

APR 12 2005

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OF THE NINTH CIRCUIT**

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

6	In re:)	BAP No.	NC-04-1379-SHB
)		
7	CENTRAL EUROPEAN INDUSTRIAL)	Bk. Nos.	02-30419
	DEVELOPMENT COMPANY, LLC;)		02-30421
8	THE KONTRABECKI GROUP LP,)		
)	Adv. No.	02-03278
9	Debtors.)		
)		
10	TKG EUROPE, LP,)		
11)	MEMORANDUM¹	
	Appellant,)		
12)		
	v.)		
13)		
	LEHMAN BROTHERS HOLDINGS,)		
14	INC.,)		
)		
15	Appellee.)		

Argued and Submitted on
January 20, 2005 at San Francisco, California

Filed - April 12, 2005

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

Honorable Dennis Montali, Bankruptcy Judge, Presiding

Before: SMITH, HOLLOWELL,² AND BRANDT, Bankruptcy Judges

¹This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

²Hon. Eileen W. Hollowell, United States Bankruptcy Judge for the District of Arizona, sitting by designation.

1 This appeal is from final orders 1) denying TKG Europe's
2 motion for relief from scheduling order; 2) denying TKG Europe's
3 motion for mandatory abstention pursuant to 28 U.S.C.
4 § 1334(c)(2); and, 3) granting summary judgment in favor of
5 Lehman Brothers ("Lehman"). We AFFIRM.

6 FACTS

7 1. The Parties

8 Lehman entered into a credit agreement in February 1998 with
9 CEIDCO and The Kontrabecki Group LP ("TKG", and collectively as
10 "Debtors") which are affiliates of TKG Europe. The funds loaned
11 by Lehman were to be used to finance loans from TKG to its
12 wholly-owned Polish subsidiaries, Warsaw Distribution Center
13 Sp.Zo.o. ("WDC") and Centrum Biznesu Ozaro Sp.Zo.o. ("OBC"),
14 among other entities.

15 TKG Europe is not a party to the Credit Agreement nor most
16 other loan documents. The bankruptcy court described TKG Europe
17 as the corporate parent, grandparent, and great-grandparent of
18 the entities that borrowed from Lehman or used its funds. TKG
19 Europe pledged its 50% ownership interest in CEIDCO as security
20 for the loans under the credit agreement ("membership pledge
21 agreement"). TKG Europe owns 0.1% of TKG and CEIDCO owns the
22 remaining 99.9%. TKG Europe's principal is John Kontrabecki
23 ("Kontrabecki"). Kontrabecki is also the former principal of
24 Debtors, WDC, and OBC.

25
26 2. The Bankruptcy Litigation

27 On February 15, 2002, one business day before Lehman's loans
28

1 matured, Debtors and former debtor TKG Europe³ filed voluntary
2 chapter 11⁴ petitions.

3 In October 2002, Debtors and TKG Europe (collectively
4 "Plaintiffs") filed applications for restraining orders and a
5 motion for a preliminary injunction along with this adversary
6 proceeding.⁵ In their adversary complaint, Plaintiffs stated
7 that the court has jurisdiction over this matter because this is
8 a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (B), (C),
9 (K) and (O). Lehman opposed the injunctive relief, arguing that
10 the court lacked jurisdiction because some of the loan documents
11 at issue, specifically the "lockbox agreements," included foreign
12 arbitration clauses. Lehman did not, however, move for
13 abstention or similar relief, nor did it claim that the court
14 lacked jurisdiction with respect to the Credit Agreement.
15 Plaintiffs filed papers encouraging the court to retain
16 jurisdiction and reach the merits.

17 _____
18 ³The court dismissed TKG Europe's bankruptcy case (Case No.
19 02-30420), in January 2003, on the ground that TKG Europe could
20 not effect a plan of reorganization. TKG Europe remains before
the court only as the sole remaining plaintiff in this adversary
proceeding against Lehman.

