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UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

In re:	)	Case No. 02-20613
	)	
KENNETH E. KOOS and	)	Chapter 7
BRENDA H. KOOS,	)	
	)	Judge Arthur I. Harris
Debtors.	)	

MEMORANDUM OF OPINION

This matter is currently before the Court on several motions related to this Court's December 26, 2002, order (Docket #23) granting relief from stay to permit a state court action against the debtors to proceed to judgment and, in particular, whether that order is affected by or should be amended as a result of this Court's May 16, 2003, order (Docket #71) converting this case from Chapter 13 to Chapter 7. For the reasons that follow, the December 26, 2002, order granting relief from stay remains in full force and effect. Neither the conversion of this case to a proceeding under Chapter 7 nor any other intervening circumstances warrant altering or amending the December 26, 2002, order granting relief from stay.

BACKGROUND

On September 23, 2002, the debtors filed their Chapter 13 proceeding. On December 26, 2002, this Court entered an order granting the motion of the Baglias

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for relief from stay (Docket # 23) to pursue litigation in Geauga County Common Pleas Court ("state court litigation"). That order provided:

1. The Motion is granted and the automatic stay imposed by § 362 of the Bankruptcy Code is terminated with respect to [Baglias], their successors and assigns.

2. [Baglias] may proceed with existing litigation against Debtors in the Geauga County Common Pleas Court Case No. 00P950 to allow [Baglias] to liquidate their claims against the Debtors. [Baglias] may proceed to judgment only. [Baglias] may not execute on state judgment, if any, entered in their favor.

On January 6, 2003, the debtors appealed the order granting relief from stay (Docket # 30) and moved this Court under Bankruptcy Rule 8005 for an order staying the December 26, 2002, order pending appeal (Docket # 32). On January 17, 2003, this Court issued a Memorandum of Opinion and Order denying the debtors' request for a stay pending appeal (Docket #s 34 & 35). The debtors did not move the Bankruptcy Appellate Panel for a stay pending appeal under Bankruptcy Rule 8005, and on April 22, 2003, the Bankruptcy Appellate Panel dismissed the appeal for non-prosecution (Docket # 63).

On March 27, 2003, this Court heard oral argument on confirmation of the debtors' plan and amended plan, the Baglias' motion to dismiss, and the Chapter 13 trustee's motion to convert. The Court initially scheduled an evidentiary hearing

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for May 21, 2003 (Docket #54); however, in an order dated May 2, 2003, (Docket # 66) the Court postponed the evidentiary hearing and instead ordered oral argument for May 15, 2003, on the Court's tentative decision to convert the case for failure to meet the "best interest of creditors" test under §1325(a)(4). On May 16, 2003, this Court granted the motion of the Chapter 13 trustee to convert this case to a Chapter 7 case for the reasons stated in the Court's tentative decision and in open Court on May 15, 2003 (Docket # 71).

In the meantime, the state court litigation involving the Baglias and the debtors went forward with a final pretrial on April 28, 2003. Apparently, the debtors decided during or after the final pretrial not to defend the state court litigation. A trial in state court was held on May 6, 2003, with several fact and expert witnesses testifying on behalf of the Baglias. No judgment has been entered in the state court litigation.

**THE BAGLIAS' SECOND MOTION FOR RELIEF FROM STAY**

On May 30, 2003, the Baglias filed their second motion for relief from stay presently before the Court (Docket #74). In their second motion the Baglias request relief to continue to litigate their claims against the debtors in the state court litigation, even though relief was granted earlier on December 26, 2002

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(Docket # 23). This second motion appears to be prompted by the "Notification of Automatic Stay" filed by counsel for the debtors in the state court litigation. *See* Baglias' motion for relief from stay, Exhibit A (Docket # 74). That notice states that upon conversion of the debtors' case to Chapter 7, a new order of relief and automatic stay became effective in the state court litigation.

On June 10, 2003, this Court held an expedited hearing on the Baglias' motion for relief from stay (Docket # 74) and the motion for reconsideration of order granting expedited hearing on the Baglias' motion for relief from stay (Docket #78) filed by the debtors. The Court invited the parties to submit additional briefing, and on June 20, 2003, the debtors and the Baglias filed additional briefs (Docket #s 83 & 84).

