

MAR 21 2017

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:) BAP No. CC-16-1273-FCTa
)
 LIBERTY ASSET MANAGEMENT) Bk. No. 2:16-bk-13575-TD
 CORPORATION, a California)
 corporation,)
)
 Debtor.)
 _____)
)
 MAXWELL REAL ESTATE)
 INVESTMENT, LLC; CHUNBO ZHANG;)
 CHENHAN WU; GOLDEN STONE)
 INVESTMENT, LLC,)
)
 Appellants,)
)
 v.) **MEMORANDUM***
)
 LIBERTY ASSET MANAGEMENT)
 CORPORATION, a California)
 corporation,)
)
 Appellee.)
 _____)

Argued and Submitted on February 23, 2017
at Pasadena, California

Filed - March 21, 2017

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

Honorable Thomas B. Donovan, Bankruptcy Judge, Presiding

Appearances: Stephen E. Ensberg argued on behalf of Appellants
Maxwell Real Estate Investment, LLC, Chunbo Zhang,
Chenhan Wu, and Golden Stone Investment, LLC;
David B. Golubchik of Levene, Neale, Bender, Yoo &

* 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 8024-1.

1 Brill LLP argued on behalf of Appellee Liberty
2 Asset Management Corporation.

3 Before: FARIS, CLEMENT,** and TAYLOR, Bankruptcy Judges.

4 **INTRODUCTION**

5 Appellants Maxwell Real Estate Investment, LLC, Chunbo
6 Zhang, Chenhan Wu, and Golden Stone Investment, LLC
7 (collectively, "Maxwell Defendants") sought relief from the
8 automatic stay to prosecute their counterclaims against
9 chapter 11¹ debtor Liberty Asset Management Corporation
10 ("Liberty") in California state court or the bankruptcy court.
11 The bankruptcy court correctly noted that the Maxwell Defendants
12 did not need stay relief to pursue their claims against Liberty
13 in the bankruptcy forum and described their arguments as "a whole
14 lot of nothing." We agree and AFFIRM.

15 **FACTUAL BACKGROUND**

16 **A. Prepetition events and Liberty's bankruptcy filing**

17 In 2012, the Maxwell Defendants loaned Liberty \$5.4 million.
18 Liberty misused the funds, and the Maxwell Defendants demanded
19 that Liberty return the money. Liberty agreed to repay the loan
20 with interest. Liberty also agreed to convey to the Maxwell
21 Defendants several parcels of real property. The proceeds from
22

23 ** he Honorable Fredrick E. Clement, United States
24 Bankruptcy Judge for the Eastern District of California, sitting
25 by designation.

26 ¹ Unless specified otherwise, all chapter and section
27 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532,
28 all "Rule" references are to the Federal Rules of Bankruptcy
Procedure, and all "Civil Rule" references are to the Federal
Rules of Civil Procedure.

1 the sales of those properties were to pay down Liberty's debt.
2 After the properties were sold, Liberty still owed the Maxwell
3 Defendants over \$1.4 million.

4 The parties entered into another agreement whereby Liberty
5 agreed to transfer real property located on 10th Street in Santa
6 Monica, California (the "10th Street Property") to the Maxwell
7 Defendants for sale. Following the sale of the 10th Street
8 Property, the Maxwell Defendants alleged that Liberty still owed
9 them \$489,910.81. In contrast, Liberty argued that the Maxwell
10 Defendants owed it over \$2.5 million.

11 Liberty filed a lawsuit in the California superior court
12 (the "State Court Action") against the Maxwell Defendants.
13 Before the Maxwell Defendants responded to the operative second
14 amended complaint, Liberty filed a voluntary chapter 11 petition.
15 Liberty also removed the State Court Action to the bankruptcy
16 court.

17 **B. The motion for relief from stay**

18 The bankruptcy court issued an order to show cause ("OSC")
19 why the State Court Action should not be remanded to the state
20 court. On July 27, 2016, the Maxwell Defendants filed a motion
21 for relief from the automatic stay ("Motion for Relief"), an
22 answer to the second amended complaint, a proposed counterclaim,
23 and a motion to remand the case to the state court ("Motion to
24 Remand").

