			FILED
1	ORDERED PU	BLISHED	MAY 30 2014
2			SUSAN M. SPRAUL, CLERK U.S. BKCY, APP, PANEL
3	UNITED STATES BANKE	RUPTCY APPEL	OF THE NINTH CIRCUIT LATE PANEL
4	OF THE NI	NTH CIRCUIT	
5			
6	In re:	BAP No.	CC-13-1328-KiTaD
7	SHOLEM PERL,	Bk. No.	13-26126-NB
8	Debtor.		
9	EDEN PLACE, LLC		
10			
11		OPINI	ΓΟΝ
12		0111	
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15		ed on March 2 a, Californi	
16	Filed - M	May 30, 2014	
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18	for the Central Di	l States Ban strict of Ca	kruptcy Court alifornia
19	Honorable Neil W. Bason,	Bankruptcy	Judge, Presiding
20			
21	Ronald Richard &	Associates,	the Law Offices of APC argued for
22 23	a brief and waive	ed right to o	ppellee failed to file oral argument.
23			
25	Before: KIRSCHER, TAYLOR and I	OUNN, Bankrup	ptcy Judges.
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28			

1 KIRSCHER, Bankruptcy Judge:

2 3 Appellant Eden Place, LLC ("Eden Place") appeals an order 4 from the bankruptcy court that determined, in part, that the 5 postpetition lockout/eviction by the Los Angeles County Sheriff's Department ("Sheriff") of the debtor from his residence on 6 7 June 27, 2013, made at the request of Eden Place violated the 8 automatic stay. Based on the Panel's decision in Williams v. Levi 9 (In re Williams), 323 B.R. 691, 699 (9th Cir. BAP 2005), aff'd, 204 F. App'x 582 (9th Cir. 2006),<sup>1</sup> we AFFIRM. 10 I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY 11 12 Prepetition events Α. Appellee-debtor Sholem Perl ("Perl") and a joint tenant 13 14 (collectively, "Perls") owned a single-family duplex in Los Angeles, California ("Residence"). In 2005, Perls refinanced 15 16 their mortgages in connection with the Residence; in 2009, Perls fell behind in their mortgage payments. 17 18 After recording a notice of default and a notice of trustee's 19 sale, Bank of America sold the Residence on March 20, 2013 to Eden 20 Place. Eden Place timely recorded the trustee's deed on March 29, 21 2013. 22 Perls failed to vacate the Residence after being served with 23 a 3-day notice to quit; Eden Place filed two identical complaints 24 (one for each side of the duplex) for unlawful detainer on 25 26 We acknowledge Eden Place submitted a letter under Fed. R. App. P. 28(j). We discussed some of Eden Place's cited 27 authorities, specifically In re Williams, with its counsel at the time of oral argument and were familiar with its other cited BAP 28 authorities.

1 March 26, 2013 ("UD Actions").

2 On April 12, 2013, the Perls filed a complaint in state court 3 against Eden Place (and others) to set aside the sale. Perls alleged claims for (1) wrongful foreclosure, (2) violation of the 4 Homeowner Bill of Rights, (3) unfair business practices and 5 6 (4) breach of contract ("Complaint to Set Aside Sale"). Eden 7 Place filed a cross-complaint on May 7, 2013, for (1) holdover damages, (2) trespass and (3) interference with prospective 8 9 economic advantage ("Cross-Complaint"), as well as a motion to 10 expunge the lis pendens filed by the Perls.

11 On June 11, 2013, the state court entered an unlawful 12 detainer judgment in favor of Eden Place (including a judgment for 13 possession and restitution of \$11,700) in the UD Actions ("UD 14 Judgment"). The state court entered a Writ of Possession in favor 15 of Eden Place on June 14, 2013. Sometime between June 14 and 16 June 24, 2013, the Sheriff posted the lockout notice.

On June 19, 2013, the state court heard Perls' motion to stay the UD Judgment and set various requirements for a stay, which Perls failed to satisfy. Consequently, a second scheduled hearing for June 26 was taken off calendar; the state court did not stay the UD Judgment. Eden Place contends that when Perls failed to obtain a stay of the UD Judgment, the Sheriff was on "auto pilot" to complete the eviction.

