

APR 20 2005

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OF THE NINTH CIRCUIT**

NOT FOR PUBLICATION

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

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In re:)	BAP No. CC-04-1408-PMaMo
)	
AARON TONKEN,)	Bk. No. LA 04-12883-EC
)	
Debtor.)	
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LOREEN ARBUS, NORMAN CHANDLER)	
FOX, and THE ISABELLE AND)	
LEONARD GOLDENSON ASSOCIATION,)	
INC.,)	
)	
Appellants,)	
)	
v.)	MEMORANDUM¹
)	
AARON TONKEN,)	
)	
Appellee.)	
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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.

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

6 FACTS

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

18 Debtor filed a petition for relief under Chapter 7² on
19 February 10, 2004. A week later, creditors' state court action was
20 consolidated with the case filed by the State. The State then filed
21 a motion for relief from the automatic stay so it could proceed with
22 its case against debtor. The State's motion for stay relief was
23 granted.

24 _____
25 ² Chapter and section references are to the Bankruptcy Code,
26 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.

1 Creditors filed their own motion for relief from automatic
2 stay and for mandatory abstention on May 7, 2004. Debtor filed a
3 "Statement of Position," in which he proposed that the requested
4 stay relief be conditioned on creditors stipulating to set aside the
5 default in the state court action. In a Tentative Ruling dated May
6 28, 2004, the bankruptcy court stated that "if the movants agree
7 with the conditions stated in the debtor's limited opposition[,] . .
8 . the court will grant the motion on those conditions." Creditors
9 did not agree, and on June 22, 2004, the bankruptcy court entered an
10 order denying creditors' motion for relief from automatic stay and
11 for mandatory abstention. Creditors timely filed a motion for
12 reconsideration, which the bankruptcy court denied on August 2,
13 2004.

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

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

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1 ISSUES

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

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

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

11 STANDARDS OF REVIEW

12 Because the issue of mandatory abstention implicates the
13 bankruptcy court's jurisdiction, we review questions of mandatory
14 abstention de novo. In re ACI-HDT Supply Co., 205 B.R. 231, 234
15 (9th Cir. BAP 1997). We review the decision to grant or deny relief
16 from the automatic stay for an abuse of discretion. In re Conejo
17 Enters., Inc., 96 F.3d 346, 351 (9th Cir. 1996). The court's
18 decision will not be reversed unless it is "based on an erroneous
19 conclusion of law or [if] the record contains no evidence on which
20 [the bankruptcy court] rationally could have based that decision."
21 Id. (quoting In re Windmill Farms, Inc., 841 F.2d 1467, 1472 (9th
22 Cir. 1988)). Decisions on motions for reconsideration in bankruptcy
23 proceedings are treated as orders disposing of motions under Rule
24 9023 or 9024, and we review such decisions for an abuse of
25 discretion. In re JWJ Contracting Co., Inc., 287 B.R. 501, 505 (9th
26 Cir. BAP 2002), aff'd, 371 F.3d 1079 (9th Cir. 2004).

1 DISCUSSION

2 A. Mandatory Abstention

3 Creditors argue that the court erred in denying their motion
4 for mandatory abstention. Mandatory abstention under 28 U.S.C.
5 § 1334(c)(2) requires seven elements:

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

12 In re Gen. Carriers Corp., 258 B.R. 181, 189 (9th Cir. BAP 2001)
13 (quoting In re World Solar Corp., 81 B.R. 603, 606 (Bankr. S.D. Cal.
14 1988)).

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

25 Though the court did not articulate this reasoning, we may
26 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

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

3 B. Automatic Stay

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

5 Creditors argue that the bankruptcy court exceeded its
6 authority by effectively giving them a choice between stay relief
7 conditioned on an agreement to set aside the default in the state
8 court or having their motion for stay relief denied outright.
9 Section 362(d) provides that if "cause" is shown, the court "shall
10 grant relief from the stay . . . such as by terminating, annulling,
11 modifying or conditioning such stay." When a bankruptcy court
12 decides that cause exists to provide stay relief, nothing in
13 § 362(d) requires that the relief take the form of an unqualified
14 lifting of the stay, as opposed to some form of conditional relief.
15 The range of options available under § 362(d) indicates that
16 bankruptcy courts "have considerable authority and discretion in
17 fashioning the automatic stay to fit each bankruptcy proceeding."
18 Browning v. Navarro, 37 B.R. 201, 208 (N.D. Tex. 1983), rev'd on
19 other grounds, 743 F.2d 1069 (5th Cir. 1984). See also In re
20 Schwartz, 954 F.2d 569, 572 (9th Cir. 1992) ("section 362 gives the
21 bankruptcy court wide latitude in crafting relief from the automatic
22 stay").

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

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

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

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

4 2. Constitutional Arguments Against Conditional Relief

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

22 "The fundamental requisite of due process of law is the
23 opportunity to be heard." Grannis v. Ordean, 234 U.S. 385, 394
24 (1914) (quoted with approval in Mullane v. Cent. Hanover Bank & Trust
25 Co., 339 U.S. 306, 314 (1950)). Creditors do not claim, nor does
26 the record suggest, that there was anything deficient about the

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

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

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

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

1 (9th Cir. BAP 1996). The bankruptcy court's "equitable jurisdiction
2 permits resolution of the[se] issue[s] without a jury." Id.

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

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

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

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

7 C. Reconsideration

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

17 Creditors filed their motion three days after the entry of
18 the order denying stay relief. A motion for reconsideration filed
19 within ten days of the entry of an order is treated as a motion
20 under Rule 9023, which incorporates Fed. R. Civ. P. 59. In re
21 Pruitt, 319 B.R. 646, 647 (Bankr. S.D. Cal. 2005) (citing In re
22 Captain Blythers, Inc., 311 B.R. 530, 539 (9th Cir. BAP 2004)).
23 There are three grounds justifying reconsideration of a prior order
24 or judgment under Rule 9023: "1) a manifest error of fact; 2) a
25 manifest error of law; or 3) newly discovered evidence." Id.
26

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

3 Contrary to creditors' argument, the court did not condition
4 mandatory abstention, because the court did not have jurisdiction
5 over the abstention motion. The court's proposed condition related
6 to relief from automatic stay, not to mandatory abstention, which
7 the court declined to address on the merits given the jurisdictional
8 problem. Conditioning the stay is explicitly provided for in
9 § 362(d). Thus, the court made no error of law by conditioning the
10 automatic stay, so there was no basis for setting the order aside.

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

1 Creditors' purported new evidence is not really evidence, but
2 rather a revised litigation strategy with which creditors hope to
3 achieve their desired form of stay relief. The Ninth Circuit has
4 stated that "a motion for reconsideration is not permitted . . . to
5 present facts which could have been presented before the initial
6 hearing . . . [or] to rehash the same arguments made the first time
7 or simply express an opinion that the court was wrong." In re
8 Greco, 113 B.R. 658, 664 (D. Haw. 1990), aff'd, 952 F.2d 406 (9th
9 Cir. 1991) (table) (citing MGIC Indem. Corp. v. Weisman, 803 F.2d 500,
10 505 (9th Cir. 1986)).

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

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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.