ORDERED.

Dated: December 21, 2012

Eileen W. Hollowell, Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In re:	)	Chapter 11
	)	
TOMMY CONSTANTINE,	)	Case No. 2:12-bk-04842-EWH
	)	
Debtor.	)	**MEMORANDUM DECISION ON MOTION FOR RELIEF FROM AUTOMATIC STAY**
	)	

I. INTRODUCTION

The Court has been asked to decide whether pursuit of a state-court appeal that could result in a decision entitled to preclusive effect constitutes cause to modify the automatic stay under § 362(d)(1).[1] The Court finds that it does not.

II. FACTUAL AND PROCEDURAL HISTORY

Tommy Constantine ("Debtor") filed a Chapter 11 voluntary petition on March 12, 2012. Debtor was a racecar driver and racing team owner before pursuing other business ventures. While working in the racing industry, Debtor entered into an agreement with Prewitt Enterprises, LLC, and its principal, Hal Prewitt (collectively, "Prewitt"), pursuant to which Prewitt paid a fee to join Debtor's racing team. The parties later experienced a falling out which resulted in Prewitt bringing a lawsuit against Debtor

[1] Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532. The Federal Rules of Bankruptcy Procedure, Rules 1001-9037, are referred to as "Rules." The Federal Rules of Civil Procedure are referred to as "Civil Rules."

in Florida Circuit Court for misrepresentation ("the Florida Complaint"). The Florida jury reached a verdict ("the Verdict") awarding Prewitt $950,000 for fraud, breach of contract, intentional misconduct, and punitive damages. It also awarded Prewitt $400,000 in attorneys' fees. However, the trial court entered a judgment notwithstanding the verdict ("JNOV") removing the fraud and punitive damages awards due to Florida's economic-loss rule (the Verdict and JNOV will be referred to collectively as "the Florida Verdict").

To grant an award for fraudulent misrepresentation, the jury was instructed[2] that it had to find: (1) that Debtor made a false statement concerning a material fact; (2) that Debtor knew the statement was false when he made it or made the statement knowing he did not know whether it was true; (3) that Debtor intended for another party to rely on the false statement; and (4) that Prewitt was injured by acting in reliance on the representation.

To grant an award for intentional misconduct, the jury was instructed:

> "Intentional misconduct" means that [Debtor] had actual knowledge of the wrongfulness of the conduct and there was a high probability [of] injury or damage to Prewitt…and, despite that knowledge, [Debtor] intentionally pursued that course of conduct, resulting in damage."

Both parties have appealed the Florida Verdict, and the appeals (collectively, "the Florida Appeal") are currently stayed as a result of Debtor's bankruptcy filing.

Contemplating that he would file an adversary complaint objecting to the discharge of the Verdict, Prewitt filed a Motion for Relief from Automatic Stay ("the MRS") on April 11, 2012 in order to pursue an appeal of the JNOV. Were he to prevail, Prewitt would seek to apply issue preclusion to his nondischargeability claim.

[2] The contents of the instructions were submitted by Prewitt in several pleadings. The pertinent jury instructions will be referred to collectively as "the Jury Instructions."

In the MRS, Prewitt argues that the only issue in the Florida Appeal is whether the trial court properly applied Florida's economic-loss rule when issuing the JNOV. Prewitt asserts that only a Florida court may decide that issue. He further contends that resolving the economic-loss issue will liquidate the value of his claim and establish most, or all, of the elements required for his dischargeability complaint through the doctrine of issue preclusion.[3] Prewitt also argues that he will suffer harm if the Court does not grant relief because his claim amount could fluctuate, and that potential harm is greater than whatever harm Debtor might incur if the stay is lifted.

Debtor responded to the MRS on May 18, 2012 ("the Response"). The Response was supported by declarations by Debtor and two attorneys, one who represents Debtor in Arizona and another who represented Debtor in Florida.

Debtor's Response to the MRS presents a different picture of the Florida Appeal. According to Debtor, he does not have the financial resources to properly prosecute the Florida Appeal and would be prejudiced in that appeal if he does not have adequate representation. Debtor also contends that resolving the Florida Appeal in Prewitt's favor will not resolve the dischargeability adversary; that liquidating Prewitt's claim is not critical because Debtor's estate lacks the resources to pay even the lowest estimate of Prewitt's claim; that even if the Florida Appeal is resolved in Prewitt's favor, Debtor may still seek a new trial due to a claim for ineffectiveness of counsel; and that the Florida Appeal will divert limited estate resources.

