NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. SC-06-1418-MoHB
ALBERT FRANCES QUINTRALL,	Bk. No. 06-00103-JM7
Debtor.	Adv. No. 06-90399
ALBERT FRANCES QUINTRALL,	
Appellant,	
v.	**M E M O R A N D U M**[1]
JON NUNES; KELLY NUNES; VINCENT BOND; JEANNE BOND; ERNESTO ESPLANA; MARLYN ESPLANA; BRIAN WILSON; MICHELLE WILSON; CAROLE BARTON; KEVIN O'NEAL; VERONICA O'NEAL; RICK KURLAND; MARY KURLAND,	
Appellees.	

Argued and Submitted on June 20, 2007
at Pasadena, California

Filed - July 5, 2007

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

Hon. James W. Meyers, Bankruptcy Judge, Presiding

Before: MONTALI, HOLLOWELL,[2] and BRANDT, Bankruptcy Judges.

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[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. Eileen W. Hollowell, Bankruptcy Judge for the District of Arizona, sitting by designation.

The bankruptcy court granted relief from the stay to allow creditors to pursue prosecution of a state court lawsuit. The debtor appealed and we AFFIRM.

I. FACTS

Appellant Albert F. Quintrall ("Debtor") is one of several defendants in a state court lawsuit alleging, inter alia, professional negligence and malpractice, breach of fiduciary duty and constructive fraud, fraud, deceit, conspiracy to defraud, and conversion. Appellees Jon Nunes, Kelly Nunes, Vincent Bond, Jeanne Bond, Ernesto Esplana, Marlyn Esplana, Brian Wilson, Michelle Wilson, Carole Barton, Kevin O'Neal, Veronica O'Neal, Rick Kurland and Mary Kurland (collectively, "Appellees") are the plaintiffs; their separate lawsuits were consolidated into one action.[3]

Debtor filed his chapter 7 petition on January 24, 2006. Thereafter, counsel for some of the Appellees discovered that Debtor had an Errors & Omissions insurance policy which appeared to provide coverage for the acts forming the basis of Appellants' state court action against Debtor. On September 13, 2006, Appellees filed a nondischargeability adversary proceeding against Debtor under 11 U.S.C. § 523(a)(2)(A) (fraud), (a)(4) (fiduciary defalcation) and (a)(6) (willful and malicious injury).[4] In support of their contentions that Debtor's

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[3] Between June 10 and July 16, 2004, Appellees filed separate lawsuits against Debtors and five other defendants. On July 28, 2005, Appellees filed a "consolidated master complaint" in the underlying state court action.

[4] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as (continued...)

obligations were nondischargeable, Appellees asserted essentially the same factual allegations set forth in the state court complaint.[5]

On September 27, 2006, Appellees filed a motion for relief from stay (the "Motion") in order to continue prosecution of their state court lawsuit. In support of the Motion, Appellees noted that the state court action had been pending more than two years, involved six other defendants outside of the jurisdiction of the bankruptcy court, and involved conspiracy allegations against all of the defendants. Appellees argued that the conduct of Debtor and the other defendants was "integrally intertwined" and that the absence of Debtor in the state court litigation "would leave a convenient out for some of the other defendants." Transcript of Hearing on October 27, 2006 ("Transcript") at 8. Appellees also stressed that judicial economy provided cause for relief from the stay, observing that trying the case in its entirety against all defendants would prevent duplication of evidence, witnesses and cost.

Debtor opposed the Motion, but noted at the hearing on the Motion that "[i]n terms of seeking collection or recovery out of the insurance, we have no opposition to that." Transcript at 11. Debtor opposed the motion on the grounds that some of the issues to be tried in state court were similar to those presented in the

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[4](...continued)
revised by The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

[5] The adversary proceeding complaint is not in the excerpts, but is available on the electronic docket (Adv. No. 06-90399).

nondischargeability action and that "nondischargeability is a core matter committed to [the bankruptcy] court's jurisdiction" and that the court could not delegate or concede that jurisdiction.[6] Transcript at 9. "That is an essential bankruptcy court function to make that [nondischargeability] determination, and . . . it's mandatory for the [Appellees] to try their case here." Id.

The bankruptcy court clarified at the hearing that the litigation involved multiple nondebtor defendants, that these defendants would be litigating claims and issues common to those asserted against Debtor, that the state court trial could proceed quickly, and that discovery was almost complete. The court stated that it had to weigh and balance the interests of having the multi-party litigation proceed in one forum against having the parties try the claims in separate trials. The court also agreed with Debtor that the state court could not decide whether the debt was nondischargeable, but held that the state court could decide factual issues that might be pertinent to (and perhaps preclusive in) the nondischargeability action. "[O]nly this court can make the judgment as to dischargeability. That doesn't mean that this court has to be the trier of fact. That's not so." Transcript at page 16. The court warned Appellees that if they intended to rely later on the doctrine of issue preclusion in their nondischargeability action, the state court factual findings would have to be specific and tailored to section 523.

