NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. CC-08-1056-DKMo
BROTMAN MEDICAL CENTER, INC.,	Bk. No. LA 07-19705-BB
Debtor.	
RETHA GREEN, by her guardian ad litem, Rosslyn Diamond,	
Appellant,	
v.	**M E M O R A N D U M**[1]
BROTMAN MEDICAL CENTER, INC.,	
Appellee.	

Argued and Submitted on July 25, 2008
at Pasadena, California

Filed - August 15, 2008

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

Honorable Sheri A. Bluebond, Bankruptcy Judge, Presiding

Before: DUNN, KLEIN and MONTALI, Bankruptcy Judges.

[1] This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

Appellant, Retha Green ("Green"),[2] appeals the bankruptcy court's denial of her motion for relief from the stay to proceed with a state court action against the debtor, Brotman Medical Center, Inc. We AFFIRM.

I. FACTS

On August 27, 2007, Green filed her first amended complaint ("complaint") against the debtor in California superior court ("state court action"). Green also named certain physicians and nurses and several unidentified parties as defendants in the complaint.

Green asserted against all of the defendants two causes of action, battery and abuse of a dependent adult, arising from the alleged wrongful death of her daughter, Linda Brown ("Brown"). Green sought $5 million in damages on the first cause of action and medical costs and pain and suffering on the second cause of action. She also sought $25 million in punitive damages on each cause of action.

On October 25, 2007, the debtor filed a voluntary chapter 11 petition.[3] Approximately seven weeks later, Green filed a motion

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[2] Retha Green appeals by and through her guardian ad litem, Rosslyn Diamond.

[3] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037, as enacted and promulgated as of October 17, 2005, the effective date of any relevant provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. 109-8, 119 Stat. 23.

for relief from the stay under § 362(d)(1) ("Motion") to proceed with the state court action.

Specifically, Green requested relief from the stay to amend the complaint to include a medical negligence cause of action against the debtor. She also wished to proceed with discovery in the state court action, mainly to obtain from the debtor Brown's medical records, the address of one of the attending nurses and the names of the unidentified defendants.[4] Notably, discovery was at an early stage, and no trial date had been set in the state court action.

The debtor opposed the Motion. Should Green be allowed to proceed with the state court action, the debtor contended, it would be distracted from its reorganization efforts and be burdened with the expense of litigating the state court action. The debtor offered to stipulate to lifting the stay, but only if Green agreed to proceed against the debtor as a nominal defendant only and to limit recovery in the state court action to insurance proceeds.

The bankruptcy court issued a tentative ruling prior to the hearing on the Motion. In its tentative ruling, the bankruptcy court acknowledged that the California superior court was the appropriate forum in which to resolve the state court action. The bankruptcy court believed, however, that lifting the stay to

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[4] Additionally, Green sought to commence an action against the debtor in either federal or state court for alleged violations of federal and state civil false claims acts. Green also requested that the bankruptcy court allow her to file a proof of claim within 30 days of any judgment entered in her favor in the state court action.

allow Green to proceed with the state court action would "adversely impact the debtor's reorganization efforts." Given such a negative effect, the bankruptcy court noted that nothing in the Motion explained why relief from the stay needed to be granted immediately.

At the February 5, 2008 hearing on the Motion, the bankruptcy court asked Green's counsel why the stay should be lifted now rather than a few months later. Green's counsel merely reiterated the same arguments advanced in the Motion: he needed to obtain from the debtor information relating to the claims and the parties listed in the state court action.

The bankruptcy court explained that the stay stopped the prosecution of claims against the debtor only, not against the non-debtor defendants. The bankruptcy court further pointed out that the stay did not prohibit third-party discovery from the debtor. Thus, the bankruptcy court continued, if Green proceeded against the non-debtor defendants only in the state court action for now, she could obtain documents and information from the debtor through third-party discovery, notwithstanding the stay.

The bankruptcy court acknowledged Green's desire to proceed with the state court action and her need for information from the debtor to prove her claims. But, the bankruptcy court continued, these reasons did not constitute sufficient cause to lift the stay under § 362(d)(1) at the time of the hearing. The bankruptcy court stressed that the stay "[was] designed to give the [d]ebtor a breathing spell so it [could] focus on its reorganization efforts." Tr. of February 5, 2008 Hr'g, 5:19-21. To establish sufficient cause to lift the stay at that time, the

bankruptcy court explained, Green must demonstrate that "something worse [was] going to happen to [her]" if the bankruptcy court did not lift the stay immediately. Tr. of February 5, 2008 Hr'g, 15:10-11.

