

SEP 25 2008

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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NOT FOR PUBLICATION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

In re:) BAP No. SC-08-1088-JuKwMo
)
 PHILLIP H. FRAZIER,) Bk. No. 05-13457
)
 Debtor.)
)
)
 PHILLIP H. FRAZIER,)
)
 Appellant,)
)
 v.) **MEMORANDUM**¹
)
)
 PUBLIC GUARDIAN'S OFFICE OF)
 SANTA CLARA COUNTY, as)
 Conservator for Thelma Louise)
 Frazier, Conservatee,)
)
 Appellee.)

Argued and Submitted on September 18, 2008
at San Diego, California

Filed - September 25, 2008

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

Honorable Peter W. Bowie, Chief Bankruptcy Judge, Presiding

Before: JURY, KWAN² 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 Robert N. Kwan, United States Bankruptcy Judge for the Central District of California, sitting by designation.

1 Appellant-debtor Philip H. Frazier appeals pro se³ the
2 bankruptcy court's order granting appellee relief from stay to
3 (1) petition the Probate Division of the Superior Court for the
4 County of Santa Clara for authority to file a partition action
5 against debtor and (2) take any additional actions it deems
6 necessary to sell the real property in which debtor and his
7 mother each hold a fifty-percent interest.

8 We AFFIRM.

9 **I. FACTS**

10 Debtor filed his voluntary chapter 13 petition⁴ on October
11 14, 2005. Debtor's modified plan provided for 100 percent
12 payment to unsecured creditors.⁵

13 Debtor listed his fifty-percent interest in real property
14 located in San Jose, California in his Schedule A and valued the
15 property at \$800,000. Debtor's mother, Thelma Frazier, who was
16 the subject of a conservatorship controlled by the County of
17 Santa Clara, held the other fifty-percent interest and at one

18
19 ³ We liberally construe debtor's pleadings due to his pro se
20 status. Ozenne v. Bendon (In re Ozenne), 337 B.R. 214, 218 (9th
21 Cir. BAP 2006).

22 ⁴ Unless otherwise indicated, all chapter, section and rule
23 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
24 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as
25 enacted and promulgated prior to the effective date of The
26 Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,
27 Pub. L. 109-8, 119 Stat. 23, because the case from which this
28 appeal arises was filed before its effective date (generally
October 17, 2005).

⁵ We take judicial notice of the pleadings which were imaged
and docketed by the bankruptcy court in Case No. 05-13457
pursuant to Atwood v. Chase Manhattan Mortgage Co. (In re
Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

1 time occupied the house on the property. A first trust deed in
2 favor of Bank of America in an amount less than \$100,000 was the
3 only encumbrance on the property.

4 Debtor filed an ex parte application to sell the property
5 post-confirmation. Debtor represented that the County of Santa
6 Clara would employ real estate professionals to list and sell
7 the property. Debtor also stated that excess proceeds would be
8 used to pay off the balance of his chapter 13 plan. The court
9 authorized the sale by an amended order entered on June 14,
10 2007.

11 Appellee prepared to obtain an order in Thelma Frazier's
12 probate case authorizing the sale of her interest in the
13 property. Before appellee could obtain the order, debtor's
14 counsel informed it that debtor no longer wished to sell the
15 property and that appellee should not proceed with the sale
16 order because to do so would violate the automatic stay.

17 Appellee accordingly sought relief from stay in the
18 bankruptcy court on February 27, 2008. Years prior to
19 appellee's motion, on November 18, 2005, appellee had moved
20 debtor's mother from the property to a skilled nursing facility,
21 where her care was being paid for by the California State
22 medical welfare program, commonly known as Medi-Cal. Since
23 debtor's mother had no assets other than the real property,
24 appellee sought to sell it to provide her with funds for
25 personal amenities and medical care not covered by Medi-Cal.

26 Debtor opposed appellee's motion on several grounds.
27 First, debtor contended that his mother had \$291,000 of equity
28 in the property which was more than sufficient as adequate

1 protection. Next, debtor disputed the veracity of Jane Aiello's
2 ("Aiello") declaration filed in support of appellee's motion.
3 Aiello testified that the residence on the property was in a
4 state of disrepair and not habitable. Debtor contended that
5 this statement was false.⁶ Debtor also maintained that he and
6 his sister, who resided in Michigan, were working diligently to
7 ensure that their mother was receiving the proper care and hoped
8 to return her to the property. Finally, debtor argued that the
9 stay should not be lifted because of a pending proceeding that
10 involved appellee.⁷

11 The bankruptcy court heard appellee's motion on March 25,
12 2008 and granted it relief from stay to (1) petition the Santa
13 Clara County Probate Court for authority to file a partition
14 action against debtor and (2) take any additional actions
15 necessary to sell the property. The order granting relief from
16 stay was entered on April 4, 2008. Appellant timely appealed.