24 **B**.

## . Postpetition events

On June 20, 2013, Perl, acting pro se, filed a "skeletal"

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1	chapter $13^2$ bankruptcy petition. Perl needed to file his
2	schedules, statement of financial affairs, chapter 13 plan and
3	other required documents by July 5, 2013. Although not listed as
4	a creditor, Eden Place received notice of Perl's bankruptcy
5	filing. On June 24, 2013, Perl's counsel faxed a letter to Eden
6	Place's counsel and to the Sheriff's department informing them of
7	the bankruptcy filing. In the letter, Perl's counsel asserted
8	that no landlord-tenant relationship existed between Perl and Eden
9	Place, so any exceptions to the automatic stay provided in
10	§ 362(b)(22) did not apply. He also asserted, citing to <u>Westside</u>
11	Apartments, LLC v. Butler (In re Butler), 271 B.R. 867, 876
12	(Bankr. C.D. Cal. 2002), that CAL. CODE CIV. P. § $715.050^3$ operated
13	in contravention to the Code and was therefore unconstitutional.
14	On June 24, 2013, Perl filed a notice to remove the three
15	state court actions - the Complaint to Set Aside Sale, the
16	Cross-Complaint and the UD Actions ("Removed Actions"). Prior to
17	Perl filing this notice of removal, the state court scheduled a
18	hearing on June 25, 2013, to consider Eden Place's motion to
19	expunge the lis pendens Perls had recorded against the Residence.
20	Later on June 24, 2013, Eden Place moved to remand the
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22	<sup>2</sup> Unless specified otherwise, all chapter, code and rule
23	references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.
24	<sup>3</sup> CAL. CODE CIV. P. § 715.050 provides, in relevant part:
25	Except with respect to enforcement of a judgment for
26	money, a writ of possession issued pursuant to a judgment for possession in an unlawful detainer action
27	shall be enforced pursuant to this chapter without delay, notwithstanding receipt of notice of the filing
28	by the defendant of a bankruptcy proceeding.
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Removed Actions ("Motion for Remand") and filed its application 1 2 for an order shortening time. The bankruptcy court scheduled the 3 Motion for Remand for hearing on June 28, 2013. Also on June 24, Eden Place filed a motion in bankruptcy court for relief from stay 4 5 ("Stay Relief Motion"), pursuant to the provisions of § 362(d)(1) and (2). Alternatively it asserted that the automatic stay did 6 7 not apply. Eden Place asserted that it purchased the Residence at the March 20, 2013 prepetition foreclosure sale, that the 8 9 trustee's deed had been properly recorded, that the UD Judgment had been obtained as well as a Writ of Possession and that the 10 Residence was not property of Perl's bankruptcy estate. 11 The 12 bankruptcy court set a hearing on the Stay Relief Motion for July 9, 2013. 13

Notwithstanding the bankruptcy filing and Eden Place's pending Stay Relief Motion, the Sheriff proceeded with Perls' lockout on June 27, 2013, thereby evicting the Perls. Some of Perls' personal belongings remained inside the Residence at the time of the eviction.

19 Perl, with the assistance of counsel, filed his Amended 20 Emergency Motion to Enforce the Automatic Stay, Set Aside the Eviction and for Order in Contempt ("Emergency Motion to Enforce 21 Stay") and his application for order shortening time. Perl 22 23 asserted that by continuing the eviction process against him and 24 eventually evicting him, Eden Place had violated the automatic 25 stay pursuant to \$ 362(a)(1)-(3). Specifically, Perl asserted 26 that his possessory interest in the Residence constituted an 27 equitable interest under § 541(a) protected by § 362(a)(3), citing 28 In re Butler and Di Giorgio v. Lee (In re Di Giorgio), 200 B.R.

1 664, 670 (C.D. Cal. 1996), vacated on mootness grounds, 134 F.3d 2 971 (9th Cir. 1998). Perl also asserted that his pending 3 litigation to set aside the sale and his dispute over the validity of the UD Judgment created a protected equitable interest in the 4 Residence. Perl requested that his Emergency Motion to Enforce 5 Stay be heard on June 28 along with Eden Place's Motion for 6 7 Remand. A few hours later, Eden Place filed an objection to Perl's Emergency Motion to Enforce Stay, contending that it was 8 9 moot and procedurally defective.

