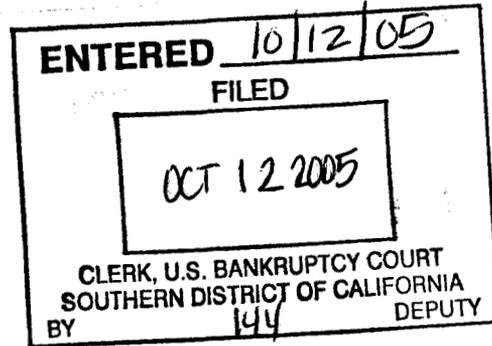


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NOT FOR PUBLICATION



UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA

In re

CHARLES R. NETHERTON,

Debtor.

TREMAIN ENTERPRISES, INC.,

Plaintiff,

v.

CHARLES R. NETHERTON,

Defendant.

Bankruptcy No. 04-08123-JM11

Adversary No. 05-90295-JM11

NOTICE OF INTENDED DECISION

I

Plaintiff's motion for summary judgment ("Motion") was heard on August 11, 2005, and taken under submission. While this Court would be inclined to grant the Motion if Plaintiff's state court judgment had not been appealed, the lack of finality prevents a ruling in Plaintiff's favor at this time.

1 II

2 BACKGROUND FACTS

3 On June 23, 2004, Plaintiff obtained a judgment against the
4 Debtor for \$548,000 for breach of partnership contract. The judgment
5 was rendered after a jury trial and the jury issued a special verdict
6 which stated that the jury found there was "a partnership contract
7 between Plaintiff Tremain Enterprises, Inc. and Defendant Charles R.
8 Netherton for the design, manufacture and sale of telemetry products
9 to third-party customers." Plaintiff recorded an abstract of judgment
10 on July 30, 2004.

11 The Debtor filed a Chapter 11 petition on September 16, 2004.
12 On April 15, 2005, the Debtor filed a motion for sanctions against
13 Plaintiff for violating the automatic stay. The Debtor claimed that
14 Plaintiff is destroying his business and slandering his name. In
15 October 2004, Debtor asserts he was displaying his models at a trade
16 show and George Tremain yelled at him and told him he had no right to
17 be there, and also committed assault and battery. The police took a
18 report. The Debtor claims that Plaintiff had a model 726B on display,
19 which was loaned to him by Debtor and he refuses to return, and that
20 Plaintiff also had a model 792 on display that he bought from Debtor,
21 but refuses to pay for. The Debtor also claims that Plaintiff is
22 violating the stay by telling potential customers that the Debtor has
23 no right to market and sell the models.

24 Plaintiff objected to the motion for sanctions on the grounds
25 that the Debtor does not own the designs, plans, specifications or
26 rights to produce the products which he claims are property of the
27 estate. Plaintiff contends that the parties already litigated this
28 issue in Superior Court and the Debtor lost. The property belongs to

1 the partnership, not the Debtor. Therefore, it is not property of the
2 Debtor's estate. In re Rodeo Canon Development Corp., 362 F.3d 603,
3 609 (9th Cir. 2004).

4 Plaintiff claims that the Debtor came to Plaintiff's booth at the
5 trade show and started accusing him of stealing the units on display,
6 despite the jury's finding that they were created by the partnership.
7 Debtor was displaying the same models under a different name. After
8 a few minutes of the Debtor's tirade, Mr. Tremain admits he did push
9 the Debtor away from the Plaintiff's booth, but that is the only
10 contact that occurred between the two.

11 At the June 9, 2005, hearing on the motion for sanctions it was
12 agreed that to reach a resolution of the issue in an appropriate
13 procedural framework, Tremain would file a complaint for declaratory
14 relief and motion for summary judgment, and the Debtor would file an
15 answer and response to the motion for summary judgment.

16 The Complaint asks for a declaration that the designs,
17 specifications and rights to produce a 792 Bit Error Rate Tester, a
18 726 PSK Demodulator, and a 726B PM/PSK Demodulator are not assets of
19 the Debtor's Chapter 11 estate. If Plaintiff prevails, there is no
20 basis to proceed with the motion for sanctions and the ruling would
21 also undermine the Debtor's ability to propose a plan of
22 reorganization.

