Honorable Mike K. Nakagawa
United States Bankruptcy Judge

Entered on Docket
July 21, 2020

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

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In re:	)	Case No.: 13-12466-MKN
	)	Chapter 13
WILLIE N. MOON and ADNETTE M. GUNNELS-MOON,	)	
	)	Date: April 15, 2020
Debtors.	)	Time: 2:30 p.m.

FINAL ORDER ON MOTION FOR CONTEMPT AGAINST RUSHMORE LOAN MANAGEMENT SERVICES FOR VIOLATION OF THE COURTS ORDER CONFIRMING PLAN #2 AGAINST CREDITOR, RUSHMORE LOAN MANAGEMENT SERVICES, LLC AND FOR ITS CONTINUING VIOLATION OF THE STAY AND DAMAGES FOR BOTH AND TO CONFIRM AVOIDANCE OF RUSHMORES SECOND MORTGAGE UNDER FRBP 5009(d)[1]

On April 15, 2020, the court heard the Motion for Contempt Against Rushmore Loan Management Services for Violation of the Courts Order Confirming Plan #2 Against Creditor, Rushmore Loan Management Services, LLC and for its Continuing Violation of the Stay and Damages for Both and to Confirm Avoidance of Rushmores Second Mortgage Under FRBP 5009(d) ("Second Contempt Motion"). The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

[1] In this Order, all references to "ECF No." are to the numbers assigned to the documents filed in the case as they appear on the docket maintained by the clerk of the court. All references to "Section" are to provisions of the Bankruptcy Code, 11 U.S.C. §§ 101, et seq., unless otherwise indicated. All references to "FRBP" are to the Federal Rules of Bankruptcy Procedure. All references to "FRE" are to the Federal Rules of Evidence.

BACKGROUND

On March 26, 2013, a joint Chapter 13 petition ("Petition") was filed by Willie N. Moon and Adnette M. Gunnels-Moon ("Debtors") through their initial bankruptcy counsel. (ECF No. 1). The case was assigned to Chapter 13 panel trustee Rick A. Yarnall ("Trustee").

On May 6, 2013, Debtors filed their schedules of assets and liabilities, along with their statement of financial affairs. (ECF Nos. 14 and 17). On their real property Schedule "A," Debtors listed a personal residence ("Residence") having a value of $120,000 located at 3391 Eagle Bend Street, Las Vegas, NV 89122. On their Schedule "D," Debtors listed a second deed of trust against their Residence securing a claim in the amount of $73,000 in favor of Rushmore Mortgage.

On May 6, 2013, Debtors filed a proposed Chapter 13 Plan #1 ("Plan #1"). (ECF No. 18). Section 5.06 of Plan #1 provided that a holder "of a claim shall retain its lien until the earlier of (a) the payment of the underlying debt determined under non-bankruptcy law or (b) discharge under Section §1328 . . . After either one of the foregoing events has occurred, creditor shall release its lien and provide evidence and/or documentation of such release within 30 days to Debtor(s)." Section 6.01 of Plan #1 provided that "Debtors intend to file a motion to value collateral and strip off the second deed of trust, in favor of Rushmore Mortgage, which encumbers their Residence at 3391 Eagle Bend Street, Las Vegas, NV 89122."

On September 25, 2013, Debtors filed a motion to value the Residence ("Valuation Motion"). (ECF No. 29). The Valuation Motion sought a determination, *inter alia*, that Rushmore Mortgage had only an unsecured claim under Section 506(a) because the value of the Residence did not exceed the claim of Chase Home Finance that was secured by the first deed of trust. As a result, Rushmore Mortgage's claim would be reclassified under Plan #1 as an unsecured claim.

On December 5, 2013, an order was entered granting the Valuation Motion ("Valuation Order"). (ECF No. 34). The Valuation Order provided that the claim of Rushmore Mortgage was classified from a secured claim to an unsecured claim and would receive pro rata payment along with other general unsecured creditors.

On February 12, 2014, Debtors filed an amended Chapter 13 Plan #2 and a notice of confirmation hearing. (ECF Nos. 39 and 40). Neither document was served.

On February 14, 2014, Debtors again filed an amended Chapter 13 Plan #2 ("Plan #2") and a notice of confirmation hearing. (ECF Nos. 42 and 43).

On April 7, 2014, an order was entered confirming Plan #2 ("Plan #2 Confirmation Order"). (ECF No. 49). Section 2.12.2 of Plan #2 provided for a prepetition arrearage in the amount of $517.51 to secured creditor Wilmington Trust National Association, apparently as successor in interest to Chase Home Finance, to be paid through the plan. Section 5.06 of Plan #2 provided that a holder "of a claim shall retain its lien until the earlier of (a) the payment of the underlying debt determined under non-bankruptcy law or (b) discharge under Section §1328 . . . After either one of the foregoing events has occurred, creditor shall release its lien and provide evidence and/or documentation of such release within 30 days to Debtor(s)."[2] As a result of completing plan payments, the Debtors would receive a discharge of their prepetition unsecured debts, including the debt owed to Rushmore, and could retain their Residence by maintaining their loan payments to the holder of the first deed of trust. Section 6.01 of Plan #2 provided that "Debtors have filed a motion to value collateral and strip off the second deed of trust, in favor of Rushmore and the motion was duly granted."