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18

19 ⁶ Contrary to appellee's contention that debtor first raises
20 this argument on appeal, debtor raised the issue of the veracity
21 of Aiello's declaration in his opposition to appellee's motion.
22 There was no evidence in the record, however, that supported
debtor's argument that Aiello's statement regarding the
habitability of the property was false.

23 ⁷ Debtor filed a "Verified Ex Parte Motion to Compel The
24 Public Guardian Santa Clara County San Jose, CA the Conservator
25 of Thelma Louise Frazier to pay their (sic) one-half amount owing
26 on the Bank of America Home Equity Line of Credit Debt; The
27 Public Guardian to Disclose amount of money received from Sale of
28 Thelma Louis Frazier's Personal Property and Disclose whereabouts
of personal property of Co-owner Phillip H. Frazier...."
Debtor's ex parte motion was filed on February 26, 2008, one day
prior to the filing of appellee's stay relief motion.

1 **II. JURISDICTION**

2 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
3 § 1334 over this core proceeding under § 157(b) (2) (G). We have
4 jurisdiction under 28 U.S.C. § 158.

5 **III. ISSUE**

6 Whether the bankruptcy court erred in granting appellee's
7 motion for relief from stay for cause under § 362(d) (1).

8 **IV. STANDARD OF REVIEW**

9 We review the bankruptcy court's decision to grant a motion
10 for relief from the automatic stay for an abuse of discretion.
11 Arkison v. Frontier Asset Mgmt. (In re Skagit Pac. Corp.), 316
12 B.R. 330, 335 (9th Cir. BAP 2004).

13 **V. DISCUSSION**

14 The automatic stay protects debtors by halting all
15 collection efforts, which gives the debtor a breathing spell
16 from his creditors and affords him the opportunity to
17 reorganize. Dawson v. Washington Mutual Bank, F.A. (In re
18 Dawson), 390 F.3d 1139, 1147 (9th Cir. 2004). It also protects
19 "creditors by preventing [them] from pursuing, to the detriment
20 of others, their own remedies against the debtor's property...."
21 Id.

22 Despite these protections, 362(d) (1) authorizes the
23 bankruptcy court to grant relief from the stay upon a showing of
24 cause. See § 362(d) (1); see also Delaney-Morin v. Day (In re
25 Delaney-Morin), 304 B.R. 365, 369 (9th Cir. BAP 2003) (bankruptcy
26 court has wide latitude in crafting relief from the automatic
27 stay under 362(d) (1)). "Because there is no clear definition of
28 what constitutes 'cause,' discretionary relief from the stay

1 must be determined on a case by case basis." Delaney-Morin, 304
2 B.R. at 369.

3 Appellee, as the party seeking relief, must first establish
4 a prima facie case that cause exists for relief under
5 § 362(d)(1). Duvar Apt., Inc. v. Fed. Deposit Ins. Corp. (In re
6 Duvar Apt., Inc.), 205 B.R. 196, 200 (9th Cir. BAP 1996). Once
7 a prima facie case has been established, the burden shifts to
8 debtor to show that relief from the stay is not warranted. See
9 § 362(g)(2)⁸; Duvar Apt., 205 B.R. at 200.

10 Debtor assigns reversible error to the bankruptcy court's
11 decision granting appellee relief from stay, contending that his
12 mother had equity in the property and, therefore, was adequately
13 protected. The concept of adequate protection, however, is
14 inapplicable under the circumstances here. Debtor's mother is
15 not a secured creditor with an encumbrance on the property
16 entitled to the benefit of her bargain. Rather, she is a
17 co-owner who has equity in the property that can be used to
18 provide her with a higher quality of care.

19 Moreover, the lack of adequate protection of an interest in
20 property is not the only cause for relief. See Amer. Savings &
21 Loan Assoc. v. Sedona San Carlos Dev. Co. (In re Sedona San
22 Carlos Dev. Co.), 59 B.R. 113, 114 (Bankr. D. Ariz. 1986). In
23 deciding whether to grant a party relief from stay to proceed in
24

25 ⁸ Section 362(g) provides: In any hearing under subsection
26 (d) or (e) of this section concerning relief from the stay of any
27 act under subsection (a) of this section-(1) the party requesting
28 such relief has the burden of proof on the issue of the debtor's
equity in property; and (2) the party opposing such relief has
the burden of proof on all other issues.

1 a nonbankruptcy forum, a court may consider the lack of
2 connection or interference with the bankruptcy case and the
3 impact of the stay on the parties and the "balance of hurt."
4 Adelson v. Smith (In re Smith), 389 B.R. 902, 918 (Bankr. D.
5 Nev. 2008).

