

United States District Court
For the Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

EMPLOYMENT DEVELOPMENT DEPARTMENT, et al.,)	Case No.: 09-CV-05209-LHK
)	
Appellants,)	ORDER DISMISSING RELATED BANKRUPTCY APPEALS
)	
v.)	
)	
FRANK BERTUCCIO,)	
)	
Appellee.)	Case No.: 09-CV-05292-LHK
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CALIFORNIA CONTRACTORS STATE LICENSE BOARD, et al.,)	
)	
Appellants,)	
)	
v.)	
)	
FRANK BERTUCCIO,)	
)	
Appellee.)	Case No.: 09-CV-05454-LHK
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FRANK BERTUCCIO,)	
)	
Appellant,)	
)	
v.)	
)	
CALIFORNIA CONTRACTORS STATE LICENSE BOARD, et al.,)	
)	
Appellees.)	
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1 Presently before the Court are appeals in three related bankruptcy proceedings. All three
2 appeals stem from Frank Bertuccio's 2004 Chapter 13 bankruptcy petition. Prior to filing for
3 bankruptcy, Bertuccio's contractor's license was suspended due to an unpaid employment tax
4 liability. After extensive litigation, trial, and post-trial briefing, the Bankruptcy Court ruled that the
5 Employment Development Department (EDD) and the California Contractors State License Board
6 (CSLB) violated the automatic stay provision of the Bankruptcy Code by refusing to reinstate
7 Bertuccio's contractor's license for twenty-four days despite notice of Bertuccio's filing for
8 bankruptcy. The Bankruptcy Court, however, also ruled that Bertuccio failed to show any damages
9 in connection with the relatively brief refusal to reinstate his contractor's license. Finally, the
10 Bankruptcy Court denied attorney's fees under recent Ninth Circuit precedent and the equitable
11 doctrine of unclean hands.
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14 In these appeals, the EDD and the CSLB (collectively "Defendants") appeal the ruling in
15 connection with the finding of a violation of the automatic stay provision, while Bertuccio appeals
16 the ruling in connection with damages and attorney's fees. The Court affirms the Bankruptcy
17 Court's decision on all three issues.

18 I. BACKGROUND

19 A. Factual Background

20 The underlying facts are not in dispute. In 1995, the CSLB issued Bertuccio a contractor's
21 license, as the sole owner of business named "European Hardwood Floors Design & Interiors," to
22 install flooring.¹ On June 25, 2003, the EDD informed the CSLB that Bertuccio was in violation of
23 California state law for failing to pay \$34,517.46 in employment taxes. On June 26, 2003, the
24 CSLB sent Bertuccio a letter advising him of the unpaid employment taxes and the potential
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27 ¹ In his application for a contractor's license, Bertuccio filed a statement under penalty of
28 perjury that he had *never* been convicted of a crime. This statement took on greater salience in the
Bankruptcy Court's 2008 trial, which revealed that Bertuccio had actually been convicted of
numerous crimes at the time he applied for a contractor's license. *See below.*

1 suspension of his contractor's license if the tax default was not corrected by August 26, 2003. On
2 August 26, 2003, after Bertuccio failed to respond to the notice of tax default, the CSLB suspended
3 Bertuccio's contractor's license solely for failing to resolve the outstanding tax liability owed to the
4 EDD in accordance with California Business & Professions Code §7145.5 ("Failure to resolve
5 outstanding liabilities as grounds for refusal to renew license").
6

7 While his license was suspended, Bertuccio continued to operate his business. At trial,
8 Bertuccio initially insisted that he only continued selling flooring materials, which does not require
9 a license, as opposed to installing flooring materials, which does require a license. However, the
10 Bankruptcy Court found, based on evidence submitted by Bertuccio, that Bertuccio entered into
11 contract for floor installation in October 2004.² Bertuccio eventually acknowledged that he entered
12 into these contracts on the belief that his contractor's license would be reinstated in light of his
13 Chapter 13 bankruptcy filing.
14

