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AUG 20 2014

CLERK U.S. BANKRUPTCY COURT
Central District of California
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**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION**

In re:

SAEED COHEN,

Debtor(s).

Case No: 2:13-bk-26483-NB

Adv. No.: 2:14-ap-01484-NB

Chapter: 11

SAEED COHEN,

Plaintiff(s),

v.

FARIBA COHEN,

Defendant(s).

**MEMORANDUM DECISION RE: DEBTOR'S
APPLICATION FOR A PRELIMINARY
INJUNCTION**

Date: August 19, 2014

Time: 2:00 p.m.

Place: Courtroom 1545

255 E. Temple Street

Los Angeles, CA 90012

In general the divorce proceedings of the debtor and Ms. Fariba Cohen have been stayed by the automatic stay of 11 U.S.C. § 362(a). There is an exception to the automatic stay for "the establishment or modification of an order for domestic support obligations." 11 U.S.C.

§ 362(b)(2)(A)(ii). The principal question raised by the debtor's application for a preliminary injunction (adv. dkt. 6) (the "Injunction Application") is whether this exception applies.

(1) Background. Ms. Cohen has filed an application in the divorce proceeding seeking a "clarification" of a consent order dated March 1, 2012 (adv. dkt. 10). That consent order (at adv. dkt. 1, exh. A) (the "Consent Order") provides for payments of \$20,988 per month which are designated (for nonbankruptcy purposes) as spousal "support," and it also provides for a division of

1 profits (if any) from the debtor's business, known as Amp Plus, which are not designated as
2 "support." Ms. Cohen seeks a "clarification" from the State court that the profits from Amp Plus are
3 part of her "support" payments under nonbankruptcy law. Ms. Cohen's stated intent, if she obtains
4 any such "clarification," would be to return to this bankruptcy court and "present it to the
5 Bankruptcy Court Judge so that he can use it when determining whether the several hundred
6 thousand dollars that are presently being held will be distributed to [Ms. Cohen]." Adv. dkt. 11,
7 13:12–14.

8 According to the debtor, a response to Ms. Cohen's application is due in less than a week,
9 so there is an urgent need to find out if the proceedings on that application will be enjoined or are
10 already stayed by the automatic stay. Before reaching the merits, this court addresses some
11 procedural issues.

12 (2) Service. Ms. Cohen argues that she was not properly served with the Injunction
13 Application. Adv. dkt. 10, 3:14–15, n.1. This court rejects that argument.

14 Where an attorney repeatedly represents a client in an underlying case and the totality of
15 the circumstances demonstrate an intent to convey such authority, "a party's bankruptcy attorney
16 can be authorized impliedly to accept service of process on the client's behalf in a related
17 adversary proceeding[.]" *In re Focus Media Inc.*, 387 F.3d 1077, 1082 (9th Cir. 2004). Service on
18 Mr. Aron, who has repeatedly represented Ms. Cohen in the underlying case, is sufficient under the
19 circumstances to satisfy the requirements of service in this adversary proceeding.

20 In addition and in the alternative, Ms. Cohen's objections to service were waived by her
21 counsel at the hearing on the record.

22 (3) Committee's arguments. Ms. Cohen's counsel objected both to the written arguments of
23 the Official Committee of Unsecured Creditor's (the "Committee") in its Status Report (dkt. 538)
24 and to the oral arguments presented by the Committee's counsel at the hearing. With regard to
25 the Committee's written arguments, this court sustained Ms. Cohen's objection and disregarded
26 the written arguments because they constituted unauthorized additional briefing on these issues.
27 With regard to the Committee's oral arguments, this court has accepted them because, although
28 the Committee is not a party to this adversary proceeding, the issues raised by the present
Injunction Application are intertwined with issues in this bankruptcy case generally.

1 Alternatively, even if this court were to disregard the Committee's arguments at the hearing,
2 that would not change the reasoning and ruling within this memorandum decision. Accordingly,
3 this court denies the oral request by counsel for Ms. Cohen for further briefing in response to the
4 Committee's arguments.

