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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:
SAMEER LAKHANY,

Debtor.

SAMEER LAKHANY,

Appellant,

v.
KAMRAN NIHAL KHAN,

Appellee.

BAP No. CC-14-1586-BrDKi
Bk. No. 8:12-bk-22838-CB

O P I N I O N

Argued and Submitted on July 23, 2015
at Pasadena, California

Filed - September 28, 2015

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

Honorable Catherine E. Bauer, Bankruptcy Judge, Presiding

Appearances: Dixon Gardner of Madison Harbor, ALC, argued for
appellant Sameer Lakhany; Michael Jason Conway of
Greengberg & Bass, LLP, argued for Appellee Kamran
Nihal Khan.

Before: BRANDT,¹ DUNN, and KIRSCHER, Bankruptcy Judges.

¹ Hon. Philip H. Brandt, Bankruptcy Judge for the Western
District of Washington, sitting by designation.

1 BRANDT, Bankruptcy Judge:

2
3 In the words of the Prophet Yogi,² "if you don't know where
4 you're going, when you get there you'll be lost." This appeal
5 demonstrates the validity of that observation.

6 Appellant-debtor, Sameer Lakhany ("Lakhany"), appeals the
7 Bankruptcy Court's Order Granting Relief from Stay ("Order") in
8 favor of appellee-creditor, Kamran Nihal Khan ("Khan").³ We
9 conclude that the bankruptcy court abused its discretion by
10 applying an incorrect legal standard in considering Khan's Motion
11 for Relief from Stay ("Motion"). The Motion referenced the
12 proper inquiry, the applicability of the discharge injunction,
13 although in a procedurally incorrect context; neither the parties
14 nor the court addressed it further.

15 Finding that error harmless, and sufficient support in the
16 record, we recast the order as a declaratory judgment and AFFIRM.

17 **FACTS**

18 Lakhany filed his voluntary petition for Chapter 7
19 bankruptcy relief on November 6, 2012. His was a "no asset"
20 case, and he received his discharge on February 25, 2013. The
21 case was closed on July 24, 2013. Lakhany did not list Khan as a

22
23 ² Berra, late of the New York Yankees.

24 ³ Unless otherwise indicated, all chapter and section
25 references are to the U.S. Bankruptcy Code, 11 U.S.C.
26 §§ 101-1532, and all "Rule" references are to the Federal Rules
27 of Bankruptcy Procedure, Rules 1001-9037. All "Civil Rule"
references are to the Federal Rules of Civil Procedure,
Rules 1-86.

1 creditor.

2 In early 2012 Khan had filed a state court lawsuit in
3 Superior Court in Orange County, California (the "State
4 Action"),⁴ alleging that numerous defendants had conspired to
5 defraud consumers seeking home loan modification services, and
6 had fraudulently used his name and law license in perpetrating
7 that scheme. The State Action is complex, involving numerous
8 intertwined parties, claims, and filings.

9 Meanwhile, the Federal Trade Commission had filed a
10 nondischargeability complaint against Lakhany,⁵ focused on relief
11 involving consumers generally - not Khan. Lakhany stipulated to
12 a judgment of nondischargeability for fraud, based on a
13 stipulated judgment in the FTC's federal district court action
14 against him.⁶ Lakhany did not admit or deny any allegation other
15 than jurisdiction.

16 During discovery in the State Action late in 2013, Khan
17 discovered Lakhany's alleged involvement in the scheme, and he
18 attempted to serve Lakhany as an additional defendant. In
19 response, Lakhany's counsel sent a letter to Khan, notifying him

20
21 ⁴ Kamran Nihal Khan v. Komail Mooman, et al., Superior Court
22 of the State of California for the County of Orange, Central
Justice Center, Case No. 30-2012-00554903.

23 ⁵ Federal Trade Commission v. Sameer Lakhany, United States
24 Bankruptcy Court for the Central District of California, Santa Ana
Division, Adv. No. 8:13-ap-01181-CB.

25 ⁶ Federal Trade Commission v. Sameer Lakhany, et al., Final
26 Order for Permanent Injunction and Settlement of Claims as to
27 Defendants Sameer Lakhany, et al., entered February 28, 2013,
Central District Court of California, Case No. SACV12-0337-CJC.

1 of the bankruptcy and the discharge injunction, and threatening
2 sanctions if he did not immediately dismiss Lakhany from the
3 State Action.

