11 U.S.C. § 544
Property of Estate
Jurisdiction
Res Judicata

Heritage Enterprises v. Silcor Inc., Adv. Nos. 688-5132, 5229
In re Heritage Enterprises, Bankr. Case. No. 688-60400-H11
District Court Civil NO. 91-6033

4/16/91 Judge Jones affirming PSH unpublished

The district court affirmed the bankruptcy court's ruling in two consolidated adversary proceedings that certain real property was not estate property subject to the DIP's § 544 avoidance powers, and that opposing party was not barred by claim or issue preclusion from asserting its ownership interest in the bankruptcy court. **Facts:** Before the DIP filed Chapter 11, it and the opposing party were sole partners in a partnership formed to develop the subject property. Upon formation, the non-debtor partner conveyed record title of the property to the partnership in return for a $6 million promissory note. When development because unfeasible, the partners attempted to terminate the partnership by signing a Dissolution Agreement providing for the deeding back of the property to the non-debtor partner)the non-debtor partner also gave the DIP a $100,000 promissory note, secured by a deed of trust on the property, to cover partnership expenses; the note was later assigned to a third party). Reconveyance of title was never accomplished and the original deed in lieu of foreclosure was lost. The DIP then filed suit in state court for money damages against the non-debtor partner, who counterclaimed for specific performance of reconveyance. While this proceeding was pending, the DIP filed bankruptcy. Shortly thereafter the state court granted judgment in favor of the DIP and dismissed the non-debtor partner's counterclaim for reconveyance with prejudice (that judgment is on appeal to the Oregon Court of Appeals). The parties then commenced these adversary proceedings. The DIP argued that partnership held and the DIP therefore owned the property as surviving partner and could avoid all other unperfected interests therein, specifically those of the non-debtor partner and the assignee of the $100,000 note. **Held**: Under Oregon law the partnership never terminated because reconveyance of property, a condition of termination, has not taken place. The property thus belonged to the partnership, not the DIP, and must be reconveyed pursuant to the Dissolution Agreement. The non-debtor partner's claim for reconveyance in bankruptcy court was not barred by res judicata. The state court lacked jurisdiction to hear and dismiss the counterclaim with prejudice because the non-debtor partner had not obtained relief from stay in order to pursue the counterclaim in state court.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

In re: HERITAGE ENTERPRISES, aka H.G. Investments; Sunset Center, Lancaster Properties of Oregon, PFH Investments, PGH Investments, Portland-Heritage and Walker, Pietka & Associates, Debtor.	Bankruptcy Case No. 688-60400
HERITAGE ENTERPRISES, Plaintiff, v. SILCOR (USA), INC., a corporation, RICHARD C. SILVERIO, FRANK J. ODENWALD, RICARDO S. SILVERIO, JR., as personal representative of the Estate of Beatriz Silverio, deceased, Defendants.	Consolidated Adversary Proceedings No. 688-5132-H No. 688-5129 District Court Civil No. 91-6033-JO
SILCOR (USA), INC., a Nevada corporation, and RICARDO C. SILVERIO, Plaintiffs, v. HERITAGE ENTERPRISES, Debtor-In-Possession, and LANCASTER PROPERTIES OF OREGON, Defendants.	OPINION AND ORDER

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JONES, Judge:

This case involves an appeal from the United States Bankruptcy Court. The court has jurisdiction pursuant to 28 U.S.C. § 158(a). The parties in this case are as follows:

1) Heritage Enterprises (Heritage). Heritage is an Oregon co-partnership, which filed for relief under Chapter 11 on February 18, 1988. At all times material to this dispute, the Heritage partners were Charles F. Kingsley and David F. Wagner.

2) Lancaster Properties of Oregon (LPO). LPO is an Oregon general partnership. At all times material to this dispute, the partners were Ricardo C. Silverio and Heritage.

