

JUL 31 2007

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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NOT FOR PUBLICATION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.	NV-06-1451-DES
)		
JOHN HARVEY WARDROBE and)	Bk. No.	01-30153
THERESA ROSE WARDROBE,)		
)	Adv. No.	04-05241
Debtors.)		
)	Ref. No.	06-17
)		
JOHN HARVEY WARDROBE and)		
THERESA ROSE WARDROBE,)		
)		
Appellants,)		
)		
v.)	MEMORANDUM ¹	
)		
SUSAN GRIFFIN,)		
)		
Appellee.)		

Argued and Submitted on May 17, 2007
at Las Vegas, Nevada

Filed - July 31, 2007

Appeal from the United States Bankruptcy Court
for the District of Nevada

Honorable Gregg W. Zive, Chief Bankruptcy Judge, Presiding.

Before: DUNN, EFREMSKY² and SMITH, 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. Roger Efremsky, U.S. Bankruptcy Judge for the Northern District of California, sitting by designation.

1 The debtors, John and Theresa Wardrobe, appeal the
2 bankruptcy court's ruling that a state court judgment had issue
3 preclusive effect in a nondischargeability action against them
4 under § 523(a)(2)(A).³ For the reasons set forth below, we
5 REVERSE and REMAND.

6
7 I. FACTS

8 John Wardrobe ("Wardrobe") was a licensed general
9 contractor, doing business as LJ Construction. On June 12, 1998,
10 Wardrobe entered into a contract with Susan Griffin ("Griffin")
11 whereby Griffin paid Wardrobe \$30,775 to repair damage to her
12 residence.

13 Approximately one year later, Griffin filed a complaint
14 against Wardrobe, alleging breach of contract and seeking
15 rescission of the contract and damages, in Nevada state court
16 (the "state court action"). Griffin also named National Guaranty
17 Insurance Co. and Intercargo Insurance Co., the two surety bond
18 insurers (collectively, "the bond insurers") for LJ Construction,
19 as defendants in her complaint. Wardrobe filed an answer in the
20 state court action.⁴ Trial in the state court action was
21 scheduled to commence on January 22, 2001.

22
23 ³ Unless otherwise indicated, all chapter, section and rule
24 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
25 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as
26 enacted and promulgated prior to October 17, 2005, the effective
27 date of most of the provisions of the Bankruptcy Abuse Prevention
and Consumer Protection Act of 2005, Pub. L. 109-8, April 20,
2005, 119 Stat. 23 ("BAPCPA"), as the debtors' bankruptcy
petition was filed in advance of the BAPCPA effective date.

28 ⁴ It appears from the State Court Findings that, in his
answer to Griffin's state court complaint, Wardrobe filed a
counterclaim.

1 On January 19, 2001, John and Theresa Wardrobe
2 (collectively, the "debtors") filed a voluntary chapter 13
3 petition, which case was later converted to chapter 7. The
4 debtors listed the state court action in both their original and
5 amended statements of financial affairs.

6 Griffin subsequently filed a motion for relief from stay
7 ("Relief from Stay Motion"). In the Relief from Stay Motion,
8 Griffin requested relief from the automatic stay so that she
9 could "proceed with her lawsuit against John Wardrobe in state
10 court. This [was] necessary so she [could] recover against . . .
11 [the bond insurers]." Relief from Stay Motion at 1:15-20, April
12 12, 2001. She explained that the state court action involved a
13 breach of contract claim against Wardrobe and attached a copy of
14 the state court complaint as an exhibit. Griffin further
15 explained that she needed to compel Wardrobe to participate in
16 the state court trial as a witness and, in order for her to
17 collect from the bond insurers, she needed to establish that a
18 valid and enforceable contract existed between herself and
19 Wardrobe and that Wardrobe breached that contract. She did not
20 allege any other claim against Wardrobe in either the Relief from
21 Stay Motion or in the state court complaint. Griffin also stated
22 that the "stay relief [would] only allow her to go to state court
23 and proceed against [the bond insurers]. . . ." Id. at 3:4-9
24 (emphasis added). Griffin served the debtors and their
25 bankruptcy counsel with notice of the hearing on the Relief from
26 Stay Motion at their respective addresses listed on the

