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

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

6 In re:) BAP No. CC-07-1393-CKMo
7 JEFFREY CLARK; JODENE CLARK,)
8 Debtors.) Bk. No. SV 00-11061-KT
9)
10 JEFFREY CLARK; JODENE CLARK,)
11 Appellants,)
12 v.) **MEMORANDUM**¹
13 MARTIN STRAND; GABRIELLE STRAND,)
14 Appellees.)

Argued and Submitted on March 19, 2008
at Pasadena, California

Filed - April 3, 2008

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

Honorable Kathleen H. Thompson, Bankruptcy Judge, Presiding

Before: CASE,² KLEIN and MONTALI, 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. Charles G. Case II, Bankruptcy Judge for the District of Arizona, sitting by designation.

1 We must determine whether the bankruptcy court erred in
2 granting post discharge relief from stay under Section 362³ after
3 previously denying relief from the discharge injunction of Section
4 524.

5 Concluding that the bankruptcy court did not abuse its
6 discretion in granting the relief requested, we AFFIRM.

7
8 **I. FACTS**

9 **A. Overview**

10 This dispute arises out of the sale of a house from Appellees
11 Martin and Gabrielle Strand ("Strands") to Debtors/Appellants
12 Jeffrey and Jodene Clark ("Clarks") in 1990. The parties sharply
13 disagree on how that transaction was structured: Clarks assert that
14 they bought fee title to a house by making a small down payment,
15 obtaining a carryback loan from Strands (which, because the deed of
16 trust drafted to secure it was never recorded, was an unsecured
17 obligation discharged in their bankruptcy) and refinancing the
18 existing first mortgage. Strands, on the other hand, assert that,
19 due to a difficult financing environment at the time, the house was
20 sold to a partnership (of which Strands and Clarks were the
21 partners) ("Alleged Partnership") pursuant to which the two parties
22 would share in appreciation above an agreed-upon amount. Strands
23 presented to the bankruptcy court a copy of the Alleged Partnership
24 agreement. For the purposes of this appeal, it is not necessary to

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26 **3** Unless otherwise indicated, all chapter, section and
27 rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-
28 1330, and to the Federal Rules of Bankruptcy Procedure, Rules
1001-9036, in effect prior to the provisions of the Bankruptcy
Abuse Prevention and Consumer Protection Act of 2005, Pub. L.
109-8, 119 Stat. 23.

1 resolve which of these versions of events is true; however, the
2 fact of the dispute is central to decisions made by the bankruptcy
3 court.

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5 **B. Procedural History**

6 On February 1, 2000, Clarks filed a petition for relief under
7 chapter 7 of the Bankruptcy Code. On Schedule A, Clarks listed a
8 house in Simi Valley, California (the "Property"), as their
9 residence. Clarks claimed the Property as exempt on Schedule C.
10 However, on Schedule B, Clarks did not schedule an interest in the
11 Alleged Partnership. On Schedule F, Clarks listed Martin Strand⁴
12 as an unsecured creditor in the amount of \$59,750.00 and Mr.
13 Strand's address as unknown. On Schedule G Executory Contracts and
14 Unexpired Leases Clarks listed none.

15 The trustee administered the case as a "no asset" estate.
16 Clarks were granted a discharge on May 23, 2000 and the case was
17 closed on May 31, 2000. Because the trustee took no action with
18 regard to the Property during the administration of the case,
19 Clarks assert that the Property was abandoned to them pursuant to
20 Section 554(c). However, because the interest in the Alleged
21 Partnership was not scheduled, it (if it exists) remains an asset
22 of the estate today. 11 U.S.C. § 554(d).

23 Six years later, Strands asked that the case be reopened. The
24 bankruptcy court granted the motion. Strands then filed a Motion
25 for Relief From the Discharge Injunction of Bankruptcy Code Section
26 524(A)(1), (2) and (3) (the "Discharge Motion") to allow them to

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⁴ Appellee Gabrielle Strand was not listed.