5 (4) Prior litigation of overlapping issues before this court. This court previously has denied,
6 without prejudice, two motions filed by Ms. Cohen that raised very similar issues. First, this court
7 denied Ms. Cohen's motion for relief from the automatic stay or, in the alternative, abstention from
8 hearing the underlying case. Dkt. 223. In that motion Ms. Cohen sought to "obtain a division and
9 allocation of community assets and liabilities and to obtain a resolution as to child and spousal
10 support." Dkt. 60, 24:28–25:1.

11 Second, this court denied Ms. Cohen's motion for adequate protection (dkt. 185), in which
12 she "request[ed] that the Court issue an order directing immediate payment of \$126,028.50 . . . as
13 payment for post-petition domestic support and as adequate protection of her interest in Amp
14 Plus." See dkt. 239.

15 The relief in these two orders was granted without prejudice and subject to possible
16 adjustment, upon a proper showing.

17 (5) The court construes the debtor's papers to request both injunctive and declaratory relief.
18 The parties have not briefed whether the complaint in this adversary proceeding and the debtor's
19 Injunction Application are using the correct procedural vehicle, in that they could be characterized
20 as seeking an injunction to enforce an injunction (the automatic stay). Ms. Cohen has waived or
21 forfeited any such objection by not raising it in her brief, so this court presumes that such an
22 injunction is a proper method under the circumstances to enforce the automatic stay. Alternatively,
23 to the extent, if any, that the proper procedural vehicle would be declaratory relief as to the scope
24 of the automatic stay, this court construes the complaint and the Injunction Application to seek
25 such declaratory relief as well as injunctive relief. For the following reasons, this court will grant
26 both forms of relief.

1 (6) The Injunction Application will be granted.

2 (a) On the present record, any attempt to increase "support" payments would be in
3 reality an attempt to obtain possession or control of bankruptcy estate property.

4 Under the Bankruptcy Code, a "domestic support obligation" must be "in the nature of
5 alimony, maintenance, or support ... without regard to whether such debt is expressly so
6 designated." 11 U.S.C. § 101(14A) (emphasis added). It is undisputed that the bankruptcy court
7 has exclusive jurisdiction to determine what is or is not a domestic support obligation.

8 [A] bankruptcy court is not bound by the state court's treatment of a divorce
9 obligation when determining whether a debt is in the nature of support.
10 Instead, this determination is governed by federal bankruptcy law, looking to
11 the substance of the debt rather than the label it has been given. [*In re King*,
12 461 B.R. 789, 793 (Bankr. D. Ak. 2010) (footnotes omitted). *See also In re*
13 *Sternberg*, 85 F.3d 1400, 1404 (9th Cir. 1996), *overruled on other grounds*,
In re Bammer, 131 F.3d 788 (9th Cir. 1997); *In re Throgmartin*, 462 B.R.
836, 839 (Bankr. M.D. Fla. 2012); *In re Nelson*, 451 B.R. 918, 921 (Bankr. D.
Or. 2011); *In re Chase*, 2008 WL 203622, *2 (S.D.N.Y. Jan. 22, 2008); adv.
dkt. 10, 7:4–8:4.]

14 The Bankruptcy Code places this responsibility on the bankruptcy court because all too
15 often what might be characterized by one or more parties or even by nonbankruptcy law as a claim
16 for "support" is in reality (for bankruptcy purposes) a division of property in the marital estate (or
17 vice versa). Under the Bankruptcy Code, "property" includes not only real property and tangible
18 personal property but also ongoing income. *See* 11 U.S.C. §§ 541 & 1115.

19 The distinction between these two things – an interest in marital property and a claim for a
20 domestic support obligation – is critical. The former generally qualifies as only an ownership
21 interest that is subordinate to the claims of creditors when it comes to the "waterfall" of distributions
22 from the bankruptcy estate. *See* 11 U.S.C. § 726(c) (incorporated into chapter 11 by 11 U.S.C.
23 § 1129(a)(7)(A)(ii)). The latter generally is treated as a priority claim that is entitled to a distribution
24 ahead of a debtor's general unsecured creditors.

