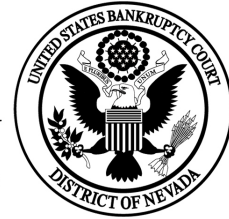




Honorable Mike K. Nakagawa
United States Bankruptcy Judge



Entered on Docket
April 19, 2018

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

* * * * *

In re:)	Case No. 17-14384-MKN
)	Chapter 13
OVIDIU REMUS ENE,)	
)	Date: March 28, 2018
Debtor.)	Time: 1:30 p.m.
)	

**ORDER ON CREDITOR FRANK VASSOUT'S
MOTION TO LIFT AUTOMATIC STAY¹**

On March 28, 2018, the court heard "Creditor Frank Vassout's Motion to Lift Automatic Stay" ("RAS Motion"). The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

BACKGROUND

On August 10, 2017, a voluntary Chapter 13 "skeleton" petition was filed by Ovidiu Remus Ene ("Debtor"). (ECF No. 1). Attached to the bankruptcy petition is a Verification of Creditor Matrix submitted by the Debtor to which is attached the Debtor's list of creditors ("Creditor Matrix"). On the same date, a Notice of Chapter 13 Bankruptcy Case ("Bankruptcy Notice") was filed, setting forth: (1) a September 19, 2017, date for the meeting of creditors; (2) a deadline of November 20, 2017, for creditors to file complaints objecting to the

¹ In this Order, all references to "ECF No." are to the numbers assigned to the documents filed in the case as they appear on the docket maintained by the clerk of the court. All references to "Section" are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to "FRBP" are to the Federal Rules of Bankruptcy Procedure. All references to "FRE" are to the Federal Rules of Evidence. All references to "Local Rule" are to the Local Rules of Bankruptcy Practice for the United States Bankruptcy Court for the District of Nevada.

1 dischargeability of certain debts (“November Deadline”); and (3) a deadline of December 18,
 2 2017, for creditors to file proofs of claim (“Claims Bar Date”). (ECF No. 6). On August 13,
 3 2017, the Bankruptcy Notice was served by first class mail on all parties appearing on the
 4 Creditor Matrix. (ECF No. 9). The case was assigned to a panel bankruptcy trustee, Kathleen
 5 Leavitt (“Chapter 13 Trustee”).

6 On October 26, 2017, after extensions of time had been granted by the court, Debtor filed
 7 his schedules of assets and liabilities (“Schedules”) along with his statement of financial affairs
 8 (“SOFA”). (ECF No. 32). On his creditor Schedule “E/F,” Debtor listed Franck Vassout
 9 (“Vassout”) as an unsecured creditor having a claim in an unknown amount based on an
 10 unspecified lawsuit. In his SOFA, Debtor listed a civil action entitled: Franck Vassout, et al vs.
 11 Kathleen Petitjean, et al, Case No. A-17-750836-C (“Civil Action”), pending in the Eighth
 12 Judicial District Court located in Clark County, Nevada (“State Court”).²

13 On October 30, 2017, a certificate of service was filed by the Debtor stating that a copy
 14 of the Bankruptcy Notice was served by United States mail to various interested parties,
 15 including Vassout in care of his attorney in the Civil Action. (ECF No. 36).

16 On December 11, 2017, an order was entered denying confirmation of the Debtor’s
 17 proposed Chapter 13 plan³ and dismissing the case. (ECF No. 47).⁴

19 ² The court takes judicial notice of the docket in the Civil Action pursuant to FRE 201(b).
 20 See Kismet Acquisition, LLC v. Diaz-Barba (In re Icenhower), 755 F.3d 1130, 1142 (9th Cir.
 21 2014)(judicial notice may be taken of “court filings and other matters of public record.”). That
 22 docket indicates that the Civil Action was commenced on February 9, 2017. The docket further
 indicates that the State Court denied a motion to dismiss and that a jury trial has been scheduled
 to commence on August 5, 2019.

