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SOUTHERN DISTRICT OF CALIFORNIA
BY DEPUTY

WRITTEN DECISION - NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF CALIFORNIA

In re **VAIL LAKE RANCHO CALIFORNIA, LLC, a California limited liability company, etc. et al.** **Debtor(s)**	**Case No. 12-16684-LA11** **MEMORANDUM DECISION**

I.
INTRODUCTION

Thomas C. Hebrank ("Mr. Hebrank"), the Liquidating Trustee for the Vail Lake Liquidating Trust ("Trustee"), has filed an objection to the allowance of Proof of Claim No. 5 ("Claim") filed by The Paul Company, LLC ("Claimant"). The Claim is based upon a debt owed by William Johnson ("Mr. Johnson") and Patricia Johnson (collectively the "Johnsons"), to the Claimant arising from consulting services embodied in a stipulated judgment against the Johnsons. Mr. Johnson is the managing member of the Vail Lake Rancho California, LLC ("Debtor"). During the involuntary gap period of the Debtor's bankruptcy case, Mr. Johnson, on behalf of the Debtor, agreed that the Debtor would be jointly liable for the debt ("Joint Liability Agreement"). The Trustee objects to the

Claim because the debt is solely the obligation of the Johnsons, and the Joint Liability Agreement is a violation of the automatic stay so it is void *ab initio*. The Court's tentative ruling sustained the Trustee's objections. [ECF No. 801]

At the hearing, the Court granted the Claimant leave to file the Joint Liability Agreement since the Claimant had inadvertently omitted it.[1] The Court took under submission the issue of whether the Joint Liability Agreement violated the automatic stay in order to consider the Claimant's additional case authority holding that a voluntary transfer of property by a debtor does not violate the automatic stay. [ECF No. 802] Upon further review of the cited case authority and the terms of the Joint Liability Agreement, the Court reaffirms her tentative ruling to disallow the Claim on the grounds that the agreement violated the automatic stay so it is void. Even if the Court were to treat the Joint Liability Agreement as a voluntary transfer of property (as urged by Claimant at the hearing), the Claim must be disallowed under § 502(d).

II.
FACTS

On December 26, 2012, an involuntary chapter 11 bankruptcy petition was filed against the Debtor. On June 10, 2013, the order for relief was entered. The period between the filing date of the involuntary petition and the entry for the order for relief will be referred to as the "GAP period." The Debtor is part of a group of entities referred to as the "Vail Lake Entities." On June 5, 2013, the other Vail Lake entities filed their own voluntary chapter 11 cases. All of these cases were administratively consolidated ("Consolidated Debtors"), and Mr. Hebrank was appointed as the Chief Restructuring Officer in charge of the Consolidated Debtors.

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[1] The Joint Liability Agreement is filed as ECF No. 803.

During the GAP period, the Debtor and Claimant entered into the Joint Liability Agreement wherein the Debtor agreed to be liable for a $22,000 debt owed by the Johnsons to Claimant. The Agreement provides:

> 1. The present agreed sum due is $22,000. [Claimant] may proceed to obtain a judgment against Johnson for that sum ... there shall be a stay on execution on that judgment for a period of six months from the date of its entry.
>
> 2. [Vail Lake Entities] agree they are jointly and severally indebted to [Claimant] in the sum of $22,000 and [Claimant] may file a claim in any bankruptcy proceeding against all or any of them in that amount ....

[ECF No. 803] According to the Debtor's attorney (who now represents the Claimant in this matter), it was his idea to enter into the Joint Liability Agreement as part of his pre-bankruptcy planning for the Consolidated Debtors. [Phillips Decl., ECF No. 780][2] He states that some of the Claimant's services had been rendered to or for the benefit of the Consolidated Debtors, so it made sense to acknowledge the debt as part of their overall bankruptcy strategy. [*Id*]

After the order for relief, the Claimant filed Proof of Claim No. 5 in the Debtor's bankruptcy case asserting liability by the Debtor for a $22,012 debt. The Claim is evidence by:

- A consulting agreement for services to be provided to the Johnsons concerning their "family's real estate holdings at Vail Lake and Walker Basin" – signed by the Johnsons individually ("Consulting Agreement") [Claim, Ex. 1];

- A $20,000 promissory note executed by the Johnsons in favor of Claimant for unpaid consulting services to be due and payable on or before December 31, 2005 ("Promissory Note") [Claim, Ex. 2]; and

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[2] The Court questions how Mr. Phillips, as the attorney for the Debtor, can disclose his privileged conversations and legal strategy for entering into the Joint Liability Agreement without the consent of the *current* holder of the attorney-client privilege. However, as there was no objection to his statements, the Court will consider them.

