

420 B.R. 541
 (Cite as: 420 B.R. 541)

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United States Bankruptcy Court,
 D. New Mexico.
 In re Karen Marie KLINE, Debtor.
 Karen Marie Kline, Plaintiff,

v.

Deutsche Bank National Trust Company, and
 Richard Leverick, Defendants.

Bankruptcy No. 13-05-12174 JS.
Adversary No. 09-01035 J.

Nov. 25, 2009.

Background: Chapter 13 debtor brought adversary proceeding to recover for mortgagee's alleged willful violation of automatic stay, and mortgagee asserted that debtor's claims were barred by res judicata or collateral estoppel effect of default judgment previously entered in state court mortgage foreclosure action.

Holdings: The Bankruptcy Court, [Robert H. Jacobvitz, J.](#), held that:

(1) genuine issues of material fact regarding nature of relationship between mortgage lender that was not listed on creditor matrix, and that received no formal notice of debtor-mortgagor's Chapter 13, and entity that serviced loan, and whether notice to this servicing entity could be imputed to lender, precluded entry of summary judgment;

(2) default judgment previously entered in state mortgage foreclosure action could not be given res judicata or collateral estoppel effect in proceeding brought by debtor-mortgagor to recover for mortgagee's alleged willful violation of stay; and

(3) court had no subject matter jurisdiction, following dismissal of underlying Chapter 13 case, over pure state law claims asserted by debtor.

So ordered.

West Headnotes

[1] Bankruptcy 51 2467

51 Bankruptcy

[51IV](#) Effect of Bankruptcy Relief; Injunction and Stay

[51IV\(D\)](#) Enforcement of Injunction or Stay

[51k2467](#) k. Damages and attorney fees.

Most Cited Cases

Debtor seeking to recover damages for alleged violation of automatic stay has burden of demonstrating: (1) that a violation of automatic stay has occurred; (2) that this violation was willfully committed; and (3) that debtor suffered damage as result of the violation. [11 U.S.C.A. § 362\(h\)](#).

[2] Bankruptcy 51 2467

51 Bankruptcy

[51IV](#) Effect of Bankruptcy Relief; Injunction and Stay

[51IV\(D\)](#) Enforcement of Injunction or Stay

[51k2467](#) k. Damages and attorney fees.

Most Cited Cases

Standard of proof in proceeding to recover damages for violation of automatic stay is proof by preponderance of evidence. [11 U.S.C.A. § 362\(h\)](#).

[3] Bankruptcy 51 2467

51 Bankruptcy

[51IV](#) Effect of Bankruptcy Relief; Injunction and Stay

[51IV\(D\)](#) Enforcement of Injunction or Stay

[51k2467](#) k. Damages and attorney fees.

Most Cited Cases

For creditor's stay violation to be "willful," as required for award of damages against it, creditor need not have specific intent to violate automatic stay; it is sufficient that creditor knew of debtor's bankruptcy case and that its actions violating the stay were intentional. [11 U.S.C.A. § 362\(h\)](#).

[4] Bankruptcy 51 2467

51 Bankruptcy

[51IV](#) Effect of Bankruptcy Relief; Injunction and Stay

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[51IV\(D\) Enforcement of Injunction or Stay](#)
[51k2467](#) k. Damages and attorney fees.

Most Cited Cases

Absent notice or knowledge on part of creditor of commencement or pendency of bankruptcy case, any stay violation by creditor is merely a “technical” violation, and no damages are to be awarded. [11 U.S.C.A. § 362\(h\)](#).

[5] Bankruptcy 51 2461

51 Bankruptcy

[51IV](#) Effect of Bankruptcy Relief; Injunction and Stay

[51IV\(D\) Enforcement of Injunction or Stay](#)
[51k2461](#) k. In general. [Most Cited Cases](#)

Creditor need not have formal notice of commencement or pendency of bankruptcy case in order for its subsequent violation of automatic stay to be “willful”; it is enough that creditor was in possession of sufficient facts to cause a reasonably prudent person to make further inquiry. [11 U.S.C.A. § 362\(h\)](#).

[6] Bankruptcy 51 2461

51 Bankruptcy

[51IV](#) Effect of Bankruptcy Relief; Injunction and Stay

[51IV\(D\) Enforcement of Injunction or Stay](#)
[51k2461](#) k. In general. [Most Cited Cases](#)

Even an innocent stay violation becomes “willful,” if creditor fails to remedy the violation after receiving notice of stay. [11 U.S.C.A. § 362\(h\)](#).

[7] Bankruptcy 51 2164.1

51 Bankruptcy

[51II](#) Courts; Proceedings in General

[51II\(B\) Actions and Proceedings in General](#)

[51k2164](#) Judgment or Order

[51k2164.1](#) k. In general. [Most Cited](#)

Cases

Genuine issues of material fact regarding nature of relationship between mortgage lender that was not listed on creditor matrix, and that received no form-

al notice of debtor-mortgagor's Chapter 13, and entity that serviced loan, and whether notice to this servicing entity could be imputed to lender, as well as to what damages debtor sustained due to the mere service postpetition of mortgage foreclosure complaint, precluded entry of summary judgment in adversary proceeding brought by debtor to recover damages for lender's alleged willful violation of automatic stay. [11 U.S.C.A. § 362\(h\)](#).

[8] Bankruptcy 51 2461

51 Bankruptcy

[51IV](#) Effect of Bankruptcy Relief; Injunction and Stay

[51IV\(D\) Enforcement of Injunction or Stay](#)
[51k2461](#) k. In general. [Most Cited Cases](#)

Principal and Agent 308 178(1)

308 Principal and Agent

[308III](#) Rights and Liabilities as to Third Persons

[308III\(E\) Notice to Agent](#)

[308k178](#) Scope of Agency or Authority

[308k178\(1\)](#) k. In general. [Most Cited](#)

Cases

Knowledge acquired by agent acting within scope of its agency is imputed to principal, for purposes of deciding whether the principal “willfully” violated automatic stay. [11 U.S.C.A. § 362\(h\)](#).