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[6] Gerald H. Davis, chapter 7 trustee for Debtor's estate, filed a limited opposition to the Motion. The trustee did not oppose the motion as long as enforcement of any judgment was limited to property outside the estate.

On October 30, 2007, the bankruptcy court entered an order granting Appellees relief from the stay to prosecute, on a limited basis, the state court litigation against Debtor:

> Relief is granted, however, only to the extent of the following:
>
> 1. Permitting [Appellees] to pursue the [state court] Litigation, including settlement or obtaining a judgment and a satisfaction of judgment, only to the extent of applicable insurance coverage;
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> 2. If no insurance coverage is available, permitting [Appellees] to complete the Litigation in order to liquidate their claim against the Estate;
>
> 3. If no insurance coverage is available, permitting [Appellees] to complete the Litigation as to whether the Debtor committed, among other things, actual fraud, defalcation while acting in a fiduciary capacity or willful and malicious injury in order to be a basis for the claims of [Appellees] that the debt is non-dischargeable, to be decided by this Court.

Debtor filed a timely notice of appeal on November 6, 2006.

On March 19, 2007, a bench trial commenced in the state court action. Trial lasted ten days and concluded on April 16, 2007. On March 17, while the trial was pending, Debtor filed a motion for stay pending appeal. We denied the motion for stay pending appeal on March 30, 2007.

On May 29, 2007, we issued an order directing the parties to file supplemental briefs describing the status of the state court litigation and addressing the issue of possible mootness. On June 8, 2007, Debtor and Appellees filed their respective supplemental briefs indicating that trial had concluded but that the state court had not yet rendered judgment. As of the date of oral argument (June 20, 2007), the state court had not issued its decision.

II. ISSUES

(1) Is this appeal moot?

(2) Did the bankruptcy court err in granting relief from the automatic stay to allow Appellees to continue prosecution of the state court lawsuit?

III. STANDARD OF REVIEW

We review a bankruptcy court's order granting relief from the stay for abuse of discretion. Duvar Apt., Inc. v. Fed. Dep. Ins. Corp. (In re Duvar Apt., Inc.), 205 B.R. 196, 199 (9th Cir. BAP 1996); Santa Clara County Fair Ass'n, Inc. v. Sanders (In re Santa Clara County Fair Ass'n, Inc.), 180 B.R. 564, 565 (9th Cir. BAP 1995); Sun Valley Newspapers, Inc. v. Sun World Corp. (In re Sun Valley Newspapers, Inc.), 171 B.R. 71, 74 (9th Cir. BAP 1994).

IV. JURISDICTION

We lack jurisdiction to hear a moot appeal. I.R.S. v. Pattullo (In re Pattullo), 271 F.3d 898, 901 (9th Cir. 2001). "Our mootness inquiry focuses upon whether we can still grant relief between the parties." Id.

> "If an event occurs while a case is pending on appeal that makes it impossible for the court to grant any effectual relief whatever to a prevailing party, the appeal is moot and must be dismissed. . . . However, while a court may not be able to return the parties to the status quo ante . . ., an appeal is not moot if the court can fashion some form of meaningful relief. . . ." [United States v. Arkison (In re Cascade Rds.), 34 F.3d 756, 759 (9th Cir. 1994)] (brackets omitted; ellipses and emphasis in original) (quoting Church of Scientology v. United States, 506 U.S. 9, 12, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992)); see Mills v. Green, 159 U.S. 651, 653, 16 S.Ct. 132, 40 L.Ed. 293 (1895) ("The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions. . . .").

Pattullo, 271 F.3d at 901. Even if the precise relief sought in the appeal is no longer available, the action is not moot if "there can be any effective relief." Northwest Envtl. Defense Ctr. v. Gordon, 849 F.2d 1241, 1244-45 (9th Cir. 1988).

In the present case, Debtor requests a reversal of the decision of the bankruptcy court to lift the automatic stay to allow prosecution of the state court lawsuit. The state court lawsuit has been prosecuted; however, judgment has not been entered. If we reverse and reimpose the stay, effectual relief could still be granted: the prevention of the entry of a final judgment. See Jerron West, Inc. v. California State Bd. of Equalization, 129 F.3d 1334, 1336-37 (9th Cir. 1997) (appellants sought injunction of certain administrative proceedings that occurred after the injunction was denied; "although the district court cannot enjoin proceedings that have already occurred, it still has the power to attempt to fashion an effective remedy to redress the alleged violations.")