23 ³ Debtor’s proposed Chapter 13 plan (“Plan”) was filed on October 26, 2017. (ECF No.
 24 34). Section 1.08 of the proposed Plan specified that the Debtor would make payments of
 25 \$1,432 for 59 months totaling \$84,488. Of the total amount paid by the Debtor, Section 2.19
 26 specified that the estimated amount of \$44.01 would be paid to nonpriority, general unsecured
 creditors.

27 ⁴ Because the Chapter 13 case was dismissed before the Claims Bar Date elapsed,
 28 creditors of the Debtor were under no deadline to file proofs of claim. No request was made by
 the Debtor, the Chapter 13 Trustee, or any other interested party to set a new deadline in the
 case.

1 On February 6, 2018, an order was entered vacating the dismissal of the Chapter 13 case.
2 (ECF No. 58).

3 On February 20, 2018, a proof of claim in the amount of \$115,690.00 was filed on behalf
4 of Vassout. On February 27, 2018, an amended proof of claim (“Vassout POC”)⁵ was filed for
5 the sole purpose of correcting the name of the Debtor.⁶ The nature of the claim is described as
6 money loaned to Debtor for investment in a restaurant. Part 9 of the Vassout POC asserts that
7 the claim is secured by a lien on property and simply describes the property as the money that
8 was loaned. Part 12 of the Vassout POC also asserts that up to \$2,850 of the claim is entitled to
9 priority as a deposit towards the purchase, sale or rental of property or services for personal,
10 family, or household use under Section 507(a)(7).

11 On February 20, 2018, Vassout filed the instant RAS Motion. (ECF No. 60). Vassout
12 seeks relief from stay under Section 362(d)(1). The RAS Motion was noticed to be heard on
13 March 28, 2018. (ECF No. 61). The motion requests relief from the automatic stay to permit
14 Vassout to proceed with the Civil Action in State Court and for this court to abstain from
15 adjudicating his state law claims.

16 On March 13, 2018, an opposition to the RAS Motion was filed by the Debtor. (ECF No.
17 64). On March 20, 2018, a reply was filed by Vassout. (ECF No. 65).

18 DISCUSSION

19 A copy of a Second Amended Complaint (“Complaint”) filed in the Civil Action is
20 attached to the RAS Motion. The plaintiffs, including Vassout, consist of two individual citizens
21 of France, doing business in Clark County, Nevada, along with a third plaintiff consisting of a
22 Nevada limited liability company doing business in Clark County. The named defendants
23 include the Debtor, along with five other individual residents of Clark County, plus two Nevada
24

25 ⁵ The first name “Frank” is used in the proofs of claim filed by Vassout. In the RAS
26 Motion as well as the Schedules, both Vassout and the Debtor use “Franck” as the spelling of the
first name.

27 ⁶ No documentation of any kind, e.g., signed promissory notes, cancelled checks, wire
28 transfer confirmations, etc., is attached to either proof of claim. Likewise, no UCC-1 financing
statements or security agreements accompany either proof of claim.

1 limited liability companies doing business in Clark County. The crux of the Civil Action is
2 described as follows:

3 Plaintiffs in this action are French investors suing their business partners in a
4 failed Las Vegas restaurant start-up because the business partners failed to make
5 their initial capital contribution of \$3,480 per percentage ownership interest,
6 caused Plaintiffs' monies to be used for restaurant start-up costs, and then quit the
7 inadequately capitalized restaurant once they ran out of Plaintiffs' monies with
8 little to no cost to themselves.

9 Complaint at ¶ 15. The Complaint is framed as eleven separate causes of action, the fifth
10 through tenth of which are asserted against all defendants, including the Debtor. Those causes of
11 action are asserted under theories of conspiracy to commit misrepresentation or breach of
12 fiduciary duties, aiding and abetting the same, concert of action, breach of contract or unjust
13 enrichment, breach of implied covenant of good faith and fair dealing, and tortious interference
14 with contract or prospective economic advantage.

