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

ORDERED PUBLISHED

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	NC-13-1455-KuDJu
)		
PAUL DUNCAN GILLESPIE,)	Bk. No.	09-55224
)		
Debtor.)	Adv. No.	09-05208
_____)		
)		
RAYMOND A. BECHTOLD,)		
)		
Appellant,)		
)		
v.)	OPINION	
)		
PAUL DUNCAN GILLESPIE,)		
)		
Appellee.)		
_____)		

Argued and Submitted on July 24, 2014
at San Francisco, California

Filed - August 28, 2014

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

Honorable Arthur S. Weissbrodt, Bankruptcy Judge, Presiding

Appearances: Marc L. Shea of Shea & McIntyre, A.P.C argued for
appellant Raymond A. Bechtold; Wayne A. Silver
argued for appellee Paul Duncan Gillespie.

Before: KURTZ, DUNN and JURY, Bankruptcy Judges.

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1 KURTZ, Bankruptcy Judge:
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3 **INTRODUCTION**

4 For purposes of the discharge injunction, when does an
5 attorney's fees claim arise? When the fees are incurred or when
6 the underlying claim arises? The bankruptcy court held that,
7 because the debtor's participation in postpetition litigation was
8 "not entirely voluntary," the creditor's fees claim arose
9 prepetition and hence was subject to the debtor's chapter 7¹
10 discharge. In so holding, the bankruptcy court distinguished
11 Boeing N. Am., Inc. v. Ybarra (In re Ybarra), 424 F.3d 1018,
12 1026-27 (9th Cir. 2005).

13 We disagree with the bankruptcy court. The bankruptcy court
14 misconstrued the meaning of voluntariness as used in Ybarra and
15 did not identify any meaningful distinction between Ybarra and
16 the instant case. Accordingly, we REVERSE AND REMAND.

17 **FACTS**

18 The debtor, Paul Duncan Gillespie, owned and controlled
19 several companies, including Dymatix, Inc. At the time of
20 Gillespie's chapter 7 bankruptcy filing, Gillespie and his
21 companies were parties to a lawsuit commenced by Raymond Bechtold
22 in the Santa Clara County Superior Court (Case No. 08-CV-119735).
23 The state court lawsuit arose from Gillespie's default on a loan,
24 which in turn led the lender, Giga-tronics, Inc., to sell all of
25 its interest in the collateral securing the loan to Bechtold.
26

27 ¹ Unless specified otherwise, all chapter and section
28 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

1 This collateral apparently consisted of much of Dymatix's assets
2 including its general intangibles and its intellectual property.
3 Bechtold then attempted to enforce his right to possession of the
4 collateral, which right Gillespie and Dymatix disputed. Among
5 other things, Gillespie and Dymatix asserted that Giga-tronics'
6 sale of the collateral to Bechtold constituted a wrongful
7 foreclosure because Giga-tronics failed to obtain possession of
8 the collateral before conducting the sale. In addition,
9 Gillespie and Dymatix filed a number of cross-claims against
10 Bechtold for breach of contract, conversion, breach of fiduciary
11 duty and tortious interference with contractual relations.

12 On June 22, 2009, several days before Gillespie's bankruptcy
13 filing, the state court issued an order providing for Gillespie's
14 incarceration based on the failure of Gillespie and Dymatix to
15 fully comply with the state court's prior prejudgment writ of
16 possession, which had directed Gillespie and Dymatix to turn over
17 all of the collateral to Bechtold. Dymatix filed its chapter 7
18 bankruptcy at the same time as Gillespie (Bk. No. 09-55233).

19 The commencement of the bankruptcy cases on July 1, 2009,
20 did not result in the cessation of the litigation between the
21 parties. To the contrary, the litigation expanded into the
22 bankruptcy court forum. Among other things, Bechtold filed a
23 series of relief from stay motions seeking permission to pursue
24 his state law remedies in the state court. Bechtold also filed
25 adversary proceedings against Dymatix and Gillespie seeking a
26 bankruptcy court determination of his ownership of and
27 entitlement to the collateral. In addition, Bechtold's adversary
28 complaint against Gillespie initially contained claims for relief

1 under §§ 523(a)(2) and (4), but Bechtold later abandoned his
2 exception to discharge claims by omitting them from his third
3 amended complaint filed in February 2010.