[9] Bankruptcy 51 2461

51 Bankruptcy

[51IV](#) Effect of Bankruptcy Relief; Injunction and Stay

[51IV\(D\) Enforcement of Injunction or Stay](#)
[51k2461](#) k. In general. [Most Cited Cases](#)

Principal and Agent 308 177(3.1)

308 Principal and Agent

[308III](#) Rights and Liabilities as to Third Persons

[308III\(E\) Notice to Agent](#)

[308k177](#) Imputation to Principal in General

eral

[308k177\(3\)](#) Notice of Particular Facts

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308k177(3.1) k. In general. **Most**

Cited Cases

Knowledge of loan servicer may be imputed to lender, for purposes of deciding whether the lender “willfully” violated automatic stay. 11 U.S.C.A. § 362(h).

[10] Judgment 228 ☞948(1)

228 Judgment

228XXII Pleading Judgment as Estoppel or Defense

228k948 Pleading in General

228k948(1) k. Necessity of pleading former adjudication in general. **Most Cited Cases**

Res judicata is affirmative defense, that must be raised and established by defendant.

[11] Judgment 228 ☞584

228 Judgment

228XIII Merger and Bar of Causes of Action and Defenses

228XIII(B) Causes of Action and Defenses Merged, Barred, or Concluded

228k584 k. Nature and elements of bar or estoppel by former adjudication. **Most Cited Cases**

Under doctrine of res judicata, final judgment on merits precludes parties or their privies from relitigating claims.

[12] Judgment 228 ☞540

228 Judgment

228XIII Merger and Bar of Causes of Action and Defenses

228XIII(A) Judgments Operative as Bar

228k540 k. Nature and requisites of former recovery as bar in general. **Most Cited Cases** Three conditions must be met in order for doctrine of res judicata to apply: (1) parties must be identical or in privity; (2) suit must be based on same cause of action; and (3) final judgment on merits must have been entered in prior action.

[13] Judgment 228 ☞542

228 Judgment

228XIII Merger and Bar of Causes of Action and Defenses

228XIII(A) Judgments Operative as Bar

228k541 Courts or Other Tribunals Rendering Judgment

228k542 k. In general. **Most Cited Cases**

Judgment 228 ☞739

228 Judgment

228XIV Conclusiveness of Adjudication

228XIV(C) Matters Concluded

228k739 k. Matters which could not have been adjudicated. **Most Cited Cases**

Res judicata will not apply where initial forum did not have power to award the full measure of relief sought in later litigation.

[14] Judgment 228 ☞828.21(2)

228 Judgment

228XVII Foreign Judgments

228k828 Effect of Judgments of State Courts in United States Courts

228k828.21 Particular Federal Proceedings

228k828.21(2) k. Bankruptcy. **Most Cited Cases**

Mortgages 266 ☞497(2)

266 Mortgages

266X Foreclosure by Action

266X(K) Judgment or Decree

266k497 Conclusiveness, Operation, and Effect of Judgment or Decree

266k497(2) k. Persons concluded and persons who may set up conclusiveness of decree. **Most Cited Cases**

Default judgment previously entered in state mortgage foreclosure action could not be given res judicata effect in proceeding later filed by Chapter 13 debtor-mortgagor to recover for mortgage lender's alleged willful violation of automatic stay in

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servicing copy of foreclosure complaint postpetition, while automatic stay was in effect; there was nothing in record of state court foreclosure action to show that debtor raised and argued this alleged stay violation by way of a defense to state court foreclosure action, or that state court had made any determination thereon. 11 U.S.C.A. § 362(h).

[15] Judgment 228 ☞713(1)

228 Judgment

228XIV Conclusiveness of Adjudication

228XIV(C) Matters Concluded

228k713 Scope and Extent of Estoppel in General

228k713(1) k. In general. **Most Cited**

Cases

Issue preclusion, or collateral estoppel, is doctrine that bars relitigation between same parties or their privies of issues of ultimate fact that may have been determined by valid and final judgment.

[16] Judgment 228 ☞634

228 Judgment

228XIV Conclusiveness of Adjudication

228XIV(A) Judgments Conclusive in General

228k634 k. Nature and requisites of former adjudication as ground of estoppel in general. **Most Cited Cases**

Collateral estoppel doctrine serves to protect parties from multiple lawsuits, prevent inconsistent decisions, and conserve judicial resources.

[17] Judgment 228 ☞713(1)

228 Judgment

228XIV Conclusiveness of Adjudication

228XIV(C) Matters Concluded

228k713 Scope and Extent of Estoppel in General

228k713(1) k. In general. **Most Cited**

Cases

Collateral estoppel may not apply in litigation in which parties do not have opportunity to fully and

fairly litigate issue.

[18] Judgment 228 ☞828.21(2)

228 Judgment

228XVII Foreign Judgments

228k828 Effect of Judgments of State Courts in United States Courts

228k828.21 Particular Federal Proceedings

228k828.21(2) k. Bankruptcy. **Most**

Cited Cases

Mortgages 266 ☞497(2)

266 Mortgages

266X Foreclosure by Action

266X(K) Judgment or Decree

266k497 Conclusiveness, Operation, and Effect of Judgment or Decree

266k497(2) k. Persons concluded and persons who may set up conclusiveness of decree. **Most Cited Cases**

Even assuming that Chapter 13 debtor-mortgagor, by way of defense to state court mortgage foreclosure action, had raised question of whether mortgagee had violated automatic stay by serving copy of mortgage foreclosure complaint postpetition while automatic stay was in effect, default judgment entered against debtor in foreclosure action did not collaterally estop debtor from asserting, in support of her damages claim, that mortgagee had willfully violated stay, given lack of evidence that stay violation issue was actually and necessarily litigated in state court action, which was concerned solely with mortgagee's right to foreclosure of debtor's condominium, not on whether mortgagee could be charged with actual or constructive notice of bankruptcy case prior to service of its foreclosure complaint. 11 U.S.C.A. § 362(h).

