommer, eds., 16th ed. 2011)(“*Collier on Bankruptcy*”). *See also* *In re Gellington*, 363 B.R. 497, 501 (Bankr.N.D. Texas 2007); *In re Lasley*, 2010 WL 817232 at *3 (Bankr.D.Mont.2010).

The bankruptcy court considered § 362(b)(2)(B), which was modified slightly,⁸ and (b)(2)(C), which was added under BAPCPA.⁹ It dismissed the debtor’s complaint on the grounds that the complaint failed to state a claim that Seyffer and Lewis violated the automatic stay because the OSC petition fell within these two exceptions. Based on our reading of the OSC petition and the two exceptions, we determine that the bankruptcy court erred in dismissing the complaint under Civil Rule 12(b)(6), as the OSC petition by the breadth of its terms did not fall clearly or completely within either exception.

(A) Section 362(b)(2)(B)

The bankruptcy court mainly focused its analysis on § 362(b)(2)(C). With respect to § 362(b)(2)(B), it simply concluded that the OSC petition was “an action collecting on a domestic support obligation” from non-estate assets. It found that the “mere filing of a petition to collect a [domestic support obligation]” did not violate the automatic stay. The bankruptcy court further determined that § 362(b)(2)(B) did not require the OSC petition to state that it sought to collect from non-estate property.

The automatic stay is broad, and the exceptions to it should be interpreted narrowly. *Hillis Motors, Inc.*, 997 F.2d at 590. The “precise wording of the [automatic] stay and its exceptions should be emphasized.” *Id.* (quoting *Stringer v. Huet (In re Stringer)*, 847 F.2d 549, 552 n. 5 (9th Cir.1988)). *See also* *Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530 U.S. 1, 6 (2000)(stating that “Congress says in a statute what it means and means in a statute what it says there,” so when a statute’s language is plain, courts must enforce it according to its terms, as long as such reading does not render it absurd).

Section 362(b)(2)(B) expressly states that **only actions seeking collection of a domestic support obligation from non-estate assets are excepted from the automatic stay**. The bankruptcy court here assumed that the OSC petition was a collection action for child support from non-estate assets. We do not make this same assumption, however, based on our plain reading of the OSC petition.

The OSC petition sought sanctions against the debtor, a judgment for child support arrears, and attorney's fees and costs connected with the OSC petition. Plainly reading the OSC petition, it was not calling for or seeking to receive payment of child support only; rather, it sought a determination of child support arrears **and an award of attorney's fees and costs**. In fact, at the hearing, counsel for Seyffer stated that "there were [child support] arrearages that had not been addressed by a judgment" and that the OSC petition sought to "reduce[] those to a judgment."¹⁰ Tr. of November 1, 2010 hr'g, 25:23–25, 26:1.

***6** The OSC petition **also sought sanctions (in the form of contempt and incarceration)**, which are measures to discipline recalcitrant parties or to compel them to comply with court orders. *See* Black's Law Dictionary 1458 (9th ed.2009)(defining sanction as a "penalty or coercive measure that results from failure to comply with law, rule or order"). *See, e.g., Lasar v. Ford Motor Co.*, 399 F.3d 1101, 1110 (9th Cir.2005)(explaining that civil contempt is punishment that is "intended to be remedial by coercing [the party] to do what he had refused to do.").

The bankruptcy court relied on its conclusion that § 362(b)(2)(B) did not expressly require actions or proceedings to indicate that they sought collection from non-estate assets. **However, there is no way of knowing, from a plain reading of the OSC petition, whether it sought collection from non-estate assets only.** Although counsel for Seyffer at the hearing asserted that the OSC petition neither intended to nor did target estate assets, **we cannot divine this intent from its language.**

Based on our plain reading of the OSC petition, we conclude that the OSC petition did not fall completely within the exception under § 362(b)(2)(B).

(B) Section 362(b)(2)(C)

The bankruptcy court also found that the OSC petition was excepted from the automatic stay under § 362(b)(2)(C). It construed the request for sanctions in the OSC petition as an attempt to enforce the child support obligation through a withholding of income from the debtor or the bankruptcy estate. The **OSC petition by its terms is not so limited.**

Section 362(b)(2)(C) excepts from the automatic stay **judicial or administrative orders withholding domestic support obligation payments from income of the debtor or bankruptcy estate property.** *Gellington*, 363 B.R. at 501. The OSC petition was **not an income withholding order**; rather, it was an action requesting: **(1)** a judgment on child support arrears; **(2)** sanctions against the debtor for non-payment of child support; and **(3)** an award of attorney's fees and costs arising from the OSC petition. According to counsel for Seyffer, the OSC petition sought a judgment "for any [child support] arrearages that hadn't been reduced to a judgment, plus interest thereon, to reduce the interest to a judgment as required, and attorney's fees for proceeding to have to get that judgment, and then an order from the [state court] that said, [the debtor] must pay toward this." Tr. of November 1, 2010 hr'g, 26:7–11.

The OSC petition **moreover did not seek a wage garnishment.** Counsel for Seyffer acknowledged at the hearing that Lewis "could have gotten, through the [OSC petition] process, a continuing lien on wages." Tr. of November 1, 2010 hr'g, 26:24–25, 27:1. She explained, however, that such a request was unnecessary, as a wage assignment was "automatic if the [debtor] is employed."¹¹ Tr. of November 1, 2010 hr'g, 27:9–10. She further elaborated, "So the fact that the [OSC] petition doesn't specifically say, we want a wage assignment against [the debtor's] wages doesn't mean that that's not something they would have gotten anyway because you don't have to file a petition for OSC to get a wage assignment." Tr. of November 1, 2010 hr'g, 27:10–14.