On July 13, 2016, the Trustee filed a final account and report indicating that $0.00 had been paid to Rushmore. (ECF No. 64).

On August 19, 2016, the Trustee filed a final report indicating, *inter alia*, that all Chapter 13 plan payments had been made over thirty-eight months and that Rushmore had a scheduled unsecured claim of $73,000 for which it had been paid $0.00. (ECF No. 68).

On August 27, 2016, Debtors filed an amended certificate of compliance with Chapter 13 discharge conditions. (ECF No. 74).

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[2] FRBP 5009(d) became effective on December 1, 2017. It provides that if a claim in a Chapter 13 case is secured by property of the bankruptcy estate, the debtor may request the bankruptcy court to enter an order declaring that the claim has been satisfied and the lien has been released under the terms of the confirmed plan. Section 5.06 of Plan #2 required Rushmore to release its lien within 30 days after the Debtors receive their discharge.

On September 28, 2016, an order of discharge of the Debtors after completion of Chapter 13 plan payments was entered.[3] (ECF No. 76).

On October 3, 2016, a final decree was entered closing the case. (ECF No. 78).

On January 4, 2019, an order was entered reopening the bankruptcy case ("Reopening Order"). (ECF No. 81).

On January 18, 2019, attorney Christopher P. Burke ("Burke") filed on behalf of the Debtors a Motion to Hold Creditor, Rushmore Loan Management in Contempt for Violation of the Automatic Stay Under §362(a) and for Violation of the Discharge Injunction Under 11 U.S.C. §524(a)(2) and to Hold Creditor SN Servicing Corporation in Contempt for Violating the Discharge Injunction Under 11 U.S.C. §524(a)(2) and for Actual Damages, Emotional Distress Damages, Punitive Damages and Attorney Fees, and Sanctions Against Both Creditors, Rushmore Loan Management and SN Servicing Corporation ("First Contempt Motion"). (ECF No. 84).

On February 8, 2019, a response in opposition to the First Contempt Motion was filed on behalf of Rushmore Loan Management Services LLC, its assignees and/or successors ("Rushmore"). (ECF No. 90).

On September 16 and 17, 2019, an evidentiary hearing was conducted, and the First Contempt Motion was taken under submission.

On February 25, 2020, a Memorandum Decision After Evidentiary Hearing ("Memorandum Decision") was entered, along with a separate Order After Evidentiary Hearing ("First Contempt Order"). (ECF Nos. 157 and 158). The First Contempt Order awarded to the Debtors under Section 362(k)(1) actual damages of $100,742.10 and punitive damages of $200,000.00 on a finding that Rushmore had willfully violated the automatic stay. The First Contempt Order also denied any award of damages under Sections 524(a)(2) and 105(a) on a finding that Debtors had failed to demonstrate a specific date when Rushmore received notice of the discharge. The First Contempt Order further directed that attorney's fees and costs under

[3] As a result of the discharge, Section 5.06 of Plan #2 required the second deed of trust against the Residence to be released no later than October 28, 2016.

Section 362(k)(1) are awarded in an amount to be determined by the court. Finally, the First Contempt Order directed attorney Burke to serve and file an itemized billing statement and supporting declaration with respect to attorney's fees and costs incurred in connection with the First Contempt Motion. Rushmore was provided an opportunity to object to the attorney's fees and costs sought by counsel.[4] Finally, the First Contempt Order specified that the deadline for Rushmore to comply with the payment requirement of the First Contempt Order would be set forth in a supplemental order addressing attorney's fees and costs.

On March 4, 2020, Rushmore appealed the First Contempt Order. (ECF No. 162).

On March 14, 2020, Debtors filed the instant Second Contempt Motion. (ECF No. 180). The Second Contempt Motion includes a request under FRBP 5009(d) to confirm that Rushmore's lien evidenced by the second deed of trust against the Residence was satisfied and released pursuant to Plan #2.

On April 2, 2020, Rushmore filed its opposition to the Second Contempt Motion ("Opposition"). (ECF No. 209).

On April 8, 2020, Debtors filed their reply ("Reply"). (ECF No. 211).

On April 15, 2020, oral arguments were presented by counsel. On the record, counsel agreed that Rushmore's lien created by the second deed of trust had been satisfied pursuant to Plan #2 and had been released. Debtors' counsel was directed to prepare an order releasing the lien pursuant to FRBP 5009(d). The remaining aspects of the Second Contempt Motion were taken under submission.[5]

DISCUSSION

[4] On March 6, 2020, a motion for attorney's fees and costs ("Fee Motion") was filed, and an amendment was filed on March 11, 2020. (ECF Nos. 169 and 179). Rushmore filed opposition, and the Debtors filed a reply. (ECF Nos. 204 and 212). That Fee Motion, as amended, was heard in conjunction with the instant Second Contempt Motion and is the subject of a separate order entered contemporaneously herewith.

