

1 Violation of automatic stay  
2 Civil contempt sanctions  
3 Federal Debt Collection Practices Act  
(FDCPA)  
4 Court's jurisdiction

5 Stoiber v. Galpern, Adversary No. 08-6052-fra  
6 Mark Stoiber, Case No. 07-61157-fra7

7 6/18/2008 FRA Unpublished

8 After the Debtor had filed his chapter 7 bankruptcy  
9 petition, his ex-wife filed a motion in state court asking that  
10 Debtor be found in contempt for, among other things, the failure  
11 to pay attorneys fees which had been awarded to her by the court  
12 (prior to Debtor's petition date). Debtor was thereafter given a  
13 discharge in bankruptcy and his case closed.

14 Debtor shortly afterward reopened his bankruptcy case and  
15 filed this adversary proceeding seeking civil sanctions against  
16 his ex-wife's attorney (the Defendant herein) for violation of  
17 the automatic stay and for damages under the FDCPA. Defendant  
18 filed a motion for summary judgment, arguing that the state court  
19 had exclusive jurisdiction over the matter, as the state-court  
20 motion for sanctions and Plaintiff's defense (i.e. automatic  
21 stay) had not been removed to the Bankruptcy Court. As for the  
22 substantive issue of violation of the automatic stay, Defendant  
23 submitted that neither he nor his client had knowledge of the  
24 bankruptcy filing at the time the motion was filed in state  
25 court.

26 The Bankruptcy Court dismissed the jurisdictional argument.  
The holding in In re Gruntz, 202 F.3d 1074 (9th Cir. 2002) is  
clear that only the Bankruptcy Court has jurisdiction to  
determine the extent of the automatic stay.

The Bankruptcy Court reviewed the submissions by the parties  
and took judicial notice of the Debtor/Plaintiff's bankruptcy  
case. Debtor had listed neither the Defendant nor his ex-wife in  
the schedules filed with his bankruptcy case. It was not until  
after the motion in state court was filed that Debtor filed an  
amended mailing matrix and mailed a notice of the bankruptcy  
filing to Defendant. As Defendant had no prior knowledge of the  
automatic stay, the Court would not impose civil sanctions for  
its violation. As the Bankruptcy Code provides the exclusive  
remedy for violation of the automatic stay, and the claim under  
the FDCPA was based entirely on collection of a debt in violation  
of the automatic stay, Debtor's claim under the FDCPA likewise  
failed. Walls v. Wells Fargo Bank, N.A., 276 F.3d 502 (9th Cir.  
2002).

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UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

IN RE	)	
	)	
MARK JEFFERY STOIBER,	)	Case No. 07-61157-fra7
	)	
Debtor.	)	
_____	)	
MARK JEFFERY STOIBER,	)	
	)	
Plaintiff,	)	Adv. Proc. No. 08-6052-fra
	)	
vs.	)	
	)	
CRAIG S. GALPERN,	)	
	)	
Defendant.	)	MEMORANDUM OPINION
_____	)	

Plaintiff, the Debtor herein, filed a document entitled "Chapter 7 Order RE: Debtor(s) Motion and Order to Show Cause Re: Contempt," which seeks damages for violation of the automatic stay and for violation of the Fair Debt Collection Practices Act (FDCPA). It was interpreted by the Court as a complaint seeking a money judgment and gave rise to this adversary proceeding. Defendant filed a motion for summary judgment to which the Plaintiff filed a response. As neither party asked for a

1 hearing, and the Court does not find one to be warranted, the  
2 matter will be decided on the present record without oral  
3 argument. For the reasons that follow, Defendant's motion for  
4 summary judgment will be granted.

5 BACKGROUND

6 Debtor's Bankruptcy

7 Debtor filed bankruptcy under chapter 7 on April 30, 2007.  
8 On February 25, 2008, the Debtor filed a "Notice of Amended  
9 Schedules and Amended Schedule(s) Matrix." On March 6, 2008, an  
10 Order of Discharge was entered and the case was closed. On March  
11 17, 2008, the Debtor filed a Motion to Reopen Chapter 7 Case and  
12 filed a complaint against the Defendant on March 17, 2008. On  
13 March 26, 2008, the Debtor filed a complaint against the  
14 Defendant's client (and creditor of the Debtor), Leisa Preboski  
15 ("Preboski").