15 On October 7, 2004, some thirteen months after his license suspension, Bertuccio filed for
16 Chapter 13 bankruptcy. Counsel for Bertuccio sent notice of the bankruptcy petition to the CSLB
17 on October 8, 2004, and requested that the CSLB reinstate Bertuccio's license. Six days later, on
18 October 14, 2004, the CSLB relayed Bertuccio's request to the EDD. The EDD, however, declined
19 the request to reinstate Bertuccio's license. On October 18, 2004, counsel for Bertuccio called the
20 EDD directly, and again requested a reinstatement of Bertuccio's license. In response, the EDD
21 asked whether Bertuccio's Chapter 13 bankruptcy plan required use of the contractor's license, as
22 it was not clear to the EDD that Bertuccio needed the license to fund the plan. On November 1,
23 2004, counsel for Bertuccio called to advise the CSLB that she would be filing a motion for an
24 injunction requiring reinstatement of Bertuccio's license. After receiving this information from
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27 ² According to the Bankruptcy Court, the contracts were initially brought into evidence by
28 Bertuccio as evidence of the alleged damages he sustained as a result of the refusal to reinstate his
contractor's license. The Bankruptcy Court found, through evidence presented at trial, that the
contracts were both entered into, and cancelled, *prior* to the Chapter 13 petition.

1 counsel, an EDD representative sent CSLB an e-mail authorizing the release of the license to
2 Bertuccio. The CSLB reinstated Bertuccio's contractor's license on November 1, 2004.

3 Also on November 1, 2004, Bertuccio commenced an adversary proceeding in Bankruptcy
4 Court, asserting damages under the automatic stay provision of the Bankruptcy Code on the ground
5 that his license was not restored immediately after notification of his bankruptcy petition. While
6 his bankruptcy action was pending, Bertuccio filed an application for a corporate license under the
7 name "European Floor Coverings, Inc." At trial, Bertuccio testified that this application was
8 denied because his contractor's license had been suspended.
9

10 The Bankruptcy Court held a trial on February 13 and 15, 2008. During the course of the
11 2008 trial, the CSLB learned that Bertuccio had lied on his original application for a contractor's
12 license, as well as on his subsequent applications for corporate contractor's licenses. Specifically,
13 Bertuccio failed to disclose several criminal convictions extending between 1984 and 1999. On
14 April 11, 2008, the CSLB held a hearing regarding revocation of Bertuccio's contractor's license in
15 light of Bertuccio's failure to disclose his extensive criminal record. On June 2, 2008, the CSLB
16 issued a final decision revoking Bertuccio's license, with a one-year ban on reapplying for a
17 reissuance or reinstatement.
18

19 On December 31, 2008, the Bankruptcy Court issued a decision ruling that Defendants, by
20 refusing to reinstate Bertuccio's contractor's license, violated the automatic stay provision. *See In*
21 *re Bertuccio*, 414 B.R. 604 (Bankr. N.D. Cal. 2008) ("*Bertuccio I*"). In that same decision,
22 however, the Bankruptcy Court also ruled that Bertuccio had failed to establish any damages. On
23 October 20, 2009, after the parties were given an opportunity to fully brief the remaining issues of
24 attorney's fees and costs, the Bankruptcy Court denied Bertuccio's request for attorney's fees and
25 costs. *See In re Bertuccio*, 2009 Bankr. LEXIS 3302 (Bankr. N.D. Cal. Oct. 15, 2009) ("*Bertuccio*
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1 *IT*'). The Bankruptcy Court entered final judgment on October 28, 2009. *See* October 28, 2009
2 Judgment, Case No. 04-56255, Adversary No. 04-5524.

3 **B. Procedural History in District Court**

4 For each of these related cases, the notice of appeal from Bankruptcy Court was filed in
5 November 2009. On June 11, 2010, the Honorable James Ware granted the parties' stipulation to
6 consolidate briefing and extend deadlines for the briefing schedule. Pursuant to the parties' own
7 stipulation, opening briefs would be due by September 28, 2010, responsive briefs would be due by
8 October 29, 2010, and reply briefs would be due by December 3, 2010. Without an Order
9 approving the parties' stipulation, opening briefs would have been due in mid-July, respondent
10 briefs would have been due 21 days later, and reply briefs would have been due 14 days after
11 service of respondent briefs. *See* Local Bankruptcy Rule 8010-1.

