NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE POMODORO RESTAURANT, Debtor.	BAP No. UT-98-045
HILLSIDE PLAZA LTD., Appellant, v. POMODORO RESTAURANT, Appellee.	Bankr. No. 98-23504 Chapter 11 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the District of Utah

Before PEARSON, ROBINSON, and CORNISH, Bankruptcy Judges.

ROBINSON, Bankruptcy Judge.

After examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. See Fed. R. Bankr. P. 8012; 10th Cir. BAP L.R. 8012-1(a). The case is therefore ordered submitted without oral argument.

I. Appellate Jurisdiction.

This Court, with the consent of the parties, has jurisdiction to hear timely-filed appeals from "final judgments, orders, and decrees" of bankruptcy courts

* This order and judgment has no precedential value and may not be cited, except for the purposes of establishing the doctrines of law of the case, res judicata, or collateral estoppel. 10th Cir. BAP L.R. 8010-2.

within the Tenth Circuit. 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1). Under this standard, we have jurisdiction over this appeal. The parties have consented to this Court's jurisdiction in that they have not opted to have the appeal heard by the United States District Court for the District of Utah. *Id.* at § 158(c); 10th Cir. BAP L.R. 8001-1(a) and (d). The appeal was filed timely by the Debtor, and the bankruptcy court's Order is "final" within the meaning of § 158(a)(1). *See* Fed. R. Bankr. P. 8001-8002; *Franklin Sav. Ass'n v. Office of Thrift Supervision*, 31 F.3d 1020, 1022 n. 3 (10th Cir. 1994) (with regard to stay orders, an order for relief from a stay order is final and, thus appealable).

II. Background.

This case involves a dispute between a landlord and tenant over the lease of commercial premises. The debtor, Pomodoro Restaurant ("Pomodoro"), is a Utah General Partnership. Pomodoro leased the premises for a restaurant ("the Lease") from Hillside Plaza ("Hillside").[1] The Lease was for a term of five years, with an expiration date of December 31, 1997. The Lease contained a renewal option for an additional five year term, which Pomodoro could exercise by delivering written notice to Hillside at least 120 days prior to the original expiration date.

On September 3, 1997, Hillside wrote to Pomodoro outlining a list of concerns about the Lease and noting that the Renewal Option had expired, and inviting Pomodoro to negotiate a new lease. Pomodoro gave written notice of its exercise of the renewal option five days later. In November 1997, Pomodoro filed an action in state court seeking a declaratory judgment that it was entitled to continue with the Lease under the renewal option. On January 23, 1998, the state court granted summary judgment to Hillside, concluding that Pomodoro failed to

[1] The premises were originally leased by Hillside to a third party, which assigned the Lease to Pomodoro in July 1994.

timely exercise the renewal option such that the Lease expired on December 31, 1997. On March 30, 1998, Pomodoro appealed the state court judgment, but did not move for a stay of the judgment or post a supersedeas bond. On the same date, March 30, 1998, Pomodoro filed its Chapter 11 petition.

Sometime after the state court judgment, Hillside also filed an unlawful detainer action to evict Pomodoro. A hearing was set for March 31, 1998, but was not held because Pomodoro filed bankruptcy on March 30. To date, Pomodoro still occupies the premises. Hillside filed a Motion for Relief from the Automatic Stay, requesting relief to allow it to complete its state court unlawful detainer action against Pomodoro. Pomodoro filed a motion to extend time to assume or reject the Lease pursuant to 11 U.S.C. § 365(d)(1).[2]

After an evidentiary hearing, the bankruptcy court denied Hillside's motion for relief from stay, contingent upon Pomodoro providing Hillside adequate protection as follows:

a. Pomodoro shall pay the fair rental value of $5,200 per month;
b. Hillside may draw $2,742.63, the renewal rental rate, from the $5,500;
c. the remaining portion shall be held in an interest bearing account;
d. Pomodoro shall pay Hillside its share of the common area maintenance charge, or $936.02 per month.

The bankruptcy court contemporaneously entered an order extending time to assume or reject the Lease, extending the 60-day period until such time as the appellate court of the state of Utah decides Pomodoro's appeal of the decision that it failed to exercise the renewal option and that the Lease had expired.

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[2] Future references are to Title 11 of the United States Code, unless noted otherwise.

Hillside filed motions for leave to appeal from both orders of the bankruptcy court. The motion for leave to appeal the order regarding relief from stay was denied by this Court as unnecessary. Leave to appeal the order regarding assumption of the Lease was denied as interlocutory.

