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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

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**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

In re:)	BAP No. CC-09-1401-JaDuMk
)	
JOY JORDAN,)	Bk. No. LA 09-29187-SB
)	
Debtor.)	
)	
_____)	
BERMAN, BERMAN & BERMAN, LLP;)	
SPENCER A. SCHNEIDER,)	
)	
Appellants,)	
)	Memorandum ¹
v.)	
)	
JOY JORDAN,)	
)	
Appellee.)	
)	
_____)	

Argued and Submitted on May 20, 2010
at Pasadena, California

Filed - June 29, 2010

Appeal from the United States Bankruptcy Court
for the Central District of California

Hon. Samuel Bufford, Bankruptcy Judge, Presiding

Before: JAROSLOVSKY,² DUNN and MARKELL, Bankruptcy Judges.

¹ This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

² Hon. Alan Jaroslovsky, United States Bankruptcy Judge for the Northern District of California, sitting by designation.

1 entirety, ruling that there was no triable issue of material fact as
2 to any of Jordan's eleven causes of action and that Berman and
3 Schneider were entitled to judgment on the complaint as a matter of
4 law.

5 Immediately after the hearing on the motion for summary
6 judgment, Jordan left the Los Angeles County courthouse and filed her
7 petition for protection under Chapter 7 in the United States
8 Bankruptcy Court for the Central District of California. The filing
9 imposed a stay of the pending trial on Schneider's cross-complaint,
10 which was set to commence 17 days later. Berman and Schneider
11 asserted an additional effect was to prevent them from obtaining the
12 judgment in their favor as to Jordan's complaint.

13 On October 13, 2009, Schneider filed an adversary proceeding in
14 bankruptcy court to determine the nondischargeability of any judgment
15 he would receive in his cross-claim against Jordan for stalking,
16 civil extortion, and intentional infliction of emotional distress,
17 pursuant to 11 U.S.C. § 523(a)(6).

18 On November 6, 2009, Berman and Schneider filed for relief in
19 bankruptcy court from the automatic stay under 11 U.S.C. § 362 to
20 allow (1) Schneider to proceed with his cross-complaint in Los
21 Angeles Superior Court, and (2) Berman and Schneider to obtain a
22 judgment in Los Angeles Superior Court on Jordan's complaint.

23 On December 1, 2009, the bankruptcy court heard Berman's and
24 Schneider's motion for relief from the stay, seeking to be allowed to
25 have judgment entered on Jordan's complaint and to be allowed to
26 litigate Schneider's cross-complaint. Stating only that "this is the

1 place to litigate [dischargeability],” the court denied the motion
2 in its entirety. This appeal timely followed.³

3 II. JURISDICTION

4 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
5 §§ 1334 and 157(b) (1) and (b) (2) (G). We have jurisdiction pursuant
6 to 28 U.S.C. § 158.

7 III. ISSUES

8 The primary issue is whether the bankruptcy court abused its
9 discretion by denying the motion for relief from the automatic stay
10 so that claims against the debtor for stalking and extortion could be
11 litigated in state court. A secondary issue is whether such claims
12 can be heard in bankruptcy court pursuant to § 157(b) (2) (I) or must
13 be heard in the district court pursuant to § 157(b) (2) (O) and
14 § 157(b) (5). A further issue, seemingly moot in light of the post-
15 appeal events described in footnote 3 above, is whether the automatic
16 stay prohibits entry of a judgment in state court against the debtor
17 when the debtor is the plaintiff.

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20 ³ Although not part of the record of this appeal, some post-
21 appeal events need to be mentioned. The state court apparently
22 insisted on entering judgment in favor of Berman on Jordan’s
23 complaint. Jordan complained to the bankruptcy court that this was a
24 violation of the automatic stay. The bankruptcy court held that
25 entry of the judgment did not violate the automatic stay. Berman
26 then filed a bill of costs, and Jordan again complained to the
27 bankruptcy court, which held that this act did violate the stay but
28 declined to assess sanctions. Berman then withdrew its cost bill.

