

AUG 29 2007

NOT FOR PUBLICATION

HAROLD S. MARENUS, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

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In re:)	BAP No.	CC-06-1386-PaMaB
)		
DAVID SCHWARCZ and CAROLINE)	Bk. No.	LA 06-11930-AA
SCHWARCZ,)		
)		
Debtors.)		
_____)		
)		
OFFICIAL COMMITTEE OF CREDITORS)		
HOLDING UNSECURED CLAIMS,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM¹	
)		
HELENE LEDERMAN,)		
)		
Appellee.)		
_____)		

Argued and Submitted on July 27, 2007
at Pasadena, California

Filed - August 29, 2007

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

Honorable Alan Ahart, Bankruptcy Judge, Presiding

Before: PAPPAS, MARLAR² 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 P. 32.1), it has not precedential value. See 9th Cir. BAP Rule 8013-1.

² Hon. James M. Marlar, United States Bankruptcy Judge for the District of Arizona, sitting by designation.

1 This is an appeal of a supplemental order granting relief
2 from stay entered in Debtors' chapter 11³ case to allow entry and
3 enforcement of a state court judgment. We AFFIRM.

4
5 **FACTS**

6 David and Caroline Schwarcz (together, "Debtors" and
7 individually "David" and "Caroline") filed a chapter 11 petition
8 on May 10, 2006. Pursuant to § 1102(a)(1), the U.S. Trustee
9 appointed a committee of unsecured creditors ("the Committee") on
10 July 3, 2006. Debtors' schedules list two residential properties:
11 the "Hillcrest Property," valued at \$3,700,000, and the "Beverly
12 Hills Condo," valued at \$830,000.

13 Appellee Helene Lederman ("Lederman") had acquired the
14 Hillcrest Property by quitclaim deed in 1991 from her ex-husband
15 as part of a divorce settlement. Lederman alleges that her
16 husband accumulated a number of debts both before and after their
17 divorce that resulted in judgment liens against the Hillcrest
18 Property, but that she was unaware of these liens until 1999.

19 Lederman alleges that she was contacted by Caroline in 1999
20 through a mutual acquaintance. At a meeting with Debtors, they
21 told Lederman that they were acquainted with liens on the
22 Hillcrest Property because David, a lawyer, was representing one
23 of the lienholders. They warned Lederman she was in imminent
24 danger of losing the Hillcrest Property. In subsequent meetings
25 and telephone conversations, David suggested that he could save
26 Lederman's equity interest in the Hillcrest Property, but would

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28

³ 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.

1 only help if she transferred the property to the Debtors. David
2 offered her \$750,000 to transfer the Hillcrest Property
3 immediately, but allegedly told Lederman that if she would wait
4 and trust him, Debtors could eventually pay her \$1.5 million or
5 even more for her interest in the property. It was always
6 Lederman's understanding, however, that she would be paid at least
7 \$125,000 by Debtors at the time of transfer of the property, with
8 the balance (somewhere between \$625,000 and \$1.375 million, or
9 possibly more) paid in installments over time.

10 Lederman agreed to retain David as her attorney in March
11 1999. At a meeting between Lederman and David, they reviewed a
12 retainer agreement which included a provision that "In full
13 consideration for [David's] services, including negotiating with
14 third parties on client's behalf trial and appellate work, client
15 has agreed to enter into the Purchase and Sale Agreement for the
16 Hillcrest Property." Lederman believes she signed this agreement,
17 but that David did not give her a copy.

18 On March 28, 1999, David sent Lederman a "Written Informed
19 Consent to Transact Business with Client Concerning the Purchase
20 of [Hillcrest Property]." According to Lederman, the consent
21 letter described a complex arrangement whereby Debtors would
22 purchase the Hillcrest Property, and that Lederman expected to
23 receive at least \$750,000 for her interest in the property. If
24 she did not, the consent letter purportedly provided that Lederman
25 "had the right to accept a lesser amount or instruct the Law
26 Offices of David R. Schwarcz to proceed with appropriate legal
27 action in an effort to negotiate a satisfaction of the relevant
28 liens [of creditors on the property]."

1 On or about April 21, 1999, Lederman agreed to meet Debtors
2 to execute the various documents relating to the transfer of the
3 Hillcrest Property. When Lederman arrived at the meeting, she
4 learned for the first time that she would be transferring the
5 Hillcrest Property to a "dummy corporation" owned by Debtors
6 called "FRNY." David directed her to sign a Side Agreement and
7 Grant Deed⁴ transferring the Hillcrest Property to FRNY, which she
8 did. When Lederman asked David about the remaining documents
9 concerning the transfer of the Hillcrest Property, including the
10 purchase agreement and the promissory note and the \$125,000
11 initial cash payment by which Debtors would purchase the Hillcrest
12 Property, David informed her that he was pressed for time but
13 would get the remaining documents and money to her later.

