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FOURTH DIVISION
April 7, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

NABIL SALEH, M.D., as Trustee of NABIL SALEH, M.D., LTD. PENSION PLAN,)	Appeal from the
)	Circuit Court of
)	Cook County.
Plaintiff-Appellee,)	
)	
v.)	
)	
HASAN MERCHANT, SHERI BANO)	
MERCHANT, MUSKEGON HOTELS, LLC,)	
M.D.1, M.D. GLOBAL, DINESH GANDHI,)	
RAHUL DEEPANKER, M.D., ANICIA)	No. 10 CH 04110
DEL FIERRO, REBECCA DEL ROSARIO,)	
HENRY DEL ROSARIO, GLOBAL)	
DEVELOPMENT, INC., WOMEN’S DOC OF)	
MELROSE PARK, WOMEN’S DOC OF ELGIN,)	
WOMEN’S DOC OF HOFFMAN ESTATES,)	
YOUR DOC, WOMEN’S DOC X and)	
STEVEN HOLOWICKI,)	
)	
Defendants-Appellants,)	
)	
NATIONAL REPUBLIC BANK,)	The Honorable
)	James R. Epstein
Defendant.)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Gallagher and Justice Pucinski concurred in the judgment.

ORDER

Held: The trial court properly denied defendants' motion to stay proceedings against defendants who were not debtors in bankruptcy where they did not meet their burden of demonstrating that the stay set forth in section 362(a) of the Bankruptcy Code (11 U.S.C. §362(a)) automatically applied to proceedings against them.

This interlocutory appeal arises from the trial court's denial of a motion to stay proceedings pursuant to section 362(a) of the Bankruptcy Code (11 U.S.C. §362(a)) based on a petition for bankruptcy filed by 1 of 18 defendants. Appellants contend that although the trial court stayed proceedings as to the defendant who was the debtor in bankruptcy, the court erred by refusing to stay proceedings against his nondebtor codefendants. We affirm.

On January 29, 2010, plaintiff Nabil Saleh, M.D., as trustee of Nabil Saleh, M.D., Ltd. Pension Plan, filed a 17-count complaint, alleging among other things, breach of fiduciary duty, fraud, negligence and conversion. The complaint generally alleged that defendant Hasan Merchant approached plaintiff with a proposal to incorporate an entity called Muskegon Hotels, LLC (Muskegon) to purchase and rehabilitate two motel properties. In furtherance thereof, defendant Hasan and defendant Dr. Rahul Deepanker, operating through their investment vehicles defendant M.D.1 and defendant M.D. Global, were required to contribute \$500,000. Plaintiff was required to contribute \$320,000 and defendant Del Fierro was required to contribute \$150,000. Muskegon's operating agreement, which was attached to the complaint, listed plaintiff and defendants M.D. Global, M.D. 1, Rebecca Del Rosario and Henry Del Rosario as members of Muskegon. The agreement however, was signed only by plaintiff and defendant Hasan on behalf of M.D.1 and M.D. Global. The agreement provided that "Hasan will be

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indemnified for acts taken on behalf of the LLC, but shall be held personally liable to the members for any acts of fraud, breach of fiduciary duty, mismanagement, or negligence in the day-to-day business decisions.”

The complaint alleged that defendants M.D.1 and M.D. Global failed to make their required contribution to Muskegon. The complaint also alleged that defendant Hasan, as Muskegon’s operating manager, deviated from its investment plan and ultimately transferred its funds to several entities which were unrelated to Muskegon’s operations but which were partially owned or controlled by defendant Hasan. The complaint further alleged that defendant Hasan altered Muskegon’s financial records and attempted to conceal his conduct. With the exception of defendant National Republic Bank, the complaint generally alleged that the other defendants were in some manner directly connected to defendant Hasan or entities which he partially owned or controlled.