29 The upshot of all of this is that even though Berman ascribes
30 error in this appeal to the bankruptcy court’s failure to allow it to
31 have judgment entered in its favor on Jordan’s complaint, judgment
32 has nonetheless been entered and the bankruptcy court has found the
33 entry of the judgment to be permitted.

1 IV. STANDARD OF REVIEW

2 We review decisions denying motions to lift the automatic stay
3 for abuse of discretion. Mataya v. Kissinger (In re Kissinger), 72
4 F.3d 107, 108 (9th Cir. 1995).

5 V. DISCUSSION

6 From a historical perspective, there is some irony in
7 Schneider's argument that it was error for the bankruptcy court to
8 deny him leave to litigate his claim against Jordan in state court.
9 Prior to 1970, dischargeability matters were litigated in state
10 court. Because of abuses which often occurred when state courts
11 heard these bankruptcy issues, the 1970 amendments to the Bankruptcy
12 Act gave exclusive jurisdiction over dischargeability disputes to the
13 bankruptcy courts. See Grove v. Fulwiler (In re Fulwiler), 624 F.2d
14 908, 909-10 (9th Cir. 1980). After 1970, the issue was not whether
15 the bankruptcy courts had to defer to state courts but rather whether
16 a bankruptcy court could, in an appropriate case, allow litigation
17 affecting dischargeability to go forward in state court under any
18 circumstances. Since the amendments, courts have usually held that
19 state court litigation of dischargeability issues is disfavored by
20 the policies underlying the 1970 amendments, but not strictly
21 prohibited. See Austin v. Wendell-West Co., 539 F.2d 71 (9th Cir.
22 1976). The Bankruptcy Code has carried forward the exclusive
23 jurisdiction of the bankruptcy courts to hear dischargeability
24 litigation under § 523(a)(2), (4) and (6). Sasson v. Sokoloff (In
25 re Sasson), 424 F.3d 864, 869 (9th Cir. 2005), cert. denied, 547 U.S.

1 1206 (2006). See also 11 U.S.C. § 523(c); 4 Collier On Bankruptcy,
2 ¶ 523.03 (16th ed. 2010).

3 It was within the bankruptcy court's discretion to allow
4 Schneider's cross-complaint to be heard in state court, and such a
5 decision might have been appropriate if there were many non-debtor
6 defendants or Schneider did not learn of the bankruptcy in time to
7 file a timely dischargeability complaint. Tidwell v. Smith (In re
8 Smith), 582 F.3d 767, 781 (7th Cir. 2009). However, no such factors
9 are present in this case and, even if they were present, state court
10 litigation would only be permitted, not mandatory.

11 In exercising its discretion to allow state court actions with
12 discharge implications to proceed, bankruptcy courts may consider
13 many factors. These include (1) the effect or lack thereof on the
14 efficient administration of the estate if a court abstains, (2) the
15 extent to which state law issues predominate over bankruptcy issues,
16 (3) the difficulty or unsettled nature of the applicable law, (4) the
17 presence of a related proceeding commenced in state court or other
18 nonbankruptcy court, (5) the jurisdictional basis, if any, other than
19 28 U.S.C. § 1334, (6) the degree of relatedness or remoteness of the
20 proceeding to the main bankruptcy case, (7) the substance rather than
21 the form of an asserted 'core' proceeding, (8) the feasibility of
22 severing state law claims from core bankruptcy matters to allow
23 judgments to be entered in state court with enforcement left to the
24 bankruptcy court, (9) the burden on (the bankruptcy court's) docket,
25 (10) the likelihood that the commencement of the proceeding in
26 bankruptcy court involves forum shopping by one of the parties,

1 (11) the existence of a right to a jury trial, and (12) the presence
2 in the proceedings of nondebtor parties. Christensen v. Tucson
3 Estates, Inc. (In re Tucson Estates, Inc.), 912 F.2d 1162, 1167 (9th
4 Cir. 1990).