1 bankruptcy court docket.⁵ The debtors did not file a response.⁶

2 On May 16, 2001, the bankruptcy court entered an order
3 granting relief from stay ("Relief from Stay Order"), which
4 provided that Griffin "may proceed with her lawsuit against
5 Debtor, John Wardrobe, National Insurance Guaranty Association
6 and Intercargo Insurance Company in State Court." Relief from
7 Stay Order at 1:19-22, May 16, 2001. The Relief from Stay Order
8 also provided that "the stay was lifted so that [Griffin] may
9 seek to compel Debtor, John Wardrobe, to participate in this
10 trial as a witness and obtain judgment." Id. at 1:23-24
11 (emphasis added). The Relief from Stay Order further provided
12 that Griffin "may not proceed to enforce that judgment against
13 the Debtor or property of the estate without further order of
14 this court" and permitted Griffin to enforce the state court
15 judgment against the bond insurers. Id. at 1:23-26 (emphasis
16 added).

17 On May 24, 2001, Griffin filed a motion to extend the bar
18 date to file a nondischargeability complaint against the debtors
19 under §§ 523(a)(2), (a)(4) and (a)(6), requesting a period of 30
20

21 ⁵ Although the debtors did not provide a copy of the notice
22 of the hearing on the Relief from Stay Motion in the record on
23 appeal, the notice was docketed and imaged by the bankruptcy
24 court. We reviewed the notice on the bankruptcy court's
25 electronic docket and take judicial notice of it. See Atwood v.
26 Chase Manhattan Mortgage Co. (In re Atwood), 293 B.R. 227, 233
n.9 (9th Cir. BAP 2003) (obtaining relevant documents not included
in the record on appeal from the bankruptcy court clerk and
taking judicial notice of them).

27 ⁶ At oral argument, counsel for debtors explained that he
28 did not file a response because, based on the representations
made in the Relief from Stay Motion, he believed that Griffin
sought relief from stay to proceed against the bond insurers
only, not the debtors.

1 days following the date of notice of entry of judgment in the
2 state court action within which to file the nondischargeability
3 complaint ("Motion to Extend"). Griffin served a copy of the
4 notice of the hearing on the Motion to Extend, along with a copy
5 of the Motion to Extend, on the debtors and their bankruptcy
6 counsel at their respective addresses listed on the bankruptcy
7 court docket. No opposition was filed by the debtors. On June
8 21, 2001, the bankruptcy court entered an order granting the
9 motion and extending the bar date as to Griffin only as requested
10 ("Extension Order").

11 On October 2, 2001, the debtors received their discharge.
12 Three days later, their bankruptcy case closed.

13 Griffin and the bond insurers entered into a stipulation on
14 or about September 17, 2003, whereby the state court complaint as
15 to the bond insurers was dismissed. Thereafter, Wardrobe was the
16 only remaining defendant in Griffin's state court action.

17 Prior to the trial in the state court action, counsel for
18 Wardrobe moved to withdraw ("Motion to Withdraw"). In the Motion
19 to Withdraw, counsel asserted that he had had no direct contact
20 with Wardrobe since September 2001, and had lost contact with
21 Wardrobe for approximately two years. Counsel also believed that
22 Wardrobe had left Nevada. The certificate of service attached to
23 the Motion to Withdraw did not list the debtors as parties served
24 with the Motion to Withdraw.⁷ Nonetheless, the state court
25 entered an order allowing counsel to withdraw on February 18,
26

27 ⁷ Per the certificate of service attached to the Motion to
28 Withdraw, only counsel for Griffin in the state court action was
served with the Motion to Withdraw.

1 2004 ("Withdrawal Order").⁸

2 The state court held the trial on the state court action on
3 July 21, 2004. Wardrobe did not appear.

4 During the state court trial, Griffin moved to amend her
5 complaint to include a claim for intentional fraudulent
6 misrepresentation and damages against Wardrobe. The state court
7 granted the motion.

8 After admitting exhibits and hearing testimony, the state
9 court ruled in Griffin's favor. Four months later, the state
10 court entered its findings of fact, conclusions of law and
11 judgment ("State Court Findings").