15 Upon the filing of the Chapter 13 petition on August 10, 2017, the automatic stay barred
16 continuation of the Civil Action against the Debtor. If the Debtor is able to confirm a Chapter 13
17 plan and then complete payments under that plan, a discharge would be entered as soon as
18 practicable pursuant to Section 1328(a). Payments would be made by the Chapter 13 Trustee on
19 all allowed claims in accordance with the terms of the confirmed plan. Under Section 502(a), a
20 claim set forth in a proof of claim is deemed allowed unless a party objects. As previously
21 mentioned at 2-3, supra, the Vassout POC is a claim in the amount of \$115,690 that allegedly is
22 secured by the monies loaned to the Debtor. Additionally, a portion of the claim allegedly is
23 entitled to priority under Section 507(a)(7).

24 Although Sections 2.10 through 2.15 of the Debtor's previous proposed Plan addressed
25 the treatment of secured claims, none of those sections provided for treatment of the Vassout
26 POC. Additionally, although Section 2.17 of the proposed Plan addressed the treatment of
27 priority unsecured claims, that Section did not provide for treatment of the Vassout POC.
28 Finally, while Sections 2.18 and 2.19 of the proposed Plan provided for the treatment of
nonpriority unsecured claims, there was no specific treatment of the Vassout POC. Instead,
Section 2.19 merely provided that nonpriority unsecured creditors would be paid the total

1 amount of only \$44.01. In other words, if Vassout's claim is allowed as a nonpriority unsecured
2 claim, Debtor previously proposed that Vassout be paid less than a penny on the dollar, with the
3 unpaid balance being discharged.

4 A Chapter 13 discharge under Section 1328(a), however, excludes a variety of debts,
5 including: [a] debts incurred through false pretenses, false representations, or actual fraud, as set
6 forth in Section 523(a)(2); [b] debts for fraud or defalcation while acting in a fiduciary capacity,
7 or embezzlement, or larceny, as set forth in Section 523(a)(4); and [c] debts for willful injury or
8 malicious injury, as set forth in Section 1328(a)(4). See 11 U.S.C. § 1328(a)(2) and (4). Under
9 FRBP 4007(c), the deadline in a Chapter 13 proceeding to object to the discharge of such claims
10 is no later than 60 days after the meeting of creditors. At least 30 days notice of that deadline
11 must be given to creditors.

12 In the present case, Vassout was not included on the Creditor Matrix filed by the Debtor.
13 As a consequence, Vassout was not served with the Bankruptcy Notice nor did Vassout receive
14 the Bankruptcy Notice before the September 19, 2017, meeting of creditors. On October 30,
15 2017, the Debtor served a copy of the Bankruptcy Notice to Vassout's counsel in the Civil
16 Action, but that was only 21 days before the November Deadline to object to dischargeability of
17 debts encompassed by Section 1328(a). Obviously, that amount of notice is less than the amount
18 required by FRBP 4007(c). At this point, Vassout has not commenced an adversary proceeding
19 to determine dischargeability of his claims under Section 523(a)(2 and 4) or Section 1328(a)(4).
20 Whether Vassout could even commence an adversary proceeding under FRBP 7001(6) on a
21 timely basis is not presently before the court.⁷

22 What is before the court is Vassout's request for relief from stay under Section 362(d)(1)
23 to pursue the Civil Action. In addition to relief from stay, Vassout requests that the court abstain
24 under 28 U.S.C. section 1334(c)(2) from deciding issues encompassed by the Civil Action. Both
25 parties acknowledge that the factual issues determined by the State Court in the Civil Action

26
27 ⁷ See, e.g., Anwar v. Johnson (In re Johnson), 720 F.3d 1183 (9th Cir. 2013) (bankruptcy
28 court lacks authority under Section 105(a) to grant retroactive extensions of a deadline
previously extended under FRBP 4007(c)).

1 would have relevance to the dischargeability complaint that has yet to be commenced. Those
2 issues also would have relevance to any objection to the allowance of the Vassout POC. Vassout
3 argues that all or some of the factual issues can be fully litigated in the Civil Action and the State
4 Court findings would have issue preclusive effect in the anticipated dischargeability proceeding
5 in the bankruptcy court. Debtor maintains that he does not want to go through the expense of
6 litigating the issues in State Court in lieu of defending a determination of the same factual issues
7 in the bankruptcy court.

