UNITED STATES BANKRUPTCY COURT

EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

In re	)	Case No. 05-30713-A-13G
HAROLD SULLIVAN, II,	)	Docket Control No. MSK-1
Debtor.	)	Date: November 28, 2005 Time: 9:00 a.m.

On November 28, 2005 at 9:00 a.m. the court considered the motion of Java Oil Limited, et al., for an order annulling the automatic stay and for dismissal of the petition. The motion was opposed by the chapter 13 debtor, Harold Sullivan, II.. The text of the final ruling appended to the minutes of the hearing follows below. This final ruling constitutes a "reasoned explanation" for the court's decision and accordingly is posted to the court's Internet site, www.caeb.uscourts.gov, in a text-searchable format as required by the E-Government Act of 2002. The official record of this ruling remains the ruling appended to the minutes of the hearing.

FINAL RULING

The motion will be granted in part.

As a preliminary matter, the court approves the continuance of the hearing to this date from November 15. The court initially posted a ruling that the motion would be dismissed because the motion was not served on the United States Trustee at the court address. However, on November 15 the United States Trustee waived the defect in service and the court permitted the continuance to November 28. See Minutes from November 15, 2005 hearing. The objection points to no prejudice caused by the

continuance. Indeed, the debtor filed timely written opposition and was ready to argue the matter on November 15. If anything, the continuance works to the advantage of the debtor because it means that he has had three weeks instead of one to digest the much too long reply filed by the movants on November 8.

This petition was filed on August 31, 2005. Despite acknowledging that it was given notice of the petition on that same day by the debtor's attorney in Gibralter, the movants nonetheless proceeded with a two-day trial or hearing in Gibralter on September 5 and 6. At the conclusion of the trial, the foreign court, at the request of the movants, entered a judgment against the debtor for more than $1,000,000 (US). This was followed on September 7 by an application by the movants requesting that the debtor's assets be frozen. The application was granted and the order was served on the debtor on October 6 along with an additional application seeking sequestration of assets purportedly belonging to the debtor and located in the Cayman Islands.

On October 14, the movants filed this motion seeking annulment of the automatic stay as well as dismissal or conversion of the case.

The first issue that arises is whether the automatic stay arising upon the filing of the petition pursuant to 11 U.S.C. § 362(a) has extraterritorial effect in Gibralter and the Cayman Islands.

Under U.S. law, the automatic stay applies worldwide, whether or not this is consistent with domestic law in the relevant foreign country. See Nakash v. Zur (In re Nakash), 190

B.R. 763, 768 (Bankr. S.D.N.Y. 1996); Lykes Bros. S.S. Co. v. Hanseatic Marine Serv. (In re Lykes Bros. S.S. Co.), 207 B.R. 282 (Bankr. M.D. Fla. 1997). If a creditor violates the automatic stay anywhere in the world, that creditor is subject to sanctions in the bankruptcy court in the U.S. See 11 U.S.C. § 105(a); Underwood v. Hilliard (In re Rimsat, Ltd.), 98 F.3d 956, 962 (7th Cir. 1996).

However, if a creditor violating the automatic stay is beyond the jurisdictional reach of the U.S. bankruptcy court, the debtor may have difficulty enforcing the automatic stay. To enforce the stay, the U.S. bankruptcy court must have *in personam* jurisdiction over the creditor violating it before the court may impose and enforce sanctions. This jurisdiction exists whenever the creditor has assets in the U.S. that are subject to the jurisdiction of a U.S. court or when the creditor has filed a claim in the bankruptcy case or has otherwise submitted to the jurisdiction of the bankruptcy court. See Hong Kong & Shanghai Banking Corp. v. Simon (In re Simon), 153 F.3d 991, 997 (9th Cir. 1998), *cert. denied*, 525 U.S. 1141 (1999).

In this case, the movants have submitted to the jurisdiction of this court by filing the instant motion requesting relief from the automatic stay and seeking dismissal or conversion of the petition.

Acts in violation of the stay are void. See Schwartz v. United States (In re Schwartz), 954 F.2d 569, 571 (9th Cir. 1992). They are void even if a nonbankruptcy court acts after erroneously concluding that the automatic stay does not apply to the litigation it is asked to adjudicate. See Gruntz v. County

of Los Angeles (In re Gruntz), 202 F.3d 1074 (9th Cir. 2000).

Hence, absent the annulment of the automatic stay, all that transpired after August 31 is void even if the Gibralter court concluded that it was able to proceed.

