

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WISCONSIN

In re

ALBERT & SYLVIA TOELLER,

Debtors.

Chapter 7

Case No. 98-31721

EDWARD & CINDY GRAFF,

Plaintiffs,

v.

Adversary No. 99-2072

ALBERT & SYLVIA TOELLER,

Defendants.

AMENDED MEMORANDUM DECISION ON PLAINTIFFS' MOTION
TO VACATE ORDER LIFTING THE AUTOMATIC STAY
(Amended to reflect proper names of parties.)

On May 10, 1999, this court, *sua sponte*, issued an order modifying the automatic stay to allow the plaintiffs in this action to proceed with an action against the debtors pending in state court. The order allowed the state court to determine the liability of the debtors, if any, but the plaintiffs could not execute on any judgment until this court determined dischargeability. On October 12, 2000, the plaintiffs filed a motion in this court asking that the May 10, 1999, order be vacated and that their action against the debtors be heard in this court. For the reasons stated below, the motion is denied.

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This court has jurisdiction over this adversary proceeding under 28 U.S.C. § 1334(b). This motion is a core proceeding under 28 U.S.C. § 157(b)(2)(G). The court's findings of fact and conclusions of law pursuant to Fed. R. Bankr. P. 7052 are set forth in this memorandum.

BACKGROUND

Litigation between the Graffs and Toellers has been going on for a very long time. The details of the dispute need not be reiterated here, but in substance it involves a defunct business in which both couples and several others participated. A complicating factor is that Mrs. Toeller is Mr. Graff's mother, and personal property, as well as the former business, is involved.

When the Toellers' bankruptcy was filed, there were two state court cases pending between the parties, one filed in 1994 and the other filed in 1998. The dismissal of the 1994 case was on appeal, and at the Graffs' request, this court modified the automatic stay so the appeal could be completed. *See* Order dated March 23, 1999. The appeal was resolved in the Toellers' favor, and the dismissal was affirmed on December 15, 1999.

At a hearing before this court on April 28, 1999, the court was informed that the 1998 case was still pending in state court. As there were individuals named as defendants over whom this court has no jurisdiction, the stay was modified to allow that action to continue. The order dated May 10, 1999, allowed the case to proceed to entry of judgment, but no execution on the judgment would be allowed until a determination of dischargeability was made by this court. If no liability by the Toellers was found in state court, the nondischargeability action would be dismissed. No one objected to this approach to resolving the dispute.

At a status conference on February 10, 2000, the court learned that no one informed the state court that the 1998 case could proceed pursuant to the May 10, 1999, order of the

bankruptcy court. This court then conferred with the state court judge, and he stated that he would issue a scheduling order to move the case along. Other parties were still in the case, so it appeared that it would be appropriate to keep all causes of action involving the same facts in state court. No one voiced any disagreement at that time.

On May 5, 2000, a hearing was held in state court on the 1998 case. The Graffs provided what appears to be a portion of the transcript of that hearing (the excerpt has no date) in which they believe they were treated unfairly by the judge, who would not allow them pro se to call or cross examine witnesses. From this they concluded that they would not be treated fairly in state court, and this was the impetus for asking this court to hear the matter. They asserted at the October 12, 2000, status conference that the other defendants were not crucial to their case against the Toellers, and the case could indeed be adjudicated here. Furthermore, the trial in state court is set for October 2001, and they believe the matter could be heard sooner in this court.

DISCUSSION

This court is satisfied that this case was, and still is, an appropriate case for discretionary abstention. 28 U.S.C. § 1334(c)(1). The action was pending in state court for some time before the bankruptcy, it involves state law issues, and it can be timely adjudicated¹. The transcript of the May 5, 2000, hearing indicates that the nonbankrupt parties are very much still involved. The order modifying the stay protects the debtors from collection action if they are found liable to the Graffs, as it requires a determination of nondischargeability by the bankruptcy court. If the judgment is properly structured, issue preclusion might apply to determine whether the debt is

¹The case is scheduled for trial in October of 2001 before the state court. This court is currently setting short trials in April or May of 2001, and it might be later than that if a long trial is anticipated. The state court trial date is sufficiently timely to support abstention.

excepted from the debtors' discharge, thereby requiring no further litigation. If the debtors are not liable to the Graffs, this court's order provides that the adversary proceeding can be dismissed, again requiring no further litigation. If this court did not abstain, the claims against the debtors would have to be tried in bankruptcy court, and the same set of operative facts would have to be tried to determine the liability of the other defendants in state court; in other words, there would be two full-scale fact finding trials in both courts. Abstention clearly promotes judicial economy.

The Graffs' dissatisfaction with the judge assigned to their case in state court is not grounds for this court to revoke its abstention and to vacate the order modifying the stay. Wisconsin has two levels of appellate courts that are fully able to address any mistakes or improprieties committed by the trial court. Therefore, the Graffs are in no way denied due process.

What is most important is that forum shopping cannot be condoned. The Graffs were content to have the state court try the case when this court first modified the stay to have it sent back there. They complain of delay, but they did not inform the state court that it could proceed. The order allowing those proceedings to continue was signed on May 10, 1999, but the judge was unaware of it when I spoke to him the following February, approximately nine months after it was issued. The Graffs did not like their treatment by the state court judge in May of 2000, but the motion asking this court to hear the action was hand carried and served on the defendants' attorney in court on October 12, 2000, five months after the fact. The request for relief from the order comes almost a year and a half after the order was entered, in clear violation of Fed. R. Civ. P. 60(b), made applicable to bankruptcy proceedings under Fed. R. Bankr. P. 7060 and 9024. In

summary, the motion is untimely, any delay was occasioned by the plaintiffs, and the grounds stated are wholly inadequate.

Therefore, the motion will be denied. A separate order will be entered accordingly.

Dated at Milwaukee, Wisconsin, December 5, 2000.

BY THE COURT

_____/s/_____
Margaret Dee McGarity
United States Bankruptcy Judge