25 The Motion for Relief requested that the bankruptcy court
26 grant the Maxwell Defendants relief from the automatic stay so
27 that they could pursue their counterclaims against Liberty in the
28 state court. They argued that the State Court Action involved

1 state law claims that did not affect the bankruptcy proceedings.
2 They also contended that they wanted to litigate their
3 counterclaims in a "non-bankruptcy forum."

4 Liberty opposed the Motion for Relief, arguing that the
5 request was inappropriate because there was no longer any
6 proceeding in the state court after Liberty removed the State
7 Court Action to the bankruptcy court; that there was no "cause"
8 to grant relief; and that the State Court Action was a core
9 bankruptcy proceeding.

10 In their reply, the Maxwell Defendants insisted that the
11 State Court Action was not a core proceeding and should be
12 litigated in the state court. They claimed that Liberty was
13 attempting to prevent them from "fully presenting and litigating
14 [their] contractual transactional dispute with Liberty[.]" They
15 also rejected the notion of pursuing their counterclaims against
16 Liberty in the bankruptcy court: "A Proof of Claim is obviously
17 an insufficient vehicle to enable the Court to evaluate the
18 nature and breadth of the full and complete dispute between the
19 Parties." Although the Maxwell Defendants requested that the
20 court grant the Motion for Relief "so that the state court
21 action, BC588682 may proceed in state court[,]" they implied for
22 the first time that they also sought stay relief to file their
23 counterclaim in the adversary proceeding before the bankruptcy
24 court: "[i]f the Court does not remand the case, Maxwell still
25 needs stay relief to file and present its claims in the pending
26 removed Adversary Proceeding based on the 2nd Amended Complaint
27 filed by Liberty."

28 After a hearing, the bankruptcy court withdrew the OSC and

1 denied the Motion to Remand. This appeal does not include those
2 decisions.²

3 The bankruptcy court held a separate hearing on the Motion
4 for Relief. The Maxwell Defendants argued that the bankruptcy
5 court "should allow us to proceed with this counterclaim in the
6 bankruptcy court as part of this adversary proceeding, so that
7 the Court can have a full elucidation of the facts presented by
8 the parties, rather than a truncated, restrictive issue"

9 The court explained to the Maxwell Defendants that they did
10 not need stay relief to file anything in the bankruptcy court and
11 that their claims would be heard at the appropriate time and
12 context:

13 I still don't see the problem. You know, we're
14 here today because of your motion for relief from stay,
15 and I think your premise for the motion is just --
16 doesn't fit with what we do in this bankruptcy world we
17 live in here.

18 The bankruptcy world's a little different than the
19 outside world. You don't need relief from stay to make
20 trouble for the debtor in this court. **You can file
21 anything you want to in this court to call the debtor
22 to account. You don't need relief from stay to do
23 that.** If you think the debtor has cheated you out of
24 something, or is cheating you out of something, or is
25 taking money out of your pocket, you can file the
26 motion, and I'll hear the motion. **That's really the
27 answer to your relief from stay motion, it's just not
28 necessary. There's nothing that I'm aware of in the
29 bankruptcy law that prevents you from making any claim
30 you want against this debtor, if you think this debtor
31 has treated you badly. And that will be heard in this
32 court whenever it comes up, however it comes up.**

25 ² The Maxwell Defendants appealed the denial of the Motion
26 to Remand to the BAP, BAP No. CC-16-1270. A motions panel
27 determined that the appeal was interlocutory, denied leave to
28 appeal, and dismissed the appeal. The Maxwell Defendants do not
29 seek further review of the bankruptcy court's denial of the
30 Motion to Remand in this appeal.

1 (Emphases added.) The court accordingly denied the Motion for
2 Relief, and the Maxwell Defendants timely appealed.

3 **JURISDICTION**

4 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
5 §§ 1334 and 157(b) (2) (G). We have jurisdiction under 28 U.S.C.
6 § 158.

