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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NOT FOR PUBLICATION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-06-1418-MoHB
)		
ALBERT FRANCES QUINTRALL,)	Bk. No.	06-00103-JM7
)		
Debtor.)	Adv. No.	06-90399
)		
ALBERT FRANCES QUINTRALL,)		
)		
Appellant,)		
)		
v.)		
)		
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.)		

MEMORANDUM¹

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.

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.

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

4 **I. FACTS**

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

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

24
25 ³ Between June 10 and July 16, 2004, Appellees filed
26 separate lawsuits against Debtors and five other defendants. On
27 July 28, 2005, Appellees filed a "consolidated master complaint"
in the underlying state court action.

28 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...)

1 obligations were nondischargeable, Appellees asserted
2 essentially the same factual allegations set forth in the state
3 court complaint.⁵

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

19 Debtor opposed the Motion, but noted at the hearing on the
20 Motion that "[i]n terms of seeking collection or recovery out of
21 the insurance, we have no opposition to that." Transcript at 11.
22 Debtor opposed the motion on the grounds that some of the issues
23 to be tried in state court were similar to those presented in the
24

25 ⁴ (...continued)

26 revised by The Bankruptcy Abuse Prevention and Consumer
27 Protection Act of 2005, Pub. L. 109-8, Apr. 20, 2005, 119 Stat.
28 23.

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

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

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

27
28 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.

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

4 Relief is granted, however, only to the extent of the
5 following:

- 6 1. Permitting [Appellees] to pursue the [state court]
7 Litigation, including settlement or obtaining a
8 judgment and a satisfaction of judgment, only to the
9 extent of applicable insurance coverage;
- 10 2. If no insurance coverage is available, permitting
11 [Appellees] to complete the Litigation in order to
12 liquidate their claim against the Estate;
- 13 3. If no insurance coverage is available, permitting
14 [Appellees] to complete the Litigation as to whether
15 the Debtor committed, among other things, actual fraud,
16 defalcation while acting in a fiduciary capacity or
17 willful and malicious injury in order to be a basis for
18 the claims of [Appellees] that the debt is non-
19 dischargeable, to be decided by this Court.

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

21 On March 19, 2007, a bench trial commenced in the state
22 court action. Trial lasted ten days and concluded on April 16,
23 2007. On March 17, while the trial was pending, Debtor filed a
24 motion for stay pending appeal. We denied the motion for stay
25 pending appeal on March 30, 2007.

26 On May 29, 2007, we issued an order directing the parties to
27 file supplemental briefs describing the status of the state court
28 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.

1 **II. ISSUES**

2 (1) Is this appeal moot?

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

6 **III. STANDARD OF REVIEW**

7 We review a bankruptcy court's order granting relief from
8 the stay for abuse of discretion. Duvar Apt., Inc. v. Fed. Dep.
9 Ins. Corp. (In re Duvar Apt., Inc.), 205 B.R. 196, 199 (9th Cir.
10 BAP 1996); Santa Clara County Fair Ass'n, Inc. v. Sanders (In re
11 Santa Clara County Fair Ass'n, Inc.), 180 B.R. 564, 565 (9th Cir.
12 BAP 1995); Sun Valley Newspapers, Inc. v. Sun World Corp. (In re
13 Sun Valley Newspapers, Inc.), 171 B.R. 71, 74 (9th Cir. BAP
14 1994).

15 **IV. JURISDICTION**

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

20 "If an event occurs while a case is pending on appeal
21 that makes it impossible for the court to grant any
22 effectual relief whatever to a prevailing party, the
23 appeal is moot and must be dismissed. . . . However,
24 while a court may not be able to return the parties to
25 the status quo ante . . . , an appeal is not moot if the
26 court can fashion some form of meaningful relief.
27 . . ." [United States v. Arkison (In re Cascade Rds.),
28 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. . . .").