4 Shortly thereafter, Khan moved to reopen Lakhany's
5 bankruptcy case for the purpose of establishing
6 nondischargeability. His supporting memorandum advised the
7 bankruptcy court that, following reopening and filing of a
8 nondischargeability complaint, he would seek relief from the
9 automatic stay to prosecute his claims against Lakhany in the
10 State Action. The bankruptcy court granted the motion and
11 entered an order simply providing that the case was reopened,
12 that Khan could file a nondischargeability complaint against
13 Lakhany within thirty days, and that a trustee need not be
14 reappointed. Lakhany did not appeal.

15 Khan promptly filed his complaint against Lakhany, alleging
16 nondischargeability for fraud, fiduciary defalcation, and willful
17 and malicious injury⁷ ("Adversary Proceeding").⁸

18
19 ⁷ Section 523(a) provides:

20 A discharge under section 727, 1141, 1228(a),
21 1228(b), or 1328(b) of this title does not
22 discharge an individual debtor from any debt-

23 . . .

24 (2) for money, property, services, or an
25 extension, renewal, or refinancing of credit,
26 to the extent obtained by-

27 (A) false pretenses, a false representation,
28 or actual fraud, other than a statement
29 respecting the debtor's or an insider's
30 financial condition;

31 . . .

32 (4) for fraud or defalcation while acting in
33 a fiduciary capacity, embezzlement, or

(continued...)

1 After Khan filed an amended complaint in the Adversary
2 Proceeding, Lakhany moved to dismiss for failure to state a claim
3 and on other grounds under Rule 7012, incorporating Civil Rule
4 12. After a hearing, the bankruptcy court granted the motion to
5 dismiss the fiduciary defalcation claim, but denied it as to the
6 fraud and willful and malicious injury claims. Lakhany answered
7 the amended complaint; the Adversary Proceeding is periodically
8 set for status conferences.

9 On November 7, 2014, Khan filed the Motion in the main case,
10 seeking relief from stay to add Lakhany as a defendant in the
11 State Action. Specifically, he sought to pursue Lakhany for
12 claims including conversion, trespass to chattels, fraudulent
13 concealment, appropriation, fraudulent misrepresentation, and
14 intentional infliction of emotional distress. He also requested
15 relief from the discharge injunction of § 524 and annulment of
16 any stay violations that he might have committed. Kahn went on
17 to indicate that, after obtaining judgment against Lakhany in the
18 State Action, he intends to move for summary judgment of
19 nondischargeability in the Adversary Proceeding, presumably
20 relying on issue preclusion.

21 The only issue briefed by the parties and argued to the
22

23 (...continued)

24 larceny;

25 . . .

26 (6) for willful and malicious injury by the
debtor to another entity or to the property
of another entity.

27 ⁸ Kamran Nihal Khan v. Sameer Lakhany, United States
28 Bankruptcy Court for the Central District of California, Adv. No.
8:14-ap-01285-CB.

1 bankruptcy court was whether sufficient cause existed for relief
2 from stay. Counsel reiterated that it was Khan's intention to
3 pursue his claims against Lakhany in state court and then to
4 return to bankruptcy court to establish nondischargeability.
5 After the bankruptcy court granted the Motion, an unsigned order
6 was docketed on December 17, 2014. Lakhany filed a notice of
7 appeal. Thereafter, on January 7, 2015, the Bankruptcy court
8 signed the Order, which was docketed as an amended order.
9 Neither version of the Order referenced any findings of fact nor
10 mentioned the discharge injunction.

11 At argument we were advised that trial in the State Action
12 is expected to be set in 2016.

13 JURISDICTION

14 The bankruptcy court had jurisdiction under 28 U.S.C.
15 §§ 1334 and 157(b)(2)(A) and (G), and we do under 28 U.S.C.
16 § 158. The bankruptcy court's order to grant Khan's Motion for
17 Relief from Stay under § 362(d) is a final order. While the
18 notice of appeal was premature, it became effective when the
19 signed order was entered, Rule 8002 (a)(2),⁹ and was timely.

20 ISSUES

21 Did the bankruptcy court abuse its discretion in granting
22 Khan's Motion for Relief from Stay to pursue the State Action?
23 If so, was entry of the Order harmless error, and may we grant
24 alternative relief?