[5] Unfortunately, counsel were unable to agree on the language of the order. (ECF Nos. 213 and 216). As a result, the court prepared and entered an interim order determining the second deed of trust to have been satisfied and the lien released under FRBP 5009(d) ("Interim Order"). (ECF No. 223).

The Memorandum Decision addressing the First Contempt Motion is the law of the case and is incorporated in the instant Order by reference.[6] As previously mentioned, the First Contempt Order awarded actual damages of $100,742.10 and punitive damages of $200,000.00 on a finding that Rushmore had willfully violated the automatic stay under Section 362(k)(1). The First Contempt Order also denied any award of damages for violation of the discharge injunction under Sections 524(a)(2) and 105(a) on a finding that Debtors had failed to demonstrate a specific date when Rushmore received notice of the discharge.

Debtors now seek an award of additional damages against Rushmore on two separate theories: that Rushmore violated the Plan #2 Confirmation Order by failing to release its lien against the Residence within 30 days of the Debtors' discharge,[7] and that Rushmore continued to violate the automatic stay through the date of entry of the Memorandum Decision by failing to release the lien. Like the First Contempt Motion, each of these theories involve different legal standards and different standards of proof.[8]

1. Sanctions for Violation of the Plan #2 Confirmation Order.

Unlike Section 362(k)(1), there is no statutory remedy specifically provided for a violation of a plan confirmation order. Absent a specific statutory remedy, courts typically enforce their orders by holding the violator in contempt. Criminal contempt sanctions are designed to punish the violator, while civil contempt sanctions are designed to coerce the violator to comply with the order, compensate the party injured by the violation, or both. See Taggart v. Lorenzen, 139 S.Ct. 1795, 1801 (2019); Falstaff Brewing Corp. v. Miller Brewing

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[6] In that Memorandum Decision, the court referred to debtor Willie N. Moon as "Willie" and debtor Adnette M. Gunnels-Moon as "Adnette" when individual references were required. The same references are used in the instant Order.

[7] The First Contempt Motion did not allege a violation of the Plan #2 Confirmation Order. See Memorandum Decision at 49 n.61. Rushmore does not assert that the claim preclusion component of res judicata should be applied to bar the Debtors' assertion of this theory.

[8] Although the instant motion seeks additional damages on separate theories, Debtors have offered no additional evidence beyond what was addressed in the Memorandum Decision on the First Contempt Motion.

Co., 702 F.2d 770, 778-79 (9th Cir. 1983). In this instance, the court already has ordered that the second deed of trust against the Residence has been satisfied and the lien is released under FRBP 5009(d). As a result, coercive civil contempt sanctions are no longer required because Section 5.06 of Plan #2 has been satisfied. Compensatory civil contempt sanctions, however, remain at issue.

Every federal court, including a bankruptcy court, has authority to enforce its own orders. See Second Contempt Motion at 8:7-21, citing, e.g., Knupfer v. Lindblade (In re Dyer), 322 F.3d 1178, 1189-90 (9th Cir. 2003). Enforcement of an existing court order against a particular party, of course, requires that the party have prior notice of the subject order. See Taggart, 139 S.Ct. at 1802. Compare Int'l Union, United Mine Workers of Am. v. Bagwell, 512 U.S. 821, 836 (1994) ("Respondents' argument highlights the difficulties encountered in parsing coercive civil and criminal contempt fines . . . Due process traditionally requires that criminal laws provide prior notice both of the conduct to be prohibited and of the sanction to be imposed."). A general source of authority for bankruptcy courts to enforce their orders is found in Section 105(a). That bankruptcy provision specifically states:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]. No provision of [the Bankruptcy Code] providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. §105(a) (emphasis added). Pursuant to both its statutory authority under Section 105(a), see Dyer, 322 F.3d at 1190-91, and its inherent authority as a judicial tribunal, see id. at 1196-98,[9] a bankruptcy court may impose sanctions for violations of its orders.

[9] See Ex Parte Robinson, 86 U.S. 505, 510 (1873) ("The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power.")

Under Section 105(a), the "'standard for finding a party in civil contempt is well settled: The moving party has the burden of showing by clear and convincing evidence that the contemnors violated a specific and definite order of the court.'" In re Dyer, 322 F.3d at 1190-91, quoting Renwick v. Bennett (In re Bennett), 298 F.3d 1059, 1069 (9th Cir. 2002) (emphasis added). The general standard for civil contempt is an objective one, and the contemnor's subjective belief will not insulate the contemnor if the belief is objectively unreasonable. See In re Taggart, 139 S.Ct. at 1801-02. Thus, if there is no fair ground of doubt as to the requirements of a court order, there would be no objectively reasonable basis for concluding that the contemnor's conduct might be lawful. Id.