4 In response to the third amended complaint, Gillespie filed
5 in March 2010 an answer and roughly a dozen counterclaims against
6 Bechtold. The counterclaims largely mirrored the cross-claims
7 Gillespie had filed in the state court. Whereas Gillespie has
8 characterized his cross-claims and counterclaims as merely
9 defensive in nature, the pleadings themselves tell a different
10 story. Both his state court cross-claims and his bankruptcy
11 court counterclaims requested compensatory damages, punitive
12 damages, costs and attorney's fees.

13 In May 2010, the bankruptcy court granted Bechtold limited
14 relief from the automatic stay to permit him to proceed with some
15 aspects of the state court litigation. The relief from stay
16 order explicitly prohibited Bechtold from enforcing any judgment
17 he might obtain in the state court against Gillespie or Dymatix,
18 or from seeking any damages for prepetition events. But the
19 order explicitly permitted Bechtold to proceed to trial on the
20 issue of his rights in the collateral. The order also stayed the
21 two adversary proceedings Bechtold had filed against Gillespie
22 and Dymatix, inasmuch as they sought essentially the same relief
23 as Bechtold was seeking from the state court. Eventually, after
24 Bechtold obtained the relief he was seeking from the state court,
25 the bankruptcy court dismissed his adversary proceedings.

26 In October 2010, the state court held trial and in March
27 2011 issued a final judgment in favor of Bechtold. Among other
28 things, the state court determined that, since July 2008,

1 Bechtold had been the owner of the collateral and was entitled to
2 possession of the collateral. Based on that determination, the
3 state court directed Dymatix and Gillespie to turn over any
4 collateral still in their possession. The judgment furthermore
5 enjoined Dymatix and Gillespie from any further use of the
6 collateral. Additionally, the judgment ruled against Dymatix and
7 Gillespie on all of their cross-claims. In a post-judgment
8 order, the state court awarded against both Dymatix and Gillespie
9 \$134,573 in fees that Bechtold had incurred postpetition in
10 litigating the dispute both in the state court and in the
11 bankruptcy court.

12 Bechtold then filed two motions in the bankruptcy court
13 seeking, among other things, permission to enforce both the non-
14 monetary relief granted by the state court and its fee award.
15 Between May 2011 and September 2013, a period of well over two
16 years, Bechtold and Gillespie both filed numerous papers in the
17 bankruptcy court regarding whether Bechtold should be permitted
18 to enforce his right to possession and exclusive use of the
19 collateral as well as his fee award.

20 In fact, by September 2011, the bankruptcy court by oral
21 tentative ruling seemingly had resolved the fee issue. More
22 specifically, the bankruptcy court orally ruled at a hearing held
23 on September 23, 2011, that Ybarra applied to Bechtold's
24 attorney's fee claim. According to the bankruptcy court, the
25 fees incurred postpetition would be treated as a postpetition
26 claim for purposes of the discharge injunction because Gillespie
27 voluntarily returned to the fray and continued to litigate with
28 Bechtold in the state court after Gillespie commenced his

1 bankruptcy case and even after Bechtold had abandoned his
2 nondischargeability claims. After Bechtold abandoned his
3 nondischargeability claims, the bankruptcy court reasoned,
4 Gillespie could have exited the state court litigation without
5 any concern of continuing exposure for prepetition debts in light
6 of his bankruptcy discharge.

7 Instead of walking away from the state court litigation, the
8 bankruptcy court noted, Gillespie took affirmative steps to
9 resume that litigation. In particular, Gillespie objected to the
10 chapter 7 trustee's proposed sale to Bechtold of the estate's
11 interest in the state court lawsuit and in the collateral in
12 exchange for a cash payment of \$14,000. Then, Gillespie
13 successfully overbid for the same property, agreeing to pay the
14 chapter 7 trustee \$32,000 to purchase essentially the same assets
15 from the trustee. The court entered an order approving the sale
16 to Gillespie in February 2010, shortly after Bechtold abandoned
17 his nondischargeability claims against Gillespie.