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14 These cases were reassigned to this Court on August 2, 2010. On September 28, 2010, the
15 same day as the deadline for filing opening briefs, the parties filed yet another stipulation agreeing
16 to further extension of briefing deadlines. In violation of Civil Local Rule 6-2, however, the
17 parties did not set forth with particularity the reasons for the requested extension of time. In fact,
18 the parties provided no reason at all. Accordingly, the Court denied the parties' request at that
19 time. *See* September 29, 2010 Order Denying Request [dkt. #16]. After the parties provided
20 additional reasons for seeking an extension, the Court granted an extension, in which briefing
21 would be complete by December 2010. *See* October 1, 2010 Order Granting Extension as
22 Modified [dkt. #18]. The parties complied with that latter schedule, and briefing is now complete.³

23
24 **II. STANDARDS OF REVIEW**

25 The Court reviews the Bankruptcy Court's factual findings for clear error and its legal
26 conclusions *de novo*. *See In re Tucson Estates*, 912 F.2d 1162, 1166 (9th Cir. 1990). Thus, the

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28 ³ Pursuant to the Northern District's Bankruptcy Local Rules, unless otherwise noted, a
matter is deemed submitted for decision upon completion of the briefing. *See* B.L.R. 8010-1(b).

1 Court reviews the Bankruptcy Court's legal decisions regarding the automatic stay *de novo*. *Berg v.*
2 *Good Samaritan Hosp.*, 198 B.R. 557, 560 (9th Cir. BAP 1996), *aff'd sub. nom In re Berg*, 230
3 F.3d 1165 (9th Cir. 2000).

4 The Bankruptcy Court's assessment of damages under § 362(h) is reviewed for an abuse of
5 discretion. *See In re Miller*, 262 B.R. 499, 503 (9th Cir. BAP 2001). The Bankruptcy Court's
6 decision with respect to attorney's fees and costs is also reviewed for abuse of discretion or
7 erroneous application of the law. *See In re Dawson*, 390 F.3d 1139, 1145 (9th Cir. 2004).

9 III. DISCUSSION

10 There are three issues on appeal. First, whether Defendants violated the automatic
11 stay provision by refusing to reinstate Bertuccio's contractor's license despite notice of the Chapter
12 13 bankruptcy petition? Second, whether Bertuccio was entitled to damages as a result of the
13 violation of the automatic stay? Third, whether Bertuccio's counsel was entitled to attorneys' fees
14 and costs as a result of the violation of the automatic stay?
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16 As explained below, the Court affirms the well-reasoned opinion of the Bankruptcy Court
17 with respect to all three issues.

18 A. Violation of the Automatic Stay Provision of the Bankruptcy Code⁴

19 At the time Bertuccio initiated his adversary proceeding, the automatic stay provision of the
20 Bankruptcy Code provided:
21

22 Except as provided in subsection (b) of this section, a petition filed under section
23 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the
24 Securities Investor Protection Act of 1970, operates as a stay, applicable to all
25 entities, of--

26 (1) the commencement or continuation, including the issuance or employment of
27 process, of a judicial, administrative, or other action or proceeding against the
28 debtor that was or could have been commenced before the commencement of the

⁴ Unless otherwise noted, all references to the Bankruptcy Code refer to code provisions in effect at the time Bertuccio initiated the underlying adversary proceeding in October 2004.

1 case under this title, or to recover a claim against the debtor that arose before the
2 commencement of the case under this title;

3 11 U.S.C. §362(a)(1).⁵ An individual injured by a “willful violation” of the stay may seek
4 damages, including costs and attorneys’ fees. 11 U.S.C. §362(h). As summarized by the
5 Bankruptcy Court, “[a] party seeking damages for violation of the automatic stay must prove by a
6 preponderance of the evidence that (1) a bankruptcy petition was filed; (2) the debtor is an
7 individual; (3) the creditor received notice of the petition; (4) the creditor’s actions were in willful
8 violation of the stay; and (5) the debtor suffered damages.” See *In re Bertuccio*, 414 B.R. 604, 611
9 (Bankr. N.D. Cal. 2008) (citing *In re Henry*, 328 B.R. 664, 667 (Bankr. E.D.N.Y. 2005). The
10 parties hotly dispute whether the EDD’s and CSLB’s actions were “willful,” and whether Bertuccio
11 suffered any damages.⁶

12 The Bankruptcy Court ruled that, under the automatic stay provision, Defendants had an
13 “affirmative duty” to reinstate Bertuccio’s license upon notice of his bankruptcy filing. Defendants
14 challenge the Bankruptcy Court’s ruling on three grounds, arguing that: (1) there was no “post-
15 petition affirmative act” in violation of the automatic stay; (2) the “police power” exception to the
16 automatic stay applies in these circumstances; and (3) Bertuccio was not entitled to the stay
17 because he never had a right to the contractor’s license since he lied about his criminal history on
18 his license application. As explained below, none of the three arguments is ultimately persuasive.