3) Silcor (USA), Inc. (Silcor). Silcor is a Nevada corporation of which Silverio is a principal. In December, 1984, Silcor was the owner in fee of the property at issue in this case, 121 acres of undeveloped land in the City of Lancaster, Los Angeles County, California (the property).

4) Frank J. Odenwald. Odenwald purchased from Heritage a $100,000 promissory note from Silcor to Heritage along with a trust deed on the property securing the note. Silcor had issued the note for expenses incurred by Heritage on behalf of LPO.

Background

Silcor conveyed record title to the property to LPO in December, 1984 in exchange for a $6 million nonrecourse promissory note with a trust deed on the property securing the note. LPO was formed solely to the develop the property, and, when no progress was made, the parties decided to terminate the partnership.

On July 31, 1987, the parties executed a number of documents, including an Agreement to Dissolve and Wind Up Partnership (Dissolution Agreement) and a $100,000 promissory note from Silcor to Heritage secured by a trust deed on the property. The $100,000 note was for expenses incurred by Heritage on behalf of LPO.

The parties delivered to Ticor Title Insurance Company (Ticor) a quitclaim deed conveying the property back to Silcor, which Kingsley and Wagner, partners in Heritage, had executed on March 13, 1987. The parties also delivered the executed documents, including the 1984 trust deed securing the $6 million promissory note from LPO to Silcor.

In addition, Gardella, Silverio's and Silcor's attorney, sent a letter to Ticor, requesting reconveyance of the trust deed. Letter from Gardella to Ticor, July 31, 1987, Exhibit K-1, Supplemental Excerpt of Record at 13. Further, Kingsley instructed Ticor that Silcor had executed a request for full reconveyance and asked Ticor to record a reconveyance of the trust deed from LPO back to Silcor. Letter from Kingsley to Ticor, July 31, 1987, Exhibit 42, Supplemental Excerpt of Record at 4. Due to a dispute over an unpaid transfer tax, Ticor refused to record the documents.

On August 28, 1987, the parties met again to choose a new title company and to draft some new forms, including a deed in lieu of foreclosure granting to Silcor all rights and title to the property held by LPO and Heritage. These new documents did not change any of the terms of the agreement entered into in July.

On or about September 15, 1987, the title company recorded all the documents except the deed in lieu of foreclosure. The original of this deed has been lost.

Gardella found out that the deed in lieu of foreclosure had not been recorded and filed a Notice of Rescission of Real Property Agreement on behalf of Silcor. This Notice sought to rescind "the contract" executed on July 31, 1987 by Heritage, Silverio, and Silcor "by the terms of which [LPO] was dissolved and [the property] was conveyed to [Silcor] by deed in lieu of foreclosure." On January 15, 1988, the Notice was recorded in Los Angeles County. Notice of Rescission, Exhibit 12, Appellee Odenwald's Excerpt of Record at 10.

In September, 1987, Heritage had assigned the $100,000 promissory note and trust deed from Silcor to Heritage to Frank J. Odenwald. The assignment was recorded on September 18, 1987.

In November, 1987, Heritage brought suit in state court against Silcor and Silverio, alleging a breach of Paragraph Nine of the Dissolution Agreement and asking for money damages. On January 17, 1989, Silverio and Silcor counterclaimed for specific performance, alleging that Heritage had failed to complete the reconveyance of the property by deed in lieu of foreclosure and asked the state court to order Heritage to deliver a deed on the property to defendants. The state court granted judgment in favor of Heritage on its claim and dismissed the counterclaim with prejudice. The judgment is now on appeal to the Oregon Court of Appeals.

Statement of Bankruptcy Case

On February 18, 1988, Heritage filed for relief under Chapter 11 of the Bankruptcy Code. Because the deed in lieu of foreclosure was never recorded, LPO remained the holder of record title to the property. Heritage, however, claimed the property was in its bankruptcy estate and, pursuant to 11 U.S.C. § 544 of the Bankruptcy Code, sought to avoid any interests which were, or could be, asserted in the property by Silverio, Silcor, Odenwald, or the estate of Silverio's deceased wife.