10 On June 27, 2013, the bankruptcy court entered its order 11 setting the hearing on Perl's Emergency Motion to Enforce Stay and 12 on Eden Place's Stay Relief Motion for June 28, 2013.

Just hours before the scheduled hearing, Eden Place filed 13 another objection to Perl's Emergency Motion to Enforce Stay. 14 Eden Place argued that, under California law, once the foreclosure 15 occurred and Eden Place recorded its trustee's deed on March 29, 16 17 2013, Perl had no legal or equitable interest in the Residence 18 protected by the automatic stay at the time of the eviction on 19 June 27, 2013; he was merely a squatter or trespasser with no 20 cognizable interest. Eden Place further argued that Perl's motion 21 failed to recognize ample authority which supports the position that continued enforcement of a prepetition unlawful detainer 22 23 judgment is not a violation of the automatic stay. Citing Lee v. 24 Baca, 73 Cal. App. 4th 1116, 1117-18 (1999), a case involving a 25 residential tenant and landlord, Eden Place argued that an 26 unlawful detainer judgment extinguishes the residential tenant's 27 interest in the property and that a postjudgment bankruptcy filing 28 does not affect the landlord's right to regain possession of the

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property because it is not, at that point, property of the 1 2 tenant-debtor's estate. Eden Place also cited Marguand v. Smith 3 (In re Smith), 105 B.R. 50, 53-54 (Bankr. C.D. Cal. 1989), which held that a debtor-tenant has no legal or equitable interest in 4 rented property once a judgment for possession has been entered in 5 favor of the landlord. Based on these authorities, Eden Place 6 7 argued that Perl lost whatever possessory interest he might have had in the Residence upon entry of the UD Judgment, so the 8 9 Sheriff's execution of the Writ of Possession did not affect 10 property of the estate. Eden Place also took the position that once the UD Judgment and Writ of Possession were issued, the 11 Sheriff had no choice but to proceed with the eviction. 12

13 Eden Place acknowledged the holdings of In re Butler and 14 In re Di Giorgio, but argued that both cases were inapplicable because they were "tenant" cases, not "squatter" cases. Eden 15 16 Place further argued that these cases were weakened with the 17 addition of § 362(b)(22) under the amendments of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, which 18 19 clarifies that residential tenants, subject to certain 20 limitations, are not protected by the automatic stay. Eden Place 21 contended that no federal courts of appeals have ever ruled that a squatter who loses an unlawful detainer action still has a 22 23 cognizable property interest that would warrant invoking the 24 automatic stay. Alternatively, Eden Place argued that cause 25 existed to annul the stay retroactively to June 20, 2013.

The hearing on the Emergency Motion to Enforce Stay, the Stay Relief Motion and the Motion for Remand proceeded on June 28, 28 2013. Counsel for both parties appeared. Before the parties

presented oral argument, the bankruptcy court opined that the 1 2 postpetition enforcement of the Writ of Possession on June 27 3 "seem[ed] to be something that would violate the automatic stay." Hr'q Tr. (June 28, 2013) 2:19-20. After hearing brief argument 4 from counsel for Eden Place, the bankruptcy court made its initial 5 findings with respect to whether Eden Place violated the automatic 6 7 stay: THE COURT: Okay. Well, let's back up a moment here. 8 As of the petition date, before the sheriff went in and 9 evicted, there was a possessory interest, correct, or am I misunderstanding the facts? 10 Well, there was a possessory interest of MR. RICHARDS: 11 naked possession, yes. 12 THE COURT: Okay. 13 . . . MR. RICHARDS: So other than a naked possessory interest, 14 that's all there was. 15 THE COURT: I understand. I do not follow In re Smith. 16 MR. RICHARDS: Okay. 17 THE COURT: And in my view, the bare possessory interest, 18 coupled with the possibility of some sort of relief, may be sufficient to give the bankruptcy estate a protected 19 interest that is subject to the automatic stay. 20 Id. at 5:3-10, 15-23. The court also noted that despite Eden 21 Place's argument respecting a residential tenant under 22 362(b)(22), this was not a rental situation. Id. at 5:24-6:15. 23 Counsel then noted that In re Butler was also a landlord-tenant case and not a case that dealt with squatters who lose their house 24 25 to foreclosure. Id. at 7:6-9. 26 After hearing further argument from the parties, the 27 bankruptcy court took a brief recess to review the cases cited by 28 the parties. However, before the recess, the court opined: -8I will note that the automatic stay is a little broader than just a property interest.