25
26 ⁹ Rule 8002(a)(2) provides that, "[a] notice of appeal
27 filed after the bankruptcy court announces a decision or order
28 –but before entry of the judgment, order, or decree– is treated
as filed on the date of and after the entry."

1 preserve the integrity of the judicial process, (2) when a change
2 of law during the pendency of the appeal raises a new issue, or
3 (3) when the issue is purely one of law. See Baccei v. U.S., 632
4 F.3d 1140, 1149 (9th Cir. 2011); Jovanovich v. U.S., 813 F.2d
5 1035, 1037 (9th Cir. 1987); Bolker v. Comm'r, 760 F.2d 1039, 1042
6 (9th Cir. 1985).

7 Lakhany briefed several new arguments on appeal that he did
8 not raise in the bankruptcy court. The only issue brought before
9 the bankruptcy court was whether there was cause for relief from
10 the automatic stay of § 362. While the first two criteria for
11 review of new issues on appeal do not apply to Lakhany's new
12 arguments, his new arguments are purely legal. Therefore, we
13 will briefly address those which were coherently articulated and
14 have some arguable substance.

15 First, Lakhany argues that the reopening of his bankruptcy
16 case permitted only the nondischargeability action, the Adversary
17 Proceeding. But,

18 the reopening of a closed bankruptcy case is
19 a ministerial act that functions primarily to
20 enable the file to be managed by the clerk as
an active matter and that, by itself, lacks
independent legal significance.

21 Menk v. Lapaqlia (In Re Menk), 241 B.R. 896, 913 (9th Cir. BAP
22 1999). The reopening of Lakhany's bankruptcy case had no
23 equitable or legal effect. Nor did it bar a request for relief
24 from stay or operate as a waiver of any right to proceed in state
25 court.

26 Further, while reopening a case for the purpose of filing a
27 nondischargeability complaint is good practice, it is not
28 necessary. "[A] separate motion to reopen is not a

1 jurisdictional requirement, or even a prerequisite for commencing
2 an action for nondischargeability of a debt under
3 § 523(a)(3)(B).” Staffer v. Predovich (In Re Staffer), 306 F.3d
4 967, 972 (9th Cir. 2002).

5 Second, he contends that the exclusive jurisdiction of the
6 bankruptcy court to determine dischargeability¹⁰ somehow bars
7 establishing the predicate facts for that determination in a
8 state court (or, presumably, any other nonbankruptcy forum).
9 This is a fundamental misunderstanding: bankruptcy courts
10 regularly make non-dischargeability determinations, via issue
11 preclusion, on facts determined elsewhere. For example, in
12 Grogan v. Garner, the Supreme Court reversed a circuit court’s
13 reversal of a bankruptcy court’s judgment of nondischargeability
14 under § 523(a)(2) predicated on issue preclusion (using older
15 terminology, “collateral estoppel”) from a state court’s fraud
16 judgment, thereby upholding the bankruptcy court. 498 U.S. 279,
17 290 (1991).

18 Further, Congress provided in 28 U.S.C. § 1334(c) that “in
19 the interest of justice, or in the interest of comity with State
20 courts or respect for State law,” a bankruptcy court may
21 “abstain[] from hearing a particular proceeding” arising under,
22 arising in, or related to a bankruptcy case.

23 Even if Lakhany’s bankruptcy case were still open and there
24 were an estate, discretionary abstention might well be

26 ¹⁰ “Bankruptcy Courts have exclusive jurisdiction over
27 nondischargeability actions brought pursuant to 11 U.S.C.
28 § 523(a)(2), (4), (6) . . . ” Rein v. Providien Fin. Corp., 270
F.3d 895, 904 (9th Cir. 2001).

1 appropriate; it certainly would be when, as here, the case is
2 closed and there never was a bankruptcy estate to be
3 administered.

4 **B. The Automatic Stay**

5 Section 362 provides, in relevant part, that the filing of a
6 bankruptcy petition stays

7 the commencement or continuation, including
8 the issuance or employment of process, of a
9 judicial, administrative, or other action or
10 proceeding against the debtor that was or
11 could have been commenced before the
commencement of the case under this title, or
to recover a claim against the debtor that
arose before the commencement of the case
under this title.

12 § 362(a)(1).