Green's counsel informed the bankruptcy court that, given Green's advanced age, she might die, and that the statute of limitations might run on any unidentified defendants. The bankruptcy court suggested that Green's counsel submit another motion, demonstrating these circumstances. Green's counsel declined to do so.

The bankruptcy court denied the Motion for lack of cause shown. The bankruptcy court recommended, however, that Green return in three months with a renewed motion for relief from the stay.

On February 5, 2008, the bankruptcy court entered an order denying the Motion without prejudice. Green has not renewed the Motion or filed another motion for relief from the stay in the debtor's bankruptcy case – over five months later as of the date of oral argument.

Also on February 5, 2008, the bankruptcy court entered an order setting April 8, 2008 as the last day for filing proofs of claim in the debtor's bankruptcy case. The order provided that if a creditor failed timely to file his or her proof of claim, his or her claim would be disallowed. The creditor also could not participate in the plan confirmation process nor receive any distribution under the confirmed plan. Green did not file a

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proof of claim by the deadline or at any time thereafter.[5]

Green appeals.

II. JURISDICTION

The bankruptcy court had jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157(b)(2)(G). An order denying relief from the stay, though without prejudice, is a final appealable order. See Benedor Corp. v. Conejo Enters. (In re Conejo Enters.), 96 F.3d 346, 351 (9th Cir. 1996)("Conejo").

The debtor argues that we should dismiss the appeal as moot because Green did not file a proof of claim pursuant to Rule 3002(a), thereby precluding her from receiving any distributions from the bankruptcy estate. It therefore would be "pointless," the debtor concludes, for the bankruptcy court to grant Green relief from the stay to prosecute her claims against the debtor in the state court action.

We cannot exercise jurisdiction over a moot appeal. I.R.S. v. Patullo (In re Patullo), 271 F.3d 898, 900 (9th Cir. 2001). A moot case is one where the issues presented are no longer live, and no case or controversy exists. Pilate v. Burrell (In re Burrell), 415 F.3d 994, 998 (9th Cir. 2005). The test for mootness is whether we still can grant effective relief to the appellant if we decide the merits in his or her favor. Id. We

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[5] The debtor did not include a copy of the claims register in the record before us. However, we reviewed the bankruptcy court's electronic claims register. See Atwood v. Chase Manhattan Mortgage Co. (In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

must dismiss the appeal if a case becomes moot while the appeal is pending. Patullo, 271 F.3d at 900.

Green counters that unless she has a judgment against the debtor, she does not have a claim against it. Only upon obtaining a claim against the debtor through the judgment, Green contends, can she file a proof of claim in the bankruptcy case. According to Green, Rule 3002(c)(3) allows her to file a proof of claim within 30 days after the judgment in the state court action becomes final. Thus, Green concludes, she still can file an allowable proof of claim.

Green misapprehends the concept of a claim in bankruptcy. A claim is a right to payment,[6] whether or not such right is reduced to judgment, unliquidated or disputed. See 11 U.S.C. § 101(5)(A).[7] This broad definition of a "claim" under the Bankruptcy Code "is designed to ensure that 'all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case.'" Cal.

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[6] A right to payment means an enforceable obligation, Johnson v. Home State Bank, 501 U.S. 78, 83 (1991)(quoting Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. 552, 559 (1990)); in other words, a right to payment recognized under state law. Travelers Cas. & Sur. Co. of Am. v. PG&E, 127 S. Ct. 1199, 1205 (2007).

[7] Section 101 provides, in relevant part:

> (5) The term "claim" means –
>
> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured . . . .

Dept. of Health Srvcs. v. Jensen (In re Jensen), 995 F.2d 925, 929 (9th Cir. 1993)(quoting H.R. Rep. No. 595, 95th Cong., 2d Sess. 1, 309 (1978), reprinted in 1978 U.S.C.C.A.N. 5963, 6266)(emphasis in original).

Here, Green's complaint sought damages (i.e., the right to payment) for the alleged wrongful death of her daughter. Therefore, although Green has not obtained a judgment against the debtor in the state court action, the causes of action asserted in the complaint constitute claims within the meaning of § 101(5)(A). See, e.g., In re Dow Corning Corp., 211 B.R. 545, 560 (Bankr. E.D. Mich. 1997)("Given [the] broad definition [of the term "claim" under § 101(5)], there is no question that a personal injury claim not yet reduced to judgment falls within its scope."). Accord 2 Collier on Bankruptcy ¶ 101.05[6] (Alan N. Resnick and Henry J. Sommer, eds., 15th ed. rev. 2008)("Under the Code, the fact that a tort claim may be unliquidated or disputed does not mean that it is not a claim."). See also, e.g., Institut Pasteur & Genetic Sys. Corp. v. Cambridge Biotech Corp. (In re Cambridge Biotech Corp.), 186 F.3d 1356, 1371 (Fed. Cir. 1999)(determining that a patent infringement complaint against the debtor constituted a proof of claim because the appellant's allegations in the complaint constituted "bankruptcy claims" within the meaning of § 101(5)).