12 In the State Court Findings, the state court found that the
13 Withdrawal Order was properly served on Wardrobe at his last
14 known address. It also found that Wardrobe was properly served
15 with notice of the trial date ("Notice of Trial").⁹

16 The state court further found that Wardrobe knowingly and
17 intentionally had made fraudulent misrepresentations as to his
18 willingness and ability to perform the proposed work in order to
19 induce Griffin to enter into the contract and to pay him. It
20 also found that Griffin relied on these fraudulent

21
22 ⁸ The debtors did not provide a copy of the Withdrawal Order
23 in the record before us. Although we may take judicial notice of
24 the papers filed in the bankruptcy court docket, see supra note
25 5, we are unable to look at the papers filed in the state court
26 action, as neither the state court record nor the state court
27 docket is available to us.

28 ⁹ Specifically, the state court found that Griffin served
notice of the trial on June 24, 2004, at the same address listed
by the debtors on their bankruptcy petition. Neither the debtors
nor Griffin provided a copy of the notice of the state court
trial in the record before us. Further, neither the state court
docket nor the state court record are available to us. See supra
note 8.

1 misrepresentations and, as a result, sustained compensatory
2 damages of \$24,377, having had to employ another contractor to
3 perform the work, and consequential damages of \$192,314.54. In
4 addition, the state court found that Wardrobe's representations
5 were extreme, outrageous and malicious, and awarded \$50,000 in
6 punitive damages, as well as attorney's fees and costs. The
7 debtors did not appeal the State Court Findings.¹⁰

8 On November 2, 2004, Griffin filed the Dischargeability
9 Complaint against the debtors under §§ 523(a)(2)(A) and
10 524(a)(3), to which the debtors filed an answer. The matter
11 proceeded to trial.

12 At trial, the bankruptcy court listened to testimony,
13 admitted evidence and made factual findings on the record.¹¹
14 Among its factual findings, the bankruptcy court determined the
15 following: (1) through the Motion to Extend, the debtors were
16 aware, at least as of June 2001, of a potential fraud claim
17 against them under § 523(a)(2)(A); (2) the state court made
18 specific findings as to the issue of fraud;¹² and (3) the state
19

20 ¹⁰ There is nothing in the record in the appeal before us
21 indicating that the debtors appealed the State Court Findings.
22 Further, the bankruptcy court found that the debtors did not
23 appeal the State Court Findings.

24 ¹¹ Midway through trial, the bankruptcy court and counsel
25 for the parties appear to have agreed to treat the matter as
26 effectively a hearing on a motion for summary judgment. It is
27 unclear from its findings of fact, conclusions of law and
28 judgment ("Bankruptcy Court Findings"), however, whether the
29 bankruptcy court ultimately made its decision under summary
30 judgment standards.

31 ¹² At first, the bankruptcy court believed that the State
32 Court Findings did not include findings on the issue of reliance.
(continued...)

1 court judgment constituted community debt under § 524(a)(3). The
2 bankruptcy court found these facts to be undisputed.¹³

3 The bankruptcy court determined that the state court made
4 the findings necessary to establish all the elements of
5 nondischargeable fraud under § 523(a)(2)(A), and to award
6 compensatory damages. However, it found that the state court did
7 not make sufficient findings to establish willful and malicious
8 injury and to award punitive damages under § 523(a)(6). Finally,
9 the bankruptcy court determined that the State Court Findings
10 constituted a final judgment, which the debtors did not appeal.
11 Based on these determinations, the bankruptcy court ruled that,
12 pursuant to 28 U.S.C. § 1738, the full faith and credit statute,
13 issue preclusion barred the bankruptcy court from revisiting the
14 State Court Findings. The bankruptcy court later entered the
15 Bankruptcy Court Findings, which incorporated its findings of
16 fact, conclusions of law and judgment in favor of Griffin on her
17 §§ 523(a)(2)(A) and 524(a)(3) causes of action.

18 The debtors appealed.

20
21 ¹²(...continued)

22 The bankruptcy court later determined, however, that all the
elements under § 523(a)(2)(A) were satisfied.

23 ¹³ Neither Griffin nor the debtors objected on the record to
24 the factual findings made by the bankruptcy court. Before the
25 bankruptcy court entered its Bankruptcy Court Findings on the
26 adversary docket on December 4, 2006, the debtors filed an
27 objection to entry of the Bankruptcy Court Findings on November
28 6, 2006, requesting more time to review the transcript of the
trial and compare it with the Bankruptcy Court Findings, but
neither a hearing nor an order followed. We reviewed the
bankruptcy court's electronic docket and the documents entered
thereon and take judicial notice thereof. See supra note 5.

