

ORDERED PUBLISHED

AUG 06 2014

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

6	In re:)	BAP No.	NV-13-1261-KiJuTa
)		
7	MARK DINGLEY,)	Bk. No.	3:13-bk-50648-BTB
)		
8	Debtor.)		
)		
9	_____)		
)		
10	YELLOW EXPRESS, LLC;)		
	YELLOW LOGISTICS, LLC,)		
)		
11	Appellants,)		
)		
12	v.)		
)		
13	MARK DINGLEY,)		
)		
14	Appellee.)		
)		
15	_____)		

O P I N I O N

Argued and Submitted on January 24, 2014
at Las Vegas, Nevada

Filed - August 6, 2014

Appeal from the United States Bankruptcy Court
for the District of Nevada

Honorable Bruce T. Beesley, Bankruptcy Judge, Presiding

Appearances: _____
Mark D. Wray, Esq., argued for appellants
Yellow Express, LLC and Yellow Logistics, LLC;
Christopher P. Burke, Esq., argued for
appellee Mark Dingley.

Before: KIRSCHER, JURY and TAYLOR, Bankruptcy Judges.

Opinion by Judge Kirscher
Concurrence by Judge Jury

1 KIRSCHER, Bankruptcy Judge:
2

3 Yellow Express, LLC and Yellow Logistics, LLC
4 (collectively, "appellants") appeal from the bankruptcy court's
5 order sanctioning appellants \$1,500 for violation of the
6 automatic stay. Following precedent of the Ninth Circuit Court
7 of Appeals ("Ninth Circuit"), first decided under the Bankruptcy
8 Act of 1898, establishing that a civil contempt proceeding is
9 not subject to the automatic stay, we REVERSE.

10 **I. FACTS¹**

11 **A. Prepetition Facts**

12 In 2009, appellants filed an action in the Second Judicial
13 District Court in Washoe County, Nevada, Case No. CV09-02392
14 against Mark Dingley ("debtor") and two LLCs which he owned and
15 controlled, M&M Tow & Transport, LLC and Superior Tow and
16 Transport Service, LLC (collectively, "the LLCs"). The
17 operative first amended complaint ("state court action") alleged
18 claims for claim and delivery, unjust enrichment, negligence,
19 conversion and constructive fraud against debtor and the LLCs
20 (collectively, "defendants"), based on the tow, storage and
21 disposition of a semi-truck and trailer which belonged to Yellow
22 Express and was leased to Yellow Logistics. The state court
23 action included no alter ego allegations.

24 Initially, defendants defaulted and, following a prove-up
25 hearing, judgment was entered against them in the total sum of

26 _____
27 ¹ The facts are largely undisputed and are drawn from
28 debtor's Motion to Enforce Automatic Stay and appellants'
Opposition to Motion to Enforce Automatic Stay.

1 \$300,000. Subsequently, defendants moved to set aside the
2 default judgment, which was granted. The state court then
3 ordered that a hearing be held on sanctions for their willful
4 failure to appear for depositions. At the hearing on June 26,
5 2012, the state court ordered defendants to pay sanctions to
6 appellants in a sum not to exceed \$6000 for attorneys' fees and
7 court reporter costs. Appellants subsequently filed an
8 affidavit, which fixed the sanctions at \$4078.35.

9 Defendants did not pay the sanctions. On March 25, 2013,
10 appellants filed an application for an order to show cause
11 regarding contempt for defendants' noncompliance with the
12 June 26, 2012 order. On April 2, 2013, the state court judge
13 issued the order to show cause ("OSC"), ordering defendants to
14 appear on April 25, 2013, to show cause why they should not be
15 held in contempt for nonpayment.

16 **B. Postpetition Facts**

17 On April 8, 2013, debtor filed a Chapter 7² proceeding in
18 the Nevada bankruptcy court. Although his membership interest
19 in the LLCs was disclosed in debtor's schedules, the LLCs did
20 not file independent cases. Debtor scheduled appellants as
21 creditors, and the court mailed notice of the filing of the
22 bankruptcy case to appellants' attorney Mark D. Wray ("Wray") on
23 April 11, 2013. On April 24, 2013, debtor's state court counsel
24 advised Wray of the bankruptcy filing and the automatic stay

25
26 ² Unless otherwise indicated, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532,
28 and "Rule" references are to the Federal Rules of Bankruptcy
Procedure and "Civil Rule" refers to the Federal Rules of Civil
Procedure.

1 provided by § 362(a). On the following day, debtor's bankruptcy
2 attorney also advised Wray of the stay. Wray, on April 24,
3 2013, wrote debtor's bankruptcy attorney acknowledging the
4 notification of debtor's bankruptcy filing and inquiring why the
5 OSC could not proceed given the law established by several noted
6 cases. Despite the bankruptcy filing notices and given his
7 response to opposing counsel, Wray declined to request the state
8 court to vacate the OSC because: (1) the LLCs had not filed and
9 did not receive the benefit of the stay; and (2) his preliminary
10 research led him to believe that Ninth Circuit authority
11 excepted a state court contempt proceeding from the automatic
12 stay. In making this second assertion, he relied on David v.
13 Hooker, Ltd., 560 F.2d 412 (9th Cir. 1977), and Dumas v. Atwood
14 (In re Dumas), 19 B.R. 676 (9th Cir. BAP 1982).