Green also misconstrues Rule 3002(c)(3).[8] Rule 3002(c)(3)

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[8] Rule 3003 governs the filing of proofs of claim in chapter 11 cases. Fed. R. Bankr. P. 3003(a)(2007). Pursuant to Rule 3003(c), the bankruptcy court fixes the time for filing proofs of claim. Fed. R. Bankr. P. 3003(c)(3). See also Prestige Ltd. (continued...)

provides, in relevant part:

> An unsecured claim which arises in favor of an entity or becomes allowable as a result of a judgment may be filed within 30 days after the judgment becomes final if the judgment is for the recovery of money or property from that entity or denies or avoids the entity's interest in property (emphasis added).

Rule 3002(c)(3) applies only to creditors whose claims arise as a result of a recovery by the bankruptcy trustee. See In re Int'l Diamond Exch. Jewelers, Inc., 188 B.R. 386, 391 (Bankr. S.D. Ohio 1995)("The provisions of Bankruptcy Rule 3002(c)(3) govern the filing of all claims arising post-petition as a result of a recovery by the trustee."). That is, a creditor has a claim against the bankruptcy estate when the bankruptcy trustee has obtained a judgment against the creditor either requiring the creditor to turn over any money or property of the bankruptcy estate in its possession or avoiding the creditor's interest in money or property as a preferential transfer or fraudulent conveyance. In re Litamar, Inc., 198 B.R. 251, 254 (Bankr. N.D. Ohio 1994).

Green does not have a claim arising from any kind of recovery of money or property by the bankruptcy trustee (or, in this case, the debtor-in-possession). Green's claim instead arises from the alleged wrongful death of her daughter

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[8](...continued)
P'ship-Concord v. East Bay Car Wash Partners (In re Prestige Ltd. P'ship-Concord), 234 F.3d 1108, 1118 (9th Cir. 2000)("Prestige"). Although Rule 3002 governs the filing of proofs of claim in chapter 7, chapter 12 and chapter 13 cases, the exception under Rule 3002(c)(3) is made applicable to chapter 11 cases by Rule 3003(c)(3). Fed. R. Bankr. P. 3003(c)(3). See also Prestige, 234 F.3d at 1118 n.7.

prepetition, while in the care of the debtor. No claim has been asserted against Green. Rule 3002(c)(3) therefore does not apply.

We nonetheless disagree with the debtor that the appeal is moot. Whether or not the bankruptcy court ultimately determines that she has an allowed claim against the debtor, Green may need to obtain relief from the stay to facilitate discovery in the state court action. Alternatively, Green may need relief from the stay to the extent that the debtor can be named as a nominal defendant in the state court action so that Green can proceed against the debtor's insurer(s).

There are further bases for declining to dismiss the appeal as moot. A new claims bar deadline may be set, either by order of the bankruptcy court, see Rule 3003(c)(3), or upon conversion of the debtor's chapter 11 case to chapter 7, see Rule 1019(2), and Green could file a proof of claim by the new claims bar deadline. Also, although Green missed the formal claims bar deadline, the Motion, which included a copy of the complaint, may be sufficient to provide notice of her claim and may serve as an informal proof of claim. See In re Pizza of Hawaii, Inc., 761 F.2d 1374, 1381-82 (9th Cir. 1985)(determining that certain documents, including a copy of the complaint against the debtor's principals attached as an exhibit to the creditor's motion for relief from the stay, constituted an informal proof of claim because they stated an explicit demand revealing the nature and amount of the claim against the estate and evidenced an intent to hold the debtor liable)(citing In re Sambo's Restaurants, Inc., 754 F.2d 811, 815 (9th Cir. 1985)).

Because we still may be able to grant effective relief to Green to enable her to proceed with the state court action, we determine that the appeal is not moot. We have jurisdiction to hear the appeal under 28 U.S.C. § 158.

We now turn to the merits of the appeal.

III. ISSUE

Whether the bankruptcy court abused its discretion in denying Green relief from the stay immediately to proceed with the state court action.

