

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
Calvin Appleberry,
Debtor.

No. 7 - 05-51063 - SA

**FINDINGS OF FACT AND CONCLUSIONS OF LAW
FOLLOWING REMAND FROM BANKRUPTCY APPELLATE PANEL
ON APPEAL OF MOTION FOR STAY RELIEF,
AND ORDER MODIFYING AUTOMATIC STAY**

This matter comes before the Court on remand from a ruling of the Tenth Circuit Bankruptcy Appellate Panel (doc 150) reversing this Court's Order Denying Motion to Modify Automatic Stay (doc 83) and Order Denying Motion for Reconsideration [of Order Denying Motion to Modify Automatic Stay] (doc 115). The BAP reversed for this Court's failure to make findings of fact and conclusions of law in denying the requested relief. The Court has now re-examined the issues and now makes findings of fact and conclusions of law. Based on that examination (including taking into account the proof of claim filed in this case by the Morinias), the Court finds and concludes that it erroneously denied the motions, and now finds and concludes that the stay should be modified.¹

¹ The parties have argued whether the collateral estoppel rule or the Rooker/Feldman doctrine, see Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923) and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983), precluded relitigation of the State Court's liability adjudication in this Court. The BAP found it unnecessary to rule on that issue given its disposition of the appeal. Similarly, this Court also finds it unnecessary to rule on that issue, at least until it sees the outcome of the State Court adjudication, given its granting of the motion for stay relief.

Background

Debtor Calvin Appleberry filed his voluntary chapter 7 petition on December 8, 2005. At the time he was a defendant in a tort action brought by plaintiffs Glynn David Harris and Toni Harris, which tort action was then and is still pending in the Second Judicial District Court, Bernalillo County, State of New Mexico, No. CV-2004-05372 (State Court Action). At the time of the filing of the petition, Debtor had been defaulted, apparently on the liability part of the State Court Action, for failure to cooperate with discovery. Doc 63, Exhibit A (Order of Default). In the course of the bankruptcy case, the Harrises filed a non-dischargeability action in connection with the State Court Action (Adv. Pro. 06-1090), but then voluntarily dismissed that action. See docket entries dated March 14, 2006 and January 25, 2007. The Harrises then filed a motion for stay relief seeking to use the State Court Action to obtain an adjudication of the damages which would liquidate their claim against Mr. Appleberry in the bankruptcy case. Doc 63. The Court, still having in mind the exclusive jurisdiction of the Bankruptcy Court to declare certain debts nondischargeable, see §523(c)(1), entered orders denying the motion for stay relief (doc 83) and denying the motion for reconsideration (doc 115) without further explanation. Obviously §523(c)(1) was not germane to deciding this issue, and the Court has now re-examined the issue. The re-examination included

rereading the briefs filed by the parties. The Court also conducted a non-evidentiary hearing at which the Court solicited the views of the Harrises and Debtor as well as those of the chapter 7 trustee and the Morinias' debtor-in-possession chapter 11 estate². The Harrises continued to advocate a modification of the stay; Debtor and the Morinias opposed that relief, and the Trustee did not appear at the hearing, informally sending word that he did "not have a dog in this fight".

Analysis

The leading case in the Tenth Circuit on whether to modify the stay in order to permit a claim to be liquidated in another forum continues to be In re Curtis, 40 B.R. 795 (Bankr. D. Utah 1984); see, for example, Busch v. Busch (In re Busch), 294 B.R. 137, 141-42 (10th Cir. B.A.P. 2003) (citing and relying on the "Curtis factors"). The Curtis factors are as follows:

- (1) Whether the relief will result in a partial or complete resolution of the issues.
- (2) The lack of any connection with or interference with the bankruptcy case.
- (3) Whether the foreign proceeding involves the debtor as a fiduciary.
- (4) Whether a specialized tribunal has been established to hear the particular cause of action and that tribunal has the expertise to hear such cases.

² No. 07-12803-s11, filed November 7, 2007.

(5) Whether the debtor's insurance carrier has assumed full financial responsibility for defending the litigation.

(6) Whether the action essentially involves third parties, and the debtor functions only as a bailee or conduit for the goods or proceeds in question.

(7) Whether litigation in another forum would prejudice the interests of other creditors, the creditors' committee and other interested parties.

(8) Whether the judgment claim arising from the foreign action is subject to equitable subordination under Section 510(c).

(9) Whether movant's success in the foreign proceeding would result in a judicial lien avoidable by the debtor under Section 522(f).

(10) The interest of judicial economy and the expeditious and economical determination of litigation for the parties.

(11) Whether the foreign proceedings have progressed to the point where the parties are prepared for trial.

(12) The impact of the stay on the parties and the "balance of hurt."

Curtis, 40 B.R. at 79-80. (Citations omitted.)