Silcor and Silverio, on the other hand, sought a declaration that the property was not in Heritage's bankruptcy estate, that Silcor was the owner of the property with interests paramount to LPO and Heritage, and that Heritage was under a duty to execute a new deed to Silcor.

After trial on consolidated proceedings, the bankruptcy court dismissed Heritage's action with prejudice. The bankruptcy court entered judgment in favor of Silcor, Silverio, and Odenwald, concluding that the property was not in Heritage's bankruptcy estate. The bankruptcy court directed Heritage to join with Silverio in executing and recording a deed conveying the property from LPO to Silcor. Heritage appeals.

Scope of Review

"The conclusions of law of the bankruptcy court are reviewed de novo, but the findings of fact will not be set aside unless clearly erroneous." In re Ott, 69 B.R. 1, 2 (D. Or. 1986). A finding is clearly erroneous "'when although there is evidence to

support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed.'" Anderson v. Bessemer City, 470 U.S. 564, 573 (1984) (citation omitted). "In practice, the 'clearly erroneous' standard requires the appellate court to uphold any district court determination that falls within a broad range of permissible conclusions." Cooter & Gell v. Hartmarx Corp., 110 S.Ct. 2447, 2458 (1990). "When an appellate court reviews a district court's factual findings, the abuse of discretion and clearly erroneous standards are indistinguishable." Id.

The court must show even more deference to the trier of fact when the findings are based upon determinations of credibility:

> [W]hen a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error.

Anderson, supra, 470 U.S. at 575.

Discussion

Heritage raises two issues on appeal. The first is whether the property is the property of the debtor Heritage. The second issue is whether claim preclusion barred Silcor and Silverio from litigating their claim to the property in bankruptcy court because of the earlier state court action.

1) Ownership of the Property

Because the deed in lieu of foreclosure was never recorded and LPO remained the holder of record title to the property, the basic question is the status of the LPO partnership. Under Oregon

partnership law, there are three separate steps necessary for the complete extinguishment of an existing partnership: dissolution, winding up, and termination. Timmermann v. Timmermann, 272 Or. 613, 626, 538 P.2d 1254 (1975). Dissolution is "the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business." Or. Rev. Stat. 68.510 (1989). "On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed." Or. Rev. Stat. 68.520 (1989).

Heritage asserts that by execution of the Dissolution Agreement, which Heritage claims is the primary document evidencing the intent of the parties, Silverio withdrew from the LPO partnership,[1] the partnership simultaneously dissolved, wound up and terminated, and, as sole remaining partner, Heritage became owner of the property, which subsequently became part of the bankruptcy estate.

To determine the parties' intent, the bankruptcy court looked beyond the four corners of the Dissolution Agreement because the bankruptcy court found that the Dissolution Agreement was not an integrated document. Findings of Fact and Conclusions of Law at 11 (Item #28).[2]

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[1] The Dissolution Agreement states that "Ricardo Silverio does hereby withdraw from Lancaster Properties of Oregon." Agreement to Dissolve and Wind Up Partnership (Para. 4), Exhibit 6, Appellant's Excerpt of Record at 7.

[2] Parties' intent with respect to integration is a question of fact. O'Meara v. Pritchett, 97 Or. App. 329, 336, 776 P.2d 866 (1989).

The bankruptcy court found that the parties had come to an understanding on the broad framework of their agreement at their first meeting on February 10, 1987. That framework included the agreement that the property would be deeded back to Silcor from LPO. See Findings of Fact and Conclusions of Law at 5-6, 12 (Items #12, 31). The bankruptcy court further found that, as part of their agreement, the parties intended that the deed and other documents be recorded. Id. at 14 (Item #42). According to the bankruptcy court, as early as February 1987, Kingsley recognized

> the absolute necessity of recording the full reconveyance under the original trust deed from LPO to Silcor, the deed reconveying the Property from LPO to Silcor, and the trust deed securing the promissory note from Silcor to Heritage if Heritage were to be successful in selling the promissory note to a third party.