1 II. JURISDICTION

2 The bankruptcy court had jurisdiction under 28 U.S.C.
3 §§ 1334 and 157(b) (2) (I). We have jurisdiction under 28 U.S.C.
4 § 158.

5
6 III. ISSUE

7 Whether, in determining Wardrobe's debt to Griffin to be
8 nondischargeable in part under § 523(a) (2) (A), the bankruptcy
9 court erred in applying issue preclusion to the State Court
10 Findings.

11
12 IV. STANDARDS OF REVIEW

13 The preclusive effect of a prior judgment is a question of
14 law that we review de novo. Far Out Productions, Inc. v. Oskar,
15 247 F.3d 986, 993 (9th Cir. 2001).

16
17 V. DISCUSSION

18 The debtors contend that issue preclusion should not apply
19 to the State Court Findings because the underlying state court
20 judgment is invalid. They argue that, although the Relief from
21 Stay Motion and Relief from Stay Order contemplated that Griffin
22 only would proceed with her state court breach of contract action
23 to obtain an enforceable judgment against the bond insurers,
24 Griffin nonetheless proceeded with a fraud action against
25 Wardrobe that was not contemplated or referenced in the Relief
26 from Stay Motion and was not provided for in the Relief from Stay
27 Order. Thus, the debtors contend, Griffin violated the stay and
28 rendered the State Court Findings invalid for issue preclusion

1 purposes in her adversary proceeding.

2 Reviewing the Relief from Stay Motion and the Relief from
3 Stay Order together, we agree with the debtors that the State
4 Court Findings lack preclusive effect to establish the elements
5 of a § 523(a)(2)(A) cause of action, with the possible exception
6 of damages, because the bankruptcy court only lifted the stay to
7 allow the state court to make a determination on the breach of
8 contract claim in order, if appropriate, to enter an enforceable
9 judgment against the bond insurers. The bankruptcy court did not
10 lift the stay to allow Griffin to proceed with her lawsuit
11 against Wardrobe, except to the extent that obtaining a judgment
12 against Wardrobe personally was a prerequisite to establishing an
13 enforceable claim against the bond insurers.

14 The authority to annul, terminate or modify the automatic
15 stay falls within the exclusive jurisdiction of the bankruptcy
16 court. Gruntz v. County of Los Angeles (In re Gruntz), 202 F.3d
17 1074, 1081 (9th Cir. 2000) (en banc). “The automatic stay under
18 11 U.S.C. § 362(a) operates, until further order of the
19 bankruptcy court, as an absolute bar to the commencement or
20 continuation of a proceeding concerning the debtor before [any
21 court].” Noli v. Comm’r of Internal Revenue, 860 F.2d 1521, 1525
22 (9th Cir. 1988) (emphasis added). As “[t]he automatic stay is an
23 injunction issuing from the authority of the bankruptcy court,”
24 persons or entities subject to the injunction of the stay,
25 including state courts, are bound until the bankruptcy court
26 modifies or terminates the stay. Gruntz, 202 F.3d at 1082
27 (quoting Celotex Corp. v. Edwards, 514 U.S. 300, 313 (1995)); see
28 also McGhan v. Rutz (In re McGhan), 288 F.3d 1172, 1178-79 (9th

1 Cir. 2002). Given the broad sweep of the automatic stay and
2 “‘because only an order of the bankruptcy court can authorize any
3 further progress in the stayed proceedings, it follows that the
4 continuation of the [stayed] proceeding can derive legitimacy
5 only from the bankruptcy court order.’” Gruntz, 202 F.3d at 1082
6 (quoting Noli, 860 F.2d at 1525). The terms of an order granting
7 relief from stay are strictly construed. Noli, 860 F.2d at 1525.

