UNITED STATES BANKRUPTCY APPELLATE PANEL
FOR THE FIRST CIRCUIT

BAP NO. MW 97-014
BAP NO. MW 97-031
(Consolidated Appeals)

IN RE: KENNETH A. KANEB
Debtor

FLEET MORTGAGE GROUP
Appellant

v.

KENNETH A. KANEB
Appellee

Appeal from the United States Bankruptcy Court
District of Massachusetts
[Hon. James F. Queenan, U.S. Bankruptcy Judge]

Before
VOTOLATO, Chief Judge, de JESUS and HAINES,
U.S. Bankruptcy Judges.

Lawson Williams, Esq. for Appellant.
Carl D. Aframe, Esq. for Appellee.

April 2, 1998

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de Jesús, J.

Fleet Mortgage Group, Inc. ("Fleet"), appeals orders entered by the bankruptcy court awarding the appellee $25,000.00 for mental anguish and $18,220.68 for costs and attorneys' fees. These awards were based on Fleet's admitted violation of the automatic stay under 11 U.S.C. § 362(h). Fleet argued the trial judge erred as a matter of law in ruling Fleet had "willfully" violated the stay and in awarding the mentioned sums. Based upon the record, we affirm the judge's rulings on willfulness and on the $25,000.00 award for mental anguish, and adjust the award of costs and attorneys' fees considering appellee's voluntary correction.

The Panel has jurisdiction to review the appealed issues under 11 U.S.C. § 158, using these standards: "'Findings of fact ... shall not be set aside unless clearly erroneous....' Fed.R.Bankr. 8013; *see North Atl. Fishing, Inc. v. Geremia*, 153 B.R. 607, 610 (D.R.I.1993). Applications of law are reviewed *de novo* and are set aside only when they are made in error or constitute an 'abuse of discretion.' *In re Gonic Realty Trust,* 909 F.2d 624, 626-27 (1st Cir. 1990); *In re Carter,* 100 B.R. 123, 125 (D.Me. 1989)." In re DN Associates, 3 F.3d 512, 515 (1st Cir. 1993).

The record shows the facts are not disputed.[1] Mr. Kenneth Kaneb is a semi-retired, eighty five year old widower, who

[1] The trial Judge's findings are concise. These relevant facts are not controverted, and show the bankruptcy Judge's succinct findings are sustained by the record.

describes himself as a "snowbird", meaning he spends winters in Florida and summers in Massachusetts. He is an educated man, with a college degree, fluent in Arabic, formerly engaged in the oil business, now overseeing certain interests in gasoline stations, somewhat hard of hearing and with limitations appropriate to this age. His son helps him manage his personal life and business interests.

Mr. Kaneb originally filed a voluntary petition for bankruptcy under Chapter 13 of the U.S. Bankruptcy Code to stop the foreclosure of mortgages encumbering his Massachusetts residence. The Massachusetts residence was sold for about $1.1 million and proceeds were used to pay various secured creditors. Thereafter, the case was voluntarily converted to Chapter 7. Mr. Kaneb chose to keep his Florida condominium unit. This was made possible by the acquiescence of the Trustee, notified to creditors who did not object, and continued payments for a time to the mortgagor. The Court entered the discharge.

Shawmut Bank, N.A. ("Shawmut") is the original mortgagor of the Florida property. Shawmut sought leave to foreclose and when relief from the automatic stay was denied, that result was communicated to the Shawmut's officers. Settlement negotiations ensued without success. Shawmut then either sold this mortgage with many others to Fleet, or agreed that Fleet would service this mortgage with others comprising much of Shawmut's loan portfolio. Shawmut delivered Kaneb's file to Fleet in a convoluted manner, by way of Milwaukee, Chicago, various Florida offices, ultimately

ending up with Fleet's "foreclosure" attorneys, Shapiro & Fishman. Ms. Donna Glick, the Fleet attorney in charge of the case, ordered a title study and supervised the preliminary steps taken before the foreclosure was initiated in the Florida State Court. She conceded knowing Mr. Kaneb was in bankruptcy because the file contained copies of the motion for relief from stay, a proposed unsigned order granting the relief and the Order of Discharge. Under the impression that the Order of Discharge terminated the automatic stay, she supervised the drafting and filing of the complaint for foreclosure.

