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As of: Dec 05, 2012

**In re WILLIAM CHARLES BACE, WILLIAM CHARLES BACE, Appellant,
-against- TRUSTEE ROY BABITT, et al., Appellees.**

11 Civ. 6065 (PAC)(HBP)

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
NEW YORK**

2012 U.S. Dist. LEXIS 92441

May 10, 2012, Decided

May 10, 2012, Filed

SUBSEQUENT HISTORY: Adopted by, Motion granted by, Appeal dismissed by *Bace v. Babitt, 2012 U.S. Dist. LEXIS 92444 (S.D.N.Y., July 3, 2012)*

PRIOR HISTORY: *Bace v. Babitt, 2008 U.S. Dist. LEXIS 23003 (S.D.N.Y., Mar. 25, 2008)*

CASE SUMMARY:

OVERVIEW: A magistrate issued a report recommending affirming a bankruptcy court's decision and granting a trustee's motion to dismiss particularly because appellant debtor failed to establish that the bankruptcy court erred in determining that unpaid parking fines, penalties, and interest owed to a creditor were nondischargeable since under *11 U.S.C.S. § 523(a)(f)*, such parking fines were clearly nondischargeable, and there was no distinction between civil and criminal fines or penalties.

OUTCOME: Recommended affirmance of bankruptcy court's decision and granting motion to dismiss.

CORE TERMS: punitive damages, automatic stay, fine, parking, exemption, punitive, compensatory, auction, intangible, dischargeable, damages awards, awarding, violator's, issue of damages, citation omitted, non-dischargeable, re-open, notice, case law, bankruptcy case, pain and suffering, emotional distress, fair market value, properly denied, standard of review, internal quotation marks, actual damages, abuse of discretion, mental anguish, emotional

LexisNexis(R) Headnotes

Bankruptcy Law > Practice & Proceedings > Appeals > Procedures

Civil Procedure > Appeals > Briefs

Civil Procedure > Appeals > Reviewability > Preservation for Review

[HN1] An appellant may abandon an issue that is raised on appeal by failing to address it in his appellate brief. *Fed. R. Bankr. P. 8010(a)(1)(E)* provides that an

appellant's brief shall contain an argument section, which in turn, shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on.

Bankruptcy Law > Practice & Proceedings > Appeals > Jurisdiction

[HN2] District courts have appellate jurisdiction to hear appeals of bankruptcy court rulings. *28 U.S.C.S. § 158(a)* provides that district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees; and, with leave of the court, from other interlocutory orders and decrees of bankruptcy judges. *Fed. R. Bankr. P. 8013* further provides that the district court may affirm, modify, or reverse a bankruptcy judge's judgment, order, or decree or remand with instructions for further proceedings.

Bankruptcy Law > Practice & Proceedings > Appeals > Standards of Review > Clear Error Review

[HN3] A bankruptcy court's findings of fact are reviewed for clear error. *Fed. R. Bankr. P. 8013* provides that findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of witnesses. A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

Bankruptcy Law > Practice & Proceedings > Appeals > Standards of Review > De Novo Review

[HN4] A bankruptcy court's legal conclusions are reviewed de novo.

Bankruptcy Law > Discharge & Dischargeability > Nondischarge of Individual Debts > Government Penalties & Taxes

Bankruptcy Law > Practice & Proceedings > Appeals > Standards of Review > De Novo Review

[HN5] Where there are no factual issues in dispute and resolution of an issue concerns the applicability of *11 U.S.C.S. § 523(a)(7)*, a district court reviews a bankruptcy judge's determination de novo.

Bankruptcy Law > Discharge & Dischargeability > Nondischarge of Individual Debts > Government Penalties & Taxes

[HN6] *11 U.S.C.S. § 523(a)* sets forth a list of exceptions to a debtor's discharge pursuant to *11 U.S.C.S. § 727*. Specifically, *§ 523(a)(7)* provides: A discharge under *§ 727* does not discharge an individual debtor from any debt--(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss. *11 U.S.C.S. § 523(a)(7)*.

Bankruptcy Law > Discharge & Dischargeability > Nondischarge of Individual Debts > Government Penalties & Taxes

Governments > Legislation > Interpretation

[HN7] *11 U.S.C.S. § 523(a)(7)* does not distinguish between criminal and civil fines and penalties. The U.S. Supreme Court has given *§ 523(a)(7)* a broad reading, and has held that it applies to all criminal and civil penalties.

Bankruptcy Law > Discharge & Dischargeability > Nondischarge of Individual Debts > Government Penalties & Taxes

[HN8] Parking fines have repeatedly been found to be nondischargeable debts pursuant to *11 U.S.C.S. § 523(a)(7)*.

Bankruptcy Law > Case Administration > Administrative Powers > Stays > Remedies > Damages
Bankruptcy Law > Practice & Proceedings > Appeals > Standards of Review > Clear Error Review

[HN9] A bankruptcy court's decision regarding the amount of damages is a factual finding and will not be disturbed unless the finding is clearly erroneous.

Bankruptcy Law > Case Administration > Administrative Powers > Stays > Remedies > Damages
Evidence > Procedural Considerations > Burdens of Proof > Allocation

[HN10] A party seeking damages pursuant to *11 U.S.C.S. § 362(h)* has the burden of proving what damages were incurred and what relief is appropriate.

Bankruptcy Law > Case Administration > Examiners, Officers & Trustees > Preferential Transfers >

Exemptions > General Overview

[HN11] 11 U.S.C.S. § 522 addresses federal bankruptcy exemptions. The language of § 522 expressly limits the applicability of the definition of "value" set forth therein to that section.

***Bankruptcy Law > Exemptions > Bankruptcy Code
Bankruptcy Law > Exemptions > State Law > Opt-Out Powers***

[HN12] The Bankruptcy Code contains a set of federal exemptions and permits debtors to choose between either federal or state exemptions. 11 U.S.C.S. § 522(b)(1). However, the Bankruptcy Code also permits individual states to opt-out of the federal exemption scheme. Pursuant to *N.Y. Debt. & Cred. Law* § 284, New York is one state that has opted-out from the federal exemption scheme.

Bankruptcy Law > Practice & Proceedings > Adversary Proceedings > Judgments & Remedies***Bankruptcy Law > Practice & Proceedings > Appeals > Standards of Review > Abuse of Discretion***

[HN13] A bankruptcy court's decision whether to award punitive damages is reviewed for an abuse of discretion. A district court abuses or exceeds the discretion accorded to it when (1) its decision rests on an error of law, such as application of the wrong legal principle, or a clearly erroneous factual finding, or (2) its decision--though not necessarily the product of a legal error or a clearly erroneous factual finding--cannot be located within the range of permissible decisions.

Bankruptcy Law > Case Administration > Administrative Powers > Stays > Remedies > Damages

[HN14] Punitive damages under 11 U.S.C.S. § 362(k) are appropriate only for violations of the automatic stay that are malicious or in bad faith. Indeed, even callous disregard is an insufficient basis upon which to award punitive damages. In determining whether a violation would justify the imposition of punitive damages, courts have looked to a variety of factors, including: (1) the nature of the violator's conduct; (2) the violator's ability to pay; (3) the violator's motives; (4) any provocation by the debtor, and (5) the violator's level of sophistication. Moreover, even where punitive damages might be appropriate, the law is clear that the bankruptcy court has considerable discretion in granting or denying punitive damages. The Bankruptcy Code does not specify a

standard for punitive damages, leaving it to the sound discretion of the bankruptcy court. The goal of awarding punitive damages is primarily to deter violations of the automatic stay, and may be appropriate even if actual damages are minimal. Nevertheless, such determinations are properly left to the sound discretion of the Bankruptcy Court.

Bankruptcy Law > Case Administration > Administrative Powers > Stays > Remedies > Damages

[HN15] Even where punitive damages might be appropriate, the law is clear that the bankruptcy court has considerable discretion in granting or denying punitive damages.

Torts > Intentional Torts > Conversion > Remedies

[HN16] Under New York law, absent proof of malicious intent on the part of the defendant, a party cannot recover damages for mental anguish, humiliation or emotional distress caused by conversion of a chattel. Under most states' laws, a plaintiff cannot recover for his mental suffering caused by an injury to his property, at least if the defendant has not maliciously intended to cause such mental suffering.