### ISSUES

1. Does the May 16, 2003, order converting this case from Chapter 13 to Chapter 7 result in a new automatic stay that overrides this Court's earlier December 26, 2002, order granting relief from stay?
2. Do intervening circumstances, including the conversion of this case to a proceeding under Chapter 7, justify altering or amending the December 26, 2002, order granting relief from stay?

### THE AUTOMATIC STAY

Under § 362(a) the filing of the petition under section 301, 302, or 303 operates as an automatic stay against various actions against the debtor and

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property of the estate. The *filing of the bankruptcy petition* is the event that triggers the imposition of the automatic stay.

Section 348 of the Bankruptcy Code provides

(a) Conversion of a case from a case under one chapter of this title to a case under another chapter of this title constitutes an order for relief under the chapter to which the case is converted, but, except as provided in subsections (b) and (c) of this section, *does not effect a change in the date of the filing of the petition*, the commencement of the case, or the order for relief. (emphasis supplied)

Subsections 348(b) and (c) address circumstances not applicable here. Subsection 348(b) lists certain sections of the code in which there is a reference to "the order for relief under this chapter" and specifies that for the listed sections, the reference should be to the conversion order when a case has been converted. Subsection 348(c) provides that the same notice be given when a case is converted as required for an order for relief under § 342(a).

### DISCUSSION

#### CONVERSION OF A CASE FROM CHAPTER 13 TO CHAPTER 7 DOES NOT CREATE A NEW AUTOMATIC STAY.

Although there exists a small amount of case law to the contrary, the vast majority of courts have held that the conversion of a case from one chapter to another does not reimpose the automatic stay of 11 U.S.C. § 362(a). *See, e.g., British Aviation Insurance Company, Ltd. v. Menut (In re State Airlines, Inc.)*,

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873 F.2d 264 (11th Cir. 1989); *In re Parker*, 154 B.R. 240 (Bankr. S.D. Ohio 1993); *State of Ohio, Department of Taxation v. H.R.P. Auto Center, Inc.*(*In re H.R.P. Auto Center, Inc.*), 130 B.R. 247 (Bankr. N.D. Ohio 1991). *See also Masterton v. Berkeley Federal Bank & Trust (In re Masterton)*, 189 B.R. 250 (Bankr. R.I. 1995) (expressly disagreeing with contrary holding of *In re Nichols*, 134 B.R. 236 (Bankr. S.D. Ohio 1991)); *In re Standfield*, 152 B.R. 528 (Bankr. N.D. Ill. 1993)(same). For the reasons stated in these published decisions, this Court agrees that the conversion of a case from one chapter to another does not reimpose the automatic stay. Accordingly, the May 16, 2003, order converting this case from Chapter 13 to Chapter 7 does not result in a new automatic stay that overrides this Court's earlier December 26, 2002, order granting relief from stay.

INTERVENING CIRCUMSTANCES DO NOT JUSTIFY  
ALTERING OR AMENDING THE DECEMBER 26, 2002, ORDER  
GRANTING RELIEF FROM STAY.

Even if conversion does not automatically reimpose a stay that was previously lifted, the Kooses assert that intervening circumstances, including the conversion of this case to a proceeding under Chapter 7, justify altering or amending the December 26, 2002, order granting relief from stay. Such a request for reconsideration based upon changed circumstances is properly analyzed under Rule 9024 of the Federal Rules of Bankruptcy Procedure, which incorporates

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Rule 60(b) of the Federal Rules of Civil Procedure. *See In re Gledhill*, 76 F.3d 1070 (10th Cir. 1996)(analyzing trustee's motion to reimpose automatic stay under Fed. R. Bankr. P. 9024 and Fed. R. Civ. P. 60(b)). *See also Agostini v. Felton*, 521 U.S. 203 (1997)(changed circumstances entitled petitioners to relief from judgment under Rule 60(b)); *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992)(changed circumstances may warrant modification of consent decree under Rule 60(b)); *Waste Management of Ohio, Inc. v. City of Dayton*, 132 F.3d 1142, 1146 n.4 (6th Cir. 1997)(changed circumstances may constitute basis for modification of consent decree under Rule 60(b)).