15 Debtor's attorney responded that she did not have time to
16 review his cases, but she continued to assert that the contempt
17 hearing was a violation of the automatic stay and that the LLCs
18 should get the benefit of debtor's stay because he listed his
19 interest in them in his schedules. She then filed a Notice of
20 Bankruptcy Filing in the state court on the same day. The state
21 court responded to that Notice by vacating the hearing. On the
22 following day, it issued an order requiring briefing from the
23 parties on the applicability of the automatic stay to the
24 contempt hearing. Appellants' brief was due ten days after the
25 order and defendants' brief was due in another ten days.

26 Appellants filed their state court brief timely on May 1,
27 2013, repeating the arguments they made to debtor's counsel that
28 the automatic stay did not apply to nondebtor co-defendants and

1 that the contempt proceeding was excepted from the stay under
2 Hooker and Dumas. Debtor did not file a brief in state court.
3 Instead, on May 3, 2013, he filed a Motion to Enforce Stay and
4 For Award of Mandatory Sanctions Pursuant to 11 U.S.C. § 362(k)
5 in the bankruptcy court. Simultaneously, debtor filed an Ex
6 Parte Application for Order Shortening Time, requesting an
7 expedited hearing on the motion since his brief in state court
8 was due. On May 6, 2013, the bankruptcy court granted the
9 application for shortened time and set the hearing for May 10,
10 2013, with opposition papers due no later than noon, May 9,
11 2013.

12 In his Motion to Enforce Stay, debtor asserted that the
13 prosecution of the contempt proceeding against him was a
14 violation of § 362(a) and that the bankruptcy court filing
15 divested the state court of jurisdiction to rule on the effect
16 of the automatic stay on its proceedings, relying on Gruntz v.
17 Cnty. of Los Angeles (In re Gruntz), 202 F.3d 1074, 1080 (9th
18 Cir. 2000) (en banc). Debtor's motion further sought an order
19 halting the state court action and an award of attorney's fees
20 and punitive damages based on appellants' willful violation of
21 the stay. Appellants timely³ filed their Opposition to Motion
22 to Enforce Stay, asserting the same arguments which they had
23 previously made to debtor's counsel. Relying on pre-Gruntz non-
24 binding authority, they contended that the state court had
25 concurrent jurisdiction to determine whether the automatic stay

26
27 ³ Wray complained that he had asked debtor's attorney for
28 an extension of time to file but that his request fell on deaf
ears.

1 applied to its proceedings. Next, pointing out that the LLCs
2 were separate legal entities from debtor and that the contempt
3 proceeding was against those entities, not his membership
4 interest, appellants argued the automatic stay did not apply to
5 the LLCs and the contempt proceeding should continue against
6 them. As authority, they cited Groner v. Miller (In re Miller),
7 262 B.R. 499, 503 (9th Cir. BAP 2001), which in turn relied on
8 Advanced Ribbons & Office Prods., Inc. v. U.S. Interstate
9 Distrib., Inc. (In re Advanced Ribbons & Office Prods., Inc.),
10 125 B.R. 259, 263 (9th Cir. BAP 1991), and Marcus, Stowell &
11 Beye Gov't Sec., Inc. v. Jefferson Inv. Corp., 797 F.2d 227, 230
12 n.4 (5th Cir. 1986) ("The well established rule is that an
13 automatic stay of judicial proceedings against one defendant
14 does not apply to proceedings against co-defendants.").

15 Appellants also contended that state court contempt
16 proceedings were exempted from the automatic stay, citing again
17 Hooker and Dumas and emphasizing to the bankruptcy court that
18 debtor's papers did not address the holding of these cases.
19 Finally, appellants noted that the only action they had taken
20 which allegedly violated the stay was filing the brief in the
21 state court pursuant to that court's request.

22 At the hearing in the bankruptcy court, debtor's counsel,
23 contrary to the position she had initially taken with
24 appellants' counsel, conceded that the stay did not apply to the
25 LLCs. However, she argued that it did apply to debtor and that
26 appellants had violated that stay by filing their brief in state
27 court, which urged that court to proceed against debtor. She
28 attempted to distinguish the Ninth Circuit authority excepting

1 contempt proceedings from the stay by arguing they involved bad
2 behavior and "criminal contempt." Despite arguments to the
3 contrary from Wray, the bankruptcy court announced categorically
4 that appellants could not proceed against debtor and that it was
5 prepared to issue an order staying the state court action
6 against him with no other relief granted.

7 Debtor's counsel then asserted that her client was broke
8 and that she had incurred \$1500 in attorney's fees to stop the
9 affirmative action against him. After reading the brief which
10 appellants had filed in state court,⁴ the court announced:

11 "The automatic stay in bankruptcy court does not
12 shield Mr. Dingley from his willful disobedience of
13 the Court's lawful order."⁵ I find that you're in
14 contempt of court for urging the district court to
15 extract from Mr. Dingley money for an order that was
16 entered prebankruptcy which is certainly
17 dischargeable. He can certainly be hauled into court
18 for postbankruptcy conduct, but you cannot use the
19 district court to try and recover money for contempt
20 or otherwise that has occurred prior to the
21 bankruptcy. I am awarding \$1500 in sanctions against
22 you.

23 Hr'g Tr. (May 10, 2014) 16:11-22. On May 17, 2013, the
24 bankruptcy court entered the Order on Debtor's Motion to Enforce
25 Automatic Stay and For Award of Mandatory Sanctions Pursuant to
26 11 U.S.C. § 362(k). Appellants paid the sanction and timely
27 appealed.