[19] Bankruptcy 51 ☞2467

51 Bankruptcy

51IV Effect of Bankruptcy Relief; Injunction and Stay

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51IV(D) Enforcement of Injunction or Stay
51k2467 k. Damages and attorney fees.

Most Cited Cases

Mortgagee's failure, when it allegedly learned of mortgagor's Chapter 13 filing subsequent to service of its foreclosure complaint, to re-serve complaint after it had obtained relief from automatic stay to allow foreclosure action to proceed was not in nature of failure to correct an earlier, innocent violation of stay, such as might itself support award of damages against it. 11 U.S.C.A. § 362(h).

[20] Bankruptcy 51 2057

51 Bankruptcy

51I In General

51I(C) Jurisdiction

51k2057 k. Effect of dismissal or closing of case. [Most Cited Cases](#)

Bankruptcy court had no subject matter jurisdiction, following dismissal of underlying Chapter 13 case, over pure state law claims asserted by debtor, that could no longer have any impact upon handling or administration of bankruptcy case, and that could not conceivably effect bankruptcy estate.

[21] Bankruptcy 51 2057

51 Bankruptcy

51I In General

51I(C) Jurisdiction

51k2057 k. Effect of dismissal or closing of case. [Most Cited Cases](#)

Bankruptcy 51 2162

51 Bankruptcy

51II Courts; Proceedings in General

51II(B) Actions and Proceedings in General

51k2162 k. Pleading; dismissal. [Most Cited Cases](#)

Bankruptcy court had obligation to sua sponte dismiss cause of action over which it no longer had subject matter jurisdiction following dismissal of underlying bankruptcy case, though no party raised question of court's continuing post-dismissal juris-

diction.

[22] Bankruptcy 51 2057

51 Bankruptcy

51I In General

51I(C) Jurisdiction

51k2057 k. Effect of dismissal or closing of case. [Most Cited Cases](#)

Bankruptcy court retains jurisdiction over certain matters even after dismissal of underlying bankruptcy case, such as jurisdiction over claim for willful violation of stay or to interpret and enforce its own orders.

*544 Karen Marie Kline, Santa Fe, NM, Pro se.

Richard Leverick, Albuquerque, NM, for Deutsche Bank National Trust Company and Richard Leverick.

MEMORANDUM OPINION

ROBERT H. JACOBVITZ, Bankruptcy Judge.

This matter is before the Court on the various motions for summary judgment filed by the parties. Defendants Deutsche Bank National Trust Company ("Deutsche Bank") and Richard Leverick ("Leverick") filed three separate Motions for Summary Judgment, on March 23, 2009 and August 10, 2009. Karen Marie Kline ("Plaintiff," "Debtor" or "Kline"), acting *pro se*, filed a Motion for Summary Judgment and Memorandum and Affidavit in Support on August 14, 2009.

This adversary proceeding arises from Plaintiff's claims of alleged stay violations based on conduct occurring during litigation in a state court foreclosure proceeding brought by Deutsche Bank, represented by Mr. Leverick, against Plaintiff. On March 5, 2009, Plaintiff filed her Adversary Proceeding Complaint for Damages for Willful Violation of the Automatic Stay alleging that Defendants willfully violated 11 U.S.C. § 362(a)(1), (3), (4), (5), and (6) in pursuing foreclosure of her property located at

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729 W. Manhattan Avenue # 3, Santa Fe, New Mexico, and alleging that Mr. Leverick engaged in deceit or collusion in violation of [NMSA § 36-2-17](#) in his conduct during the foreclosure proceeding. Plaintiff seeks recovery of compensatory damages, damages for emotional distress, punitive damages, costs and interest pursuant to [11 U.S.C. § 362\(h\)](#) ^{FN1} for Defendants' alleged violation of the automatic stay. Additionally, Plaintiff seeks treble damages from Mr. Leverick for violation of [NMSA § 36-2-17](#).

^{FN1}. The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”) re-designated [§ 362\(h\)](#) as [§ 362\(k\)](#). However, revisions to [§ 362](#) made by BAPCPA do not apply in this case because the alleged stay violation occurred prior to the effective date of BAPCPA as it relates to [11 U.S.C. § 362](#). The Court therefore will cite to [§ 362\(h\)](#) in this opinion, not [§ 362\(k\)](#).

Defendants filed their Motion for Summary Judgment (“First Motion”) (Docket No. 8) and accompanying Memorandum in Support (Docket No. 9) asserting that Defendants did not violate the automatic stay, and that Plaintiff’s claim of a stay violation *545 is barred by *res judicata*. Defendants contend that this claim was fully litigated in the state court, and that both the state district court and state court of appeals found Plaintiff’s claim lacked merit. Plaintiff in her response to the First Motion does not address the *res judicata* issue, and reiterates her stay violation claims. *See* Plaintiff’s Objection to Motion for Summary Judgment and Memorandum and Affidavit in Support (Docket No. 13).

Defendants’ Second Motion for Summary Judgment (“Second Motion”) (Docket No. 34) asserts that Defendants are entitled to summary judgment on the stay violation claim under the doctrine of collateral estoppel. Defendants contend that Ms. Kline seeks to re-litigate ultimate facts or issues actually and necessarily decided in the state court foreclosure. Ms. Kline in response asserts that her “federal

bankruptcy court issues” were not litigated in the state court because the state court lacked jurisdiction. *See* Plaintiff’s Response to Defendants’ Second Motion for Summary Judgment and Their Memorandum (Docket No. 44).

Defendants’ Third Motion for Summary Judgment (“Third Motion”) (Docket No. 36) asserts that Defendants are entitled to summary judgment on Plaintiff’s claims against Mr. Leverick for violation of [NMSA § 36-2-17](#) on the ground that Plaintiff has not produced any evidence to support a finding that Mr. Leverick’s conduct was done with “intent to deceive the court, judge or party,” or that he in fact deceived the state court or that any deceit resulted in the entry of the foreclosure judgment. In her response, Plaintiff reasserts that she seeks damages under the statutory provision for Mr. Leverick’s allegedly deceitful conduct during the foreclosure proceeding. *See* Plaintiff’s Objection to Defendants’ (sic) Third Motion for Summary Judgment and Their Memorandum (Docket No. 45).