25 Specifically, if this court ultimately were to determine that Ms. Cohen were owed any unpaid
26 prepetition "domestic support obligations" then those obligations generally would be treated as
27 priority claims that must be paid on the effective date of any plan of reorganization. 11 U.S.C.
28 §§ 507(a)(1) & 1129(a)(9)(B). Similarly, if this court ultimately were to determine that Ms. Cohen

1 were owed any unpaid postpetition "domestic support obligations" then those obligations generally
2 would have to be current as of the time of plan confirmation. 11 U.S.C. § 1129(a)(14).

3 Based on this court's examination of the record, however, including most importantly the
4 terms of the Consent Order, the apparent insolvency of the bankruptcy estate, and the parties'
5 history of running up truly astronomical attorney fees at the expense of not paying their creditors,
6 any attempt to increase Ms. Cohen's "support" above its current level of \$20,988 per month could
7 never qualify as a "domestic support obligation." Instead it could only be an attempted "property
8 grab" ahead of creditors. Among other things, it has been undisputed that Ms. Cohen and the
9 debtor, between them, incurred in the range of \$13 million to \$15 million in attorney fees before the
10 debtor filed his bankruptcy petition. Ms. Cohen's attempt to seek increased "support" payments is
11 a thinly disguised attempt to support her ongoing, exhaustive litigation at the expense of depleting
12 the bankruptcy estate of the property with which to pay creditors.

13 Ms. Cohen is only receiving her current distributions of \$20,988 per month because this
14 court has extended considerable leeway to her (and to the debtor) in what they can receive. Prior
15 to plan confirmation, the Bankruptcy Code does not specify how *alleged* domestic support
16 obligations must be treated. As an interim measure, this court has authorized the debtor to
17 continue making distributions to Ms. Cohen at the same level of "support" designated in the
18 nonbankruptcy Consent Order. This court has done so both (i) on the theory that Ms. Cohen has a
19 *possible* interest in distributions out of property of the bankruptcy estate (although that seems
20 increasingly unlikely), and therefore she should be granted adequate protection of that interest
21 (see 11 U.S.C. §§ 361, 362(d) & (f), 363(e)), and alternatively (ii) to the extent that no specific
22 sections of the Bankruptcy Code are applicable, based on general equitable principles including
23 that, like the debtor, she should have funds with which to litigate the complex issues in this case.
24 None of this interim relief remotely justifies any *increase* in what this court has *provisionally* treated
25 as domestic support obligations.

26 In sum, Ms. Cohen's attempt to obtain from the State court even greater "support"
27 payments than she is already receiving, in the hope that any such increase would persuade this
28 court to recognize an increased level of "domestic support obligation," is so unrealistic that her
attempt cannot properly be characterized as "the commencement or continuation of a civil action or

proceeding ... for the establishment or modification of an order for domestic support obligations." 11 U.S.C. § 362(b)(2)(A)(ii) (emphasis added). Rather, it must be characterized as an "act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate" including income from Amp Plus. 11 U.S.C. § 362(a)(3) (emphasis added). For the foregoing reasons, the automatic stay applies, and the exception in 11 U.S.C. § 362(b)(2)(A)(ii) does not apply.

(b) Injunctive relief, and the Anti-Injunction Act.

Ms. Cohen argues that injunctive relief cannot be granted in view of the Anti-Injunction Act. See adv. dkt. 10, 3:14–21. The Anti-Injunction Act provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. "[I]t is well recognized that the 'expressly authorized' exception in § 2283 includes injunctions authorized under the bankruptcy laws." *In re Brown*, 39 B.R. 820, 826 (Bankr. M.D. Tenn. 1984). The Anti-Injunction Act does not apply where, as here, the conduct being enjoined is already expressly prohibited by the Bankruptcy Code's automatic stay.

Alternatively, assuming solely for the sake of discussion that the automatic stay did not apply, the Bankruptcy Code contemplates the orderly liquidation or reorganization of the bankruptcy estate, not piecemeal and wasteful litigation of issues that are highly speculative. This court has already noted that the parties have spent in the range of \$13 million to \$15 million on attorney's fees before the bankruptcy case was filed. At that level of expenditure, there will be nothing left for anyone, and permitting such conduct to continue would be diametrically opposite to the priority scheme and structure of the Bankruptcy Code. Accordingly, this court interprets the injunctive relief available under 11 U.S.C. § 105(a), under these circumstances, to constitute an express exception to the Anti-Injunction Act. See *In re Baptist Med. Ctr. of New York*, 80 B.R. 637, 641 (Bankr. E.D.N.Y. 1987) ("As *Collier* observes, '[t]he basic purpose of the section [§ 105] is to enable the court to do whatever is necessary to aid its jurisdiction, i.e., anything arising in or relating to a bankruptcy case.' In fact, Section 105(a) contemplates injunctive relief in precisely those instances where parties are pursuing actions pending in other courts that threaten the integrity of a bankrupt's estate.") (citations omitted).

