

§ 362
Relief from Automatic Stay
§ 507(a)
Admin. Expense Priority

In re Doorn, Case No. 399-36294-elp13

5/29/01

ELP

Unpublished

Creditor sought relief from stay in a chapter 13 case to collect damages and attorney fees and costs arising from a postpetition arbitration concerning a prepetition contract. The court determined that the automatic stay applied because the claim arose prepetition and that the creditor did not establish that she was entitled to relief from stay.

The court also rejected the creditors contention that the attorney fees and costs awarded to it in the arbitration were entitled to administrative expense priority under § 507(a). The claim arose from litigation concerning the creditor's prepetition contract with the Debtor, not from a transaction with the Debtor in Possession.

P01-4(9)

1 clause.

2 Doorn and his wife ("Debtors") filed their chapter 13¹
3 petition on August 18, 1999. Sometime before this date, Hogue filed
4 a motion to compel arbitration under the Contract in state court.
5 After Debtors filed their bankruptcy petition, Hogue sought relief
6 from the automatic stay to obtain an injunction enforcing the non-
7 compete clause. This court granted Hogue's motion.

8 Hogue then filed a second motion for relief from stay asking
9 that she be allowed to pursue damages and attorney fees against
10 Doorn. This court entered an order stating that:

11 [T]he automatic stay . . . shall be terminated . . . to
12 the extent that Hogue may liquidate her claims for money
13 damages against debtor DOORN which arise from the sale of
14 DOORN's accounting practice to HOGUE and the subsequent
15 employment of DOORN by HOGUE. . . . Relief from stay to
16 collect the claims, if any, is DENIED.

17 This order is made without prejudice against HOGUE to
18 petition the court at a later date for relief from stay to
19 enforce any judgment she may obtain for money damages against
20 DOORN.

21 The arbitrator denied Hogue's request for injunctive relief
22 enforcing the non-compete clause. However, he awarded Hogue damages
23 in the amount of \$44,626 and attorney fees and costs as the
24 prevailing party under Oregon Rule of Civil Procedure 68.

25 Hogue filed a third motion for relief from stay pursuant to
26 § 362(d) and (f) to collect the \$44,626 judgment. In a supplement
to her motion for relief from stay, Hogue also requests that she be

25 ¹ Unless otherwise indicated, all chapter and section
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330.

1 granted relief to collect the attorney fees and costs.

2 ISSUES

- 3 1. Whether the automatic stay applies.
4 2. If so, whether relief from the stay should be granted.

5 DISCUSSION

- 6 1. The automatic stay applies.

7 The stay imposed under § 362 applies to "any act to collect,
8 assess, or recover a claim against the debtor that arose before the
9 commencement of the case . . . [.]" § 362(a)(6). The issue is
10 whether Hogue's claim for damages and attorney fees arose before the
11 commencement of Debtors' case.

12 Federal law determines when a claim arises for bankruptcy
13 purposes. In re Cool Fuel, Inc., 210 F.3d 999, 1006 (9th Cir.
14 2000). Claim means a "right to payment, whether or not such right
15 is reduced to judgment, liquidated, unliquidated, fixed, contingent,
16 matured, unmatured, disputed, undisputed, legal, equitable, secured,
17 or unsecured." § 101(5)(A). Congress provided for the "broadest
18 definition of claim" and "intended to ensure that all legal
19 obligations of the debtor, no matter how remote or contingent, will
20 be able to be dealt with in the bankruptcy case." In re Hassanally,
21 208 B.R. 46, 50 (9th Cir. BAP 1997) (internal quotation and citation
22 omitted).

23 "A claim arises at the time an obligation is incurred, not
24 when it is due." 3 Lawrence P. King, COLLIER ON BANKRUPTCY
25 ¶ 362.03[3][a] (15th ed. Rev. 1997). "Claims which are contingent
26 or unliquidated before the commencement of the case . . . 'arise'

1 before the commencement of the case." Id. A contingent claim is
2 "one which the debtor will be called upon to pay only upon the
3 occurrence or happening of an extrinsic event which will trigger the
4 liability of the debtor to the alleged creditor." In re Fostvedt,
5 823 F.2d 305, 306 (9th Cir. 1987). In contrast, a claim is
6 noncontingent if "all events giving rise to liability occurred prior
7 to the filing of the bankruptcy petition." Id.