13 But "insofar as the automatic stay bars actions against the
14 debtor, the stay automatically expires upon the grant of a
15 discharge." Ruvacalba v. Munoz (In re Munoz), 287 B.R. 546, 551
16 (9th Cir. BAP 2002) (referencing § 363(c)(2)(C));¹¹ see also
17 Zilog, Inc. v. Corning, 450 F.3d 996, 1009 n.13 (9th Cir. 2006)
18 (same). In other words, "the existence of a discharge means that
19 there is no automatic stay from which relief may be granted to
20

21 ¹¹ 362(c) provides:

22 (2) the stay of any other act [other than those
23 against property of the estate] under subsection
24 (a) of this section continues until the earliest
of

- 25 (A) the time the case is closed;
26 (B) the time the case is dismissed; or
27 (C) if the case is a case under chapter 7
28 of this title concerning an individual or a
case under chapter 9, 11, 12, or 13 of this
title, the time a discharge is granted or
denied.

1 permit an action against the debtor." Munoz, 287 B.R. at 551.

2 Khan moved for relief from stay well over a year after
3 Lakhany's discharge. As the stay had "automatically expire[d]
4 upon the grant of [Lakhany's] discharge," the bankruptcy court
5 abused its discretion in granting relief from the stay. See
6 Munoz, 287 B.R. at 551. Rather, the appropriate inquiry would
7 have been the applicability of the discharge injunction. While
8 Khan's Motion included a request for relief from the discharge
9 injunction, that issue was not addressed in briefing or argument,
10 nor in the bankruptcy court's ruling or Order.

11 **C. The Discharge Injunction**

12 Section 524(a)(2) provides that a discharge in bankruptcy

13 operates as an injunction against the
14 commencement or continuation of an action,
15 the employment of process, or an act, to
16 collect, recover or offset any [discharged]
debt as a personal liability of the debtor,
whether or not discharge of such debt is
waived

17 **1. Procedure**

18 "Determinations regarding the scope of the discharge require
19 a declaratory judgment obtained in an adversary proceeding."

20 Munoz, 287 B.R. at 551; Fed. R. Bankr. P. 7001(9).¹²

21 It is error to circumvent the requirement of
22 an adversary proceeding by using a 'contested
23 matter' motion under Federal Rule of
Bankruptcy Procedure 9014.

24 Such an error may nevertheless be harmless
25 when the record of the procedurally incorrect
'contested matter' is developed to a

26 ¹² Rule 7001(9) provides that "[t]he following are
27 adversary proceedings: . . . (6) a proceeding to determine the
28 dischargeability of a debt; . . . [or] (9) a proceeding to obtain
a declaratory judgment relating to any of the foregoing"

1 sufficient degree that the record of an
2 adversary proceeding likely would not have
3 been materially different. In such
4 circumstances, the error does not affect the
substantial rights of the parties and is not
inconsistent with substantial justice.

5 Munoz, 287 B.R. at 551 (internal citations omitted).

6 In determining whether it was harmless error to forgo an
7 adversary proceeding, we may appropriately consider whether the
8 "material facts are few and undisputed," whether the "critical
9 questions are pure questions of law," and whether the "factual
10 record [or] the quality of the presentation of the arguments
11 would have been materially different had there been an adversary
12 proceeding." Munoz, 287 B.R. at 551.

13 The question of the scope of the discharge injunction should
14 have been raised in the Adversary Proceeding. But here, the
15 material facts are undisputed, the critical discharge injunction
16 questions are purely legal, and the factual record is as well-
17 developed as it would have been in the Adversary Proceeding. We
18 conclude that it was harmless error to have proceeded in the main
19 case rather than in the Adversary Proceeding.

20 **2. Scope**

21 Khan seeks to establish Lakhany's liability for a
22 nondischargeable debt in the State Action, and then to establish
23 its nondischargeability in the Adversary Proceeding.

24 Section 524(a) provides for the discharge injunction:

25 A discharge in a case under this title –

26 (1) voids any judgment at any time obtained,
27 to the extent that such judgment is a
determination of the personal liability of
28 the debtor with respect to any debt
discharged under section 727 . . . , whether

1 or not discharge of such debt is waived;
2 (2) operates as an injunction against the
3 commencement or continuation of an action,
4 the employment of process, or an act, to
5 collect, recover or offset any such debt as a
6 personal liability of the debtor, whether or
7 not discharge of such debt is waived[.]

8 (emphasis added). The antecedent of each "such" in subparagraph
9 (2) is unambiguously "any debt discharged..." in subparagraph
10 (1). See Munoz, 287 B.R. at 555-556.