It's not just any act to obtain possession of the property of the estate or to exercise control over property of the estate, an enforcement against the debtor or against property of the estate of a judgment obtained before commencement of the case.

Now, when we're talking about a cause of action or claims or defenses such as an assertion of a right to possession, even if that's after a writ of possession, there are still claims there.

Any by - if - it may be that the automatic stay applies even to the more limited bundle of rights that still exists. It may not even be a bundle. It might just be the opportunity to seek some relief.

## 11 Id. at 34:17-35:7.

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12 Upon further review of the cases cited by the parties, the bankruptcy court determined that the eviction was a violation of 13 the automatic stay and was therefore void. The bankruptcy court 14 15 granted Eden Place's Motion for Remand and Eden Place's Stay 16 Relief Motion prospectively, modifying the automatic stay to 17 permit Perl until July 12, 2013, to seek relief from the state 18 court and denied Eden Place's request to annul the stay 19 retroactively. The bankruptcy court entered an order after the 20 hearing containing the following relevant part: "The eviction of 21 the debtor by the Sheriff, at the request of the movant, after the 22 bankruptcy petition was filed violated the automatic stay and is 23 void[.]" June 28, 2013 Order ("Order").

The bankruptcy court declined to impose any contempt sanctions against Eden Place for the stay violation because Perl had not yet offered any evidence of damages due to the eviction. Sanctions would be decided at a later hearing, after the state court had an opportunity to rule on Perl's claims. The bankruptcy

1	court directed the parties to file a status report informing it of
2	the state court proceedings.
3	Eden Place filed a status report on July 15, 2013. <sup>4</sup> Despite
4	extensions to file his schedules and other required documents,
5	Perl never filed anything further in his bankruptcy case. The
6	case was ultimately dismissed on August 8, 2013, for Perl's
7	failure to appear at the scheduled § 341(a) meeting of creditors.
8	Eden Place timely appealed the Order.
9	II. JURISDICTION
10	The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334
11	and 157(b)(2)(G). We have jurisdiction under 28 U.S.C. § 158. $^{5}$
12	III. ISSUE
13	Did the bankruptcy court err when it determined that Eden
14	Place violated the automatic stay with the postpetition eviction
15	of Perl?
15 16	of Perl? IV. STANDARD OF REVIEW
16	IV. STANDARD OF REVIEW
16 17	IV. STANDARD OF REVIEW Whether the automatic stay provisions of § 362 have been
16 17 18	<pre>IV. STANDARD OF REVIEW Whether the automatic stay provisions of § 362 have been violated is a question of law we review de novo. <u>McCarthy,</u></pre>
16 17 18 19	<pre>IV. STANDARD OF REVIEW Whether the automatic stay provisions of § 362 have been violated is a question of law we review de novo. <u>McCarthy, Johnson &amp; Miller v. N. Bay Plumbing, Inc. (In re Pettit)</u>, 217 F.3d</pre>
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16 17 18 19 20 21 22 23 24	<pre>IV. STANDARD OF REVIEW Whether the automatic stay provisions of § 362 have been violated is a question of law we review de novo. McCarthy, Johnson &amp; Miller v. N. Bay Plumbing, Inc. (In re Pettit), 217 F.3d 1072, 1077 (9th Cir. 2000) (citing Cal. v. Taxel (In re Del</pre>
<ol> <li>16</li> <li>17</li> <li>18</li> <li>19</li> <li>20</li> <li>21</li> <li>22</li> <li>23</li> <li>24</li> <li>25</li> </ol>	<pre>IV. STANDARD OF REVIEW Whether the automatic stay provisions of § 362 have been violated is a question of law we review de novo. McCarthy, Johnson &amp; Miller v. N. Bay Plumbing, Inc. (In re Pettit), 217 F.3d 1072, 1077 (9th Cir. 2000) (citing Cal. v. Taxel (In re Del</pre>
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<u>Mission Ltd.</u>, 98 F.3d 1147, 1150 (9th Cir. 1996)). 1 2 V. DISCUSSION 3 The sole issue in this appeal is whether, at the time Perl filed his bankruptcy petition, he had any remaining interest in 4 the Residence protected by the automatic stay. Eden Place 5 contends that he did not and that the bankruptcy court erred in 6 7 determining that Perl's possessory interest was a sufficient 8 estate interest to trigger the protections of the automatic stay 9 under § 362(a). 10 Α. The bankruptcy court did not err when it determined that Eden Place had violated the automatic stay. 11 12 "The automatic stay under § 362 is designed to give the 13 bankruptcy court an opportunity to harmonize the interests of both 14 debtor and creditors while preserving the debtor's assets for 15 repayment and reorganization of his or her obligations." In re Pettit, 217 F.3d at 1077 (citation omitted). 16 The stay is 17 self-executing, effective upon the filing of the bankruptcy 18 petition, and sweeps broadly. Id. It stays the "commencement or 19 continuation . . . or other action or proceeding against the 20 debtor that was or could have been commenced before the [filing of 21 the bankruptcy]," as well as the enforcement of a prepetition 22 judgment against the debtor or property of the estate. 23 § 362(a)(1) & (2). 24 It also stays actions to "obtain possession of property of 25 the estate or of property from the estate or to exercise control 26 over property of the estate." § 362(a)(3). "Property of the 27 estate" is also broadly defined to include all of the debtor's

