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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

IN RE:)	Case No. SACV 10-01856-VAP
)	USBC Case No. SA 10-23758-ES
BAILEY & ASSOCIATES, APC)	
DEBTOR,)	
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Bailey & Associates APC)	ORDER AFFIRMING THE
)	BANKRUPTCY COURT'S ORDER
Appellant,)	GRANTING RELIEF UNDER 11
)	U.S.C. § 362(d)(1)
v.)	
)	
Brown and Charbonneau)	
LLP,)	
)	
Appellee.)	
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I. BACKGROUND

In 2006, Appellant Bailey & Associates ("Bailey") hired Appellee Brown & Charbonneau ("Brown") to represent Bailey in a collection action brought against Bailey by one of Bailey's former clients. (Doc. No. 7 (Ex Parte Application to Staying Pending Appeal), Ex. 4 at 5.) A dispute later arose between Bailey and Brown regarding attorney's fees related to Brown's representation of

1 Bailey. (Id. at 5-6.) In 2008, Bailey was dissolved.
2 (Id. at 6.) That same year, Brown brought an arbitration
3 action against Bailey and received a default against
4 Bailey. (Id.) On September 11, 2009, Brown brought suit
5 in the California Superior Court for the County of Orange
6 ("Superior Court") asserting five claims related to
7 Bailey's default ("State Action"): (1) breach of
8 personal guarantee; (2) violation of uniform fraudulent
9 transfers act; (3) successor liability; and (4) liability
10 for violation of bulk sales notice requirements. (In re:
11 Bailey & Assoc., APC, Case No. 8:10-bk-23758-ES, Doc. No.
12 ("Bankr. Doc. No.") 1 at 8-17.)

13
14 On September 28, 2010, Bailey filed a voluntary
15 bankruptcy petition under Chapter 7 in the United States
16 Bankruptcy Court for the Central District of California.
17 (Bankr. Doc. No. 1.) On October 12, 2010, Brown filed a
18 "Motion for Relief From Automatic Stay" ("Mot. for
19 Relief"). (Bankr. Doc. No. 4.) On November 2, 2011,
20 Bailey filed an opposition to the Motion for Relief
21 ("Opp'n to Relief"). (Bankr. Doc. No. 7.) On November
22 8, 2010, Brown filed a reply ("Reply for Relief").
23 (Bankr. Doc. No. 8.) On November 16, 2010, following a
24 hearing, the Bankruptcy Court granted Brown relief from
25 the automatic stay under 11 U.S.C. § 362(d)(1) ("Order"),
26 which was entered on December 8, 2010. (Bankr. Doc. No.
27 17.) The Bankruptcy Court's Order found Bailey filed its
28

1 bankruptcy action in "bad faith," and Brown's state
2 claims against Bailey arose under non-bankruptcy law and
3 accordingly could be "most expeditiously resolved" in a
4 non-bankruptcy forum. (Id.)

5
6 On December 3, 2010, Bailey filed a Notice of Appeal
7 of the Bankruptcy Court's Order in this Court. (Doc. No.
8 1.) On February 18, 2011, Bailey filed a motion to stay
9 pending appeal ("Motion to Stay"). (Doc. No. 15), and on
10 March 13, 2011, Brown filed an opposition ("Motion to
11 Stay Opposition") to the Motion to stay (Doc. No. 16).
12 On April 1, 2011, Bailey filed its opening brief
13 ("Opening Br.") (Doc. No. 25) and an Appendix ("Bailey
14 App.") (Doc. No. 26). On April 15, 2011, Brown filed a
15 "reply brief" ("Brown Br.") (Doc. No. 30) and an
16 Appendix ("Brown App.") (Doc. No. 30-1). On April 29,
17 2011, Bailey filed a motion to strike portions of Brown's
18 Appendix. (Doc. No. 31.) On April 29, 2011, Bailey
19 filed its reply brief ("Bailey Reply"). (Doc. No. 32.)
20

21 **II. JURISDICTION AND STANDARD OF REVIEW**

22 Title 28 U.S.C. § 158(a) confers jurisdiction on
23 federal district court to entertain an appeal from a
24 bankruptcy court; it provides in pertinent part: "The
25 district courts of the United States shall have
26 jurisdiction to hear appeals . . . from final judgments,
27 orders, and decrees."
28

