**IT IS ORDERED as set forth below:**

**Date: April 16, 2015**

Wendy L. Hagenau

**Wendy L. Hagenau**
**U.S. Bankruptcy Court Judge**

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

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| IN RE: | ) | CASE NO. 13-70818-WLH |
| TISHA LYNN COX, | ) | CHAPTER 7 |
| Debtor. | ) | JUDGE WENDY L. HAGENAU |
| TISHA L. COX, | ) | |
| Plaintiff, | ) | |
| v. | ) | ADV. PROC. NO. 15-5063 |
| ROBIN RUSSLER-KLEIN and BRUCE N. KLEIN, | ) | |
| Defendant. | ) | |

**ORDER DENYING MOTION TO DISMISS**

This matter is before the Court on Defendants' Motion to Dismiss Adversary Proceeding for Failure to State a Claim ("Motion") [Docket No. 4] and Plaintiff's Response thereto. This Court has subject matter jurisdiction of this matter pursuant to 28 U.S.C. §§ 1334 and 157, and it is a core matter pursuant to 28 U.S.C. § 157(b)(A), (G) and (O).

## FACTUAL BACKGROUND

This adversary proceeding was brought by the Debtor, Tisha Lynn Cox ("Cox") against Robin Russler-Klein ("RRK") and Bruce N. Klein ("BNK", collectively, "Defendants") for an alleged willful violation of the automatic stay. RRK is the owner of a condominium in Cobb County, Georgia located at 2738 Suwannee Way, Marietta, Georgia. Cox claims her friend Chase Frazier ("Frazier") was the named tenant on a residential lease with RRK for the condominium. Cox also claims she had a written sublease/roommate agreement with Frazier executed February 18, 2013. Per the terms of this alleged sublease/roommate agreement, Cox paid Frazier $450 for rent. On September 17, 2013, RRK commenced a dispossessory action in the Cobb County Magistrate Court naming Cox, although not her tenant of record, as a party defendant. On September 22, 2013, the sheriff's office served a summons of a dispossessory proceeding by "tack and mail", which Cox allegedly never saw. Cox did not timely respond to the dispossessory proceeding.

On September 24, 2013, Cox filed a voluntary Chapter 13 petition, listing the condominium as her home address. Cox did not list RRK or BNK on the creditor matrix. On October 1, 2013, a writ of possession order was entered authorizing the marshal to remove Cox and her property from the condominium. Cox was presented with the writ on October 2, 2013. On October 3, 2013, Cox filed an amended matrix with the bankruptcy court adding RRK and BNK as creditors/parties-in-interest in the case. Cox also filed pleadings with the Cobb County Magistrate Court stating she had filed a bankruptcy petition on September 24, 2013 and alleging that the writ from the Magistrate Court entered on October 1, 2013 was in violation of the automatic stay. Later that same day, a Cobb County Magistrate Court judge vacated and set aside the writ of possession pending disposition of the bankruptcy case. By this time, however, RRK and BNK had changed the deadbolt lock and removed most of Cox's belongings and

placed them on the curb. Cox informed RRK of the order vacating the writ of possession and requested that she be let back into the condominium, but neither Defendant let her in the condominium. Allegedly, upon returning to the condominium on October 4, 2013, Cox's belongings were no longer there.

On January 27, 2015, Cox filed this adversary proceeding, alleging willful violation of the automatic stay. Defendants have answered and filed their Motion, alleging the Complaint fails to state a claim upon which relief can be granted.

**LEGAL ANALYSIS**

The Defendants allege the Complaint fails to state a claim for willful violation of the stay and should be dismissed. In the context of a motion to dismiss, the court must construe all of the allegations in the complaint as true and view the assertions "in the light most favorable to the plaintiff." Watts v. Florida Internat'l Univ., 495 F.3d 1289, 1295 (11th Cir. 2007). Under Fed. R. Civ. P. 8(a)(2), a complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief". There is no need for "detailed factual allegations", but the complaint must provide the grounds for relief, which "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atl. Corp. v. Twombley, 550 U.S. 544, 555 (2007). "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009) (citation omitted). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. at 678.

Defendants' Motion contains numerous allegations of factual disputes. Factual disputes, however, are not a basis for a motion to dismiss as this Court must assume for purposes of deciding this Motion that the allegations in Plaintiff's Complaint are true and correct.

Defendants' Motion is based on the theory that Cox had no property or possessory interest in the condominium and therefore no stay violation occurred by removing her from the condominium. Taking all of the allegations as true, however, the automatic stay applied to the actions taken by the Defendants to dispossess Cox from the condominium. Under 11 U.S.C. § 362(a)(1), the automatic stay operates as a stay of "the commencement or continuation … of a judicial … proceeding against the debtor … that was … commenced before the commencement of the case under this title". The Complaint alleges that, prior to the filing of the bankruptcy petition, the Defendants instituted a dispossessory action naming Cox as a defendant. This matter was not concluded before the filing of the bankruptcy case and therefore upon the filing of the bankruptcy case the automatic stay arose to prohibit the continuation of that dispossessory proceeding against Cox.