19 **1. Post-petition Affirmative Act**

20 “An award of actual damages under Section 362(h) requires a showing by the debtor that
21 she sustained an injury from a ‘willful’ violation of the stay. A ‘willful violation’ does not require

22 ⁵ As the Bankruptcy Court noted, Section 362 was substantially amended by the
23 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (the “BAPCA”). Importantly,
24 the BAPCA expressly amended Section 362 to limit automatic stays in numerous circumstances,
25 including “with respect to the withholding, suspension, or restriction of a driver’s license, a
26 *professional or occupational license*, or a recreational license.” See 11 U.S.C. §362(b)(2)(D)
(emphasis added). This narrowing of the automatic stay requirement would, presumably, have
27 negated Bertuccio’s adversarial proceeding, a proceeding solely based on the refusal to reinstate his
28 professional contractor’s license. However, Bertuccio’s adversary proceeding was filed in October
2004, prior to the enactment of BAPCA, and thus the amendments are not controlling in his action.

⁶ There is no dispute that the first three elements are satisfied. Bertuccio, an individual,
filed a Chapter 13 bankruptcy petition on October 7, 2004. In seeking reinstatement of the
contractor’s license, counsel for Bertuccio notified both the CSLB and the EDD of the filing.

1 specific intent to violate the automatic stay. A violation of the automatic stay is ‘willful’ if 1) the
2 creditor knew of the stay and 2) the creditor’s actions, which violated the automatic stay, were
3 intentional.” *See In re Roman*, 283 B.R. 1, 7-8 (9th Cir. BAP 2002) (internal citations omitted).
4 “Once a creditor knows that the automatic stay exists, the creditor bears the risk of all intentional
5 acts that violate the automatic stay regardless of whether the creditor means to violate the
6 automatic stay.” *See In re Champion*, 294 B.R. 313, 318 (9th Cir. BAP 2003).

7 Defendants argue that they did not actively seek collection of the tax liability after receiving
8 notice of Bertuccio’s filing for Chapter 13 bankruptcy. The August 26, 2003 *pre-petition*
9 suspension of Bertuccio’s contractor’s license was not a violation of the stay. Instead, the issue is
10 whether Defendants’ refusal to reinstate the suspended license, after notice of Bertuccio’s Chapter
11 13 petition, is a continuation of an action against a debtor to recover a claim that arose before the
12 bankruptcy filing. *See* 11 U.S.C. §362(a)(1). In these circumstances, the answer is a clear yes.

13 The automatic stay provision, § 362(a)(1), plainly states that “the commencement or
14 *continuation*, including the issuance or employment of process, of a judicial, administrative, or
15 other action or proceeding against the debtor that was or could have been commenced before the
16 commencement of the case under this title, or to *recover a claim against the debtor that arose*
17 *before the commencement of the case* under this title” falls under the automatic stay. 11 U.S.C.
18 §362(a)(1) (emphasis added). It is undisputed that the pre-petition suspension of Bertuccio’s
19 contractor’s license was based on Bertuccio’s failure to pay employment taxes.⁷ The Bankruptcy
20 Court found, and it is also uncontested, that Bertuccio’s license would have been promptly
21 reinstated had he paid the taxes owed to the EDD. By denying Bertuccio’s request for
22 reinstatement of his license, Defendants affirmatively acted in continuation of an action to recover
23 on a claim, and thus violated the automatic stay provision. *See Eskanos & Adler, P.C. v. Leetien*,
24 309 F.3d 1210, 1215 (9th Cir. 2002) (holding that “§ 362(a)(1) imposes an affirmative duty to
25 discontinue post-petition collection actions.”).

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27 ⁷ The EDD does suggest that “[f]ailure to pay a tax was not *per se* the sole basis for
28 suspending Bertuccio’s contractor’s license.” *See* EDD Appellant’s Opening Brief at 12. This
statement, however, is in the context of arguing for the “police powers” exception to the automatic
stay provision, an argument more fully addressed below.

1 The “public policy” test distinguishes between those proceedings that effectuate public
2 policy and those that adjudicate private rights. *Universal Life*, 128 F.3d at 1297; *In re*
3 *Charter First Mortg., Inc.*, 42 B.R. 380, 383 (Bankr. D. Or. 1984). Under the latter test, the
4 court considers whether the administrative agency is exercising legislative, executive, or
5 judicial functions. *In re Poule*, 91 B.R. 83, 86 (9th Cir. BAP 1988). “Where the agency’s
6 action affects only the parties immediately involved in the proceedings, it is exercising a
7 judicial function and the debtor is entitled to the same protection from the automatic stay as
8 if the proceeding were being conducted in a judicial form.” *Id.*

9 *In re Dunbar*, 235 B.R. at 471.