Plaintiff filed her own Motion for Summary Judgment and Memorandum and Affidavit in Support (“Plaintiff’s Motion”) (Docket No. 46) asserting that she is entitled to summary judgment on her claims for damages for willful violation of the automatic stay under [11 U.S.C. § 362\(a\)\(1\)](#), (2), (3), (4), (5), and (6) as well as on her claim for deceit or collusion in violation of [NMSA § 36-2-17](#). Plaintiff asserts that the exhibits attached to Plaintiff’s Motion establish that there are no genuine issues of material fact and that she is entitled to judgment as a matter of law. She contends that Defendants’ conduct during the foreclosure litigation shows that they willfully violated the automatic stay, that they failed to take affirmative action to undo or reverse their violation, and that Mr. Leverick used deceit to accomplish the foreclosure sale. Defendants’ response to Plaintiff’s Motion incorporated by reference their three Motions for Summary Judgment. Defendants again assert that Plaintiff has already litigated the issues of service and stay violation in the state court foreclosure action, and that these is-

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sues are barred by *res judicata* and *collateral estoppel*.

The Court having reviewed the motions and responses, and being fully sufficiently advised, finds that the evidence presented is not sufficient to grant summary judgment on the First Motion, the Second Motion or Plaintiff's Motion, and therefore will deny those motions. The Court further finds that it does not have jurisdiction to adjudicate any claims arising from the alleged violation under NMSA § 36-2-17, and therefore will deny the Third Motion and dismiss Plaintiff's claims under NMSA § 36-2-17.

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate when there are no genuine issues of material ***546** fact, and the moving party is entitled to judgment as a matter of law. Rule 56(c), Fed.R.Civ.P., made applicable to adversary proceedings by Rule 7056, Fed.R.Bankr.P. The party requesting summary judgment must demonstrate to the Court that the undisputed facts entitle the movant to judgment as matter of law.^{FN2} The party opposing summary judgment may not rest upon allegations or denials contained in its own pleading, but must "set out specific facts showing a genuine issue for trial." Rule 56(e)(2), Fed.R.Civ.P. To successfully defend against a motion for summary judgment, the affidavits and/or other documentation offered by the party opposing summary judgment must contain probative evidence that would allow a trier of fact to find in Defendant's favor. In determining whether summary judgment should be granted, the Court must view the facts in the light most favorable to the party opposing summary judgment.^{FN3}

FN2. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). ("[A] party seeking summary judgment always bears the initial responsibility of informing the ... court of the basis for its motion, and ... [must] demonstrate

the absence of a genuine issue of material fact.").

FN3. *Harris v. Beneficial Oklahoma, Inc., (In re Harris)*, 209 B.R. 990, 995 (10th Cir. BAP 2007)("When applying this standard, we are instructed to 'examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment.' "); *Wolf v. Prudential Ins. Co. of America*, 50 F.3d 793, 796 (quoting *Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir.1990))(internal quotation marks omitted); *Henderson v. Inter-Chem Coal Co.*, 41 F.3d 567, 569 (10th Cir.1994)(stating that the court must "view all facts and any reasonable inferences that might be drawn from them in the light most favorable to the nonmoving party ...").

UNDISPUTED FACTS

Ms. Kline filed her voluntary petition under Chapter 13 of the United States Bankruptcy Code, 11 U.S.C. § 101 *et. seq.*, on March 21, 2005 commencing a bankruptcy case assigned No. 05-12174 (the "Chapter 13 Case"). Deutsche Bank was the holder of a residential note secured by a mortgage granted by the Debtor to Deutsche Bank against property having the street address of 729 W. Manhattan Avenue # 3, Santa Fe, New Mexico (the "Condo"). Deutsche Bank filed a Complaint For Foreclosure ("Complaint") in Cause No. D-101-CV-2005-0515, Santa Fe County District Court, New Mexico, on March 9, 2005, to foreclose the mortgage (the "State Court Action"). Deutsche Bank filed an Amended Complaint (the "Amended Complaint") for foreclosure on March 16, 2005 to add parties to the litigation. Deutsche Bank served the original Complaint on Ms. Kline pre-petition on March 18, 2009 by personal service, and served the Amended Complaint on Ms. Kline post-petition on March 29, 2009.

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Ms. Kline listed the Condo on Schedule A of her schedules filed in the Chapter 13 Case on March 21, 2005 (the “Schedules”) (Docket No. 1 in the Chapter 13 Case) ^{FN4}. On Schedule D, Ms. Kline listed the Condo as subject to a lien in favor of Ocwen Federal Bank FSB. Neither Deutsche Bank nor Richard Leverick are listed as *547 creditors in the Schedules, and neither was included on the mailing list generated by the Clerk of Court for the Chapter 13 Case when the case was filed. A Certificate of Service filed of record in the Chapter 13 Case reflects service on March 25, 2005 of the Notice of Chapter 13 Bankruptcy Case, which gave notice of the commencement of the Chapter 13 Case, on Ocwen Federal Bank, 12650 Ingenuity Dr., Orlando, FL 32826-2717 but does not reflect service of the Notice on Deutsche Bank or Richard Leverick. (Docket No. 4 in the Chapter 13 Case).

^{FN4}. The Court takes judicial notice of the contents of the court file. See *In re SAI Holdings Ltd.*, 2009 WL 1616663, *1 (Bankr.N.D. Ohio, 2009); *St. Louis Baptist Temple Inc. v. FDIC*, 605 F.2d 1169, 1172 (10th Cir.1979) (“[A] court may take judicial notice whether requested or not of its own records and files, and facts which are part of its public records.... The doctrine of judicial notice has been utilized, *sua sponte*, when the defending party's motion for summary judgment is predicated on affirmative defenses such as *res judicata* or *collateral estoppel*.”)