Id. at 13-14 (Item #38).

The record supports the bankruptcy court's findings. As noted above, in February, 1987, Kingsley sent a letter to Ticor asking that the quitclaim deed from LPO to Silcor be recorded first in priority, the 1984 trust deed be reconveyed and recorded second in priority, and that a trust deed from Silcor to Pacific Developmental Services [a corporation in which Kingsley and his partner had an interest] should be recorded third in priority. Letter From Kingsley to Ticor, February 17, 1987, Exhibit U, Supplemental Excerpt of Record at 11. Further, the documents and letters executed in both July and August of 1987 specifically asked the title company to record the reconveyance of the 1984 trust deed and vest title back in Silcor as well as record the

trust deed that secured the $100,000 promissory note from Silcor to Heritage.

The trial transcript also shows that both Silverio and Kingsley intended for the documents to be recorded. Silverio stated explicitly that "[m]y withdrawal from the partnership which is Lancaster Properties of Oregon is conditioned and contingent upon Silcor receiving a fully recorded grant deed from Lancaster Properties of Oregon." Trial Transcript III at 154-55.

Further, the bankruptcy court, referring to Kingsley's July 31, 1987 letter, asked Kingsley: "When you wrote the letter to Ticor and sent it to them, you intended for them to record the documents?" Kingsley responded: "Yes, I did." Trial Transcript II at 184. In addition, Robertson, Heritage's attorney, intended for the documents to be recorded. Trial Transcript III at 59. In an August 7, 1987 letter to Ticor, Robertson said "After you have secured all of the documents, I would appreciate a call to let us know when the recording will take place. Exhibit Q-1, Supplemental Excerpt of Record at 18.

When Kingsley found out that Ticor would not record the July set of documents, he initiated the August meeting and took the documents so he could take them to the new title company to be recorded. Trial Transcript II at 159, 203, Trial Transcript III at 110, 112-113. Kingsley admitted that the intent of the parties was the same in August as it had been in July. Kingsley specifically stated that "the intent in July was to give Silverio/Silcor a deed and the things we had talked about, so we

were doing the same thing." Trial Transcript II at 196.

Kingsley also understood that the deed from LPO to Silcor had to be recorded before Heritage could get a deed of trust on the property securing the $100,000 promissory note that Silcor had given to Heritage for expenses incurred on behalf of LPO. Kingsley admitted that Heritage was cash poor and wanted to sell the note, but understood that Odenwald, the purchaser, wanted a valid deed of trust securing the note. Trial Transcript II at 239-40.

The bankruptcy court found Kingsley was not credible on the recording issue:

> At trial Kingsley wished to convey the impression he had very little knowledge of the importance and function of the land recordation system in relation to dealings in real estate. However, this court believes he understood the function of that system very well.

Findings of Fact and Conclusions of Law at 13 (Item #38). As noted above, a trial court's finding based upon credibility is entitled to exceptional deference. Anderson, supra, 470 U.S. at 575.

The record thus amply supports the bankruptcy court's findings that recording the various documents was integral to the parties' agreement to end the LPO partnership.[3] In fact, as noted

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[3] Heritage claims that the court must use a clear and convincing standard rather than a clearly erroneous standard to review the findings of the trial court because the case involves a modification of a written contract, the Dissolution Agreement. Appellant's Reply Brief at 1. However, as noted above, the trial court found that the Dissolution Agreement did not represent the total agreement between the parties. Findings of Fact and Conclusions of Law at 11 (Item #28). The record supports this finding. Modification is thus not the issue and clearly erroneous is the correct standard.

above, Gardella filed a Notice of Rescission on behalf of Silcor when he found out that the deed in lieu of foreclosure had never been recorded. The Notice sought to rescind the agreement which was supposed to dissolve LPO and convey the property back to Silcor.