In addition, even if judgment had been entered in the state court action, we could fashion a remedy that would limit its preclusive effect in the nondischargeability action if we determined that the bankruptcy court abused its discretion in allowing the state court action to hear the fraud and conversion counts. Therefore, we conclude that the appeal is not moot and we have jurisdiction to hear it on the merits.

V. DISCUSSION

Section 362(d)(1) permits a bankruptcy court to grant relief from the automatic stay upon a showing of "cause." Although Congress did not define cause, "courts in the Ninth Circuit have

granted relief from the stay under § 362(d)(1) when necessary to permit pending litigation to be concluded in another forum if the non-bankruptcy suit involves multiple parties or is ready for trial." Truebro, Inc. v. Plumberex Specialty Products, Inc. (In re Plumberex Specialty Products, Inc.), 311 B.R. 551, 556-57 (Bankr. C.D. Cal. 2004), citing Christensen v. Tucson Estates, Inc. (In re Tucson Estates, Inc.), 912 F.2d 1162, 1166 (9th Cir. 1990) ("[w]here a bankruptcy court may abstain from deciding issues in favor of an imminent state court trial involving the same issues, cause may exist for lifting the stay as to the state court trial"); Packerland Packing Co. v. Griffith Brokerage Co. (In re Kemble), 776 F.2d 802, 807 (9th Cir. 1985) (affirming an order lifting the stay to permit a creditor to pursue a conversion and fraudulent conveyance action pending in the federal district court).

"Judicial economy is a factor to be considered by bankruptcy courts when deciding lift stay issues." Plumberex, 311 B.R. at 556, citing Piombo Corp. v. Castlerock Prop. (In re Castlerock Prop.), 781 F.2d 159, 163 (9th Cir. 1986); Kemble, 776 F.2d at 807; Santa Clara County Fair, 180 B.R. at 566. As we noted in Santa Clara County Fair, the legislative history of section 362(a) indicates that judicial economy provides sufficient cause to lift the stay to permit the prosecution of actions pending elsewhere against a debtor:

> [I]t will often be more appropriate to permit proceedings to continue in their place of origin, when no great prejudice to the bankruptcy estate would result, in order to leave the parties to their chosen forum and to relieve the bankruptcy court from many duties that may be handled elsewhere.

Santa Clara County Fair, 180 B.R. at 566, citing H.R. Rep. No. 95-595, at 341 (1977); S. Rep. No. 95-989, at 50 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5836 (emphasis added).

Here, the bankruptcy estate suffered "no great prejudice" from having the action proceed in state court, as the enforcement of any state court judgment would be limited to insurance coverage and non-estate assets. The trustee specifically did not oppose having the state court liquidate or fix the claim of Appellees. Debtor did not oppose state court liquidation of the claim for insurance purposes. In addition, the record demonstrates that the interests of judicial economy favored granting relief from the stay: the state court litigation involved multiple nondebtor parties and claims that Debtor participated in a fraudulent conspiracy with these parties.[7] The state court litigation involved similar causes of action and factual allegations. The state court case had been pending for more than two years and discovery was nearing completion. Trial could be -- and was -- set quickly in state court. The parties had a right to jury trial in state court, even though that was waived on the eve of trial. Appellee's Supplemental Brief at 2.

The bankruptcy court therefore did not abuse its discretion in granting relief from the automatic stay for "cause." Santa Clara County Fair, 180 B.R. at 566-67; see also Kazerooni v.

[7] Appellees suggested to the bankruptcy court that the multiple nondebtor parties and Debtor would present a similar defense to the allegations of fraud and conspiracy. In their Supplemental Brief, Appellees note that all of the state court defendants (including Debtor) participated in a joint defense spearheaded by one particular attorney defendant.

Namazi (In re Namazi), 106 B.R. 93, 94-95 (Bankr. E.D. Va. 1989) (lifting stay to allow plaintiffs to prosecute fraud action against debtor in nonbankruptcy forum where "the debtor is so intertwined with the factual issues in the civil litigation that to sever debtor from the proceeding would overly handicap the movant's ability to fully develop his case [against other defendants]").

Debtor argues that the bankruptcy court erred as a matter of law in allowing the state court to make factual findings which may or may not give rise to issue preclusion in the nondischargeability action. Debtor contends that "the bankruptcy court cannot abdicate its congressionally mandated role in the determination of issue regarding dischargeability." Appellant's Opening Brief at 6. The bankruptcy court did not abdicate its responsibility: it correctly noted that it alone can determine dischargeability and that any findings made by the state court with respect to fraud or other conduct would have to be tailored to section 523 before issue preclusion could apply.[8] As noted