On June 1, 2005, “Ocwen Federal Bank FSB, loan servicing agent for Deutsche Bank” filed a Motion for Relief from Stay to permit it to proceed with the State Court Action. (Docket No. 20 in the Chapter 13 Case). As a result of Ms. Kline having failed to file a timely objection to the stay motion, the Court entered a Default Order Granting Relief From Stay on July 1, 2005 modifying the automatic stay to allow Deutsche Bank to proceed with the State Court Action. (Docket No. 27 in the Chapter 13 Case). Thereafter, Deutsche Bank prosecuted the foreclos-

ure action in state court. On July 13, 2005, Plaintiff's bankruptcy case was dismissed.

DISCUSSION

A. Claims For Willful Violation of the Stay.

1. Defendants Have Not Established that They Had No Knowledge of the Chapter 13 Case.

Upon the filing of a voluntary petition under the Bankruptcy Code, 11 U.S.C. § 362 imposes an automatic stay applicable to all entities that prohibits actions against the debtor or against property of the bankruptcy estate. 11 U.S.C. § 362(a). The scope of the automatic stay is broad ^{FN5} and specifically prohibits, among other things

^{FN5}. See *In re Sullivan*, 357 B.R. 847, 853 (Bankr.D.Colo.2006) (“The scope of the automatic stay is extremely broad.”)(citing *In re Gagliardi*, 290 B.R. 808, 814 (Bankr.D.Colo.2003)).

the commencement or continuation, including the issuance of employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title[.]

11 U.S.C. § 362(a)(1).

[1][2][3][4][5][6] Section 362(h) provides that an individual injured by any willful violation of a stay shall recover actual damages, including costs and attorneys fees and, in appropriate circumstances, punitive damages. “A debtor alleging a violation of the automatic stay has the burden to demonstrate, by a preponderance of the evidence, that a violation of the automatic stay has occurred, that the violation was willfully committed and that the debtor suffered damage as a result of the violation.” ^{FN6}

A “willful violation” does not require a specific intent to violate the automatic stay but only that the defendant has knowledge of the bankruptcy case and that the defendant’s actions which violated the stay were intentional.^{FN7} Absent notice or knowledge on the part of a creditor of the commencement or pendency of the bankruptcy case, *548 there is still a violation of the stay but the violation is merely “technical,” and no damages are to be awarded.^{FN8} “Notice of the commencement or pendency of a bankruptcy case need not be formal in nature ‘where the creditor had sufficient facts which would cause a reasonably prudent person to make further inquiry.’”^{FN9} Even an innocent stay violation (one committed without knowledge of the stay) becomes willful, if the creditor failed to remedy the violation after receiving notice of the stay.^{FN10}

FN6. *In re Panek*, 402 B.R. 71, 76 (Bankr.D.Mass.2009)

FN7. *In re Fisher*, 194 B.R. 525, 532 (Bankr.D.Kan.,1996); *Panek* 402 B.R. at 76(citing *Fleet Mortgage Group, Inc. v. Kaneb* 196 F.3d 265, (1st Cir.1999)) (“the standard for a willful violation of the automatic stay under 362(h) is met if there is knowledge of the stay and the defendant intended the actions which constitute the violation”).

FN8. *In re McMullen*, 386 F.3d 320, 330 (1st Cir.2004)(citing *In re Will*, 303 B.R. 357, 364 (Bankr.N.D.Ill.2003))(noting that no damages could be awarded under subsection 362(h) where creditor had not been listed, and hence had received no notice of the bankruptcy case and resultant automatic stay); *Shaddock v. Rodolakis*, 221 B.R. 573, 575 (D.Mass.1998)(no damages are allowable for technical violation, even where debtor nonetheless incurred attorney fees as result of violation).

FN9. *In re Reed*, 102 B.R. 243, 245

(Bankr.E.D.Okl.,1989) (citing *In re Bragg*, 56 B.R. 46, 49 (Bankr.M.D.Ala.,1985)).

FN10. *Gagliardi*, 290 B.R. at 818-819; *McMullen* 386 F.3d at 330 (Normally, however, a creditor that commits a technical violation of the automatic stay, due to lack of notice, has an affirmative duty to remedy the violation as soon as practicable after acquiring actual notice of the stay.)

[7] The threshold issue pertaining to the claim for violation of the automatic stay is whether Deutsche Bank and Mr. Leverick had notice or knowledge of the Chapter 13 Case at the time their alleged actions occurred in the prosecution of the foreclosure action prior to modification of the stay on July 1, 2005 to permit prosecution of the foreclosure action. Deutsche Bank and Mr. Leverick assert there was no violation of the automatic stay because “notice of the bankruptcy filing was mailed only to Deutsche Bank’s loan servicer Ocwen, and not to either Defendant, and the Defendants were unaware of the Chapter 13 Case when service of the Amended Complaint was made.”

[8][9] Based on the record, the Court cannot conclude that there is no genuine issue of fact as to whether Deutsche Bank had knowledge of the Chapter 13 Case prior to service of the Amended Complaint. With certain exceptions not applicable here, knowledge acquired by an agent acting within the scope of its agency is imputed to the principal for purposes of determining whether the principal willfully violated the automatic stay; and under this doctrine, knowledge of a loan servicer can be imputed to the lender.^{FN11} Defendants have submitted no evidence of the relationship between Deutsche Bank and Ocwen, other than a recitation that Ocwen was a loan servicer for Deutsche Bank^{FN12}, and have submitted no evidence regarding when Ocwen received the notice of the Chapter 13 Case or otherwise knew the Chapter 13 Case was pending.