16 Complaint

17 The Plaintiff filed an affidavit with his Complaint in which  
18 he alleges that the Defendant sought to recover debts which were  
19 subject to discharge in violation of the automatic stay, by  
20 filing legal action in the Circuit Court of the State of Oregon  
21 for Jackson County.<sup>1</sup> He seeks punitive damages and attorney fees  
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24 <sup>1</sup> Defendant's client, Leisa Preboski, fka Leisa Stoiber, filed a motion  
25 in state court asking the court to find the Plaintiff in contempt for 1)  
26 interfering with the rights allocated to Preboski as custodial parent, 2)  
failing to pay attorney fees previously awarded to her, and 3) failing to  
provide insurance information.

1 for violation of the automatic stay of 11 U.S.C. § 362(a)<sup>2</sup>(by way  
2 of civil contempt rather than the statutory remedy under §  
3 362(k)(1))and "Maximum Civil Penalties" under 15 U.S.C. § 1692  
4 (the FDCPA). Violation of the FDCPA appears to be predicated  
5 entirely on the allegation of Defendant's willful violation of  
6 the automatic stay.

7 SUMMARY JUDGMENT

8 Summary judgment is appropriate when the pleadings,  
9 depositions, answers to interrogatories, admissions, and  
10 affidavits, if any, show that there is no genuine issue of  
11 material fact and the moving party is entitled to judgment as a  
12 matter of law. Fed. R. Civ. P. 56, made applicable by Fed. R.  
13 Bankr. P. 7056. The movant has the burden of establishing that  
14 there is no genuine issue of material fact. Celotex Corp. v.  
15 Catrett, 477 U.S. 317, 323 (1986). The court must view the facts  
16 and draw all inferences in the light most favorable to the  
17 nonmoving party. T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors  
18 Ass'n, 809 F.2d 626, 630-31 (9<sup>th</sup> Cir. 1987). The primary inquiry  
19 is whether the evidence presents a sufficient disagreement to  
20 require a trial, or whether it is so one-sided that one party  
21 must prevail as a matter of law. Anderson v. Liberty Lobby,  
22 Inc., 477 U.S. 242, 247 (1986).

23 A party opposing a properly supported motion for summary  
24 judgment must present affirmative evidence of a disputed material

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26 <sup>2</sup> All section references are to the Bankruptcy Code, 11 U.S.C. §§ 101  
et. seq. in effect at August 11, 2005, unless the context otherwise indicates.

1 fact from which a factfinder might return a verdict in its favor.  
2 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 257 (1986).  
3 Federal Rule of Bankruptcy Procedure 7056, which incorporates  
4 Federal Rule of Civil Procedure 56(e), provides that the  
5 nonmoving party may not rest upon mere allegations or denials in  
6 the pleadings, but must respond with specific facts showing there  
7 is a genuine issue of material fact for trial. Absent such  
8 response, summary judgment shall be granted if appropriate. See  
9 Celotex Corp. v. Catrett, 477 U.S. 317, 326-27 (1986).

#### 10 CIVIL CONTEMPT

11 Bankruptcy courts have the inherent power to sanction under  
12 Code § 105, but do not have the authority to impose significant  
13 punitive sanctions. In re Rainbow Magazine, Inc., 77 F.3d 278  
14 (9th Cir. 1996); In re Thomas Dyer, 322 F.3d 1178 (9th Cir.  
15 2003). Caselaw involving civil sanctions imposed on a creditor  
16 for violating the discharge injunction of Code § 524 is relevant  
17 in a case involving an alleged violation of the automatic stay.  
18 To assess sanctions for violation of the discharge injunction,  
19 the moving party must prove that the creditor "(1) knew the  
20 discharge injunction was applicable and (2) intended the actions  
21 which violated the injunction." Zilog, Inc. v. Corning et al. (In  
22 re Zilog, Inc.), 450 F.3d 996, 1007 (9th Cir. 2006) (citing In re  
23 Hardy, 97 F.3d 1384, 1390 (11th Cir. 1996)).

#### 24 DISCUSSION AND ANALYSIS

25 Defendant's motion for summary judgment is based on two  
26 arguments: (1) That this court does not have subject matter

1 jurisdiction, and (2) That the Defendant did not knowingly  
2 violate the automatic stay. While no evidence has been presented  
3 specifically showing that Preboski's claim for attorney fees was  
4 subject to the automatic stay, it appears that Defendant does not  
5 contest that fact and the Court will accept it as true.