Further, the weight of authority holds that "a mere possessory interest in real property, without any accompanying legal interest, is sufficient to trigger the protection of the automatic stay." In re 48th St. Steakhouse, Inc., 835 F.2d 427, 430 (2d Cir. 1987); see also In re Convenient Food Mart No. 144, Inc., 968 F.2d 592, 594 (6th Cir. 1992); In re Atl. Bus. & Cmty. Corp., 901 F.2d 325, 328 (3d Cir. 1990); In re Blaylock, 301 B.R. 443, 445 (Bankr. E.D. Pa. 2003). Section 362(a)(3) prohibits a party from taking "any act to obtain possession … of property from the estate or to exercise control over property of the estate." See In re Kennedy, 39 B.R. 995, 997 (C.D. Cal. 1984) (mere possessory interest triggered the automatic stay and any actions with respect to the property at issue would constitute actions to take property from the estate).

As the court in In re Blaylock reasoned, obtaining relief from the stay is a relatively "simple matter" and therefore parties should not be invited "to take post-petition action against a debtor when they unilaterally believe the debtor's claim to the property is not 'colorable.'" In re

Blaylock, 301 B.R. at 447–48. Such a rule would be "in contrast to the general understanding that a party takes action against a debtor at its peril in the face of the bankruptcy stay." Id. at 448; accord In re Flabeg Solar US Corp., 499 B.R. 475, 482 (Bankr. W.D. Pa. 2013).

Again, taking the allegations in the Complaint as true, the continued eviction of Cox from the condominium was an act to obtain property from the estate, even if it was not property of the estate, and certainly was exercising control over property of the estate in the form of the Debtor's personal belongings. Thus, the Complaint sufficiently alleges the Defendants violated the automatic stay.

To find Defendants liable under Section 362(k) for violation of the stay, the Defendants must have been aware of the filing of the bankruptcy case and intended the action that was taken. Jove Eng'g., Inc. v. IRS, 92 F.3d 1539, 1555 (11th Cir. 1996). The parties do not dispute the Defendants were unaware of Cox's bankruptcy filing when the writ of possession was issued on October 1, 2013. However, taking Cox's allegations as true, the Defendants became aware of the filing of the bankruptcy case at least by October 3, 2013. At that point, they were deemed to have knowledge of the existence of the automatic stay and the allegations are sufficient that the Defendants intended the actions they took from October 3, 2013 forward in refusing Cox's request to re-enter the condominium.

Case law supports Cox's theory of recovery that a failure to take affirmative action to undo an innocent violation of the automatic stay may constitute a willful violation of the stay. In re Smith, 180 B.R. 311, 319 (Bankr. N.D. Ga. 1995). In the Smith case, a creditor instituted contempt proceedings against the debtor in state court without notice of the debtor's bankruptcy filing. Id. at 314. The creditor's attorney was subsequently notified of the debtor's bankruptcy case. Upon receiving this knowledge, the creditor and its attorney chose to go forward with the contempt hearing and the debtor was incarcerated. Id. at 317. The bankruptcy court, in granting

a motion for sanctions against the creditor and its attorney, stated, "[w]hen a creditor receives such actual notice [of a pending bankruptcy case], the burden is then on the creditor to assure that the automatic stay is not violated or, if it has been violated prior to receiving actual notice, the burden is on the creditor to reverse any such action taken in violation of the stay." Id. at 319. See also Commercial Credit Corp. v Reed, 154 B.R. 471, 476 (E.D. Tex. 1993) ("creditor must act immediately to restore the status quo once it learns that it has violated the stay"); In re Wariner, 16 B.R. 216 (Bankr. N.D. Tex. 1981) ("A creditor has an affirmative duty to return the property and restore the status quo once it learns its actions violated the stay."); In re Miller, 10 B.R. 778 (Bankr. D. Md. 1981) (creditor has an affirmative obligation to return vehicle repossessed post-petition; failure to do so constituted a willful stay violation and supported an award of damages). Whether the theory of recovery applies in this case depends on the facts established at trial.

The Complaint alleges that, even after the Defendants were placed on notice of the Debtor's bankruptcy case and the vacated writ of possession, they failed to remove the changed locks at the condominium and allow Cox back into the premises, as a result of which her belongings disappeared.

Thus, taking all of Cox's allegations as true, the Complaint states a claim. It is hereby ORDERED that the Defendants' Motion to Dismiss is DENIED.

**### END OF ORDER ###**