10 Defendants argue that both the pecuniary purpose and public policy tests are satisfied
11 because the employment taxes assessed on Bertuccio would eventually go toward instruments like
12 the State Unemployment Insurance fund, the State Unemployment Disability Insurance fund, and
13 Employment Training Taxes, all of which benefit the public. The Court rejects Defendants’
14 arguments, and agrees with the Bankruptcy Court that neither “police powers” exception to the
15 automatic stay is satisfied. *See, e.g., In re PMI-DVW Real Estate Holdings, L.L.P.*, 240 B.R. 24, 31
16 (Bankr. D. Ariz. 1999) (noting that the “police powers” exception “allows a governmental unit to
17 pursue actions to protect public health and safety, however Congress intended this exception to be
18 given a narrow construction”).

19 With respect to the pecuniary purpose test, the Bankruptcy Court properly determined,
20 based on the evidence before it, that the suspension of Bertuccio’s license was solely pecuniary.
21 Bertuccio’s license was not suspended based on any determination of fraud, public safety, or
22 welfare, but was instead suspended solely for failure to pay taxes. Indeed, Bertuccio’s license
23 would have been promptly reinstated had he paid the taxes owed to the EDD. *See Bertuccio I* at
24 616-17 (citing Notice of Suspension to Bertuccio, which stated: “This suspension *will be* lifted
25 when you submit proof from the [EDD] that the liability has been satisfied. Thus, the Debtor
26 needed to do nothing more than pay the debt owing to the EDD.”). Moreover, the EDD admitted
27 that it required review of the debtor’s plan before making its decision on releasing the suspension
28 because it wanted to ensure its claims would be paid under the plan. *See id.* Finally, as soon as the
EDD authorized the CSLB to remove the suspension, the CSLB did so without question and
without inquiry into Bertuccio’s qualifications. As the Bankruptcy Court aptly summarized: “It
was simply a matter of owing back taxes. It is clear, therefore, that the continued suspension of

1 [Bertuccio's] license was done solely to advance the pecuniary interests of the EDD." *Id.* at 617;
2 *compare In Re Poule*, 91, B.R. 83 (9th Cir. BAP 1988) (finding legitimate police power exception
3 where reason for suspension of debtor's license involved undisputed findings of "willful
4 misconduct and fraudulent activities" against customers).

5 The Bankruptcy Court also properly determined that Defendants' actions did not satisfy the
6 public policy test. As stated by the Ninth Circuit Bankruptcy Appellate Panel: "The purpose of
7 [the California Contractor's License Law] is 'to guard the public against the consequences of
8 incompetent workmanship, imposition, and deception.'" *See In Re Poule*, 91 B.R. at 87 (citing
9 *Asdourian v. Araj*, 38 Cal. 3d 276, 282, 211 Cal. Rptr. 703, 696 P.2d 95 (1985)); *see also Chao v.*
10 *Hosp. Staffing Servs. Inc.*, 270 F.3d 374, 389 (6th Cir. 2001) ("the public policy test calls upon
11 courts to analyze whether a particular lawsuit is undertaken by a governmental entity in order to
12 effectuate public policy or, instead, to adjudicate private rights."). Defendants' suspension of
13 Bertuccio's license in August 2003 did not implicate the public interests of preventing incompetent
14 workmanship or fraud. Instead, the suspension was simply a means of collecting a tax, and was
15 completely unrelated to the debtor's qualifications or competence.⁸ In these circumstances, where
16 the reason underlying the suspension had nothing to do with the public policy interests of the
17 California Contractor's License Law (e.g., protection of the public against incompetent, deceptive,
18 or fraudulent conduct), the public policy exception to the automatic stay provision is not satisfied.