8 Hogue's claim arose prepetition. The Contract is a
9 prepetition contract. As a general rule, "contract based claims
10 arise at the time the contract is entered into, rather than upon the
11 occurrence of subsequent events such as termination." In re Caldor,
12 Inc., 240 B.R. 180, 192 (Bankr. S.D.N.Y. 1999). See also Pearl-Phil
13 GMT (Far East) Ltd. v. Caldor Corp., 2001 WL 314637, *5 (Bankr.
14 S.D.N.Y. 2001) (contract based bankruptcy claims arise at the time
15 the contract is executed).

16 Hogue asserts that the automatic stay does not apply as to
17 the \$44,626 in damages because a portion of those damages is
18 attributable to Doorn's postpetition breach of the non-compete
19 clause. Whether a claim for postpetition breach of a prepetition
20 non-compete clause arises before or after commencement of a
21 bankruptcy case is an interesting question. However, I need not
22 address that issue because it is clear from the arbitration
23 transcript that the arbitrator did not award damages for breach of
24 the non-compete clause.

25 A partial transcript of the arbitration is included in the
26 record. In the transcript, the arbitrator explains the basis on

1 which he awarded damages to Hogue.² The arbitrator concluded that
2 Doorn breached the Contract when he continued to engage in extensive
3 borrowing from clients after he sold the business to Hogue and while
4 he was employed by Hogue & Associates. The arbitrator stated that
5 Hogue was justified in terminating Doorn's employment because of
6 this conduct and awarded damages to Hogue based on the fact that she
7 overpaid Doorn a total of \$44,626 in 1998 and in 1999 prior to the
8 date Hogue terminated Debtor's employment and prior to the date
9 debtors filed bankruptcy.

10 The employment relationship between Hogue and Doorn
11 terminated prior to the petition date. Doorn states in his Schedule
12 I that he is self employed. Also, his Schedule G indicates that the
13 employment agreement between Hogue and himself had been terminated
14 when he filed his petition. Therefore, all of the events giving
15 rise to Doorn's liability to Hogue occurred prior to the filing of
16 Debtors' petition.

17 Hogue contends that her claim for attorney fees and costs
18 arose postpetition because she incurred a portion of that claim in
19 defending against a wrongful termination counterclaim that Doorn
20 first asserted against her postpetition. There are several problems
21 with Hogue's argument.

22 As I stated at the May 15, 2001 hearing on the motion, there

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24 ² At the hearing on the motion for relief from stay, Hogue
25 asserted that the arbitrator's findings were ineffective because
26 they were not reduced to writing. Hogue is mistaken. Oral findings
and conclusions are sufficient. See Austin v. McGee, 140 Or.App.
263, 267 (1996).

1 is no evidence in the record to support Hogue's contention regarding
2 the timing of the filing of Doorn's counterclaim. Even if I assume
3 that Doorn filed his counterclaim postpetition, there is nothing in
4 the record to establish what portion, if any, of the attorney fees
5 and costs incurred by Hogue in the arbitration proceeding is
6 attributable to defending against Doorn's wrongful termination
7 claim. Finally, even if the problems discussed immediately above
8 did not exist, I would not be persuaded by Hogue's argument. Hogue
9 cites no authority for the proposition that a debtor's postpetition
10 filing of a counterclaim in an action commenced prepetition
11 concerning a contract entered into before bankruptcy gives rise to a
12 postpetition claim. Hogue ignores the fact that she commenced the
13 arbitration proceeding concerning the Contract prior to the petition
14 date and sought relief from stay to continue that action. On a
15 fundamental level, the attorney fees and costs incurred by Hogue are
16 attributable to her actions in pursuing her claims postpetition
17 which allowed or caused Doorn to pursue his counterclaim.

18 Hogue asserts that her claim for attorney fees and costs
19 arising from the arbitration is entitled to priority as an
20 administrative expense under § 507(a) because Debtors committed any
21 recovery on Doorn's wrongful termination counterclaim to chapter 13
22 plan payments. I disagree. The principles developed in this area
23 support my conclusion that the automatic stay applies because
24 Hogue's claim arose before the commencement of Debtors' case.

25 In order to be entitled to administrative expense priority,
26 the claimant must show that the debt

1 (1) arose from a transaction with the debtor-in-possession as
2 opposed to the preceding entity (or, alternatively, that the
3 claimant gave consideration to the debtor-in-possession); and
4 (2) directly and substantially benefitted the estate.