28 legal and equitable interests in property as of the commencement

of the case, wherever located and by whomever held. § 541(a). 1 See also Ramirez v. Fuselier (In re Ramirez), 183 B.R. 583, 587 2 3 (9th Cir. BAP 1995) (automatic stay protects property of the estate in which the debtor has a legal, equitable or possessory 4 interest) (citing Interstate Commerce Comm'n v. Holmes Transp., 5 Inc., 931 F.2d 984, 987 (1st Cir. 1991)). Bankruptcy courts must 6 7 look to state law to determine whether and to what extent the debtor has any legal or equitable interests in property as of the 8 9 commencement of the case. Butner v. United States, 440 U.S. 48, 54-55 (1978). 10

Actions taken in violation of the automatic stay are void.
Griffin v. Wardrobe (In re Wardrobe), 559 F.3d 932, 934 (9th Cir.
Country of Los Angeles (In re Gruntz), 202
F.3d 1074, 1082 (9th Cir. 2000) (en banc)).

In determining whether Eden Place violated the automatic stay 15 by proceeding with the eviction of Perl, we must determine whether 16 17 Perl had any remaining interest in the Residence on the date he 18 filed bankruptcy. Because the Residence is located in California, California law controls this determination. Here, it is 19 20 undisputed that Eden Place purchased the Residence and timely 21 recorded its trustee's deed prepetition. Under CAL. CIV. CODE  $\$  2924h(c), "the trustee's sale shall be deemed final upon the 22 23 acceptance of the last and highest bid, and shall be deemed perfected as of 8 a.m. on the actual date of sale if the trustee's 24 25 deed is recorded within 15 calendar days after the sale[.]" "The 26 purchaser at a nonjudicial foreclosure sale receives title under a 27 trustee's deed free and clear of any right, title or interest of 28 the trustor. A properly conducted nonjudicial foreclosure sale

constitutes a final adjudication of the rights of the borrower and 1 2 Wells Fargo Bank v. Neilsen, 178 Cal. App. 4th 602, 614 lender." (2009) (citations and quotation marks omitted). See also 4 Miller 3 & Starr, Cal. Real Estate § 10:208 (3d ed. 2009) (Under California 4 law, "[t]he purchaser at the foreclosure sale receives title free 5 and clear of any right, title, or interest of the trustor or any 6 7 grantee or successor of trustor."). Accordingly, title to the Residence passed to Eden Place free and clear of any right, title 8 9 or interest of Perl's about three months before he filed his chapter 13 bankruptcy petition. Thus, Perl's ownership interest 10 in the Residence was eliminated prepetition. Therefore, to find 11 12 that Eden Place violated the automatic stay, we must determine whether Perl held some other sort of interest in the Residence 13 14 recognized by California law at the time he filed bankruptcy.