Under its inherent sanctioning authority, "a court must make an explicit finding of bad faith or willful misconduct." In re Dyer, 322 F.3d at 1196. As the Ninth Circuit panel further explained:

> In this context, "willful misconduct" carries a different meaning than the meaning employed in the context of determining whether an individual is entitled to damages under § 362(h) or a contempt judgment under § 105(a) for an automatic stay violation. With regard to the inherent sanction authority, bad faith or willful misconduct consists of something more egregious than mere negligence or recklessness . . . Although "specific intent to violate the automatic stay" may not be required in the contempt context, . . . such specific intent or other conduct in "bad faith or conduct tantamount to bad faith," . . . is necessary to impose sanctions under the bankruptcy court's inherent power.

Id. (citations omitted; emphasis added). Sanctions imposed under a court's inherent powers must be compensatory rather than punitive in nature. See Goodyear Tire & Rubber Co. v. Haeger, 137 S.Ct. 1178, 1186 (2017). Sanctions that are punitive in nature require "procedural guaranties applicable to criminal cases, such as a 'beyond a reasonable doubt' standard of proof." Id. A sanction is "compensatory only if it is 'calibrate[d] to [the] damages caused by' the bad-faith acts on which it is based." Id. "That kind of causal connection . . . is appropriately framed as a but-for test: The complaining party . . . may recover 'only the portion of his fees he would not have paid but for' the misconduct." Id. at 1187.

In this case, Debtors do not seek criminal contempt sanctions, but do seek civil contempt sanctions in the form of damages resulting from Rushmore's failure to release the second deed of trust against their Residence as required by the Plan #2 Confirmation Order. As previously mentioned, Section 5.06 of Plan #2 provided that a holder "of a claim shall retain its lien until the earlier of (a) the payment of the underlying debt determined under non-bankruptcy law or (b) discharge under Section §1328 . . . After either one of the foregoing events has occurred, creditor shall release its lien and provide evidence and/or documentation of such release within 30 days to Debtor(s)." There is no dispute that this requirement under Section 5.06 of Plan #2, confirmed by the court, is a "specific and definite order of the court."

As previously mentioned, with respect to the automatic stay under Section 362(a), the court previously found that Rushmore had notice of the automatic stay as of December 20, 2014. See Memorandum Decision at 41. The court found that Rushmore willfully violated the automatic stay under Section 362(k)(1) between December 20, 2014, and September 28, 2016. Id. at 43. As a result of the willful violation of the automatic stay, the court awarded compensatory damages to the Debtors totaling $100,742.10. Id. at 53 and 54. Due to the reprehensible nature of Rushmore's conduct, the court further awarded punitive damages in the amount of $200,000. Id. at 59. The court also awarded attorney's fees and costs in an amount to be determined.

Also as previously mentioned, with respect to the discharge injunction under Section 524(a)(2), the court found that Rushmore violated the injunction because it had received notice of the Debtors' discharge and continued to seek collection of the debt. See Memorandum Decision at 43-45. For the discharge violation, however, the court awarded no civil contempt sanctions under Section 105(a) because Debtors had failed to prove the date on which Rushmore received notice of the discharge. Id. at 45-46 & n.59.

With this Second Contempt Motion, the notice given to Rushmore again is a threshold issue, regardless of whether civil contempt sanctions are considered under Section 105(a) or civil sanctions are considered under the inherent powers of this court. In connection with the First Contempt Motion, the court found that the Debtors had failed to prove that Rushmore had

received notice of the documents filed during the Chapter 13 proceeding. See Memorandum Decision at 43 & n.55. The court also found, however, that Rushmore did receive notice of the Debtors' bankruptcy proceeding through a telephone conversation with Willie on December 20, 2014. Moreover, the court found that after the Debtors received their Chapter 13 discharge on September 28, 2016, Rushmore did receive notice of the discharge through another telephone conversation with Willie.

There is no dispute that the Plan #2 Confirmation Order was entered on April 7, 2014. There is no dispute that the Debtors received their Chapter 13 discharge on September 28, 2016. There is no dispute that under Section 5.06 of Plan #2, the second deed of trust against the Residence was required to be released no later than October 28, 2016. There is no dispute that the First Contempt Motion was filed on January 18, 2019. There is no dispute that the First Contempt Motion disclosed the April 7, 2014, confirmation date of Plan #2. See First Contempt Motion at 2:4. There is no dispute that the First Contempt Motion disclosed the September 28, 2016, discharge date. Id. at 5:8. There is no dispute that Rushmore was served with the First Contempt Motion. There is no dispute that Rushmore filed a response to the First Contempt Motion on February 8, 2019. Thus, there is no dispute that Rushmore had notice of entry of the Plan #2 Confirmation Order no later than February 8, 2019.

