

**APR 12 2005**

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U.S. BKCY. APP. PANEL  
OF THE NINTH CIRCUIT**

**NOT FOR PUBLICATION**

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

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		)	<b>MEMORANDUM<sup>1</sup></b>	
	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,<sup>2</sup> AND BRANDT, Bankruptcy Judges

<sup>1</sup>This 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.

<sup>2</sup>Hon. 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 Europe<sup>3</sup> filed voluntary  
2 chapter 11<sup>4</sup> 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.<sup>5</sup> 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 <sup>3</sup>The 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 <sup>4</sup>Unless 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 <sup>5</sup>The 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).<sup>6</sup>

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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22  
23 <sup>6</sup>In 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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