Of the factors that are applicable, virtually all weigh heavily in favor of modifying the stay, as follows:

(1) The remaining issue is the amount of damages arising from the already adjudicated liability. The State Court Action can resolve that remaining issue completely. The Morinias have now filed a proof of claim in the approximate amount of \$2 million. Almost all of that is a claim over against Debtor for any damages that they are required to pay to Harrises; their liability to

Harrises and damages arising therefrom had already been adjudicated in the State Court Action before they filed their chapter 11 petition. There might be a need to decide the issue of liability over against Debtor; on the other hand, there is definitely a need for an adjudication of the Harrises' damages against Debtor. This consideration by itself argues for a State Court adjudication.

A further consideration is whether it makes more sense to combine the Appleberry damages adjudication with the liability-over determination in the State Court Action or to combine the two issues in this Court. It is not clear whether that combination would even be possible at this stage of the State Court Action; it certainly would be possible in this Court. However, it appears to the Court that those two issues are distinct enough that there may be little to be gained by trying them together. Thus this further consideration argues for modification of the stay also.

(2) The State Court Action will not interfere with any ongoing bankruptcy activities; if anything, the adjudication by the State Court will facilitate administration of the chapter 7 case.

(3) The Harrises may argue that Debtor had fiduciary obligations, but that aspect of the State Court Action, and of the bankruptcy court claim, is so minor in the greater scheme of things that

this factor is largely inapplicable. And in any event, that issue should have been addressed in the liability adjudication.

(4) There is no specialized tribunal for liquidating this claim.

(5) This is not an insurance case.

(6) Debtor is not a bailee or conduit in the case.

(7) No other creditor in this case has (yet) disputed the Harris claim. Two claimants holding claims totaling about \$3,400 are unlikely to further participate. The Morinias, having been adjudged liable in the State Court Action already, are also unlikely to challenge the Harrises' claim against Debtor; indeed, it would appear against their interest to do so since if they were successful, the entire liability to the Harrises would then fall on them. In consequence, there is little likelihood of further litigation of the Harrises' claim once the State Court has issued its damages ruling.

Regardless of whether the damages issue is decided in this Court or in the State Court Action, it will have to be defended by Debtor or the Trustee. Whichever Court adjudicates the issue will have to decide whether Debtor still has standing to contest the issue, assuming the standing issue is raised. Thus that issue is not affected by whether the stay is modified or not.

(8) There are no equitable subordination issues.

(9) No judicial lien will arise as a result of any adjudication.

(10) The State Court is familiar with the litigation, more so than this Court. It was also in the process of actually adjudicating the damages claim against Debtor when Debtor filed his petition, and has already adjudicated the damages claim against the Morinias. The parties would need to spend additional time educating this Court about the many and varied details of the transactions compared to what they will need to spend with the State Court. In consequence, it appears that having the State Court adjudicate this issue will make everyone's job easier (except of course for the State Court). This analysis assumes that the same judge will continue to adjudicate the State Court Action. The Court has no information that the Honorable Geraldine Rivera, D.J. (who, coincidentally, was an experienced bankruptcy attorney in her former life), will not continue on the case. Should that not be the case, the time it will take another state district judge to get fully up to speed would be little more than what it would take this Court to get fully up to speed.

(11) As mentioned above, the parties were actually in trial on the damages issue when the petition was filed.

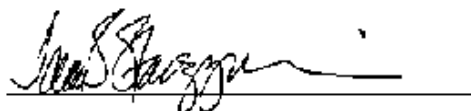
(12) Overall, the "balance of hurt" favors having the damages issue resolved in the State Court Action. Indeed, it would appear that all parties would save resources and time by returning to the State Court. An undercurrent of Debtor's argument is a fear that the State Court, having expressed some

displeasure with Debtor's having failed to comply with discovery demands, will express that displeasure further in the damages adjudication. The Court of course cannot and does not assume that the State Court will not provide Debtor (or the Trustee) a completely fair and impartial hearing; indeed, the Court is confident that just the opposite will occur.

Conclusion and Order

In considering the background and facts of this chapter 7 case and all that has led up to it, as well as what remains to be done, and taking into consideration the views of the parties, the Court easily comes to the conclusion that the automatic stay should be modified to permit the parties (the Harrises and whoever else has standing) to return to the State Court for an adjudication of the damages issue.

IT IS THEREFORE ORDERED that the automatic stay is modified for cause to permit the Harrises and others to obtain from the Second Judicial District Court, Bernalillo County, State of New Mexico, an adjudication of the damages incurred by the Harrises arising from the liability of Debtor Calvin Appleberry.



Honorable James S. Starzynski
United States Bankruptcy Judge

Date Entered on Docket: January 6, 2009

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