NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. CC-04-1336-MaBK
TERRENCE REDD,	Bk. No. LA 00-35477-EC
Debtor.	Adv. No. LA 04-01300-EC
TERRENCE REDD, DAVID LALLY,	
Appellants,	
v.	**M E M O R A N D U M**[1]
CLAUD A. SINCLAIR,	
Appellee.	

Argued and Submitted on February 23, 2005
at Los Angeles, California

Filed - June 1, 2005

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

Honorable Ellen A. Carroll, Bankruptcy Judge, Presiding.

Before: MARLAR, BRANDT and KLEIN, Bankruptcy Judges.

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[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 doctrine of law or the case or the rules of res judicata. See 9th Cir. BAP Rule 8013-1.

INTRODUCTION

This appeal continues the litigation saga between the debtor and creditor's attorney Claud A. Sinclair ("Sinclair"), who paid $1,515 in sanctions before we reversed the initial sanctions order in a previous appeal. Pending that appeal, however, the bankruptcy court entered a separate order enforcing the same sanction, which order has apparently not been vacated. Sinclair's response (rather than seeking to vacate the second order) was to sue the debtor and his attorney in state court for money had and received, fraud, conspiracy and other state law causes of action.

The debtor then reopened his bankruptcy case and attempted to remove the action, but the bankruptcy court granted Sinclair's motion for remand. The debtor and his attorney ("Appellants") have now appealed the remand order.

At oral argument in this appeal, the parties stipulated to the return of the $1,515 to Sinclair. That payment has been completed. Thus, it is indisputable that the money-had-and-received count has been settled and is moot.[2]

Nonetheless, Appellants seek to prosecute this appeal as to the remaining counts. We conclude that, sans the money-had-and-received count, the bankruptcy court lacked subject matter jurisdiction over the remainder of the action. Therefore we AFFIRM the bankruptcy court's remand order.

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[2] Appellants have most recently stated, in their response to a BAP order, that the payment did not affect any of the issues on appeal. To the extent they are contending that the money-had-and-received count is still viable, such argument is barred by judicial estoppel. See Hamilton v. State Farm Fire & Cas. Co., 270 F.3d 778, 780 (9th Cir. 2001).

FACTS

In 2000, Terrence Redd ("Debtor"), a contractor, filed a chapter 7[3] bankruptcy case after an arbitration award for $45,000 had been entered against him. Sinclair was the plaintiff's attorney in that proceeding.

Sinclair filed a § 523 complaint to determine the nondischargeability of the plaintiff's debt. Debtor moved to dismiss the complaint as frivolous. In 2001, the parties stipulated to dismiss the adversary proceeding with prejudice and to retain bankruptcy court jurisdiction over any matters that might arise from the adversary proceeding. The stipulation made no provision for attorneys' fees.

Thereafter, Debtor filed a motion for attorneys' fees as a sanction pursuant to the court's § 105(a) inherent power. At a hearing, the bankruptcy court found that Sinclair's § 523 complaint and pleadings were baseless and totally deficient. On November 6, 2001, the court awarded reasonable fees and costs to Debtor in the amount of $14,730. Sinclair appealed the sanction order, and it was reversed on appeal.[4]

Nevertheless, while the appeal was pending, the bankruptcy court entered a separate order ("Enforcement Order"), following a

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[3] Unless otherwise indicated, all 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.

[4] The BAP reasoned that Debtor had circumvented Rule 9011 and its safe harbor provision, and that the bankruptcy court had abused its discretion by using its inherent power to sanction Sinclair for frivolous pleadings.

show-cause hearing, which required full payment of the sanctions.[5] After we decided the appeal, Sinclair discontinued payment and demanded the return of the money he had already paid, but did not seek to set aside the Enforcement Order.[6]

Communication then ceased between the parties, and a year later, on August 8, 2003, Sinclair filed a complaint (hereinafter the "Fraud Action") in state court against Appellants for damages on the following theories: (1) fraud and deceit; (2) negligence; (3) intentional infliction of emotional distress; (4) conversion; (5) conspiracy; and (6) money had and received. In addition, Sinclair demanded a jury trial.

