

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NOT FOR PUBLICATION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.	)	<b>MEMORANDUM</b> <sup>1</sup>	
	)		
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, EFREMSKY<sup>2</sup> and SMITH, Bankruptcy Judges.

<sup>1</sup> 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.

<sup>2</sup> 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).<sup>3</sup> 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.<sup>4</sup> Trial in the state court action was  
21 scheduled to commence on January 22, 2001.

22  
23 <sup>3</sup> 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 <sup>4</sup> 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.<sup>5</sup> The debtors did not file a response.<sup>6</sup>

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  
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21 <sup>5</sup> 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 <sup>6</sup> 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.<sup>7</sup> Nonetheless, the state court  
25 entered an order allowing counsel to withdraw on February 18,  
26

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27 <sup>7</sup> 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").<sup>8</sup>

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").<sup>9</sup>

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

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21  
22 <sup>8</sup> 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 <sup>9</sup> 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.<sup>10</sup>

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.<sup>11</sup>  
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;<sup>12</sup> and (3) the state  
19

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20 <sup>10</sup> 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 <sup>11</sup> 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.

<sup>12</sup> At first, the bankruptcy court believed that the State  
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.<sup>13</sup>

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.

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20  
21 <sup>12</sup>(...continued)

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

24 <sup>13</sup> Neither Griffin nor the debtors objected on the record to  
25 the factual findings made by the bankruptcy court. Before the  
26 bankruptcy court entered its Bankruptcy Court Findings on the  
27 adversary docket on December 4, 2006, the debtors filed an  
28 objection to entry of the Bankruptcy Court Findings on November  
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.<sup>14</sup>

## 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.

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25  
26 <sup>14</sup> 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.