7 **ISSUE**

8 Whether the bankruptcy court erred in denying the Maxwell
9 Defendants relief from the automatic stay.

10 **STANDARDS OF REVIEW**

11 We review for an abuse of discretion the bankruptcy court's
12 decision to grant or deny relief from the automatic stay under
13 § 362(d). Kronemyer v. Am. Contractors Indem. Co.

14 (In re Kronemyer), 405 B.R. 915, 919 (9th Cir. BAP 2009)

15 (citation omitted). We apply a two-part test to determine

16 whether the bankruptcy court abused its discretion. United

17 States v. Hinkson, 585 F.3d 1247, 1261-62 (9th Cir. 2009)

18 (en banc). First, we consider de novo whether the bankruptcy
19 court applied the correct legal standard to the relief requested.

20 Id. Then, we review the bankruptcy court's factual findings for

21 clear error. Id. at 1262. We must affirm the bankruptcy court's

22 factual findings unless we conclude that they are illogical,

23 implausible, or without support in inferences that may be drawn

24 from the facts in the record. Id.

25 Additionally, "[w]e review de novo contentions that present
26 an issue of law regarding stay relief." In re Kronemyer,

27 405 B.R. at 919. "De novo review requires that we consider a

28 matter anew, as if no decision had been made previously."

1 Francis v. Wallace (In re Francis), 505 B.R. 914, 917 (9th Cir.
2 BAP 2014) (citations omitted).

3 **DISCUSSION**

4 **A. Section 362(d) (1) allows a court to grant relief from the**
5 **automatic stay “for cause.”**

6 The filing of a bankruptcy petition creates an automatic
7 stay under § 362(a), which stays specific acts against the
8 debtor, his property, and the property of the estate, including:
9 “the commencement or continuation . . . of a judicial . . .
10 action or proceeding against the debtor that was or could have
11 been commenced before the commencement of the case under this
12 title, or to recover a claim against the debtor that arose before
13 the commencement of the case under this title.” § 362(a)(1).

14 Section 362(d) allows the court to grant relief from the
15 automatic stay in certain circumstances. Section 362(d)(1)
16 provides that the bankruptcy court may grant a creditor relief
17 from stay “for cause.”

18 “Because there is no clear definition of what constitutes
19 ‘cause,’ discretionary relief from the stay must be determined on
20 a case by case basis.” MacDonald v. MacDonald (In re MacDonald),
21 755 F.2d 715, 717 (9th Cir. 1985); see Fadel v. DCB United LLC
22 (In re Fadel), 492 B.R. 1, 11 (9th Cir. BAP 2013) (“What
23 constitutes ‘cause’ to terminate the stay is determined on a
24 case-by-case basis.”).³

25
26 ³ When considering whether to lift the stay so that the
27 creditor may pursue prepetition litigation, we have previously
28 used the twelve nonexclusive factors enumerated in In re Curtis,
40 B.R. 795, 799-800 (Bankr. D. Utah 1984). See Lapierre v.
(continued...)

1 "[T]he party seeking relief must first establish a prima
2 facie case that 'cause' exists for relief under § 362(d)(1).
3 Once a prima facie case has been established, the burden shifts
4 to the debtor to show that relief from the stay is unwarranted.
5 If the movant fails to meet its initial burden to demonstrate
6 cause, relief from the automatic stay should be denied."
7 In re Advanced Med. Spa Inc., 2016 WL 6958130, at *4.

8 **B. The bankruptcy court did not abuse its discretion in denying**
9 **stay relief.**

10 **1. The Maxwell Defendants sufficiently raised before the**
11 **bankruptcy court the issue of lifting the stay in the**
12 **adversary proceeding.**

13 Liberty argues that the Maxwell Defendants only requested
14 that the bankruptcy court lift the stay to allow them to
15 prosecute their counterclaims in the state court. It contends
16 that, as a result, the Maxwell Defendants cannot argue for the
17 first time on appeal for stay relief to pursue their claims in
18 the bankruptcy court. We disagree.