1 A district court reviews a bankruptcy court's order
2 to list an automatic stay under 11 U.S.C. § 362 for an
3 abuse of discretion. See In re Mac Donald, 755 F.2d 715,
4 716 (9th Cir. 1985) ("A decision to lift the automatic
5 stay under 11 U.S.C. § 362 is within the discretion of
6 the bankruptcy judge and reviewed for an abuse of
7 discretion."). The bankruptcy court's legal conclusions
8 are subject to de novo review, see In re Taylor, 884 F.2d
9 478, 480 (9th Cir. 1989), while its factual findings are
10 reviewed under a "clearly erroneous" standard. Fed. R.
11 Bankr. P. 2013; In re Irwin, 338 B.R. 839, 844 (E.D. Cal.
12 2006) (quoting In re Blackwell, 162 B.R. 117, 119 (E.D.
13 Pa. 1993)). Finally, "[i]f reasonable men could differ
14 as to the propriety of the action taken by the trial
15 court, then it cannot be said that the trial court abused
16 its discretion." Id.

17 18 **III. DISCUSSION**

19 After filing a Chapter 7 bankruptcy, the debtor is
20 granted an automatic stay. 11 U.S.C. § 362(a). The
21 bankruptcy court, however, may grant a creditor relief
22 from the automatic stay "for cause." 11 U.S.C. §
23 362(d)(1) ("On request of a party in interest and after
24 notice and a hearing, the [bankruptcy court] shall grant
25 relief from [a] stay . . . for cause, including the lack
26 of adequate protection of an interest in property of such
27 party in interest."). "Cause" is determined on a case-

1 by-case basis. In re Tucson Estates, Inc., 912 F.2d
2 1162, 1166 (9th Cir. 1990). Here, Bailey appeals the
3 Bankruptcy Court's Order granting relief from the
4 automatic stay to Brown under 11 U.S.C. § 362(d)(1), on
5 the basis of bad faith. (Opening Br. at 3.) For the
6 reasons set forth below, the Court finds the Bankruptcy
7 did not abuse its discretion in lifting the stay and
8 accordingly AFFIRMS the Bankruptcy Court's Order.

9
10 **A. The Bankruptcy Court's Factual Findings Were Not**
11 **"Clearly Erroneous"**

12 Bailey appeals the Bankruptcy Court's factual finding
13 that Bailey filed its bankruptcy petition in bad faith.
14 A factual finding of bad faith is reviewed for "clear
15 error." In re Eisen, 14 F.3d 469, 470 (9th Cir. 1994);
16 In re Mallas Enter., Inc., 37 B.R. 964, 967 (9th Cir. BAP
17 1984) ("Whether or not a case has been filed in bad faith
18 involves questions of fact. . . ."). Under the clearly
19 erroneous standard, "the court must accept the bankruptcy
20 court's findings of fact unless, upon review, the court
21 is 'left with the definite and firm conviction that a
22 mistake has been committed' by the bankruptcy judge." In
23 re Greene, 583 F.3d 614, 618 (9th Cir. 2009) (citing
24 Latman v. Burdette, 366 F.3d 774, 781 (9th Cir. 2004)
25 (quoting United States v. United States Gypsum Co., 333
26 U.S. 364, 395 (1948))). Thus, the test for clear error
27 is not whether the reviewing court would make the same
28

1 findings, but whether the reviewing court, based on all
2 of the evidence, has a definite and firm conviction that
3 a mistake has been made. Anderson v. City of Bessemer
4 City, 470 U.S. 564, 573 (1985). A reviewing court may
5 not overturn a decision, even if it would have weighed
6 the evidence in a different manner, so long as the trial
7 court's view of the evidence is plausible in light of the
8 entire record. Id. at 573-74. Moreover, in applying the
9 clearly erroneous standard, the appellate court views the
10 evidence in the light most favorable to the party that
11 prevailed below. Lozier v. Auto Owners Ins. Co., 951
12 F.2d 251, 253 (9th Cir. 1991).