6 A. Subject Matter Jurisdiction

7 Defendant states that it brought the action in state court  
8 against the Plaintiff and the Plaintiff failed to remove it to  
9 the Bankruptcy Court. Citing In re Jeffries, 191 B.R. 861  
10 (Bankr. D. Or. 1995), an opinion from this Court, Defendant then  
11 argues that jurisdiction over the matter is concurrent between  
12 the state and federal courts under 28 U.S.C. § 1334 and, until  
13 the matter is removed, jurisdiction rests with the state court  
14 and does not attach to the federal court. The state court, it  
15 therefore follows, has sole jurisdiction over the substantive  
16 issues and the merit of any defenses (including violation of the  
17 automatic stay of the Bankruptcy Code or that the debts in  
18 question are subject to discharge in bankruptcy). Defendant's  
19 argument might have merit if Jeffries were the final word on the  
20 matter. However, since that opinion was released, there have been  
21 further developments in the area in the Ninth Circuit.

22 In In re Gruntz, 202 F.3d 1074, 1082 (9th Cir. 2000), the  
23 Court of Appeals held that "[t]he automatic stay is an injunction  
24 issuing from the authority of the bankruptcy court, and  
25 bankruptcy court orders are not subject to collateral attack in  
26 other courts." [internal citations omitted]. Moreover, "[a]ny

1 state court modification of the automatic stay would constitute  
2 an unauthorized infringement upon the bankruptcy court's  
3 jurisdiction to enforce the stay. . . . Because of the bankruptcy  
4 court's plenary power over core proceedings, the . . . argument  
5 that states have concurrent jurisdiction over the automatic stay  
6 under 28 U.S.C. § 1334(b) is unavailing." Id. at 1082-83. A  
7 state court thus lacks jurisdiction in the first instance to  
8 determine whether a particular action of a defendant violated or  
9 violates the automatic stay of the bankruptcy court. That  
10 jurisdiction resides exclusively with the bankruptcy court.

11 B. Violation of the Automatic Stay

12 Defendant in his Concise Statement of Material Facts, filed  
13 with his Motion for Summary Judgment, lists the following  
14 pertinent facts (supported by affidavits of the Defendant and the  
15 Defendant's attorney, and by copies of documentary evidence):

16 (1) Defendant filed the action in state court on February 1,  
17 2008 which, among other items, asked the court to hold Debtor in  
18 contempt for failing to pay attorney fees which had been entered  
19 against him in a previous proceeding.

20 (2) At the time Defendant filed the state court action, he  
21 was unaware that Debtor had filed bankruptcy.

22 (3) Defendant does not recall learning of Debtor's  
23 bankruptcy filing until February 22, 2008, when he received an  
24 envelope from Debtor containing a copy of the original notice of  
25 Debtor's bankruptcy issued by the court on April 30, 2007.

26 (4) To the best of Defendant's recollection, at about the

1 same time he received the notice of Debtor's bankruptcy filing,  
2 his client Preboski dropped off at his office the same notice she  
3 had received from the Debtor.

4 (5) To the best of Defendant's knowledge, Preboski did not  
5 learn of the bankruptcy filing until receiving the Notice of  
6 Filing at the time he received it.

7 (6) On March 2, 2008, Defendant received from the bankruptcy  
8 court a copy of an order returning documents to the Debtor.  
9 Before receiving this notice, the Defendant had received nothing  
10 from the bankruptcy court concerning Debtor's bankruptcy.

11 In response to the Defendant's motion for summary judgment,  
12 the Plaintiff submitted his affidavit in which he submits:

13 (1) There is a genuine issue of material fact.

14 (2) Defendant should have had knowledge of the Plaintiff's  
15 bankruptcy filing as he is an experienced litigator and would  
16 have learned of the filing as part of due diligence in the  
17 representation of his client.

18 (3) Defendant continued to pursue legal action against the  
19 Plaintiff in state court for 65 days after the date that  
20 Defendant states he learned of the bankruptcy filing.

21 (4) Defendant willfully withheld discovery materials in the  
22 state court proceeding in an attempt to conceal his prior  
23 knowledge of Plaintiff's bankruptcy filing.

24 (5) Defendant's affidavit filed with his motion for summary  
25 judgment in this court is disingenuous and misleading.