23
24 **III**

25 **MOTION FOR SUMMARY JUDGMENT**

26 Plaintiff filed a motion for summary judgment based on the res
27 judicata and collateral estoppel effect of the state court judgment.
28 Plaintiff argues that the jury necessarily found that the telemetry

1 equipment was produced by the partnership and not the Debtor
2 individually. The issue of ownership in the state court case was
3 fundamental to Plaintiff's claim for damages. The jury issued special
4 verdicts finding that there was a partnership between the Debtor and
5 Plaintiff, that the Debtor breached the partnership agreement and
6 awarded damages based on the loss to Plaintiff from the partnership's
7 inability to sell the same telemetry products the Debtor now claims
8 to own. The Debtor also filed a cross-complaint against Plaintiff for
9 damages due when he rented or loaned the products to Plaintiff, and
10 the jury specifically found against the Debtor on that issue.

11 The Debtor submitted his declaration and that of his state court
12 attorney to support his objection. The attorney claims that the jury
13 special verdict awarded Plaintiff damages for breach of contract based
14 on projections for lost sales because the product that was not
15 manufactured. It did not award ownership of the Debtor's products or
16 the right to market the products to Tremain or the partnership. The
17 Debtor's counsel provides a copy of an instruction issued by the state
18 court judge to the jury which says "Whether or not Mr. Netherton has
19 made the subject plans available to Mr. Tremain is a contested issue
20 in this case. Mr. Netherton says he has (at least as to the 726 and
21 726B plans), whereas Mr. Tremain says he has not. Regardless of how
22 that issue is resolved by the jury, if at all, and regardless of the
23 jury's ultimate determination in this case, there will be no
24 requirement as a result of this case that Mr. Netherton turn anything
25 over to Mr. Tremain."

26 Mr. Netherton's declaration also makes several statements to
27 refute the jury decision and claims that "the jury incorrectly found
28 that there was an oral partnership agreement, and awarded damages for

1 breach of that agreement."

2 The Debtor filed a timely notice of appeal from the state court
3 judgment. He argues that the Plaintiff is not entitled to summary
4 judgment because the state court judgment is not final. In
5 California, a judgment is not final until an appeal from the trial
6 court has been exhausted, so the requirement of a final judgment to
7 apply collateral estoppel or res judicata has not been met.

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IV

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DISCUSSION

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To grant summary judgment based on prior litigation in the California state court, this Court must apply California law. Under California law, collateral estoppel only applies if certain requirements are met. In re Cantrell, 329 F.3d 1119, 1124 (9th Cir. 2003). These requirements include a state court judgment that is a final decision on the merits, and that the same issue was actually litigated and necessarily decided. Id. Based on the allegations in the state court complaint and cross-complaint, and the special verdicts issued by the jury, this Court would find that the jury necessarily determined that the telemetry products involved in this case were partnership property, not property of the Debtor. However, since the Debtor filed a notice of appeal of that decision, the ruling is not final under California law, and summary judgment would be premature. In addition, the instruction provided by the state court judge is puzzling and would require further explanation and context before this Court would grant summary judgment.

Applying the doctrine of collateral estoppel in this case would also further the public policies identified by the California Supreme

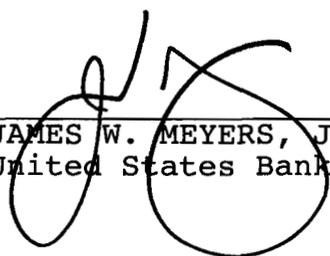
1 Court to support the use of collateral estoppel: "preservation of the
2 integrity of the judicial system, promotion of judicial economy, and
3 protection of litigants from harassment by vexatious litigation."
4 Lucide v. Superior Court, 51 Cal.3d 335, 341-341, 272 Cal.Rptr. 767,
5 769-770, 795 P.2d 1223, 1225-1226 (1990). Relitigation in the
6 bankruptcy court of the issues already decided in the state court
7 would likely conflict with the principle of federalism underlying the
8 Full Faith & Credit Act. In re Baldwin, 249 F.3d 912, 920 (9th Cir.
9 2001). Therefore, rather than ignore the policies underlying the
10 doctrine of collateral estoppel, this Court would abstain, under 28
11 U.S.C. § 1334(c)(1), from further hearings in the adversary proceeding
12 and on the Debtor's motion for sanctions, pending a final decision by
13 the state appellate court.

14
15 V

16 CONCLUSION

17 Given the lack of a final judgment, Plaintiff's motion for
18 summary judgment must be denied at this time. However, this Court
19 will abstain from issuing further rulings in this adversary proceeding
20 and as to the Debtor's motion for sanctions pending a final judgment
21 by the California Appellate Court on the matter between the Plaintiff
22 and the Debtor.

23 Dated: OCT 12 2005

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26 _____
27 JAMES W. MEYERS, Judge
28 United States Bankruptcy Court