The bankruptcy court also found that "LPO did not carry on any ongoing business nor did Heritage carry on or assume LPO;s ongoing business after July 31, 1987." Findings of Fact and Conclusions of Law at 15 (Item #51). Rather, Heritage was responsible for winding up LPO's affairs, including getting the record title in the proper form. Id. at 14 (Item # 39).

The record also supports these findings. Even though the Dissolution Agreement refers to the "continuing partners," the "continuing partners," that is, Heritage, agreed to "do any and all things that are necessary to legally wind up and totally dissolve the partnership business which was known as Lancaster Properties of Oregon in a timely and expeditious manner." Dissolution Agreement at 3 (Item #8), Appellant's Excerpt of Record at 9. The Dissolution Agreement also states that the partnership business was to be liquidated. Id.

Kingsley testified that LPO had some minor assets besides the real property. Trial Transcript II at 151-52, 240-41. Heritage claims that tax returns and these minor assets, a small checking account and some work product, needed to be dealt with and therefore there was still business to conduct. Heritage Brief at 16. Taking care of these "minor" assets, however, is consistent

with winding up the partnership.

In any event, Kingsley specifically testified that there was no intent to continue the business of LPO, that he never entered into any transaction on behalf of LPO to develop or carry on business after July 31, 1987 other than to do the winding up. Trial Transcript II at 244. Kingsley stated that Heritage's intent "was that Mr. Silverio withdraw and that we continue to wind up the affairs of the partnership." Id. at 243.

In summarizing Kingsley's testimony, the bankruptcy court noted that the testimony supported the bankruptcy court's finding that LPO did not carry on any ongoing business nor did Heritage carry on or assume LPO's ongoing business after July 31, 1987:

> He testified that at his direction some bookkeeping was done, work was done on some bills, and a final tax return was filed. He testified that he thought his work was being done for Heritage, not LPO, and that Heritage was simply continuing the business of LPO. Yet, Kingsley could not confirm that any new plans for development through LPO had been discussed with his partner or anyone else. No new plans for development had in fact been formed. Heritage did not register LPO as an assumed business name of Heritage with the State of Oregon.[4]

Findings of Fact and Conclusions of Law at 16-17 (Item #51).

In sum, it is undisputed that record title was not transferred from LPO back to Silcor because the deed in lieu of foreclosure was lost and never recorded. Further, the bankruptcy

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[4] Heritage notes that Gardella testified that Heritage had "discussed continuing on in business with the 'Lancaster Properties of Oregon' name." Heritage Brief at 16. Gardella testified that Heritage "wished to use the name essentially in the future." Trial Transcript III at 129. But a discussion about possibly using the name in the future is not evidence that LPO continued in business.

court made findings of fact that the Dissolution Agreement did not reflect the total agreement among the parties, that the parties also agreed the property would be deeded back to Silcor from LPO, and that the deed would be properly recorded. The bankruptcy court also found that LPO was not to continue in business nor was Heritage to carry on or assume LPO's business but that Heritage was to wind up and terminate the partnership. These findings will not be set aside because they are not only not clearly erroneous but are amply supported by the record.

Based upon these findings, the court concludes that the execution of the Dissolution Agreement dissolved LPO, but did not terminate it. The parties' agreement was, inter alia, to vest record title to the property back in Silcor. Because the deed in lieu was never recorded, Heritage, as the winding up partner, never completed the process of winding up and LPO has never been terminated.

As a result, LPO existed as a legal entity separate from its partners, Heritage and Silverio, at the time Heritage filed for bankruptcy and continues to exist as a separate legal entity. Consequently, the property was LPO partnership property at the time of Heritage's bankruptcy filing February 18, 1988 and continues to be LPO partnership property.