Bankruptcy Law > Case Administration > Administrative Powers > Stays > General Overview***Bankruptcy Law > Case Administration > Administrative Powers > Stays > Remedies > Damages***

[HN17] Although the case law is unsettled on the matter, there is authority for the proposition that a debtor may, under appropriate circumstances, recover emotional distress damages for a creditor's willful violation of the automatic stay.

Bankruptcy Law > Case Administration > Administrative Powers > Stays > Remedies > Damages

[HN18] It is the case that the goal of awarding punitive damages is primarily to deter violations of the automatic stay, and may be appropriate even if actual damages are minimal. However, an award of punitive damages is a matter that is properly left to the sound discretion of the Bankruptcy Court. Moreover, in New York, bankruptcy courts often assess awards of punitive damages that are reasonably proportionate to the actual damages.

Bankruptcy Law > Practice & Proceedings > Adversary

Proceedings > General Overview***Bankruptcy Law > Practice & Proceedings > Appeals > Standards of Review > Abuse of Discretion******Civil Procedure > Judgments > Relief From Judgment > Motions to Alter & Amend***

[HN19] The applicable standard of review with respect to a motion under *Fed. R. Bankr. P. 9023*, which makes *Fed. R. Civ. P. 59(e)* applicable to bankruptcy proceedings, is abuse of discretion.

Bankruptcy Law > Practice & Proceedings > Adversary Proceedings > General Overview***Civil Procedure > Judgments > Relief From Judgment > Motions to Alter & Amend***

[HN20] *Fed. R. Bankr. P. 9023* incorporates *Fed. R. Civ. P. 59. Rule 59* provides: (a) Grounds. A new trial may be granted to all or any of the parties on all or part of the issues (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment. *Fed. R. Civ. P. 59*.

Civil Procedure > Judgments > Relief From Judgment > Motions to Alter & Amend***Evidence > Procedural Considerations > Burdens of Proof > Allocation***

[HN21] Reconsideration is merited when there has been a clear error or manifest injustice in an order of the court or if newly discovered evidence is unearthed. A movant must show that the court overlooked factual matters or controlling precedent that might have materially influenced its earlier decision. To prevail a moving party must demonstrate an intervening change in controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice. This criterion is strictly construed against the moving party.

Civil Procedure > Judgments > Relief From Judgment > Motions to Alter & Amend

[HN22] A motion to reconsider should not give the moving party another bite at the apple by permitting argument on issues that could have been or should have been raised prior to the original motion. Whatever may be

the purpose of *Fed. R. Civ. P. 59(e)* it should not be supposed that it is intended to give an unhappy litigant one additional chance to sway the judge.

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For Trustee Roy Babitt, Appellee: Heike Maria Vogel, Arent Fox LLP(New York), New York, NY.

For New York City Department of Finance, Appellee: Joshua Matthew Wolf, NYC Law Department, Office of the Corporation Counsel (NYC), New York, NY.

For Jeffrey S. Rose, Appellee: Thomas Charles Lambert, Lambert and Shackman PLLC, New York, NY.

JUDGES: HENRY PITMAN, United States Magistrate Judge. HONORABLE PAUL A. CROTTY, United States District Judge.

OPINION BY: HENRY PITMAN

OPINION

REPORT AND RECOMMENDATION

PITMAN, United States Magistrate Judge:

TO THE HONORABLE PAUL A. CROTTY,
United States District Judge,

I. Introduction

By an amended Notice of Appeal dated August 3, 2011 (Docket Item 3), William Charles Bace ("Appellant") appeals from two Orders, Docket Nos. 299 and 300,¹ entered by the Honorable Robert D. Drain, United States Bankruptcy Judge, dated June 28, 2011 in *In re William Charles Bace*, Case No. 05-42446 (S.D.N.Y. June 28, 2011).

¹ References to "Docket No. " refer to the docket of the United States Bankruptcy Court for the Southern District of New York in *In re William Charles Bace*, Case No. 05-42446.

Appellees, the City of New York Department of Finance ("DOF") and the New York City Police [*2] Department ("NYPD") (collectively, the "City"), oppose the appeal (Docket Item 12). Appellee New York City

Marshal Jeffrey S. Rose adopts the arguments made by the City in its opposition papers (Docket Item 14). Finally, appellee Roy Babitt, Esq., in his capacity as Chapter 7 Trustee ("Trustee"), has moved by Notice of Motion dated January 19, 2012 to dismiss the appeal as against him (Docket Item 9).

For the reasons set forth below, I respectfully recommend that (1) the Bankruptcy Court's decision be affirmed in all respects and (2) the Trustee's motion to dismiss be granted.

II. Facts

A. Relevant Bankruptcy Proceedings

On October 16, 2005, appellant filed a Chapter 13 Voluntary Petition ("Petition") in the United States Bankruptcy Court for the Southern District of New York ("Bankruptcy Court") (Docket No. 1). Appellant provided the following relevant information in his petition: (1) on Schedule B entitled "Personal Property," he reported that he owned a 1992 Subaru with an alleged market value of \$1,000.00 (Docket No. 1, Schedule B), (2) on Schedule C entitled "Property Claimed as Exempt," he listed the same 1992 Subaru (Docket No. 1, Schedule C) and (3) on Schedule F entitled "Creditors [*3] Holding Unsecured Nonpriority Claims," he listed a claim for "fines" owed to "NYC Parking Fines P.O. Box 3670 NY NY 10008" in the amount of \$2,228.00 (Docket No. 1, Schedule F).

On March 9, 2006, the Bankruptcy Court converted appellant's Chapter 13 case to a Chapter 7 case (Docket No. 13). On March 13, 2006, Roy Babitt, Esq. was appointed Chapter 7 Trustee (Docket No. 18).

The DOF filed a proof of claim on May 31, 2006 in the amount of \$3,800.98 for unpaid parking fines, including penalties and interest (see Docket No. 284 at 6; Brief of Appellees the City of New York Department of Finance and the New York City Police Department, dated Jan. 19, 2012 ("Appellees' Brf.") (Docket Item 12), 5-6). The DOF amended its proof of claim on November 7, 2008 to seek a total of \$4,123.46, reflecting updated penalties and interest owed on the unpaid parking fines (see Docket No. 284 at 6; Appellees' Brf. at 5-6).

On May 7, 2009, appellant was granted a discharge pursuant to *11 U.S.C. § 727* (Docket No. 249). A form attached to the Discharge Order entitled "Explanation of Bankruptcy Discharge in a Chapter 7 Case" noted that

some debts are not dischargeable, including "[d]ebts for most fines [and] penalties [*4]" (Docket No. 249 at 2).

By motion dated July 9, 2009, appellant argued that the DOF willfully violated the automatic stay imposed pursuant to *11 U.S.C. § 362* on a number of occasions by wrongfully seizing, impounding, and, ultimately, selling his 1992 Subaru to satisfy the pre-petition parking fines, penalties and interest (Docket No. 253 at ¶¶ 8-21). Appellant also contended that the DOF willfully violated the automatic stay and the discharge injunction entered in his case pursuant to *11 U.S.C. § 524* by wrongfully seizing and impounding his 1997 Subaru -- which he had bought as a replacement car for the 1992 Subaru that had been sold -- in order to satisfy the balance of the aforementioned debts (Docket No. 253 at ¶¶ 22-25).

On or about September 24, 2010, appellant re-filed his motion to include evidence of an Auction Bill of Sale for the 1992 Subaru (Docket No. 283) ("First Motion"). The Auction Bill of Sale disclosed that the 1992 Subaru had been sold by the NYPD at an auction on March 22, 2006 for \$475.00. Appellant also requested compensatory and punitive damages for the City's allegedly willful violation of the automatic stay (see Docket Nos. 282 and 283).

Judge Drain [*5] held hearings in connection with appellant's motion on November 23, 2010 and June 6, 2011 (see Docket Nos. 296 and 297). Following the June 6, 2011 hearing, appellant filed a motion to re-open the hearing, requesting that he be permitted "to present additional testimony solely on the issue of damages" because he did not have "an opportunity [during the hearing] to discuss in detail . . . [his] intangible damages . . . including, but not limited to, pain and suffering, emotional distress, loss of use of automobile, inconvenience, etc." (Docket No. 295 at ¶ 7) ("Second Motion").