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

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

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

25 **V. DISCUSSION**

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

1 granted relief from the stay under § 362(d)(1) when necessary to
2 permit pending litigation to be concluded in another forum if the
3 non-bankruptcy suit involves multiple parties or is ready for
4 trial." Truebro, Inc. v. Plumberex Specialty Products, Inc. (In
5 re Plumberex Specialty Products, Inc.), 311 B.R. 551, 556-57
6 (Bankr. C.D. Cal. 2004), citing Christensen v. Tucson Estates,
7 Inc. (In re Tucson Estates, Inc.), 912 F.2d 1162, 1166 (9th Cir.
8 1990) ("[w]here a bankruptcy court may abstain from deciding
9 issues in favor of an imminent state court trial involving the
10 same issues, cause may exist for lifting the stay as to the state
11 court trial"); Packerland Packing Co. v. Griffith Brokerage Co.
12 (In re Kemble), 776 F.2d 802, 807 (9th Cir. 1985) (affirming an
13 order lifting the stay to permit a creditor to pursue a
14 conversion and fraudulent conveyance action pending in the
15 federal district court).

16 "Judicial economy is a factor to be considered by
17 bankruptcy courts when deciding lift stay issues." Plumberex,
18 311 B.R. at 556, citing Piombo Corp. v. Castlerock Prop. (In re
19 Castlerock Prop.), 781 F.2d 159, 163 (9th Cir. 1986); Kemble, 776
20 F.2d at 807; Santa Clara County Fair, 180 B.R. at 566. As we
21 noted in Santa Clara County Fair, the legislative history of
22 section 362(a) indicates that judicial economy provides
23 sufficient cause to lift the stay to permit the prosecution of
24 actions pending elsewhere against a debtor:

25 [I]t will often be more appropriate to permit
26 proceedings to continue in their place of origin, when
27 no great prejudice to the bankruptcy estate would
28 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.

1 Santa Clara County Fair, 180 B.R. at 566, citing H.R. Rep. No.
2 95-595, at 341 (1977); S. Rep. No. 95-989, at 50 (1978),
3 reprinted in 1978 U.S.C.C.A.N. 5787, 5836 (emphasis added).

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

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

24
25
26 ⁷ Appellees suggested to the bankruptcy court that the
27 multiple nondebtor parties and Debtor would present a similar
28 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.

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

8 Debtor argues that the bankruptcy court erred as a matter of
9 law in allowing the state court to make factual findings which
10 may or may not give rise to issue preclusion in the
11 nondischargeability action. Debtor contends that "the bankruptcy
12 court cannot abdicate its congressionally mandated role in the
13 determination of issue regarding dischargeability." Appellant's
14 Opening Brief at 6. The bankruptcy court did not abdicate its
15 responsibility: it correctly noted that it alone can determine
16 dischargeability and that any findings made by the state court
17 with respect to fraud or other conduct would have to be tailored
18 to section 523 before issue preclusion could apply.⁸ As noted
19

20 ⁸ "Issue preclusion" is the more modern nomenclature for
21 "collateral estoppel." See Paine v. Griffin (In re Paine), 283
22 B.R. 33, 38 (9th Cir. BAP 2002) (noting that "issue preclusion"
23 includes the doctrines of direct estoppel and collateral
24 estoppel). "Principles of collateral estoppel apply to
25 proceedings seeking exceptions from discharge brought under 11
26 U.S.C. § 523(a)." Harmon v. Kobrin (In re Harmon), 250 F.3d
27 1240, 1245 (9th Cir. 2001); see also Diamond v. Kolcum (In re
28 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...)

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

14
15 ⁸(...continued)
16 not abdicate its responsibility under the Bankruptcy Code;
17 rather, it recognized long-standing law that issue preclusion can
18 be applied in a nondischargeability action, as long as all
19 elements for preclusion exist.

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

27 ⁹ At oral argument, counsel reiterated Debtor's position
28 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...)

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

9 In Santa Clara County Fair, the debtor attempted to apply
10 seven factors set out in Edmondson v. America West Airlines (In
11 re America West Airlines), 148 B.R. 920, 923 (Bankr. D. Ariz.
12 1993) in arguing that the bankruptcy court had abused its
13 discretion in lifting the stay. We disagreed, noting that the
14 debtor's arguments were "far from compelling." Santa Clara
15 County Fair, 180 B.R. at 567. We did not adopt or apply the
16 factors. In any event, the seven factors applied in America West
17 are different than the twelve adopted by Curtis and those urged
18 by Debtor here. (In fact, in his initial opposition to the
19 Motion, Debtor asserted that only five factors applied, citing In
20 Pro Football Weekly, Inc., 60 B.R. 824, 826 (N.D. Ill. 1986),
21 which identified three factors to consider.)

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

26 _____
27 ⁹(...continued)
28 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).

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

17 **VI. CONCLUSION**

18 For the foregoing reasons, we AFFIRM.
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