28 ///

25 ⁴ The bankruptcy judge said his court was very "green" and
26 he did not print out the papers. When he learned the state
27 court brief was attached as an exhibit to the Motion, he read it
28 while on the bench.

⁵ The court apparently read from the brief.

1 **II. JURISDICTION**

2 The bankruptcy court had jurisdiction over this proceeding
3 under 28 U.S.C. §§ 1334 and 157(b)(2)(A). We have jurisdiction
4 under 28 U.S.C. § 158.

5 **III. ISSUES**

6 A. Whether the bankruptcy court erred in ruling that
7 appellants violated the automatic stay; and

8 B. Whether the bankruptcy court erred in awarding sanctions
9 of \$1500.

10 **IV. STANDARDS OF REVIEW**

11 A bankruptcy court's determination that the automatic stay
12 was violated is a question of law subject to de novo review.
13 Cal. Emp. Dev. Dep't v. Taxel (In re Del Mission Ltd.), 98 F.3d
14 1147, 1150 (9th Cir. 1996).

15 An award of sanctions is reviewed for abuse of discretion.
16 Nash v. Clark Cnty. Dist. Attorney's Office (In re Nash), 464
17 B.R. 874, 878 (9th Cir. BAP 2012). The bankruptcy court abuses
18 its discretion when it fails to identify and apply "the correct
19 legal rule to the relief requested," or if its application of
20 the correct legal standard was "(1) 'illogical,'
21 (2) 'implausible,' or (3) without 'support in inferences that
22 may be drawn from the facts in the record.'" United States v.
23 Hinkson, 585 F.3d 1247, 1262-63 (9th Cir. 2009) (en banc).

24 ///

25 ///

26 ///

27 ///

28 ///

1 **V. DISCUSSION⁶**

2 **A. The Automatic Stay and Sanctions for Willful Violation**

3 The automatic stay of § 362(a), as asserted to be
4 applicable here, provides:

5 (a) Except as provided in subsection (b) of this
6 section, a petition filed under section 301, 302, or
7 303 of this title . . . operates as a stay, applicable
8 to all entities, of--

9 (1) the commencement or continuation, including
10 the issuance or employment of process, of a
11 judicial, administrative, or other action or
12 proceeding against the debtor that was or could
13 have been commenced before the commencement of
14 the case under this title, or to recover a claim
15 against the debtor that arose before the
16 commencement of the case under this title;

17 (2) the enforcement, against the debtor or
18 against property of the estate, of a judgment
19 obtained before the commencement of the case
20 under this title;

21

22 Section 362(k)(1) provides for an order for sanctions if a
23 party willfully violates the stay:

24 [A]n individual injured by any willful violation of a
25 stay provided by this section shall recover actual
26 damages, including costs and attorneys' fees, and, in
27 appropriate circumstances, may recover punitive
28 damages.

29 Before imposing sanctions, the bankruptcy court must find
30 that a violation of the stay was willful. The test for
31 determining whether a violation of the automatic stay is willful
32 is: (1) whether the appellants knew of the stay; and

33 ⁶ We acknowledge debtor submitted a letter pursuant to Fed.
34 R. App. P. 28(j). Appellants responded to debtor's letter. We
35 reviewed the submissions and have concluded, given the record
36 and issues before us, that the submitted case involves issues we
37 do not reach in this Opinion.

1 (2) whether the violation of the stay was intentional. Goichman
2 v. Bloom (In re Bloom), 875 F.2d 224, 227 (9th Cir. 1989).

3 "Intentional" does not mean a specific subjective intent to
4 violate the stay. Pinkstaff v. United States (In re Pinkstaff),
5 974 F.2d 113, 115 (9th Cir. 1992). It is irrelevant whether the
6 party believed in good faith that it had a right to the property
7 at issue. In re Bloom, 875 F.2d at 227.

8 Willfulness is a question of fact reviewed for clear error.
9 Safety Nat'l Cas. Corp. v. Kaiser Aluminum & Chem. Corp. (In re
10 Kaiser Aluminum Corp.), 303 B.R. 299, 303 (D. Del. 2003).

11 Appellants contend that the bankruptcy court erred:

12 (1) because the stay did not apply to the state court civil
13 contempt proceeding under applicable Ninth Circuit precedent;
14 and (2) even if it did apply, the act of filing a brief in state
15 court, which arguably had jurisdiction to determine whether the
16 stay applied to its proceeding, was not a willful violation of
17 the stay. We address these arguments below, insofar as
18 necessary to decide this case.

19 **B. Exclusive Jurisdiction of the Bankruptcy Court**

20 As a preliminary matter, appellants assert that the state
21 court had concurrent jurisdiction with the bankruptcy court to
22 decide whether the stay applied to its proceeding, citing Fid.
23 Nat'l Title Ins. Co. v. Franklin (In re Franklin), 179 B.R. 913,
24 925 (Bankr. E.D. Cal 1995). Franklin is inapplicable to this
25 issue as it dealt with subject matter jurisdiction of a non-core
26 proceeding. To the contrary, the Ninth Circuit has definitively
27 held that the applicability of the automatic stay is within the
28 exclusive jurisdiction of the bankruptcy court. In Gruntz, 202

1 F.3d at 1083, the Ninth Circuit disregarded state court
2 authorities and nonprecedential cases in ruling:

3 In sum, by virtue of the power vested in them by
4 Congress, the federal courts have the final authority
5 to determine the scope and applicability of the
6 automatic stay. "The States cannot, in the exercise
of control over local laws and practice, vest State
courts with power to violate the supreme law of the
land."