Because the Debtors have not established that Rushmore was given notice of the Plan #2 Confirmation Order prior to the service of the First Contempt Motion, any compensation must be limited to damages occurring after the First Contempt Motion was filed on January 18, 2019.[10] But what damages were caused by Rushmore after it received notice?[11]

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[10] Rushmore concedes that it received the First Contempt Motion after it was filed on January 18, 2019. Because Rushmore filed its response to the First Contempt Motion on February 8, 2019, it is undisputed that Rushmore received the First Contempt Motion no later than February 8, 2019. See Memorandum Decision at 15 n.16 (noting that Robert Montoya, an assistant secretary for Rushmore, represented under penalty of perjury that Rushmore first received notice on February 6, 2019).

[11] Notice of the Plan #2 Confirmation Order is different from notice of the automatic stay or notice of the discharge. As a matter of law, the automatic stay arises immediately whenever a Chapter 13 bankruptcy petition is filed (except for repeat filers under Section 362(c)(4)). As a matter of law, the discharge injunction arises immediately when a Chapter 13 discharge is

Neither Willie nor Adnette testified as to any emotional injury they suffered after Rushmore was given notice of the Plan #2 Confirmation through service of the First Contempt Motion. Both Willie and Adnette did testify, however, that they attempted to refinance the Residence in June 2019, but were unable to do so because the second deed of trust had not been released. See Memorandum Decision at 23, 26, 47, 49 & n.61. Adnette testified that she attempted to refinance the first mortgage against the Residence at an interest rate of 4.0 percent rather than the existing 7.7 percent, but the loan application was suspended due to the continued presence of the second deed of trust. Id. at 26 and 49.

Rushmore does not dispute that the application to refinance the first mortgage was suspended. Copies of the Debtors' credit reports, generated August 8, 2019, were admitted into evidence. (Exhibits 10 and 11; Exhibits DD and EE). The credit reports listed Rushmore as the holder of a second mortgage with "closed" and "transferred" dates of "10-18." However, as the court observed:

> No written or live testimony from any source was offered by either party to explain the impact of Rushmore's actions on the Debtors' finances or their ability to obtain refinancing of their Residence. No written or live testimony from any lender was offered to establish that any lien in favor of Rushmore or any information reported by Rushmore has prevented the Debtors from refinancing the loan obligation owed to their primary lender.

Memorandum Decision at 47 (Emphasis added). Other than Adnette's testimony that her application was suspended, there is no evidence in the record that the application would have been approved even if the second deed of trust had been released or reconveyed in compliance with the Plan #2 Confirmation Order.

In opposition to the Second Contempt Motion, Rushmore submitted evidence that on February 13, 2017, a copy of the Valuation Order was recorded in the county records encompassing the Residence. See Exhibit "A" to Opposition. A copy of the Valuation Order

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entered. In contrast, a plan confirmation order is not entered in every Chapter 13 case, and multiple confirmation orders can be entered as a result of multiple modified Chapter 13 plans. Thus, in determining whether a party should be subject to sanctions for violation of a specific plan confirmation order, there must be certainty that notice of the specific court order was given.

previously was admitted as Rushmore Exhibit "I" in connection with the First Contempt Motion, but the evidence of recordation was not.[12] The Valuation Order states in pertinent part that the "lien created by the recordation of the second deed of trust in favor of RUSHMORE MORTGAGE, or its predecessor be, and the same is hereby, avoided and removed as a claim against the subject real property located at 3391 Eagle Bend Street, Las Vegas, NV 89122 having Clark County Assessor's Parcel Number 161-16-511-003 . . . " (Emphasis added.) The final paragraph of the Valuation Order states that "the Court's avoidance of the second deed of trust and reclassification of the claim of RUSHMORE MORTGAGE is predicated upon Debtors' successful completion of their Chapter 13 Plan in this case, and in the event that Debtors do not complete their Chapter 13 Plan or the case is otherwise converted or dismissed, the second deed of trust and claim shall be reinstated." (Emphasis added.) Given that the Valuation Order voided the second deed of trust against the Residence subject to a condition subsequent, i.e., the Debtors' completion of their Chapter 13 plan and resulting discharge, it appears that the lender otherwise might have proceeded with the refinance application even if Rushmore or its successor had not complied with the Plan #2 Confirmation Order.

Moreover, Adnette testified only that the application to refinance the first mortgage was suspended, but not denied. In support of the instant Second Contempt Motion, no evidence has been offered that Debtors have been denied refinancing of the first mortgage as result of Rushmore's failure to comply with the Plan #2 Confirmation Order. Additionally, no evidence has been offered to establish the amount of the net monetary losses that were suffered by the Debtors as a result of the suspension of the application much less a denial of refinancing at a reduced interest rate.