On March 17, 2010, defendant Hasan filed a motion to transfer plaintiff’s case to the bankruptcy calendar because defendant Hasan was in bankruptcy proceedings (*In re Polo Builders, Inc.*, 04 B 23758). Following a hearing regarding defendant Hasan’s motion, Judge Epstein entered a written order on March 25, 2010, providing that plaintiff’s case was stayed as to defendant Hasan. On May 18, 2010, all defendants other than National Republic Bank, Anicia Del Fierro and Women’s Doc X (movants), filed a motion to stay plaintiff’s case against all nondebtor defendants based on defendant Hasan’s bankruptcy proceedings. The motion concluded that “the facts of the complaint inextricably intertwine the actions and conduct of the debtor Hasan Merchant” and the movants. The motion did not however, identify any specific

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facts supporting that conclusion as to any of the 17 nondebtor codefendants. Apparently referring to the automatic stay provided in section 362(a) of the Bankruptcy Code (11 U.S.C. §362(a)), movants argued that “[t]he automatic stay continues and remains in effect during the pendency of a case and is not terminated until the case is closed, the case is dismissed or until the discharge is granted or denied.” The movants provided no further explanation regarding why such a stay automatically applied to them as nondebtors and did not rely on any other federal or State statutory authority for their request for a stay. Notably, in the motion’s prayer for relief, movants asked the court to stay proceedings against all defendants, rather than to enforce any preexisting stay.

In plaintiff’s written response, he argued, in pertinent part, that movants should have sought relief in the bankruptcy proceeding, rather than the State court, that the automatic stay set forth in section 362(a) of the Bankruptcy Code does not protect nondebtors, and that a stay will be extended under the bankruptcy court’s equity jurisdiction to nondebtors in “[o]nly in the most unusual of circumstances.” Plaintiff argued that movants’ conclusory argument was insufficient to warrant a stay. In reply, movants argued that the bankruptcy court was not the only court which could grant injunctive relief and that such relief “can be based both on the Bankruptcy Code and the equitable powers granted to the courts.” Movants did not explain why the trial court should exercise its equitable powers based on the facts of this case. In addition, movants cited legal authority for circumstances where a stay may apply to nondebtors but again, provided no explanation of how the law cited applied to the specific facts of plaintiff’s case.

At a hearing on July 9, 2010, movants’ attorney argued that the complaint showed

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defendant Hasan's actions were "inextricably intertwined with the allegations of the complaint itself" and essentially argued that pursuing this action would affect all of the parties' rights. The court then asked, "Why is it so inextricably bound that you can't adjudicate the claims against the others without affecting the rights of Mr. Merchant?" In response, movants' attorney essentially argued that defendant Hasan was one of the main parties in the factual scenario alleged in the complaint and that all depositions, discovery or determinations of liability involving the other parties "would impact directly Hasan Merchant because they are all together in a group." Movants' attorney argued that defendant Hasan was standing in place of some of the other movants and the complaint alleged he made statements that would give rise to liability for the other movants. Despite also being defendant Hasan's attorney, counsel further argued that if the case against the other movants was tried without defendant Hasan, they would be prevented from filing a claim against defendant Hasan, seeking contribution from him or proceeding with his deposition. "[T]he fifteen parties, would like to do [*sic*] to protect their rights, they will be unable to because Hasan Merchant is a debtor in bankruptcy and the case cannot proceed against him."

Plaintiff's attorney argued that the question was whether there is an identity between the debtor and the third-party defendants such that a judgment against them would, in effect, be a judgment against the debtor. Plaintiff's attorney also stated, "Typically what we see in almost 99 percent of the cases that involve this sort of extension would be an indemnity of some sort, saying that if we're found liable, then he must indemnify us." Plaintiff's attorney argued however, that those circumstances were not present. In addition, counsel argued that the court

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could only guess how the 2004 bankruptcy proceeding would be impacted by plaintiff pursuing his cause against the other movants and further argued that the bankruptcy judge who had presided over the case for approximately six years was better situated to determine whether the stay should extend to the other movants. In reply, movants' attorney argued that the complaint alleged that as part of the Muskegon agreement, defendant Hasan "will be indemnified for acts taken on behalf of the LLC and would be held personally liable to the members for any acts of fraud, breach of fiduciary duty, mismanagement or negligence in the day-to-day business decisions." Movants' attorney argued that "all the other defendants will be sitting in the place of Hasan Merchant if he is not allowed - - if the case is allowed to proceed against all defendants."