19 **3. Bertuccio's Entitlement to Reinstatement of License**

20 Defendants argue that Bertuccio's failure to disclose his prior criminal convictions on his
21 contractor's license application nullifies the basis for a violation of the automatic stay. Both state
22 entities assert that Bertuccio *likely* would not have received his contractor's license if the prior
23 convictions had been revealed. Thus, Defendants contend that Bertuccio lacks standing, as his
24 contractor's license was void *ab initio*. Moreover, Defendants repeatedly suggest that "the
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27 ⁸ As the Bankruptcy Court noted, not until the trial in February 2008 did Defendants
28 become aware of Bertuccio's criminal history and misrepresentations on his license application.
See Bertuccio I at 617 n.44. In August 2003, the sole reason for Bertuccio's suspension was the
tax debt owed to the EDD.

1 equities” in this case do not support the Bankruptcy Court’s determination that Bertuccio “was
2 entitled to relief.” *See, e.g.*, EDD Appellant’s Opening Brief in Case No. 09-cv-5209-LHK at 19.

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4 Defendants are incorrect that Bertuccio’s bad acts, discovered four years after the license
5 suspension, negate the fact that the EDD and CSLB willfully violated the automatic stay.⁹ The
6 Ninth Circuit’s decision in *Southwest Adm’rs, Inc. v. Rozay’s Transfer*, 791 F.2d 769 (9th Cir.
7 1986) is instructive. The *Southwest* court distinguished between two types of misrepresentations:
8 fraud in the inducement and fraud in the execution. *Id.* at 774. Fraud in the inducement occurs
9 when a misrepresentation is used to induce a party to assent to something she otherwise would not
10 have, while fraud in the execution arises when an agreement is executed without knowledge, or a
11 reasonable opportunity to obtain knowledge, of its character or its essential terms. *Id.* The Ninth
12 Circuit held that “fraud in the execution results in the agreement being void *ab initio*, whereas
13 fraud in the inducement makes the transaction merely voidable.” *Id.* Here, the application was
14 evaluated by the CSLB, who had ample opportunity to investigate. There is no indication by any
15 of the parties that Bertuccio’s criminal record was difficult to locate, or did not appear in the
16 standard databases utilized for such information. Furthermore, while it is true that the CSLB *may*
17 *have* denied Bertuccio’s application if his criminal convictions were disclosed, the evidence
18 presented to the Bankruptcy Court did not establish with certainty that his application would have
19 been denied. For this Court to find that a denial would have been certain calls for speculation
20 inappropriate on an appeal.¹⁰ Thus, the debtor’s fraud lies within the category of fraud in the
21 inducement, making the license voidable. As the license is not clearly void *ab initio*, there is no

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23 ⁹ The Court notes that whether Defendants violated the automatic stay provision is a
24 separate and distinct question from whether Bertuccio is entitled to relief for the violation.
25 Conflating these two questions, Defendants mischaracterize the bankruptcy’s decision as
26 determining that Bertuccio was “entitled to relief.” In fact, just the opposite is true: the Bankruptcy
27 Court *denied* Bertuccio his requested relief of damages and attorney’s fees and costs. *See, e.g.*,
28 *Bertuccio I* at 625 (ruling that Bertuccio failed to establish any damages) and *Bertuccio II* at *27-
28 (denying Bertuccio attorney fees and costs under doctrine of “unclean hands”).

¹⁰ It is notable that the June 2, 2008 decision of the CSLB revoking Bertuccio’s license
included a one-year ban on reapplying for a reissuance or reinstatement of the contractor’s license.
See Bertuccio I at 610. This leaves open the possibility, however unlikely given his criminal
history, that Bertuccio may apply for a reissuance of reinstatement of a contractor’s license.

1 merit to Defendants' claim that there is no actual case or controversy because Bertuccio lacks
2 standing.

3 Defendants protest that the Bankruptcy Court did not fully consider two arguably similar
4 cases. In the first case, *In re Feature Homes, Inc.*, 116 B.R. 731 (Bankr. E.D. Cal. 1990), the
5 debtor was a corporation whose corporate status was suspended for failure to pay taxes. The
6 *Feature Homes* Bankruptcy Court refused to construe the State's refusal to issue a certificate of
7 revivor as an affirmative action violating the automatic stay. *Feature Homes*, however, is
8 distinguishable in significant respects. Most importantly, the *Feature Homes* court conducted no
9 analysis regarding whether the State's conduct was an affirmative act violating the automatic stay
10 provision because it had absolutely no tangible impact upon the debtor's business. *See Feature*
11 *Homes*, 116 B.R. at 733. Moreover, the *Feature Homes* court reserved the possibility to compel a
12 revivor if the suspension ever became necessary for the debtor's continued business operations. *Id.*
13 Here, it is undisputed that Bertuccio sought reinstatement of his contractor's license in order to
14 continue his business operations. Consequently, Defendants' argument that *Feature Homes* is
15 somehow dispositive of the present case is unpersuasive.