Under these circumstances, the court concludes that the Debtors have failed to meet their burden of proving that the violation of the Plan #2 Confirmation Order caused any non-pecuniary or pecuniary damages.[13] Because the Debtors have failed to prove that Rushmore's conduct after

[12] Debtors do not object to the court's consideration of Exhibit "A" to the Opposition even though it was not part of the evidentiary record on the First Contempt Motion.

notice of the Plan #2 Confirmation Order was the cause of any alleged damages, an award of compensatory civil contempt sanctions under Section 105(a), or civil sanctions under the court's inherent authority, is not appropriate.[14]

2. Sanctions for Continued Violation of the Automatic Stay.

Section 362(k)(1) provides an express statutory remedy for a violation of the automatic stay. It permits individuals injured by a willful violation of the automatic stay to recover actual damages, including costs and attorney's fees, and, if appropriate, punitive damages.[15] The court previously found that Rushmore willfully violated the automatic stay commencing on December 20, 2014, when it received notice of the Debtors' bankruptcy, but continued to seek collection of the underlying debt. The court also concluded that the automatic stay expired as a matter of law on September 28, 2016, when the Debtors received their Chapter 13 discharge. For the period between December 20, 2014, and September 28, 2016, the court awarded actual damages of $100,742.10, and punitive damages of $200,000.00.

Even though the automatic stay expired on September 28, 2016, Debtors now assert that Rushmore continued to violate the stay by: (1) by not releasing the second deed of trust in

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[13] Because the Debtors have failed to demonstrate that any damages were caused by Rushmore in connection with the Plan #2 Confirmation Order, it is unnecessary to address whether Rushmore had the ability to comply with the Plan #2 Confirmation Order by releasing the lien or reconveying the second deed of trust. See Opposition at 3:12-22. Additionally, in connection with the automatic stay, the court already concluded that Rushmore willfully violated the automatic stay after it obtained knowledge of the Debtors' bankruptcy on December 20, 2014, and that it had no objectively reasonable basis for violating the discharge injunction after it received notice. Because the Debtors have failed to demonstrate any damages were caused after Rushmore received notice of the Plan #2 Confirmation Order, however, it is unnecessary to determine whether Rushmore's conduct otherwise was objectively reasonable or in bad faith in connection with that order.

[14] Because the Debtors have failed to prove that they sustained damages after receiving notice of the Plan #2 Confirmation Order, it is unnecessary to reach Rushmore's assertion that the Debtors' instant request is barred by the doctrine of laches, see Opposition at 5:8 to 6:21, or that it is not permitted by the Reopening Order. Id. at 8:7-13.

[15] Because Section 362(k)(1) provides an express statutory remedy when a creditor is determined to have willfully violated the automatic stay, it is unnecessary to apply the equitable standards for imposition of civil contempt sanctions. But see Suh v. Anderson (In re Jeong), 2020 WL 1277575, at *4 & n.3 (B.A.P. 9th Cir. Mar. 16, 2020).

compliance with the Plan #2 Confirmation Order, see Second Contempt Motion at 11:8-10 and Reply at 3:4-5, and (2) not acknowledging the stay violation until the court entered the Memorandum Decision on February 25, 2020. See Second Contempt Motion at 12:15-20 and Reply at 3:3-19. Debtors rely primarily on the circuit decision in Snowden v. Check Into Cash of Wash. Inc. (In re Snowden), 769 F.3d 651 (9th Cir. 2014). That reliance, however, is misplaced.

In Snowden, an individual debtor filed a voluntary Chapter 7 petition on January 16, 2009. She filed a motion to sanction a payday lender for willfully violating the automatic stay on April 9, 2009. She refiled her motion on May 12, 2009. The payday lender made a limited offer on May 20, 2009, to settle the motion, while denying the automatic stay violation and denying payment of any non-economic damages. Also, on May 20, 2009, Snowden received her Chapter 7 discharge. The bankruptcy court entered an order on December 10, 2009, finding that the payday lender willfully violated the automatic stay. It also required an evidentiary hearing to determine the amount of damages. After an evidentiary hearing, the bankruptcy court entered a judgment on November 17, 2010, awarding emotional distress and punitive damages, as well as attorney's fees. After an appeal and remand from the district court, the bankruptcy court entered additional findings and conclusions, and a new judgment on June 11, 2012, awarding the same amounts as the original judgment.[16]

On appeal from the district court, the Snowden panel of the Ninth Circuit issued its opinion on September 12, 2014, affirming the bankruptcy court's award of emotional distress and punitive damages for violation of the automatic stay. 769 F.3d at 657-58. The circuit court reversed on the bankruptcy court's decision to limit the amount of attorney's fees to those accrued as of the payday lender's May 20, 2009, settlement offer. The circuit panel concluded

[16] The court takes judicial notice under FRE 201 of the docket maintained in the Snowden bankruptcy proceeding by the U.S. Bankruptcy Court for the Western District of Washington. See U.S. v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980). See also Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank, 136 F.3d 1360, 1364 (9th Cir. 1998) (taking judicial notice of court filings in a state court case where the same plaintiff asserted similar claims); Bank of Am., N.A. v. CD-04, Inc. (In re Owner Mgmt. Serv., LLC Trustee Corps.), 530 B.R. 711, 717 (Bankr. C.D. Cal. 2015) ("The Court may consider the records in this case, the underlying bankruptcy case and public records.").

that the May 20, 2009 settlement offer did not end the payday lender's automatic stay violation. Id. at 660. Instead, the panel concluded that the stay violation ended on December 10, 2009, when the bankruptcy court issued its order finding that the lender willfully violated the automatic stay. Id.[17]