11 Nondischargeable debts are not subject to the discharge
12 injunction. See Boeing N. Am., Inc. v. Ybarra (In re Ybarra),
13 424 F.3d 1018, 1027 n.11 (9th Cir. 2005) (so concluding); Fla.
14 Dep't of Revenue v. Diaz (In re Diaz), 647 F.3d 1073, 1088 (11th
15 Cir. 2011)(concluding that "the discharge injunction prohibits
16 collection only with respect to dischargeable debts and does not
17 apply to nondischargeable debts") (internal quotations omitted).
18 "As a result, once a discharge has been granted, holders of
19 **nondischargeable** debts generally may attempt to collect from the
20 debtor personally for such debts." Diaz, 647 F.3d at 1088.

21 Because this was a no asset case and no debt to Khan was
22 scheduled, nor was he listed as a creditor, nor did he have
23 notice of the bankruptcy in time to object to dischargeability,
24 § 523(a)(3)(B) applies.¹³ And "[i]f the [omitted] debt is of a

25 ¹³ Section 523(a) provides:

26 A discharge . . . does not discharge an
27 individual debtor from any debt—

28 . . .
(3) neither listed nor scheduled under section
521(a)(1) of this title, with the name, if
known to the debtor, of the creditor to whom
such debt is owed, in time to permit—

(continued...)

1 type covered by . . . § 523(a)(3)(B), it has not been discharged,
2 and is nondischargeable." Beezley v. California Land Title Co.,
3 994 F.2d 1433, 1434 (9th Cir. 1993). But § 523(a)(3)(B)

4 does not, in itself, make a debt
5 nondischargeable . . . [The] creditor must
6 also have a cause of action under
7 § 523(a)(2), (4), or (6). **Mere allegations**
8 **of a cause of action are not sufficient.** It
remains necessary for the creditor to prove
its case under either Code § 523(a)(2), (4),
or (6) because 11 U.S.C. § 523(a)(3)(B) only
applies if such a case can be established.

9 C&W Asset Acquisition, LLC v. Feagins (In re Feagins), 439 B.R.
10 165, 176 (Bankr. D. Hawaii 2010) (emphasis in original) (quoting
11 Urbatek Sys., Inc. v. Lochrie (In re Lochrie), 78 B.R. 257 (9th
12 Cir. BAP 1987)).

13 Further:

14 [T]he § 524(a)(2) discharge injunction does
15 not, by its straightforward terms, apply to
16 protect the debtor from any debt that is not
17 discharged. . . . We hold that . . . the
§ 524(a)(2) discharge injunction does not
18 protect a debtor from an action to determine
the debtor's liability on a nondischargeable
debt.

19 Munoz, 287 B.R. at 556.

20 We agree, and accordingly will refashion the Order as a
21 declaratory judgment that the discharge injunction of § 524(a)(2)

22 _____
23 (...continued)

24 . . .
25 (B) if such debt is of a kind specified in
26 paragraph (2), (4), or (6) of this subsection,
27 timely filing of a proof of claim and timely
28 request for a determination of
dischargeability of such debt under one of
such paragraphs, unless such creditor had
notice or actual knowledge of the case in time
for such timely filing and request[.]

(emphasis added).

1 does not enjoin Khan's quest to establish Lakhany's liability for
2 a debt nondischargeable under § 523(a)(2) and/or (a)(6).¹⁴

3 **CONCLUSION**

4 For these reasons, we recast the Order for Relief from Stay
5 as a declaratory judgment that the discharge injunction of § 524
6 does not enjoin Khan's attempt to establish Lakhany's liability
7 for a nondischargeable debt in the State Action, AFFIRM, and
8 direct that this disposition be docketed in the Adversary
9 Proceeding as well as in the main case.

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18 ¹⁴ Rule 9005 provides:

19
20 Rule 61 F.R.Civ.P. applies in cases under the
21 Code. When appropriate, the court may order
22 the correction of any error or defect or the
cure of any omission which does not affect
substantial rights.

23 Civil Rule 61 provides:

24 Unless justice requires otherwise, no error in
25 admitting or excluding evidence - or any other
26 error by the court or a party - is ground for
27 granting a new trial, for setting aside a
28 verdict, or for vacating, modifying, or
otherwise disturbing a judgment or order. At
every stage of the proceeding, the court must
disregard all errors and defects that do not
affect any party's substantial rights.