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AUG 17 2004

**UNITED STATES
BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA**

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In re
Steven R. Leivas and Robbin G.
Leivas,
Debtor.

Chapter 13
Case No. 04-01315-PHX-SSC

Steven R. Leivas and Robbin G.
Leivas,
Plaintiff,

Adversary No. 04-00079

v.
Raynold P. Simoes; and Russell
A. Brown, Chapter 13 Trustee,
Defendants.

MEMORANDUM DECISION

I. INTRODUCTION

This matter comes before the Court on the Defendant's Raynold P. Simoes February 25, 2004 Motion for Summary Judgement. The Debtors filed a response and cross moved, requesting that if the Court believed that the doctrine of res judicata were applicable, that the Court nevertheless exercise its equitable powers and consider the dispute on the merits pursuant to Fed. R. Civ. P. 60.¹ In the Motion, counsel

¹ Bankruptcy Rule 9024 provides that Fed.R.Civ.P. 60 applies to bankruptcy proceedings. Fed. R. Civ. P. 60(b) provides that on motion and just terms, the court may relieve a
(continued...)

1 relied on the case of In re Siegel, 143 F.3d 525 (9th Cir.
2 1998) for the proposition that Mr. Simoes was entitled to
3 judgment as a matter of law. After the Motions were fully
4 briefed, the Court scheduled oral argument.

5 At oral argument on May 20, 2004, the Court
6 shephardized the case of In re Siegel and asked Simoes' counsel
7 if he were aware that there was a Federal District Court
8 decision, with facts which appeared similar to the facts
9 herein, which distinguished the Siegel case and ultimately came
10 to the opposite holding of Siegel. Neither Mr. Simoes'
11 counsel, nor Debtors' counsel, had shephardized the Siegel
12 Decision, so the Court took the matter under advisement to
13 research the matter further.

14 The Court now sets forth its Decision. The Court
15 has jurisdiction over this matter, and this is a core
16 proceeding pursuant to 28 U.S.C. §§1334(b) and 157(b) (West
17 2004). To the extent necessary, the Court has set forth its
18 findings of fact and conclusions of law pursuant to Bankruptcy
19 Rule 7052 of the Rules of Bankruptcy Procedure.

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21 _____
22 **1.** (...continued)
23 party from a final judgment, order or proceeding for the
24 following reasons: (1) mistake, inadvertence, surprise, or
25 excusable neglect; (2) newly discovered evidence which by due
26 diligence could not have been discovered in time to move for a
27 new trial under Rule 59(b); (3) fraud (whether heretofore
28 denominated intrinsic or extrinsic), misrepresentation, or other
misconduct of an adverse party; (4) the judgment is void; (5)
the judgment has been satisfied, released, or discharged, or a
prior judgment upon which it is based has been reversed or
otherwise vacated, or it is no longer equitable that the judgment
should have prospective application; or (6) any other reason
justifying relief from the judgment.

1 **II. DISCUSSION**

2 The Debtors executed a promissory note in favor of
3 AM-COR Carpets Inc.,² on or about January 27, 1998. At that
4 time, Mr. Leivas executed a Deed of Trust, securing the debt
5 with a lien on the Debtors' residence. The parties dispute
6 whether Ms. Leivas executed the Deed of Trust. Subsequently,
7 Mr. Simoes alleges that the parties entered into a modified
8 agreement, an amended promissory note, and an amended deed of
9 trust on July 22, 1998, as to the same underlying debt between
10 the Debtors and AM-COR Carpets. The Debtors allege that all of
11 the signatures on the modified or amended documents were
12 forged. The parties do agree that Mr. Simoes is the successor
13 in interest to AM-COR Carpets.

14 On August 12, 2003, the Debtors filed their first
15 bankruptcy petition, Case No. 03-14218-PHX-SSC, a Chapter 13
16 proceeding. During the course of those proceedings, Mr. Simoes
17 filed a Motion for Relief from Stay.³ The automatic stay was
18 modified, and the Debtors agreed to provide adequate protection
19 payments to the creditor. Other than the issue of adequate
20 protection, no other issues were raised by the Debtors.
21 Apparently the Debtors did not comply with the Order, so on
22 January 20, 2004, the Court entered an order vacating the
23 automatic stay.⁴ The obligation due to Mr. Simoes was listed
24 on the Debtors' schedules as secured, with a lien on the

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26 **2.** Mr. Simoes' predecessor in interest.