4 In re DAK Indus., Inc., 66 F.3d 1091, 1094 (9th Cir. 1995).

5 Hogue's claim fails the first test. A claim does not arise
6 from a transaction with debtor in possession, where, as here, the
7 claim arises out of litigation over a contract entered into before
8 the bankruptcy petition was filed. In re Abercrombie, 139 F.3d 755,
9 756 (9th Cir. 1998).³ Hogue's claim for attorney fees and costs
10 arises from litigation concerning her prepetition contract with
11 Doorn. It does not qualify for treatment as an administrative
12 expense.

13 Hogue cites Reading Co. v. Brown, 391 U.S. 471 (1968), in
14 support of her argument that her claim for attorney fees qualifies
15 as an administrative expense. Hogue misreads this case. Reading is
16 an exception to the rule that administrative expenses must provide a
17 benefit to the estate; it is not an exception to the rule that the
18 claim must arise out of a postpetition transaction. In addition,
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20 ³ In Siegel v. Federal Home Loan Mortgage Corp., 143 F.3d
21 525 (9th Cir. 1998), the Ninth Circuit determined that attorney fees
22 incurred in postpetition litigation concerning a prepetition
23 contract were not discharged in the debtor's bankruptcy case because
24 the claim for attorney fees arose postpetition. The facts of Siegel
25 are clearly distinguishable from those of this case. In Siegel, the
26 debtor instituted and pursued the litigation postpetition. In this
case, Hogue, not Debtors, commenced the arbitration concerning the
Contract before commencement of Debtors' case. Hogue, not Debtors,
caused the arbitration to be completed postpetition in that Hogue
obtained relief from stay to complete the arbitration.

1 the exception has been narrowly construed in the Ninth Circuit and
2 is limited to postpetition tort-like conduct or violation of
3 statutory duties. See, e.g., In re Allen Care Centers, Inc., 96
4 F.3d 1328, 1331 (9th Cir. 1996).

5 2. Hogue is not entitled to relief from the automatic stay.

6 In her motion for relief from stay, Hogue asserts that relief
7 from stay is warranted under § 362(d) and (f). Section 362(d)
8 provides that a court shall grant relief from the stay "for cause,
9 including the lack of adequate protection of an interest in the
10 property" Section 362(f) states as follows:

11 Upon request of a party in interest, the court, with or
12 without a hearing, shall grant such relief from the stay . .
13 . as is necessary to prevent irreparable damage to the
14 interest of an entity in property, if such interest will
15 suffer such damage before there is an opportunity for notice
16 and hearing under subsection (d) or (e) of this section.

17 Hogue has not established a basis for granting relief from
18 the stay. She concedes that she is not a secured creditor. Citing
19 In re Younie, 211 B.R. 367 (9th Cir. BAP 1997) aff'd 163 F.3d 609
20 (9th Cir. 1998) (Table), Hogue asserts that relief from stay should
21 be granted because her claim for damages is nondischargeable in
22 bankruptcy. Hogue's argument is not persuasive.

23 In Younie, the BAP affirmed the trial court's decision that
24 an entire judgment debt for fraud, including attorney fees, was
25 nondischargeable in a chapter 7 case. Debts arising from fraud may
26 be excepted from discharge under § 523(a)(2). The attorney fees in
Younie were nondischargeable because they "flowed" from the debtor's
fraudulent conduct. 211 B.R. at 377. There is no basis for

1 concluding that Hogue's claim for damages, which is based on breach
2 of contract, is nondischargeable in Debtors' chapter 13 case. As a
3 result, Hogue's claim for attorney fees does not flow from a
4 nondischargeable debt.⁴

5 CONCLUSION

6 For the reasons set forth above, I will DENY Hogue's motion
7 for relief from stay. Ms. Wade shall submit the order within 10
8 days.

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ELIZABETH L. PERRIS
Bankruptcy Judge

12 cc: Anthony V. Albertazzi
13 Carolyn G. Wade
14 Rick A. Yarnall

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⁴ Even if the debt were nondischargeable, that, by itself,
25 would not compel a finding in a Chapter 13 case that there is cause
26 for relief from stay. The purpose of Chapter 13 is to afford debtor
an opportunity to repay creditors through a trustee supervised plan.