On June 28, 2011, Judge Drain issued the two written Orders which are the subjects of this appeal. In the first Order (Docket No. 299), which addressed appellant's First Motion, Judge Drain held the following: (1) appellant's debts to the DOF were not dischargeable pursuant to *Section 523(a)(7) of the Bankruptcy Code*, and, thus, the City and City Marshal Rose did not violate the discharge injunction entered in appellant's case; (2) appellant's 1997 Subaru was not subject to an exemption under *Section 522* because it was neither property of the

estate pursuant to *section 541(a)* nor was it purchased with proceeds [*6] of estate property; (3) the City's actions with respect to appellant's 1992 Subaru constituted a willful violation of the automatic stay, and, as a result, appellant was entitled to receive compensatory damages pursuant to *Section 362(k)(1)* against the City and City Marshal Rose in the amount of \$750.00 for the value of the auctioned 1992 Subaru and \$65.00 for out-of-pocket expenses and (4) appellant was entitled to receive punitive damages pursuant to *Section 362(k)(1)* against the City only in the amount of \$250.00.

In the second Order (Docket No. 300), which addressed appellant's Second Motion, Judge Drain denied appellant's request to present additional testimony on the issue of "intangible damages" because (1) he had considered all of appellant's written submissions, none of which identified the "intangible damages" being sought, (2) appellant, although proceeding pro se, had "extensive experience in federal court," and, in any event, the record was clear that the parties had been given "a full and fair opportunity to submit additional evidence at the evidentiary hearing on June 6, 2011" and (3) he had fully considered appellant's possible damages in awarding him compensatory and [*7] punitive damages.

B. The Present Appeal

Appellant timely appealed from Judge Drain's Orders dated June 28, 2011 (see Docket Item 1). In his Amended Notice of Appeal dated August 3, 2011 (Docket Item 3), appellant raised eleven issues, although many of the issues overlap with one another.

Appellant's brief, however, raises only four issues: (1) whether appellant's prepetition indebtedness to the DOF is dischargeable, (2) whether Judge Drain properly determined appellant's compensatory and punitive damages awards, (3) whether Judge Drain properly denied appellant's motion to re-open the hearing on damages and (4) whether Judge Drain properly denied appellant's request that the Chapter 7 Trustee provide him with assistance "regarding his claim[s] of exemption and lien avoidance [sic]" (see Appellant's Brief, dated Dec. 19, 2011 ("Appellant's Brf.") (Docket Item 8), 7).

The City contends, among other things, that appellant has abandoned all issues raised in his Amended Notice of Appeal, but not addressed in his appellate brief (see Appellees' Brf. at 1 n.1).

III. Analysis

A. Abandoned Issues

The City is correct that appellant has abandoned certain issues that he raised in his Amended Notice of [*8] Appeal. [HN1] An appellant may abandon an issue that is raised on appeal by failing to address it in his appellate brief. See *In re Leslie Fay Co., Inc.*, 222 B.R. 718, 721 n.3 (S.D.N.Y. 1998) (Rakoff, D.J.) ("Although appellants also appeal the Bankruptcy Court's order denying them compensation for professional services and expenses, they make nary an argument on the topic in their opening brief, and have therefore waived the issue entirely."), *aff'd*, 182 F.3d 899 (2d Cir. 1999); *Fed.R.Bankr.P. 8010(a)(1)(E)* (an appellant's brief shall contain an argument section, which in turn, "shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on."); see also *In re Vargas Realty Enter., Inc.*, 440 B.R. 224, 241-42 (S.D.N.Y. 2010) (Sullivan, D.J.); *Axis Reinsurance Co. v. Bennett*, 07 Civ. 7924 (GEL), 07 Civ. 9420 (GEL), 07 Civ. 9842 (GEL), 07 Civ. 10302 (GEL), 07 Civ. 9843 (GEL), 2008 U.S. Dist. LEXIS 53921, 2008 WL 2600034 at *1 (S.D.N.Y. June 27, 2008) (Lynch, then D.J., now Cir. J.). Accordingly, I address only the four issues set forth in appellant's brief.

B. Applicable Legal Principles

[HN2] District [*9] courts have appellate jurisdiction to hear appeals of bankruptcy court rulings. 28 U.S.C. § 158(a) ("[D]istrict courts of the United States shall have jurisdiction to hear appeals . . . from final judgments, orders, and decrees; . . . [and,] with leave of the court, from other interlocutory orders and decrees . . . of bankruptcy judges."). *Fed.R.Bankr.P. 8013* further provides that the district court "may affirm, modify, or reverse a bankruptcy judge's judgment, order, or decree or remand with instructions for further proceedings."

[HN3] The bankruptcy court's findings of fact are reviewed for clear error. *In re Bayshore Wire Prod. Corp.*, 209 F.3d 100, 103 (2d Cir. 2000); see *Fed.R.Bankr.P. 8013* ("Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of witnesses."); see also *In re Hyman*, 502 F.3d 61, 65 (2d Cir. 2007); *In re DeTrano*, 326 F.3d 319,

321 (2d Cir. 2003). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction [*10] that a mistake has been committed." *Dist. Lodge 26, Int'l. Ass'n of Machinists & Aerospace Workers, AFL-CIO v. United Tech. Corp.*, 610 F.3d 44, 51 (2d Cir. 2010), quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746 (1948).

[HN4] The bankruptcy court's legal conclusions are reviewed de novo. *In re Bayshore Wire Prod. Corp.*, *supra*, 209 F.3d at 103; see also *In re Hyman*, *supra*, 502 F.3d at 65; *In re DeTrano*, *supra*, 326 F.3d at 321.

C. Application of the Foregoing Principles to the Present Appeal

1. Dischargeability of Unpaid Parking Fines, Penalties and Interest

Appellant first argues that Judge Drain erred in determining that the unpaid parking fines, penalties and interest that he owed to the DOF were non-dischargeable debts pursuant to 11 U.S.C. § 523(a)(7). The crux of his argument is that there is a distinction between criminal and civil fines and penalties, such that only the former are not dischargeable pursuant to *Section 523(a)(7)*. Thus, appellant contends that because his debts to the DOF -- i.e., parking fines, penalties and interest -- are civil in nature, they are dischargeable and do not fall within the ambit of *Section 523(a)(7)* (see Appellant's Brf. at 9-17).

The [*11] City contends that appellant's argument is without merit because "[t]here is simply no meaningful distinction between 'civil' and 'criminal' fines and penalties when determining whether such debts are nondischargeable under the [Bankruptcy] Code" (Appellees' Brf. at 12).

[HN5] Because there are no factual issues in dispute and resolution of this issue concerns the applicability of *Section 523(a)(7)*, I review Judge Drain's determination de novo. See *In re Gelb*, No. 95-CV-4725 (FB), 1998 U.S. Dist. LEXIS 6085, 1998 WL 221366 at *2 (E.D.N.Y. Apr. 29, 1998) (applying de novo standard of review where "[t]he single issue presented on [] appeal [was] whether [a] restitution order [was] non-dischargeable pursuant to 11 U.S.C. § 523(a)(7)."); accord *In re Sandoval*, 541 F.3d 997, 1000 (10th Cir. 2008) ("Because this case requires us to determine the meaning of 11 U.S.C. § 523(a)(7), we

review the bankruptcy court's decision de novo." (internal quotation marks and citation omitted)); *In re Warfel*, 268 B.R. 205, 209 (B.A.P. 9th Cir. 2001) (reviewing de novo "[a] mixed question of law and fact [which] occurs when the historical facts are established; the rule of law is undisputed, i.e., the elements of § 523(a)(7); and the issue [*12] is whether the facts satisfy the legal rule." (internal quotation marks and citation omitted)).

At the hearing held on November 23, 2010, Judge Drain found that appellant's debts to the DOF for unpaid parking tickets, penalties and interest were non-dischargeable pursuant to *Section 523(a)(7)* because they were (1) fines payable to or for the benefit of a governmental unit and (2) not compensation for actual pecuniary loss (Docket No. 296 at 12). Judge Drain then rejected appellant's arguments that *Section 523(a)(7)* distinguishes between criminal and civil debts, stating that "[t]he case law and commentary on this issue are clear as is the statute . . . the discharge exception extends to both categories [i.e., criminal and civil] liabilities" (Docket No. 296 at 12-13) (internal quotation marks and citation omitted). On the basis of the foregoing, Judge Drain held that appellant's debts to the DOF were non-dischargeable pursuant to *Section 523(a)(7)*.

