NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. CC-04-1408-PMaMo
AARON TONKEN,	Bk. No. LA 04-12883-EC
Debtor.	
LOREEN ARBUS, NORMAN CHANDLER FOX, and THE ISABELLE AND LEONARD GOLDENSON ASSOCIATION, INC.,	
Appellants,	
v.	**MEMORANDUM**[1]
AARON TONKEN,	
Appellee.	

Argued and Submitted on
March 23, 2005 at Pasadena, California

Filed – April 20, 2005

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

Honorable Ellen Carroll, Bankruptcy Judge, Presiding

Before: Perris, Marlar and Montali, Bankruptcy Judges.

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

Appellants Loreen Arbus, Norman Chandler Fox and The Isabelle and Leonard Goldenson Association, Inc. ("creditors") appeal the denial of their motion for mandatory abstention and relief from the automatic stay, and the denial of their subsequent motion for reconsideration. We AFFIRM.

FACTS

Debtor is currently serving a federal prison sentence for mail and wire fraud in connection with purported fundraising activities. Creditors are charitable donors and a charitable foundation who claim that debtor fraudulently induced them to make donations worth hundreds of thousands of dollars. Creditors commenced an action in the California state court seeking damages against debtor and others arising out of the allegedly fraudulent fundraising activities. Creditors obtained an order of default against debtor in the state court action, though no default judgment was entered. Several months later, the California Attorney General filed a civil action in California state court against debtor.

Debtor filed a petition for relief under Chapter 7[2] on February 10, 2004. A week later, creditors' state court action was consolidated with the case filed by the State. The State then filed a motion for relief from the automatic stay so it could proceed with its case against debtor. The State's motion for stay relief was granted.

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[2] Chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and rule references are to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, which make applicable certain Federal Rules of Civil Procedure.

Creditors filed their own motion for relief from automatic stay and for mandatory abstention on May 7, 2004. Debtor filed a "Statement of Position," in which he proposed that the requested stay relief be conditioned on creditors stipulating to set aside the default in the state court action. In a Tentative Ruling dated May 28, 2004, the bankruptcy court stated that "if the movants agree with the conditions stated in the debtor's limited opposition[,] . . . the court will grant the motion on those conditions." Creditors did not agree, and on June 22, 2004, the bankruptcy court entered an order denying creditors' motion for relief from automatic stay and for mandatory abstention. Creditors timely filed a motion for reconsideration, which the bankruptcy court denied on August 2, 2004.

Creditors then filed a complaint in bankruptcy court to determine the dischargeability of a debt. Creditors next filed a motion to stay their dischargeability action. In a Tentative Ruling dated November 30, 2004, the bankruptcy court stated that "[s]ince no request for relief from stay is pending, it is the court's tentative ruling to deny this motion so that the plaintiff's [sic] dischargeability action may proceed promptly to trial in this court."

Creditors appeal the order denying their motion for relief from the automatic stay and for abstention, and the order denying their motion for reconsideration.

ISSUES

1. Whether the court erred in denying creditors' motion for mandatory abstention.

2. Whether the court abused its discretion in denying creditors' motion for relief from automatic stay because creditors refused to stipulate that they would set aside the default they had obtained against debtor in state court as a condition of the requested relief.

3. Whether the court abused its discretion in denying creditors' motion for reconsideration.

STANDARDS OF REVIEW

Because the issue of mandatory abstention implicates the bankruptcy court's jurisdiction, we review questions of mandatory abstention de novo. In re ACI-HDT Supply Co., 205 B.R. 231, 234 (9th Cir. BAP 1997). We review the decision to grant or deny relief from the automatic stay for an abuse of discretion. In re Conejo Enters., Inc., 96 F.3d 346, 351 (9th Cir. 1996). The court's decision will not be reversed unless it is "based on an erroneous conclusion of law or [if] the record contains no evidence on which [the bankruptcy court] rationally could have based that decision." Id. (quoting In re Windmill Farms, Inc., 841 F.2d 1467, 1472 (9th Cir. 1988)). Decisions on motions for reconsideration in bankruptcy proceedings are treated as orders disposing of motions under Rule 9023 or 9024, and we review such decisions for an abuse of discretion. In re JWJ Contracting Co., Inc., 287 B.R. 501, 505 (9th Cir. BAP 2002), aff'd, 371 F.3d 1079 (9th Cir. 2004).