26 In a Reply to Plaintiff's Response, Defendant states that



1 once he learned of Debtor's bankruptcy he took no action to  
2 recover for Preboski any debts discharged in Plaintiff's  
3 bankruptcy. Copies of two documents were filed with the Reply.  
4 Defendant's client Preboski filed a Response on April 30, 2008,  
5 over Defendant's signature, to Plaintiff's motion to dismiss the  
6 state action, by which she stated that she had no objection to  
7 dismissal of that part of the action regarding attorney fees,  
8 since she had become informed of Plaintiff's bankruptcy filing. A  
9 copy of Plaintiff's motion to dismiss was also tendered which  
10 shows that it was denied on May 14, 2008.

11 Analysis

12 Neither the Defendant nor his client Preboski were listed in  
13 the Debtor's schedules filed with his bankruptcy petition. The  
14 Notice of Filing issued by the bankruptcy court on May 2, 2007  
15 was not mailed to either party. It was not until February 25,  
16 2008, when the Debtor filed an amended Schedule F and an Amended  
17 Mailing Matrix, that the Defendant and Preboski were on the  
18 court's list of creditors. Presumably, the Debtor mailed copies  
19 of the Notice of Filing to the two omitted creditors just prior  
20 to filing amended schedules with the court. This is consistent  
21 with Defendant's statement that neither he nor his client were  
22 aware of the bankruptcy filing until the February 22, 2008  
23 receipt of the copy of the Notice of Filing which had been sent  
24 by the Debtor.

25 Plaintiff argues that the Defendant should have been aware  
26 of his bankruptcy filing, as he is an experienced litigator.

1 However, the Court will not impose on the Defendant the duty to  
2 search the bankruptcy records for a filing by the Plaintiff,  
3 especially when the Plaintiff had the duty under the Bankruptcy  
4 Code to list all creditors with his initial filing. Plaintiff  
5 provides no other evidence as to actual knowledge of the filing  
6 before February 22, 2008. Accordingly, for purposes of  
7 Defendant's motion, the Court accepts February 22, 2008 as the  
8 date that Defendant obtained knowledge of the Plaintiff's  
9 bankruptcy filing.

10 Plaintiff states in his affidavit that the Defendant  
11 continued to pursue legal action in state court for 65 days after  
12 February 22, 2008. He does not, however, present any evidence or  
13 facts showing that Defendant took any affirmative measures to  
14 collect the debt subject to discharge. Nor does he present any  
15 evidence that any party acting for the Defendant or the state  
16 court itself took any actions in furtherance of the state court  
17 action pertaining to the debt. Defendant, on the other hand,  
18 states that he took no actions to collect the disputed debt once  
19 he learned of the bankruptcy filing and presented documentary  
20 evidence showing that his client informed the state court on  
21 April 30, 2008 that she had no objection to dismissal of that  
22 portion of her action pertaining to her claim for attorney fees,  
23 as she had learned that the Plaintiff had filed for bankruptcy.  
24 Accordingly, as Plaintiff has presented no "affirmative evidence"  
25 that Defendant took any actions in violation of the automatic  
26 stay after he learned of Plaintiff's bankruptcy filing, this

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1 Court will not award any contempt sanctions under Code § 105 for  
2 violation of the automatic stay.

3 C. Federal Debt Collection Practices Act (FDCPA).

4 As stated previously, the Plaintiff suggests no violations  
5 of the FDCPA other than collection of a debt in violation of the  
6 Bankruptcy Code's automatic stay. Because the Bankruptcy Code  
7 provides the exclusive remedy for violation of both the automatic  
8 stay and the discharge injunction of §524, a claim under the  
9 FDCPA based entirely on a violation of either of those provisions  
10 is barred. Walls v. Wells Fargo Bank, N.A., 276 F.3d 502 (9th  
11 Cir. 2002). Accordingly, Plaintiff's claim for damages under the  
12 FDCPA must fail.

13 CONCLUSION

14 Defendant has submitted sufficient evidence, not rebutted by  
15 the Plaintiff, showing that Defendant was not timely notified of  
16 Plaintiff's bankruptcy filing and was thus unaware that the  
17 actions he took in state court could have violated the Code § 362  
18 automatic stay which went into effect when Plaintiff filed his  
19 petition in bankruptcy. As that is an element the Plaintiff must  
20 prove before this court will award civil sanctions for violation  
21 of the automatic stay, Plaintiff's claim for violation of § 362  
22 must fail. Because the Bankruptcy Code provides the exclusive  
23 remedy for violation of the automatic stay, Plaintiff's claim  
24 under the FDCPA must also fail.

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Accordingly, Defendant's motion for summary judgment will be granted. An order consistent with this Memorandum Opinion will be entered by the court.

FRANK R. ALLEY, III  
Bankruptcy Judge