Judge Drain's determination was correct. [HN6] *Section 523(a)* sets forth a list of exceptions to a debtor's discharge pursuant to *Section 727 of the Bankruptcy Code*. Specifically, *Section 523(a)(7)* provides:

A discharge under *section 727* . . . [*13] does not discharge an individual debtor from any debt -- . . . (7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss . . .

11 U.S.C. § 523(a)(7). Contrary to appellant's contention, [HN7] this section does not distinguish between criminal and civil fines and penalties. See 4 Collier on Bankruptcy ¶ 523.13[2] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2012) ("The text of [*Section 523(a)(7)*] does not distinguish between criminal and civil fines [and] penalties . . . "); see also *In re Fucilo*, No. 00-36261 (CGM), 2002 Bankr. LEXIS 475, 2002 WL 1008935 at *10 (Bankr. S.D.N.Y. Jan. 24, 2002) (Morris, B.J.) ("The

Supreme Court has given § 523(a)(7) a broad reading, and has held that it applies to all criminal and civil penalties" (collecting cases); accord *In re Poule*, 91 B.R. 83, 87-88 (B.A.P. 9th Cir. 1988); *In re Wolfson*, 261 B.R. 369, 375-76 (Bankr. E.D.N.Y. 2001); *In re Caggiano*, 34 B.R. 449, 450-51 (Bankr. D. Mass. 1983).

Moreover, [HN8] parking fines have repeatedly been found to be non-dischargeable debts pursuant to *Section 523(a)(7)*. See *In re Busby*, 46 B.R. 15, 16 (Bankr. E.D.N.Y. 1984) [*14] ("Only the Parking Violations Bureau might have ultimately received more under Chapter 7 than under Chapter 13 since such debts are not dischargeable in straight bankruptcy [pursuant to] 11 U.S.C. § 523(a)(7)."); *In re Meltzer*, 11 B.R. 624, 625 (Bankr. E.D.N.Y. 1981) ("[W]ere Mr. Meltzer to file under Chapter 7 . . . he could not escape paying the judgment against him for parking violations, nor obtain a discharge from the remainder of his debts."); *Johnson v. City of New York Dep't of Fin. Admin. Attorney Bankr.*, 2003 N.Y. Misc. LEXIS 479, 2003 WL 21049599 at *1, 2003 N.Y. Slip Op. 50837[U] (N.Y. Sup. App. Term. Apr. 9, 2003) ("Contrary to plaintiff's contention, traffic and parking fines are nondischargeable debts."); accord *In re Burkhardt*, 220 B.R. 837, 846 (Bankr. D. N.J. 1998); *In re Stevens*, 184 B.R. 584, 586 (Bankr. W.D. Wash. 1995); *In re Gallagher*, 71 B.R. 138, 139 (Bankr. N.D. Ill. 1987); *In re Caggiano*, *supra*, 34 B.R. at 450-51.

On the basis of the foregoing, Judge Drain's determination that appellant's debts to the DOF are non-dischargeable pursuant to *Section 523(a)(7)* should be affirmed.

2. Whether the Bankruptcy Court Properly Assessed Appellant's Damages

Appellant next argues that Judge Drain erred [*15] in assessing compensatory and punitive damages for the City's willful violation of the automatic stay.

a. Compensatory Damages

Appellant contends that Judge Drain erred in fixing the value of his 1992 Subaru at \$750.00 instead of \$1,000.00. Specifically, appellant states:

Judge Drain erred as a matter of law in valuing [a]ppellant's Subaru at \$750.00, when the only evidence before the Court on the issue of the automobile's value was

that submitted by [a]ppellant. The sole proof introduced was that the value was between \$1,720 - \$1,045 [sic] [according to the "Kelley Blue Book"], and as [a]ppellant attributed a value of \$1,000 in his initial schedules [to the 1992 Subaru], the [a]ppellant is limited from claiming [sic] a value in excess of \$1,000.00.

(Appellant's Brf. at 19). Appellant also (1) contends that \$475.00 -- the price obtained for the 1992 Subaru at the NYPD auction -- does not establish its fair market value because it was a forced sale and (2) generally quotes the following language from 11 U.S.C. § 522 of the Bankruptcy Code: "value" means the "fair market value as of the date of the filing of the petition" (Appellant's Brf. at 18-19, quoting in part 11 U.S.C. § 522).

The [*16] City contends that *Section 522* is inapplicable here because that section only concerns federal exemptions that are not applicable to appellant's bankruptcy case (see Appellees' Brf. at 12-13 & n.7). The City also contends that appellant is incorrect in asserting that he was the only party to submit evidence of the 1992 Subaru's value because the City submitted the Auction Bill of Sale for \$475.00 during the hearing on damages (Appellees' Brf. at 13). Thus, the City argues that, under a "clearly erroneous" standard of review, the Bankruptcy Court's determination as to the 1992 Subaru's value was proper because the Court was "[c]onfronted with competing proposed values . . . and . . . no competent testimony regarding the condition of the vehicle at the time [that] it was sold" (Appellees' Brf. at 13-14).

[HN9] "A bankruptcy court's decision regarding the amount of damages is a factual finding and will not be disturbed unless the finding is clearly erroneous." *Ball v. A.O. Smith Corp.*, 321 B.R. 100, 110 (N.D.N.Y. 2005), *aff'd*, 451 F.3d 66 (2006); see also *In re Adomah*, 368 B.R. 134, 137 (S.D.N.Y. 2007) (Sweet, D.J.); *In re Louis Frey Co., Inc.*, 06 Civ. 7587 (RMB), 06 Civ. 7588 (RMB), 2007 U.S. Dist. LEXIS 21675, 2007 WL 924206 at *7 (S.D.N.Y. Mar. 26, 2007) [*17] (Berman, D.J.); *Collins v. Hi-Qual Roofing & Siding Materials*, No. 02-CV-0921E(F), 02-CV-0922E(F), 2003 WL 23350125 at *6 (W.D.N.Y. Dec. 18, 2003); *Matter of Fugazy Express, Inc.*, 124 B.R. 426, 430 (S.D.N.Y. 1991) (Duffy, D.J.).

In this case, the Bankruptcy Court held a hearing on the issue of damages on June 6, 2011. In determining that the value of the 1992 Subaru was \$750.00, the Bankruptcy Court stated:

The parties dispute the market value of the car. The range is between the price derived at the auction, which is four hundred and seventy-five dollars, and the amount stated by Mr. Bace on his schedules, which was one thousand dollars. Generally speaking, a full and fair auction does establish the value of a car, but given the Kelley Blue Book value of the car[,] I'm not satisfied that a price of less than half of that value in a police auction establishes the fair value of the car.

I conclude that as between a willing buyer and a willing seller, the value of the car was seven hundred fifty dollars.

(Docket No. 297 at 64-65).

Here, appellant has not shown that the Bankruptcy Court's determination that the value of his 1992 Subaru was \$750.00 is clearly erroneous. [HN10] "The party seeking [*18] damages pursuant to § 362(h) has the burden of proving what damages were incurred and what relief is appropriate."² *Ball v. A.O. Smith Corp.*, *supra*, 321 B.R. at 110, quoting *In re Sucre*, 226 B.R. 340, 349 (Bankr. S.D.N.Y. 1998) (Gonzalez, B.J.).

2 The provisions that are currently set forth in *Section 362(k)* were previously set forth in *Section 362(h)*. In this Report and Recommendation, I cite case law discussing *Section 362(k)*, as well as case law discussing the prior *Section 362(h)*, because there is no substantive difference between the two sections that is relevant to this bankruptcy appeal. See *In re Ebad*, 448 B.R. 308, 320 n.13 (E.D.N.Y. 2011).

Appellant argues that he was the only party to submit evidence as to the 1992 Subaru's value, i.e., the Kelley Blue Book value, but his contention is simply wrong. Appellant may not agree that the auction price the car achieved was, in fact, the fair market value of the car, but that does not mean that the City failed to offer competing evidence as to the car's value. In fact, it is clear from the

hearing transcript that Judge Drain based his ultimate determination on the parties' competing proposed values (see Docket No. 297 at 64-65).

