

**UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION**

In Re)	Case No. 02-37729
)	
Robert H. Gaylord)	Chapter 7
Dyane L. Gaylord)	
)	
Debtors.)	JUDGE MARY ANN WHIPPLE

ORDER MODIFYING AUTOMATIC STAY

The court held a further hearing on April 4, 2003, on the Motion for Relief from Stay [Doc. #13] filed by creditors Deborah Nelson and Patrick Nelson, and Debtor Robert Hugh Gaylord's Memorandum in Support of Motion for Relief From Stay [Doc. #29].

The Nelsons ask for relief from the automatic stay of 11 U.S.C. § 362(a) to continue litigating a pre-petition lawsuit they filed in state court on June 21, 2002, against Debtor Robert Hugh Gaylord. A copy of the complaint in the state court action was attached as an exhibit to the Nelsons' motion for relief from stay. There are other defendants in the state court action, whom both parties characterize as necessary parties. The lawsuit is based on a real estate transaction involving the Nelsons, as lessees of certain property, and Robert Hugh Gaylord and two other non-debtor defendants, Carolyn Johnson and Danberry Realty, as the lessor and real estate broker, respectively. Debtor Robert Hugh Gaylord was the Danberry agent/broker involved in the lease transaction. The complaint consists of seven counts, not all of which appear to be asserted against Debtor Robert Hugh Gaylord.

The first count is against Debtor Robert Hugh Gaylord, and is based on an alleged unauthorized practice of law. The second count is for breach of contract, and appears to be against defendant Johnson, only. Count three is based upon alleged fraud, and is asserted against all three defendants. Likewise, counts four and five, for unjust enrichment and tortious [sic] interference with contract, and count seven for rescission, are asserted only against Johnson. Count six is styled as a violation of statute, Ohio Revised Code §5321, involving the breach of warranty of

habitability. It is unclear against whom the Nelsons assert this claim. The complaint's prayer for relief seeks compensatory damages, punitive damages and attorney's fees, as well as rescission of the lease in issue.

The Nelsons have also commenced an adversary proceeding in this court. The adversary proceeding asserts a claim for determination of the dischargeability of any debt Robert Hugh Gaylord owes the Nelsons, based on 11 U.S.C. § 523(a)(4) "for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny."¹ A copy of the state court complaint is also attached to the adversary complaint in this court as the alleged factual basis for the dischargeability objection.

The parties agree that the fraud claim should be initially tried in the state court under count three of the state court complaint. A finding of fraud is an element of the Nelsons' claims in both state court and in this court. The parties believe, and the court agrees, that judicial economy and the resources of the parties will be most effectively be used if discovery is done once and Mr. Gaylord is required to testify about these issues once. Because other parties are involved there, it also makes more sense to have the state court determine the fraud issue, as the case can proceed in state court as against the other defendants free of the automatic stay in any event, without the necessity of any relief from this court. *See Goya Foods, Inc. v. Ulpiano Unanue-Casal (In re Ulpiano Unanue-Casal)*, 159 B.R. 90, 95 (D. P.R. 1993) (list of factors to be considered in granting relief to proceed with litigation in other court).

Ultimately, however, this court has exclusive jurisdiction to determine the dischargeability of any such judgment and claim. 11 U.S.C. § 523(c)(1). The burden of proof as to fraud in both courts is by a preponderance of the evidence. So a finding of fraud in the state court action will be binding on this court in the Nelsons' adversary proceeding. After the fraud issue is determined in state court, however, the parties will have to return to this court for entry of a judgment one way or the other on the Nelsons' pending § 523(a)(4) complaint. It is not entirely clear to this court that there will be a complete identity of issues, even on the third count of the state court complaint, because § 523(a)(4) only excepts from

¹ Co-debtor Dyane Lynn Gaylord was also sued in the dischargeability adversary proceeding filed by the Nelsons. She was not, however, sued in the state court action and the Nelsons' counsel will be dismissing her from the adversary immediately.

discharge debts for fraud or defalcation *in a fiduciary capacity*. Significantly, the parties report that a trial date has already been set for November, 2002, in the state court action, so any delay in this court in making the final determination of dischargeability, if the case proceeds on that schedule in state court, will not be undue.

But the parties do not agree on relief as to any of the other claims in the complaint to the extent they have been asserted against Debtor Robert Hugh Gaylord. Count two is for simple breach of contract, and is asserted only against Johnson; it would be dischargeable in any event, and so relief from stay would be inappropriate even if it were asserted against Gaylord. Likewise, counts four (unjust enrichment), five (tortious [sic] interference with contract) and six (for rescission of Nelsons' lease with Johnson) are asserted only against Johnson, and are not in issue as to relief from stay in this court.² The counts in dispute as to whether relief from stay should be granted are count one for the unauthorized practice of law, asserted only against Gaylord, and count six for violation of the Ohio landlord/ tenant law, unclearly asserted.