[3] "Issue preclusion" is a doctrine which "preclude[s] relitigation of issues already litigated in and necessary to a prior judgment." In re Gottheiner, 703 F.2d 1136 (9th Cir. 1983). Issue preclusion is applied in order to protect a prevailing party from the expense and vexation of multiple lawsuits, conserve judicial resources, and foster reliance on judicial action by minimizing the possibility of inconsistent decisions. FDIC v. Daily (In re Daily), 47 F.3d 365, 368 (9th Cir. 1995). Issue preclusion, unlike claim preclusion, is applicable in a dischargeability action. Grogan v. Garner, 498 U.S. 279, 284 n. 11, 111 S. Ct. 654, 658 n. 11, 112 L. Ed. 2d 755 (1991); Stephens v. Bigelow (In re Bigelow), 271 B.R. 178, 184 (9th Cir. BAP 2001).

To demonstrate the viability of his claim for ineffective assistance of counsel,[4] Debtor argues that because he could not afford an experienced attorney, he was forced to settle for counsel who had only been practicing for seven months. The lawyer had never tried a case in front of a jury prior to Debtor's case, did not understand the pretrial process, and made fundamental evidence errors which prejudiced Debtor. An experienced attorney from Arizona sought to intercede for Debtor, but his admission *pro hac vice* was denied several times.

Prewitt filed a reply on June 11, 2012 ("the Reply"), and the Court held hearings on the MRS on June 22, 2012 and July 26, 2012. Between the hearings, Prewitt filed a Complaint to Determine Dischargeability of Debts ("the Complaint") on July 9, 2012. The Complaint alleges that Debtor made financial misrepresentations which qualify for an exception to discharge under 11 U.S.C. §§ 523(a)(2)(A) and (a)(6).

At the July 26 hearing, the Court asked the parties to submit briefs addressing whether the Florida Appeal would result in a judgment which would have preclusive effect. Debtor submitted his memorandum ("Debtor's Memorandum") on August 20, 2012, and Prewitt submitted his ("Prewitt's Memorandum") on September 4, 2012.

III. ISSUE

Does the pending Florida Appeal constitute cause to grant relief from the automatic stay?

IV. JURISIDICTIONAL STATEMENT

Jurisdiction is proper under 28 U.S.C. §§ 1334 and 157(b)(2)(A), (G), and (I).

[4] Without making a decision on the merits of the claim, the Court notes that an ineffective-assistance claim is a criminal concept. See, generally, Strickland v. Washington, 466 U.S. 668, 694-95, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (U.S. 1984)

V. DISCUSSION

A. Relief from Stay

Section 362(d)(1) provides that a court may grant a party in interest relief from the automatic stay "for cause…." The Code does not provide a definition of "cause," and bankruptcy courts determine cause "on a case-by-case basis." In re Tucson Estates, Inc., 912 F.2d 1162, 1166 (9th Cir. 1990). "When making this determination, bankruptcy courts consider the totality of the circumstances in each case." Green v. Brotman Med. Ctr., Inc. (In re Brotman Med. Ctr., Inc.), 2008 Bankr. LEXIS 4692, 15 (9th Cir. BAP Aug. 15, 2008) (internal citations omitted). The Court has wide latitude when determining if relief from the automatic stay is appropriate, and a decision to lift the automatic stay is within a bankruptcy court's discretion, subject to review for abuse. In re Delaney-Morin, 304 B.R. 365, 369-70 (9th Cir. BAP 2003); In re Leisure Corp., 234 B.R. 916, 920 (9th Cir. BAP 1999).

"Courts in the Ninth Circuit have granted relief from the stay under § 362(d)(1) when necessary to permit pending litigation to be concluded…if the non-bankruptcy suit involves multiple parties or is ready for trial." Truebro, Inc. v. Plumberex Specialty Prods., Inc. (In re Plumberex Specialty Prods., Inc.), 311 B.R. 551, 556-57 (Bankr. C.D. Cal. 2004). The legislative history behind § 362(a), the stay provision, explains, "It will often be more appropriate to permit proceedings to continue in their place of origin, *when no great prejudice to the bankruptcy estate would result*…." H.R. Rep. No. 95-595, at 341 (1977); S. Rep. No. 95-989, at 50 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5836 (emphasis added). The Truebro court exercised this discretion by looking to twelve nonexclusive factors discussed by In re Curtis, 40 B.R. 795 (Bankr. D. Utah

1984), and approved by the Ninth Circuit BAP in Kronemyer v. Am. Contrs. Indem. Co. (In re Kronemyer), 405 B.R. 915, 921 (9th Cir. BAP 2009) ("We agree that the Curtis factors are appropriate, nonexclusive, factors to consider in deciding whether to grant relief from the automatic stay to allow pending litigation to continue in another forum.")