In Florida, foreclosures are published in the newspaper. These publications commonly generate a flood of colorful offers for legal defense. Such an inundation of "dayglow" mail occurred at Mr. Kaneb's Florida mailbox when he was residing in Massachusetts. As a result, neighbors who collected his mail and looked after his apartment became aware of his legal and financial difficulties. Mr. Kaneb testified that when his "situation" became known, many of his Florida neighbors avoided him, invited him to join them with less frequency, or asked to join them for less expensive social activities. His social activities and company changed. This change caused Mr. Kaneb's pain and suffering.

Meanwhile, before initiating foreclosure proceedings in Florida, Fleet's employees were sending letters welcoming Mr. Kaneb as its valued customer. He was offered an adjusted interest rate and asked to forward a sum as the monthly installment due on the mortgage loan. Mr. Kaneb complied. Fleet cashed his checks.

Ms. Glick acknowledged subsequent telephone conversations, documents sent by FAX and letters from Mr. Kaneb and his attorney making her fully aware of the ongoing bankruptcy and of the alleged violation of the automatic stay. Her first response was to place a hold on the foreclosure suit. After receiving a forcefully worded letter prepared by Mr. Kaneb with his son's help, Ms. Glick filed a voluntary dismissal of the foreclosure suit. Mr. Kaneb then filed the adversary proceeding seeking damages, costs and attorney's fees for Fleet's alleged willful violation of the stay under 11 U.S.C. § 362(h). The trial was held. Several witnesses testified, including Debtor. Fleet did not object to Mr. Kaneb's testimony on mental anguish caused by Fleet's filing the foreclosure suit in Florida. Nor did Fleet raise any question as to the sufficiency of this evidence under federal or applicable nonbankruptcy law in the Court below. The trial judge ruled in favor of plaintiff, and quantified costs and attorney's fees once he considered counsel's specific application under oath, defendant's opposition and oral arguments.

A. Did Fleet willfully violate the automatic stay when it initiated foreclosure of the mortgage encumbering the Florida condominium unit?

The trial Judge held it did. We review his ruling using the clearly erroneous standard.

Fleet admitted it violated the automatic stay, but argued the violation had been unintentional, akin to negligence, due mainly to

the circumstances surrounding the transfer of a huge loan portfolio from Shawmut to Fleet.[2]

The facts painted a picture of large banks whose employees and Attorneys were engaged in actions to collect a secured debt from

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[2] Our Colleague dissents believing this stipulation is the parties' erroneous conclusion of law, not binding on this panel and subject to *de novo* review. We are not convinced the parties' stipulation is a clear mistake of law. In his July 19, 1996 letter to Fleet, Mr. Kaneb states: **"Since there is equity in this asset for the estate, it remains part of the bankruptcy estate** and I have a claim of exemption in this asset." (our emphasis) This statement cannot serve as the basis for concluding on appeal that the asset was no longer part of the estate and therefore not subject to the automatic stay. Neither can Judge Corcoran's conclusion in *In re Millsaps* that "The Millsaps' contention that any action taken by the Service violated the automatic stay can be rejected summarily. The Millsaps claimed the subject property as exempt, and there were no objections to the exemption claimed. Thus, in 1987 the property had long since ceased to be property of the estate". 133 B.R. 547, 551-552 (Bankr. M.D. Fl 1991) When as here we have realty with little or no information as to its value, encumbrances and exemption, we cannot know whether it is valueless, outside the purview of the estate.

In *T I Federal Credit Union v. Delbonis*, the Court of Appeals sets aside a stipulation considering facts very different to the one at hand. There one of the parties admitted it mistakenly stipulated what proved to be an erroneous conclusion of law. It actively sought relief refused by the Bankruptcy Court. There the issue was preserved on appeal due to party's efforts to get the U.S. District Court to set aside the stipulation enforced by the Bankruptcy Court. Here parties have made no claim of mistake and sought no such relief. Here our Colleague during appellate review would *sua sponte* grant this relief never requested by the parties before any court.

Lastly, this stipulation raises no important constitutional or governmental issues which should be treated on appeal regardless of their introduction by the parties. 72 F.3d 921, 928-930 (1st Cir. 1995).

Mr. Kaneb or his property, ignoring the bankruptcy case, even though they knew or should have known these actions violated the automatic stay. The trial judge grasped this situation. Based upon the evidence and the stipulated violation of the stay, he found Fleet willfully violated the automatic stay. This finding is supported by the record and is grounded in the law. See Matter of Flynn, 169 B.R. 1007 (Bankr. S.D. Ga. 1994); In re McPeck, 1991 WL 8405 (Bankr. D. Minn.); In re Wagner, 74 B.R. 898 (Bankr. E.D. Pa. 1987).