13
14 At the hearing on the Motion for Relief, the
15 Bankruptcy Court made a factual finding that Bailey filed
16 the bankruptcy to avoid the State Action, based upon the
17 timing of Bailey's filing of the petition and the
18 existence of only two creditors - Brown and "insider
19 creditor" ClintonBailey - on the bankruptcy petition and
20 schedules. (See Doc. No. 26 at 124 (Transcript of
21 Hearing re: Motion for Relief from Automatic Stay ("Hr'g
22 Tr.")) 9:13-15).) The evidence in the record confirms
23 there were only two creditors listed on Bailey's original
24 petition and schedules. (See Brown App. at 151 (Schedule
25 F - Creditors Holding Unsecured Nonpriority Claims).)
26 Examining the timing of Bailey's filing of the bankruptcy
27 petition, as well as the contents of the petition and
28

1 schedule, the Bankruptcy Court held, "[G]iven the
2 representation made in the petition and in the schedules
3 that there were no other creditors that were owed any
4 money," (id. at 10:4-6), Bailey's "bankruptcy was filed
5 for an improper purpose, and that is solely to avoid
6 litigation with the debtor's primary creditor," Brown.
7 (Hr'g Tr. 9:21-25-10:1.) Viewing the evidence in the
8 light most favorable to Brown, Lozier, 951 F.2d at 253,
9 the Bankruptcy Court's view of the evidence was plausible
10 in light of the entire record. Anderson, 470 U.S. at
11 573-74. The evidence in the record supported the
12 Bankruptcy Court's factual finding of "bad faith"¹ and
13 accordingly was not clearly erroneous.

14

15 **B. The Bankruptcy Court Did Not Err In Lifting the Stay**
16 **Following a Factual Finding of Bad Faith**

17 "The existence of bad faith in commencing a
18 bankruptcy case constitutes cause for granting relief

19

20 ¹ Bailey's argument that the Bankruptcy Court based
21 its finding of bad faith upon evidence first raised in
22 Brown's Reply for Relief lacks merit; on the contrary,
23 the Bankruptcy Court repeatedly stated that it primarily
24 relied upon the timing of the bankruptcy petition's
25 filing and the contents of the petition and bankruptcy
26 schedules in making its determination of bad faith. (See
27 Hr'g Tr. 4: 21-22 (Bankruptcy Court: "I relied on the
28 schedules that were actually filed."); 5:15-16
(Bankruptcy Court: "At the time [Bailey] filed its
papers, [it] apparently [was] under the impression that
there was no debt owed to [creditors other than Brown] .
. . . Otherwise, the bankruptcy schedules would have
reflected all the other creditors"); 9:13-15 ("At
the time the bankruptcy was filed, the debtor did not
list any debt being owed to any other creditor other than
an insider.").)

1 from the stay pursuant to § 362(d)." In re Duvar Apt.,
2 Inc., 205 B.R. 196, 200 (9th Cir. BAP 1996) (citing In re
3 Walter, 108 B.R. 244, 247 (Bankr. C.D. Cal. 1989)).

4
5 "[B]ad faith exists where the debtor only intended to
6 defeat state court litigation." In re Eisen, 14 F.3d
7 469, 470 (9th Cir. 1994) (citing In re Chinichian, 784
8 F.2d 1440, 1445-46 (9th Cir. 1986)); see also In re
9 Silberkraus, 253 B.R. 890, 903 (Bankr. C.D. Cal. 2000)
10 ("[B]ankruptcy is not supposed to be like a '7-11'
11 convenience store, where the debtor merely drops in and
12 picks up that which the debtor wants (here, obstruction
13 and delay of the state court litigation).")

14
15 The Bankruptcy Court granted Brown's Motion for
16 Relief "under [11 U.S.C. §] 362(d)(1) for cause and the
17 cause being that [Brown's] bankruptcy was filed for the
18 purpose . . . of avoiding litigation with the moving
19 party." (Hr'g Tr. 9:4-7.) After making a factual
20 finding of bad faith, the Bankruptcy Court's legal
21 conclusion that such a finding warranted lifting the stay
22 was correct, because a "bad faith" bankruptcy constitutes
23 "cause" to lift an automatic stay under 11 U.S.C. §
24 362(d)(1). Thus, the Bankruptcy Court's Order lifting
25 the automatic stay survives a de novo review.

1 **C. Brown Had Standing to Bring the State Action Claims**

2 Brown sought relief from the automatic stay under 11
3 U.S.C. § 362(d)(1) in part because Brown's State Action
4 contained claims that did not implicate bankruptcy law
5 and could be "most expeditiously" resolved in state
6 court. (Brown Br. at 3-4.) Bailey contends Brown did
7 not have standing to bring the State Action claims in the
8 Superior Court. (Opening Br. at 23-24.) Bailey argues
9 Brown's State Action claims were "general claims, not
10 particularized ones," which belonged to the Chapter 7
11 trustee. (Id.) Bailey thus argues Brown lacked
12 standing. (Id.)