7 Therefore, only the bankruptcy court had jurisdiction to
8 determine whether the automatic stay applied to the state court
9 contempt proceeding; the state court did not have concurrent
10 jurisdiction. Id. at 1082-83.

11 **C. Automatic Stay and State Court Contempt Proceedings**

12 The Ninth Circuit has created a bright-line rule on whether
13 the automatic stay applies to state court contempt proceedings,
14 whether they are based on nonpayment of a monetary sanction or
15 some other behavior which violates a state court order: if the
16 sanction order "does not involve a determination [or collection]
17 of the ultimate obligation of the bankrupt nor does it represent
18 a ploy by a creditor to harass him" the automatic stay does not
19 prevent the proceeding from going forward. Hooker, 560 F.2d at
20 418.

21 Hooker was decided under the Bankruptcy Act of 1898 and
22 interpreted the scope of the stay provided by Rule 401(a) of the
23 former Federal Rules of Bankruptcy Procedure which applied to
24 cases filed under the Act. The question posed to the Ninth
25 Circuit was whether the district court where a contempt
26 proceeding was pending "had jurisdiction" to proceed after a
27 bankruptcy petition had been filed. The order violated was not
28 dissimilar to the order in this case: a discovery sanction

1 which directed the defendants to answer interrogatories and pay
2 attorney's fees. The Ninth Circuit reasoned that the basic
3 purpose of the stay was "to protect the bankrupt and to relieve
4 the courts from pointless and needless litigation" over
5 dischargeable debts. Id. at 417. Since the contempt proceeding
6 at issue was ancillary to the underlying debt, the Ninth Circuit
7 found the purpose of the stay was not implicated. Relying on
8 old district court decisions⁷ and 1A Collier ¶ 11.02 at 1147-48,
9 the Ninth Circuit noted that the question was not a
10 jurisdictional one since the stay suspended, rather than
11 dismissed, the nonbankruptcy case. Id. at 418. Thus not every
12 aspect of the proceeding was to be suspended, and a proceeding
13 addressing disobedience of a state court order made prior to the
14 stay was not meant to be suspended. Id. Moreover, the Ninth
15 Circuit reasoned that the proceeding did not "'attempt in any
16 way to interfere with the property which had passed to the
17 control of the bankruptcy court; it sought merely to vindicate
18 its dignity which had been affronted by the contumacious conduct
19 of a person who ignored its order.'" Id.

20 The same issue was first addressed under the Bankruptcy Act
21 of 1978 (the Code) and its automatic stay provided by § 362(a)
22 by this panel in Dumas. Prebankruptcy, the debtor stipulated
23 that he was in contempt of court for violation of a subpoena; a
24 hearing for sentencing for the contempt was scheduled. Prior to
25 the hearing, Dumas filed his bankruptcy petition and asserted
26

27 ⁷ In re Hall, 170 F. 721 (S.D.N.Y. 1909), and In re Spagat,
28 4 F. Supp. 926, 927 (S.D.N.Y. 1933).

1 that the automatic stay applied to the sentencing hearing. The
2 Panel determined that no meaningful difference existed between
3 the stay of Rule 401(a) and the automatic stay of § 362(a). It
4 further found that, although the issue was raised as a
5 jurisdictional one in Hooker, the court's reasoning dealt with
6 the propriety of the exercise of that jurisdiction when the stay
7 might apply. Finally, it also found no distinction where a
8 private party, rather than the court itself, initiated the
9 contempt proceeding. Accordingly, it applied the holding of
10 Hooker and concluded that the state court's post-bankruptcy
11 sentence for contempt was not stayed.

12 Appellants cited these authorities to debtor's counsel and
13 eventually to the bankruptcy court. Debtor's counsel tried to
14 distinguish them by claiming the contempt proceedings at issue
15 in those cases were criminal and the holdings did not apply to
16 civil contempt. As noted above, this argument was erroneous.
17 The bankruptcy court did not acknowledge them at all, turning
18 aside the arguments:

19 You can't⁸ proceed against whatever distributions may
20 come to Mr. Dingley from them [the LLCs], but you
21 cannot proceed against Mr. Dingley. And even if Judge
22 Sattler orders you to proceed against Mr. Dingley, you
23 will get a sanction from me because you've violated -
you will have violated the automatic stay, and the
fact - and Judge Sattler, if he proceeds against
Dingley, he has violated the automatic stay

24 Hr'g Tr. (May 10, 2013) 13:1-8.

26 ⁸ The bankruptcy court may have meant "can," given the
27 context of the discussion between counsel and the bankruptcy
28 court and the ability to pursue postpetition chapter 7
distributions from the LLCs.

1 I find that you're in contempt of court for urging the
2 district court to extract from Mr. Dingley money for
3 an order that was entered prebankruptcy which is
4 certainly dischargeable.