14 At some point shortly after Lederman signed the grant deed,
15 David told Lederman that it would be foolish for Debtors to pay
16 Lederman the minimum \$125,000 initial payment on the property in
17 cash because Lederman "should not have any assets in her own
18 name." Instead, David advised Lederman that Debtors should use
19 this money as a down payment on another residence that Lederman
20 would move into after vacating the Hillcrest Property. David
21 indicated that Caroline should hold legal title to the new
22 property because Caroline had a better credit rating and Lederman
23 should not have any assets in her own name. David allegedly
24 assured Lederman that Caroline would transfer title to Lederman
25 after Lederman resolved her debt problems.

26

27 ⁴ The executed grant deed was recorded in the official
28 records of Los Angeles County on June 18, 1999, as instrument
991127646.

1 Lederman located and selected the Beverly Hills Condo as
2 suitable for her purposes. As agreed, Debtors purchased the
3 Beverly Hills Condo making a \$125,000 down payment with legal
4 title vested in Caroline. After the closing, David told Lederman
5 that Lederman should sign a lease agreement with Caroline.
6 Although the lease indicated that Lederman was only a tenant,
7 David told Lederman that it was necessary for her protection.
8 Lederman signed the lease.

9 Over the next two years, Lederman acknowledges that David
10 provided legal services to her in an effort to negotiate a
11 reduction of the liens against the Hillcrest Property. She
12 repeatedly pressed him to deliver the promissory note securing
13 Debtors' obligation for payment on the Hillcrest Property. On or
14 about October 3, 2000, David made a payment to Lederman of
15 \$60,000, but he refused to give her the promissory note because
16 Lederman should not have assets in her name and that the
17 promissory note would be an asset vulnerable to creditors. For
18 that reason, the \$60,000 was made payable to Providential, another
19 corporation David controlled, with Lederman having drawing rights
20 on an account at Providential.

21 Debtors allegedly told Lederman they needed to refinance the
22 Hillcrest Property before they could pay Lederman the sums they
23 owed her, and Lederman states that Debtors repeatedly informed her
24 that they were unable to refinance. In fact, Lederman would
25 discover later that Debtors had secured a loan on the Hillcrest
26 Property for \$312,000 on May 23, 2000, and another on January 9,
27 2003, for \$1,140,000.

28

1 The record does not detail the events that led Lederman to
2 file suit against Debtors in Los Angeles Superior Court,⁵ Lederman
3 v. Schwarcz, Case no. BC 307709. In that action, on October 13,
4 2005, Lederman filed a Verified Sixth Amended Complaint including
5 eleven counts against Debtors for, among other things, breach of
6 contract for failure to pay a minimum of \$750,000 for the
7 Hillcrest Property and for failure to transfer the Beverly Hills
8 Condo to her; breach of fiduciary duty against David under the
9 purchase agreement and under the attorney-client relationship;
10 negligent and intentional misrepresentation; fraud; rescission of
11 contract; unjust enrichment; and conversion. Lederman also sought
12 equitable relief for quiet title of the Hillcrest Property and
13 Beverly Hills Condo in her name.

14 The state action culminated in a jury trial. On March 29,
15 2006, the jury rendered its verdict in favor of Lederman for
16 breach of contract, breach of fiduciary duty, concealment, and
17 conversion, awarding her \$2,718,936 in economic damages and
18 \$2,000,000 in damages for emotional distress. On March 30, 2006,
19 the jury returned a second verdict in favor of Lederman for \$500
20 in punitive damages. Then, on April 13, 2006, after a hearing,
21 the state court ruled on Lederman's claims for equitable relief.
22 The state court voided the conveyances pursuant to which Debtors
23 obtained title to the Hillcrest Property and Beverly Hills Condo

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25

26 ⁵ There is an unexplained entry in Debtors' Schedule B,
27 listing a judgment against Lederman in the amount of \$69,720.00.
28 We are unable to determine from the record any details on this
debt. However, there appears to have been an argument made in the
state court action by Debtors for an offset of some unidentified
debt owed by Lederman to Debtors against Lederman's award, which
was rejected by the state court.

1 and quieted titled to them in Lederman's name. The trial judge
2 court was particularly scathing in comments made to Debtors'
3 attorney concerning Debtors' actions:

4 Don't you understand what your client has done
5 is very, very wrong? It's fraudulent
6 Your client has committed fraud. He's taken
7 advantage of this lady and taken all of her
8 property from her, all of [her] worldly
9 possessions except [what] she was able to move.
10 . . . So this lady has suffered for six years,
11 six years from the time she entered into this
12 transaction; six years. . . . I'm telling you
13 what I have seen in this case. In the 30 years
14 I've been on this bench I've never seen such
15 outrageous and e[g]regious conduct by an
16 attorney. It is the wors[t] case I've ever
17 seen. I don't think there's a reported case in
18 the books that would show what this, your client
19 has done in this case in all the books. What
20 your client has done.