19 As a general rule, we will only consider on appeal issues
20 that were distinctly raised before the bankruptcy court. See
21 O'Rourke v. Seaboard Sur. Co. (In re E.R. Fegert, Inc.), 887 F.2d
22 955, 957 (9th Cir. 1989) ("appellate courts will not consider
23 arguments that are not 'properly raise[d]' in the trial courts").
24 An issue "must be raised sufficiently for the trial court to rule
25 on it" in the first instance. Id.

26 ³(...continued)
27 Advanced Med. Spa Inc. (In re Advanced Med. Spa Inc.), BAP No.
28 EC-16-1087, 2016 WL 6958130, at *3-4 (9th Cir. BAP Nov. 28, 2016)
(enumerating the Curtis factors); In re Kronemyer, 405 B.R. at
921 (recognizing the Curtis factors).

1 Liberty is correct that the Motion for Relief emphasized the
2 request for stay relief to pursue counterclaims in the state
3 court. The only mention of the Maxwell Defendants' desire for
4 relief to pursue claims in the bankruptcy court came in one
5 passing sentence in their reply brief. There is no doubt that
6 the Maxwell Defendants' filings focused almost exclusively on
7 getting their claims litigated in the state court.

8 However, following the court's denial of the Motion to
9 Remand, the Maxwell Defendants changed tactics at the hearing on
10 the Motion for Relief and emphasized their request for stay
11 relief to proceed in the bankruptcy court. They specifically
12 requested that the court "allow us to proceed with this
13 counterclaim in the bankruptcy court as part of this adversary
14 proceeding."

15 While the Maxwell Defendants did not raise the request to
16 lift the stay to proceed in bankruptcy court in their written
17 submissions until the reply brief, the argument was sufficiently
18 raised at the hearing, and it was the only relief considered by
19 the court.⁴ Because the court had a sufficient opportunity to
20 consider the issue and made an informed ruling, this issue is
21 appropriate for our review.

22 Conversely, Liberty attempts to confuse the issues by
23 introducing new arguments at the oral argument before this Panel.

24
25 ⁴ Liberty argues that we cannot consider arguments not
26 raised in the Motion for Relief, since it could not respond in
27 writing. However, Liberty could have addressed the arguments at
28 the hearing on the motion. Moreover, the only operative question
is whether the court was presented with sufficient argument to
rule on the issue currently on appeal, not whether Liberty could
sufficiently respond to that argument.

1 Liberty argued for the first time at oral argument that relief
2 from stay is required to assert a setoff but is not required to
3 asserts claims of recoupment. We will not consider these new
4 arguments on appeal.

5 **2. The automatic stay does not bar the Maxwell Defendants**
6 **from pursuing their claims in the bankruptcy court.**

7 The only issue on appeal is whether the bankruptcy court
8 erred in denying the Maxwell Defendants relief from stay to
9 litigate their claims against Liberty in the bankruptcy court.
10 We consider only the narrow issue of whether relief from stay is
11 warranted, not whether the court must afford the Maxwell
12 Defendants' claims any particular procedure or consideration.

13 The Maxwell Defendants argue that they require stay relief
14 to file their counterclaim in the adversary proceeding and
15 consolidate all matters regarding the \$5.4 million loan and
16 10th Street Property before the bankruptcy court. They claim
17 that the bankruptcy court's ruling is prejudicial because the
18 mischaracterization of the issues will prevent the bankruptcy
19 court from understanding the full scope of the parties'
20 transaction. The Maxwell Defendants misapprehend the bankruptcy
21 court's decision.