In the present case, however, neither the conversion of this case to a proceeding under Chapter 7 nor any other intervening circumstances warrant altering or amending the December 26, 2002, order granting relief from stay. First, while the actual conversion from Chapter 13 to Chapter 7 may not have occurred until May 16, 2003, the Kooses had ample warning that they may not be receiving a broad discharge under 11 U.S.C. §1328 long before they elected to stop defending the state court litigation in late April or early May of 2003. The Baglias' motion to dismiss the Chapter 13 case was filed on November 20, 2002, and remained pending as of May 15, 2003; the Chapter 13 trustee's motion to convert was filed on February 4, 2003, and remained pending as of May 15, 2003;

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nor was there any guarantee that the amended Chapter 13 plan would be confirmed, since confirmation was contingent upon the outcome of the evidentiary hearing scheduled for May 21, 2003. Thus, the Kooses had no reasonable basis for assuming that they could rely on a broad Chapter 13 discharge at the time they chose to abandon the defense of the state court litigation.

Second, the Kooses had ample opportunities to challenge this Court's December 26, 2002, order granting relief from stay. While the Kooses did file a notice of appeal and a motion with the bankruptcy court for a stay of the order pending appeal, which this Court denied on January 17, 2003, the Kooses chose not to seek a stay of this Court's order with the Bankruptcy Appellate Panel under Rule 8005 and ultimately chose not to prosecute their appeal before the Bankruptcy Appellate Panel.

Third, if the Kooses are concerned about the possible preclusive effect that a state court judgment might have in a dischargeability proceeding before this Court<sup>1</sup>, there are at least several options available to them in state court. For

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<sup>1</sup> For the application of Ohio issue preclusion law to bankruptcy proceedings, *see generally In re Fordu*, 201 F.2d 693, 703-04 (6th Cir. 1999) (indicating elements of issue preclusion law in Ohio); *In re Sweeney*, 276 B.R. 186 (6th Cir. BAP 2002) (applying "actually and directly litigated" element of Ohio issue preclusion law); *In re Rebarchek*, 293 B.R. 400 (Bankr. N.D. Ohio 2002), (applying Ohio issue preclusion law to situation where state court entered findings after defendant failed to appear at trial); *Thompson v. Wing*, 70 Ohio St.3d 176,



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example, the Kooses could consent to a money judgment in the state court. Such a money judgment, if it had no factual findings associated with it, would resolve the state claims with finality, but likely would not have any issue-preclusive effect.

*Compare Arizona v. California*, 530 U.S. 392, 414 (2000) ("In most circumstances, it is recognized that consent agreements ordinarily are intended to preclude any further litigation on the claim presented but are not intended to preclude further litigation on any of the issues presented." *citing* 18 C. Wright, A. Miller, & E. Cooper, *Federal Practice & Procedure* § 4443 and *Restatement (Second) of Judgments* § 27), with *In re Clark*, 222 B.R. 114, 117 (Bankr. N.D. Ohio 1997) ("Ohio law clearly allows for the consent judgments to be given issue preclusive effect [*citing* Ohio case law]. However, any factual determination to be given preclusive effect must have been necessary to the prior judgment.").

Alternatively, the Kooses could ask the court for a new trial in which they and their counsel would actually appear and defend the lawsuit.

Finally, this Court rejects the Kooses' argument that the dischargeability proceeding filed in bankruptcy court somehow entitles them to a federal forum for finding facts on issues common to both the state court litigation and the dischargeability action. The Supreme Court's decision in *Marrese v. American*  

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*183, 637 N.E.2d 917, 923 (1994)*(stating test for issue preclusion under Ohio law).

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*Academy of Orthopaedic Surgeons*, 470 U.S. 373, 384 (1985), makes it clear that the full faith and credit statute, 28 U.S.C. §1738, requires a federal court to accord a state court judgment the same preclusive effect that the judgment would have in a state court. If issues common to both the state court litigation and a dischargeability action need to be decided, there is nothing that dictates the bankruptcy court must decide the issues first, particularly when judicial economy and other factors suggest that the state court is in a better position to decide the issue more promptly and efficiently. Therefore, for the reasons stated previously, this Court remains convinced that the state court litigation should be allowed to proceed to judgment.

CONCLUSION

For the foregoing reasons, the Baglias' second motion for relief from stay (Docket #74) is granted to the extent that it seeks a declaration that the December 26, 2002, order granting relief from stay (Docket #23) remains in full force and effect. A separate order shall be entered in accordance with this Memorandum of Opinion.

/s/ Arthur I. Harris 07/10/2003  
Arthur I. Harris  
United States Bankruptcy Judge