The complaint alleged facts surrounding the stipulation to dismiss the § 523 adversary proceeding in bankruptcy court. In particular, Sinclair alleged that Appellants had orally agreed that both parties would pay their own attorneys' fees, and that Sinclair had signed the stipulation in reliance on Appellants' false representation. Sinclair further alleged that Appellants had secretly conspired to mislead Sinclair, all the while intending to bring their motion for attorneys' fees after the adversary proceeding was dismissed with prejudice. Sinclair alleged that he had been damaged in the amount of $25,000 as a

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[5] The bankruptcy court had jurisdiction to enforce its sanction order, notwithstanding that it was on appeal to the BAP. See Neary v. Padilla (In re Padilla), 222 F.3d 1184, 1190 (9th Cir. 2000) ("Absent a stay or supersedeas, the trial court also retains jurisdiction to implement or enforce the judgment or order but may not alter or expand upon the judgment).

[6] A motion to vacate the Enforcement Order would have been a more appropriate remedy. See Federal Rule of Civil Procedure 60(b) (incorporated by Rule 9024); RESTATEMENT (SECOND) OF JUDGMENTS §§ 78, 79 & 80 (discussing motions in same or different forum or in subsequent action).

result of the fraud, emotional stress and trauma, and diversion of work effort away from his law practice. Sinclair also alleged that Appellants' conduct was intentional and "willful and malicious."

The negligence count alleged that Appellants were grossly negligent in carrying out their duties to each other and to the court.

Finally, Sinclair alleged that Appellants had converted Sinclair's payments, and he demanded the return of $1,515.14.

Debtor immediately moved to reopen his bankruptcy case, and the bankruptcy court granted the motion to reopen on January 16, 2004, ordering Debtor to "file the necessary documents within thirty days of entry of this order to remove the State Court case . . . ." Order Granting Motion to Reopen (January 20, 2004), p. 2. The order also provided that the bankruptcy case would be closed again 60 days after entry of the order. (It was subsequently closed on May 11, 2004.)

On January 23, 2004, Appellants noticed a removal of the Fraud Action to bankruptcy court. The asserted ground for removal was that the Fraud Action was either a core proceeding or a related-to matter over which the bankruptcy court had jurisdiction under 28 U.S.C. § 1334, because the allegations related to the prior adversary proceeding in bankruptcy court.

Sinclair then filed a motion to remand the Fraud Action.[7] He

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[7] Sinclair also filed a written opposition to removal in which he argued that it was untimely. On appeal, he has neither raised the untimeliness issue as a defense in his responsive brief, nor has he cross-appealed on that issue. Therefore, he has (continued...)

argued, inter alia, that it was an unrelated civil tort action over which the bankruptcy court lacked subject matter jurisdiction.[8]

The bankruptcy court granted the motion for remand in an order entered on June 22, 2004. Appellants timely appealed.

ISSUE

The sole issue is whether the bankruptcy court erred in remanding the Fraud Action under 28 U.S.C. § 1452(a) for lack of subject matter jurisdiction.[9]

STANDARD OF REVIEW

Jurisdictional issues, including the removal of an action from state to federal court as an exercise of federal subject matter jurisdiction, are reviewed de novo. See R.T.C. v. Bayside

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[7](...continued)
waived any jurisdictional objection on the grounds of untimeliness. See Dilley v. Gunn, 64 F.3d 1365, 1367 (9th Cir. 1995) (issues not raised in the opening brief are usually deemed waived).

[8] Sinclair alternatively argued that mandatory abstention was required under 28 U.S.C. § 1334(c)(2), but we do not need to reach that issue. In the Ninth Circuit, abstention is inappropriate where an action has been removed to federal court and therefore there no longer is any parallel state court proceeding. See Schulman v. Cal. (In re Lazar), 237 F.3d 967, 981 (9th Cir. 2001); Sec. Farms v. Int'l Bhd. of Teamsters, 124 F.3d 999, 1009-10 (9th Cir. 1997).