16 The second case cited by Defendants, *In re Kimsey*, 263 B.R. 244 (Bankr. E.D. Ark. 2001),
17 dealt with a debtor whose driver's license was suspended due to unpaid fines for traffic violations.
18 The *Kimsey* Bankruptcy Court held that the State was not in violation of the automatic stay when it
19 refused to lift the suspension of the driver's license. However, as the Bankruptcy Court reasoned
20 below, the suspension in *Kimsey* involved express issues of public safety and punishment, thus
21 distinguishing it from Bertuccio's suspension based solely on a tax debt. *See also In re Thomas*,
22 2007 Bankr. LEXIS 1320, *9 (Bankr. N.D. Cal. Apr. 5, 2007) (distinguishing *Kimsey* as a case
23 involving refusal to reinstate license in order to enforce traffic laws as a matter of public safety,
24 rather than for any financial reasons).

25 In sum, on *de novo* review, the Court affirms the Bankruptcy Court's ruling that Defendants
26 violated the automatic stay provision of the Bankruptcy Code by refusing to reinstate Bertuccio's
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1 contractor's license for twenty-four days despite actual notice of Bertuccio's bankruptcy petition.
2 The Court now turns to the issues of damages and attorney's fees, respectively.

3 **B. Damages**

4 Upon a finding of a willful violation of the automatic stay provision, a debtor is "entitled to
5 an award of actual damages, costs, and attorney fees to the extent she was injured by the 'willful
6 violation.'" *See In re Taylor*, 884 F.2d 478, 483 (9th Cir. 1989). "Section 362(h) provides little
7 guidance regarding the applicable standards for awarding actual damages. Nonetheless, most courts
8 apply a reasonableness analysis. Section 362(h) 'requires that the injured party be awarded the
9 entire amount of actual damages *reasonably incurred* as a result of a violation of the automatic
10 stay.'" *See In re Roman*, 283 B.R. at 11. On appeal, Bertuccio challenges the Bankruptcy Court's
11 ruling that he did not establish any actual damages as a result of the violation of the automatic stay
12 provision for the twenty-four day period between October 7, 2004 and November 1, 2004.

13 The Court's review of the record reveals no abuse of discretion in the Bankruptcy Court's
14 damages ruling. Bertuccio offered three forms of evidence to prove lost profits. *See Bertuccio I* at
15 621-25. First, Bertuccio submitted two flooring installation contracts from October 4 and 7, 2004,
16 alleging lost profits of about \$14,000. However, as the Bankruptcy Court determined at trial, both
17 contracts were entered into and cancelled *before* Bertuccio's bankruptcy petition was even filed.
18 *Id.* No evidence was presented to show why the two contracts were cancelled. Thus, the
19 cancellation of these two contracts could not have been due to the automatic stay violation because
20 the contracts were cancelled before Bertuccio even filed for bankruptcy.

21 Second, Bertuccio testified that he averaged a net profit of \$40,000 per month for the
22 installation component of his business before his license was suspended in August 2003. However,
23 Bertuccio's credibility was severely impeached at trial, and he offered absolutely no documentary
24 evidence or business records, such as accounting records identifying income and expenses, of any
25 kind in support of his testimony of income. Moreover, Bertuccio's testimony related to alleged
26 earnings prior to the suspension of his license in August 2003. At the time of the October 2004
27 bankruptcy filing, Bertuccio had not installed flooring in over a year. Although courts have
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1 recognized that lost profits are “necessarily an estimate” and need not be shown with
2 “mathematical precision,” Bertuccio failed to provide any support to his testimony of lost income.
3 *See, e.g., Humetrix, Inc. v. Gemplus S.C.A.*, 268 F.3d 910, 919 (9th Cir. 2001) (although lost profits
4 are “necessarily an estimate,” an appellate court may uphold an award of damages that is supported
5 by substantial evidence).