8 Neither Vassout nor the Debtor dispute, however, that the Civil Action seeks to
9 determine the liability of non-debtor defendants over which this bankruptcy court does not have
10 jurisdiction, and also seeks a jury trial for all of the state law claims alleged in the Complaint.
11 As between the non-debtor plaintiffs and the non-debtor defendants, the bankruptcy court simply
12 lacks authority to enter a final judgment on any of the causes of action, none of which arise
13 under bankruptcy law. See Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S.
14 50, 52, 71-72 & n.26, 87 (1982) (plurality opinion). See also Executive Benefit Ins. Agency v.
15 Arkison, 134 S.Ct. 2165, 2171 (2014). As to a jury trial, it also is clear that the bankruptcy court
16 lacks authority to conduct a jury trial without the affirmative consent of all parties. See Local
17 Rule 9015(e). Additionally, the nature of the allegations of the fifth through tenth causes of
18 action, i.e., conspiracy, aiding and abetting, concert of action, and the like, suggest that the
19 testimony of multiple parties either through discovery or during trial, will be required. The legal
20 expenses therefore will be significant irrespective of whether the State Court or this bankruptcy
21 court resolves the relevant factual issues.

22 As a general rule, a federal court cannot abstain from adjudicating a matter where there is
23 no parallel proceeding pending in state court that could adjudicate the same matter. See Sec.
24 Farms v. Int'l Bhd. of Teamsters, Chauffers, Warehousemen & Helpers, 124 F.3d 999, 1009 (9th
25 Cir. 1997). In this unusual case, however, the opposite situation currently exists: there is no
26 adversary proceeding pending before this court that can be abated in favor of the pending Civil
27 Action. Thus, abstention, even on a permissive basis under 28 U.S.C. § 1334(c)(1), is
28 inappropriate. Compare Christensen v. Tucson Estates, Inc. (In re Tucson Estates, Inc.), 912

1 F.2d 1162, 1167-68 (9th Cir. 1990) (applying twelve-factor test to determine whether bankruptcy
 2 court should abstain with respect to issues raised in pending state court action). The question,
 3 then, is whether granting relief from stay to permit the Civil Action to proceed would serve any
 4 purpose in the context of the Debtor's bankruptcy case. See id. at 1166 ("Where a bankruptcy
 5 court may abstain from deciding issues in favor of an imminent state court trial involving the
 6 same issues, cause may exist for lifting the [automatic] stay as to the state court trial.").

7 In the instant case, the Civil Action clearly is an action against the Debtor to recover a
 8 claim that arose before the instant Chapter 13 proceeding was commenced. Section 362(a)(1)
 9 therefore applies. Prosecution of the Civil Action also is an act to collect, assess or recover a
 10 claim against the Debtor that arose before the Chapter 13 was filed. Section 362(a)(6) therefore
 11 applies. It is also clear, however, that the stay of an action or act to recover a claim against a
 12 debtor does not shield the debtor from involvement as a witness or a source of discovery. See
 13 Bartech Systems Int'l, Inc. v. Mobile Simple Solutions, Inc., 2018 WL 679905, at *2 (D. Nev.
 14 Jan. 4, 2018); United Nat'l Funding, LLC v. JetDirect Aviation, Inc., 2012 WL 2514929, at *3
 15 (D. Nev. June 28, 2012); Baker v. Miller (In re Miller), 262 B.R. 499, 505 (B.A.P. 9th Cir.
 16 2001). Thus, as it currently stands, nothing prevents Vassout from seeking discovery from the
 17 Debtor to pursue the state law causes of action against the non-debtor defendants in the Civil
 18 Action, including the civil conspiracy and similar theories.

19 Under Section 362(d)(1), "cause" may be established to permit litigation to go forward in
 20 another forum. As in the case of permissive abstention, courts typically apply a multi-factor test
 21 in determining whether cause exists. See Sonnox Indus., Inc. v. Tri Component Prods. Corp. (In
 22 re Sonnox Indus., Inc.), 907 F.2d 1280 (2nd Cir. 1990). "These are: (1) whether relief would
 23 result in a partial or complete resolution of the issues; (2) lack of any connection with or
 24 interference with the bankruptcy case; (3) whether the other proceeding involves the debtor as a
 25 fiduciary; (4) whether a specialized tribunal with the necessary expertise has been established to
 26 hear the cause of action; (5) whether the debtor's insurer has assumed full responsibility for
 27 defending it; (6) whether the action primarily involves third parties; (7) whether litigation in
 28 another forum would prejudice the interests of other creditors; (8) whether the judgment claim