18 In essence, the bankruptcy court determined that Gillespie
19 affirmatively and voluntarily acted postpetition by purchasing
20 the estate's interest in his disputed claims against Bechtold and
21 the collateral and by voluntarily returning to the state court
22 litigation to press those claims. But after the state court
23 completely rejected all of Gillespie's claims, the bankruptcy
24 court explained, Gillespie sought to characterize all of these
25 claims as purely defensive in nature. Under these circumstances,
26 the bankruptcy court concluded, Ybarra was apposite and its rule
27 regarding the discharge of attorney's fees incurred postpetition
28 should be followed.

1 Even so, the bankruptcy court's initial written order on the
2 subject matter of Bechtold's motions, an order entered in October
3 2011, explicitly reserved all issues regarding the effect of the
4 discharge injunction on Bechtold's entitlement to enforce the
5 state court judgment.

6 At the conclusion of the September 23, 2011 hearing, the
7 court indicated that there were two small lingering issues that
8 still needed deciding. One concerned whether the state court
9 properly included fees incurred by Bechtold in prosecuting his
10 nondischargeability claims (before Bechtold abandoned those
11 claims). The other concerned whether the bankruptcy court should
12 forbear from issuing its final order on the matter until after
13 Gillespie's state court appeal had run its course. The court
14 continued the hearing so that it could ponder these issues.

15 In the ensuing months, the parties filed a seemingly endless
16 series of supplemental papers, and the bankruptcy court held a
17 number of continued hearings. Some of the papers and hearings
18 addressed issues that already had been addressed by the court
19 while others raised new issues. Nonetheless, on several
20 occasions, the court orally re-confirmed or "finalized" its prior
21 tentative ruling regarding the fee issue. For instance, in March
22 2012, the court stated as follows:

23 At the last hearing held December 8th, 2011, the Court
24 finalized the previous tentative ruling from September
25 2011 that Defendant, quote: ". . . returned to the fray
26 by purchasing the bankruptcy estate's litigation rights
27 and pursuing those rights in the State Court
litigation." As a result the Chapter 7 discharge does
not discharge Defendant's debt for post-petition
attorney's fees and costs awarded by the State Court.

28 Hr'g Tr. (March 6, 2012) at 3:25-4:9. The court once again

1 when it concluded that Bechtold's fee claim constituted a
2 prepetition claim and hence was covered by Gillespie's chapter 7
3 discharge?

4 **STANDARDS OF REVIEW**

5 The scope of a chapter 7 discharge is a question of law that
6 requires use to construe the discharge provisions of the
7 Bankruptcy Code. Hassanally v. Republic Bank (In re Hassanally),
8 208 B.R. 46, 48 (9th Cir. BAP 1997). We review questions of law
9 de novo. Id.

10 **DISCUSSION**

11 The only question raised in this appeal is whether the
12 attorney's fees the state court awarded against Gillespie
13 constitute a prepetition debt or a postpetition debt for purposes
14 of Gillespie's chapter 7 discharge.

15 A chapter 7 discharge releases the debtor from personal
16 liability for debts arising "before the date of the order for
17 relief under this chapter" and enjoins creditors from enforcing
18 or collecting upon those debts. See § 727(b); see also
19 § 524(a)(2); Heilman v. Heilman (In re Heilman), 430 B.R. 213,
20 218 (9th Cir. BAP 2010). Under the Bankruptcy Code, the term
21 "debt" means liability on a claim. § 101(12). The existence of
22 such a claim ordinarily is determined by reference to
23 nonbankruptcy law - particularly state law. In re Hassanally,
24 208 B.R. at 49.