1 (c) Remedies.

2 Despite Ms. Cohen's brazen attempt to deplete the bankruptcy estate of assets to fund her
3 litigation, this court is not persuaded that Ms. Cohen's violation of the automatic stay was "willful"
4 within the meaning of 11 U.S.C. § 362(k), or that there are other grounds for fee shifting or
5 sanctions. *See Sternberg v. Johnson*, 595 F.3d 937, 946 n.3 (9th Cir. 2010). The issues are
6 complex and Ms. Cohen had at least a colorable basis to proceed as she did. Therefore this court
7 will deny the debtor's request for damages in the Injunction Application.

8 As for injunctive and declaratory relief, the automatic stay renders any act taken in violation
9 of the automatic stay void. *In re Gruntz*, 202 F.3d 1074, 1082 (9th Cir. 2000). Arguably, therefore,
10 no additional injunctive relief is required. Nevertheless, for the reasons discussed in connection
11 with the Anti-Injunction Act, this court will grant injunctive relief under 11 U.S.C. 105(a) as an
12 alternative basis for staying Ms. Cohen's acts.

13 Accordingly, this court will issue a separate order granting the following declaratory and
14 injunctive relief, for the reasons set forth in this memorandum decision:

15 1. Ms. Cohen's application for "clarification" of the Consent Order violates the
16 automatic stay of 11 U.S.C. 362(a)(3), and therefore is void and of no effect, and any proceedings
17 on that application likewise are void and of no effect.

18 2. In addition and in the alternative, Ms. Cohen and all persons acting in concert with
19 her are subject to a preliminary injunction against further prosecution of that application.

20 3. In addition and in the alternative, Ms. Cohen, individually and through her counsel,
21 is subject to a mandatory injunction to take all steps that are necessary or advisable to minimize
22 the disruption to the State court, including communicating to the State court at the earliest
23 opportunity the rulings of this bankruptcy court so that the State court can manage its calendar
24 accordingly, and also including withdrawal of her application if required by the State court for the
25 management of its docket (without prejudice to resetting the application in the event that this order
26 is modified by this bankruptcy court or reversed on any appeal or by mandamus or otherwise).

27 (7) Conclusion.

28 This court recognizes that Ms. Cohen might be accustomed to a lavish lifestyle, and she
also might (or might not) have very legitimate grievances against the debtor. Perhaps under

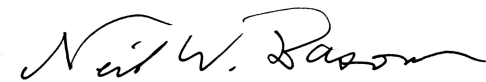
1 nonbankruptcy law these things would justify increased payments to Ms. Cohen. But whatever the
2 rights and equities as between the debtor and Ms. Cohen alone under nonbankruptcy law, this
3 court must enforce the provisions of the Bankruptcy Code.

4 The Bankruptcy Code gives primacy to the interests of creditors. Indeed, the Ninth Circuit
5 has "held on several occasions that the automatic stay imposes on non-debtor parties an
6 affirmative duty of compliance." *Sternberg*, 595 F.3d at 943. It also places the responsibility on
7 this court to determine when a proceeding truly seeks to establish or modify a "domestic support
8 obligation" and when, instead, it seeks to exercise control over or divide property of the bankruptcy
9 estate. Ms. Cohen's application to "clarify" the consent order seeks the latter, and therefore is
10 barred by the automatic stay. As an alternative and additional ground for granting the Injunction
11 Application, the debtor has established sufficient cause for injunctive and declaratory relief under
12 11 U.S.C. § 105(a).

13 A separate order granting the foregoing relief will be issued concurrent with this
14 memorandum decision.

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25 Date: August 20, 2014

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27 _____
28 Neil W. Bason
United States Bankruptcy Judge