Additionally, [*19] it is clear from the hearing transcript that the City conceded the value of the 1992 Subaru was at least \$475.00 and appellant conceded that the value of the 1992 Subaru was not above \$1,000.00 (see Docket No. 297 at 14). Other than this range of proposed values, no other testimony or evidence was offered by either side concerning the value or condition of the 1992 Subaru.³

3 Appellant filed a motion to re-open the damages hearing held on June 6, 2011 (Docket No. 295). This motion, however, did not address the actual value of the 1992 Subaru. Instead, it dealt only with "intangible damages" (see Docket No. 295 at ¶ 3). Accordingly, this motion does not alter the analysis set forth above.

Finally, appellant's reference to the definition of "value" in *Section 522 of the Bankruptcy Code* is similarly unavailing. While appellant appears to argue that this definition of value -- i.e., the fair market value as of the date the petition was filed -- supports valuing the 1992 Subaru at \$1,000.00, the City is correct in its contention that [HN11] *Section 522* addresses federal bankruptcy exemptions and is inapplicable here.⁴ Additionally, the language of *Section 522* expressly limits the applicability of [*20] the definition of "value" set forth therein to that section. See 11 U.S.C. § 522(a) ("In this section -- . . . (2) 'value' means fair market value as of the date of the filing of the petition . . .").

4 [HN12] "The Bankruptcy Code contains a set of federal exemptions and permits debtors to choose between either federal or state exemptions. 11 U.S.C. § 522(b)(1). However, the Bankruptcy Code also permits individual states to 'opt-out' of the federal exemption scheme. See e.g., *In re Corio*, 190 B.R. 498, 499 (Bankr. E.D.N.Y. 1995). Pursuant to *N.Y. Debt. & Cred. Law* [] § 284, New York is one state that has opted-out from the federal exemption scheme." *In re Mims*, 438 B.R. 52, 54 n.3 (Bankr. S.D.N.Y. 2010) (Glenn, B.J.). Accordingly, *Section 522* is inapplicable here.

Thus, on the basis of the foregoing, Judge Drain determined that it was reasonable to strike a balance between the competing proposed values; he did so by

assigning a value to the car that was slightly more than halfway between the parties' respective positions. I cannot say that Judge Drain's findings on this issue are unsupported, nor can I say that I am left with "with the definite and firm conviction that a mistake has been [*21] committed." See *Dist. Lodge 26, Int'l. Ass'n of Machinists & Aerospace Workers, AFL-CIO v. United Tech. Corp.*, *supra*, 610 F.3d at 51 (internal quotation marks and citation omitted). Accordingly, Judge Drain's determination that the value of the 1992 Subaru was \$750.00 should be affirmed.

b. Punitive Damages

Appellant also asserts that Judge Drain erred in assessing only \$250.00 in punitive damages against the City. Specifically, appellant argues that in determining the amount of punitive damages to award, Judge Drain (1) failed to consider the factors set forth in *In re B. Cohen & Sons Caterers, Inc.*, 108 B.R. 482, 487 (E.D. Pa. 1989), (2) erred when he considered whether appellant had suffered emotional distress, (3) awarded punitive damages in an amount that is not sufficient to deter future wrongdoing and (4) erred when he declined to award punitive damages against City Marshal Rose (Appellant's Brf. at 22-23).

The City contends that it was an abuse of discretion for Judge Drain to award any punitive damages against it because he did not make an express finding that the City had violated the automatic stay with malice or in bad faith (Appellees' Brf. at 14-15). In the alternative, [*22] the City contends that Judge Drain's decision to award only \$250.00 in punitive damages is not clearly erroneous (Appellees' Brf. at 15).

[HN13] "A bankruptcy court's decision whether to award punitive damages is reviewed for an abuse of discretion." *In re Sturman*, 10 Civ. 6725 (RJS), 2011 U.S. Dist. LEXIS 109599, 2011 WL 4472412 at *1 (S.D.N.Y. Sept. 27, 2011) (Sullivan, D.J.), citing *In re Adomah*, *supra*, 368 B.R. at 137. "A district court 'abuses' or 'exceeds' the discretion accorded to it when (1) its decision rests on an error of law (such as application of the wrong legal principle) or a clearly erroneous factual finding, or (2) its decision -- though not necessarily the product of a legal error or a clearly erroneous factual finding -- cannot be located within the range of permissible decisions." *Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 169 (2d Cir. 2001) (internal footnotes omitted).

The Honorable Richard J. Sullivan, United States District Judge, succinctly set forth the standards applicable to a punitive damages award under *Section 362(k)* in *In re Sturman*, *supra*, 2011 U.S. Dist. LEXIS 109599, 2011 WL 4472412 at *5:

[HN14] Punitive damages are appropriate only for violations of the automatic stay that are "malicious [] or in bad faith." *In re Adomah*, 368 B.R. at 139. [*23] Indeed, "even callous disregard is an insufficient basis upon which to award punitive damages." *Id.* In determining whether a violation would justify the imposition of punitive damages, courts have looked to a variety of factors, including: "(1) the nature of the [violator's] conduct; (2) the [violator's] ability to pay; (3) the [violator's] motives; . . . (4) any provocation by the debtor," and (5) "the [violator's] level of sophistication." *In re Crawford*, 388 B.R. at 525. Moreover, even where punitive damages might be appropriate, the law is clear that "[t]he bankruptcy court has considerable discretion in granting or denying punitive damages." *In re Stinson*, 128 F. App'x 30, 32 (9th Cir. 2005); see also *In re Heghmann*, 316 B.R. 395, 405 (B.A.P. 1st Cir. 2004) (noting that the Bankruptcy Code does not specify a standard for punitive damages, "leaving it to the sound discretion of the bankruptcy court"). The goal of awarding punitive damages is primarily to deter violations of the automatic stay, and may be appropriate even if actual damages are minimal. *In re Crawford*, 388 B.R. at 525. [*24] Nevertheless, such determinations are properly left to the sound discretion of the Bankruptcy Court.

See also *In re Cryslen/Montenay Energy Co.*, 902 F.2d 1098, 1105 (2d Cir. 1990); *In re Pachman*, No. 09-37475, 2010 Bankr. LEXIS 1221, 2010 WL 1489914 at *4 (Bankr. S.D.N.Y. Apr. 14, 2010) (Morris, B.J.); *In re Burkart*, No. 08-61077, 2010 Bankr. LEXIS 385, 2010 WL 502945 at *6 (Bankr. N.D.N.Y. Feb. 9, 2010); *In re Lukach*, No. 805-89014-478, 2007 Bankr. LEXIS 1631, 2007 WL 1365436 at *6 (Bankr. E.D.N.Y. May 8, 2007).

Appellant's first argument is that, in awarding punitive damages, Judge Drain failed to consider the factors set forth in *In re B. Cohen & Sons Caterers, Inc.*, *supra*, 108 B.R. at 487, to wit, (1) the nature of the violator's conduct, (2) the violator's ability to pay, (3) the violator's motives and (4) any provocation by the debtor. Appellant's argument, however, is without merit. Although these factors have been applied in a few New York cases, see, e.g., *In re Sturman*, *supra*, 2011 U.S. Dist. LEXIS 109599, 2011 WL 4472412 at *5 and *In re Pachman*, *supra*, 2010 Bankr. LEXIS 1221, 2010 WL 1489914 at *4, appellant cites no authority from the Second Circuit or the United States Supreme Court that requires a bankruptcy court to consider these factors when awarding punitive damages pursuant to *Section 362(k)*. [*25] Moreover, as already noted above, [HN15] "even where punitive damages might be appropriate, the law is clear that the bankruptcy court has considerable discretion in granting or denying punitive damages." *In re Sturman*, *supra*, 2011 U.S. Dist. LEXIS 109599, 2011 WL 4472412 at *5 (internal quotation marks and citations omitted).