FN11. *E.g. In re Crawford*, 388 B.R. 506,

519 (Bankr.S.D.N.Y.2008) (notice to loan servicer Owen Federal Bank FSB imputed to lender HSBC Bank for purposes of determining whether a willful violation of the stay occurred); *Haile v. York*, 90 B.R. 51, 55 (Bankr.W.D.N.Y.1988)(notice to Alan Joseph Law office was imputed to creditor New York State Higher Educ. Services Corp. for purposes of determining whether a willful violation of the stay occurred.)

FN12. Ocwens's filing of a stay motion in the Chapter 13 Case in its own name as servicing agent for Deutsche Bank suggests the existence of an agency relationship between the two in relation to assertion of Deutsche Bank's claims against Plaintiff.

*549 Likewise, based on the record, the Court cannot conclude that there is no genuine issue of fact as to whether Mr. Leverick had knowledge of the Chapter 13 Case prior to service of the Amended Complaint.^{FN13} Defendants' statement of material facts asserts that when the Amended Complaint was served Mr. Leverick was unaware of the Chapter 13 Case and such service was not done with the intention, on his part, of violating the stay.^{FN14} Ms. Kline has not specifically disputed this fact. However, Mr. Leverick does not refer to any pleadings, affidavits, deposition transcripts, discovery responses, or any other evidence to support his assertions, and the Court has found none. Absent any evidence regarding when Mr. Leverick obtained actual knowledge of the Chapter 13 Case, the Court cannot conclude that there is no genuine issue of fact as to whether he knew of the Chapter 13 Case before service of the Amended Complaint even though Ms. Kline does not specifically dispute this fact.^{FN15}

FN13. Even if Deutsche Bank and/or Mr. Leverick had knowledge of the Chapter 13 Case prior to service of the Amended Complaint, Plaintiff would still need to prove damages resulting from a stay viola-

tion. Given the limited activity that occurred in the foreclosure action between commencement of the Chapter 13 Case and entry of the order granting relief from the stay to permit prosecution of the foreclosure action to proceed, it is not clear from the record what actual damages Plaintiff suffered that can be attributed to a stay violation.

FN14. Ocwens's knowledge of the Chapter 13 Case would not be imputed to Mr. Leverick because in the relationship, if any, Mr. Leverick would not be the principal. See *Siharath v. Citifinancial Servs. (In re Siharath)*, 285 B.R. 299, 304 (Bankr.D.Minn.2002) (a principal's undisclosed knowledge is not imputed to the agent); *In re Manzanares*, 345 B.R. 773, 792-93 (Bankr.S.D.Fla.2006) (agency law generally does not hold agents responsible for knowledge possessed only by their principal).

FN15. Rule 56(e) provides, in relevant part, that:

Supporting and opposing affidavits shall be made on personal knowledge, *shall set forth such facts as would be admissible in evidence*, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

See also *D.H. Blair & Co., Inc. v. Gottdiener*, 462 F.3d 95, 110 (2nd Cir.2006) (“If the evidence submitted in support of the summary judgment motion does not meet the movant's burden of production, then summary judgment must be denied *even if no opposing evidentiary matter is presented.*”)(quoting

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Vermont Teddy Bear Co., Inc. v. 1-800 Beargram Co., 373 F.3d 241, 244 (2nd Cir.2004)(emphasis in original); *One Piece of Real Property*, 363 F.3d at 1101-1102 (to the same effect); *Jaroma v. Massey*, 873 F.2d 17, 20 (1st Cir.1989)(per curiam) (“[T]he district court cannot grant a motion for summary judgment merely for lack of any response by the opposing party, since the district court must review the motion and the supporting papers to determine whether they establish the absence of a genuine issue of material fact.”); *John v. State of Louisiana (Bd. of Trustees for State Colleges and Universities)*, 757 F.2d 698, 708 (5th Cir.1985)(the movant has the burden of demonstrating the absence of a material fact even if no response to the summary judgment motion is made).

2. Plaintiffs Claims are Not Barred under the Doctrine of Res Judicata

[10][11][12][13] In the First Motion, Defendants also assert that Plaintiff's claims are barred by *res judicata* because Plaintiff raised the issue that the automatic stay was violated during the foreclosure proceeding, and that the “Plaintiff's arguments on the alleged violation of the automatic stay in the bankruptcy were briefed, argued and denied.”^{FN16}

Res judicata is an affirmative defense that must be raised and established by a defendant. *550 Fed.R.Civ.P. 8(c). Under the doctrine of *res judicata*, a final judgment on the merits precludes the parties or their privies from relitigating claims.^{FN17}

For the doctrine to apply, three conditions must be satisfied: (1) the parties must be identical or in privity; (2) the suit must be based on the same cause of action; and (3) a final judgment on the merits must have been made in the prior action.^{FN18} “Res judicata will not apply where the initial forum did not have the power to award the full measure of relief sought in the later litigation.”

FN19

FN16. See Memorandum in Support of Defendants' Motion For Summary Judgment (Doc 9) at page 18 filed herein.

FN17. *In re Thomas*, 362 B.R. 478, 484-85 (10th Cir.BAP2007). *In re S.N.A. Nut Co.*, 215 B.R. 1004,1008 (Bankr.N.D.Ill.1997); *In re Miller*, 153 B.R. 269, 272 (Bankr.D.Minn.1993).

FN18. *In re Vigil*, 250 B.R. 394, 396 (Bankr.D.N.M.,2000)(“*Res judicata*, also known as claim preclusion, requires the presence of the following elements: 1) a final judgment on the merits in a prior action; 2) same parties in both suits (or party is in privity with a party to the prior suit); and 3) same cause of action in both suits.”)

FN19. *Burgos v. Hopkins*, 14 F.3d 787, (2nd Cir.1994)(citing *Davidson v. Capuano*, 792 F.2d 275, 278 (2d Cir.1986)); *McLearn v. Cowen & Co.*, 48 N.Y.2d 696, 422 N.Y.S.2d 60, 61, 397 N.E.2d 750 (1979).