The "Curtis factors" that a court can weigh when determining whether pending litigation argues for stay relief include:

> (1) Whether the relief will result in a partial or complete resolution of the issues;
>
> (2) The lack of any connection with or interference with the bankruptcy case;
>
> (3) Whether the foreign proceeding involves the debtor as a fiduciary;
>
> (4) Whether a specialized tribunal has been established to hear the particular cause of action and whether that tribunal has the expertise to hear such cases;
>
> (5) Whether the debtor's insurance carrier has assumed full financial responsibility for defending the litigation;
>
> (6) Whether the action essentially involves third parties, and the debtor functions only as a bailee or conduit for the goods or proceeds in question;
>
> (7) Whether the litigation in another forum would prejudice the interests of other creditors, the creditors' committee and other interested parties;
>
> (8) Whether the judgment claim arising from the foreign action is subject to equitable subordination under Section 510(c)
>
> (9) Whether movant's success in the foreign proceeding would result in a judicial lien avoidable by the debtor under Section 522(f)
>
> (10) The interests of judicial economy and the expeditious and economical determination of litigation for the parties;
>
> (11) Whether the foreign proceedings have progressed to the point where the parties are prepared for trial; and
>
> (12) The impact of the stay on the parties and the "balance of hurt."

Curtis, 40 B.R. at 799-800 (citations omitted). Factors 1, 2, 10, and 12 are most pertinent in this case. Under them, cause for granting relief from the automatic stay exists if prosecuting the Florida Appeal is both more effective than litigating the Complaint in this Court and resolution of the Florida Appeal is fully aligned with the dischargeability provisions of the Code. To determine if these conditions are met, the Court must consider how issue preclusion would be applied to the Verdict if Prewitt prevails on the Florida Appeal.

B. Issue Preclusion

The standard for evaluating whether issue preclusion arises out of a state-court judgment is not in dispute: Florida law determines the preclusive effect of a Florida judgment. Gayden v. Nourbakhsh (In re Nourbakhsh), 67 F.3d 798, 800 (9th Cir. 1995). Under Florida's law of issue preclusion, a judgment is afforded preclusive effect when:

> five factors [are] present: (1) an identical issue must have been presented in the prior proceedings; (2) the issue must have been a critical and necessary part of the prior determination; (3) there must have been a full and fair opportunity to litigate that issue; (4) the parties in the two proceedings must be identical; and (5) the issues must have been actually litigated.

Cook v. State, 921 So. 2d 631, 634 (Fla. Dist. Ct. App. 2d Dist. 2005) (citing Goodman v. Aldrich & Ramsey Enters., Inc., 804 So. 2d 544, 546-47 (Fla. 2d DCA 2002)). Because Prewitt seeks relief so that he may apply issue preclusion to claims under §§ 523(a)(2) and (6), the findings of fraud and injury in the Verdict must be identical to what Prewitt must prove to prevail on the Complaint.

C. Section 523(a)(2)(A)

Section 523(a)(2)(A) excludes from discharge any debt obtained by "false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition." 11 U.S.C. § 523(a)(2)(A). To prevail on a claim under § 523(a)(2)(A), a creditor bears the burden of proof in demonstrating: (1) misrepresentation, fraudulent omission, or deceptive conduct by the debtor; (2) knowledge of the falsity or deceptiveness of his statement or conduct; (3) an intent to deceive; (4) justifiable reliance by the creditor on the debtor's statement or conduct; and (5) damage to the creditor proximately caused by its reliance on the debtor's statement or conduct. Deitz v. Ford (In re Deitz), 469 B.R. 11, 24 (9th Cir. BAP 2012).

The Jury Instructions for a finding of fraudulent misrepresentation in Florida were similar but not necessarily identical to what plaintiffs must prove under § 523(a)(2)(A). In particular, the Court is unable to determine from the record presented if the statements which the Florida jury found to be false were statements about Debtor's financial condition. As explained below, knowing whether Debtor's statements were about his financial condition is critical to determining what Prewitt must prove under § 523(a)(2).