5 While some of these considerations may have militated in favor
6 of allowing litigation to proceed in state court, the bankruptcy
7 court clearly found the predominant consideration was that
8 Schneider's claims went to the issue of dischargeability under the
9 Bankruptcy Code. A bankruptcy court is usually well within its
10 discretion to deny relief from the automatic stay to continue state
11 court litigation where issues of nondischargeability are present.
12 Mass. Dept. of Revenue v. Crocker (In re Crocker), 362 B.R. 49, 55
13 (1st Cir. BAP 2007). Indeed, Schneider has not cited a single case
14 where it was held to be error for a bankruptcy court to retain
15 jurisdiction to hear dischargeability issues. We cannot say that
16 such a decision in this case was an abuse of discretion.

17 Schneider's argument that the bankruptcy court erred in not
18 giving him permission to litigate his cross-complaint against Jordan
19 in state court because the bankruptcy court lacks jurisdiction over
20 personal injury actions has numerous flaws. First, it is not
21 established that the personal injury exceptions to those matters
22 which may be heard in the bankruptcy court, contained in 28 U.S.C
23 § 157(b)(2)(O) and 157(b)(5) apply to dischargeability
24 determinations. Second, it is by no means certain that the types of
25 claims raised by Schneider are personal injury tort claims within the
26 meaning of the statute. See, e.g., Vinci v. Town of Carmel (In re

1 Vinci), 108 B.R. 439, 442 (Bankr. S.D.N.Y. 1989) (personal injury
2 exception to bankruptcy court jurisdiction only applies to actual
3 bodily injury). Third, it appears that Schneider may have waived any
4 right to have the matter litigated outside the bankruptcy court by
5 filing an adversary proceeding in bankruptcy court alleging core
6 status. Adelson v. Smith (In re Smith), 389 B.R. 902, 913-14 (Bankr.
7 D. Nev. 2008). And fourth, even if all of the above considerations
8 are resolved in favor of Schneider, all he has is a right to litigate
9 in district court. Sections 157(b)(2)(O) and 157(b)(5) do not create
10 a right to be heard in state court so it cannot be error, based on
11 these sections, for the bankruptcy court to have denied Schneider's
12 motion for relief from the automatic stay.

13 The only remaining issue is whether the automatic stay
14 prohibited Berman from having judgment entered in its favor on
15 Jordan's complaint. This issue appears moot for two reasons. First,
16 the bankruptcy court only denied relief to litigate dischargeability
17 issues of the cross-complaint, and did not make any sort of
18 declaration that entry of the judgment was stayed. Second, judgment
19 has in fact been entered and the bankruptcy court has ruled that
20 entry of judgment was permitted notwithstanding the automatic stay.

21 To the extent not moot, the automatic stay does not bar Berman
22 from having judgment entered in its favor on Jordan's complaint.⁴

24 ⁴ While the state court's judgment order stated that the motion
25 for summary judgment of both Berman and Schneider had been granted,
26 judgment was entered only in favor of Berman. At oral argument,
counsel for Appellants stated that judgment could not be entered in
favor of Schneider under state court rules while Schneider's cross-
complaint was unresolved.

1 The plain language of § 362 affects only those cases brought "against
2 the debtor." § 362(a)(1). Case law makes it clear that the
3 automatic stay only prohibits actions "against the debtor" and not
4 defensive actions in litigation brought "by the debtor." White v.
5 City of Santee (In re White), 186 B.R. 700, 703 (9th Cir. BAP
6 1995) ("[w]e could find no case that supports the proposition that the
7 automatic stay prevents a defendant to continuing to defend against a
8 pre-bankruptcy lawsuit. To the contrary, there is substantial
9 authority that the stay is inapplicable to postpetition defensive
10 action in a prepetition suit brought by the debtor."); Gordon v.
11 Whitmore (In re Merrick), 175 B.R. 333, 336 (9th Cir. BAP 1994)
12 (defensive action taken by defendants in a state court lawsuit
13 commenced by a debtor does not violate the automatic stay imposed by
14 11 USC § 362).

15 VI. CONCLUSION

16 The bankruptcy court did not abuse its discretion in denying
17 Schneider relief from the automatic stay to litigate his cross-
18 complaint in state court. In denying the motion, the bankruptcy
19 court did not intend to bar Berman from having judgment entered in
20 its favor on Jordan's complaint. We accordingly MODIFY the order to
21 so reflect and AFFIRM the order denying relief from stay as modified.
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