[14] Although Defendants assert, in support of the application of *res judicata*, that the stay violation issue was briefed, argued and denied in the State Court Action, Defendants have not cited to anything in the record in the State Court Action demonstrating that Plaintiff asserted a claim in the state court that she is entitled to damages under 11 U.S.C. § 362(h) as a result of a willful violation of the stay or that such a claim was decided in state court.^{FN20} Since there is no evidence that such claim was asserted or determined in state court, this Court cannot conclude that the State Court Action precludes litigation of the claim in bankruptcy court under the doctrine of *res judicata*.^{FN21} The Court therefore finds that the First Motion should be denied.

FN20. *Id.*

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FN21. Further, even if a claim under 11 U.S.C. § 362(h) had been adjudicated in state court, it is not at all clear that it would be binding on this Court. There is substantial authority for the proposition that the Bankruptcy Court has exclusive jurisdiction to impose sanctions under the Bankruptcy Code for violation of the automatic stay. E.g. *In Eastern Equipment & Services Corp. v. Factory Point Nat'l Bank*, 236 F.3d 117, 120-21 (2d Cir.2001); *MSR Exploration, Ltd. v. Meridian Oil, Inc.*, 74 F.3d 910, 913-16 (9th Cir.1996); *In re Theokary*, 2008 WL 5329310 (Bankr.E.D.Pa.2008); *In re Benalcazar*, 283 B.R. 514 (Bankr.N.D.Ill.2002); *Halas v. Platek*, 239 B.R. 784, 792 (N.D.Ill.1999). Cf., *In re Lucas*, 312 B.R. 559, 571 (Bankr.D.Md.2004); *In re Startec Global Communications Corp.*, 292 B.R. 246, 254 (Bankr.D.Md.2003).

3. Plaintiffs Claims are Not Barred under the Doctrine of Collateral Estoppel

[15][16][17] Issue preclusion or collateral estoppel “is a doctrine that bars relitigation between the same parties or their privies of issues of ultimate fact that may have been determined by a valid and final judgment.” FN22 The collateral estoppel doctrine serves to protect parties from multiple lawsuits, prevent inconsistent decisions and to conserve judicial resources. FN23 In litigation where the parties do not have the opportunity to “fully and fairly” litigate an issue, collateral estoppel may not apply. FN24

FN22. *In re Putvin*, 332 B.R. 619, 624 (10th Cir. BAP 2005).

FN23. *Id.* at 624-625.

FN24. *General Signal Corp. v. Rosania (In re Rexotech California, Inc.)* 968 F.2d 1224 (10th Cir.1992);

[18] Defendants assert that collateral estoppel prevents re-litigation of the alleged*551 stay violation, and in the Second Motion incorporate their Statement of Uncontested Material Facts contained in the First Motion. Defendants set forth facts that at the various hearings in the foreclosure proceeding Plaintiff raised the issue that the Defendants violated the automatic stay by failing to re-serve plaintiff with the amended complaint. Defendants cite to New Mexico case law for the proposition that collateral estoppel does not require that both suits be based on the same cause of action, FN25 and assert that this adversary proceeding is attempting to do just that, re-litigate “ultimate facts or issues actually decided in a prior suit.”

FN25. Bankruptcy Courts have also held that collateral estoppel precludes relitigation of issues actually litigated where the second action is based on a different cause of action from the first cause of action. See *In re Edie*, 314 B.R. 6, 11 (Bankr.D.Utah 2004); *In re Lewis*, 271 B.R. 877, 883 (10th Cir. BAP 2002); *In re Schwarten*, 194 B.R. 239, 244-245 (D.Kan.1996); *In re Lindsay*, 55 B.R. 569, 572 (Bankr.Okl.1985).

This Court disagrees. Defendants have not supported the Second Motion with evidence that the stay violation issue was actually and necessarily litigated in state court. The state court proceeding focused on the foreclosure of the Plaintiff's Condo. FN26 While Plaintiff may have raised the issue that the automatic stay was violated, the state court did not make specific findings whether and when Defendants had knowledge of the Chapter 13 Case or whether any knowledge by Ocwen was imputed to Deutsche Bank. The state court's finding that Plaintiff failed to timely answer or file a responsive pleading to the complaint for foreclosure and its issuance of a default judgment, and the affirmance of that decision on appeal, does not foreclose Plaintiff's claim under Bankruptcy Code § 362(h).

FN26. The Summary Judgment, Stipulated

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Judgment, Default Judgment, Decree of Foreclosure, Order of Sale and Appointment of Special Master entered in the state district court on December 15, 2005 grants the relief requested by Deutsche Bank, foreclosure of the Condo.

This Court, therefore, finds Defendants Second Motion should be denied.

4. *Plaintiff Has Not Established She is Entitled to Summary Judgment*

[19] Plaintiff's Motion for Summary Judgment asserts that the Defendants violated the automatic stay and then proceeded with the foreclosure based on the amended complaint. Plaintiff repeatedly claims that Defendants should have made efforts to undo their actions that violated the automatic stay. She contends that the amended complaint seeking foreclosure of her property should have been reserved on her after the order granting relief from the automatic stay was entered.

Plaintiff's statement of material facts set forth in her Memoranda contain no references to any pleadings, affidavits, deposition transcripts, discovery responses, or any other evidence to support her assertions that at the time of service of the Amended Complaint either Deutsche Bank or Mr. Leverick had knowledge of the Chapter 13 Case, that service of the Amended Complaint was done with the intention of violating the stay, or that re-service of the Amended Complaint on Plaintiff after the stay relief was granted was required. In fact, the record reflects that the state court did not require Defendant to re-serve the amended complaint on the Plaintiff.^{FN27} Absent any evidence in the *552 record to support her motion for summary judgment, the Court cannot find that Plaintiff is entitled to judgment as a matter of law based on facts that are not in genuine dispute.