After Snowden was decided on September 12, 2014, the Ninth Circuit revisited the issue of the attorney's fees that may be awarded under Section 362(k). In America's Servicing Co. v. Schwartz-Tallard (In re Schwartz-Tallard), 803 F.3d 1095 (9th Cir. 2015), the circuit concluded, en banc, that reasonable attorney's fees may be recovered under Section 362(k) not only for obtaining a sanctions award from the bankruptcy court, but also for defending any appeal of the award. Id. at 1101.[18] Neither Snowden nor Schwartz-Tallard addressed what has occurred in the present case: Debtors already have been awarded sanctions under Section 362(k) for their actual damages and attorney's fees incurred before the automatic stay expired.

On the First Contempt Motion, the court awarded $100,000 to Willie for his emotional distress suffered prior to the expiration of the automatic stay. See Memorandum Decision at 52-53. Based on her testimony, no emotional distress damages were awarded to Adnette for that period. Id. at 51. Economic damages were awarded to the Debtors in the total amount of $742.10 for their out-of-pocket expenses incurred in pursuing the First Contempt Motion. Id. at

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[17] A "willful violation" of the automatic stay must be found for sanctions to be imposed under Section 362(k)(1). Snowden should not be interpreted to mean that a sanctionable violation continues simply because the responding creditor opposes relief that is sought under Section 362(k)(1). The result of such a motion may well be a finding that a stay violation occurred but that it was not willful. This court is concerned that creditors will be chilled from raising appropriate objections to a sanctions motion on the fear that additional emotional distress and attorney's fees will be sought in every instance. Moreover, Debtors assert that Rushmore continued to violate that automatic stay by "not acknowledging" the violation until the Memorandum Decision and First Contempt Order were entered on February 25, 2020. Rushmore timely appealed and presumably does not concede that it violated the automatic stay. It is not clear whether the Debtors will now assert another violation of the automatic stay as a result of that appeal.

[18] The three-judge panel in Snowden relied heavily on the three-judge panel decision in Schwartz-Tallard, 765 F.3d 1096 (9th Cir. 2014). See Snowden, 769 F.3d at 659 (majority) and 662 (concurring). A petition for rehearing en banc was granted in Schwartz-Tallard, and the circuit revisited the issues in its en banc opinion entered a year later.

54.[19] No economic damages were addressed with respect to the refinancing of the first mortgage because the First Contempt Motion did not assert a violation of the Plan #2 Confirmation Order. See Memorandum Decision at 54. Punitive damages were awarded to the Debtors in the amount of $200,000 based on Rushmore's conduct prior to the expiration of the automatic stay. Id. at 58-59.

On the First Contempt Motion, the court also awarded attorney's fees, subject to further motion brought by Debtors' counsel. See Memorandum Decision at 54-55. That Fee Motion see note 4, supra, was noticed to be heard concurrently with this instant Second Contempt Motion. (ECF No. 170). The Fee Motion seeks recovery of attorney's fees and costs for the period from November 7, 2018, through April 8, 2020, i.e., including amounts incurred after the Memorandum Decision and First Contempt Order were entered. An opposition to the requested attorney's fees was filed by Rushmore, and a reply was filed by the Debtors. (ECF Nos. 204 and 212). Any attorney's fees and costs incurred after April 8, 2020 may be sought separately, as well as those incurred in defending any such award.

As the First Contempt Motion already awarded actual and punitive damages for violation of the automatic stay before it expired on September 28, 2016, the instant Second Contempt Motion raises a separate question. Are the Debtors entitled to additional damages under Section 362(k)(1) for Rushmore's failure to release the lien under the second deed of trust after the automatic stay expired, and to acknowledge the automatic stay violation until after the First Contempt Order was entered? Based on the record, the court concludes that an award of additional damages is not warranted.

As to Rushmore's failure to release the second deed of trust, the court concluded above that the Debtors have not sufficiently proven that the alleged failure was the cause of any damages. Based on the Debtors' failure to meet their burden of proof, this conclusion would be the same even if damages occurring after expiration of the automatic stay would be permissible.

[19] The award of economic damages did not include attorney's fees or legal costs incurred by the Debtors, if any, prior to the filing of the First Contempt Motion because the Debtors never requested such items.