4 Id. at 16:14-17.

5 Other courts have followed Hooker and Dumas in this
6 circuit. Most notably (and recently) the district court of
7 Hawaii cited Hooker with approval in crafting a totality of the
8 circumstances analysis of the "judicially created . . .
9 exception to § 362(a) for civil contempt proceedings in limited
10 circumstances." Kukui Gardens Corp. v. Holco Capital Grp., 675
11 F. Supp. 2d 1016, 1026 (D. Haw. 2009). The Kukui court
12 distinguished between contempt proceedings intended to
13 effectuate collection of a judgment and those intended to uphold
14 the dignity of the court. Id. If the purpose of the contempt
15 is to "punish a contemnor and uphold the dignity of the court,"
16 it found the automatic stay does not apply, id.; however, in
17 making this statement, it clarified that it was speaking of
18 civil, not criminal contempt. Moreover, in addressing the test
19 as totality of circumstances, the court actually relied on
20 Lowery v. McIlroy & Millian (In re Lowery), 292 B.R. 645, 650
21 (Bankr. E.D. Mo. 2003), rather than any Ninth Circuit precedent.
22 The Hooker and Dumas precedent appears to be more a bright-line
23 test than a totality of circumstances test.

24 This judicially-crafted exception has been narrowly
25 construed even by the Ninth Circuit. In Bloom, the federal
26 contempt proceeding arose out of a post-judgment deposition that
27 Goichman scheduled in advance of a hearing on an exemption claim
28 asserted by Bloom to a garnishment. 875 F.2d at 225. Bloom

1 filed her bankruptcy petition after the date set for the
2 deposition, but prior to the scheduled date for the exemption
3 claim hearing. Goichman was notified of the bankruptcy
4 petition; Bloom attended neither the deposition nor the
5 exemption claim hearing. The district court, after the hearing,
6 denied the exemption claim. Goichman moved for contempt against
7 Bloom for, among other things, her nonattendance at the
8 deposition. The district court held another hearing and ordered
9 Bloom to convey partnership assets to Goichman as security for
10 the judgment and fined Bloom \$500 for contempt for her failure
11 to attend the deposition. The district court made a minute
12 entry for the fine; however, the fine was not included in the
13 final order.

14 After various procedural maneuvers in district court, which
15 are not relevant here, Bloom filed an adversary proceeding in
16 the bankruptcy court asserting a stay violation. The bankruptcy
17 court found Goichman violated the stay by proceeding in district
18 court after the bankruptcy filing. The district court affirmed
19 and the Ninth Circuit also affirmed. Since the district court
20 relief sought by Goichman was ordering the appointment of a
21 receiver, ordering compliance with the prepetition consent
22 decree, striking the exemption claim and ordering the transfer
23 of assets of the bankruptcy estate to himself, these proceedings
24 did violate the stay. Id. at 226-27.

25 This limitation on the breadth of Hooker was followed in
26 the unpublished decision of the Federal Circuit, In re Long, 318
27 F. App'x 891, 894 (Fed. Cir. 2008), where the postbankruptcy
28 contempt proceedings related to enforcement of the judgment not

1 "improper conduct during litigation."

2 As noted in Debtor's brief, the Hooker/Dumas decisions have
3 drawn sharp criticism in other bankruptcy courts. See Atkins v.
4 Martinez (In re Atkins), 176 B.R. 998, 1005 (Bankr. D. Minn.
5 1994) ("With all due respect to the courts that rendered these
6 decisions [Hooker and Dumas], . . . they are not well-
7 founded."); Dock C-Food, Ltd. v. Cherry (In re Cherry), 78 B.R.
8 65, 70 (Bankr. E.D. Pa. 1987) ("We would be inclined to
9 recognize as exemptions from the power of the stay only those
10 specifically set forth in 11 U.S.C. § 362(b), not court-created
11 exemptions in cases decided under the Bankruptcy Act . . .").
12 A common theme of these contrary views is that when Congress
13 enacted the Bankruptcy Code in 1978, it provided specific
14 statutory exceptions to the automatic stay in § 362(b), making
15 the judicially created exemption under the Act improvident.
16 Since Hooker was decided before the Code was adopted, if
17 Congress had wished to include contempt proceedings under the
18 exceptions to the stay, it could have done so in § 362(b).

19 Other courts have attempted to distinguish Hooker and
20 Dumas. These courts assert that if the contempt proceeding is
21 to deter wrongful conduct such as showing disrespect to the
22 court or filing a frivolous appeal, such contempt proceeding
23 should be allowed to proceed, whereas if a creditor is merely
24 attempting to collect money due under a court order it should be
25 stayed. See In re Musaelian, 286 B.R. 781, 782 (Bankr. N.D.
26 Cal. 2002). The Musaelian court said the state court "alone"
27 would not be stayed if the contempt proceeding was for public
28 policy purposes, but that if the creditor or his attorneys

1 participated "in any way other than pursuant to [a] direct and
2 unsolicited order of the state court, they risk liability for
3 violation of the automatic stay." Id. The Musaelian court
4 further denied relief from stay so the creditor could not pursue
5 collection of any monetary amount associated with any private
6 interest furthered by pursuing any discovery sanction order.
7 However, Hooker and Dumas made no such distinction between a
8 public policy and a private interest analysis, since both cases
9 involved monetary sanction orders arising from contempt
10 proceedings and both authorized recovery of the monetary
11 sanctions associated with the discovery violations.

