NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. CC-06-1386-PaMaB
DAVID SCHWARCZ and CAROLINE SCHWARCZ,	Bk. No. LA 06-11930-AA
Debtors.	
OFFICIAL COMMITTEE OF CREDITORS HOLDING UNSECURED CLAIMS,	
Appellant,	
v.	**M E M O R A N D U M**[1]
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, MARLAR[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 P. 32.1), it has not precedential value.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.

This is an appeal of a supplemental order granting relief from stay entered in Debtors' chapter 11[3] case to allow entry and enforcement of a state court judgment. We AFFIRM.

FACTS

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

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

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

[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.

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

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

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

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

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

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

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

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

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

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

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

[5] There is an unexplained entry in Debtors' Schedule B, listing a judgment against Lederman in the amount of $69,720.00. 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.

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

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

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

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]

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[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...)

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

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

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

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

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

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

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

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

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

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

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

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

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

> (I) move the state court to record whatever judgment the state court enters; (ii) enforce whatever judgment the state court enters to effectuate the obvious purpose of the judgment to immediately return title, ownership in all 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.

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

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

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

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

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

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

> [Lederman] may proceed in the non-bankruptcy forum to final judgment (including any appeals) in accordance with applicable non-bankruptcy law. Furthermore, the judgment signed by the state court may be entered, recorded, executed upon and put into effect as to title, ownership, possession, and all other rights in, to and 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.

The Committee filed a timely notice of appeal of the Supplemental Order on October 25, 2006.[7]

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

JURISDICTION

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

ISSUE[8]

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

STANDARD OF REVIEW

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

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

[8] In its opening brief, the Committee also lists as an issue on appeal whether the bankruptcy court erred in allowing the state court to evict the debtors. We do not address this issue. First, no stay pending appeal was entered, and this issue was likely 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.

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

DISCUSSION

A.

Trustee and the Committee

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

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

[9] The notice of appeal filed by the Committee listed the 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...)

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

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

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[9](...continued)
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.

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

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

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

[11] We note that one circuit has ruled that a chapter 7 trustee succeeds only to the rights of the debtor-in-possession. Hill v. Akamai Technologies, Inc. (In re MS55, Inc.), 477 F.3d 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.

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

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

B.

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

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

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[12] We note that, had Trustee moved to substitute himself for the Committee pursuant to Fed. R. App. P. 43(b), there is some authority that would allow us to grant the substitution. Malick v. Int'l Bhd. Of Elec. Workers, 814 F.2d 674, 679 (D.C. Cir. 1987)(appellate court may substitute for a deceased party under Appellate Rule 43(b) a party that could have joined in the appeal). However, Trustee has not moved for substitution under Fed. R. App. P. 43(b), and we are unsure of our authority to act 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).

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

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

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

> The Bankruptcy Court has jurisdiction over all "core" proceedings, which include, but are not limited to, matters concerning the administration of the Debtors' estate and other proceedings affecting the liquidation of assets 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.

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

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

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

> Congress did not intend this provision to reach . . . broadly. . . . The provision's purpose was to eliminate the jurisdictional distinctions between property in the possession and property 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.

Tucson Estates, 917 F.2d at 1166.

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

> (1) the effect or lack thereof on the efficient administration of the estate if a court recommends abstention, (2) the extent to which state law issues predominate over bankruptcy issues, (3) the difficulty or unsettled nature of the applicable law, (4) the presence of a related proceeding commenced in state court or other nonbankruptcy court, (5) the jurisdictional basis, if any, other than § 1334, (6) the degree of relatedness or remoteness of 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.

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

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

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

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

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

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

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

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

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[13] At oral argument, both Trustee and Lederman seemed concerned that the bankruptcy court's decision may be interpreted as determining the parties' substantive rights in the Hillcrest 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.

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

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

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[14] This rule is made applicable in bankruptcy cases by Rule 9023.

[15] When applicable, to obtain relief under Rule 59, the movant must show 1) the motion is necessary to correct manifest 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).

otherwise ordered by the Court in a particular matter." (Emphasis added.). Since the local rules allow an individual bankruptcy judge to opt out of the rules in a particular matter, it cannot be an abuse of discretion for the court to fail to enforce its own discretionary rules. Price v. Lehtinen (In re Lehtinen), 332 B.R. 404, 411 (9th Cir. BAP 2005).

The procedural arguments raised by the Committee and Trustee do not convince us that the bankruptcy court abused its discretion. To the contrary, what the bankruptcy court faced was the simple question whether the automatic stay should be modified to allow a state court to enter and enforce a judgment resolving issues fully adjudicated prior to the bankruptcy filing. It granted the Original Motion and entered an order allowing the entry of judgment. However, when Lederman persuaded the bankruptcy court that its order required clarification, it granted the Supplemental Motion providing that the state court could not only enter a judgment, but that the judgment could be enforced as to the properties as well.

CONCLUSION

We AFFIRM the supplemental order of bankruptcy court.