The bankruptcy court has "wide latitude in crafting relief from the automatic stay, including the power to grant retroactive relief from the stay." In re Schwartz, 954 F.2d at 572. Annulment of the automatic stay can validate an otherwise invalid transaction. See Algeran, Inc. v. Advance Ross Corp. (In re Algeran), 759 F.2d 1421, 1425 (9th Cir. 1992).

The standard for annulling the automatic stay has been phrased differently by various courts. One has held that cause to annul the stay may exist where "the stay harms the creditor and lifting the stay will not unjustly harm the debtor or other creditors." In re Murray, 193 B.R. 20, 22 (Bankr. E.D. Cal. 1996) (quotation marks and citation omitted). Another has indicated that the court should focus on whether the creditor was aware of the petition, whether the debtor engaged in unreasonable or inequitable conduct, and whether prejudice would result to the creditor. See National Environmental Waste Corp. v. City of Riverside (In re National Environmental Waste Corp.), 129 F.3d 107, 108 (9th Cir. 1997). Yet another court examined such factors as whether the automatic stay would have been modified to permit the litigation to proceed had such relief been seasonably sought, whether the debtor is and was represented by legal counsel in the nonbankruptcy proceeding, and whether or not annulling the stay would lead to nonsensical results. Mataya v. Kissinger (In re Kissinger), 72 F.3d 107, 109 (9th Cir. 1995).

Distillation of this precedent leads the court to conclude that exercising its discretion to annul the automatic stay must be guided by the particular circumstances of each case. No one fact or circumstance determines the result. See, In re National Environmental Waste Corp., 129 F.3d at 108; Palm v. Klapperman (In re Cady), 266 B.R. 172, 179 (B.A.P. 9th Cir. 2001); Aheong v. Mellon Mortgage Company (In re Aheong), 276 B.R. 233, 250 (B.A.P. 9th Cir. 2001).

The facts presented in this case favor annulment.

It is clear that the debtor disputes the claim being asserted against him by the movants. Given that the claim is based on foreign law, and given that aspects of the controversy were already adjudicated against one other party, judicial economy dictated that the court in Gibraltar resolve the claim against the debtor. See e.g., Packerland Packing Co. v. Griffith Brokerage Co. (In re Kemble), 776 F.2d 803, 806-807 (9th Cir. 1985) (holding that judicial economy may be cause warranting modification of the stay to permit a nonbankruptcy court to resolve litigation involving a debtor); Piombo Corp. v. Castlerock Properties (In re Castlerock Properties), 781 F.2d 159, 163 (9th Cir. 1986) (not an abuse of discretion to modify the automatic stay to permit creditor's claim to be determined in nonbankruptcy court along with the debtor's related counterclaim).

Had the relief from the automatic stay been sought before proceeding further in the foreign court, it is clear that some relief would have been permitted. Given the dispute concerning the debtor's liability, the court would have permitted the

foreign court to resolve that dispute. While the plan pays nothing to unsecured creditors, a fact that ameliorates the need to resolve the dispute, the movants are also seeking conversion or dismissal of the petition for reasons that implicate the nature of the debt allegedly owed to the movants. Therefore, the debt, and its character, are central to the disposition of the case in this court.

As to relief from the automatic stay in order to sequester and freeze assets, the court would not typically grant such relief. However, the debtor in this case denies having assets in the Cayman Islands or in Gibraltar. Indeed, the schedules suggest that the debtor has no substantial tangible assets. In this circumstance, it would have permitted the movants relief to seek and freeze assets to the extent not included on the schedules.

The fact that the movants knew of the petition and could have first requested relief from the automatic stay before proceeding in the foreign court militates in favor of the debtor. In most instances where annulment is sought the movant is unaware of the petition and the automatic stay or, if aware of it, proceeds anyway because the court has previously granted prospective relief or because the debtor has filed repetitive petitions in bad faith.

This is the first petition filed by the debtor and the movants were aware of the petition before they acted. And, there is no substantial evidence that the movants were compelled by circumstances to act so promptly that prior relief from this court was not feasible. These facts detract from the merits of

any request for annulment.

However, despite these facts that favor the debtor, the equities clearly favor the movants.

It is clear that the debtor's schedules (which were not timely filed) were filed as part of an effort to gerrymander eligibility. They were not filed in good faith.

11 U.S.C. § 109(e) required that a chapter 13 debtor have less than $307,675 of noncontingent, liquidated, unsecured debts. The schedules show $185,000 in unsecured and priority unsecured claims. However, included on Schedule F are the movants' claims and the claims of several other creditors. Their claims are listed at "$0.00" and as "disputed," although not unliquidated or contingent.