15 Prepetition, Eden Place had successfully obtained the 16 UD Judgment, and Perl's efforts to stay that judgment failed. A 17 Writ of Possession in favor of Eden Place was also issued 18 prepetition. It is undisputed that Perl was in possession of the 19 Residence at all relevant times. We often cite the following 20 passage from a well-known treatise in cases where the order on 21 appeal concerns the bankruptcy court's decision to grant relief 22 from stay so that the purchaser may proceed with its eviction 23 action against the holdover debtor-borrower:

Where a real property nonjudicial foreclosure was completed and the deed recorded prepetition, the debtor has neither legal nor equitable title to the property at the time the bankruptcy petition is filed. Although the debtor may still be in possession of the premises, his or her status is essentially that of a "squatter." The mortgagee (or purchaser at the foreclosure sale) is entitled to the property and thus relief from the stay should be granted. Kathleen P. March and Alan M. Ahart, CALIFORNIA PRACTICE GUIDE:
 BANKRUPTCY ¶ 8:1196 (2009) (emphasis in original). See <u>Wells Farqo</u>
 <u>Bank v. Edwards (In re Edwards)</u>, 454 B.R. 100, 106 (9th Cir. BAP
 2011), as just one of many examples.

5 We have determined in cases with facts such as these that 6 "cause" was established to grant relief from stay because the 7 debtor, hence the estate, no longer had any interest in the real 8 property at issue when he or she filed for bankruptcy. Id. at 9 107. See also Nyamekye v. Wells Fargo Bank (In re Nyamekye), 2011 WL 3300335, at \*5-6 (9th Cir. BAP Feb. 15, 2011) (determining that 10 because an unlawful detainer judgment and writ of possession had 11 been obtained by the creditor prepetition, neither the holdover 12 13 debtor-borrower nor her estate had any ownership interest or right 14 in the property; therefore cause was shown to grant relief from 15 stay).

A distinction exists between the analyses required for stay 16 17 relief matters and violation of stay matters. In the former, the 18 creditor is summarily attempting to establish a colorable claim in terms of an interest in a debtor's secured note or an interest in 19 20 debtor's property. In considering the interest in debtor's 21 property, an analysis is made as to the strength of debtor's interest vis-a-vis creditor's interest in the same property. 22 23 Consequently, terms like "owner" and "squatter" appear. See 24 In re Edwards, 454 B.R. at 105-06. In the latter, the debtor is 25 attempting to establish that the creditor is violating the 26 automatic stay by taking some action against the debtor or against 27 property of the estate. In this instance, the strength of one's 28 interest is not determinative; but more importantly, if debtor or

1 the estate has "any" interest the question becomes: is the 2 creditor's action violative of the stay. Creditor's action may be 3 violative even if a minimal interest, such as a squatter's or 4 possessory interest, is held by the debtor or the estate. <u>See</u> 5 In re Di Giorgio, 200 B.R. at 672-74.

6 In a case factually similar to Nyamekye concerning whether a 7 party had violated the automatic stay, we held that a debtor-8 borrower had a possessory interest in the real property at issue by virtue of his or her physical occupancy. In re Williams, 9 10 323 B.R. at 699. In <u>In re Williams</u>, we cited <u>In re Butler</u>, 271 11 B.R. at 876-77, with approval and for the proposition that under 12 California law a debtor-tenant's mere physical possession of apartment premises after writ of possession had issued in favor of 13 14 landlord in unlawful detainer action is an equitable interest in 15 the property, protected by the automatic stay. In other words, we 16 extended the holding of In re Butler to include a debtor-former 17 homeowner as opposed to only a debtor-tenant under a residential 18 lease. We also cited In re Di Giorgio, which similarly held that 19 under California law mere possession of real property, even after 20 a writ of possession has issued, creates a protected equitable 21 interest subject to the automatic stay. 200 B.R. at 671-73. 22 Granted, In re Di Giorgio, a case from 1996, involved a 23 residential tenant as opposed to a former homeowner, and, as we 24 discuss below, residential tenants are no longer given the 25 protection of the automatic stay if certain limitations are 26 satisfied. However, the holding in In re Di Giorgio appears 27 broad, and the district court did not limit its analysis as to 28 what constitutes a "possessory interest" under California law