Heritage contends that a "full accounting was rendered at the time of the dissolution [and] there was nothing further to 'wind-up' between Silverio and Heritage." Heritage Brief at 12-13. Heritage relies on Timmermann, supra, 272 Or. at 613, 538 P.2d at

1254 (1975) and Or. Rev. Stat. 68.630. However, both Timmermann and Or. Rev. Stat. 68.630 are inapposite because, as distinguished from the case at bar, they refer to a continuing partnership.

Furthermore, Heritage's claim of a full accounting is not supported by the record. Gardella testified that Heritage, as the winding up partner, had a duty to account for the property even though Heritage did not have a duty to account for the other remaining minor assets of LPO. Gardella stated "All we were receiving was title to the property in Lancaster." Trial Transcript III at 146-47. It is undisputed that Silcor never received record title from LPO.

Heritage also insists that Silverio withdrew, and believed he had withdrawn, on July 31, 1987, pursuant to the execution of the Dissolution Agreement. That may be true. However, the issue is not when Silverio withdrew but when winding up was completed and the partnership terminated, and winding up could not be completed until Silcor received record title from LPO.

Heritage's arguments are without merit. The court concludes that Heritage is not the owner of the property and the property is not an asset of Heritage's bankruptcy estate.

2) Res Judicata

Heritage claims that res judicata bars Silverio and Silcor from litigating their claim to the property in bankruptcy court because of the prior state court action. As noted above, in that action, the state court dismissed with prejudice Silverio's and Silcor's counterclaim for specific performance.

"The doctrine of res judicata includes two distinct types of preclusion, claim preclusion and issue preclusion." Robi v. Five Platters, 838 F.2d 318, 321 (9th Cir. 1988).

> Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided. This effect also is referred to as direct or collateral estoppel. Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit.

Migra v. Warren City School Dist. Bd. of Educ., 465 U.S. 75, 77 n.1 (1984) (citations omitted).

The Court noted that the term "res judicata" has also been used "in a narrow sense, so as to exclude issue preclusion or collateral estoppel. When using that formulation, 'res judicata' becomes virtually synonymous with 'claim preclusion.'" Id. (citations omitted). The Court used the term "claim preclusion" "to refer to the preclusive effect of a judgment in foreclosing litigation of matters that should have been raised in an earlier suit." Id.

In the bankruptcy proceeding, Heritage raised both claim preclusion and issue preclusion.[5] The bankruptcy court held that both claim preclusion and issue preclusion [referred to as collateral estoppel by the bankruptcy court] did not apply in this case. Findings of Fact and Conclusions of Law at 30-31 (Items ##

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[5] Heritage claimed that a state court finding that Silverio withdrew from LPO upon entering the Dissolution Agreement was conclusive and constituted collateral estoppel of that fact. Findings of Fact and Conclusions of Law at 31 (Item #45).

41-45).

Heritage only appears to appeal the issue of claim preclusion, using the term "res judicata" in the narrow sense "to refer to the preclusive effect of a judgment in foreclosing litigation of matters that should have been raised in an earlier suit." Migra, supra, 465 U.S. at 894 n.1.[6] A trial court's ruling on the availability of claim preclusion is reviewed de novo. Robi, supra, 838 F.2d at 321.

Federal courts "must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." Migra, supra, 465 U.S. at 896. See also Eichman v. Fotomat Corp., 759 F.2d 1434, 1438 (9th Cir. 1985). Oregon refers to "the law of res judicata" or the "rules of res judicata." Those terms include both claim preclusion and issue preclusion. See North Clackamas School Dist. v. White, 305 Or. 48, 50, 750 p.2d 485, modified on other grounds, 305 Or. 468, 752 P.2d 1210 (1988).