21 Tr. Hr'g 12:24 - 13:25 (April 13, 2006). The judge directed
22 Lederman to prepare a proposed judgment, which was lodged on April
23 24, 2006. Debtors filed an objection to the form of the judgment
24 on May 4, 2006. Then, as noted above, on May 10, 2006, Debtors
25 filed their chapter 11 petition. On May 12, 2006, Debtors filed a
26 notice in state court concerning the filing of the chapter 11
27 petition and the automatic stay.

28 On May 30, 2006, the state court conducted a hearing
regarding Debtors' objection to the proposed judgment. After
reviewing the notice of bankruptcy filing by Debtors, the state
court issued an Order to Show Cause why the judgment should not be
entered, with a hearing on the OSC set for July 28, 2006.⁶

⁶ It is not clear why the state court, having acknowledged receipt of the notice of the bankruptcy filing, decided it was appropriate to issue the show cause order and schedule a hearing in what was apparently a clear violation of the automatic stay. In re Pettit, 217 F.3d 1072, 1080 (9th Cir. 2000) (signing or
(continued...)

1 On July 14, 2006, Lederman filed a Motion for Relief from
2 Stay (the "Original Motion") in the bankruptcy court. Lederman's
3 Original Motion sought relief from the stay so that the state
4 court could enter the judgment. Debtors opposed stay relief. The
5 Committee did not file an objection but one creditor who was a
6 member of the committee, Gerry Burk, did. The bankruptcy court
7 held a hearing on the Original Motion on August 9, 2006. Counsel
8 for Lederman, Debtors and the Committee were present. None of
9 the parties to this appeal provided the Panel with a transcript of
10 this hearing, nor is that transcript in the docket of the
11 bankruptcy case. However, all parties agree that the bankruptcy
12 court granted the Original Motion. They disagree, however, as to
13 the effect and extent of the court's rulings at the hearing. For
14 example, Debtors suggest in their Objection to Lederman's Order
15 that:

16 At the hearing, the Court ruled that Lederman's
17 Motion would be granted and that Lederman would
18 be granted relief from the automatic stay for
19 the limited purpose of proceeding to judgment in
20 the State Action. No other relief was granted,
21 and Mr. Kogan [attorney for the Committee]
22 clarified on the record that relief was limited
23 to only entry of judgment in the state action,
24 but not enforcement or execution on any such
25 judgment.

26 In the Declaration of David Weinstein, attached to Lederman's
27 Reply to Debtors' Objection to Lederman Order, Lederman responds
28 that:

29 _____
30 ⁶(...continued)
31 entry of orders by a judge does not fall within the "ministerial
32 act" exception to the automatic stay). However, as discussed
33 below, the state court did not enter the judgment until after the
34 stay had been modified by the bankruptcy court, likely rendering
35 the state court's earlier stay violations harmless.

1 The court stated on the record that Mrs.
2 Lederman's Stay Motion would be granted and the
3 stay should be vacated. Upon question by Mr.
4 Kogan as to the parameters of the relief from
5 stay, the Court repeated that the Stay Motion
6 would be granted to the fullest extent of relief
7 sought in it.

8 The proposed order submitted by Lederman to the bankruptcy
9 court (the "Lederman Order") provided:

10 Movant may proceed in the non-bankruptcy forum
11 to final judgment (including any appeals) in
12 accordance with applicable non-bankruptcy law.
13 A judgment substantially in the form presented
14 with the motion for Relief from Stay as it might
15 be modified by the state court, may be signed,
16 entered and put into effect, so long as no
17 execution is made against property of the
18 estate. Execution against insurance, such as
19 malpractice insurance of the Debtor, to the
20 extent it exists, may be pursued under
21 applicable non-bankruptcy law and rules of
22 practice. Eviction of the debtors, if
23 authorized by the state court, is permitted.

24 The copy of this proposed order in the record bears a handwritten
25 notation by the bankruptcy judge that "This order was not signed.
26 AMA."

27 Debtors filed an objection to the Lederman Order arguing that
28 it provided relief beyond what was requested in the Original
29 Motion, and did not accord with the bankruptcy court's ruling at
30 the hearing. Debtors provided an alternative order for the
31 bankruptcy court's consideration.

32 On August 25, 2006, the bankruptcy court entered an
33 abbreviated version of Debtors' proposed order:

34 Movant may proceed in the non-bankruptcy forum
35 to final judgment (including any appeals) in
36 accordance with applicable non-bankruptcy law.
37 A judgment substantially in the form presented
38 with the motion for Relief from Stay as it might
39 be modified by the state court, may be signed
40 and entered.

1 The bankruptcy court apparently agreed with Debtors that the
2 provisions suggested by Lederman authorizing execution against
3 malpractice insurance and allowing eviction of Debtors should be
4 omitted. However, the bankruptcy court in its own handwriting and
5 initials deleted the Debtors' proposed restriction that "so long
6 as no execution is made against property of the estate and such
7 judgment does not affect the property of the estate."