DISCUSSION

A. Mandatory Abstention

Creditors argue that the court erred in denying their motion for mandatory abstention. Mandatory abstention under 28 U.S.C. § 1334(c)(2) requires seven elements:

> (1) a timely motion; (2) a purely state law question; (3) a non-core proceeding [under] § 157(c)(1); (4) a lack of independent federal jurisdiction absent the petition under Title 11; (5) that an action is commenced in a state court; (6) the state court action may be timely adjudicated; (7) a state forum of appropriate jurisdiction exists.

In re Gen. Carriers Corp., 258 B.R. 181, 189 (9th Cir. BAP 2001) (quoting In re World Solar Corp., 81 B.R. 603, 606 (Bankr. S.D. Cal. 1988)).

A threshold requirement for application of the doctrine, however, is that "there must be a 'proceeding' from which the bankruptcy court can abstain." Id. at 190. When creditors filed their motion for mandatory abstention on May 7, 2004, there was no non-core proceeding pending in the bankruptcy court. Without such a "parallel proceeding in bankruptcy court," there is no proceeding "upon which § 1334(c) can operate." Id. As a result, "since there was no adversary proceeding in bankruptcy court, the bankruptcy court lacked jurisdiction over the motion for abstention of such action." Id. at 191.

Though the court did not articulate this reasoning, we may infer that the court considered the jurisdictional question from its decision not to address abstention on the merits. Thus, to the extent that the court impliedly denied the motion for mandatory

abstention because it did not have jurisdiction over it, the court did not err.

B. Automatic Stay

1. Propriety of Conditional Stay Relief Under § 362(d)

Creditors argue that the bankruptcy court exceeded its authority by effectively giving them a choice between stay relief conditioned on an agreement to set aside the default in the state court or having their motion for stay relief denied outright. Section 362(d) provides that if "cause" is shown, the court "shall grant relief from the stay . . . such as by terminating, annulling, modifying or conditioning such stay." When a bankruptcy court decides that cause exists to provide stay relief, nothing in § 362(d) requires that the relief take the form of an unqualified lifting of the stay, as opposed to some form of conditional relief. The range of options available under § 362(d) indicates that bankruptcy courts "have considerable authority and discretion in fashioning the automatic stay to fit each bankruptcy proceeding." Browning v. Navarro, 37 B.R. 201, 208 (N.D. Tex. 1983), rev'd on other grounds, 743 F.2d 1069 (5th Cir. 1984). See also In re Schwartz, 954 F.2d 569, 572 (9th Cir. 1992)("section 362 gives the bankruptcy court wide latitude in crafting relief from the automatic stay").

In the hearing on their motion for stay relief, creditors characterized the judge's proposed conditional stay relief as a court-ordered "stipulat[ion] that they would agree that the default could be set aside." Transcript of June 1, 2004 hearing at 5.

Though there seems to be a dearth of reported case law precisely on point, the Fifth Circuit condoned this type of conditional relief when it reviewed the district court's decision in Browning. In Browning, the bankruptcy court granted relief from the automatic stay so two state court actions that had been removed to the bankruptcy court and were being remanded could proceed in state court. 37 B.R. at 203. The relief was conditioned, however, on the parties' compliance with a stipulation regarding the way the proceedings would be tried, including that the cases be consolidated. Id. at 203-04. Reviewing the bankruptcy court's order, the district court held that the bankruptcy court "did not exceed its authority in conditioning the modification of the automatic stay upon each party's compliance with the stipulation and agreement." Id. at 209. On appeal, the Fifth Circuit upheld the district court's holding. Browning, 743 F.2d at 1084.