B. Did the trial Judge err when he awarded $25,000.00 to Mr. Kaneb for his mental anguish caused by Fleet's described attempts to collect its secured loan?

"As a general rule, an appellate court will not consider an issue raised for the first time on appeal." In re Berg, 186 B.R. 479, 483 (9th Cir. BAP 1995). Our examination of the lengthy record shows Fleet did not question the appropriateness of the $25,000.00 award due to mental anguish on grounds that there was no corroborating medical evidence. Therefore, Fleet is precluded from raising the issue of corroboration now, especially since it presents no reason why it should be exempt from the general rule. In re 604 Columbus Ave. Realty Trust, 968 F.2d 1332 (1st Cir. 1992); Boston Beer Co. v. Slesar Bros. Brewing co., Inc., 9 F.3d 175 (1st Cir. 1993); Petitioning Creditors of Melon Produce v. Braunstein, 112 F.3d 1232 (1st Cir. 1997); In re Tyler, 147 B.R. 208 (9th Cir. 1992).

C. Did the trial Judge commit an error as a matter of law when he awarded Mr. Kaneb costs and attorneys' fees in the sum of $18,220.65?

In its supplemental brief appellant argues the trial judge erred as a matter of law in awarding the mentioned costs and fees. Appellant repeats the six points raised, heard and resolved by the opinion entered on May 16, 1997. We review the bankruptcy judge's decision for abuse of discretion. In re DN Assoc., at 515-516.

The bankruptcy judge addressed each point that was not conceded. As the trial judge he is better able to appreciate the difficulties presented by the proceeding. While we feel his award was generous, we cannot say his findings and conclusions were not supported by the record.

Finally, appellant's counsel agreed to delete a disputed entry of $225.00 for secretarial services. Hence, the total award for costs and fees should have been $17,995.68 instead of $18,220.68. With this minor adjustment, we AFFIRM.

VOTOLATO, C.J., dissenting.

I must respectfully disagree with the conclusions of my colleagues on the Panel, for the following reasons. First, notwithstanding Fleet's stipulation, in my view there was no stay violation; second, a determination of whether the stay was violated involves a question of law and is therefore subject to *de novo* review; and third, even if Fleet did violate the automatic stay, the damage award of $43,220[3] is excessive and not supported by the evidence.

At the hearing in the Bankruptcy Court Fleet stipulated that it had violated the stay. At the outset, and wholly apart from the wisdom of that decision, I am unable to agree with the majority's decision to leave undisturbed a stipulation that is invalid as a matter of law, in light of the fact that as of the date of the alleged stay violation: (1) the discharge had already entered; and (2) the debtor had claimed his condominium as exempt, thereby terminating its status as property of the estate. See Excerpts of Record on Appeal 5, July 19, 1996 Letter from Kaneb to Fleet. *See Millsaps v. United States (In re Millsaps)*, 133 B.R. 547, 551-552

[3] The Bankruptcy Judge awarded $25,000 for emotional distress damages, plus fees and costs of $18,220. I do not believe that in enacting § 362 Congress intended, without proof of actual damages or at least the trial court's indication as to how the damages were quantified, that such transgressions of the stay should be anywhere near this expensive and/or punitive. In addition, during the pendency of this appeal, debtor's attorney filed a request for an additional $22,000 for services rendered before the Panel.

(Bankr. M.D. Fl. 1991), *aff'd* 138 B.R. 87 (M.D. Fl. 1991) (Summarily denying the debtor's claim that the IRS violated the automatic stay when it sold his home. In *Millsaps,* the court held that when the debtors claimed the home as exempt, it ceased to be property of the estate and § 362 no longer precluded creditor action against the property); 11 U.S.C. § 362(c)[4]; *see also Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992)(Barring a timely objection, property claimed as exempt *is exempt period,* even where there is no colorable basis for such claim.)

The First Circuit in *T I Federal Credit Union v. DelBonis*, in relieving the plaintiff credit union from an erroneous stipulation, held that:

> Litigation stipulations can be understood as the analogue of terms binding parties to a contract. As in contract

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[4] This Section states:

(c) Except as provided in subsections (d), (e), and (f) of this section--

> (1) the stay of an act against property of the estate under subsection (a) of this section continues *until such property is no longer property of the estate*; and
> (2) the stay of any other act under subsection (a) of this section continues until the earliest of--
> (A) the time the case is closed;
> (B) the time the case is dismissed; or
> (C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, *the time a discharge is granted or denied*.