1 pursue a state court lawsuit for Dissolution of Partnership,
2 Accounting, and Appointment of a Receiver⁵ regarding the Alleged
3 Partnership. The Discharge Motion alleged that Clarks did not
4 disclose their interest in the Alleged Partnership and that Strands
5 were not listed as creditors. Strands acknowledge that the lawsuit
6 does not seek to impose personal liability on Clarks.

7 Clarks objected to the Discharge Motion ("First Objection"),
8 contending that Strands were listed as creditors with an unknown
9 address and that the listed \$59,000 in debt was discharged in May
10 2000. Additionally, Clarks objected to much of the declaration of
11 Martin Strand.

12 At the April 3, 2007 hearing on the Discharge Motion, the
13 bankruptcy court denied relief because the statute of limitations
14 to revoke the discharge had run and proceeding by motion was
15 procedurally improper.

16 Apparently picking up on comments made by the court during the
17 April 3 hearing, Strands on July 30, 2007 brought a Motion for
18 Relief from the Automatic Stay under Section 362 (the "Stay
19 Motion"). Strands argued that Clarks' interest in the Alleged
20 Partnership remained property of the estate because it had not been
21 scheduled. As such, Strands requested relief from the automatic
22 stay so that the state court could decide if a partnership existed,
23 and, if so, to have it dissolved, and the rights of the partners
24 determined.

25 Clarks filed their Response to the Stay Motion on September 5,
26 2007 along with Objection to Evidence in Support of Opposition to

27 ⁵ SC 044691, filed on or about July 7, 2006, in Ventura County
28 Superior Court.

1 Movant's Stay Motion (collectively "Second Objection"). Clarks
2 argued in their Second Objection that the Stay Motion was in
3 reality a motion for reconsideration of denial of the Discharge
4 Motion. Clarks also argued that the Section 362 stay is
5 inapplicable because the debt has already been discharged.
6 Further, they argued that the Property had been abandoned back to
7 Clarks upon discharge and that the failure to schedule the Alleged
8 Partnership interest was irrelevant.

9 At a hearing on September 20, 2007, the bankruptcy court
10 granted relief under Section 362 to determine if the Alleged
11 Partnership existed, to determine its terms, to request its
12 dissolution and to perform an accounting. The bankruptcy court
13 further ruled that any determination regarding the personal
14 liability of Clarks would be made by the bankruptcy court. The
15 bankruptcy court made no determination regarding the truth or
16 falsity of the underlying facts set forth in the Stay Motion and
17 the Second Objection.

18 The order granting relief from the stay was entered on October
19 4, 2007. An appeal was timely filed.⁶

21 II. JURISDICTION

22 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
23 §§ 1334 and 157(b)(2)(A), (G), (I) and (J). The Panel has
24 jurisdiction under 28 U.S.C. § 158.

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27 ⁶ Clarks submitted their reply brief about a week late on
28 February 5, 2008 ("Reply"). Appellees also filed their responsive
brief with one page missing. Under the circumstances, the amendment
to the Appellees' brief and the late Reply are accepted.

1 **III. ISSUES**

2 Was the Stay Motion a motion for reconsideration of the order
3 denying the Discharge Motion?

4 Did the bankruptcy court abuse its discretion in granting the
5 Stay Motion?

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7 **IV. STANDARD OF REVIEW**

8 Contentions presenting an issue of law regarding stay relief
9 are reviewed de novo. Mataya v. Kissinger (In re Kissinger), 72
10 F.3d 107, 108 (9th Cir. 1995). Decisions by the bankruptcy court
11 to lift an automatic stay under Section 362 are reviewed for abuse
12 of discretion. Id.