The bankruptcy court here said that it would grant the motion for stay relief, if creditors effectively would stipulate that the default would be set aside in the state court action. Given that creditors wished to use any state court judgment and collateral estoppel to establish the nondischargeability of certain debts, the bankruptcy court may well have concluded that equitable considerations demanded debtor be given a chance to defend the dischargeability claim on the merits, either in the state court fraud action or in bankruptcy court. Section 362(d) provides authority for the court to condition the stay. Because creditors refused to accept the court's proposed conditional stay relief, the

court acted within its discretion by denying the motion and assuring debtor of an opportunity to defend the nondischargeability claim on the merits.

2. Constitutional Arguments Against Conditional Relief

Creditors raise two constitutional arguments. First, they argue that the bankruptcy court's proposed conditional stay relief "effectively deprived Appellants of their due process rights," because "[t]he default at issue was obtained only after the expenditure of Appellants' time and money in preparing a lengthy complaint, researching the facts and law, and initiating the action." Creditors' Opening Brief at 18. Creditors claim that both their procedural and substantive rights would be violated by the court's proposed conditional stay relief, though they provide no authority in support of their due process argument. Creditors do not explain how their procedural rights would be affected; they suggest that their substantive rights would be violated by the proposed voluntary set-aside of the default, because they expended time and money to get to that point in the state court proceeding. The implication is that they have a property interest in their default order, of which the bankruptcy court would be depriving them.

"The fundamental requisite of due process of law is the opportunity to be heard." Grannis v. Ordean, 234 U.S. 385, 394 (1914)(quoted with approval in Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)). Creditors do not claim, nor does the record suggest, that there was anything deficient about the

notice and hearing procedures afforded to them in connection with the lift stay motion. Creditors cite no authority grafting a substantive due process standard onto the well-established standard for vacating entries of default, in either federal or state court.

Creditors have not explained why an entry of default should be seen as anything more than a procedural step in civil litigation, let alone why it should be seen as creating a cognizable property interest. As a result, creditors' attempt to dress up the setting aside of an entry of default in the solemn garb of a substantive due process violation is without merit.

Second, creditors argue that their Seventh Amendment right to a jury trial on their state law claims is jeopardized by the fact that similar issues are involved in the dischargeability action pending in the bankruptcy court. If the bankruptcy court resolves certain issues in the dischargeability action, creditors argue, principles of collateral estoppel would prevent the same issues from being tried again in state court in front of a jury.

The issues of debtor's liability and damages are properly before the bankruptcy court as part of the dischargeability proceeding. Indeed, in the prayer for relief of their nondischargeability complaint, creditors specifically ask the bankruptcy court to determine debtor's liability and liquidate their damages, in addition to requesting that the court deem the debts nondischargeable. "[T]here is no right to jury trial on the issue[s] of liability and damages where a complaint objecting to nondischargeability has been filed." In re Locke, 205 B.R. 592, 600

(9th Cir. BAP 1996). The bankruptcy court's "equitable jurisdiction permits resolution of the[se] issue[s] without a jury." Id.

Furthermore, if creditors obtained judgment in state court based on the order of default, they would not have a jury trial in state court in any event. The only way that creditors would be assured a jury trial would be if the state court set aside the order of default and tried the case on the merits. If creditors had agreed to set aside the order of default, the bankruptcy court would have granted relief from stay and creditors would have had their jury trial. Creditors cannot complain about the loss of a jury trial when they caused the result.

3. Cause to Grant Stay Relief Under § 362(d)

Creditors argue that the bankruptcy court abused its discretion by failing to find cause to lift the stay of the state court proceeding against debtor. This argument wrongly assumes that the court denied the motion for relief from stay because of an insufficient showing of cause. The order denying the motion does not state that the court failed to find cause, but simply denies the motion. Moreover, the court's Tentative Ruling impliedly states that cause existed to provide stay relief by indicating that the court was prepared to grant conditional relief. Without a showing of cause, § 362(d)(1) would not permit the court to grant any relief from stay. Additionally, the fact that the court granted the State's stay relief motion so the State could proceed with its state court action against debtor suggests that the bankruptcy court also found cause for granting stay relief to creditors, since the two

actions shared many similar issues. Thus, it appears that the court did find cause to grant stay relief, provided debtor was given a fair opportunity to defend, but that because creditors refused to comply with the conditions established by the bankruptcy court that would have allowed debtor a fair opportunity to defend, the motion ultimately was denied.