On August 5, 2010, Judge Epstein entered a written order denying the motion to stay proceedings. After observing that the automatic stay of section 362(a)(1) applied only to the debtor in bankruptcy, Judge Epstein stated it was unclear from the motion whether the nondebtor defendants were requesting Judge Epstein to extend to them his own order staying proceedings against defendant Hasan or, to extend the bankruptcy court's automatic stay. The court found it lacked jurisdiction to grant the latter request and that the movants had otherwise failed to justify their need for an extension through clear and convincing circumstances outweighing the potential harm to the plaintiff. Finally, Judge Epstein found movants' argument that the facts of the complaint were inextricably intertwined with defendant Hasan's conduct was "manifestly insufficient." Movants filed a timely interlocutory appeal. We note that although, National Republic Bank, Del Fierro and Women's Doc X were not listed as parties on the motion to stay, movants' attorney has included them as appellants on the notice of interlocutory appeal. We

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further observe it appears that National Republic Bank is not an appellant and is represented by separate counsel.

On appeal, movants contend that the trial court erred by refusing to stay proceedings against defendant Hasan's 17 nondebtor codefendants pursuant to section 362(a). As a threshold matter, we note that movants rely primarily on federal cases. Federal decisions are not binding on this court but we may follow federal decisions if we find them to be persuasive. *Maniez v. Citibank, F.S.B.*, 404 Ill. App. 3d 941, 955 (2010). In addition, federal cases are particularly persuasive when examining a federal statute in order to maintain a uniform body of law. See *Fosler v. Midwest Care Center II, Inc.*, 398 Ill. App. 3d 563, 569 (2009). Although movants rely primarily on cases outside of the Seventh Circuit, we find it more appropriate to consider case law within our own circuit.

This court has previously reviewed the trial court's denial of a motion to stay pursuant to section 362(a) in an interlocutory appeal for an abuse of discretion. *Zurich Insurance Company v. Raymark Industries, Inc.*, 213 Ill. App. 3d 591, 594 (1991). Pursuant to section 362(a) of the Bankruptcy Code, the filing of a bankruptcy petition operates, in pertinent part, as a stay as to the following:

“(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

* * *

(3) 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.” 11 U.S.C. §362(a) (1998).

The stay provided in section 362(a) takes effect immediately upon the debtor’s filing of his petition in bankruptcy, regardless of whether the other parties to a stayed proceeding are even aware that a petition has been filed. *In re Application of County Treasurer and Ex Officio County Collector of Cook County*, 308 Ill. App. 3d 33, 40 (1999). Section 362 is intended to protect a debtor from a scramble for his assets, to prevent one creditor from pursuing a remedy to the harm of other creditors and to give the debtor a reasonable respite from litigation, during which he may formulate a plan of reorganization. *555 M Manufacturing, Inc., v. Calvin Klein, Inc.*, 13 F.Supp.2d 719, 722 (N.D. Ill. 1998). In addition, section 362(a) generally does not prohibit actions against nondebtor entities, even where a close nexus exists between such entities and the debtor. *In re Gary Winer*, 158 B.R. 736, 743 (Bankr. N.D. Ill. 1993) (citing *Pitts v. Unarco Industries, Inc.*, 698 F.2d 313, 314 (7th Cir. 1983)). This is equally true where the nondebtor is a corporation which is wholly owned by the debtor (*In re Gary Winer*, 158 B.R. at 743 (citing *Pitts*, 698 F. 2d at 314)), or where the debtor was an officer, director, partner or agent of the nondebtor (*In re Koop*, No. 00B24471, 2002 WL 1046700, slip op. at 6, (Bkrtcy. N.D. Ill. May 23, 2002) (unpublished)).