6 The record shows that the relief granted would not
7 interfere with debtor's bankruptcy case at all. The bankruptcy
8 court correctly recognized that "it is not a plan problem."
9 Moreover, when debtor sought court authority to sell the
10 property, he represented that excess proceeds from the sale
11 would be used to pay off his chapter 13 plan. Creditors may
12 thus benefit from a sale of the property by receiving earlier
13 payment. Lastly, the court observed that debtor's rights in the
14 property were fully protected in the context of the state court
15 proceeding. The relief granted thus had little relationship to
16 the purpose of the automatic stay, which is to protect debtor
17 and his estate from creditors so that he could have a chance to
18 reorganize.

19 The record does not support debtor's contention that
20 granting relief from stay would harm him or his creditors. In
21 contrast, ample evidence demonstrates that his mother would be
22 harmed if relief from stay were denied. A sale of Thelma
23 Frazier's only asset would provide her with the needed funds for
24 her care and comfort to improve her quality of life as a full
25 time resident in the skilled nursing facility beyond the minimum
26 care covered by the Medi-Cal welfare program.

27 The record further shows that it was unlikely debtor's
28 mother would ever return to the property. She had been in the

1 nursing home since late 2005. Although debtor contended that he
2 was working with his sister to ensure his mother's proper care,
3 Aiello declared that debtor's sister had not been to California
4 for years, was employed and took care of a disabled husband. No
5 contrary evidence appears in the record. Aiello further
6 declared that Thelma Frazier's primary physician opined that a
7 skilled nursing facility was the most appropriate place for her.
8 Again, the record contains no evidence rebutting this statement.
9 Therefore, the impact of the automatic stay arising in debtor's
10 bankruptcy case on debtor's mother was great because it denies
11 her the benefit of her only asset absent a sale.

12 The record also reflects debtor's delay. Debtor originally
13 sought to sell the property, but months later the property
14 remained unsold and debtor had changed his mind about selling.
15 Meanwhile, debtor's mother continued to live at the nursing
16 facility with inadequate funds for the basic necessities of
17 life. The bankruptcy court noted, "I think we need to get this
18 resolved."

19 Finally, debtor's allegation that Aiello committed perjury
20 regarding the condition of the residence is irrelevant, because
21 the bankruptcy court did not consider its habitability as
22 grounds for granting appellee relief from stay. Rather, the
23 record implies that the bankruptcy judge left that issue for
24 consideration by the state court. Motions for relief from the
25 stay are intended to be determined under an expedited procedure,
26 such that hearings are handled in a summary fashion.
27 Consequently, the issues are generally limited to the grounds
28 for relief stated in 362(d)(1), lack of adequate protection or

1 other cause for relief. Here, appellee asserted a prima facie
2 case that cause existed for granting relief from stay, unrelated
3 to the habitability of the property.

4 Likewise, debtor's contention that the bankruptcy court
5 erred in granting relief from stay because there was a pending
6 proceeding on other matters between debtor and appellee is
7 without merit. The hearing on the motion for relief from stay
8 does not involve an adjudication of the merits of claims,
9 defenses, or counterclaims. See Biggs v. Stovin (In re Luz
10 Int'l., Ltd.), 219 B.R. 837, 842 (9th Cir. BAP 1998). Any
11 claims that debtor has against appellee on unrelated issues⁹ were
12 beyond the scope of a stay relief motion. Regardless, the stay
13 relief does not impede debtor from moving forward with his
14 asserted claims against the Public Guardian.

15 In sum, the record confirms that the bankruptcy court did
16 not base its decision on an erroneous view of the law or clearly
17 erroneous factual findings. Skagit Pac. Corp., 316 B.R. at 335.
18 We thus find no reversible error under the abuse of discretion
19 standard of review.¹⁰

21 ⁹ These issues pertained primarily to how the County
22 disposed of personal property of debtor and his mother.

23 ¹⁰ In his reply brief, debtor mentions that after the
24 bankruptcy court granted appellee relief from stay, a hearing
25 took place in the superior court in San Jose, California, Probate
26 Division before the Honorable Judge Grilli. Judge Grilli granted
27 appellee's request to proceed with the partition action. Debtor
28 requests that this Panel vacate the order of Judge Grilli as
being in violation of the stay. Although debtor filed a pleading
titled "Notice of Stay of Proceedings," there is nothing in the
record that shows debtor ever requested a stay pending his appeal
from the bankruptcy court pursuant to Rule 8005. Therefore, we

(continued...)

1 **VI. CONCLUSION**

2 For the reasons stated above, we AFFIRM the bankruptcy
3 court's order.

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26 ¹⁰(...continued)
27 perceive no stay violation. At oral argument, appellee confirmed
28 that it has moved forward with filing a complaint to partition
the property. Nonetheless, we observe, and appellee concedes,
that the commencement of its partition action did not make this
appeal moot because the property has yet to be sold.