12 Still other courts have excepted nonbankruptcy contempt
13 proceedings arising from sanction orders by applying one of the
14 statutory exceptions provided in § 362(b). The Seventh Circuit
15 in Alpern v. Lieb, 11 F.3d 689, 690 (7th Cir. 1993), relied on
16 the police power exception of § 362(b)(4) when determining that
17 enforcement of a Civil Rule 11 sanction was not stayed, even
18 when the Civil Rule 11 motion was brought by a private party.
19 Similarly, the Ninth Circuit in Berg v. Good Samaritan Hosp.
20 (In re Berg), 230 F.3d 1165 (9th Cir. 2000), used the police
21 power exception when determining that an action to collect an
22 attorney sanction for filing a frivolous appeal was not subject
23 to the automatic stay. In both Alpern and Berg the payment at
24 issue was to a private party for attorney's fees, not the court.

25 Although we recognize these different approaches to the
26 issue before us, the precedent of this circuit is set by Hooker
27 as followed post-Code by Dumas: a contempt action for
28 nonpayment of court-ordered sanctions is exempted from the

1 automatic stay unless the proceeding turns on the determination
2 or collection of the underlying judgment. We acknowledge the
3 strength of the points made in the concurrence. We ultimately
4 determine, however, that it is for the Ninth Circuit to make the
5 determination as to the continued validity of the Hooker bright-
6 line test.

7 Applying this rule here, the contempt proceeding in the
8 Nevada state court was not subject to the stay. Debtor had been
9 ordered to pay attorney's fees and costs to Appellants due to
10 his noncooperation with discovery. The relevant civil contempt
11 proceeding arose from his nonpayment under that order. These
12 facts parallel those in Hooker and Dumas which provide the rule
13 of law.

14 Consequently, the bankruptcy judge erred when he found
15 appellants willfully violated the automatic stay; in this
16 context, no stay existed to violate.⁹ The sanction award also
17 was error.

18 VI. CONCLUSION

19 For the reasons set forth above, we REVERSE the finding of
20 a violation of the automatic stay and the order to pay
21 sanctions.

22
23 Concurrence begins on next page.
24
25

26
27 ⁹ The bankruptcy court's oral findings on the willful
28 nature of the violation are sparse. However, since no violation
occurred, we do not address the sufficiency of these findings.

1 JURY, Bankruptcy Judge, Concurring:

2
3 With reluctance, I concur with the Panel's decision
4 reversing the bankruptcy court's decision finding appellants in
5 contempt for violating the automatic stay of § 362. We are
6 compelled to follow the holding in Hooker, which in turn, was
7 followed in Dumas. See Salomon N. Am. v. Knupfer (In re Wind N'
8 Wave), 328 B.R. 176, 181 (9th Cir. BAP 2005) (bankruptcy panel
9 is bound by its previous precedent). Nonetheless, I write
10 separately because I believe that Hooker's judicially-created
11 rule excepting a contempt action for nonpayment of court-ordered
12 sanctions from the automatic stay is not consistent with the
13 modern breadth of the automatic stay espoused in Ninth Circuit
14 case law and at odds with the plain language of § 362(b).

15 The issues decided by the Hooker court highlight just how
16 undeveloped the concept of the stay in bankruptcy was at the
17 time the decision was rendered. Rather than questioning whether
18 a bankruptcy stay precluded a district court from conducting a
19 contempt proceeding arising from noncompliance with discovery,
20 the issue was initially posed as whether the district court had
21 jurisdiction to issue the order of contempt after the bankruptcy
22 petition was filed. The Ninth Circuit recognized the question
23 was not jurisdictional because the stay merely "suspends the
24 proceedings." That the Circuit was even asked to consider a
25 jurisdictional impact, however, illustrates how novel the stay
26 concept was at the time.

27 Moreover, Hooker interpreted the impact of a stay provided
28 by then Rule 401(a), a stay limited in scope when compared to

1 the today's version of § 362(a). Rule 401(a) became effective
2 in 1973 and provided:

3 The filing of a petition shall operate as a stay of
4 the commencement or continuation of any action against
5 the bankrupt, or the enforcement of any judgment
6 against him, if the action or judgment is founded on
an unsecured provable debt other than one not
dischargeable under clause (1), (5), (6), or (7) of
section 35(a) of this title.

7 At the time of its ruling, the court noted that no cases had
8 discussed the precise scope of the Rule 401(a) stay. Hooker,
9 560 F.2d at 417 n.8. The court, however, was persuaded by the
10 concept that the purpose of the Rule 401 stay was only to
11 prevent adjudication or collection of the underlying unsecured
12 debt, such that collateral proceedings like enforcement of
13 discovery orders did not fall within that province. Thus, the
14 court decided that continuing with the district court contempt
15 proceeding did not violate the Rule 401 stay. This holding
16 established the rule of law applied by the Panel in Dumas.

17 In the meantime, the Bankruptcy Act of 1978 was enacted and
18 along with it came the automatic stay of § 362(a) and, perhaps
19 of equal importance, a list of statutory exceptions to the stay
20 provided by § 362(b). "[I]n enacting § 362 in 1978, Congress
21 significantly broadened the scope of the automatic stay, an
22 expansion that had begun only five years earlier with the
23 adoption of the Bankruptcy Rules in 1973 In the face of
24 the greatly increased scope of § 362, it was necessary for
25 Congress to limit this new power expressly." Midlantic Nat'l
26 Bank v. N.J. Dep't of Env'tl. Prot., 474 U.S. 494, 504 (1986)
27 (citations omitted) (noting that the express exceptions to the
28 stay were meant to overrule certain judicial expansions of the

1 stay).