25 But federal law determines when a claim arises for
26 bankruptcy purposes. SNTL Corp. v. Ctr. Ins. Co. (In re SNTL
27 Corp.), 571 F.3d 826, 839 (9th Cir. 2009); Zilog, Inc. v. Corning
28 (In re Zilog, Inc.), 450 F.3d 996, 1000 (9th Cir. 2006). To

1 ascertain when a claim arises for purposes of the discharge
2 injunction, we must first consider the Bankruptcy Code's broad
3 definition of the term "claim," which means a:

4 (A) right to payment, whether or not such right is
5 reduced to judgment, liquidated, unliquidated, fixed,
6 contingent, matured, unmatured, disputed, undisputed,
7 legal, equitable, secured, or unsecured; or [a]

8 (B) right to an equitable remedy for breach of
9 performance if such breach gives rise to a right to
10 payment, whether or not such right to an equitable
11 remedy is reduced to judgment, fixed, contingent,
12 matured, unmatured, disputed, undisputed, secured, or
13 unsecured.

14 § 101(5).

15 The Bankruptcy Code utilizes an exceptionally broad
16 definition of the term "claim" in order to ensure that "all legal
17 obligations of the debtor, no matter how remote or contingent,
18 will be able to be dealt with in the bankruptcy case." In re
19 SNTL Corp., 571 F.3d at 838 (quoting Cal. Dep't of Health Servs.
20 v. Jensen (In re Jensen), 995 F.2d 925, 929-30 (9th Cir. 1993)).
21 This broad definition "is critical in effectuating the bankruptcy
22 code's policy of giving the debtor a 'fresh start.'" In re
23 Jensen, 995 F.2d at 930.

24 To facilitate this broad definition and the fresh start
25 policy, the Ninth Circuit ordinarily employs the "fair
26 contemplation" test in determining when a claim arises. See,
27 e.g., In re SNTL Corp., 571 F.3d at 839; In re Ziloq, 450 F.3d at
28 1000; In re Jensen, 995 F.2d at 930. This test dictates that a
claim arises when the claimant "can fairly or reasonably
contemplate the claim's existence even if a cause of action has
not yet accrued under nonbankruptcy law." In re SNTL Corp., 571
F.3d at 839 (citing Cool Fuel, Inc. v. Bd. of Equalization (In re

1 Cool Fuel, Inc.), 210 F.3d 999, 1007 (9th Cir. 2000)).

2 However, the Ninth Circuit has adopted a different standard
3 for determining for discharge purposes when an attorney's fee
4 claim arises. Under that standard, even if the underlying claim
5 arose prepetition, the claim for fees incurred postpetition on
6 account of that underlying claim is deemed to have arisen
7 postpetition if the debtor "returned to the fray" postpetition by
8 voluntarily and affirmatively acting to commence or resume the
9 litigation with the creditor. In re Ybarra, 424 F.3d at 1026-
10 1027. The Ybarra court explained that, "[e]ven if a cause of
11 action arose pre-petition, the discharge shield cannot be used as
12 a sword that enables a debtor to undertake risk-free
13 [postpetition] litigation at others' expense." Id. at 1026. The
14 Ybarra court further explained that, while Congress intended the
15 discharge to relieve debtors from costs associated with their
16 prepetition acts even if such costs continue to accrue
17 postpetition, it did not intend to insulate debtors from costs
18 associated with postpetition acts. Id. at 1024 (citing In re
19 Hadden, 57 B.R. 187, 190 (Bankr. W.D. Wis. 1986)).

20 The Ybarra rule applies regardless of whether the litigation
21 begins prepetition or postpetition, regardless of the nature of
22 the underlying claim, and regardless of the forum in which the
23 postpetition litigation takes place. See, e.g., In re Ybarra,
24 424 F.3d at 1023-24; Siegel v. Fed. Home Loan Mortg. Corp., 143
25 F.3d 525, 533-34 (9th Cir. 1998); Shure v. Vermont (In re
26 Sure-Snap), 983 F.2d 1015, 1017-19 (11th Cir. 1993).

