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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 <sup>1</sup>
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,<sup>2</sup> DUNN and MARKELL, Bankruptcy Judges.

<sup>1</sup> 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.

<sup>2</sup> 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.<sup>3</sup>

## 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 <sup>3</sup> 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.<sup>4</sup>

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24 <sup>4</sup> 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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