[9] Based on our disposition, we do not need to discuss whether there were equitable reasons for remand pursuant to 28 U.S.C. § 1452(b).

Developers, 43 F.3d 1230, 1234 (9th Cir. 1995) (as amended); Miles v. Okun (In re Miles), 294 B.R. 756, 759 (9th Cir. BAP 2003).

DISCUSSION

28 U.S.C. § 1452(a) permits removal of state court actions which fall within the district court's bankruptcy jurisdiction as provided by 28 U.S.C. § 1334, and provides, in pertinent part:

> (a) A party may remove any claim or cause of action in a civil action . . . to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

28 U.S.C. § 1452(a).

Under 28 U.S.C. § 1334, bankruptcy courts have subject matter jurisdiction over all civil proceedings "arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334(b). Such proceedings may be either "core" or "noncore." Bankruptcy courts can enter final judgments in core proceedings. They include such matters as administration of the estate, dischargeability determinations, or other proceedings affecting the liquidation of the estate assets or the adjustment of the debtor-creditor relationship. See 28 U.S.C. § 157(b)(2)(A), (I), (O).

The Fraud Action alleges fraud and misrepresentation, negligence, conspiracy, and intentional infliction of emotional distress committed by Appellants during the settlement phase of the prior § 523 adversary proceeding. Therefore, Debtor attempted to remove the action on the grounds that the alleged misconduct arose out of the prior core nondischargeability adversary

proceeding. Appellants contend that "[i]t makes no sense to remand this case back to State Court and force Appellants to educate a State Court . . . about three years of litigation." Appellants' Opening Brief (November 22, 2004), p. 7:8-10.

Sinclair has responded that his complaint was grounded only in state common law, there was no federal question, that "any prior federal court litigation was merely incidental" to the complaint, and that Appellants were "attempting to manufacture" bankruptcy court jurisdiction. Appellee's Brief (December 14, 2004), at 5:5-7; 19-20.

Sinclair's argument has merit. Indeed, the § 523 adversary proceeding was dismissed with prejudice pursuant to the parties' stipulation. A court has limited subject matter jurisdiction over a matter that has been dismissed pursuant to a stipulation; such jurisdiction must be expressly retained in the stipulation itself. See Hagestad v. Tragesser, 49 F.3d 1430, 1433 (9th Cir. 1995) (citing Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 381 (1994)).[10]

Here, the stipulation contained a broad retention of

[10] Because, here, a stipulation was involved which dismissed the § 523 adversary complaint with prejudice, our facts differ from a case like Maitland v. Mitchell (In re Harris Pine Mills), 44 F.3d 1431 (9th Cir. 1995). In Harris Pine Mills, purchasers of a division of the debtor brought a state court action against the chapter 11 trustee and his professionals, alleging fraud, negligence, and negligent misrepresentation, after the division proved to be less profitable than had been anticipated. The defendants removed the action to district court, and the plaintiffs filed a motion to remand that was denied because the district court determined that the action was a core proceeding and referred it to the bankruptcy court. Id. at 1434. The district court then affirmed the bankruptcy court and the Ninth Circuit affirmed the district court's determination that the matter was a core proceeding which affected the administration of the estate. Id. at 1438.

jurisdiction over any matter arising from the adversary proceeding. In our prior disposition, we examined whether Debtor's motion for attorneys' fees and sanctions came within the ambit of that broad provision. We stated, without deciding, that it was "debatable" whether the sanction motion fell within the broad jurisdictional retention provision of the stipulation, since the motion for sanctions did not go to the merits of the adversary proceeding. Memorandum, BAP No. CC-01-1549 (August 2, 2002), at 11.

Similarly, in this appeal, Appellants concede that the causes of action are based on state law and do not go to the merits of the § 523 adversary proceeding.