Based on what is on the face of the schedules, the debtor is eligible for chapter 13 relief. The Ninth Circuit has "simply and explicitly state[d] the rule for determining Chapter 13 eligibility" is "that eligibility should normally be determined by the debtor's originally filed schedules, checking only to see if the schedules were filed in good faith. See In re Scovis, 249 F.3d 975, 982 (9th Cir. 2001).

The court agrees with the objecting creditors' contention that those schedules and statements are not accurate and they were filed in bad faith. First, they were not filed timely. Despite receiving an extension of time to file the documents, they were filed six days after the extension was filed. Second, and more importantly, the documents are incomplete and inaccurate.

///

They are incomplete, at a minimum, in their omission of information concerning the debtor's income in 2004 and 2005. They are inaccurate in their listing of the movants' claims. While the debtor may dispute those claims, their amounts were subject to ready calculation. The movants had prevailed in the foreign court and obtained the dismissal of the debtor's clients claim against them on July 7, 2004 and on November 16, 2004. The movants then sought an award of fees and costs against both the debtor's client and the debtor.

The fact that the debtor disputes the amount of a debt does not make it unliquidated. Nicholes v. Johnny Appleseed of Washington (In re Nicholes), 184 B.R. 82, 90 (B.A.P. 9th Cir. 1995). If it is subject to ready calculation it is liquidated even when it is disputed. In re Fostvedt, 823 F.2d 305, 306 (9th Cir. 1997). Fees and costs awarded to the prevailing party are readily calculable by a court. See e.g., FDIC v. Wenberg (In re Wenberg), 94 B.R. 631, 634 (9th Cir. B.A.P. 1988). The amount demanded was known by the debtor when the petition was filed. The amount awarded was known by the debtor when the schedules were filed. Yet, the debtor listed the debt at $0.00. When the petition was filed, the debtor was well within his right to maintain that the movants' claims for fees and costs against him were disputed. However, he knew full well that they were not demanding nothing. As an attorney, the debtor also knew that fees and costs are readily calculable by a court. That is, the claims were subject to "ready determination and precision in computation," In re Fostvedt, 823 F.2d at 306, and would not require an extensive contested evidentiary hearing to establish

amounts or liability. See In re Wenberg, 94 B.R. at 634.

The court concludes that the failure of the debtor to list the movants' million dollar plus claim was for the sole purpose of making it appear he qualified for chapter 13 relief. As such, the schedules were filed in bad faith and the court will look beyond them when determining his eligibility for chapter 13 relief. As demanded in Gibralter, and as awarded by that court, the claims of the movants' alone cause this case to exceed the debt limits of section 109(e).

Compounding this is the debtor's failure to be completely candid with the court, the trustee, and creditors concerning his income. As noted, he has failed to disclose his year-to-date 2005 income and his 2004 income. Also, the debtor failed to report on Schedule I and Schedule J the income and expenses of his nonfiling spouse even though those Schedules require the disclosure of this information. While the nonfiling spouse's income may not be property of the estate, it must be disclosed because it bears on the amount of the debtor's disposable income (perhaps the spouse is paying household expenses permitting the debtor to contribute more income to the plan) and the feasibility of the debtor's plan.

Also, Schedule I reports that the debtor earns $7,500 in monthly gross income from his employer. However, at the first meeting, the debtor acknowledged that this income is only payable if the debtor brings in sufficient business and only after overhead costs (which are not itemized on Schedule J) are paid. There appears, then, nothing regular about this income. Section 109(e) requires that chapter 13 debtors have regular income.

This problem is made worse by the fact that the debtor admitted at the first meeting that his real income will come from contingency fees cases. However, nowhere on Schedule B are these potential fees valued or disclosed. If the cases belong to law corporations or partnerships owned by the debtor, Schedule B reveals no such entities with any value.

In short, the income listed by the debtor is not regular income and the debtor has chosen to given the court incomplete and inaccurate information regarding his actual income and expenses.

Based on these circumstances, the court concludes that the debtor is not eligible for chapter 13 relief, both because his income is not regular and because his unsecured debts exceed the limit imposed by section 109(e). If the court's conclusions are erroneous it is because the debtor has chosen to conceal his true finances. The foregoing barely scratches the surface of the compelling evidence regarding this concealment.

Therefore, the automatic stay will be annulled and the petition will be dismissed.