- A stipulated judgment entered solely against the Johnsons in the amount of $22,012 ("Stipulated Judgment") [Claim, Ex. 3].

In March 2015, the Consolidated Debtors confirmed their joint chapter 11 liquidating plan ("Plan"). [ECF Nos. 637, 722] The Plan provides for prospective substantive consolidation, and creation of the Vail Lake Liquidating Trust ("Liquidating Trust"). Mr. Hebrank was appointed the Trustee of the Liquidating Trust.

On June 30, 2015, the Trustee filed his objection to the Claim on the grounds that the Debtor has no liability for the debt because the Stipulated Judgment is against the Johnsons, and the Debtor's books and records reflect that the debt is a personal liability of the Johnsons. In response, the Claimant asserts that the Debtor's liability is based upon the Joint Liability Agreement.

III.
ISSUES

1. Whether the Claimant's execution of the Joint Liability Agreement violated the automatic stay rendering it void.

2. If there was no automatic stay violation, whether the Claim should be an allowed claim.

III.
ANALYSIS

The first question is whether the Claimant violated the automatic stay by executing the Joint Liability Agreement rendering it void. The automatic stay in § 362(a) provides, in relevant part, that the filing of an involuntary petition automatically stays: "*any act* to collect, assess, or recover a claim against the debtor that arose before the commencement of the case." 11 U.S.C. § 362(a)(6) (emphasis added). It is established law that violations of the automatic stay are

void *ab initio*, and not merely voidable. *In re Schwartz*, 954 F.2d 569, 571 (9th Cir. 1992). Thus, it is incumbent upon those taking postpetition collection actions to obtain relief from the automatic stay. *Schwartz*, 954 F.2d at 572.

In this case, it is undisputed that the automatic stay protected the Debtor's property at the time Claimant entered into the Joint Liability Agreement with the Debtor. It is undisputed that Claimant did not obtain relief from stay. Finally, it is also undisputed that the Joint Liability Agreement assessed liability to the Debtor to pay a prepetition debt – an act that is plainly prohibited by the language in § 362(a)(6).[3] The Claimant's defense is that there was no stay violation because the Debtor's agreement was voluntary, citing to *In re Tippett*, 542 F.3d 684 (9th Cir. 2008) as governing this issue.

In *Tippett*, the debtor scheduled his residence as property of the estate and partially exempted it. Thereafter, without the trustee's knowledge, he listed his residence with a broker and sold it. *Tippett*, 542 F.3d at 687. The trustee could not avoid the transfer under § 549 because it was undisputed the buyer was a bona fide purchaser. Therefore, the trustee argued the voluntary transfer of the property was void *ab initio* because it violated § 362(a)(3).[4] *Id.* at 690-91. The Ninth Circuit considered the issue of whether the automatic stay rendered the debtor's voluntary transfer of property *void*, or whether the transfer was merely *avoidable* under § 549 as an unauthorized transfer of property. *Id.* at 690-92. It held that the transfer was not void because § 362(a)'s automatic stay does not apply to a voluntary transfer of property by the debtor, and that the mechanism to challenge a debtor's unauthorized postpetition transfer of property is § 549. *Id.* at 691 (citing,

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[3] Where the language of the Code is clear, it is to be enforced according to its terms. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989).

[4] This section enjoins any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.

inter alia, *40235 Wash. Street Corp. v. Lusardi*, 329 F.3d 1076, 1081-82 (9th Cir. 2003)).