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strictly to residential tenants under a lease. "Under California 1 2 law, mere possession of real property creates a protected interest." Id. at 671 (citing to CAL. CIV. CODE § 1006, which 3 states: "Occupancy for any period confers a title sufficient 4 against all except the state and those who have title . . . . "). 5 "[T]he mere possession of real estate is constantly treated as 6 7 property which may be purchased and sold, and for the recovery of which an action may be maintained against one having no better 8 9 title." King v. Goetz, 70 Cal. 236, 240, 11 P. 656, 658 (1886). See 12 WITKIN ON REAL PROP., SUMMARY 10TH (2005) § 208 (possession 10 11 gives possessor substantial right).

12 In In re Williams, the debtor had transferred record title to 13 his condominium to his girlfriend prepetition, but was still 14 occupying the condo when he filed bankruptcy and at the time the homeowners association foreclosed its lien on the property. 15 Recognizing that the debtor had no recorded interest in the condo 16 17 on the petition date, we determined that he nonetheless held a 18 possessory interest in it that was property of the estate under § 541(a) and protected by the automatic stay. 323 B.R. at 699. 19 20 We remanded that portion of the order to have the bankruptcy court 21 determine whether any stay violation damages were appropriate. 22 Id. at 702.

Eden Place had not cited to <u>In re Williams</u> in its brief and appeared to be unaware of it at the time of oral argument. Instead, Eden Place argues that the bankruptcy court erred by not following <u>In re Smith</u> and contends that we should adopt it, and further contends that we should reject <u>In re Butler</u>. In <u>In re Smith</u>, the bankruptcy court held that where a residential

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landlord obtained an unlawful detainer judgment prepetition, the 1 2 debtor-tenant has no legal or equitable interest in the property protected by the automatic stay. 105 B.R. at 54. The court 3 4 further held that the debtor-tenant's physical possession of the property was not a property interest recognized by law. Id. 5 Notably, it did not cite to any California authority for this 6 7 proposition. The court went on to conclude that it was not necessary for the movant to obtain relief from stay in order to 8 9 regain possession of the apartment. Id.

10 We decline to adopt In re Smith for two reasons. First, it is contrary to our holding in In re Williams, and we are bound by 11 12 our precedent. Gaughan v. The Edward Dittlof Revocable Trust 13 (In re Costas), 346 B.R. 198, 201 (9th Cir. BAP 2006) (absent a change in the law, we are bound by our precedent). For that same 14 15 reason, we are not inclined to reject In re Butler. Second, the 16 concerns expressed by the bankruptcy court in In re Smith 17 regarding what it viewed as a lack of power of residential 18 landlords have been addressed with the addition of § 362(b)(22).<sup>6</sup> 19 Under that provision, absent certain limitations not relevant

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Section 362(b)(22) provides that the filing of a bankruptcy petition does not create a stay "subject to subsection (1), under subsection (a)(3), of the continuation of any eviction, unlawful detainer action, or similar proceeding by a lessor against a debtor involving residential property in which the debtor resides as a tenant under a lease or rental agreement and with respect to which the lessor has obtained before the date of the filing of the bankruptcy petition, a judgment for possession of such property against the debtor[.]"

Section 362(1) provides, however, that a 30-day stay shall apply if there is a rent default by a debtor-tenant, where the debtor certifies with the bankruptcy petition that he or she can cure the default and deposits with the clerk the amount of rent due for the next 30 days.

here, the automatic stay does not apply to cases under which the debtor resides as a tenant under a lease or rental agreement and where the lessor has obtained before the bankruptcy filing a judgment for possession. As the bankruptcy court observed in the instant case, we do not have a rental property situation, and clearly, we have no lease or rental agreement between the parties.