8 Neither party appealed the August 25, 2006, order. However,
9 counsel for Lederman felt uncertain about the scope of this order
10 and filed a Supplemental Motion for Relief from Stay. At the same
11 time, Lederman filed a Motion [for an order] Shortening Time for
12 hearing the Supplemental Motion, in which Lederman alleges that
13 three areas in the August 25, 2006, order should be supplemented.
14 In particular, Lederman sought a clarification that she could:

15 (I) move the state court to record whatever
16 judgment the state court enters; (ii) enforce
17 whatever judgment the state court enters to
18 effectuate the obvious purpose of the judgment
19 to immediately return title, ownership in all
20 respects and possession of the Properties to
Mrs. Lederman; and (iii) cause the Debtors'
eviction from the Properties should the state
court award Mrs. Lederman possession of the
Properties and the Debtors fail to properly
evacuate.

21 Lederman also requested permission to pursue a claim against
22 Debtors' malpractice insurance.

23 Both the Committee and the Debtors filed objections to the
24 Supplemental Motion. They argued that the Supplemental Motion did
25 not contain any new factual information, did not contain any new
26 documents, and was merely a disguised motion for reconsideration.
27 The Committee and Debtors objected to the Supplemental Motion
28 because it sought the same relief as the Original Motion.

1 On September 13, 2006, the state court signed and entered
2 Lederman's proposed judgment (hereafter the "State Court
3 Judgment") awarding Lederman \$4,718,936 in compensatory damages,
4 \$500 in punitive damages, voiding ab initio the purported sale of
5 the Hillcrest Property by Lederman to Debtors, quieting title in
6 both the Hillcrest Property and Beverly Hills Condo to Lederman in
7 fee simple absolute, and directing Debtors to vacate the
8 properties.

9 The bankruptcy court heard arguments on the Supplemental
10 Motion on September 27, 2006. After hearing arguments of all
11 counsel, the court announced its decision:

12 I'm going to rule at this point. I am satisfied
13 that the creditor has made the appropriate
14 showing here. I'm going to grant the motion as
15 follows: Number one, I will allow them to pursue
16 the applicable insurance. . . . Secondly, I
17 will grant the moving party the ability to
18 enforce the judgment that was entered only as
19 against the real property, to wit, possession,
20 whatever it takes, only as against the real
21 property, cannot collect on any money judgment,
22 cannot obtain any additional liens against other
23 assets, et cetera, et cetera.

19 Tr. Hr'g 7:16 - 8:4 (September 27, 2006). A Supplemental Order
20 was entered by the court on October 16, 2006, which recites:

21 [Lederman] may proceed in the non-bankruptcy
22 forum to final judgment (including any appeals)
23 in accordance with applicable non-bankruptcy
24 law. Furthermore, the judgment signed by the
25 state court may be entered, recorded, executed
26 upon and put into effect as to title, ownership,
27 possession, and all other rights in, to and
28 against the two parcels of property affected by
that judgment [the Hillcrest Property and
Beverly Hills Condo]. No execution may be made
against property of the estate. However,
[Lederman] may also proceed against insurance,
such as malpractice insurance of the Debtor, to
the extent it exists. Eviction of the Debtors,
if authorized by the state court, is permitted.

1 The Committee filed a timely notice of appeal of the Supplemental
2 Order on October 25, 2006.⁷

3 On April 18, 2007, the bankruptcy court granted the motion of
4 the U. S. Trustee to convert Debtors' case to a case under chapter
5 7 based upon their failure to timely file a proposed plan of
6 reorganization. On April 26, 2007, John J. Menchaca was appointed
7 to serve as chapter 7 trustee in that case ("Trustee").

8

9

JURISDICTION

10 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
11 §§ 1334 and 157(b)(2)(G). We have jurisdiction pursuant to 28
12 U.S.C. § 158.

13

14

ISSUE⁸

15 Whether the bankruptcy court abused its discretion in
16 granting Lederman's Supplemental Motion for Relief from Stay.

17

18

STANDARD OF REVIEW

19 We review the bankruptcy court's decision granting a motion
20 for relief from stay for abuse of discretion. In re Umali, 345

21

22 ⁷ Debtors appealed the State Court Judgment to the
23 California Court of Appeals. We are unaware of whether there has
24 been any decision by the appellate court. Debtors vacated and
surrendered the keys to the Hillcrest Property and the Beverly
Hills Condo to Lederman.

25 ⁸ In its opening brief, the Committee also lists as an issue
26 on appeal whether the bankruptcy court erred in allowing the state
27 court to evict the debtors. We do not address this issue. First,
no stay pending appeal was entered, and this issue was likely
28 mooted before the Committee filed its opening brief when Debtors
vacated the Hillcrest Property and surrendered the keys to both
the Hillcrest Property and the Beverly Hills Condo. Second,
neither the Committee in its opening brief nor Trustee in the
Reply Brief argue this issue, nor was it discussed during oral
argument before the Panel.