2 Section 362 has continually expanded over decades, with the
3 petition now staying all entities from

4 (1) the commencement or continuation, including the
5 issuance or employment of process, of a judicial
6 administrative, or other action or proceeding against
7 the debtor that was or could have been commenced
8 before the commencement of the case under this title,
9 or to recover a claim against the debtor that arose
10 before the commencement of the case under this title;

11 (2) the enforcement, against the debtor or against
12 property of the estate, of a judgment obtained before
13 the commencement of the case under this title;

14 . . .

15 [and] (6) any act to collect, assess, or recover a
16 claim against the debtor that arose before the
17 commencement of the case under this title[.]

18 Clearly, the plain language of the statute today shows that
19 the reach of the stay is much broader than that previously
20 provided by Rule 401(a). Incredibly, at least to me, the Dumas
21 Panel found the "present statute and the former rule are
22 essentially similar." In re Dumas, 19 B.R. at 677. Because of
23 that perceived similarity, the Panel, without any discussion of
24 the statutory exceptions then listed in § 362(b), held that the
25 rule in Hooker controlled the outcome of the case – a contempt
26 proceeding arising from a discovery dispute like Hooker.

27 Since Hooker, Ninth Circuit case law has continually
28 recognized and preserved the broad scope of the stay outlined in
§ 362(a). In Schwartz v. United States (In re Schwartz), 954
F.2d 569 (9th Cir. 1992), the Ninth Circuit ruled that an act
taken in violation of the stay was void ab initio. In so
ruling, the court explained the importance of the stay:

[T]he automatic stay plays a vital role in bankruptcy.

1 It is designed to protect debtors from all collection
2 efforts while they attempt to regain their financial
3 footing. As Congress stated: "The automatic stay is
4 one of the fundamental debtor protections provided by
5 the bankruptcy laws. It gives the debtor a breathing
6 spell from his [or her] creditors. It stops all
collection efforts, all harassment, and all
foreclosure actions. It permits the debtor to attempt
a repayment or reorganization plan, or simply to be
relieved of the financial pressures that drove him
into bankruptcy."

7 Id. at 571 (emphasis in original).

8 In the context of determining that the power to interpret
9 the scope of the automatic stay was exclusively held by the
10 bankruptcy courts, the Circuit again emphasized the broad sweep
11 of the stay in In re Gruntz, 202 F.3d at 1081-82:

12 The automatic stay is self-executing, effective upon
13 the filing of the bankruptcy petition. . . . The
14 automatic stay sweeps broadly, enjoining the
15 commencement or continuation of any judicial,
16 administrative, or other proceedings against the
debtor, enforcement of prior judgments, perfection of
liens, and "any act to collect, assess or recover a
claim against the debtor that arose before the
commencement of the case."

17 The cases which have echoed this interpretation of the
18 breadth of the stay since Schwartz and Gruntz are legion and
19 need not be cited here. However, more recent decisions
20 emphasize the absolute power of the stay. See Sternberg v.
21 Johnston, 595 F.3d 937, 943 (9th Cir. 2010) ("We have held on
22 several occasions that the automatic stay imposes on non-debtor
23 parties an affirmative duty of compliance" to remedy automatic
24 stay violations.); Eskanos & Adler, P.C. v. Leetien, 309 F.3d
25 1210, 1215 (9th Cir. 2002) ("Consistent with the plain and
26 unambiguous meaning of the statute, and consonant with
27 Congressional intent, we hold that § 362(a)(1) imposes an
28 affirmative duty to discontinue post-petition collection

1 actions."). I cannot help but wonder if the Dumas Panel had
2 been informed by these cases, would it still opine that the Rule
3 401(a) stay and the § 362 stay were "essentially similar"?

4 More than just the scope of the stay is in play here,
5 however. Whatever may have been the perceived scope of the stay
6 before the enactment of the Code, Congress has since regulated
7 the exceptions to the stay by statute. When the Bankruptcy Code
8 took effect in 1978, § 362(b) only contained seven types of
9 actions not stayed under § 362(a). See Bankruptcy Reform Act of
10 1978, Pub. L. No. 95-598 (1978) (superseded by 11 U.S.C § 362(b)
11 (2005)). Between 1990 and 1994, § 362(b) had expanded to
12 eighteen exceptions, then when the Code was modified by the
13 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,
14 Congress added another ten exceptions so that § 362(b) presently
15 specifies twenty-eight categories of actions not barred by the
16 stay.

17 The legislative history of § 362 illuminates the thinking
18 of Congress when the Code was enacted:

19 Subsection (b) lists seven exceptions to the automatic
20 stay. The effect of an exception is not to make the
21 action immune from injunction. The court has ample
22 other powers to stay actions not covered by the
23 automatic stay. Section 105 . . . grants the power to
24 issue orders necessary or appropriate to carry out the
25 provisions of title 11. The district court and the
26 bankruptcy court as its adjunct have all the
27 traditional injunctive powers of a court of equity . .
28 . . Stays or injunctions issued under these other
sections will not be automatic upon the commencement
of the case, but will be granted or issued under the
usual rules for the issuance of injunctions. By
excepting an act or action from the automatic stay,
the bill simply requires that the trustee move the
court into action, rather than requiring the stayed
party to request relief from the stay. There are some
actions, enumerated in the exceptions, that generally
should not be stayed automatically upon the

1 commencement of the case, for reasons of either policy
2 or practicality. Thus, the court will have to
3 determine on a case-by-case basis whether a particular
action which may be harming the estate should be
stayed.

