

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In Re: : Chapter 11  
: :  
BEN FRANKLIN HOTEL :  
ASSOCIATES : Civil Action No. 97-7449  
a Pennsylvania limited partnership :  
Debtor : Bankruptcy No. 93-17088 SR

O'Neill, J.

March , 1998

MEMORANDUM

Ben Franklin Hotel Associates (“debtor”) appeals the bankruptcy court’s Order of October 31, 1997 granting in part and denying in part debtor’s motion to enforce the discharge injunction and to find in contempt and impose sanctions against appellees Alfred Gilbert and B.F. General Associates (“BFG”). As set forth below, the bankruptcy court’s Order will be affirmed.

I.

Debtor is a limited partnership created to own and redevelop a property in downtown Philadelphia formerly known as the Ben Franklin Hotel.<sup>1</sup> As of 1991, Gilbert was a limited partner in BFG and BFG was a general partner in debtor. In July of that year, debtor issued a “cash call” to its partners and, when BFG failed to respond, foreclosed on BFG’s ownership interest pursuant to debtor’s partnership agreement. Gilbert subsequently instituted an action in

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<sup>1</sup> The following background material is derived from the bankruptcy court’s opinion, which more fully sets forth the facts of this case.

state court against BFG, debtor, and their interest holders alleging that the cash call and foreclosure were shams intended only to divest BFG of its interest in debtor. Asserting that defendants thereby breached the partnership agreement and their fiduciary duties, Gilbert sought, among other things, money damages and reinstatement of BFG's partnership interest in debtor.

In December, 1993, debtor petitioned for Chapter 11 bankruptcy. Gilbert filed a timely proof of claim (Claim No. 6) for "\$2,000,000+" incorporating the claims in his still-pending state action. BFG filed no proof of claim. The bankruptcy court subsequently abstained from determining the merits of Claim No. 6 in favor of allowing the state action to proceed, which decision was affirmed by this Court. Gilbert v. Ben Franklin Hotel Associates, 1995 WL 598997 (E.D. Pa. 1995). Subsequently, Gilbert settled with BFG and its other partners and obtained controlling interest in BFG. He then sought and obtained leave of the state court to amend his complaint against debtor and its partners to change BFG from defendant to co-plaintiff, to add a third theory of recovery (conversion) and a demand for punitive damages, and to increase claimed compensatory damages to in excess of \$5,000,000. These amendments prompted the instant controversy.

Debtor moved the bankruptcy court to enjoin BFG from asserting any claims against it in the state court action; to enjoin Gilbert from maintaining any claims in the state action other than those incorporated in the original Proof of Claim No. 6; and to find BFG and Gilbert in contempt of the discharge injunction. The bankruptcy court granted the motion as to BFG's claims for money damages on grounds that BFG had filed no proof of claim and its monetary claims were therefore barred by the discharge injunction, and this decision is not challenged on appeal. The remainder of debtor's motion was denied.

At issue in this appeal are the bankruptcy court's determinations that (1) BFG's equitable claim for reinstatement of its claimed ownership interest in debtor is not subject to bankruptcy discharge nor barred by the debtor's confirmed bankruptcy plan; (2) Gilbert's additional theories of recovery and increased damages claims do not constitute new claims barred by the discharge injunction; (3) BFG's assertion of money damages claims in the state court proceeding, while in violation of the discharge injunction, was not contemptuous and would not be sanctioned; and (4) whether BFG's action against debtor is barred by a previous settlement or judicially estopped would be left to the state court's determination.

## II.

The district court sits as an appellate court in bankruptcy cases. In re Cohn, 54 F.3d 1108, 1113 (3d Cir. 1995); Fed. R. Bankr. P. 8013. The bankruptcy court's findings of fact will not be disturbed unless clearly erroneous. Fed. R. Bankr. P. 8013. Questions of law, however, are reviewed de novo; the district court must draw its own legal conclusions without deference to the bankruptcy court's determinations. In re Allentown Moving & Storage, Inc., 214 B.R. 761, 763 (E.D. Pa. 1997).

### A. BFG's Partnership Claim

Debtor asserts that BFG should be enjoined from asserting any claim to a partnership interest in debtor because BFG failed to raise such claims during bankruptcy proceedings and debtor's confirmed bankruptcy plan ("Plan") preserved no such claims. Accordingly, defendant

argues, BFG's claim is barred by 11 U.S.C. § 1141<sup>2</sup> and the discharge injunction, see 11 U.S.C. § 524(a).