1 F.3d 818, 822 (9th Cir. 2003); Duvar Apt. v. FDIC (In re DuVar
2 Apt.), 205 B.R. 196 (9th Cir. BAP 1996).

3
4 **DISCUSSION**

5 A.

6 Trustee and the Committee

7 First, we note a novel procedural concern about the parties
8 to this appeal.

9 After the Committee filed its notice of appeal and opening
10 brief, the bankruptcy court converted Debtors' case from chapter
11 11 to chapter 7. As discussed below, most case law holds that a
12 chapter 11 creditors' committee is effectively dissolved upon
13 conversion. But in this instance, while the Committee initially
14 prosecuted the appeal, the trustee appointed in Debtors' converted
15 chapter 7 case filed the reply brief. In that brief, Trustee
16 claims he is empowered to pursue the appeal as the "assignee" of
17 the rights of the Committee, as well as in his status as the
18 successor to Debtors, who he argues were also "parties" to the
19 appeal. In particular, Trustee argues that the Committee has
20 agreed to execute an assignment of its interests in the appeal to
21 Trustee, although no such assignment by the Committee has
22 apparently been executed nor included in the record. Trustee also
23 asserts that the former debtors-in-possession joined in the
24 appeal. There is also nothing in the record to evidence any such
25 joinder.⁹

26 _____
27 ⁹ The notice of appeal filed by the Committee listed the
28 Committee as the sole appellant, Lederman as the sole appellee,
and Debtors as a "party in interest." Debtors' attorney did not
sign the notice of appeal. Debtors did join in a motion filed in
the bankruptcy court for stay pending appeal. However, their
(continued...)

1 Although chapter 11 expressly provides for the creation of an
2 unsecured creditors' committee, § 1102(a), and bestows "party in
3 interest" standing on that committee, § 1109(b), the Bankruptcy
4 Code is silent concerning the status of the committee upon
5 conversion of the bankruptcy case to another chapter.
6 Nevertheless, a significant number of courts agree with Lederman's
7 contention that a creditors' committee loses its powers upon
8 conversion. See, e.g., Official Comm. Of Unsecured Creditors v.
9 Belgravia Paper Co. (In re Great Northern Paper Co.), 299 B.R. 1,
10 5 (D. Me. 2003) ("Once the Chapter 11 case was converted to a
11 Chapter 7 case, the Committee ceased to exist; the Committee's
12 attorney therefore had no authority to make an assignment, nor did
13 the Committee have any rights to assign."); In re World Health
14 Alternatives, Inc., 344 B.R. 265, 268 (M.D. Fla. 2006) (citing
15 Great Northern Paper); In re Parks Jaggars Aerospace Co., 129 B.R.
16 265, 268 (M.D. Fla. 1991); Unsecured Creditors Comm. Of Butler
17 Group, Inc. V. Butler (In re Butler), 94 B.R. 291, 295 (Bankr.
18 N.D. Tex. 1989); In re Kel-Wood Timber Products Co., 88 B.R. 91,
19 94 (Bankr. E.D. Va. 1988); see also, 4 NORTON BANKR. L & PRAC.2D
20 § 78:10.5 Since the bankruptcy court entered its order converting
21 Debtors' case to chapter 7 on April 18, 2007, as of that date,
22 according to this line of cases, the Committee was effectively
23 dissolved.

24 However, based upon our research, no federal appellate court
25 has ruled conclusively regarding the status and rights of a

26 _____
27 ⁹(...continued)
28 pleading joining in that motion argues that the bankruptcy court
should stay the Supplemental Order pending outcome of a
dischargability proceeding pending in the bankruptcy court, not
this appeal.

1 chapter 11 creditors' committee following conversion of the case
2 to chapter 7. Trustee does not contest Lederman's argument that,
3 upon conversion, the Committee was dissolved and could not
4 continue with this appeal,¹⁰ and so we need not review that
5 question. And since there is nothing in the record to support
6 Trustee's argument that the (by-then) dissolved Committee
7 "assigned" its right to pursue this appeal to him, we also need
8 not address the efficacy of such a transaction in this context.¹¹

9 Finally, we are not persuaded by Trustee's argument that he
10 succeeded to the debtors-in-possession's status as an appellant in
11 this appeal. As a general rule, we do not question the authority
12 of a chapter 7 trustee to succeed to the rights of the debtor-in-
13 possession in a converted chapter 11 case. Upon conversion, the
14 chapter 7 trustee becomes the sole representative of the estate.
15 § 323(a). The trustee succeeds to the rights, responsibilities
16 and liabilities of the estate and debtor-in-possession. Dobin v.
17 Presidential Fin. Corp. (In re Cybridge Corp.), 312 B.R. 262
18 (D.N.J. 2004). But here, in spite of Trustee's claims that

19
20 ¹⁰ In Lederman's brief, she argues that, because of the
21 conversion, the Committee was dissolved and therefore may not
22 pursue this appeal. However, since Trustee did not appear in this
23 appeal until he filed the reply brief, Lederman had no opportunity
24 to brief the issue of Trustee's status.