13
14 **V. DISCUSSION**

15 **A. The Stay Motion Was Not a Motion for Reconsideration**

16 Clarks argue that the Stay Motion was in reality a motion for
17 reconsideration of the order denying the Discharge Motion⁷ and that
18 it did not meet the standards required for such a motion. A review
19 of the record indicates otherwise. The Discharge Motion was a
20 motion for relief from the discharge injunction under Section 524.⁸

21
22 ⁷ The Panel notes that if the Stay Motion was a motion
23 for reconsideration, it would have been untimely. A timely motion to
24 alter or amend under Rule 9023 is one filed within ten days of the
entry of judgment. Preblich v. Battley 181 F.3d 1048 (9th Cir. 1999).

25 ⁸ Section 524(a)(2) reads:

26 A discharge in a case under this title operates as an injunction
27 against the commencement or continuation of an action, the
employment of process, or an act, to collect, recover or offset
28 any such debt as a personal liability of the debtor, whether or
not discharge of such debt is waived.

1 The Stay Motion was a motion for relief from the automatic stay
2 under Section 362.⁹ The two statutes are quite different in their
3 scope and effect.

4 Section 524 implements the concept of discharge by acting as
5 a permanent injunction against a party seeking to collect a debt as
6 a personal liability of the debtor or to commence an action to
7 collect against property of the debtor. Lone Star Security & Video,
8 Inc. v. Gurrola (In re Gurrola), 328 B.R. 158 (9th Cir. BAP 2005).
9 The bankruptcy court properly determined that relief from the
10 discharge injunction of Section 524 is only available through a
11 complaint to revoke discharge under Section 727(e) and Rule 7001(4).
12 At the time of the hearing, the one year statute of limitations had
13 long passed to seek revocation of the discharge.¹⁰ Accordingly, the
14 bankruptcy court correctly denied the Discharge Motion without
15 considering whether other relief might have been appropriate under
16 Section 362.

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18 **9** Section 362(a) reads in part:

19 Except as provided in subsection (b) of this section, a petition
20 filed under section 301, 302, or 303 of this title, or an
21 application filed under section 5(a)(3) of the Securities
Investor Protection Act of 1970, operates as a stay, applicable
to all entities, of--

22 . . .

23 (3) any act to obtain possession of property of the estate or of
property from the estate or to exercise control over property of
the estate;

24 (4) any act to create, perfect, or enforce any lien against
property of the estate;

25 **10** Rule 9024(2) requires a complaint to revoke discharge be
26 brought within the time allowed under Section 727(e). Section 727(e)
27 requires a complaint to revoke discharge be brought within one year of
the discharge or within one year of the date the case is closed
28 depending on the circumstances of the request. The Stay Motion was
filed much more than one year past May 31, 2000, the date the
bankruptcy was first closed.

1 Comparatively, Section 362(a) operates as a stay, inter alia,
2 against property of the estate. The bankruptcy court's order
3 granting relief under Section 362 specifically leaves the
4 protections of Section 524 in place. The court granted relief
5 solely to determine issues regarding property of the estate. As
6 discussed more fully below, if the Alleged Partnership existed,
7 Clarks' interest in it was property of the estate that was not
8 disclosed. Undisclosed property of the estate does not revert to
9 a debtor upon discharge in a Chapter 7. Pace v. Battley (In re
10 Pace), 146 B.R. 562, 564 (9th Cir. BAP 1992). As such, under
11 Section 362(c)(1) a stay against property of the estate remains in
12 place until the property is no longer property of the estate.¹¹
13 Thus, stay relief was required to pursue the matter in state court.

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15 **B. The Bankruptcy Court Did Not Abuse Its Discretion in**
16 **Granting the Stay Motion**

17 1. The Alleged Partnership was not fully administered
18 and abandoned back to Clarks.

19 Property that has been abandoned or administered becomes
20 property of a debtor under Section 554(c).¹² However, property that
21 is not abandoned or administered remains property of the estate
22

23 **11** Section 362(c)(1) reads:
24 the stay of an act against property of the estate under
25 subsection (a) of this section continues until such property is
no longer property of the estate.