21 ⁴Unless otherwise indicated, chapter and section references
22 are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and rule
23 references are to the Federal Rules of Bankruptcy Procedure,
Rules 1001-9036, which make applicable certain Federal Rules of
Civil Procedure.

24 ⁵The complaint in this adversary asserts claims against
25 Lehman for breach of contract, breach of the covenant of good
26 faith and fair dealing, promissory estoppel, intentional and
27 negligent misrepresentation, intentional and negligent
28 interference with prospective economic advantage, unfair business
practices and declaratory relief. The prayer for relief seeks
monetary, injunctive and declaratory relief and rescission of
part or all of the Credit Agreement.

1 After holding eight hearings on the matter, the court issued
2 a memorandum rejecting Lehman's jurisdiction arguments but
3 denying, without prejudice, Plaintiffs' motion for injunctive
4 relief on the ground that the allegations were too vague to form
5 a basis for such relief.

6 In January 2003, the court appointed a trustee for Debtors
7 and it was soon discovered that, unbeknownst to Lehman or the
8 court, Kontrabecki had arranged for the transfer of TKG's control
9 of WDC and OBC to his business colleague, Piotr Kukulka. Lehman
10 and the Trustee then filed an adversary proceeding against
11 Kontrabecki, Kukulka and others seeking to unwind the transfers,
12 among other things.

13 The parties reached a compromise, and in September 2003, the
14 court granted the Trustee's motion for approval of a settlement
15 agreement between the Debtors, Lehman and the Trustee
16 ("Settlement Agreement"). The Settlement Agreement provides in
17 part:

- 18 • Lehman's prepetition claims against Debtors are allowed
19 in the slightly reduced amount of \$29,997,886.20.
- 20 • The adversary proceeding to unwind Kontrabecki's
21 unauthorized transfers is assigned to Lehman, with
22 Debtors' estates retaining the right to prosecute
23 certain actions if Lehman does not do so.
- 24 • After Lehman is reimbursed for certain costs and fees
25 of litigation, "the next available proceeds shall be
26 split between the [Debtors' Estates] and Lehman, on the
27 basis of 25% to the Estates and 75% to Lehman" until
28 payment in full of administrative, priority and non-
subordinated general unsecured claims (other than
Lehman's claim).
- The adversary proceeding against Lehman shall be
dismissed with prejudice as to all claims asserted by
CEIDCO, TKG, WDC and OBC (but not TKG Europe).

1 3. TKG Europe's Remaining Claims against Lehman

2 On October 17, 2003, over a year after filing the complaint
3 in the adversary proceeding, TKG Europe filed its abstention
4 motion, seeking in the alternative to dismiss TKG Europe's claims
5 against Lehman without prejudice under Fed.R.Civ.Pro. 41(a)(2).
6 TKG Europe contends that, since Debtors' claims against Lehman
7 were settled by a court-approved settlement on October 6, 2003,
8 the only remaining claims against Lehman are non-core, and
9 therefore, the court must abstain under 28 U.S.C. § 1334(c)(2).⁶

10 On November 25, 2003, Lehman countered with a motion for
11 summary judgment ("Lehman MSJ") claiming that TKG Europe, neither
12 a party or a third-party beneficiary of the Credit Agreement, has
13 no standing to assert the claims. Additionally, Lehman argues
14 that TKG Europe has not sustained any damages, has failed to
15 plead sufficient facts to sustain a cause of action for unfair
16 business practices, and cannot maintain a claim for declaratory
17 relief because there is no actual controversy between the
18 parties.