1 arising from the other action is subject to equitable subordination; (9) whether movant's success
 2 in the other proceeding would result in a judicial lien avoidable by the debtor; (10) the interests
 3 of judicial economy and the expeditious and economical resolution of litigation; (11) whether the
 4 parties are ready for trial in the other proceeding; and (12) impact of the stay on the parties and
 5 the balance of harms.” 907 F.2d at 1286, citing In re Curtis, 40 B.R. 795, 799-800 (Bankr. D.
 6 Utah 1984) (“Sonnax/Curtis Factors”).

7 For the reasons already discussed, the court concludes that items (1), (6), (7), and (10) of
 8 the Sonnax/Curtis Factors favor relief from stay under certain conditions. Additionally, item (2)
 9 is neutral because the Civil Action is relevant to the bankruptcy case, but prosecution under the
 10 circumstances will not interfere with the case. Item (3) also is neutral insofar as any
 11 determination of the Debtor’s fiduciary status may or may not be consistent with the definition of
 12 a fiduciary under Section 523(a)(4).⁸ Items (4), (5), (8) and (9) are inapplicable. Item (11) on its
 13 face does not favor relief from stay because trial of the Civil Action is not imminent. Item (12)
 14 favors relief from stay inasmuch as the Debtor already is subject to compelled testimony and
 15 discovery in connection with the causes of action against the non-debtor defendants. Any harm
 16 to the Debtor can be avoided by reserving any dischargeability determination to the bankruptcy
 17 court and barring the enforcement of any judgment in the Civil Action against property of the
 18 Debtor or the bankruptcy estate.

19 On balance, the court concludes that relief from stay for cause pursuant to Section
 20 362(d)(1) is warranted under the Sonnax/Curtis Factors. As permitted by Section 362(d),
 21 termination of the automatic stay will be subject to the conditions set forth below.

22 **IT IS THEREFORE ORDERED** that Creditor Frank Vassout’s Motion to Lift
 23

24 ⁸ See Lewis v. Scott (In re Lewis), 97 F.3d 1182, 1185 (9th Cir. 1996) (“Whether a
 25 relationship is a ‘fiduciary’ one within the meaning of section 523(a)(4) is a question of federal
 26 law...The broad, general definition of a ‘fiduciary’ is inapplicable in the dischargeability
 27 context...Instead, the fiduciary relationship must be one arising from an express or technical trust
 28 that was imposed before and without reference to the wrongdoing that caused the debt.”). See
 also Alle v. Gales (In re Alle), 2017 WL 4768448, at *6 (B.A.P. 9th Cir. Sep. 29, 2017);
Dreyfuss v. Clooback (In re Clooback), 2007 WL 7535051, at *7-8 (B.A.P. 9th Cir. May 2,
 2007).

Automatic Stay, Docket No. 60, be, and the same hereby is, **GRANTED AS PROVIDED HEREIN.**

IT IS FURTHER ORDERED that the movant may proceed with respect to the above-captioned debtor in the civil action styled as Franck Vassout, et al vs. Kathleen Petitjean, et al, Case No. A-17-750836-C, pending in the Eighth Judicial District Court, Clark County, Nevada, subject to the following conditions:

- (1) This bankruptcy court retains jurisdiction to determine the dischargeability of any personal liabilities of the debtor set forth in any judgment entered in the aforementioned civil action; and
- (2) Any judgment entered in the aforementioned civil action may not be enforced against the debtor, property of the debtor, or property of the bankruptcy estate, without further order of this bankruptcy court.

IT IS FURTHER ORDERED that notice of entry of the instant Order must be filed by the moving party in the aforementioned civil action.

Copies sent to all parties via CM/ECF ELECTRONIC FILING

Copies sent via BNC to:

OVIDIU REMUS ENE
5840 RED ROCK STREET
LAS VEGAS, NV 89118

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