C. Reconsideration

Creditors argue that the bankruptcy court abused its discretion by denying their motion for reconsideration. Creditors argued for reconsideration on two grounds: (1) that the court made an error of law by requiring a condition before granting a request for mandatory abstention; and (2) that new evidence had come to light, namely that creditors decided, following the court's denial of the mandatory abstention/stay relief motion, to accede to some (but not all) of the conditions proposed by the court. Creditors' argument fails on both counts.

Creditors filed their motion three days after the entry of the order denying stay relief. A motion for reconsideration filed within ten days of the entry of an order is treated as a motion under Rule 9023, which incorporates Fed. R. Civ. P. 59. In re Pruitt, 319 B.R. 646, 647 (Bankr. S.D. Cal. 2005)(citing In re Captain Blythers, Inc., 311 B.R. 530, 539 (9th Cir. BAP 2004)). There are three grounds justifying reconsideration of a prior order or judgment under Rule 9023: "1) a manifest error of fact; 2) a manifest error of law; or 3) newly discovered evidence." Id.

(citing In re JWJ Contracting Co., Inc., 287 B.R. 501, 514 (9th Cir. BAP 2002), aff'd, 371 F.3d 1079 (9th Cir. 2004)).

Contrary to creditors' argument, the court did not condition mandatory abstention, because the court did not have jurisdiction over the abstention motion. The court's proposed condition related to relief from automatic stay, not to mandatory abstention, which the court declined to address on the merits given the jurisdictional problem. Conditioning the stay is explicitly provided for in § 362(d). Thus, the court made no error of law by conditioning the automatic stay, so there was no basis for setting the order aside.

To support their argument that there was newly discovered evidence, creditors are "obliged to show not only that this evidence was newly discovered or unknown to [them] until after the hearing, but also that [creditors] could not with reasonable diligence have discovered and produced such evidence at the hearing." Frederick S. Wyle, P.C. v. Texaco, Inc., 764 F.2d 604, 609 (9th Cir. 1985) (quoting Englehard Indus., Inc. v. Research Instrumental Corp., 324 F.2d 347, 352 (9th Cir. 1963)(emphasis in original)). The evidence that creditors claim was newly discovered is their changed position with respect to the court's proposed conditions. Creditors claim that, after the court denied the abstention/stay relief motion because they refused to accept all of the proposed conditions, including the voluntary set-aside of the default, they decided to accept the court's condition that no state court judgment received would be enforced. They still did not, however, agree to set aside the default.

Creditors' purported new evidence is not really evidence, but rather a revised litigation strategy with which creditors hope to achieve their desired form of stay relief. The Ninth Circuit has stated that "a motion for reconsideration is not permitted . . . to present facts which could have been presented before the initial hearing . . . [or] to rehash the same arguments made the first time or simply express an opinion that the court was wrong." In re Greco, 113 B.R. 658, 664 (D. Haw. 1990), aff'd, 952 F.2d 406 (9th Cir. 1991)(table)(citing MGIC Indem. Corp. v. Weisman, 803 F.2d 500, 505 (9th Cir. 1986)).

Even if creditors' change of heart qualified as evidence, creditors could have come to this decision before the hearing occurred. The court's May 28, 2004 Tentative Ruling, which creditors concede they saw prior to the hearing, clearly stated that "if the movants agree with the conditions stated in the debtor's limited opposition[,] . . . the court will grant the motion on those conditions." Before the June 1, 2004 hearing began, creditors knew what the conditions were, and they knew the court required compliance with all of them as a prerequisite to the requested relief. As a result, the purported new evidence was not really new, since creditors could have decided to abide by what they knew the court was asking of them prior to the commencement of the hearing. Moreover, because creditors knew that the court required them to agree to all of the conditions, creditors should have known that their refusal to set aside the default would cause the court to deny the requested relief.

CONCLUSION

The bankruptcy court did not have jurisdiction over the motion for mandatory abstention and did not err in denying it. The court did not abuse its discretion by denying relief from stay based on creditors' refusal to accept the court's proposed conditions on stay relief. Finally, the court did not abuse its discretion by denying the Rule 9023 motion. Therefore, we AFFIRM.