4 S. Rep. 95-989 (1978), p. 51; H.R. Rep. 95-595 (1977) p. 321
5 (reprinted in 1978 U.S.C.C.A.N. 5787, 5837).

6 Congress thus flagged circumstances which it believed, for
7 policy or practical reasons, should not be subject to the stay
8 automatically, shifting the burden to the trustee or debtor to
9 seek a stay if necessary to preserve the estate. Significantly,
10 nowhere in § 362(b) does Congress choose to except contempt
11 proceedings. If Congress had intended to except contempt
12 proceedings in a non-bankruptcy forum from the automatic stay
13 for reasons of policy or practicality, it would have done so
14 expressly and not by silence. The Supreme Court has held that
15 "[w]here Congress explicitly enumerates certain exceptions to a
16 general prohibition, additional exceptions are not to be
17 implied, in the absence of evidence of a contrary legislative
18 intent." Andrus v. Glover Constr. Co., 446 U.S. 608, 616-17
19 (1980). This recognition presents another source of conflict -
20 by applying the rule in Hooker, we effectively incorporate
21 another exception into § 362(b). That would mean creditors
22 could pursue twenty-nine different types of actions without
23 concern for violating the automatic stay. As this cannot be
24 what Congress intended, it would seem that the statutory
25 exceptions are exclusive.

26 The oft-quoted maxim of statutory interpretation *expressio*
27 *unius est exclusio alterius* also tells us that when a
28 legislature "includes particular language in one section of a

1 statute . . . it is generally presumed that [the legislature]
2 acts intentionally and purposely in the disparate inclusion or
3 exclusion." Russello v. United States, 464 U.S. 16, 23 (1983).
4 It is true that this principle does not apply "unless it is fair
5 to suppose that Congress considered the unnamed possibility and
6 meant to say no to it." Marx v. Gen. Revenue Corp., __ U.S. __,
7 133 S. Ct. 1166, 1175 (2013). Moreover, this rule is a "rule of
8 interpretation, not a rule of law. The maxim is 'a product of
9 logic and common sense,' properly applied only when it makes
10 sense as a matter of legislative purpose." Longview Fibre Co.
11 v. Rasmussen, 980 F.2d 1307, 1313 (9th Cir. 1992). Thus, it can
12 be overcome by a strong indication of contrary legislative
13 intent or policy.

14 While it is impossible to know if Congress in 1978
15 considered excepting contempt proceedings from the automatic
16 stay and rejected that concept, it is logical and makes common
17 sense to apply the maxim *expressio unius est exclusio alterius*
18 here. Not including all contempt proceedings within the
19 exclusions to the automatic stay is fully consistent with the
20 legislative purpose behind the automatic stay, which is to stop
21 collection actions against the debtor to give him or her
22 breathing space. I do recognize that exceptions to the
23 automatic stay are based on specific policies and that by
24 allowing a contempt action to proceed the dignity of the court
25 issuing the contempt could be upheld. After all, as opined by
26 more than one court, a debtor should not be allowed to
27 disrespect a court order without consequence by retreating
28 behind the automatic stay of a bankruptcy that he or she

1 voluntarily files. But I do not find this policy overcomes the
2 plain language of the statutory exceptions listed in § 362(b).

3 Further, a bankruptcy court can always grant relief from
4 stay for "cause" to allow the delinquent debtor to face his or
5 her due before the court whose order he or she has disobeyed.
6 The bright-line Hooker exception to the automatic stay for
7 contempt proceedings fails to recognize that not all violations
8 of court orders are of equal magnitude and show disrespect for
9 the court issuing the disobeyed order. Where, as here, the
10 court order was to pay a sum of money to a party litigant for a
11 discovery violation, I view this as an action more to collect
12 money from the debtor than to compel compliance with a court
13 order. Collection of money from the debtor arising from a
14 prepetition debt is just the type of action intended to be
15 stayed by § 362.

16 As noted above, Hooker and Dumas have drawn criticism from
17 at least one bankruptcy court in the Ninth Circuit and courts in
18 other jurisdictions for the same reasons I assert here. One
19 bankruptcy court analyzed the different types of contempt
20 actions I have highlighted above:

21 Every court faces two types of contempt proceedings:
22 those resulting from a private squabble among
23 litigants, where the role of the court is merely to
24 enforce the law and move the litigation to conclusion,
25 and those resulting from acts truly offensive to the
26 court and tending to interfere with the administration
27 of justice. An example of the former would be a
discovery sanction; examples of the latter might
include disrespectful conduct in court or the bringing
of a frivolous appeal. In order for contempt
proceedings to go forward after bankruptcy, there must
be a direct, unattenuated need for them in order to
deter wrongful conduct and not just collect money.

28 In re Musaelian, 286 B.R. at 782; see also In re Atkins, 176

1 B.R. at 1005; In re Cherry, 78 B.R. at 70. I agree with these
2 bankruptcy courts that court-created exceptions to the automatic
3 stay should not have survived the Bankruptcy Act of 1978.

4 Accordingly, a party to a state court contempt proceeding, like
5 all others subject to the § 362 stay, should be required to seek
6 relief from the stay for cause, leaving the determination of
7 whether the action should go forward to the discretion of the
8 bankruptcy court. For all these reasons, I conclude that the
9 stay imposed under § 362(a) should "automatically" apply to
10 contempt proceedings in non-bankruptcy forums.