19 The hearings on both motions were set for December 19, 2003.
20 Prior to the December hearing date, however, it came to light
21 that TKG Europe's special litigation counsel, the Sedgwick firm,

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23 ⁶In addition to this adversary proceeding, TKG Europe and
24 Debtors filed a complaint in New York state court against Lehman
25 in January 2003. TKG Europe filed a second suit in New York
26 against Lehman on March 4, 2003, raising new claims concerning
27 Lehman's foreclosure and imminent public sale of TKG Europe's
28 shares in CEIDCO. After learning that a trustee had been
appointed in Debtors' bankruptcy case, and that the Trustee was
uncertain about how to proceed in Debtors' New York action, TKG
Europe dismissed the first New York suit and consolidated all of
its claims against Lehman in the second suit where it now,
apparently, prefers to have the matter heard.

1 had a potential conflict with Lehman and therefore would have to
2 withdraw.

3 On December 19, 2003, Lehman agreed to a continuance to
4 January 26, 2004. TKG Europe then requested another continuance
5 and, following a status conference, the court issued an order
6 continuing the combined hearing on both motions to March 22 so
7 that TKG Europe could have more time to retain substitute
8 counsel. On March 2, Sedgwick requested another one month
9 continuance of the hearing and a briefing schedule on both
10 motions. The court held a status conference the following day
11 and, after inquiring why it was taking so long to retain new
12 counsel, the court specifically warned TKG Europe that if it did
13 not obtain substitute counsel promptly, the abstention motion
14 would be taken off the calendar for lack of prosecution. The
15 court further admonished TKG Europe that, if it did not file an
16 opposition to the Lehman MSJ, the court would consider the motion
17 unopposed. The court then continued the hearing on the motions
18 to April 28 with the opposition to the Lehman MSJ due April 14.

19 On April 14, instead of filing an opposition to the Lehman
20 MSJ, Sedgwick filed a written motion for leave to withdraw. A
21 hearing was held on April 15, at which time the court denied the
22 TKG Europe abstention motion for lack of prosecution and
23 continued Sedgwick's motion to withdraw to April 27 so that TKG
24 Europe could respond. The court also noted that the time to
25 oppose the Lehman MSJ had expired.

26 At the April 27 hearing, TKG Europe's new counsel requested
27 leave to file a motion for relief from the scheduling order. The
28 court granted the request but also indicated that after reviewing

1 the Lehman MSJ, the court's tentative ruling was to grant it. On
2 May 6, TKG Europe filed its motion for relief from the scheduling
3 order and opposition to the Lehman MSJ. Lehman never filed an
4 opposition to the abstention motion, claiming that, even though
5 it was prepared to do so, it should not have to respond to the
6 abstention motion until TKG Europe responded to its MSJ. The
7 court apparently agreed.

8 After TKG Europe filed its late opposition to Lehman's MSJ
9 on May 6, the court determined that Lehman need not file further
10 papers regarding either the MSJ or the TKG Europe abstention
11 motion. The court thereafter issued three orders with an
12 accompanying memorandum decision denying TKG Europe's motion for
13 relief from the scheduling order, denying TKG Europe's abstention
14 motion and granting the Lehman MSJ.

15 JURISDICTION

16 The bankruptcy court had jurisdiction under 28 U.S.C. § 1334
17 and § 157(b)(1) and (b)(2). We have jurisdiction under 28 U.S.C.
18 § 158(b)(1).

19 ISSUES

20 1. Whether the court abused its discretion in denying TKG
21 Europe's motion for relief from the scheduling order, which
22 necessarily led to the denial of TKG Europe's untimely motion for
23 mandatory abstention.

24 2. Whether the court erred in granting summary judgment in
25 favor of Lehman.

26 STANDARD OF REVIEW

27 Appellate review of a district court's case-management
28 decision, such as whether to grant or deny relief from scheduling

1 orders, is solely for abuse of discretion. Velez v. Awning
2 Windows, Inc., 375 F.3d 35, 40 (1st Cir. 2004). We review
3 orders granting or denying summary judgment de novo. Paine v.
4 Griffin (In re Paine), 283 B.R. 33, 36 (9th Cir. BAP 2002).