As to count one, the court doubts that there is even an independent, private cause of action under Ohio law for damages for the unauthorized practice of law. Research has not yielded any case law support for such a claim. Rather, unauthorized practice of law seems to be a disciplinary matter sometimes involving the necessity of injunctive relief to stop it. And as pleaded in the state court complaint, count one does not now implicate any dischargeability concern under § 523(a)(4). The court could envision an alleged unauthorized practice of law amounting to fraud, such as if Gaylord had told the Nelsons he was a lawyer and he was not. But that circumstance would otherwise be subsumed within count three for plain fraud.

On the other hand, the parties will be litigating at least one claim in state court. And drawing clean dividing lines between what is discovery on count three of the complaint and what is discovery on count one of the complaint, should relief from stay not be granted as to the latter claim, would be practically difficult for all involved. Accordingly, the court will also modify the automatic stay to allow the

² Gaylord is probably a witness with respect to those claims against Carolyn Johnson, and is therefore certainly subject to discovery as to those claims. That is not, however, an automatic stay issue.

Nelsons' lawsuit to proceed in state court on count one. To the extent there is doubt about the existence of an independent cause of action for damages for the unauthorized practice of law, that issue can be raised by Gaylord and determined in state court on motion practice, without substantial additional burden on the debtor given the pending fraud claim. If it does proceed to trial and results in a verdict in favor of the Nelsons, this court will then have to determine whether the resulting debt is nondischargeable under § 523(a)(4).

The issues are the same as to whether relief from stay should be granted on count six. The claim is unclearly plead as to whether it is even being asserted against Gaylord. The statute in issue is the Ohio landlord/tenant law, which does provide for damages for its breach. Ohio Rev. Code § 5321.12. But that is as against the landlord, and Gaylord was not the Nelsons' landlord. Also, these claims sound in breach and do not appear to implicate dischargeability under § 523(a)(4).

On the other hand, if Gaylord had knowledge of defects in the property and omitted to disclose them, such facts would probably also be subsumed within the Nelsons' fraud claim. As discovery on such allegations will proceed as to Johnson in any event, and as against Gaylord as to the fraud claim, the court will also modify the stay to permit the case to proceed on count six. As with the claim for the alleged unauthorized practice of law, if there is a pleading defect and no separate cause of action as against Gaylord, those issues can just as effectively and efficiently be addressed in the state court on motion practice before returning to this court for a final determination of dischargeability.

Based on the consent of the parties as to count three of the state court action, and for the foregoing reasons as to counts one and six, the court will therefore modify the automatic stay as follows:³

³ In deference to judicial economy and the resources of the parties, the court will essentially hold the pending adversary action in abeyance in this court to allow the state court action to proceed as now scheduled and as set forth in his order. A further pretrial conference has been set in the adversary proceeding for November 10, 2003, after the conclusion of the scheduled trial in state court. Discovery on the fraud claim in this court, were the state court action to remain stayed, would not be materially different in terms of consumption of resources, timing and burdensomeness on the debtor. That is a substantial reason for relief to be granted; discovery will have to occur in either proceeding. Another important reason for the court's willingness to grant relief to proceed initially in state court is that a trial date and case schedule are already in place in the state court lawsuit. Should that schedule materially change, however, this

IT IS ORDERED that the Motion for Relief From Stay [Doc. #13] filed by Deborah Nelson and Patrick Nelson is **GRANTED** to the extent set forth below; and

IT IS FURTHER ORDERED that the automatic stay of 11 U.S.C. § 362(a) is hereby modified to permit creditors Deborah Nelson and Patrick Nelson to continue their state court lawsuit, Case No. CI0200203564 pending in the Lucas County, Ohio Common Pleas Court, against Debtor Robert Hugh Gaylord to final judgment on counts one, three and six of the complaint, only, provided, however, that the automatic stay continues in effect to prohibit the Nelsons from any act to collect any judgment that may be entered in that action, including without limitation the filing of a certificate of judgment lien, pending a determination by this court in pending Adversary Proceeding Case No. 03-3058 that the debt is nondischargeable.

/s/ Mary Ann Whipple

MARY ANN WHIPPLE
UNITED STATES BANKRUPTCY JUDGE

court's willingness to defer conclusion of the adversary proceeding in this court will also likely change.