6 On appeal, Bertuccio downplays his lack of credibility by stating that: “the record shows
7 that, at the trial of this matter, [Bertuccio] testified truthfully, including *truthful testimony about his*
8 *prior lies* on his application for the license.” *See* Bertuccio Reply Brief in Case No. 09-cv-05454-
9 LHK at 5 (emphasis added). This odd argument has no merit, and misrepresents Bertuccio’s
10 actions at trial. Even at the 2008 trial, Bertuccio first lied about having a criminal record, and then
11 only admitted his extensive criminal history after cross-examination by Defendants’ counsel in
12 open court. In any event, the Bankruptcy Court did not abuse its discretion in deciding not to rely
13 solely on Bertuccio’s testimony, unsupported by any documentary or accounting records, with
14 respect to lost income.

15 Finally, Bertuccio also submitted a telephone log of potential customer calls between
16 October 8, 2004 and October 31, 2004. The phone log, however, did not differentiate between
17 calls for potential installation projects and other projects. Furthermore, the Bankruptcy Court
18 found that “many of the calls” related to materials sales and inquiries regarding warranties for past
19 installations. *See Bertuccio I* at 624-25. The Bankruptcy Court did not exceed its discretion by
20 determining that such speculative evidence does not establish actual damages with respect to
21 Bertuccio’s potential installation projects.

22 Thus, the Court can no discern no abuse of discretion in the Bankruptcy Court’s ruling that
23 Bertuccio failed to establish actual damages.

24 **C. Attorneys’ Fees and Costs**

25 In addition to seeking damages, a debtor is expressly allowed to seek costs and attorneys’
26 fees under Section 362(h). In determining the appropriate amount of attorneys’ fees, “the court
27 looks to two factors: ‘(1) what expenses or costs resulted from the violation and (2) what portion of
28

1 those costs was reasonable, as opposed to the costs that could have been mitigated.” *See In re*
2 *Roman*, 283 B.R. at 12. Under recent Ninth Circuit authority, however, attorneys’ fees and costs
3 recoverable for violations of the automatic stay are limited to work performed prior to the
4 remedying of the stay violation. *See Sternberg v. Johnston*, 595 F.3d 937, 949 (9th Cir. 2009)
5 (actual damages *include* attorney’s fees incurred seeking to enforce the automatic stay, but *do not*
6 *include* attorney’s fees incurred in prosecuting the adversary proceeding to obtain damages).
7 Finally, a court may consider the equitable doctrine of “unclean hands” in evaluating requests for
8 attorneys’ fees and costs in relation to a bankruptcy proceeding. *See In re Gustafson*, 111 B.R. 282
9 (9th Cir. BAP 1990), *overruled on other grounds by In re Gustafson*, 934 F.2d 216 (9th Cir. 1991).

10 In light of *Sternberg*, the Bankruptcy Court took a two-prong approach to deciding
11 attorneys’ fees for this case. First, the Bankruptcy Court denied the bulk of attorneys’ fees and
12 costs because, on counsel for Bertuccio’s own account, only \$4,084.75 of the fees sought were
13 incurred prior to reinstatement of Bertuccio’s license on November 1, 2004. *See Bertuccio II* at
14 *21. The Bankruptcy Court denied the fees incurred after reinstatement of the license, fees which
15 amounted to \$28,177, as unrecoverable under *Sternberg*. *See id.* at *22. Second, the Bankruptcy
16 Court denied the remainder of attorneys’ fees (the \$4,084.75) on the basis of Bertuccio’s bad faith
17 actions (“unclean hands”).

18 This Court finds that the Bankruptcy Court did not abuse its discretion in either respect.
19 The Ninth Circuit, in *Sternberg*, directly addressed the question of attorney’s fees incurred to
20 obtain damages (as opposed to those incurred seeking to enforce the automatic stay), and answered
21 that those fees are not recoverable. Although noting that *Sternberg* “weakens substantially the
22 effectiveness of the automatic stay,” the Bankruptcy Court found itself bound, as this Court is also
23 bound, to follow direct Ninth Circuit authority. Thus, the Bankruptcy Court properly found that
24 the fees incurred after reinstatement of Bertuccio’s license are not recoverable.¹¹

25
26 ¹¹ In *Sternberg*, the Ninth Circuit clarified that it was not considering the civil contempt
27 authority of a bankruptcy court, and was not limiting the availability of contempt sanctions,
28 including attorney’s fees, as an option where otherwise appropriate. *See* 595 F.3d at 946 n.3.
Counsel for Bertuccio suggests that the Court remand to the Bankruptcy Court the issue of whether
attorney’s fees are appropriate as a “civil contempt sanction.” *See Bertuccio Reply in Case No. 09-*
cv-5454-LHK at 3. The Court declines to remand on that basis. The Bankruptcy Court could have