Nonetheless, we also held, in the last appeal, that the bankruptcy court had "ancillary" jurisdiction to consider a motion for sanctions. Id. at 12. See also Westlake North Prop. Owners Ass'n v. City of Thousand Oaks, 915 F.2d 1301, 1303 (9th Cir. 1990). "[E[ven if a court does not have jurisdiction over an underlying action, it may have jurisdiction to determine whether the parties have abused the judicial system and whether sanctions are appropriate to remedy such abuse." Id. (citing Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 396-98 (1990)).

Here, any ancillary jurisdiction over the original sanctions order has long since disappeared together with the invalidated initial order. In the new proceedings, Sinclair did not request the bankruptcy court to use its inherent power to sanction Appellants. Instead, he asserted independent state law claims for damages. Such an action is distinguishable from an ancillary proceeding to impose sanctions for abuse of the bankruptcy

process.

Appellants also maintain that the Fraud Action is "core" because it directly affects the bankruptcy court's Enforcement Order, which, they maintain is still viable because Sinclair did not appeal that order. This argument is moot, however, in view of the settlement and repayment of Sinclair's $1,515. In other words, the only count relevant to the Enforcement Order was the count for money had and received, which now has been settled.

Therefore, the Fraud Action was not a core matter which would fall either within the bankruptcy court's retained or ancillary jurisdiction.

Appellants contend that, even if "core" jurisdiction did not exist, the action was "related to" the bankruptcy case because all of the alleged misconduct occurred in or as a result of the settlement of the § 523 adversary proceeding in bankruptcy court.

Noncore matters are synonymous with "related" proceedings. See Harris Pine Mills, 44 F.3d at 1456. Noncore matters, such as state law claims, may be heard by a bankruptcy judge, but only determined in bankruptcy court with the consent of all parties to the proceeding. See 28 U.S.C. § 157(c)(1), (2). Here, Sinclair did not consent to jurisdiction, but the bankruptcy court could nonetheless hear the action and submit its findings and conclusions to the district court if related-to jurisdiction existed. See id.

An action is "related to" a bankruptcy case "if the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy," such as altering the debtor's rights, liabilities, options or freedoms of action (either

positively or negatively) in such a way as to impact on the administration of the bankruptcy estate. Fietz v. Great W. Sav. (In re Fietz), 852 F.2d 455, 457 (9th Cir. 1988) (adopting the position of the Third Circuit in Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984)). The Pacor court realized that "there is a statutory, and eventually constitutional, limitation to the power of a bankruptcy court." Id.

Any impact of the litigation of the Fraud Action on the administration of Debtor's chapter 7 bankruptcy case is improbable. The postpetition claims, even if they resulted in damages against Appellants, would not diminish the estate property, which has already been administered. Nor would any recovery by Appellants increase the chapter 7 estate. The adversary proceeding, in which the sanction was imposed, has already been dismissed with prejudice, and the case has been closed for a second time. Moreover, the order imposing the sanction was reversed and is of no effect. Therefore, the Fraud Action is not related to the bankruptcy case for purposes of establishing the bankruptcy court's jurisdiction.

Although the bankruptcy court did not give the reasons for its ruling, we may affirm on any grounds fairly supported by the record. First Pac. Bank v. Gilleran, 40 F.3d 1023, 1024-25 (9th Cir. 1994). Here, subject matter jurisdiction was lacking and remand was mandatory without reference to the equities of the situation. See Billington v. Winograde (In re Hotel Mt. Lassen, Inc.), 207 B.R. 935, 942 (Bankr. E.D. Cal. 1997). Therefore, we conclude that the removal of the Fraud Action was inappropriate under 28 U.S.C. § 1452(a), and that remand was mandatory.

CONCLUSION

Once the money-had-and-received count was resolved by settlement, the remainder of the Fraud Action did not present any grounds for either retained core jurisdiction or ancillary jurisdiction of the bankruptcy court. Moreover, the state law claims did not relate to the bankruptcy case since the underlying adversary proceeding, in which the alleged misconduct took place, had already been dismissed with prejudice, and the chapter 7 estate had been administered and the case closed. Lacking subject matter jurisdiction, the bankruptcy court properly remanded the removed Fraud Action to state court in accordance with 28 U.S.C. § 1452(a). **AFFIRMED.**