IV. STANDARDS FOR REVIEW

We review the bankruptcy court's decision to deny relief from the stay for abuse of discretion. Conejo, 96 F.3d at 351. Under the abuse of discretion standard, we must affirm the decision below unless (1) we have a definite and firm conviction that the bankruptcy court committed a clear error of judgment in the conclusion it reached upon weighing the relevant factors, (2) the bankruptcy court applied the wrong law, or (3) the bankruptcy court rested its decision on clearly erroneous findings of material fact. Delay v. Gordon, 475 F.3d 1039, 1043 (9th Cir. 2007).

V. DISCUSSION

Green argues that the bankruptcy court abused its discretion in denying the Motion. She accuses the bankruptcy court of "ignoring or rejecting" factors relevant to its determination as to whether cause existed to lift the stay under § 362(d)(1).

According to Green, the bankruptcy court should have applied the factors set forth in In re Johnson, 115 B.R. 634 (Bankr. D. Minn. 1989), to determine whether cause existed to lift the stay. Green argues that the bankruptcy court instead applied its own inappropriate standard, requiring Green to demonstrate "some extraordinary circumstance" warranting a grant of relief from the stay immediately.

The filing of a bankruptcy petition automatically stays all actions or proceedings against the debtor, except those specified under § 362(b). See 11 U.S.C. § 362(a)-(b). See also Conejo, 96 F.3d at 351. The stay protects not only the debtor, but its creditors as well. Id. at 351. See also MacDonald v. MacDonald (In re MacDonald), 755 F.2d 715, 717 (9th Cir. 1985)(the automatic stay under § 362 "gives the bankruptcy court an opportunity to harmonize the interests of both debtor and creditors while preserving the debtor's assets for repayment and reorganization of his or her obligations."). For the debtor, the stay provides a "breathing spell" from creditors, allowing the debtor to focus its efforts on reorganization. Conejo, 96 F.3d at 351. For the creditors, the stay facilitates an orderly liquidation process under which all like situated creditors receive equal treatment. Id. at 352.

The bankruptcy court can lift the stay for cause. 11 U.S.C. § 362(d)(1). Because "cause" has no clear definition in the Bankruptcy Code, bankruptcy courts determine cause on a case-by-case basis. Conejo, 96 F.3d at 352 (quoting Christensen v. Tucson Estates, Inc. (In re Tucson Estates, Inc.), 912 F.2d 1162, 1166 (9th Cir. 1990)("Tucson")). When making this determination,

bankruptcy courts consider the totality of the circumstances in each case. In re Bryan Road, LLC, 382 B.R. 844, 854 (Bankr. S.D. Fla. 2008). Accord Baldino v. Wilson (In re Wilson), 116 F.3d 87, 90 (3rd Cir. 1997).

Green contends that the factors in Johnson control the bankruptcy court's determination, but Johnson is not binding Ninth Circuit precedent. Moreover, although the factors discussed in Johnson may be worthy of consideration, as the bankruptcy court pointed out, Johnson focuses on whether cause exists to grant relief from the stay, not on whether the bankruptcy court ought to grant relief from the stay immediately. Given the early stage of the debtor's chapter 11 case at the time the Motion was considered, timing was an issue concerning the bankruptcy court.

Within the Ninth Circuit, cause for lifting the stay has been found to exist where the debtor filed a bankruptcy petition in bad faith, see Idaho v. Arnold (In re Arnold), 806 F.2d 937, 939 (9th Cir. 1986), where the bankruptcy court determined to abstain from deciding issues in favor of a pending state court trial involving the same issues, see Tucson, 912 F.2d at 1166, and where a creditor wished to proceed with litigation against the debtor in an appropriate non-bankruptcy forum, Santa Clara County Fair Assoc., Inc. v. Sanders (In re Santa Clara County Fair Assoc., Inc.), 180 B.R. 564, 567 (9th Cir. BAP 1995)("Santa Clara").

Where a creditor requests relief from the stay to proceed with litigation against the debtor in a non-bankruptcy forum, Congress has explained that:

> "[I]t will often be more appropriate to permit proceedings to continue in their place of origin, when no great prejudice to the bankruptcy estate would result, in order to leave the parties to their chosen forum and to relieve the bankruptcy court from many duties that may be handled elsewhere."