The Ninth Circuit BAP recently conducted a careful examination of this issue in Barnes v. Belice (In re Belice), 461 B.R. 564 (9th Cir. BAP 2011), a case where the plaintiff claimed that a debtor had secured a loan based on a willful misrepresentation. The debtor argued that the plaintiff could not rely on § 523(a)(2)(A) because the allegedly fraudulent statements related to the debtor's financial condition and therefore had to be in writing. Whether a dischargeability inquiry must proceed under

§§ 523(a)(2)(A) or (B) hinges on the meaning of "respecting the debtor's…financial condition," a phrase which the Ninth Circuit interprets narrowly only to cover those statements "that purport to present a picture of the debtor's overall financial health." Id. at 577-78 (quoting Cadwell v. Joelson (In re Joelson), 427 F.3d 700 (10th Cir. 2005)) (internal quotation marks omitted). Belice relied on this excerpt from Joelson to explain:

> Statements that present a picture of a debtor's overall financial health include those analogous to balance sheets, income statements, statements of changes in overall financial position, or income and debt statements that present the debtor or insider's net worth, overall financial health, or equation of assets and liabilities. . . . What is important is not the formality of the statement, but the information contained within it—information as to the debtor's or insider's overall net worth or overall income flow.

Id. at 578 (quoting Joelson, 427 F.3d at 714). To reinforce that statements concerning overall financial health are a limited category, the Belice court found that a debtor's oral statements concerning monthly wages, proceeds from specific transactions, monthly rent, specific expenses, and specific assets did not qualify.

The BAP returned to its § 523(a)(2)(A) jurisprudence earlier this year in Cai v. Shenzhen Smart-In Indus. Co. (In re Cai), 2012 WL 1588834, 2012 Bankr. LEXIS 2021 (9th Cir. BAP May 7, 2012). In Cai, a debtor who worked as a shoe distributor made the same two promises to several creditors: (1) that he intended to pay for the shoes ordered and delivered; and (2) that he had sufficient funds to pay for the shoes. Cai at *1. The debtor in that case claimed that these statements pertained to overall financial condition and qualified the resulting debts for discharge. The BAP disagreed, citing Belice and Joelson while finding that neither the representation that debtor could pay the specific debts nor his larger promise to pay "shed any real light on [debtor]'s overall

net worth or…income flow." Cai at *3-4. The debtor's promises were not statements respecting financial condition.

Prewitt argues that the facts from Cai are analogous enough to the current circumstances that Debtor's statements about funding the racing team fall outside this circuit's narrow interpretation of statements respecting financial condition. But for the same reason why the Court cannot discern which statements informed the Verdict, the Court finds that Prewitt has provided insufficient information in the MRS for the Court to accept that Cai should control in this case.

Prewitt also has not address a central element of § 523(a)(2)(A)—that his reliance on Debtor's statements or conduct was justifiable. This is a conspicuous omission because the concept of justifiability is a notable difference between the Jury Instructions and the Code's § 523(a)(2) standard, and the evidence supporting the MRS does not permit this Court to make an informed judgment about this question.

In sum, the Court has not received a full enough record of the evidence introduced at trial in Florida to make a determination that the Verdict will have preclusive effect in this Court. Without this information, the Court cannot be confident, as required by Florida's issue preclusion doctrine, that an identical issue was presented in the prior proceeding.

The Court also believes that granting relief from stay will prejudice the bankruptcy estate and place an undue burden on Debtor. The Florida Appeal will diminish the estate by draining resources to defend the JNOV and to prosecute Debtor's cross appeal. Furthermore, prosecuting the Florida Appeal will result in undue delay in

administering Debtor's estate. This Court can expedite prosecution of the Complaint and promptly conduct a trial if requested to do so.

VI. CONCLUSION

Prewitt has failed to demonstrate that cause exists to grant relief from the stay. By operation of a separate order to be entered on the same day as this memorandum, the MRS will be denied.

Dated and signed above.

Notice to be sent through
the Bankruptcy Noticing Center
to the following:

Tommy Constantine
P.O. Box 26870
Scottsdale, AZ 85255

Robert C. Warnicke
Thomas Littler
Gordon Silver
1 E. Washington, Ste. 400
Phoenix, AZ 85004

John J. Fries
Josh Kahn
Ryley Carlock & Applewhite
1 N. Central Ave., Ste. 1200
Phoenix, AZ 85004

Christopher Pattock
Office of the U.S. Trustee
230 N. First Ave., #204
Phoenix, AZ 85003