27 **3.** See Case No. 03-142180-PHX-SSC; Docket Entry No. 5.

28 **4.** See Case No. 03-142180-PHX-SSC; Docket Entry No. 50.

1 Debtors' residence. The Debtors did not list the obligation on
2 their schedules as disputed, contingent, or unliquidated. The
3 Debtors also proposed certain treatment of the secured claim in
4 the Debtors' Chapter 13 plan of reorganization.

5 After the automatic stay was vacated, the Debtors
6 elected to file a second bankruptcy proceeding, Case No. 04-
7 01315-PHX-SSC, which is the present case and also a Chapter 13
8 proceeding. Therefore, for a period of time, the Debtors had
9 two Chapter 13 proceedings pending at the same time. After
10 this second case was filed, the Debtors commenced this
11 Adversary Proceeding, challenging the validity of Mr. Simoes'
12 lien on a number of grounds. On February 25, 2004, Mr. Simoes
13 filed his Motion for Summary Judgment which is now being
14 considered by the Court.⁵

15 Ultimately, the Debtors failed to comply with the
16 Trustee's Recommendations, failed to submit an order of
17 confirmation that the creditors and Court could review, and
18 failed to remain current with their interim plan payments in
19 the first bankruptcy case. As a result, that case was
20 dismissed on March 27, 2004.⁶

21 As noted previously, the Court did conduct
22 additional research on the issues presented in the pending
23

24 **5.** In the Motion for Summary Judgment, Simoes argues that
25 this case and Adversary Proceeding should be dismissed because
26 the Debtors have two cases pending. However, after the filing of
27 the Motion, the Debtors' first case was dismissed; therefore,
28 Simoes' argument on this issue has been rendered moot and will
not be considered by the Court.

6. See Case No. 03-142180-PHX-SSC; Docket Entry No. 52.

1 Motions. Based upon the In re Mirzai Decision at 271 B.R. 647
2 (C.D.Cal. 2001), this Court must deny Mr. Simoes' Motion for
3 Summary Judgment, will grant the Debtors' Motion insofar as the
4 Court agrees that res judicata does not apply to the issues
5 raised by the Debtors in the Adversary Proceeding, and will set
6 a Bankruptcy Rule 7016 Scheduling Conference so that the
7 factual and legal issues may be resolved by the Court.

8 In the Mirzai Decision, the Bankruptcy Court
9 approved the stipulation of the debtor and creditor, allowing
10 the automatic stay to be modified so that the parties could
11 proceed to judgment in certain state court litigation that was
12 then pending. The Bankruptcy Court, however, ordered that
13 there be no execution or collection on any state court judgment
14 without further order of the Bankruptcy Court. Id. at 650.
15 The creditor did file a proof of claim with the Bankruptcy
16 Court to which the debtor interposed an objection. Ultimately,
17 the Bankruptcy Court sustained the objection of the debtor,
18 disallowing the claim in its entirety, since the creditor was a
19 suspended corporation under California law. The debtor then
20 dismissed its bankruptcy petition. The debtor had not
21 confirmed a plan of reorganization and had not received a
22 discharge. Id.

23 The debtor and creditor continued to litigate in
24 the state court, with the creditor ultimately succeeding on
25 appeal, and obtaining a judgment against the debtor. The
26 debtor then raised, in the the state court, the issue of the
27 disallowance of the creditor's proof of claim by the Bankruptcy
28 Court. When the state court refused to set aside the judgment

1 of the creditor, the debtor filed another bankruptcy petition,
2 this time attempting to have the same Bankruptcy Judge issue a
3 declaratory judgment and an injunction to prevent the creditor
4 from executing on its final state court judgment. Id. at 650-
5 651. The Bankruptcy Judge refused to grant a preliminary
6 injunction, stating that the disallowance of the creditor's
7 proof of claim did not have res judicata effect so that the
8 creditor's state court judgment was somehow invalid. Id. at
9 651.