25 ¹¹ We note that one circuit has ruled that a chapter 7
26 trustee succeeds only to the rights of the debtor-in-possession.
27 Hill v. Akamai Technologies, Inc. (In re MS55, Inc.), 477 F.3d
28 1131, 1138 (10th Cir. 2007). In other words, the only rights of
the creditors' committee that a trustee may assert are those
derived from either the debtor or the bankruptcy estate. Id.

The Committee may not act on behalf of, or with rights
derivative of, the debtor-in-possession or estate without
permission of the bankruptcy court. Liberty Mut. Ins. Co. v.
Official Creditors' Comm. Of Spaulding Composites, Inc., 207 B.R.
899, 904 (9th Cir. BAP 1997). In this case, it is undisputed that
the bankruptcy court never authorized the Committee to act on
behalf of Debtors or the bankruptcy estate.

1 Debtors "joined" in the appeal, and therefore that Trustee may
2 substitute for Debtors as an appellant, the record contains
3 nothing to establish that this joinder occurred.¹² Absent such, we
4 cannot say that Trustee stands as a matter of right in the shoes
5 of the former debtor-in-possession in this appeal, whatever those
6 rights may have been.

7 In short, we are skeptical regarding Trustee's status in this
8 appeal. However, because we affirm the decision of the bankruptcy
9 court on the merits, we do not consider it necessary to examine
10 whether Trustee is a proper appellant here.

11
12 B.

13 The bankruptcy court did not abuse its discretion in
14 granting the Supplemental Motion for Relief from Stay.

15 Neither the Committee nor Trustee have argued that the
16 bankruptcy court abused its discretion by concluding that
17 sufficient cause existed to grant Lederman's Original Motion and
18 relief from the automatic stay.

19
20 ¹² We note that, had Trustee moved to substitute himself for
21 the Committee pursuant to Fed. R. App. P. 43(b), there is some
22 authority that would allow us to grant the substitution. Malick
23 v. Int'l Bhd. Of Elec. Workers, 814 F.2d 674, 679 (D.C. Cir.
24 1987) (appellate court may substitute for a deceased party under
25 Appellate Rule 43(b) a party that could have joined in the
26 appeal). However, Trustee has not moved for substitution under
27 Fed. R. App. P. 43(b), and we are unsure of our authority to act
28 sua sponte on this question. Alabama Power Co. v. ICC, 852 F.2d
1361, 1366 (D.C. Cir. 1988) (motion for substitution required when
substitution is contested).

We also note that Rule 6009 would likely not allow a trustee
to appear in an appeal in place of creditors on his own initiative
and without court or panel approval. While Rule 6009 allows a
trustee to appear in the place of a debtor, it does not allow a
trustee to step into a creditor's shoes when, as here, the
creditor is acting only in the interests of some but not all
creditors. Koch Refining v. Farmers Union Cent. Exch., Inc, 831
F.2d 1339, 1348-49 (7th Cir. 1987).

1 Moreover, neither the Committee nor Trustee have questioned
2 the propriety of the provisions of the bankruptcy court's order
3 granting the Original Motion entered on August 25, 2006. In part,
4 that order clearly provided that "A judgment substantially in the
5 form presented with the motion for Relief from Stay as it might be
6 modified by the state court, may be signed and entered." The form
7 of judgment that had been proposed by Lederman to the state court,
8 which the bankruptcy court had before it at the time it entered
9 the order granting the Original Motion, included a provision
10 quieting title in Lederman to both properties. In other words,
11 neither the Committee nor Trustee challenge the bankruptcy court's
12 exercise of discretion to allow the state court to enter a
13 judgment providing that Lederman held fee simple title to the two
14 properties and quieting ownership to them in her.

15 Instead, the Committee and Trustee target the bankruptcy
16 court's Supplemental Order. In particular, Trustee argues that
17 the bankruptcy court abused its discretion in granting the
18 Supplemental Motion in three ways: (1) an adversary proceeding in
19 the bankruptcy court was required to determine ownership of the
20 Hillcrest Property and Beverly Hills Condo; (2) the Supplemental
21 Motion was merely a disguised motion for reconsideration and did
22 not fulfill the requirements for such motions; and (3) the
23 granting of the Supplemental Motion violated the local bankruptcy
24 rules of the Central District of California. It is not obvious
25 that, had the motion been styled as one for clarification rather
26 than supplemental, any of these issues would have arisen.

27 In its Opening Brief at p.20, the Committee cites numerous
28 cases, including our own, for the proposition that:

1 The Bankruptcy Court has jurisdiction over all
2 "core" proceedings, which include, but are not
3 limited to, matters concerning the
4 administration of the Debtors' estate and other
5 proceedings affecting the liquidation of assets
6 of the estate. 28 U.S.C. § 157(b)(2)(A) & (O).
Accordingly, the State Court does not have
authority to determine what constitutes property
of the estate and dispose of the Debtors'
properties.