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[8] "Issue preclusion" is the more modern nomenclature for "collateral estoppel." See Paine v. Griffin (In re Paine), 283 B.R. 33, 38 (9th Cir. BAP 2002) (noting that "issue preclusion" includes the doctrines of direct estoppel and collateral estoppel). "Principles of collateral estoppel apply to proceedings seeking exceptions from discharge brought under 11 U.S.C. § 523(a)." Harmon v. Kobrin (In re Harmon), 250 F.3d 1240, 1245 (9th Cir. 2001); see also Diamond v. Kolcum (In re Diamond), 285 F.3d 822, 829 (9th Cir. 2002) (the plaintiffs "are entitled to a declaration of nondischargeability under 11 U.S.C. § 523(a)(2)(A) and (a)(6) because the state court judgment to which they asked the bankruptcy court to give preclusive effect necessarily implicated issues identical to those implicated in the nondischargeability proceeding . . ."). Therefore, despite Debtor's contentions to the contrary, the bankruptcy court did (continued...)

by one leading treatise on bankruptcy law: "it is not unheard of for the bankruptcy court to abstain from hearing the liability phase of a discharge trial, instead directing that it be heard in state court, reserving for itself the determination of whether any liability found to exist is dischargeable." 1 Collier on Bankruptcy, ¶ 3.05[1] (Rev. 15th Ed. 2007). In Kemble, the Ninth Circuit affirmed a decision to lift the stay to allow fraud litigation to proceed outside of bankruptcy court, even though a section 523 nondischargeability action involving similar allegations was pending. Kemble, 776 F.2d at 803 and 807. Debtor's contention that the bankruptcy court's decision to modify the automatic stay was incorrect as a matter of law is not well taken.[9]

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[8](...continued)
not abdicate its responsibility under the Bankruptcy Code; rather, it recognized long-standing law that issue preclusion can be applied in a nondischargeability action, as long as all elements for preclusion exist.

That said, the issue on appeal is not whether the court correctly applied the doctrines of issue preclusion; the bankruptcy court has not yet determined whether to grant preclusive effect to any state court judgment or findings. While issue preclusion may be available generally in section 523(a) proceedings, the requisites for its application must still be satisfied on a case-by-case basis.

[9] At oral argument, counsel reiterated Debtor's position that once a bankruptcy petition has been filed and a matter obtains a "bankruptcy flavor," a state court cannot determine facts pertinent to exceptions to a debtor's discharge. As noted in the text above, that position is incorrect. Issue preclusion is applicable in section 523(a) proceedings. In any event, Debtor conceded to having the state court determine facts pertinent to the liquidation of Appellees' claims for insurance purposes, even though claims allowance and estimation is also imbued with a "bankruptcy flavor." Whether such factual findings were made
(continued...)

Debtor also argues that the bankruptcy court erred in not specifically weighing the factors set forth in In re Curtis, 40 B.R. 795 (Bankr. D. Utah 1984) for determining whether to lift the stay to permit pending litigation to continue in another forum. Interestingly, Debtor cites only one bankruptcy court case in the Ninth Circuit (Plumberex) applying the Curtis factors. We cannot locate any decision by this panel or the Ninth Circuit adopting or applying the Curtis factors.

In Santa Clara County Fair, the debtor attempted to apply seven factors set out in Edmondson v. America West Airlines (In re America West Airlines), 148 B.R. 920, 923 (Bankr. D. Ariz. 1993) in arguing that the bankruptcy court had abused its discretion in lifting the stay. We disagreed, noting that the debtor's arguments were "far from compelling." Santa Clara County Fair, 180 B.R. at 567. We did not adopt or apply the factors. In any event, the seven factors applied in America West are different than the twelve adopted by Curtis and those urged by Debtor here. (In fact, in his initial opposition to the Motion, Debtor asserted that only five factors applied, citing In Pro Football Weekly, Inc., 60 B.R. 824, 826 (N.D. Ill. 1986), which identified three factors to consider.)

The record shows that many of the factors identified in America West weigh in favor of relief from the stay: insurance may have been available to cover Appellees' claims against Debtor, Debtor did not oppose having the state court liquidate

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[9](...continued)
before the petition date or after the petition date is irrelevant to the application of preclusion principles (as long as such findings were not made in violation of the automatic stay).

the claim for insurance purposes, judicial economy favored having the action proceed in state court, a likelihood existed that resources used to prepare for the state court trial against all of the defendants including Defendant would be wasted if the litigation did not proceed in state court, the litigation involved other non-debtor parties and obtaining full relief against these defendants and alleged co-conspirators of Debtor may have been affected by Debtor's absence from the litigation. America West, 148 B.R. at 923. More importantly, even though the bankruptcy court did not specifically apply a checklist here, it did consider the factors that are common to many of the diverse checklists, including those set forth in America West. Therefore, assuming that a checklist of factors did apply and had been adopted by this panel or Ninth Circuit, the bankruptcy court did not abuse its discretion in modifying the stay to allow the state court litigation to proceed.

VI. CONCLUSION

For the foregoing reasons, we AFFIRM.