As was the bankruptcy court, however, I am persuaded that BFG's claim for partnership interest in debtor is not a "claim" or "debt"<sup>3</sup> within the meaning of the bankruptcy code and therefore is not barred by § 1141 or the discharge injunction:

[A]n ownership interest in a debtor partnership differs fundamentally from other

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<sup>2</sup> Section 1141 provides in relevant part:

(a) Except as provided in subsections (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor . . . and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

(b) Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor.

(c) Except as provided in subsections (d)(2) and (d)(3) of this section and except as otherwise provided in the plan or in the order confirming the plan, after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor. . . .

(d) (1) Except as otherwise provided in this subsection, in the plan, or in the order confirming the plan, the confirmation of a plan -- . . . .

(B) terminates all rights and interests of equity security holders and general partners provided for by the plan.

Subsections (d)(2) and (d)(3) are not relevant to this case.

<sup>3</sup> A "debt" is "liability on a claim." 11 U.S.C. § 101(12). A "claim" is defined by §101(5) as

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

rights that might be asserted against the partnership[.] “An ownership interest is not a debt of the partnership. Partners own the partnership subject to the profits or losses. Creditors, however, hold claims regardless of the performance of the partnership business. Thus, an ownership interest is not a claim against the partnership.”

In re Riverside-Linden Investment Co., 925 F.2d 320, 323 (9th Cir. 1991) (per curiam), quoting In re Riverside-Linden Investment Co., 99 B.R. 439 (9th Cir. BAP 1989) (legislative history and harmony among various bankruptcy code provisions require holding that asserted partnership interest is not a claim within meaning of the Code). Cf. In re Hedged-Investments Associates, Inc., 84 F.3d 1267, 1272 (10th Cir. 1996) (limited partners’ equity interests in debtor are not claims within meaning of 11 U.S.C. § 101(5)).<sup>4</sup>

Nor is BFG’s claim barred by debtor’s confirmation Plan. See § 1141(d)(1)(B). Aside from provision for Gilbert’s Proof of Claim No. 6, the Plan does not purport to resolve or even affect partnership issues, but rather maintains the pre-petition status quo in general language providing that partnership interests in debtor would remain unchanged and debtor’s partnership

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<sup>4</sup> If, as debtor argues, a partner’s ownership interest in a debtor were a “claim or interest” discharged upon plan confirmation “except as otherwise provided in the plan” pursuant to § 1141(a) and (c), then subsection (d)(1), which provides for termination of “all rights and interests” of equity security holders and general partners “provided for by the plan,” would appear to be superfluous if not in outright conflict with (a) and (c). The better interpretation is that (a) and (c) govern right to payment claims which, whether held by “insiders” or others, make their holders creditors and are discharged upon confirmation unless and except as treated in the plan, while (d)(1) provides authority for reorganization plans to affirmatively deal with partners’ and equity holders’ other rights and interests, such as ownership or management interests, which would otherwise be unaffected by discharge. Cf. In re St. Charles Preservation Investors, Ltd., 112 B.R. 469, 474 (D.D.C. 1990) (noting that the bankruptcy code “implicitly recognizes” that partners may have both creditor interests and equity interests and holding that limited partners in debtor were “creditors” with dischargeable claims insofar as they held rights to guaranteed annual payments from the partnership in addition to and separate from equity interests). In other words, absent express provision in a plan for partners’ ownership interests pursuant to (d)(1)(B), section 1141 simply does not speak to disputes going to the ownership of the debtor rather than to allocation of the debtor’s property among creditors. Hence, authority cited by debtor to the effect that creditors are “stuck” with the treatment or lack thereof of their claims in approved confirmation plans is inapposite to this case.

agreement remain in effect so far as not inconsistent with the Plan. (See Bankr. Op. at 16.) There is no inconsistency with the Plan's treatment of creditors' claims or reorganization of debt. Contrary to debtor's unsupported assertion that appellees, should they prevail in their partnership claims, might "unravel such implementation [of the Plan] that has occurred as unauthorized because they were not on board" (Appellant's B. at 13), § 1141(a) would plainly bind appellees to the Plan's treatment of creditors' claims. Should BFG prevail, its claim would not affect the debtor qua debtor, but only the relative interests of its various partners. Allowing BFG to maintain its action therefore threatens neither the "fresh start" policy central to the Bankruptcy Code nor the finality of the plan confirmation process. Cf. In re Cohn, 54 F.3d 1108, 1113 (3d Cir. 199 ("overriding purpose" of the code is "to relieve debtors from the weight of oppressive indebtedness and provide them with a fresh start"); In re McNeil, 128 B.R. 603, 614 (Bankr. E.D. Pa. 1991) ("a debtor's 'fresh start' [is] the litmus against which any argument impacting discharge must be compared") (quotes and citation omitted).