7 But the Ninth Circuit has cautioned against the precise
8 argument made here by the Committee and Trustee. The property
9 dispute in this appeal was fully tried and adjudicated in a state
10 court and dealt principally with state law causes of action, i.e.,
11 breach of contract and breach of fiduciary duty. The claims raised
12 by Lederman in the state action are founded upon state law and
13 could "not have been commenced in a court of the United States
14 absent jurisdiction under [the bankruptcy provisions]." 28 U.S.C.
15 § 1334(c)(2). As the court of appeals ruled, to characterize such
16 litigation as a core proceeding within the exclusive jurisdiction
17 of the bankruptcy court would raise constitutional problems under
18 Marathon, given the state litigation's common law nature. "We
19 have held that a court should avoid characterizing a proceeding as
20 core if to do so would raise constitutional problems. The
21 apparent broad reading that can be given to § 157(b)(2) should be
22 tempered by the Marathon decision." Christensen v. Ward (In re
23 Tucson Estates, Inc.), 917 F.2d 1162, 1166 (9th Cir. 1990).

24 Although not specifically cited, the Committee and Trustee
25 appear to rely on 28 U.S.C. § 1334(d): "The district court in
26 which a case under chapter 11 is commenced or is pending shall
27 have exclusive jurisdiction of all of the property, wherever
28 located, of the debtor as of the commencement of such case, and of

1 property of the estate." In Tucson Estates, again, the court of
2 appeals cautioned against giving this provision too broad a scope.

3
4 Congress did not intend this provision to reach
5 . . . broadly. . . . The provision's purpose
6 was to eliminate the jurisdictional distinctions
7 between property in the possession and property
8 not in the possession of the bankruptcy court.
See 124 CONG.REC. 11, 108, 17, 408, 17, 425
(1978); 1 COLLIER BANKRUPTCY MANUAL § 23.00 (1978).
Courts in applying the provision defer to state
courts in many cases that concern estate
property.

9 Tucson Estates, 917 F.2d at 1166.

10 A bankruptcy court "shall" grant relief from the automatic
11 stay "for cause." §362(d)(1). Where a bankruptcy court may
12 exercise discretionary abstention in deciding issues in favor of
13 an imminent state court action involving the same issues, cause
14 may exist for lifting the stay as to the state court action. In
15 re Castlerock Properties, 781 F.2d 159, 163 (9th Cir. 1986). The
16 Tucson Estates court listed the criteria that bankruptcy courts
17 should apply in discretionary abstention.

18 (1) the effect or lack thereof on the efficient
19 administration of the estate if a court
20 recommends abstention, (2) the extent to which
21 state law issues predominate over bankruptcy
22 issues, (3) the difficulty or unsettled nature
23 of the applicable law, (4) the presence of a
24 related proceeding commenced in state court or
25 other nonbankruptcy court, (5) the
26 jurisdictional basis, if any, other than § 1334,
27 (6) the degree of relatedness or remoteness of
28 the proceeding to the main bankruptcy case, (7)
the substance rather than form of an asserted
core proceeding, (8) the feasibility of severing
state law claims from core bankruptcy matters to
allow judgments to be entered in state court
with enforcement left to the bankruptcy court,
(9) the burden of the bankruptcy court's docket,
(10) the likelihood that the commencement of the
proceeding in bankruptcy court involves forum
shopping by one of the parties, (11) the
existence of a right to a jury trial, and (12)
the presence in the proceeding of nondebtor
parties.

1 912 F.2d at 1167. Because the Committee and Trustee have not
2 provided us with a transcript of the hearing at which the
3 bankruptcy court explained its reasons for granting the Original
4 Motion, we cannot precisely determine if the bankruptcy court
5 actually applied any of these twelve criteria in its analysis. We
6 have previously warned litigants that "failure to provide an
7 adequate record may be grounds for affirmance." In re Burkhart,
8 84 B.R. 658 (9th Cir. BAP 1988). However, on this record, it
9 would appear that factors 1, 2, 4, 5, 7, 9 and 11 favor stay
10 relief and none strongly support the contrary. We conclude,
11 therefore, that the bankruptcy court had sufficient support in the
12 record to grant the Supplemental Motion and to allow the state
13 court to enter and enforce its judgment.

14 The Committee also cites Rule 7001(2) for the proposition
15 that "a proceeding to determine the validity, priority, or other
16 interest in property" is an adversary proceeding. We have no
17 quarrel with this notion that, if the bankruptcy court were to
18 decide the contest over who owned these properties, an adversary
19 proceeding would be the required procedure. However, the
20 Committee insists that "the effect of the Bankruptcy Court's
21 ruling and the Supplemental Order was to make a determination of
22 an interest in the properties, which is only appropriately made in
23 an adversary proceeding." Committee's Opening Br. at 19. We
24 disagree with this suggestion because it fails to recognize that
25 the motions before the bankruptcy court were not to "make a
26 determination of an interest in properties," but only to obtain a
27 ruling as to where that determination would be made.