5 DISCUSSION

6 1. Motion for Relief from Scheduling Order

7 A scheduling order "is not a frivolous piece of paper, idly
8 entered, which can be cavalierly disregarded by counsel without
9 peril." Johnson v. Mammoth Recreations, 975 F.2d 604, 611 (9th
10 Cir. 1992) citing Gestetner Corp. v. Case Equipment Co., 108
11 F.R.D. 138, 141 (D. Maine 1985). Thus, a dismissal for want of
12 prosecution will stand unless it is an abuse of discretion.
13 Hamilton v. Neptune Orient Lines, Ltd., 811 F.2d 498, 499 (9th
14 Cir. 1987). In determining whether an abuse of discretion has
15 occurred, a number of factors are relevant, including the
16 plaintiff's diligence, the trial court's need to manage its
17 docket, the danger of prejudice to the party suffering the delay,
18 the availability of alternate sanctions, and the existence of
19 warning to the party occasioning the delay. Id.

20 The bankruptcy court found that TKG Europe's reasons for
21 missing scheduled deadlines were inadequate. TKG Europe
22 essentially claimed that it was unable to retain substitute
23 counsel from December 2003 to late April 2004, which prevented it
24 from meeting the deadlines set in the scheduling order. The
25 court was not persuaded, and found that, though TKG Europe
26 claimed to have contacted ten different firms to no avail, only
27 the names of four firms were provided. The court also found
28 significant Kontrabecki's failure to explain why TKG Europe could

1 not engage its New York counsel who was already familiar with the
2 dispute and willing and able to represent TKG Europe.

3 TKG Europe was warned several times by the court of the
4 specific consequences of its continued failure to meet deadlines.
5 Additionally, Lehman was able to provide evidence that TKG Europe
6 and its affiliates had used delay as a litigation tactic from the
7 early stages of the case. Following a well-reasoned analysis,
8 the court concluded that TKG Europe had not adequately justified
9 its failure to meet the April 14, 2004 deadline, that its delays
10 were prejudicial to Lehman, and that TKG Europe had not
11 demonstrated that it would be greatly prejudiced by not going to
12 trial. Therefore, the court declined to excuse TKG Europe from
13 its failure to obtain new counsel to prosecute the abstention
14 motion and to file an opposition to the Lehman MSJ.

15 TKG Europe has not provided evidence or authority supporting
16 its position that the court abused its discretion in making these
17 findings. We find no abuse of discretion in the court's denial
18 of TKG Europe's motion for relief from the scheduling order.

19 Because we find that the court did not abuse its discretion
20 in denying TKG Europe relief from the scheduling order and
21 dismissing the abstention motion for lack of prosecution, we need
22 not address the merits of TKG Europe's abstention motion.

23
24 2. Lehman MSJ

25 A trial judge may expect a party's compliance with court-
26 ordered deadlines and, absent compliance, may rule on the merits
27 of unopposed pre-trial motions. Easley v. Kirmsee, 382 F.3d 693,
28 699 (7th Cir. 2004); see also Velez v. Awning Windows, Inc., 375

1 F.3d at 40 (holding that, because the defendants failed to file
2 an opposition to the motion for summary judgment by the court-
3 appointed deadline, the judge was entitled to consider the motion
4 as unopposed and to disregard a subsequently-filed opposition).

5 The court considered the unopposed Lehman MSJ and granted
6 it, finding that TKG Europe lacked standing to bring any third
7 party contract claims against Lehman because it was neither a
8 party to the Credit Agreement nor a third party beneficiary
9 thereunder. The court further held that the remainder of TKG
10 Europe's claims either appeared to be derivative, and therefore
11 barred by the Settlement Agreement, or failed sufficiently to
12 allege how TKG Europe was damaged by Lehman's alleged conduct.