In contrast, this case involves an agreement by the Debtor to be liable for the Johnsons' prepetition debt. The agreement granted to the Claimant the right to seek payment from the Debtor, *i.e.*, to file a proof of claim which it did. It did not transfer to the Claimant any interest in or right to the Debtor's property. *See In re Asia Global Crossing Ltd.*, 333 B.R. 199, 203-04 (Bankr. S.D.N.Y. 2005)(holding that an agreement to incur a debt creates an "obligation" by the debtor; it does not "transfer" any interest in or right to the debtor's property); *see also U.S. Bank N.A. v. Verizon Communications, Inc.*, 2012 WL 310078, *5-6 (N.D. Tex. July 31, 2012)(recognizing that when a debtor issues a note or makes a guarantee, it incurs an obligation; it does not transfer any property). Both of these cases specifically considered the term "transfer" in § 101(54), and concluded that an agreement to incur a debt is not among the actions that constitute a transfer of property. *Asia Global Crossing*, 333 B.R. at 204; *Verizon Communications, Inc.*, 2012 WL at *5-6.

Consequently, *Tippett* does not support the Claimant's defense that there was no stay violation. The Claimant's act of entering into the Joint Liability Agreement with the Debtor falls squarely within § 362(a)(3). The Claimant was required to seek relief from stay in order for the transaction to be valid. It does not matter that the Debtor's agreement was voluntary. It is axiomatic that the automatic stay protects both creditors and debtors, and a debtor cannot unilaterally waive the benefit of the automatic stay. *In re Guthrie*, 86 F.3d 1162, *1 (9th Cir. 1996); *Takara v. Ass'n of Apt. Owners of Harbor Pointe*, 2014 WL 2761214, *2 (Bankr. D. Haw. 2014)(explaining that the stay continues until specified events in § 362 occur and there is no waiver contingency in the statute).

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Even if the Court determined that there was a voluntary transfer of property, as occurred in *Tippett*, the Claim must be disallowed for other reasons. The transfer would be avoidable under § 549 because it happened during the GAP period and was unauthorized. *See In re Mastro*, 2011 WL 3300370, *3 (9th Cir. BAP 2011)(listing the elements as: (1) a transfer; (2) of estate property; (3) that occurred after the petition date; and (4) was not authorized by statute or the court). The Claimant would not be protected by § 549(b) because Claimant's attorney (who represented the Debtor), states that the Joint Liability Agreement was made in furtherance of the Consolidated Debtors' bankruptcy planning, so it was not a transfer in the ordinary course of business. [ECF No. 780-82] Further, the evidence shows that the new value was given *to the Johnsons* who received a six month stay of enforcement of their judgment, and not to the Debtor. [ECF No. 803].

Section 502(d) provides that a claim that arises from a transfer that is avoidable must be disallowed, unless the benefits of the transfer are surrendered. *Asia Global Crossing*, 333 B.R. at 202. There is no requirement that an independent avoidance action be brought; nor does it matter that the avoidance action would be time barred. *In re America West Airlines, Inc.*, 217 F.3d 1161, 1166-68 (9th Cir. 2000)(citing *In re KF Dairies, Inc.*, 143 B.R. 734, 737 (9th Cir. BAP 1992). Here, surrender of the transfer – the Joint Liability Agreement -- would render the Johnsons' debt unenforceable against the Debtor so the Claim must be disallowed.

IV.
CONCLUSION

The Trustee's objection to the Claim is sustained on the ground that the Joint Liability Agreement violated the automatic stay in § 362(b)(6) rendering it void. The *Tippett* case does not apply because there was not a voluntary transfer

of property by the Debtor. It does not matter that the Debtor voluntarily agreed to be liable for the debt because the automatic stay cannot be unilaterally waived. Even if there was a voluntary transfer of property, as occurred in *Tippett*, the transfer would be an avoidable preference and the Claim must be disallowed under § 502(d) unless the transfer is surrendered at which point the debt would be unenforceable against the Debtor and the Claim must be disallowed.

The Trustee is directed to prepare and lodge an order in accordance with this Memorandum Decision within ten days of its entry.

Dated: 20 Oct 2015

LOUISE DE CARL ADLER, JUDGE

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[Revised July 1985]

UNITED STATES BANKRUPTCY COURT
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Case No. 12-16684-LA11

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CERTIFICATE OF SERVICE

The undersigned, a regularly appointed and qualified clerk in the Office of the United States Bankruptcy Court for the Southern District of California, at San Diego, hereby certifies that a true copy of the attached document, to-wit:

MEMORANDUM DECISION

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