13
14 Although the Bankruptcy Court's decision did not
15 address standing in detail, the Court nevertheless
16 examines the question here. See D'Lil v. Best W. Encina
17 Lodge & Suites, 538 F.3d 1031, 1035 (9th Cir. 2008)
18 ("Federal courts are required sua sponte to examine
19 jurisdictional issues such as standing."). For the
20 reasons below, the Court finds Brown had standing to
21 bring its State Action claims.

22
23 In bankruptcy proceedings, the bankruptcy trustee
24 brings general claims, while any injured parties may
25 bring particularized or personal claims. In re Folks,
26 211 B.R. 378, 387 (9th Cir. BAP 1997). "A cause of
27 action is 'personal' if the claimant himself is harmed
28

1 and no other claimant or creditor has an interest in the
2 cause." Id. (quoting Koch Refining v. Farmers Union
3 Cent. Exch., Inc., 831 F.2d 1339, 1348-49 (7th Cir.
4 1987)). "If [the] claim could be brought by any creditor
5 of the debtor, the trustee is the proper person to assert
6 the claim, and the creditors are bound by the outcome of
7 the trustee's action." In re Folks, 211 B.R. at 387
8 (citing Kalb, Voorhis & Co. v. Am. Fin. Corp., 8 F.3d
9 130, 132 (2d Cir. 1993)).

10
11 The record here does not support Bailey's assertion
12 that Brown's claims in the State Action were general, and
13 not particularized. Brown filed the State Action on
14 September 11, 2009. (Bankr. Doc. No. 4 at 8-17.) On
15 September 3, 2009, Mark Bailey testified under oath that
16 Bailey did not have any creditors other than Brown.
17 (Doc. No. 16., Ex. 8 at 21-22.) Bailey later amended its
18 bankruptcy petition to include additional creditors.
19 (Doc. No. 15, Ex. 2.) When Brown brought the State
20 Action claims, however, there were no other known
21 claimants or creditors, let alone other claimants or
22 creditors who could bring the same claims. Bailey has
23 not provided any additional evidence or legal authority
24 to support its contention that the "state law case
25 brought by Brown & Charbonneau is problematic because the
26 claims being asserted against the debtor are . . . claims
27 which are general to all creditors of Bailey &

1 Associates, APC." (Opening Br. at 23.) Thus, Bailey has
2 failed to establish that Brown lacked standing to bring
3 the State Action claims.

4
5 **D. The Bankruptcy Court's "Notice and Hearing" Did Not**
6 **Abuse Its Discretion**

7 Bailey argues the Bankruptcy Court violated its due
8 process rights in the Order granting relief from the
9 automatic stay. "The Fifth Amendment's requirement of
10 due process applies to bankruptcy proceedings." See In
11 re Nicholson, 435 B.R. 622, 635 (9th Cir. BAP 2010). A
12 bankruptcy court's order granting relief from an
13 automatic stay may be granted only after a "notice and a
14 hearing." 11 U.S.C. § 362(d)(1). The phrase "notice and
15 a hearing" is defined by Section 102(1)(A) of the
16 Bankruptcy Code as "such notice as is appropriate in the
17 particular circumstances, and such opportunity for a
18 hearing as is appropriate in the particular
19 circumstances." 11 U.S.C. § 102(1)(A). Accordingly,
20 "[t]he concept of 'notice and a hearing' is a flexible
21 one." In re Nicholson, 435 B.R. at 635 (citations and
22 internal quotations omitted). "The bankruptcy judge has
23 considerable, albeit not unlimited, discretion in
24 determining if the notice and a hearing requirement has
25 been satisfied." Id. (quotation and citation omitted).