13 In arguing that the court erred in granting summary
14 judgment, TKG Europe argues that there is an "internal
15 inconsistency" in the court's decision because, in addition to
16 denying TKG Europe's abstention motion for lack of prosecution,
17 the court addressed the merits of TKG Europe's abstention motion
18 and held, in the alternative, that abstention was not appropriate
19 because the matter was a core proceeding. According to TKG
20 Europe, the inconsistency occurs insofar as the court held, in
21 granting the Lehman MSJ, that TKG Europe had no standing to bring
22 its contract claims against Lehman under the Credit Agreement.
23 The argument proffered is that, if TKG Europe had no rights under
24 the contract to seek to enforce or rescind it, then its complaint
25 could not be a core proceeding, and therefore its abstention
26 motion should have been granted. Because we find that the court
27 did not abuse its discretion in dismissing the abstention motion
28 for lack of prosecution, we need not address the court's

1 alternative findings regarding the merits of TKG Europe's
2 abstention motion.

3 TKG Europe does not disagree with the court's conclusion
4 that it is not a third party beneficiary by virtue of its
5 ownership and manager status with contracting parties, but claims
6 instead that it has third party beneficiary status because it is
7 a party to and guarantor of the Credit Agreement through its
8 Membership Pledge, an argument overlooked by the court. The
9 court, however, specifically addressed this issue and found that
10 TKG Europe had inflated its role, that TKG Europe was not a party
11 to the Credit Agreement, and that TKG Europe had cited no
12 authority that its managerial role made it a third party
13 beneficiary. As argued by Lehman, it takes far more than merely
14 being a parent entity of a contracting party to create a third
15 party beneficiary relationship, and TKG Europe has failed to make
16 such a showing. United Int'l Holdings v. Wharf Ltd., 988 F.
17 Supp. 367, 370 (S.D.N.Y. 1997).

18 While the court agreed with TKG Europe's assertion that an
19 equity owner who invests funds and labor in an entity in reliance
20 on a promise to loan funds to that entity could be a third party
21 beneficiary, the court found that TKG Europe's allegations and
22 evidence of Lehman's promises were too amorphous to support such
23 a finding in this case. The complaint alleges that "[i]n
24 reliance upon Lehman's promise of flexibility, [Debtors] executed
25 the Credit Agreement," but does not allege that TKG Europe
26 executed its Membership Pledge Agreement or did anything else in
27 reliance on any such promises. The court found, and we agree,
28 that TKG Europe's evidence boils down to the allegation that

1 Lehman promised Debtors it would be "flexible" and would "adjust"
2 the interest rate, loan terms, and exit fees in unspecified ways.
3 TKG Europe has presented no argument or evidence on appeal that
4 would lead to a different conclusion.

5 TKG Europe does not challenge the court's legal conclusions
6 with respect to its non-contract claims, but argues that the
7 court should never have reached the matter because its abstention
8 motion should have been granted. This argument has already been
9 addressed and rejected.

10 TKG Europe also believes the court erred in granting summary
11 judgment without ruling on its Fed.R.Civ.P. Rule 56(f) request
12 for discovery. TKG Europe's request, however, was filed with its
13 untimely opposition papers and, therefore, not considered by the
14 court. Because we find no error with the court's denial of TKG
15 Europe's motion for relief from the scheduling order, the court
16 did not err in not making any findings with respect to matters
17 asserted in the late-filed opposition.

18 Last, TKG Europe argues that the court improperly concluded
19 that TKG Europe's principal witness, Kontrabecki, lacked
20 credibility which is a determination that cannot be made on
21 summary judgment. The court, however, did not base its decision
22 with respect to the summary judgment motion on the credibility of
23 John Kontrabecki. Rather, the court referred to Kontrabecki only
24 in the discussion regarding TKG Europe's motion for relief from
25 the scheduling order, noting that Kontrabecki's declaration would
26 be given the weight it deserves in light of the fact that he had
27 earlier made statements to the court that turned out to be
28 misrepresentations.

CONCLUSION

Based on the foregoing, we AFFIRM.

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