11 U.S.C.§ 362(c) (emphasis added).

> law though, rules limiting litigants to trial stipulations are not absolute. *Marshall*, 593 F.2d at 569. ... Parties will usually be relieved of their stipulations where it becomes evident that "the agreement was made under a clear mistake." *Brast v. Winding Gulf Colliery Co.*, 94 F.2d 179, 180 (4th Cir. 1938).
>
> Relief from erroneous stipulations is especially favored where the mistake made concerns a legal conclusion. *Saviano*, 765 F.2d at 645. "[P]arties may not stipulate to the legal conclusions to be reached by the court." *Id.*; *see also Swift & Co. v. Hocking Valley Ry. Co.*, 243 U.S. 281, 289-90, 37 S.Ct. 287, 289-91, 61 L.Ed. 722 (1917); *O'Connor v. City and County of Denver*, 894 F.2d 1210, 1225-26 (10th Cir. 1990) (*citing Platt v. United States*, 163 F.2d 165, 168 (10th Cir. 1947)); *Gunn v. United States*, 283 F.2d 358, 364 (8th Cir. 1960); *In re Dawson*, 162 B.R. 329, 334 (Bankr. D. Kan. 1993). Issues of law are the province of courts, not of parties to a lawsuit, individuals whose legal conclusions may be tainted by self-interest. Courts, accordingly, "are not bound to accept as controlling, stipulations as to questions of law." *Estate of Sanford v. Commissioner*, 308 U.S. 39, 51, 60 S.Ct. 51, 60 S.Ct. 51, 59, 84 L.Ed. 20 (1939); *accord Dedham Water Co., Inc. v. Cumberland Farms Dairy, Inc.*, 972 F.2d 453, 457 (1st Cir. 1992) (*citing RCI Northeast Servs. Div. v. Boston Edison Co.*, 822 F.2d 199, 203 (1st Cir. 1987)); *In re Scheinberg*, 132 B.R. 443, 444 (Bankr. D. Kan.), *aff'd*, 134 B.R. 426 (Bankr. D. Kan. 1992).

T I Federal Credit Union v. DelBonis, 72 F.3d 921, 928 (1st Cir. 1995). The Court in *DelBonis* held that the credit union's stipulation that it was not a governmental unit involved a question of law, and was therefore not irrevocable. Similarly here, I view Fleet's stipulation that it violated the automatic stay as legally erroneous, and therefore is: (1) not binding on this Panel; and (2) subject to *de novo* review on appeal. *Id.* *See, e.g.*, *In re Healthco Int'l, Inc.*, 132 F.3d 104, 107-09 (1st Cir. 1997), where the First Circuit Court of Appeals reversed the Bankruptcy

Appellate Panel's acceptance of a stipulation that *de novo* review was the standard to be applied on appeal. In *Healthco*, neither party to the stipulation was seeking to have it undone, but the Court, seeing the legal error for the first time on appeal, acted *sua sponte* to correct it and applied the clearly erroneous standard. I see nothing wrong with that. Similarly here, if as a matter of law there was no stay violation, the damage award should not be allowed to stand.

Having said that, I also take issue with the amount of damages assessed by the Bankruptcy Judge, assuming *arguendo* that a violation of the stay actually occurred. In discussing the award, the Bankruptcy Judge said:

> In the succeeding weeks, the pending foreclosure became known to the Plaintiff's circle of friends and acquaintances at Boynton Beach. This apparently came about as a result of misdirected mail sent the Plaintiff by numerous parties offering their services to aid the Plaintiff in avoiding foreclosure. None of those friends and acquiantances [sic] have said anything to the Plaintiff about the foreclosure, but it has adversely affected the Plaintiff's social relationships. He is invited much less often to join others for dinner or golf. The community he resides in is an affluent one, and he is now somewhat of a pariah. The effects of the foreclosure caused the Plaintiff severe emotional distress.

Excerpts of Record 6, at 3. Findings of fact are overturned only if clearly erroneous. *Jeffrey v. Desmond*, 70 F.3d 183, 185 (1st Cir. 1995); *In re SPM Mfg. Corp.*, 984 F.2d 1305, 1311 (1st Cir. 1993). *LaRoche v. Amoskeag Bank* (*In re LaRoche*), 969 F.2d 1299, 1301 (1st Cir. 1992). "This means, of course, that a reviewing

court 'ought not to upset findings of fact or conclusions drawn therefrom unless, on the whole of the record, [the appellate judges] form a strong, unyielding belief that a mistake has been made.' *Cumpiano v. Banco Santander P.R.*, 902 F.2d 148, 152 (1st Cir. 1990)." *In re Healthco*, 132 F.3d at 108.