In addition, notwithstanding the lack of any requirement that he do so, it is clear from the hearing transcript that Judge Drain did consider the *In re B. Cohen & Sons Caterers* factors. Judge Drain first explored the nature of the City's conduct and its motives concerning the repeated impoundment and ultimate sale of appellant's 1992 Subaru (see generally Docket No. 297 at 19-31). After doing this, Judge Drain concluded that appellees' conduct had impacted an important personal property right of appellant and that such conduct warranted the imposition of punitive damages (see Docket No. 297 at 63-64). The City also made a representation to Judge Drain that it would pay the full damages award to appellant (see Docket No. 297 at 67-68). Thus, even if Judge Drain did not expressly reference *In re B. Cohen & Sons Caterers*, his analysis substantially mirrored the factors set forth therein, and, in any [*26] event, the Court ruled in appellant's favor on the issue.

Appellant's second argument is that Judge Drain improperly considered whether appellant had suffered emotional distress in awarding punitive damages. Specifically, appellant contends:

Judge Drain erred as a matter of law when determining the amount of punitive

damages assessed against Appellees. He concluded that "I will not award any actual damages for [emotional distress damages] believing that any issue as to mental suffering is taken into account by the punitive damages . . ." Appellant argues, however, that any emotional distress suffered by a debtor is a matter to be considered when determining the debtor's actual damages. It is not a proper factor to be considered when determining punitive damages.

(Appellant's Brf. at 22). The City does not address this aspect of appellant's argument.

The principal problem with appellant's argument is that it incorrectly assumes that he was entitled to recover any damages for mental anguish. The City's seizure and sale of appellant's car in violation of the automatic stay was closely analogous to the common law tort of conversion. However, [HN16] "under New York law, . . . absent proof of malicious [*27] intent on the part of the defendant, a party cannot recover damages for mental anguish, humiliation or emotional distress caused by conversion of a chattel." *Bhattal v. Grand Hyatt-New York*, 563 F. Supp. 277, 281 (S.D.N.Y. 1983) (Briant, D.J.), citing *Cauverien v. DeMetz*, 20 Misc. 2d 144, 147, 188 N.Y.S.2d 627, 631 (Sup. Ct. N.Y. Co. 1959); see also *Evans v. City of Chicago*, Nos. 77 C 4119, 79 C 1939, 79 C 2493, 1985 WL 1157 at *1 (N.D. Ill. May 9, 1985) ("Under most states' laws, a plaintiff cannot recover for his mental suffering caused by an injury to his property, at least if the defendant has not maliciously intended to cause such mental suffering."). Because there was no evidence that the City seized appellant's 1992 Subaru with the specific intent of causing injury to appellant, appellant was not entitled to any damages for mental anguish. Thus, to the extent that Judge Drain considered mental anguish in awarding punitive damages, any error actually worked in appellant's favor and does not provide a basis for reversal.

Additionally, to the extent that appellant's argument can be read to assert a claim for mental anguish damages as a result of the violation of the automatic stay, [*28] that argument must also be rejected.[HN17] Although the case law is unsettled on the matter, there is authority for the proposition that a debtor may, under appropriate circumstances, recover emotional distress damages for a

creditor's willful violation of the automatic stay. See, e.g., *In re Rackowski, Bankruptcy No. 10-61574, Adversary No. 10-80048, 2011 Bankr. LEXIS 5267, 2011 WL 7069457 at *3-*4 (Bankr. N.D.N.Y. June 14, 2011)*; *In re Pachman, supra, 2010 Bankr. LEXIS 1221, 2010 WL 1489914 at *3*; *In re Adomah, 340 B.R. 453, 460 (Bankr. S.D.N.Y. 2006)* (Gropner, B.J.). Appellant, however, did not present any evidence of such damages during the June 6, 2011 hearing. He did not offer any evidence that the City's violation of the automatic stay had any impact on his mental well being. Thus, regardless of how appellant frames his argument on appeal, he was not entitled to recover any damages for mental anguish.

Appellant's third argument is that the punitive damages award is not sufficient to deter future wrongdoing. [HN18] It is the case that "[t]he goal of awarding punitive damages is primarily to deter violations of the automatic stay, and may be appropriate even if actual damages are minimal." *In re Sturman, supra, 2011 U.S. Dist. LEXIS 109599, 2011 WL 4472412 at *5*. However, [*29] again, an award of punitive damages is a matter that is "properly left to the sound discretion of the Bankruptcy Court." *In re Sturman, supra, 2011 U.S. Dist. LEXIS 109599, 2011 WL 4472412 at *5*. Moreover, "[i]n New York, bankruptcy courts often assess awards of punitive damages that are reasonably proportionate to the actual damages." *In re Westridge, No. 07-35257, 2009 Bankr. LEXIS 3310, 2009 WL 3491164 at *4 (Bankr. S.D.N.Y. Oct. 23, 2009)* (Morris, B.J.) (collecting cases). Here, Judge Drain awarded appellant the following damages: (1) actual damages in the amount of \$815.00, which represented the value of the 1992 Subaru (\$750.00) and his out-of-pocket expenses (\$65.00) and (2) punitive damages in the amount of \$250.00 (Docket No. 297 at 64-65). There is nothing about Judge Drain's reasoning or his ultimate determination that suggests the punitive damages award in this case is not reasonably proportionate to the compensatory damages award.

Finally, appellant argues that Judge Drain erred in concluding that City Marshal Rose was not liable for punitive damages because he had not filed a proof of claim in the bankruptcy case. Specifically, appellant contends that Judge Drain "conflated the issues of a punitive damages award pursuant [*30] to § 362 and § 106(b)" and "[p]unitive damages are indisputably assessable against Marshal Rose . . . as he is neither [the] 'government,' nor is he a salaried employee of the City of

New York, the Department of Finance or any other branch of the City 'Government'" (Appellant's Brf. at 23).

I need not reach this aspect of appellant's argument. For the reasons set forth herein, I conclude that the amount of punitive damages awarded is reasonable and there can be no serious question that the City will pay the award of punitive damages. Under these circumstances, the issue of City Marshal Rose's personal liability is a matter of academic interest only, and resolving the issue would have no practical effect on appellant. Accordingly, on the basis of the foregoing, the punitive damages award in this case should be affirmed.

3. Whether Judge Drain Properly Denied Appellant's Motion to Re-Open the Hearing on Damages

Appellant next argues that Judge Drain erred in denying his motion to re-open the hearing to permit appellant to submit additional evidence concerning damages. By motion dated June 13, 2011, appellant moved pursuant to *Fed.R.Civ.P. 59, Fed.R.Bankr.P. 9023* and *Local Fed.R.Bankr.P. 9023-1* [*31] to present additional testimony on the issue of "damages relating to pain and suffering/emotional distress, etc." based on the contention that he had not been afforded an adequate opportunity to present such evidence during the June 6, 2011 hearing (Docket No. 295 at ¶ 3).

Appellant argues the following on appeal: (1) Judge Drain did not warn him that the evidentiary portion of the June 6, 2011 hearing "was coming to [a] close," (2) Judge Drain's decision should be "carefully scrutinized" because denial of the opportunity to fully testify on the issue of damages implicates a "substantive right" and (3) during the June 6, 2011 hearing, appellant intended to testify on "intangible damages" such as "the loss of use of [his] 1992 Subaru, the time [that he] devote[d] to the issue of the wrongful towing [] and [] eventual sale of his 1992 Subaru . . . [,] the DMV suspension of [his] license/driving privileges as the result of [a]ppellee's [sic] wrongful retention of [his] license plates [and] mental strain and suffering" (Appellant's Brf. at 25-26).

The City contends that these arguments are without merit because appellant had ample opportunity to give testimony or submit other [*32] evidence as to his damages throughout the course of the proceedings (Appellees' Brf. at 18). The City points out that appellant had been granted multiple hearings throughout his bankruptcy case and that neither Judge Drain nor the City

prevented him from offering evidence on the matter (Appellees' Brf. at 19). Finally, the City contends that appellant has not, at any point, identified either the precise nature of the additional damages sought or described the evidence that he was precluded from offering (Appellees' Brf. at 19). Thus, the City argues that Judge Drain did not abuse his discretion when he denied appellant's Second Motion (Appellees' Brf. at 19-21).