I conclude, then, that BFG's claim for partnership interest in debtor is not barred by § 1141, the confirmation Plan, or the discharge injunction. Debtor should therefore address to the state court its contentions that BFG's claims are precluded by a previous settlement or are judicially estopped due to the inconsistent positions BFG has taken in the state court proceedings.

**B. Gilbert's Amended State Court Claims**

Debtor next asserts that Gilbert's amended complaint asserts new claims, including increased money damages and an additional theory of recovery, that go beyond Proof of Claim No. 6 and are therefore barred by the discharge injunction. The bankruptcy court's decision to

allow the amendments is reviewed for abuse of discretion. In re Hemingway Transport, Inc., 954 F.2d 1, 10 (1st Cir. 1992).

“Amendments to timely proofs of claim are liberally allowed” and may relate back to the initial filing if filed after the bar date, but will not be permitted if they actually constitute new claims. In re Metro Transportation Co., 117 B.R. 143, 147 (Bankr. E.D. Pa. 1990). If the initial proof did not “give fair notice of the conduct, transaction or occurrence that forms the basis of the claim asserted in the amendment” then the amendment asserts new claims and will not be allowed. Id. (quoting In re Westgate-California Corp., 621 F.2d 983, 984 (9th Cir. 1980); see also Fed. Bankr. R. 7015.<sup>5</sup> On the other hand, amendments that merely cure defects in the previously-filed claim, describe the claim in more detail, plead new theories of recovery on the same facts presented in the initial claim, or increase damages do not constitute new claims. In re Hemingway Transport, Inc., 954 F.2d 1, 10 (1st Cir. 1992); In re International Horizons, Inc., 751 F.2d 1213, 1216 (11th Cir.1985); In re Northeast Office and Commercial Properties, Inc., 178 B.R. 915, 923 (Bankr. D. Mass. 1995).

The additional claims for damages and new theory of recovery asserted in Gilbert’s

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<sup>5</sup> Fed. Bankr. R. 7015 provides “Rule 15 F.R.Civ. P. applies in adversary proceedings.” Rule 15 provides in relevant part:

(a) Amendments. [Any time after responsive pleading is served or more than 20 days after service of pleading] a party may amend the party’s pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires . . . .

(c) Relation Back of Amendments. An amendment of a pleading relates back to the date of the original pleading when

. . . .

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading. . . .

Amended Complaint are based on exactly the same transactions alleged in the original complaint. Accordingly, they are not barred by the discharge injunction and may be litigated in state court as previously authorized by the bankruptcy court with regard to Gilbert's original complaint and Proof of Claim No. 6.<sup>6</sup> Accord, e.g., In re Hemingway Transport, Inc., 954 F.2d 1, 10 (1st Cir. 1992); In re Northeast Office and Commercial Properties, Inc., 178 B.R. 915, 923 (Bankr. D. Mass. 1995).

### C. Sanctions

Finally, debtor contends that the bankruptcy court erred in refusing to hold appellees and their counsel in contempt and subject to sanctions despite its determination that BFG's assertion of money damages claims violated the discharge injunction. The bankruptcy court's decision not to find contempt and impose sanctions is reviewed for abuse of discretion. Fellheimer, Eichen & Braverman, P.C. v. Charter Technologies, Inc., 57 F.3d 1215, 1223 (3d Cir. 1995).

The bankruptcy court determined that appellees' violation of the discharge injunction was not contemptuous because they had at least a colorable argument that BFG's claims for money damages had been preserved by Gilbert's proof of claim and because Gilbert had previously been directed to address to the state court issues concerning his partnership claims against debtor. I cannot find that this decision was an abuse of discretion.

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<sup>6</sup> The allowability of any money judgement eventually rendered for Gilbert is a separate issue over which the bankruptcy court has retained authority but thus far expressly refrained from deciding (Bankr. Op., at 13), and therefore is not ripe for review.