III. Standard of Review.

The Bankruptcy Appellate Panel may affirm, modify, or reverse a bankruptcy court's judgment, order, or decree, or remand with instructions for further proceedings. Fed. R. Bankr. P. 8013. "For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable de novo), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion')." *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

IV. Discussion.

A. Section 362(b)(10).

Hillside first argues that the bankruptcy court erred in holding that the automatic stay applied, citing § 362(b)(10),[3] which contains an exception to the automatic stay where, under state law, a lease has expired pre-petition by it terms. Hillside contends that because the Lease expired by its terms under Utah law, it is not stayed from obtaining possession of the premises pursuant to § 362(b)(10). As Pomodoro points out, however, this argument was not specifically brought before the bankruptcy court and cannot be raised for the first time on appeal.

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[3] Section 362(b)(10) provides:

> The filing of a petition under . . . this title . . . does not operate as a stay–
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> . . .
>
> (10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term or the lease before the commencement of or during a case under this title to obtain possession of such property . . . .

Hillside argued below that under § 541(b)(2), property of the estate did not include the Lease because it had expired, and that the Lease could not be assumed pursuant to § 365(c)(3). However, Hillside did not mention § 362(b)(10). Rather than arguing that it was excepted from the stay, Hillside requested relief for cause, specifically, that it was not adequately protected and that Pomodoro had improperly avoided filing a supersedeas bond in the state court appeal. The bankruptcy court's decision, both from the bench and in its order, further indicates that application of § 362(b)(10) was not at issue. It is a well established principle of law that an issue not raised before the trial court will not be considered before an appellate court. *See Garrick v. Weaver*, 888 F.2d 687, 695 (10th Cir. 1989). In this case, Hillside originally raised the issue of expiration of the Lease in the context of § 541 and § 365. On appeal, Hillside is raising the issue of expiration of the Lease under a different, albeit related, statute. We will not consider a new theory on appeal that falls under the same general category as an argument presented at trial. *Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 722 (10th Cir. 1993).[4]

B. Relief from stay.

Hillside contends that the bankruptcy court erred when it did not grant relief from the automatic stay for cause, based on 1) Pomodoro's bad faith, and 2) Pomodoro's failure to adequately protect Hillside's interest. The Court will

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[4] We note that the state court judgment holding the lease has expired would not have preclusive effect in the bankruptcy proceedings. Federal courts are to give preclusive effect to state court judgments whenever the courts of the state from which the judgment emerged would do so. *Allen v. McCurry*, 449 U.S. 90, 96 (1980). However, a Utah state court judgment is not final while an appeal is pending or until the time to appeal has expired. *Young v. Hansen*, 218 P.2d 674 (Utah 1950). Since Pomodoro has filed an appeal from the judgment in state court action, that judgment is not final and cannot have preclusive effect in the bankruptcy proceedings. *See Chavez v. Morris*, 566 F. Supp. 359 (D. Utah 1983). *Cf. Phelps v. Hamilton*, 122 F.3d 1309, 1318 (10th Cir. 1997) (noting that Kansas state courts adopt majority view regarding the pendency of appeals, which provides that the fact that an appeal is pending in a case does not generally vitiate the res judicata effect of a judgment).

address the bad faith argument first.

Section 362(d)(1) directs the bankruptcy court to grant relief from the stay "for cause," which includes the inadequate protection of a creditor's interest in the collateral. Because the Code provides no definition of what constitutes "cause," courts must determine whether discretionary relief is appropriate on a case-by-case basis. *See Industrial Ins. Servs., Inc. v. Zick (In re Zick)*, 931 F.2d 1124, 1129 (6th Cir. 1991). It is generally recognized that a debtor's lack of good faith in filing a petition for bankruptcy may be the basis for lifting the automatic stay. *See Carolin Corp. v. Miller*, 886 F.2d 693, 699 (4th Cir. 1989); *In re Arnold*, 806 F.2d 937, 939 (9th Cir. 1986). We review for abuse of discretion the court's order denying relief from stay. *See Laguna Assocs. Limited Partnership v. Aetna Casualty & Surety Co. (In re Laguna Assocs. Limited Partnership)*, 30 F.3d 734, 737 (6th Cir. 1994).

Hillside argues that Pomodoro's bankruptcy was filed in bad faith because it was filed as a substitute for posting a supersedeas bond. Courts are split on the issue of whether a bankruptcy filing is in bad faith because it was done to circumvent the statutory requirement of posting a supersedeas bond.[5] Recognizing such a split, the court in *In re Davis*, 93 B.R. 501 (Bankr. S.D. Tex. 1987), held that:

> One primary characteristic of those cases not finding bad faith is that the judgment together with the debtors' other liabilities substantially exceeded the assets. Another characteristic included the cooperativeness of the debtors in providing information to assist the court and creditors in expeditiously handling the cases. Those courts also found that the

[5] Those courts holding that such litigation tactics do not constitute bad faith include: *In re Corey*, 46 B.R. 31 (Bankr. D. Haw. 1984); *In re McLaury*, 25 B.R. 30 (Bankr. N.D. Tex. 1982); *In re Alton Tel. Printing Co.*, 14 B.R. 238 (Bankr. S.D. Ill. 1981). Those courts considering such tactics demonstrative of bad faith in the filing include: *In re Karum Group, Inc.*, 66 B.R. 436 (Bankr. W.D. Wash. 1986); *In re Smith*, 58 B.R. 448 (Bankr. W.D. Ky. 1986); *In re Wally Findlay Galleries*, 36 B.R. 849 (Bankr. S.D.N.Y. 1984).