[HN19] "The applicable standard of review with respect to a motion under *Bankruptcy Rule* [] 9023 . . . -- which make[s] *Fed.R. Civ.P. 59(e)* . . . applicable to bankruptcy proceedings -- is abuse of discretion." *Key Mech. Inc. v. BDC 56 LLC, 01 Civ. 10173 (RWS), 2002 U.S. Dist. LEXIS 5005, 2002 WL 467664 at *2 (S.D.N.Y. Mar. 26, 2002)* (Sweet, D.J.), citing in relevant part *McCarthy v. Manson, 714 F.2d 234, 237 (2d Cir. 1983)*; see also *Schwartz v. Liberty Mut. Ins. Co., 539 F.3d 135, 150 (2d Cir. 2008)*; *In re BDC 56 LLC, 330 F.3d 111, 123 (2d Cir. 2003)*, abrogated [*33] on other grounds, see *In re Zarnel, 619 F.3d 156 (2d Cir. 2010)*; *In re Interpictures, Inc., 122 F.3d 1056, 1997 WL 416925 at *2 (2d Cir. 1997)*; *Wechsler v. Hunt Health Sys., Ltd., 94 Civ. 8294 (PKL), 2004 U.S. Dist. LEXIS 19757, 2004 WL 2210261 at *2 (S.D.N.Y. Sept. 30, 2004)* (Leisure, D.J.).

Before setting forth the standards applicable to a motion made pursuant to *Fed.R.Bankr.P. 9023* and *Fed.R.Civ.P. 59*, I address appellant's second argument on appeal because it implicates the standard of review to be applied here. Specifically, appellant contends that a standard of "careful scrutiny," as opposed to abuse of discretion, should be applied to Judge Drain's denial of his Second Motion. Appellant argues that reviewing courts should "give little or no deference" to a determination that "is determinative of a substantive right of a party, e.g., whether to dismiss a bankruptcy case as [] filed in bad faith" (Appellant's Brf. at 24). Here, appellant asserts that his right to present complete testimony on the issue of damages is a "substantive right" (see Appellant's Brf. at 25).

Appellant's argument must be rejected. First, as already noted above, the law in the Second Circuit is clear that the standard [*34] of review on appeal for motions made pursuant to *Fed.R.Bankr.P. 9023* and *Fed.R.Civ.P. 59* is abuse of discretion. The cases that appellant cites in his brief, with the exception of one Second Circuit case, are from other jurisdictions, and, therefore, I decline to follow them to the extent that they

conflict with Second Circuit precedent. Second, the single Second Circuit case that appellant cites -- *Buffalo Courier-Express, Inc. v. Buffalo Evening News, Inc., 601 F.2d 48 (2d Cir. 1979)* -- is factually inapposite. Buffalo Courier-Express dealt with the grant or denial of a preliminary injunction, not an application to re-open a damages hearing.

Turning to the applicable legal principles, the Honorable Judge Robert W. Sweet, United States District Judge, succinctly set forth the standards applicable to a motion for reconsideration made pursuant to *Fed.R.Bankr.P. 9023* and *Fed.R.Civ.P. 59* in *Key Mech. Inc. v. BDC 56 LLC, supra, 2002 U.S. Dist. LEXIS 5005, 2002 WL 467664 at *2-3*:

[HN20] *Bankruptcy Rule 9023* [] incorporates *Fed.R.Civ.P. 59. Rule 59* provides:⁵

(a) Grounds. A new trial may be granted to all or any of the parties on all or part of the issues . . . (2) in an action tried without a jury, for any of the reasons for [*35] which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

Fed.R.Civ.P. 59.

[HN21] Reconsideration "is merited when there has been a clear error or manifest injustice in an order of the court or if newly discovered evidence is unearthed." *In re Bird, 222 B.R. 229, 235 (Bankr. S.D.N.Y. 1998)*. The movant must

show that the court overlooked factual matters or controlling precedent that might have materially influenced its earlier decision. *Id.*; see also *Morales v. Quintiles Transnational Corp.*, 25 *F. Supp. 2d* 369, 372 (*S.D.N.Y.* 1998) ("To prevail [the moving party] must demonstrate an intervening change in controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice."). This criterion is strictly construed against the moving party. *Id.*

In addition, [HN22] a "motion to reconsider should not give the moving party another bite at the apple by [*36] permitting argument on issues that could have been or should have been raised prior to the original motion." *In re Bird*, 225 *B.R.* at 235; see also *Herschaft v. New York City Campaign Fin. Bd.*, 139 *F. Supp. 2d* 282, 285-86 (*E.D.N.Y.* 2001); *Air Espana v. O'Brien*, 1997 *U.S. Dist. LEXIS* 20397, 1997 *WL* 803756 at *[5] (*E.D.N.Y.* 1997) ("[W]hatever may be the purpose of *Rule 59(e)* it should not be supposed that it is intended to give an unhappy litigant one additional chance to sway the judge." (citations omitted)).

See also *In re Vargas Realty Enter. Inc.*, No. 09-10402 (*SMB*), 2009 *Bankr. LEXIS* 2040, 2009 *WL* 2929258 at *2-*3 (*Bankr. S.D.N.Y.* July 23, 2009) (Bernstein, B.J.); *Wechsler v. Hunt Health Sys.*, *supra*, 2004 *U.S. Dist. LEXIS* 19757, 2004 *WL* 2210261 at *2; *In re Crozier Bros., Inc.*, 60 *B.R.* 683, 687-88 (*Bankr. S.D.N.Y.* 1986) (Schwartzberg, B.J.).

⁵ *Fed.R.Civ.P.* 59 has been amended since Judge Sweet's decision in *Key Mech. Inc. v. BDC 56 LLC*, however, the amendments do not affect the substance of the rule. See *Fed.R.Civ.P. Advisory Committee Notes*, 2007 Amendments ("The language of *Rule 59* has been amended as part of the general restyling of the Civil Rules to make them more easily understood . . . [t]hese changes are intended to be stylistic only.") and 2009 Amendments [*37] (amending time limits applicable to *Rule 59* for filing post-judgment motions).

Appellant's first argument is that Judge Drain failed to warn him that the evidentiary portion of the June 6, 2011 hearing would be coming to a close, and, as a result, he was effectively precluded from presenting evidence concerning "intangible damages" (Appellant's Brf. at 24). This argument, however, is without merit. After determining that the City had willfully violated the automatic stay during the November 23, 2010 hearing, Judge Drain directed that a second hearing be held specifically on the issue of damages (see Docket No. 296 at 15). This hearing was held on June 6, 2011 and lasted approximately two hours (see generally Docket No. 297). Nothing that occurred during the course of this hearing indicates that had appellant requested an opportunity to present further evidence at the hearing on the issue of "intangible damages," Judge Drain would have precluded him from doing so.

In fact, early in the hearing, Judge Drain noted that although appellant requested "pain and suffering damages"⁶ in his First Motion, he had not "quantit[ified]" those damages (Docket No. 297 at 18). Judge Drain also explained [*38] at the close of the hearing that he was not going to award appellant separate, compensatory damages for emotional distress because appellant had not offered any evidence on the matter (Docket No. 297 at 65). Appellant did not, at any point during the hearing, either controvert these statements or express a desire to offer evidence concerning pain and suffering damages.

⁶ Specifically, Judge Drain stated: "Your motion did seek what I'll just refer to as pain and suffering damages, but didn't quantify them" (Docket No. 297 at 18). The section entitled "Damages" in appellant's First Motion does discuss a variety of damages not representing actual financial loss (see Docket No. 283 at 24-34), however, these damages were alleged only with respect to the 1997 Subaru. As discussed above in Section III(A), appellant has abandoned any issues on appeal concerning the 1997 Subaru.

Additionally, appellant submitted an itemized list of damages to Judge Drain during the hearing (see Docket No. 297 at 16). With respect to this list, appellant stated: "The only damages that are not included would be the psychological, emotional damages that are not out-of-pocket. But other than those damages . . . I [*39] can stipulate to the one thousand sixty-five dollars"⁷

(Docket No. 297 at 16-17). Again, appellant did not, at any point during the hearing, indicate to Judge Drain that he had further evidence to present on the issue of "intangible damages." Thus, the record on appeal simply does not support appellant's contention that Judge Drain concluded the evidentiary portion of the June 6, 2011 hearing without notice to him.