Although most subsections of section 362(a) are concerned with efforts to obtain money from the estate or reduce its ability to collect money from others, section 362(a)(3) reaches

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further, encompassing any effort to exercise control over the estate's property." *National Tax Credit Partners, L.P. v. Havlik*, 20 F.3d 705, 708 (7th Cir. 1994). Accordingly, subsection (a)(3) stays even acts against third parties where such acts may affect the estate's property. *In re Application of County Treasurer and Ex Officio County Collector of Cook County*, 308 Ill. App. 3d at 43; *Chrysler Rail Transportation Corp.*, No. 93C5140, 1996 WL 238788, slip op. at 2 (N.D.Ill. May 7, 1996) (unpublished). Nonetheless, it is generally the debtor's burden to demonstrate that the section 362(a) automatic stay should prohibit litigation against a nondebtor in a state court action. See *In re Lennington*, 286 B.R. 672, 675 (Bankr. C.D. Ill. 2001); *In re Koop*, No. 00B24471, 2002 WL 1046700, slip op. at 4.

Movants first contend the trial court incorrectly found that it lacked jurisdiction to grant their request to modify a section 362(a) stay. See *In re Mid-City Parking, Inc.*, 332 B.R. 798, 804 (Bankr. N.D. Ill. 2005) (if a state court's order effectually modifies the automatic stay, the state court has interfered with the bankruptcy court's power to protect its exclusive jurisdiction). Specifically, movants assert that they were asking the court to merely enforce the section 362(a) stay which already existed and applied to them, rather than to modify that stay. *In re Benalcazar*, 283 B.R. 514, 528 (Bankr. N.D. Ill. 2002) (a state court has jurisdiction to decide whether the automatic stay applies). Movants do not dispute that the court's finding that it lacked jurisdiction would have been correct if they were seeking modification of the stay.

Contrary to movants' suggestion, the pleading in question did not clearly request the trial court to enforce an already existing stay. Although the pleading included some law referring to the "automatic stay," the pleading never explained that the stay automatically applied to the

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nondebtor codefendants under the procedural facts of this case. In addition, the pleading was titled “Motion to Stay,” rather than “Motion to Enforce Stay.” Similarly, the motion’s prayer for relief requested that the court “stay all proceedings against all defendants,” rather than asking the court to enforce a preexisting stay. The very nature of movants’ argument on appeal shows that the distinction is more than mere semantics. We share the trial court’s lack of comprehension that movants sought the enforcement, rather than modification, of a stay, because the motion was somewhat obtuse.

Next, movants assert that the trial court erred by not enforcing the automatic stay as to the nondebtors under subsection 362(a)(3), and instead only examined subsection 362(a)(1). We find that movants have forfeited this argument. Section 362(a) includes eight different subsections providing eight different actions to which a stay applies. See 11 U.S.C. §362(a) (1998). Despite this, neither the motion to stay, the movants’ reply brief nor their oral arguments specifically cited section 362(a), let alone identified which of the eight subsections applied under these circumstances. In his order denying the motion, Judge Epstein reasonably represented that the motion did not clearly specify the legal action which movants were asking the court to take. Under these circumstances, movants have forfeited the right to challenge the court’s failure to consider subsection 362(a)(3), a subsection which movants did not specifically ask the court to consider. See *In re Professional Sales Corp.*, 56 B.R. 753, 763 n. 6 (Bankr. N.D. Ill. 1985) (party forfeited right to argue that section 362(a)(3) applied); see also *Shales v. Lanas Construction, Inc.*, No. 07C2970, 2010 WL 5366617, slip op. at 1 (N.D.Ill. December 16, 2010). Forfeiture aside, we find no error, as movants failed to meet their burden in the trial court.