^{FN27}. The Summary Judgment, Stipulated Judgment, Default Judgment, Decree of

Foreclosure, Order of Sale and Appointment of Special Master entered in the state district court on December 15, 2005 makes a finding that the Plaintiff, herein, failed to appear or plead in the foreclosure proceeding. Then on June 20, 2006 the state district court entered orders denying Plaintiff's Rule 59 Motion for Reconsideration and Rule 60 Motion to Set Aside Order Approving Foreclosure Sale wherein Plaintiff attempted to vacate the foreclosure judgment by asserting that the Amended Complaint was served in violation of the automatic stay; was therefore void and Defendants should be required to be re-serve the complaint.

B. *The Court Lacks Jurisdiction to Hear or Determine the Claim for Violation of NMSA 36-2-17.*

[20] Defendants' Third Motion asserts that Defendants are entitled to summary judgment on Plaintiff's claims against Mr. Leverick for violation of NMSA § 36-2-17 NMSA 1978. NMSA § 36-2-17, states in pertinent part:

If an attorney is guilty of deceit or collusion or consents thereto with intent to deceive the court, judge or party, he shall forfeit to the injured party, treble damages to be recovered in a civil action.

Plaintiff contends that Defendant Leverick was deceitful in the pleadings filed and at hearings held in the state court foreclosure action and as a result Plaintiff was damaged by the foreclosure and sale of her condo as well as suffered emotional distress.

[21] This Court lacks jurisdiction to hear or determine this claim.^{FN28} The Chapter 13 Case was dismissed on July 13, 2005. Plaintiff's claim for violation of NMSA § 36-2-17 is governed entirely by nonbankruptcy law and exists independently of a bankruptcy case. Further, resolution of the claim would have no impact on the handling or adminis-

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tration of the Chapter 13 Case and would have no conceivable effect on the bankruptcy estate. As a result, the claim is not a claim arising under [title 11](#) or arising in or related to a case under [title 11](#), and the Court has no jurisdiction to hear or determine the claim.^{FN29}

FN28. Although no party raised the question of jurisdiction, this Court has an obligation to dismiss a claim *sua sponte* if the court has no subject matter jurisdiction. See *Image Software, Inc. v. Reynolds & Reynolds Co.*, 459 F.3d 1044, 1048 (10th Cir.2006) (stating “Federal courts ‘have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party,’ and thus a court may *sua sponte* raise the question of whether there is subject matter jurisdiction ‘at any stage in the litigation.’ ”); *Williams v. Life Sav. And Loan*, 802 F.2d 1200, 1202 (10th Cir.1986)(“It is well settled that a federal court must dismiss a case for lack of subject matter jurisdiction, even should the parties fail to raise the issue.”)

FN29. See 28 U.S.C. § 1334(a) and (b) (conferring exclusive jurisdiction on the district courts over all cases under [title 11](#), and original jurisdiction over “all civil proceedings arising under [title 11](#), or arising in or related to cases under [title 11](#).”); 28 U.S.C. § 157(b) (providing that “[b]ankruptcy judges may hear and determine all cases under [title 11](#) and all core proceedings arising under [title 11](#), or arising in a case under [title 11](#)”). See also *In re Johnson*, 575 F.3d 1079, 1082 (10th Cir.2009) (bankruptcy courts have jurisdiction to “hear and determine all cases under [title 11](#) and all core proceedings arising under [title 11](#), or arising in a case under [title 11](#)”, and may hear non-core proceedings that are related to a case under [title 11](#))

(quoting 28 U.S.C. § 157(b)(1)); *In re Gardner*, 913 F.2d 1515, 1518 (10th Cir.1990) (stating that “[b]ankruptcy courts have jurisdiction over core proceedings ... [which] are proceedings which have no existence outside of bankruptcy.”); *Vongrabe v. Mecs (In re Vongrabe)*, 332 B.R. 40, 43-44 (Bankr.M.D.Fla.2005) (concluding that the Court lacked jurisdiction over an adversary proceeding filed by the Chapter 7 debtor where the claims at issue reverted back to the debtor upon abandonment by the trustee and the asset was no longer part of the bankruptcy estate; the outcome of the proceeding would have no conceivable impact on the administration of the bankruptcy estate) (citations omitted).

*553 [22] Although the bankruptcy court has jurisdiction over certain matters after dismissal of a bankruptcy case, such as jurisdiction over a claim for willful violation of the stay or to interpret and enforce its orders,^{FN30} Ms. Kline's claim of violation of NMSA § 36-2-1 in the conduct of the state court foreclosure proceeding does not fall under the auspices of the court's post-dismissal jurisdiction. Therefore the Court will deny the Third Motion for Summary Judgment, and enter an order dismissing Plaintiff's claim against Mr. Leverick for violation of NMSA § 36-2-17 based on lack of subject matter jurisdiction.

FN30. *In re Johnson*, 575 F.3d 1079, 1083 (10th Cir.2009)(Even after the dismissal of a bankruptcy case, it is appropriate for bankruptcy courts to maintain jurisdiction of proceedings involving stay violations); *In re Menk*, 241 B.R. 896, 906 (9th Cir. BAP 1999); *Rodriguez v. Volpentesta (In re Volpentesta)*, 187 B.R. 261, 270-71 (Bankr.N.D.Ill.1995)(“Issues of dischargeability of particular debts survive dismissal”); *Elias v. U.S. Trustee (In re Elias)*, 188 F.3d 1160, 1162 (9th Cir.1999)

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“Issues of compensation and sanctions survive dismissal.”); *Beneficial Trust Deeds v. Franklin (In re Franklin)*, 802 F.2d 324, 326-27(9th Cir.1986)(“The bankruptcy court retains subject-matter jurisdiction to interpret orders entered prior to dismissal”).

CONCLUSION

The Court therefore finds that the parties have failed to provide admissible evidence sufficient to grant Defendants' First Motion, Second Motion or Plaintiff's Motion, and will therefore deny each of those motions. The Court will deny Defendant's Third Motion based on lack of subject matter jurisdiction.

This Memorandum Opinion shall constitute the Court's findings of fact and conclusions of law under [Rule 7052, Fed.R.Bankr.P.](#) Appropriate orders will be entered.

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