Under Oregon law, "while res judicata generally applies to a dismissal with prejudice, (citation omitted), it does not apply to matters over which the original court did not have jurisdiction." Long v. Storms, 50 Or. App. 39, 46-47, 622 P.2d

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[6] Heritage notes in its brief "It is clear under Oregon law that, for res judicata purposes (as opposed to collateral estoppel), the important question is what could have been litigated, not what actually was litigated." Heritage Brief at 18 (emphasis in original). Therefore, "there [was] no need to submit a complete transcript or record from the first [state] trial: the only issue [in this case] is what could have been litigated, not what actually was litigated." Id. at 19 (emphasis in original). "Whether Silcor and Silverio actually litigated those claims or presented any evidence on those claims is irrelevant." Id. at 20.

731 (1981) (citations omitted). See also Fisher v. Bowman, 97 Or. App. 357, 361, 776 P.2d 575 (1989) ("Claim preclusion does not apply when the procedural system does not permit a plaintiff to claim all possible remedies in one action.").

Under the Bankruptcy Code, a bankruptcy petition acts as an automatic stay,

> applicable to all entities, of -- (1) the commencement or continuation ... of a judicial ... action or proceeding against the debtor that was or could have been commenced before the commencement of the case ..., or to recover a claim against the debtor that arose before the commencement of the case under this title.

11 U.S.C. § 362(a)(1).

According to the findings of the bankruptcy court, Silverio and Silcor, as defendants in the state suit, "did not obtain an order from [the bankruptcy court] relieving them from the automatic stay to enable them to pursue their counterclaim in state court." Findings of Fact and Conclusions of Law at 18 (Item #55). Thus, § 362(a)(1) "operated, in the absence of the bankruptcy court's consent, to oust the jurisdiction of the state court." Id. at 30 (Item #41) (citations omitted). Because the state court did not have jurisdiction over the counterclaim, the court concludes claim preclusion is inapplicable, and Silverio and Silcor were not precluded from bringing their claim in bankruptcy court.

Heritage cites to Clackamas Town Center Assocs. v. Donald H. Hartvig, No. 91-65 slip op. (D. Or. Mar. 20, 1991) (Panner, J.) for the proposition that a creditor seeking to assert a counterclaim against a plaintiff in bankruptcy must obtain relief

from the automatic stay because "counterclaims arising out of the same transaction will be barred by res judicata ('claim preclusion') if not litigated in the first case." Heritage Supplemental Memorandum at 3-4. In Clackamas Town Center, however, the court did not reach the issue of whether claim preclusion barred the creditor's state court counterclaim because the bankruptcy trustee waived its right to assert claim preclusion. Id., slip op. at 7. As such, Clackamas Town Center is inapplicable to the case at bar.

Heritage also cites to In re Schwartz, 119 B.R. 207, 209, 211 (9th Cir. BAP 1990) for the proposition that action taken contrary to the automatic stay is voidable, rather than void and only the debtor can challenge such a voidable action and have it set aside. "'The automatic stay is for the benefit of the debtor and if it chooses to ignore stay violations other parties cannot use such violations to their advantage.'" In re Globe Inv. and Loan Co., 867 F.2d 556, 558 (9th Cir. 1989) (citation omitted).[7] Heritage claims it never objected to the trial of the counterclaim as a violation of the stay and therefore the state court's dismissal of the counterclaim with prejudice had claim preclusive effect.

In the first place, In re Schwartz is distinguishable from the case at bar. The In re Schwartz court held that IRS penalties assessed against the debtor constituted a voidable, rather than void, transfer pursuant to 11 U.S.C. § 362(a)(4), (a)(5), and

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[7] The Globe court noted that parties other than debtors and possibly creditors could not attack violations of the automatic stay. 867 F.2d at 560.

(a)(6). The appellate court specifically "adopt[ed] the rule that transfers in violation of the automatic stay are voidable in an action brought during the bankruptcy in which the violation occurred." 119 B.R. at 211 (emphasis added). The case at bar, however, does not involve a transfer but rather defendants' attempt to bring a judicial action against Heritage pursuant to 11 U.S.C. § 362(a)(1).