As to Rushmore's alleged failure to acknowledge the automatic stay violation until the First Contempt Order was entered, the court concludes that additional damages are not supported by the record. There is no dispute that the First Contempt Motion was filed on January 18, 2019. There is no dispute that Rushmore filed its opposition to the First Contempt Motion on February 8, 2019. Until that time, there is no evidence in the record that Rushmore was disputing the automatic stay violation.[20] For the period from February 8, 2019, through the entry of the First Contempt Order on February 25, 2020, no evidence was presented that the Debtors suffered any additional emotional distress or incurred additional out-of-pocket expenses that was caused by Rushmore's opposition. While Section 362(k)(1) additionally authorizes the award of punitive damages "in appropriate circumstances," such an award in this instance would appear to be nothing more than punishing Rushmore for contesting the First Contempt Motion. The court is not convinced that punitive damages authorized under Section 362(k)(1) were intended for that purpose.[21]

Finally, the court questions whether the language in Snowden would or should, in any event, authorize additional sanctions under Section 362(k)(1) after the automatic stay is

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[20] The court previously found that Rushmore received notice of the Debtors' bankruptcy proceeding on December 20, 2014 and violated the automatic stay until it expired on September 28, 2016. From September 28, 2016 to February 7, 2019, Rushmore was not contesting the automatic stay violation because the Debtors had not alleged such a violation. Compare Snowden, 769 F.3d at 659-660 ("[Creditor] contested that it violated the automatic stay and made it clear that giving [Debtor] the $1,445 was not an admission of a violation of the automatic stay. [Creditor] unsuccessfully maintained that position throughout the litigation in the bankruptcy court. [Debtor] had to proceed with the litigation to establish a violation of the automatic stay; put differently, [Debtor] had to go to court to end the stay violation . . . Because [Creditor] did not return the property it had wrongfully seized from [Debtor] on May 20, 2009, the bankruptcy court chose the wrong date to mark the end of the stay violation. The proper date is December 10, 2009, when the bankruptcy court found a violation of the automatic stay. The litigation leading up to that ruling relate[d] to [Debtor] enforcing the automatic stay and remedying the stay violation.") (citation and quotations omitted).

[21] If Rushmore's response to the First Contempt Motion, or even the instant Second Contempt Motion, is legally or factually frivolous, an appropriate remedy may be considered under FRBP 9011. See, e.g., In re Crystal Cathedral Ministries, 2020 WL 1649619, at *22-28 (Bankr. C.D. Cal. Mar. 31, 2020) (denying sanctions under FRBP 9011(b) due to failure to comply with 21-day safe harbor).

terminated. The automatic stay under Section 362(a) is designed to give an individual debtor a breathing spell from his or her creditors. See generally 3 COLLIER ON BANKRUPTCY, ¶ 362.03 (Richard Levin and Henry J. Sommer, eds., 16th Ed. 2020). Once a discharge is entered, the breathing spell afforded by the automatic stay is no longer necessary due to the effect of a bankruptcy discharge under Section 524. See 11 U.S.C. §524(a). When a debtor receives a discharge for his or her pre-petition debts under Section 727(b), a statutory injunction arises under Section 524(a)(2) that bars creditors from commencing or continuing any act to collect such debts as a personal liability of the debtor. Moreover, under Section 524(a)(1), any pre-petition or post-petition judgment against the debtor is void to the extent it determines the personal liability of the debtor for the discharged debt. Once the automatic stay expires as a result of a bankruptcy discharge, it appears that enforcing the discharge injunction provides a sufficient remedy to ensure the individual debtor's fresh start through bankruptcy.[22] This was not addressed by the circuit panel in Snowden, nor by the circuit en banc in Schwartz-Tallard, and this court is reluctant to recognize an overlapping and possibly redundant remedy.

CONCLUSION

For the reasons discussed, the court concludes that the Debtors have failed to meet their burden of proof on this Second Contempt Motion. Sanctions for violation of the Plan #2 Confirmation Order against Rushmore for civil contempt under Section 105(a) or as an independent sanction under the inherent powers of the court will not be awarded. Additionally, sanctions under Section 362(k)(1) against Rushmore for failing to release the lien under the second deed of trust against the Residence or failing to acknowledge the automatic stay violation will not be awarded.

IT IS THEREFORE ORDERED that the Motion for Contempt Against Rushmore Loan Management Services for Violation of the Courts Order Confirming Plan #2 Against Creditor, Rushmore Loan Management Services, LLC and for its Continuing Violation of the Stay and Damages for Both and to Confirm Avoidance of Rushmores Second Mortgage Under

[22] In fact, Debtors attempted to enforce the discharge injunction through their First Contempt Motion. Debtors were not awarded damages for Rushmore's discharge violation only because they failed to prove specifically when Rushmore received notice of the discharge.

FRBP 5009(d), brought by the above-captioned Debtors, Docket No. 180, be, and the same hereby is, **DENIED except as provided below**.

IT IS FURTHER ORDERED the relief previously granted by the Interim Order Regarding Motion for Contempt Against Rushmore Loan Management Services for Violation of the Courts Order Confirming Plan #2 Against Creditor, Rushmore Loan Management Services, LLC and for its Continuing Violation of the Stay and Damages for Both and to Confirm Avoidance of Rushmores Second Mortgage Under FRBP 5009(d), Docket No. 223, is **final and unaffected by the instant Order.**

Copies sent via CM/ECF ELECTRONIC FILING

Copies sent via BNC to:
WILLIE N. MOON
ADNETTE M. GUNNELS-MOON
3391 EAGLE BEND STREET
LAS VEGAS, NV 89122

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