7 Eden Place argues that In re Smith is consistent with California law, where a judgment for possession has issued. 8 CAL. 9 CODE CIV. P. § 715.050 provides, in relevant part, that "a writ of possession issued pursuant to a judgment for possession in an 10 unlawful detainer action shall be enforced pursuant to this 11 chapter without delay, notwithstanding receipt of notice of the 12 filing by the defendant of a bankruptcy proceeding." In other 13 words, CAL. CODE CIV. P. § 715.050 provides that a writ of 14 possession obtained in an unlawful detainer action must be 15 executed despite a defendant's filing of a postjudgment bankruptcy 16 17 petition. Two courts have held that this statute is preempted by 18 federal bankruptcy law and is therefore unconstitutional on its 19 face. In re Di Giorgio, 200 B.R. at 675; In re Butler, 217 B.R. 20 at 876. One California Court of Appeal has held to the contrary. 21 See Lee, 73 Cal. App. 4th at 1119-20 (relying on In re Smith to 22 hold that CAL. CODE CIV. P. § 715.050 survives a preemption attack). 23 We are not persuaded by Lee and agree with the reasoning of 24 In re Butler and In re Di Giorgio. Clearly, with the statute's 25 express reference to the filing of a bankruptcy petition, its 26 purpose is to carve out an exception to the automatic stay 27 provided by federal law. This exception is preempted by § 362(a). 28 While state law determines the existence and scope of a debtor's

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1 interest in property, federal law determines whether that property 2 interest is protected by the automatic stay. <u>In re Di Giorgio</u>, 3 200 B.R. at 673 n.4; <u>In re Gruntz</u>, 202 F.3d at 1082 ("The 4 automatic stay is an injunction issuing from the authority of the 5 bankruptcy court, and bankruptcy court orders are not subject to 6 collateral attack in other courts.").

7 Finally, Eden Place argues that the eviction did not violate the automatic stay because it was a "ministerial act," and that 8 the Sheriff was on "auto pilot" and had no choice but to execute 9 the Writ of Possession. We fail to see where Eden Place raised 10 this argument before the bankruptcy court. We generally do not 11 12 consider arguments raised for the first time on appeal, and we do not exercise our discretion to do so in this case. O'Rourke v. 13 14 Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957 15 (9th Cir. 1989). See also Moldo v. Matsco, Inc. (In re Cybernetic Servs., Inc.), 252 F.3d 1039, 1045 n.3 (9th Cir. 2001) (appellate 16 17 court will not explore ramifications of argument because it was 18 not raised below and, accordingly, was waived).

We conclude that, based on our holding in <u>In re Williams</u>, Perl's physical occupation of the Residence conferred a possessory interest under California law that was protected by the automatic stay. Even Eden Place must have thought that Perl possibly had some sort of interest or it would not have filed the Stay Relief Motion.

To "willfully" violate the automatic stay, the alleged violator must have knowledge of the automatic stay and have intentionally violated the stay. <u>Ozenne v. Bendon (In re Ozenne)</u>, 337 B.R. 214, 220 (9th Cir. BAP 2006). The record reflects that

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Eden Place was on notice of Perl's bankruptcy filing prior to the 1 eviction on June 27, 2013, even if notice was only based on 2 3 counsel's faxed letter. "Knowledge of the bankruptcy filing is legal equivalent of knowledge of the automatic stay." Id. (citing 4 In re Ramirez, 183 B.R. at 589). Informal notice suffices. 5 In re Ozenne, 337 B.R. at 220 (citing Morris v. Peralta (In re Peralta), 6 7 317 B.R. 381, 389 (9th Cir. BAP 2004)). Further, the acts here 8 were intentional. Whether Eden Place believed in good faith that 9 it had a right to the Residence is irrelevant to the analysis of 10 whether its act was intentional. Id. at 221 (citations omitted). 11 Accordingly, we conclude that Eden Place violated the automatic 12 stay when it did not advise the Sheriff to desist in its efforts to lock out and evict Perl from the Residence. We further note 13 14 that changing the locks on the Residence, locking inside Perl's 15 personal property, which was also property of the estate, was an 16 act to exercise control over property of the estate in violation 17 of § 362(a)(3). See In re Gagliardi, 290 B.R. 808, 815 (Bankr. D. Colo. 2003). 18

## VI. CONCLUSION

Based on the foregoing reasons, we AFFIRM the portion of the Order ruling that the postpetition lockout/eviction by the Sheriff of the debtor from his residence on June 27, 2013, violated the automatic stay and is void.

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