10 On appeal, the District Court affirmed the
11 Bankruptcy Court, focusing on the effect of any order which may
12 be entered by the Bankruptcy Court in a case that is
13 subsequently dismissed without confirmation of a plan or the
14 debtor obtaining a discharge. Under 11 U.S.C. § 349(b), the
15 Court stated that certain orders and judgments are vacated upon
16 the dismissal of a bankruptcy case unless the Bankruptcy Court
17 preserves them for cause. An order for the disallowance of a
18 claim under Section 502 of the Bankruptcy Code is not one of
19 the enumerated orders in Section 349(b). Nevertheless, the
20 Court concluded that the dismissal of the case should place the
21 parties in the same position, to the extent practicable, as if
22 the case had not been filed as to the parties' rights and
23 remedies. Id. at 652. If the debtor had received a discharge,
24 and the case had been closed, finality would have occurred, and
25 the order disallowing the proof of claim would have been final.
26 However, if no discharge is granted, there is no finality, and
27 unless the orders are preserved by the Bankruptcy Court, for
28

1 cause, the Court's dismissal of the case vacates the orders
2 that were entered. Id.

3 The Mirzai Court distinguishes the In re Pavelich
4 Decision at 229 B.R. 777 (9th Cir. BAP 1999). In Pavelich, the
5 Panel would not vacate a discharge order even though the case
6 had been dismissed, since the discharge order was not one of
7 the enumerated orders in Section 349, and the Panel relied on
8 the general rule that if an order is not enumerated, it is not
9 vacated even if the case is dismissed. The Mirzai Court
10 limited Pavelich to its facts and noted that a discharge order
11 creates finality, precluding creditors from legally pursuing
12 their claims, whereas the disallowance of the claim in its case
13 was on a procedural basis only, was an interlocutory order, and
14 was not a determination on the merits. Mirzai at 653-654.
15 Hence, the dismissal of the debtor's case should render the
16 order a nullity and of no preclusive effect.

17 In this matter, this Court may review the Adequate
18 Protection Order and note that it is limited in its scope.
19 Pursuant to the Ninth Circuit Decision of In re Johnson, 756
20 F.2d 738, 741 (9th Cir. 1985), the Bankruptcy Court does not
21 address the nature, extent, or validity of a lien when a motion
22 for relief from stay is presented to the Bankruptcy Court. The
23 Court's focus is on a summary proceeding which determines
24 whether the creditor has set forth a prima facie case as to the
25 validity of its lien, whether there is equity in the property
26 which is subject to the lien, whether the creditor is being
27 provided adequate protection during the course of the
28 bankruptcy proceedings, and if there is no equity in the

1 property, whether the property is necessary for the effective
2 reorganization of the debtor. Hence, the Adequate Protection
3 Order did not consider the underlying validity of Mr. Simoes'
4 lien, and under the analysis of Mirzai would have no preclusive
5 effect in this subsequent case.

6 Although Mr. Simoes principally relies on the In
7 re Siegel Decision for the granting of summary judgment in this
8 Adversary, the Mirzai Court briefly discusses the
9 inapplicability of the In re Siegel Decision and the doctrine
10 of res judicata in a footnote. This Court agrees that in the
11 Siegel Decision, the creditor had filed a proof of claim to
12 which no objection was interposed, the debtor had received a
13 discharge, and the case closed. Under such circumstances,
14 there is finality, and the doctrine of res judicata should bar
15 a debtor from relitigating the underlying nature of the
16 creditor's claim.

17 In this case, the reality is that the Debtors did
18 not confirm a plan or receive a discharge. As specifically
19 provided under 11 U.S.C. 349, the fact that a debtor files a
20 case, then dismisses it, does not preclude the debtor from
21 receiving a discharge in a subsequent case. From a policy
22 standpoint, Section 349 permits repetitive filings. Without
23 more, the Debtors should be permitted to proceed with this
24 second case, and have the issues in this Adversary Proceeding
25 determined on the merits.

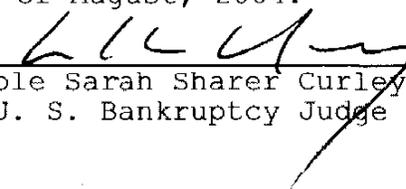
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IV. CONCLUSION

Based upon the foregoing the Court concludes that the Defendant's Motion for Summary Judgment is DENIED. The Court will grant the Debtors' Motion under Fed.R.Civ.P. 60, insofar in this Adversary should be determined on the merits. A Rule 7016 Conference will be set by separate notice from the Court.

The Court will execute a separate order incorporating this Memorandum Decision.

DATED this 17th day of August, 2004.


Honorable Sarah Sharer Curley
Chief U. S. Bankruptcy Judge

Copy of the foregoing mailed on the 18th day of Aug., 2004, to:

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By 
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