7 The \$1,065.00 figure referenced by appellant reflects (1) a proposed valuation of the 1992 Subaru in the amount of \$1,000.00 and (2) the out-of-pocket expenses that appellant incurred as a result of the City's violation of the automatic stay in the amount of \$65.00 (see generally Docket No. 297 at 12-18).

Appellant's final argument, i.e., that he intended to testify as to various "intangible damages" during the June 6, 2011 hearing, is similarly without merit. For the same reasons already articulated above, there is nothing from the record on appeal that indicates this was the case.

On the basis of the foregoing, Judge Drain properly denied appellant's Second Motion. It was appellant's burden to show that the court had either overlooked factual matters or controlling precedent [*40] that might have materially influenced its earlier decision, or that new evidence had become available since its earlier decision. See *Key Mech. Inc. v. BDC 56 LLC*, *supra*, 2002 U.S. Dist. LEXIS 5005, 2002 WL 467664 at *3. Appellant simply did not carry this burden. Judge Drain applied the correct legal standard to appellant's motion (see Docket No. 300 at 1-2), and, in reaching his conclusion, he did not rely on any clearly erroneous factual findings. See *Zervos v. Verizon New York, Inc.*, *supra*, 252 F.3d at 169. Accordingly, the denial of appellant's Second Motion should be affirmed.

4. Whether Judge Drain Properly Denied Appellant's Request for a Court Order to Compel the Trustee to Assist Him and the Trustee's Motion to Dismiss

Finally, appellant argues that Judge Drain erred by failing to compel the Trustee to assist him in presenting his claims of exemption and lien avoidance to the Court (Appellant's Brf. at 26). Specifically, appellant contends that, pursuant to 11 U.S.C. § 323(a), a Chapter 7 Trustee is a fiduciary charged with protecting the interest of all estate beneficiaries -- including the debtor's interest in exemptions and possible surplus property (Appellant's Brf. at 27). It is unclear, however, [*41] from what

specific order of the Bankruptcy Court appellant is appealing, and, in any event, what relief appellant is seeking at this stage of the litigation.

Appellant's papers and the relevant hearing transcripts provide the following context. During the November 23, 2010 hearing, appellant raised the issue of the Trustee's obligation to assist him in connection with his First Motion (see Docket No. 296 at 4-5, 15-17). Judge Drain responded that the Trustee's presence at the hearing was immaterial because appellant had standing to pursue the issues raised in his motion (Docket No. 296 at 5). Moreover, Judge Drain noted that (1) the Trustee would not have been required to take action against the City for which there was no legal basis and (2) the Trustee's inaction with respect to the City's violation of the automatic stay "actually helped [appellant] because [it was] more likely than not that the [damages] [would go to appellant] and not the estate" (Docket No. 296 at 16-17).

During the June 6, 2011 hearing, appellant again raised the issue of the Trustee's obligation to assist him (see Docket No. 297 at 8-12). Appellant requested that "the Court [rule] as to whether or not the trustee [*42] should be here . . . representing [the issues raised in the First Motion] on behalf of [appellant and the estate]" (Docket No. 297 at 9). Judge Drain first noted that it did not appear appellant had suffered any harm as a result of the Trustee's lack of involvement because all of the issues raised had been briefed and argued (Docket No. 297 at 9). Ultimately, Judge Drain determined that he would not delay the hearing because appellant's motion "d[id] not specifically seek to direct the trustee to take action on the specific issues that [were] before [the Court], and [instead] [was] really directed at the City and Marshal Rose" (Docket No. 297 at 11). Judge Drain concluded by informing appellant that if he wanted to pursue a claim against the Trustee, he was free to do so (Docket No. 297 at 11).

The Trustee has moved to dismiss the present appeal because he contends that there is no "case or controversy" present as required by Article III of the United States Constitution (Docket Item 9; see also Motion by Roy Babitt, Chapter 7 Trustee, for an Order Dismissing the Appeal of William Charles Bace against the Chapter 7 Trustee Based on the Failure to Allege a Claim or Controversy [*43] Against the Chapter 7 Trustee and Memorandum of Law in Support of Motion, dated Jan. 19, 2012 ("Trustee's Mot.") (Docket Item 10), 1-2 & ¶

24). Specifically, the Trustee states that the orders which are the subjects of this appeal do not implicate him in any way and are directed only at the City and City Marshal Rose (Trustee's Mot. at ¶ 1). The Trustee also contends that appellant has failed to allege that he suffered any injury-in-fact as a result of the Trustee's inaction (Trustee's Mot. at ¶¶ 25-26).

Appellant does not have a claim on appeal with respect to the Trustee. First, Judge Drain was correct that appellant's First Motion did not request an order directed to the Trustee to take action on the specific issues raised in that motion. For example, appellant made only one passing reference to the Trustee and his statutory obligation pursuant to *Section 323(a)* in the motion.⁸ The Trustee is not mentioned again in the motion, nor does appellant request any particular relief with respect to the Trustee (see Docket No. 282 at 32, 51-52). Accordingly, in entering the Orders dated June 28, 2011, Judge Drain did not make any findings of fact or any conclusions of law concerning the Trustee's [*44] action or inaction in appellant's bankruptcy case. The Orders only address the City and City Marshal Rose (see Docket Nos. 299 and 300).

8 Specifically, while discussing whether his debts to the DOF were dischargeable pursuant to *Section 523(a)(7)*, appellant (1) quoted the statutory language of *Section 323(a)* and (2) stated the following:

What about the chapter 7 trustee, one might ask? As there's no obvious payday for a chapter 7 trustee in this dispute, why would a trustee voluntarily get involved? All that the trustee can expect is more work, more hassles, more court appearances, more attorney's fees . . . and then the debtor gets to ride away in the car! Can anyone feign surprise that Roy Babitt, Esq. informed the U.S. Trustee: "I have no interest in Mr. Bace's automobile or claimed exemption."

(Docket No. 282 at 32).

Second, with the exception of the *Section 523(a)(7)* dischargeability issue, appellant prevailed on the issues

that he presented to Judge Drain and which are the subject of this bankruptcy appeal. Judge Drain found that the City had willfully violated the automatic stay and awarded appellant not only compensatory, but also punitive, damages. With respect to the dischargeability [*45] issue, as already discussed above, the case law and commentary are clear and conclusive that appellant's debts to the DOF are not dischargeable. Thus, even if appellant is correct that the Trustee had a statutory obligation to assist him in presenting his claims to the Bankruptcy Court, appellant has not suffered any prejudice or damage as a result of the Trustee's inaction. Accordingly, the Trustee's motion to dismiss the present appeal should be granted.

IV. Conclusion

For all the foregoing reasons, I respectfully recommend that (1) the Bankruptcy Court's decision be affirmed in all respects and (2) the Trustee's motion to dismiss be granted.

V. OBJECTIONS

Pursuant to 28 U.S.C. § 636(b)(1)(C) and *Rule 72(b) of the Federal Rules of Civil Procedure*, the parties shall have fourteen (14) days from receipt of this Report to file written objections. See also *Fed.R.Civ.P. 6(a)*. Such objections (and responses thereto) shall be filed with the Clerk of the Court, with courtesy copies delivered to the Chambers of the Honorable Paul A. Crotty, United States District Judge, 500 Pearl Street, Room 735, and to the Chambers of the undersigned, 500 Pearl Street, Room 750, New York, New York 10007. Any [*46] requests for an extension of time for filing objections must be directed to Judge Crotty. FAILURE TO OBJECT WITHIN FOURTEEN (14) DAYS **WILL** RESULT IN A WAIVER OF OBJECTIONS AND **WILL** PRECLUDE APPELLATE REVIEW. *Thomas v. Arn*, 474 U.S. 140, 155, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985); *United States v. Male Juvenile*, 121 F.3d 34, 38 (2d Cir. 1997); *IUE AFL-CIO Pension Fund v. Herrmann*, 9 F.3d 1049, 1054 (2d Cir. 1993); *Frank v. Johnson*, 968 F.2d 298, 300 (2d Cir. 1992); *Wesolek v. Canadair Ltd.*, 838 F.2d 55, 57-59 (2d Cir. 1988); *McCarthy v. Manson*, *supra*, 714 F.2d at 237-38.

Dated: New York, New York

May 10, 2012

Respectfully submitted,

/s/ Henry Pitman

HENRY PITMAN

United States Magistrate Judge