In the instant case, the only evidence as to damages was by the Debtor, who testified that he purchased the Florida condominium[5] in 1987, and thereafter spent approximately four months each year in Florida — typically December through March. See Transcript, at 121 and 138. After his wife died in 1993, Kaneb continued to be socially active, playing golf with neighbors, going to dinner "once in awhile," and attending parties and social activities that were by invitation only. *Id*. at 125. As a result of the mail prompted by the notice of foreclosure, Kaneb says his life changed:

> I wasn't ostracized, but I was not treated as friendly as I had in the past.
> ...
> [I]nvitations were not coming, golf appointments were not coming. I had to golf with my son. I couldn't get a game, with the exception of Wednesday, which was men's day, which the group assigns you to whom you play with. So I had no control over that. And far [sic] as invitations going out to dinner, I have not received any this year.
> ...
> Prior to this we never questioned where we went to dinner, but of late if I was going to get an invitation,

[5] The condominium complex is a gated compound with two executive golf courses and club house. *See* Transcript, at 122.

> I think you'd find it-- we would not go to the places we had gone to prior to that.
> Q. Okay. So you'd go to less expensive places?
> A. Well, limited-- limited menu.
> Q. Okay. Would they be generally less expensive places?
> A. Low prices.
> ...
> Well, its very irritating. I don't sleep well. My eating habits have changed. I-- I don't feel that ambitious about getting out and doing things and meeting people. It's-- it's not a pleasant situation to be in.
> ...
> I'm worried concerning where am I going to live.

Id. at 133-35.

Even giving full credence to the Debtor's testimony, as did the Bankruptcy Judge, "[c]ourts have repeatedly warned litigants that damages 'must be computed in some rational way upon a firm factual base.'" *Ondine Shipping Corp. v. Cataldo*, 24 F.3d 353, 357 (1st Cir. 1994)(*quoting Reliance Steel Prods. Co. v. National Fire Ins. Co.*, 880 F.2d 575, 578 (1st Cir.1989)); *see also In re Alberto*, 119 B.R. 985, 995 (Bankr. N.D. Ill. 1990) ("Once a party has proven that he has been damaged, he needs to show the amount of damages with reasonable certainty"). Although Kaneb's desire to not have the news of his bankruptcy broadcast is understandable, it is also clearly a matter of public record. The fact that word of it eventually got out of the bag ought not to carry such a price tag. Based on this record, and even assuming a stay violation, I see no competent evidence to support anything other than an award of nominal damages.

Additionally, although courts disagree as to whether some

objective medical evidence is necessary to support a claim for emotional distress damages, *see In re Flynn*, 169 B.R. 1007, 1021-1022 (Bankr. S.D. Ga. 1994), *aff'd in part, rev'd in part* 185 B.R. 89 (S.D. Ga. 1995); *see also Sullivan v. Boston Gas Co.* 605 N.E.2d 805, 809-810 (Mass. 1993), *quoting Payton v. Abbott Labs*, 437 N.E.2d 171, 175 (Mass. 1982) (in Massachusetts, "plaintiffs must provide an 'objective corroboration of the emotional distress alleged'"), the decision appealed from does not address this issue. I would have remanded to have the bankruptcy judge provide more detailed findings with regard to the award. *See Healthco*, 132 F.3d at 108 n.5 ("[o]f course, if a reviewing court determines that a bankruptcy court's findings are too indistinct, it may decline to proceed further and remand for more explicit findings. This avenue was open to the BAP and it is equally open to us.")

As for the acceptance of the stipulation at trial, these comments are not meant to be critical of the Bankruptcy Judge, who reasonably responded to the hand he was dealt by the parties. But I am more concerned here with the approval of a questionable precedent,[6] than in dismissing the issue because it was not squarely presented to the trial judge. *See, e.g., Healthco*, 132 F.3d 107-09. Again, I would have remanded the matter for reconsideration of the issue.

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[6] I.e., the tacit approval of a stipulation that does not meet the statutory requirements to constitute a stay violation.

Although the matters addressed in this dissent clearly should have been raised by Fleet in the Bankruptcy Court, and while its failure to do so is incomprehensible, I am constrained to make these comments because of my conviction that a mistake has been made.

This 2nd day of April, 1998.