22 We previously answered the question whether the automatic
23 stay prevents the bankruptcy court from adjudicating an adversary
24 proceeding against the debtor in a bankruptcy forum. In Prewitt
25 v. North Coast Village, Ltd. (In re North Coast Village, Ltd.),
26 135 B.R. 641 (9th Cir. BAP 1992), the debtor and a creditor were
27 involved in litigation in the state court. When the debtor filed
28 for chapter 11 bankruptcy protection, the creditor filed an

1 adversary proceeding against the debtor, alleging the same claims
2 that were raised in the state court action. The debtor moved to
3 dismiss the creditor's adversary complaint as a violation of the
4 automatic stay and sought sanctions. The bankruptcy court
5 granted the debtor's motion and dismissed the adversary complaint
6 for violating the automatic stay. 135 B.R. at 642.

7 On appeal, the BAP reversed. We considered whether the
8 automatic stay prevented the creditor from pursuing an adversary
9 proceeding in the bankruptcy court where the bankruptcy case was
10 pending. Id. at 642-43. We pointed to the consensus among
11 various courts and said:

12 **We agree that the stay does not apply to**
13 **proceedings commenced against the debtor in the**
14 **bankruptcy court where the debtor's bankruptcy is**
15 **pending.** Although the statutory language does not
16 differentiate between proceedings in bankruptcy courts
and proceedings in other courts, **the application of the**
stay to proceedings against the debtor in the home
bankruptcy court would be illogical and would not serve
the purposes underlying the automatic stay.

17 Id. at 643 (emphases added).

18 As the bankruptcy court correctly told the Maxwell
19 Defendants, "You don't need relief from stay to make trouble for
20 the debtor in this court. You can file anything you want to in
21 this court to call the debtor to account. You don't need relief
22 from stay to do that. . . . That's really the answer to your
23 relief from stay motion, it's just not necessary." We agree.
24 The automatic stay does not preclude the Maxwell Defendants from
25 asserting their claims in either the main bankruptcy case or the
26 adversary proceeding, and the bankruptcy court's order did not
27 prevent the Maxwell Defendants from filing anything concerning
28 the \$5.4 million loan transaction. The bankruptcy court denied

1 the Motion for Relief simply because relief from stay to proceed
2 in the bankruptcy court is unnecessary. As it said at the
3 hearing, the Maxwell Defendants are free to file anything they
4 want, and its filings will be "heard in this court whenever it
5 comes up, however it comes up." Accordingly, there was no cause
6 to lift the stay, and the bankruptcy court did not abuse its
7 discretion.

8 Although the automatic stay does not prevent the Maxwell
9 Defendants from filing counterclaims in the adversary proceeding,
10 other rules might. Ordinarily, creditors assert prepetition
11 claims by filing proofs of claim, not complaints or counterclaims
12 in adversary proceedings. Compare §§ 501(a), 502(a), with
13 Rule 7001. The bankruptcy court may impose sanctions on a party
14 who files a complaint or a counterclaim where a proof of claim
15 would have been proper. In re N. Coast Vill., Ltd., 135 B.R. at
16 644 ("an adversary proceeding against the debtor seeking to
17 recover on a pre-petition dischargeable claim would not, under
18 our holding today, violate the automatic stay. Such a proceeding
19 could, however, be dismissed and sanctions could be awarded under
20 [Rule] 9011 in an appropriate proceeding, because the claim
21 should have been asserted through the claims allowance process").
22 But this is not an inexorable command. The bankruptcy court
23 could, if it so chooses, permit the Maxwell Defendants to file a
24 counterclaim, rather than just a proof of claim, or consolidate
25 an objection to the Maxwell Defendants' proof of claim with the
26 adversary proceeding. The bankruptcy court also might find this
27 unnecessary; we do not agree with the Maxwell Defendants'
28 argument that they can only defend themselves and put Liberty's

1 claims in context by filing a counterclaim.

2 But these broader issues are not before us. The bankruptcy
3 court denied the Motion for Relief simply because the motion was
4 unnecessary: the automatic stay did not preclude the Maxwell
5 Defendants from doing what they wanted to do. The bankruptcy
6 court's decision was correct.

7 **CONCLUSION**

8 For the reasons set forth above, the bankruptcy court did
9 not abuse its discretion in denying the Maxwell Defendants relief
10 from the automatic stay. Accordingly, we AFFIRM.

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28