8 Only federal courts have the final authority to determine
9 the scope and applicability of the stay. Gruntz, 202 F.3d at
10 1083; see also McGhan, 288 F.3d at 1179 (explaining that Gruntz
11 holds that state courts lack jurisdiction to modify the stay).
12 “Any state court modification of the automatic stay would
13 constitute an unauthorized infringement upon the bankruptcy
14 court’s jurisdiction to enforce the stay.” Gruntz, 202 F.3d at
15 1082. In modifying the stay, a state court interferes in the
16 operation of the ongoing bankruptcy case, the management of which
17 is delegated exclusively to the bankruptcy court. Id. at 1084.

18 Should the state court issue a judgment in violation of the
19 stay, that judgment is void, id. at 1082, and the bankruptcy
20 court need not extend full faith and credit to such judgment, id.
21 at 1082 n.6.

22 Interpreting the Relief from Stay Order in light of the
23 relief requested in the Relief from Stay Motion, we determine
24 that the state court, in finding in favor of Griffin on her
25 fraudulent misrepresentation claim against Wardrobe, first raised
26 during the state court trial, acted beyond the limited scope of
27 the relief from stay ordered by the bankruptcy court.

28

1 Although the Relief from Stay Order states that the
2 automatic stay was lifted and that Griffin could proceed with her
3 lawsuit against Wardrobe and the bond insurers, the Relief from
4 Stay Motion requested that the stay be lifted in order to obtain
5 an enforceable judgment against the bond insurers only. The
6 bankruptcy court could not, in the Relief from Stay Order, grant
7 relief greater than what Griffin requested in the Relief from
8 Stay Motion. See, e.g., Thornburg v. Lynch (In re Thornburg),
9 277 B.R. 719, 726-27 (Bankr. E.D. Tex. 2002) (where the bankruptcy
10 court determined that the narrow relief sought in a motion for
11 relief from stay “cannot be broadened retroactively by the
12 loosely drafted language of the order,” and that the order on the
13 relief from stay motion granted the relief requested in the
14 motion, “no more, no less”).

15 In the Relief from Stay Motion, Griffin asserted to the
16 bankruptcy court her need to obtain relief in order to pursue her
17 breach of contract claim against the bond insurers as the sole
18 ground to lift the stay. This was the only issue that Griffin
19 presented to the bankruptcy court to determine the extent to
20 which it should lift the stay. Because “[t]he automatic stay
21 sweeps broadly, enjoining the commencement or continuation of any
22 judicial, administrative, or other proceedings against the debtor
23 . . . that arose before the commencement of the case,” Gruntz,
24 202 F.3d at 1081-82, the stay was still in effect as to the
25 prosecution of a fraudulent misrepresentation claim against
26 Wardrobe in state court. Griffin did not request that the
27 bankruptcy court terminate the stay to allow such a claim against
28 Wardrobe to proceed in state court. The lifting of the stay, as

1 authorized by the bankruptcy court in the Relief from Stay Order,
2 was narrow in its application; the stay only was lifted to pursue
3 the breach of contract claim in Griffin's state court lawsuit in
4 order to establish an enforceable claim against the bond
5 insurers.

6 The state court allowed Griffin to proceed with her lawsuit
7 against Wardrobe on a fraudulent misrepresentation claim, first
8 raised at trial, and later made findings against Wardrobe in her
9 favor. By doing so, the state court impermissibly modified the
10 stay as to Wardrobe. Thus, the State Court Findings against
11 Wardrobe were entered in violation of the stay. With the
12 possible exception of damages, the State Court Findings are void
13 and without preclusive effect. The bankruptcy court
14 inappropriately accorded all of the State Court Findings full
15 faith and credit in finding in favor of Griffin on her
16 § 523(a) (2) (A) cause of action.¹⁴

17 18 VI. CONCLUSION

19 As the State Court Findings with respect to the fraudulent
20 misrepresentation claim against Wardrobe lack preclusive effect,
21 having been based on an impermissible modification of the
22 automatic stay, we REVERSE and REMAND to the bankruptcy court to
23 hear evidence and to make its own findings, as appropriate, on
24 Griffin's § 523(a) (2) (A) cause of action against the debtors.

25
26 ¹⁴ The bankruptcy court arguably could give preclusive
27 effect to the amount of actual and consequential damages
28 determined by the state court, as there is nothing in the record
indicating that breach of contract damages would have been
determined differently.