Santa Clara, 180 B.R. at 566 (quoting S.Rep. No. 989, 95th Cong., 2d Sess. 50, reprinted in 1978 U.S.C.C.A.N. 5787, 5836). In determining whether cause exists under such circumstances, "the bankruptcy court must balance the potential hardship that will be incurred by the party seeking relief if the stay is not lifted against the potential prejudice to the debtor and the bankruptcy estate." In re United Imports, Inc., 203 B.R. 162, 166 (Bankr. D. Neb. 1996).

Here, the bankruptcy court weighed the potential hardships to Green from continuing the stay against the potential prejudice to the debtor and the bankruptcy estate if the bankruptcy court lifted the stay immediately. Taking into account the underlying objectives of the automatic stay, the bankruptcy court found that the potential prejudice to the debtor and the bankruptcy estate outweighed the potential hardships for Green, at least at the time of the hearing.

The bankruptcy court believed that the debtor had "an awful lot on its plate right now . . . [so it needed] the breathing spell" offered by the automatic stay to focus its efforts on reorganization. Tr. of February 5, 2008 Hr'g, 2:21-22, 5:19-21. Should the stay be lifted immediately to allow Green to proceed with the state court action, the bankruptcy court reasoned, the debtor would be distracted from its reorganization efforts, concerned about potential uninsured exposure to Green's claims.

Moreover, if the bankruptcy court granted relief from the stay to Green at that time, it logically would have to grant relief from the stay to other creditors with similar actions pending against the debtor. As the bankruptcy court pointed out, given that there were forty or more actions pending against the debtor, having to deal with them all would be "[even more] disruptive and problematic [to the debtor's reorganization efforts], particularly when the senior people may be called to depositions and [the debtor is] trying to put together document protections." Tr. of February 5, 2008 Hr'g, 10:4-6.

The bankruptcy court found that Green, on the other hand, would suffer limited hardship, if any, at that time. Green did not demonstrate that she would be harmed or otherwise negatively affected by waiting a few months to obtain Brown's medical records and other information from the debtor. Such documents and information possibly could be obtained from the debtor through third-party discovery without the stay being lifted. See e.g., Groner v. Miller (In re Miller), 262 B.R. 499 (9th Cir. BAP 2001). The bankruptcy court thus determined that Green did not establish sufficient cause to lift the stay at the time the Motion was heard.

Green argues that the balance of hardships tips in her favor. She contends that the bankruptcy court's denial of the Motion "until some indeterminate time" imposes more hardship on her "because the passage of time will cause the aging of evidence and the fading of memories" concerning the events underlying her causes of action. Appellant's Opening Brief at 24. Green further asserts that denial of the Motion imposes a financial

burden on her in that it effectively requires duplicate discovery efforts. Id.

As to the latter two points, Green is advancing arguments that she did not raise before the bankruptcy court. Although the bankruptcy court invited Green to submit further papers, Green declined to do so. We will not consider Green's new arguments here. See O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d 955, 957 (9th Cir. 1989).

Green also alleges that the bankruptcy court attempted to pressure her into waiving her claims against the debtor and to proceed against the insurer(s) only, in exchange for a grant of relief from the stay. Contrary to Green's assertions, however, the bankruptcy court repeatedly told Green that it was not trying "to force anybody to consent to a waiver of claims." Tr. of February 5, 2008 Hr'g, 3:6-7. We discern nothing in the record before us showing that the bankruptcy court attempted to pressure the debtor into waiving her claims and proceeding against the insurer(s) only. Rather, the bankruptcy court was trying to explain that the prejudice to the debtor from lifting the stay would have been less had Green agreed to proceed against the debtor's insurer(s) only.

In fact, based on the record before us, the bankruptcy court tried to assist Green in her efforts to move forward with the state court action. The bankruptcy court advised Green that she still could obtain information with regard to the unidentified defendants and other named defendants from the debtor through third-party discovery, as the stay only prohibited litigation against the debtor. The bankruptcy court also advised Green to

renew her motion for relief from the stay a few months later. At that time, the debtor would "know where [it was] going in the case," and if the bankruptcy court did not grant relief from the stay, it would "be more inclined to continue the hearing . . . ." Tr. of February 5, 2008 Hr'g, 13:4-7. Despite the bankruptcy court's explanations and suggestions, Green apparently has not availed herself of the suggested opportunities.

VI. CONCLUSION

Based on our review of the record, we do not have a definite and firm conviction that the bankruptcy court clearly erred, or otherwise abused its discretion, in finding that the prejudice to the debtor would outweigh the hardship to Green if relief from the stay under § 362(d)(1) were granted immediately at the time the Motion was heard. The bankruptcy court did not abuse its discretion in denying the Motion. We AFFIRM.