To the extent In re Schwartz is applicable and the state court action on defendants' counterclaim was voidable rather than void, the record shows that Heritage did object to lifting the stay. Prior to the state trial, Heritage recognized the effect of the stay and opposed any relief from it to allow litigation of the counterclaim in state court. Heritage's counsel understood that Silverio and Silcor could defend themselves in the state suit and bring up their affirmative defenses, but could not raise the counterclaim without a motion to the court. Transcript of Telephone Conference, Dec. 14, 1988, Supplemental Excerpt of Record at 2. Heritage's counsel specifically requested a hearing if defendants were to move for relief of the stay. Id. at 39-40. Further counsel stated:

> Your Honor, they [state court defendants] have had since November; we're having a trial on Friday. They have done everything else; they've moved for injunction and everything else. And now they think maybe they want to move for relief from the automatic stay.
>
> From my standpoint of trying to get ready for trial and trying to balance all of these things up in the air and being in two courts at the same time -- which they don't have to do -- I want to just go forward to trial on this thing. I think it's getting a little late to address all these issues.

Id. at 42.

Heritage got what it wanted. Silverio and Silcor did not obtain an order from the bankruptcy court "relieving them from the automatic stay to enable them to pursue their counterclaim in state court." Findings of Fact and Conclusions of Law at 18 (Item #55). The court finds that Heritage did exercise its rights as debtor to challenge what Heritage claims is a voidable action. Therefore, to the extent the state court's action was voidable, the state court's action was voided and the state court's dismissal of Silverio's and Silcor's counterclaim with prejudice had no claim preclusive effect.

It is not clear to the court if Heritage also appeals the bankruptcy court's conclusion that issue preclusion is inapplicable with respect to the state court finding that Silverio withdrew from LPO upon entering into the Dissolution Agreement. See Heritage Brief at 11. A trial court's ruling on the availability of issue preclusion is reviewed de novo. Robi, supra, 838 F.2d at 321.

Issue preclusion only applies to a matter that has been litigated and decided and is necessary to the judgment. Migra, 465 U.S. at 77 n.1; State Farm Fire and Casualty Co. v. Century Home Components, 275 Or. 97, 550 P.2d 1185 (1976). To enable a court to make those determinations "with the requisite degree of certainty," a party has to place into evidence sufficient portions of the prior record, including the "reporter's transcript of the testimony and proceedings." State Farm, supra, 275 Or. at 104,

550 P.2d at 1188. "If the materials submitted are inadequate to permit the court to ascertain an identity of issue, the matters decided or the basis for decision in the prior action, the party seeking estoppel cannot prevail." Id.

Heritage did not provide a transcript of the state court proceedings. In fact, Heritage specifically states "there is no need to submit a complete transcript or record from the first trial" because "the only issue is what could have been litigated, not what actually was litigated." Heritage Brief at 19 (emphasis in original). Consequently, to the extent Heritage is appealing the bankruptcy court's conclusion that issue preclusion does not apply in this case, Heritage cannot prevail.

Conclusion

The court concludes that Heritage is not the owner of the property and therefore the property is not an asset of Heritage's bankruptcy estate.

The court also concludes that Silverio and Silcor were not barred by claim preclusion or issue preclusion from bringing their claim to the property in bankruptcy court.

The judgment of the bankruptcy court is therefore AFFIRMED.

DATED this 15 day of April, 1991.

ROBERT E. JONES
United States District Judge

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

HERITAGE ENTERPRISES, Plaintiff,	)	Civil No. 91-6033-JO
v.	)	JUDGMENT
SILCOR (USA), INC., et al., Defendants.	)	

The judgment of the bankruptcy court is affirmed.

DATED: April 16, 1991.

DONALD M. CINNAMOND, CLERK

by Dan Marsh
Dan Marsh, Deputy Clerk