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In the motion to stay, movants merely concluded that “the facts of the complaint inextricably intertwine the actions and conduct of the debtor Hasan Merchant” and the nondebtor defendants but provided no further argument regarding how plaintiff’s specific action against these specific codefendants would affect the property of the bankruptcy estate. Notwithstanding plaintiff’s response, which stated that the automatic stay of section 362(a) generally does not apply to nondebtors, movants’ reply still failed to provide the court with a factual explanation justifying a stay against each of the nondebtor defendants. At the hearing, movants concluded that the actions of defendant Hasan were “inextricably intertwined with the allegations of the complaint itself,” that pursuing this action would affect all of the parties’ rights, that defendant Hasan was one of the main parties in the factual scenario alleged in the complaint and that determinations of liability involving the other parties would impact the debtor “because they are all together in a group.” Movants continuously failed to support these conclusions with facts or to explain why a determination of liability against the nonmovants would impact the bankruptcy estate. In contrast, at one point, movants’ attorney argued that if nondebtor codefendants’ rights were adjudicated without Hasan, the nondebtor movants, rather than the debtor or the bankruptcy estate, would be harmed because they would be unable to file a counterclaim against him or seek contribution. As stated, section 362(a) is intended to protect the debtor, not nondebtors. Movants failed to meet their burden of demonstrating to the trial court that plaintiff’s action against the nondebtor codefendants would jeopardize the bankruptcy estate. Movants’ conclusory allegations were wholly insufficient.

Movants also argue that plaintiff correctly stated at the hearing that stays were generally

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extended to nondebtors where there was a requirement of indemnification by the debtor but incorrectly represented that no indemnification requirement was involved here. See *Hamilton v. American Corrective Counseling Services, Inc.*, No. 3:05-CV-434-RM, 2009 WL 973447, slip op. at 2 (N.D. Ind. April 8, 2009) (unpublished) (proceedings may be enjoined against nondebtor codefendants pursuant to section 362 where the debtor has an obligation to indemnify the nondebtor). Muskegon's operating agreement stated that "Hasan will be indemnified for acts taken on behalf of the LLC, but shall be held personally liable to the members for any acts of fraud, breach of fiduciary duty, mismanagement, or negligence in the day-to-day business decisions." Any potential error by plaintiff's attorney was remedied when movants' attorney made the trial court aware of this clause, including the provision stating that Hasan had potential liability to members of Muskegon for certain enumerated acts. Nonetheless, we reiterate that movants did not explain to the trial court how proceeding with this action against each of Hasan's 17 individual nondebtor codefendants, including the codefendants who were not party to the operating agreement, would constitute an attempt to exercise control over the bankruptcy estate or otherwise jeopardize the estate under these circumstances.

Movants further argue that the complaint alleged, among other things, that defendant Hasan is the operations manager of Muskegon, that he approached Saleh with a business proposal, that he drafted the operating agreement, that he organized Muskegon, signed the agreement for two parties and was responsible for the financial statements. They argue that despite these allegations, "the Circuit Court failed to perceive that virtually any act attempting to obtain property from the bankruptcy estate could conceivably have an impact on the bankruptcy

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estate.” Not only did movants forfeit those arguments by failing to raise them in their written motion or oral arguments, but movants once again fail to specifically explain the impact of the aforementioned allegations on the bankruptcy estate.

Finally, to the extent movants alternatively state that injunctive relief may be granted based on the equitable powers of the courts, movants have failed to develop any argument as required by Supreme Court Rule 341(h)(7) (eff. Sept. 1, 2006). A claim that is merely listed but not argued does not satisfy Rule 341 and is forfeited. *Vancura v. Katris*, 238 Ill. 2d 352, 373 (2010). Accordingly, we will not consider this claim.

For the foregoing reasons, we affirm the judgment.

Affirmed.