27 The bankruptcy court here acknowledged that Gillespie
28 affirmatively acted to resume his participation in the state

1 court litigation with Bechtold. Gillespie did so by purchasing
2 the estate's interest in the collateral and in the state court
3 lawsuit and by litigating the state court action to its
4 conclusion. Nonetheless, the bankruptcy court still held that
5 Gillespie's return to the state court litigation was not
6 voluntary within the meaning of Ybarra. The bankruptcy court
7 concluded that Gillespie's postpetition litigation activity was
8 not entirely voluntary because Gillespie stood to lose any
9 interest he otherwise might have had in the collateral and in the
10 cross-claims and defenses he asserted in the state court lawsuit
11 unless he continued to actively assert those interests in the
12 lawsuit.

13 But this cannot be what Ybarra had in mind when it stated
14 that "Ybarra's actions to revive the state suit were sufficiently
15 voluntary and affirmative to be considered 'returning to the
16 fray.'" In re Ybarra, 424 F.3d at 1027. Any time debtors hold
17 disputed claims or property interests at the time of their
18 bankruptcy filing, those claims or interests are at risk of being
19 forfeited unless they or their estate take postpetition action to
20 preserve them. This was precisely the state of affairs each of
21 the debtors faced in Ybarra, Siegel and Sure-Snap. Thus, in
22 determining whether a debtor's postpetition actions were
23 voluntary, Ybarra could not have meant that bankruptcy courts
24 should assess whether the debtors were compelled to act to
25 prevent the loss of their asserted interests and claims.

26 The bankruptcy court further ruled that Ybarra does not
27 apply when, as here, the debtor is the named defendant in the
28 postpetition litigation. According to the bankruptcy court,

1 Ybarra only should apply when the debtor is the named plaintiff.
2 The bankruptcy court offered no explanation for this limitation
3 of Ybarra, except to note that it had not found any cases in
4 which the Ybarra rule had been applied to a debtor who engaged in
5 postpetition litigation nominally as a defendant.

6 We disagree with the bankruptcy court's attempt to limit
7 Ybarra in this manner. The focus of Ybarra's inquiry does not
8 turn upon who is named as plaintiff and who is named as
9 defendant. Rather, the focus of the Ybarra inquiry is on the
10 debtor's motivation for engaging in the postpetition litigation
11 and whether the debtor "returned to the fray" to press his
12 disputed claims and property interests or for some other purpose.
13 See id. at 1023-24; see also In re Sure-Snap Corp., 983 F.2d at
14 1018; In re Hadden, 57 B.R. at 190.

15 We acknowledge that these three decisions do not specify
16 where the line between voluntary and involuntary always should be
17 drawn. Nonetheless, these three decisions support the conclusion
18 that Gillespie is not entitled to a discharge of Bechtold's
19 postpetition attorney's fees given that Gillespie chose to resume
20 his participation in the state court action postpetition in order
21 to preserve his or her asserted interest in the collateral, in
22 his cross-claims, and in his defenses to Bechtold's claims.

23 The bankruptcy court explicitly found here that Gillespie
24 continued to pursue the state court litigation postpetition for
25 these purposes. While the bankruptcy court later reversed itself
26 regarding the voluntariness of Gillespie's postpetition actions,
27 the bankruptcy court never reversed its findings regarding the
28 underlying purposes of Gillespie's postpetition litigation

1 activity, and neither party appealed the bankruptcy court's
2 findings in this regard. Consequently, we accept those findings
3 as true. See Sachan v. Huh (In re Huh), 506 B.R. 257, 272 (9th
4 Cir. BAP 2014) (en banc).

5 Moreover, we agree with these findings. The state court
6 litigation was, at bottom, a dispute over ownership of the
7 collateral, with each side using the litigation as an opportunity
8 to assert their respective interests in the collateral and to
9 assert claims for damages to the extent their respective property
10 interests were interfered with.² Simply put, whichever side was
11 nominally designated as the plaintiff and whichever was nominally
12 designated as the defendant did not, in this instance, change the
13 fundamental nature and purpose of the litigation.