1 Bailey argues the Bankruptcy Court violated its due
2 process rights because Brown's Motion for Relief was
3 submitted on a form pleading. To support its contention
4 that form pleadings violate due process, Bailey cites In
5 re Ingersoll, 238 B.R. 202, 204 (D. Co. 1999). (See
6 Opening Br. at 16 n.4 (citing In re Ingersoll, 238 B.R.
7 at 204 (stating that when the material issues to be
8 resolved are factual questions, a bankruptcy court's
9 boilerplate forms do not give adequate notice)).) This
10 authority is not binding on this court and is inapposite
11 to Bailey's contention that the Bankruptcy Court violated
12 its due process rights. Brown's attorney of record for
13 the Motion for Relief, included a declaration within that
14 motion, stating the following factual basis:

15
16 [Bailey's] bankruptcy petition was filed after
17 [Bailey] was ordered [in the State Action] to
18 produce records and respond to discovery showing
19 that all of the assets of Bailey . . . were
20 transferred to Mark Bailey and Clinton Bailey, APC
21 to avoid the debt owed to its only creditor[,
22 Brown]. A motion for terminating sanctions was
23 filed . . . just when the [bankruptcy] petition
24 was filed. [Bailey] had dissolved nearly two
25 years ago and it has stated repeatedly under other
26 that its only creditor is [Brown]. This is a two
27 party dispute and the filing was done as a method
28 of delay and forum shopping.

23 (Mot. for Relief at 7; Harter Decl. at 2.) Moreover,
24 Brown attached additional information to the Motion for
25 Relief. Thus, Brown's Motion for Relief, although
26 submitted in boilerplate form, provided sufficient notice

1 to Bailey of the basis for Brown's contention that
2 Bailey's bankruptcy petition was filed in bad faith.

3
4 Moreover, Bailey had an opportunity to respond, and
5 did so, both in writing and at the hearing.
6 Specifically, Bailey submitted a seven-page written
7 opposition to the Motion for Relief, along with two
8 declarations and an exhibit. (See generally Relief
9 Opp'n.) The Bankruptcy Court also conducted a hearing on
10 November 15, 2010, and heard argument from Bailey's
11 counsel. (See generally Hr'g Tr.) After considering the
12 papers filed in support of, and in opposition to, the
13 Motion for Relief, as well as the arguments of counsel at
14 the hearing, the Bankruptcy Court granted the Motion for
15 Relief under section 362(d)(1) for cause, finding
16 Bailey's bankruptcy petition "was filed for the purpose .
17 . . of avoiding litigation with [Brown]." (Hr'g Tr. 9:8-
18 11.) The Bankruptcy Court noted, "This is essentially a
19 two-party dispute, notwithstanding the argument of
20 counsel" (id. 9:11-13), and concluded, "[G]iven the
21 representation made in the petition and in the schedules
22 that there were no other creditors that were owed any
23 money," (id. at 10:4-6), Bailey's "bankruptcy was filed
24 for an improper purpose, . . . solely to avoid

1 litigation with the debtor's primary creditor," Brown
2 (id. 9:21-25-10:1).²

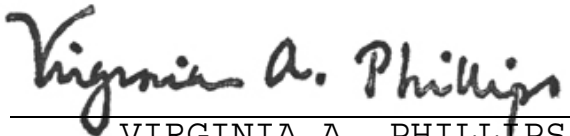
3
4 The Bankruptcy Court accordingly did not violate
5 Bailey's due process rights because the Court provided
6 sufficient "notice and a hearing." 11 U.S.C. §
7 362(d)(1). Specifically, Brown's Motion for Relief gave
8 sufficient notice to Bailey of the factual basis upon
9 which Brown sought relief from the automatic stay.
10 Moreover, before reaching its decision, the Bankruptcy
11 Court conducted a hearing and allowed Bailey an
12 opportunity to voice opposition to the Motion for Relief.
13 Thus, the Bankruptcy Court did not abuse its discretion.

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20 ³ Despite Bailey's contention otherwise, the
21 Bankruptcy Court repeatedly stated it relied on
22 Bailey's bankruptcy petition and schedules in finding
23 Bailey acted in bad faith. (See Hr'g Tr. 4: 21-22
24 (Bankruptcy Court: "I relied on the schedules that
25 were actually filed."); 5:15-16 (Bankruptcy Court:
26 "At the time [Bailey] filed its papers, [it]
27 apparently [was] under the impression that there was
28 no debt owed to [creditors other than Brown]
Otherwise, the bankruptcy schedules would have
reflected all the other creditors"); 9:13-15
("At the time the bankruptcy was filed, the debtor
did not list any debt being owed to any other
creditor other than an insider.").)

1 IV. CONCLUSION

2 For the foregoing reasons, the Court AFFIRMS the
3 Bankruptcy Court's Order granting Brown relief from the
4 automatic stay under 11 U.S.C. § 362(d)(1). The Court
5 DENIES all other pending motions as moot.

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9 Dated: September 6, 2011


VIRGINIA A. PHILLIPS
United States District Judge