26 **12** Section 554(c) reads:
27 Unless the court orders otherwise, any property scheduled under
28 section 521(1) of this title not otherwise administered at the
time of the closing of a case is abandoned to the debtor and
administered for purposes of section 350 of this title.

1 under Section 554(d).¹³ See also In re Pace. Clarks claim that,
2 having become property of the estate by having been scheduled, the
3 Property was abandoned by the Trustee because it was not
4 administered in the case.

5 Clarks misframe the argument. The correct question is whether
6 Clarks' interest in the Alleged Partnership was scheduled and there
7 is no dispute that it was not. The purpose of the Stay Motion was
8 to allow a court of competent jurisdiction to determine if the
9 Alleged Partnership exists, and if so, to make appropriate rulings
10 about the assets of the Alleged Partnership and the rights and
11 obligations of the partners. This Panel has previously stated,
12 "[a]bandonment pursuant to Section 554 requires that the property
13 to be abandoned is properly scheduled under Section 521(1)." In re
14 Pace, 146 B.R. at 564. Here, if the Alleged Partnership exists, it
15 was not scheduled. Accordingly, it has not been fully administered
16 and was not abandoned back to Clarks.

17 The arguments of Clarks regarding dischargeability are not
18 persuasive for similar reasons. Citing to Beezley v. California
19 Land Title Co. (In re Beezley), 994 F.2d 1433 (9th Cir. 1993),
20 Clarks argue that because their case was a "no asset" case, any debt
21 owed to Strands was discharged regardless of whether they were
22 properly scheduled as creditors. See § 523(a)(3)(A). However, this
23 case involves an unscheduled asset, not whether a debt was
24 dischargeable. To accept Clarks' Beezley argument would be to strip

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13 Section 554(d) reads:

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Unless the court orders otherwise, property of the estate that is
not abandoned under this section and that is not administered in
the case remains property of the estate.

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1 Strands of their interest in the Alleged Partnership without due
2 process.

3 2. The Bankruptcy Court was Not Required to Rule on the
4 Underlying Evidentiary Objections.

5 The remaining focus of Clarks' appeal rests on the bankruptcy
6 court's treatment of the evidence underlying the Stay Motion.
7 Specifically, Clarks claim that the bankruptcy court erred by not
8 considering evidence regarding lack of perfection of Strands' lien
9 on the Property, not ruling in favor of Clarks on the theory of
10 laches and failing to rule on evidentiary objections raised by
11 Clarks.

12 Again, Clarks miss the point. The order granting stay relief
13 was not a ruling on the merits; instead, it merely permitted the
14 state court to address the merits. Among the issues that can be
15 presented to, and decided by, the state court are whether Strands
16 have a perfected lien and whether they should be barred from seeking
17 to dissolve the Alleged Partnership, even if one exists, by the
18 doctrine of laches. Those issues are fully preserved for the
19 appropriate court at the appropriate moment.

20 In this context, it is important to keep in mind the purpose
21 of stay relief. As this Panel stated in Biggs v. Stovin (In re Luz
22 Int'l, Ltd.), 219 B.R. 837 (9th Cir. BAP 1998):

23 Given the limited grounds for obtaining a motion for
24 relief from stay, read in conjunction with the expedited
25 schedule for a hearing on the motion, most courts hold
26 that motion for relief from stay hearings should not
27 involve an adjudication of the merits of claims,
28 defenses, or counterclaims, but simply determine whether
the creditor has a colorable claim to the property of the
estate.

28 Id. at 842. Here, Strands needed to present a colorable claim. In

1 the eyes of the bankruptcy court, they did so. We cannot say that
2 the bankruptcy court abused its discretion in making that
3 determination.

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VI. CONCLUSION

6 For the foregoing reasons, the order of the bankruptcy court
7 is **AFFIRMED**.

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