14 The only other ground the bankruptcy court offered for
15 distinguishing Ybarra was that the debtor there was offered a
16 monetary settlement as an alternative to continued postpetition
17 litigation, whereas Gillespie here was not offered any money in
18 lieu of continuing to assert his interests in the collateral and
19 the state court lawsuit. However, as we already have explained
20 above, the focus of the Ybarra test is on the purpose of the
21 postpetition litigation. Thus, any distinction regarding what,
22 if anything, the debtor was offered to not pursue his or her

24 ² Of course, as a result of Gillespie's bankruptcy
25 discharge, by the time Gillespie resumed his participation in the
26 state court action, Gillespie no longer had any exposure on
27 account of Bechtold's damages claims arising from Gillespie's
28 prepetition interference with Bechtold's property interests in
the collateral. See generally In re Hassanally, 208 B.R. at 54-
55 (holding that construction defects claims arose prepetition
when the tortious conduct occurred and hence were discharged).

1 asserted interests and claims is immaterial, except to the extent
2 it tends to demonstrate the underlying purpose of the
3 postpetition litigation.

4 Aside from the bankruptcy court's reasoning, Gillespie
5 similarly argues that he had no choice but to return to the fray,
6 so the bankruptcy court correctly determined that his return to
7 the fray was not voluntary. As Gillespie puts it, he "never had
8 the option of enjoying his fresh start, because Bechtold
9 contended that Gillespie was wrongfully in possession of [the
10 collateral], and that Gillespie's continued wrongful possession
11 was actionable despite Gillespie's [c]hapter 7 discharge." Aple.
12 Resp. Brief (Jan 27, 2014) at p. 25.

13 Gillespie's argument is fallacious. It improperly equates
14 Gillespie's entitlement to a fresh start and his entitlement to
15 the benefit of his chapter 7 discharge with an entitlement to
16 indefinitely impede Bechtold's right as owner to exclusive use
17 and possession of the collateral. In other words, Gillespie's
18 chapter 7 discharge rights did not alter or entitle him to alter
19 Bechtold's property interests. Bechtold's property interests
20 passed through Gillespie's bankruptcy proceedings unaffected.
21 See Dewsnap v. Timm, 502 U.S. 410, 418 (1992). "[A] bankruptcy
22 discharge extinguishes only one mode of enforcing a claim -
23 namely, an action against the debtor in personam - while leaving
24 intact another - namely, an action against the debtor in rem."
25 Johnson v. Home State Bank, 501 U.S. 78, 84 (1991).

26 Moreover, Gillespie's argument is inconsistent with Ybarra's
27 teaching that, "[i]f the debtor chooses to enjoy his fresh start
28 by pursuing pre-petition claims . . ., he must do so at the risk

1 of incurring the post-petition costs involved in his acts." In
2 re Ybarra, 424 F.3d at 1024 (quoting In re Hadden, 57 B.R. at
3 190).

4 In sum, the bankruptcy court committed reversible error
5 because it misconstrued Ybarra. In addition to reversing the
6 bankruptcy court's ruling, we must remand this matter for further
7 findings. The record indicates that a portion of the attorney's
8 fees Bechtold incurred postpetition were incurred while Gillespie
9 was still under the cloud of Bechtold's nondischargeability
10 claims. The bankruptcy court must determine whether and to what
11 extent, before Bechtold abandoned his nondischargeability claims,
12 Gillespie engaged in his postpetition litigation activity for the
13 purpose of limiting or preventing his exposure on account of the
14 nondischargeability claims. To that extent, under Ybarra,
15 Bechtold's postpetition fees should be considered discharged. We
16 express no opinion regarding how the bankruptcy court should
17 apportion Bechtold's postpetition fees between those that are
18 discharged and those that are not discharged. Instead, we leave
19 it to the bankruptcy court to address that issue in the first
20 instance.

21 **CONCLUSION**

22 For the reasons set forth above, we REVERSE AND REMAND.
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