28

1 The Committee and Trustee refer to a several cases in arguing
2 that the bankruptcy court should not grant stay relief when that
3 action would also determine the merits of claims affecting
4 property of the estate. For example, in In re Colrud, 45 B.R. 159
5 (Bankr. D. Ak. 1984), a creditor sought to lift the stay to allow
6 a judicial foreclosure sale. The Colrud court modified the
7 automatic stay to provide adequate protection for the creditor by
8 increasing the interest rate payable on a note. In a footnote in
9 its decision, on which Trustee relies, the bankruptcy court opined
10 that the question of whether debtors owned a particular property
11 and whether the creditor was in fact a creditor of the estate
12 could not be litigated in a context of a motion to lift stay.

13 Trustee also cites two of our opinions to support his
14 position. In In re Lutz, 219 B.R. 837, 841 (9th Cir. BAP 1998),
15 we determined that it was improper for a bankruptcy court to make
16 a determination of a setoff claim pursuant to § 362(a)(7) in the
17 context of a motion for relief from stay. And in In re Boni, 240
18 B.R. 381 (9th Cir. BAP 1999), the Panel reversed a bankruptcy
19 court's grant of a motion to annul the stay to allow entry of a
20 state court action against the debtor, where the court also ruled
21 that the judgment in the state court was nondischargeable.

22 As can be seen, all three cases cited by Trustee for the
23 proposition that the bankruptcy court should not modify the stay
24 where to do so would allow another court to determine claims
25 affecting the property of the estate deal with decisions that
26 implicated substantive rights under title 11. In the two cases
27 decided by the Panel, we reversed bankruptcy courts that, in
28 orders modifying the automatic stay, also ruled on the merits of

1 underlying claims where such rulings should have been determined
2 in the bankruptcy court in the context of an adversary proceeding.
3 Thus, they do not support Trustee's general argument that the
4 court should not lift the stay when that action might also affect
5 the merits of claims affecting property of the estate. They only
6 stand for the proposition that the court should not modify the
7 stay where the effect of the court's order also determines other
8 substantive rights under title 11 that are within the exclusive
9 jurisdiction of the bankruptcy court. As discussed above, the
10 determination of property rights under the facts of this case is
11 not within the exclusive jurisdiction of the bankruptcy court.

12 In short, Trustee's fundamental premise that the bankruptcy
13 court has "exclusive" jurisdiction, or even some nebulous form of
14 preferred jurisdiction, over the property involved in the state
15 court action, is flawed. In this context, an adversary proceeding
16 in the bankruptcy court was not the only fashion in which issues
17 involving ownership of these properties could be determined.¹³

18 The other two arguments advanced by the Committee and
19 Trustee, that the Supplemental Motion was merely a disguised
20 motion for reconsideration and that the bankruptcy court's order
21 approving the Supplemental Motion violated the local bankruptcy
22 rules, also lack merit.

23
24

25 ¹³ At oral argument, both Trustee and Lederman seemed
26 concerned that the bankruptcy court's decision may be interpreted
27 as determining the parties' substantive rights in the Hillcrest
28 and Beverly Hills properties. However, we conclude that, in its
orders, the bankruptcy court made no such determination. The
court merely modified the automatic stay to allow the parties to
exercise whatever rights they may have under otherwise applicable
law.

1 Lederman never asked the bankruptcy court to “reconsider” nor
2 sought to overturn the order granting the Original Motion. Every
3 reference in Lederman’s pleadings and in counsel’s comments at the
4 hearings emphasized that the Supplemental Motion was designed to
5 obtain a clarification of the authority of the state court to
6 enter and enforce its judgment. The Supplemental Motion did not
7 seek “a substantive change of mind by the court,” a requirement in
8 our circuit to construe a motion as one for reconsideration under
9 Fed. R. Civ. P. 59(e).¹⁴ Miller v. Transamerican Press, Inc., 709
10 F.2d 524, 526 (9th Cir. 1983). Since the Supplemental Motion
11 never attempted to undo, overturn or “substantive[ly] change” the
12 original order, it is not a disguised motion for reconsideration
13 and there is no need to apply the requirements of case law
14 interpreting Fed. R. Civ. P. 59 to the Supplemental Motion.¹⁵ In
15 our view, the Supplemental Motion merely sought a more detailed
16 statement of the relief the bankruptcy court intended to grant in
17 the order disposing of the Original Motion.

18 Finally, the bankruptcy court’s order approving the
19 Supplemental Motion also did not violate the local bankruptcy
20 rules of the Central District of California. Local Bankruptcy
21 Rule 1001-1(b) provides that: “The Local Bankruptcy Rules . . .
22 shall be applied uniformly throughout this District unless

23
24 ¹⁴ This rule is made applicable in bankruptcy cases by Rule
25 9023.

26 ¹⁵ When applicable, to obtain relief under Rule 59, the
27 movant must show 1) the motion is necessary to correct manifest
28 errors of law or fact upon which a judgment is based; 2) the
moving party presents newly discovered evidence; 3) the motion is
necessary to prevent manifest injustice; or 4) there is an
intervening change in controlling law. Turner v. Burlington N.
Santa Fe R. Co., 338 F.3d 1058, 1063 (9th Cir. 2003).