***7** Based on our reading of the OSC petition, as well as statements made by counsel for Seyffer at the hearing, **we conclude that the OSC petition did not constitute only a request for an income withholding order within the meaning of § 362(b)(2)(C).**

(C) Willful violation of the automatic stay

A debtor may request and obtain sanctions against a creditor if it willfully violated the automatic stay. *See* § 362(k). A creditor willfully violates the automatic stay if it knew of the automatic stay and intentionally acted in violation of the automatic stay. *Eskanos & Adler, P.C. v. Leetien*, 309 F.3d 1210, 1215 (9th Cir.2002)(analyzing automatic stay violation under former § 362(h)).

The debtor here urges us to determine whether Seyffer and Lewis willfully violated the automatic stay in filing and serving the OSC petition. The bankruptcy court did not make any such determination. It instead determined that the OSC petition was excepted from the automatic stay under § 362(b)(2)(B) and (C). We thus remand this issue to the bankruptcy court so that it can determine whether the filing and serving of the OSC petition constituted a willful violation of the automatic stay, and if so, whether the debtor suffered any compensable damages.¹²

CONCLUSION

The bankruptcy court erred in dismissing the debtor's complaint under Civil Rule 12(b)(6). The OSC petition was not clearly excepted from the automatic stay, based on its language read in light of § 362(b)(2)(B) and (C). The debtor's complaint stated sufficient facts plausibly to claim that Seyffer and Lewis willfully violated the automatic stay. We thus VACATE the bankruptcy court's dismissal of the debtor's complaint. We REMAND the matter to the bankruptcy court for a determination as to whether Seyffer and Lewis willfully violated the automatic stay, and if so, whether the debtor suffered any compensable damages.

Footnotes

- ¹ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (*see Fed. R.App. P. 32.1*), it has no precedential value. *See* 9th Cir. BAP Rule 8013–1.
- ² The Hon. Terry L. Myers, Chief Bankruptcy Judge for the District of Idaho, sitting by designation.
- ³ Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101–1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001–9037. The Federal Rules of Civil Procedure are referred to as “Civil Rules.”
- ⁴ The debtor and his wife, Meredith Lawida, jointly filed the chapter 7 petition. Only the debtor filed the complaint against Seyffer and Lewis.
- ⁵ We obtained a copy of the debtor's schedules from the bankruptcy court's electronic docket. *See O'Rourke v. Seaboard Surety Co. (In re E.R. Fegert, Inc.)*, 887 F.2d 955, 957–58 (9th Cir.1988); *Atwood v. Chase Manhattan Mortg. Co. (In re Atwood)*, 293 B.R. 227, 233 n. 9 (9th Cir.BAP2003).
- ⁶ The debtor filed the complaint against Seyffer, his wife, his law firm, Deroon & Seyffer, PC, Lewis, and her husband. Victoria Orze represented both Seyffer and Lewis in the adversary proceeding. She also represents them in the instant appeal. We hereafter refer to Ms. Orze as counsel for Seyffer for the sake of convenience.
- ⁷ Civil Rule 12(b)(6) is applicable through Rule 7012(b).
- ⁸ Prior to BAPCPA, § 362(b)(2)(B) read:
The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay ... of the collection of *alimony, maintenance, or support* from property that is not property of the estate.
(Emphasis added.)
Section 362 (b)(2)(B) now reads:
The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities

Investor Protection Act of 1970, does not operate as a stay ... of the collection of a *domestic support obligation* from property that is not property of the estate.

(Emphasis added.)

BAPCPA also added the definition of “domestic support obligation” to § 101. Section 101(14A) defines, in relevant part, a “domestic support obligation” as a debt that accrues before, on, or after the date of the order for relief in a case under this title, including interest that accrues on that debt as provided under applicable nonbankruptcy law notwithstanding any other provision of this title, that is—

(A) owed to or recoverable by—

(i) a spouse, former spouse, or child of the debtor or such child’s parent, legal guardian, or responsible relative; or

(ii) a governmental unit;

(B) in the nature of alimony, maintenance, or support (including assistance provided by a governmental unit) of such spouse, former spouse, or child of the debtor or such child’s parent, without regard to whether such debt is expressly so designated;

(C) established or subject to establishment before, on, or after the date of the order for relief in a case under this title, by reason of applicable provisions of—

(i) a separation agreement, divorce decree, or property settlement agreement;

(ii) an order of a court of record....

9 Section 362(b)(2)(C) did not exist prior to BAPCPA. Section 362(b)(2)(C) provides:

The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay ... with respect to the withholding of income that is property of the estate or property of the debtor for payment of a domestic support obligation under a judicial or administrative order or a statute....

10 At the hearing, counsel for Seyffer explained that the OSC petition also sought an order from the state court requiring the debtor to “pay [his] child support current obligation....” Tr. of November 1, 2010 hr’g, 26:11–12.

11 Counsel for Seyffer later clarified her understanding of the wage garnishment process. She explained that an ex-spouse must make a formal request for a wage assignment, though the ex-spouse does not need a hearing on her request. The ex-spouse simply submits a form request to the state court, which automatically sends it to the debtor’s employer.

12 Based on the record before us, it is possible to conclude that Seyffer and Lewis may have violated the automatic stay in filing and serving the OSC. The debtor may not be able to show he suffered any damages, however, as Seyffer and Lewis immediately withdrew the OSC petition upon the debtor’s request, prior to his filing his adversary complaint.