> debtors had been forced into bankruptcy to avoid a forced sale and liquidation of its assets.

Id. at 503 (citation omitted).

Also recognizing the split of authority, the court in *In re Boynton*, 184 B.R. 580 (Bankr. S.D. Cal. 1995), noted that:

> The cases granting dismissal on bad faith grounds, with the exception of Karum, dealt with smaller judgments where the debtor had the ability to satisfy the judgment without losing the ability to stay in business. The cases denying the motion to dismiss typically involved larger judgments that would render the debtor unable to continue its business and allowed the judgment creditor only a partial recovery.

Id. at 582 (citation omitted).

This Court agrees with those cases that look to the circumstances of the case, including whether or not the debtor could afford to post a supersedeas bond without losing the ability to stay in business. In this case, the bankruptcy court rejected Hillside's argument that the sole reason Pomodoro filed its bankruptcy case was to avoid paying the supersedeas bond. Instead, the court found that there was a "legitimate rationale" for filing the proceeding and that there were trade creditors that needed to be paid as well as employees whose livelihoods depended upon the business. Significantly, the court further found that, if it were to lift the stay and force Pomodoro to return to state court to defend the unlawful detainer action without the ability to post a supersedeas bond, it would effectively terminate the Chapter 11 proceedings, which was inappropriate at this stage in the proceedings. We conclude these findings are clearly supported by the record and the court thus did not abuse its discretion in denying Hillside's motion for relief from stay for cause.

Hillside also raises the issue of whether the bankruptcy court erred by failing to grant sufficient adequate protection. After finding that Pomodoro's bankruptcy was not filed in bad faith, the bankruptcy court acknowledged the risk

to Hillside if it did in fact prevail on appeal. Accordingly, the court required Pomodoro to provide adequate protection of $5,200.00 per month, which was the market rate for rental of the premises based upon Hillside's testimony. Hillside argues that the court erred by not requiring Pomodoro to also pay post-petition damages under Utah state law, citing § 363(e) and § 365(b). We disagree.

Adequate protection is granted to protect an entity's interest in property held by a trustee or debtor in possession where the entity is prohibited from enforcing its interest due to the automatic stay. 11 U.S.C. § 361. Periodic payments are one suggested form of adequate protection. *Id.* What constitutes adequate protection is a question of fact and any award of adequate protection turns upon the value to be protected. *MBank Dallas, N.A. v. O'Connor (In re O'Connor)*, 808 F.2d 1393, 1396-97 (10th Cir. 1987). A bankruptcy court has considerable discretion in balancing the factors in awarding adequate protection and any such determination is to be done on a case-by-case basis. *Id.* at 1395-97.

Hillside contends that, under Utah state law, Pomodoro is liable for treble damages which are accruing at the rate of $15,600.00 per month, or three times the fair rental value.[6] This argument is unpersuasive, however, since at the time Pomodoro initiated these bankruptcy proceedings, Hillside's unlawful detainer action was pending. No hearing had been held, nor had any judgment been entered awarding Hillside restitution or assessing damages. While Hillside may certainly be within its rights to claim treble damages resulting from Pomodoro's unlawful detainer of the premises, Hillside's lawsuit was stayed by the filing this

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[6] Utah Code Ann.§ 78-36-10 (1996) provides:

> (2) The jury or the court . . . shall also assess the damages resulting to the plaintiff from . . .
> (b) forcible or unlawful detainer . . . .
> (3) The judgment shall be entered against the defendant for the rent, for three times the amount of the damages assessed under Subsections (2) (a) through (2) (c), and for reasonable attorneys' fees, if they are provided for in the lease or agreement.

bankruptcy and no damages have been awarded under the statute.

Hillside further argues that § 365(b)(1) prohibits the debtor from assuming a lease unless it can provide adequate assurance that the landlord will be paid for any pecuniary loss resulting from default of the lease. This argument is also unpersuasive. Pomodoro can only assume the Lease if it is successful in overturning the state court order determining the Lease had expired, in which case there will no longer be grounds for the unlawful detainer action and any resulting damages. If Pomodoro does not prevail on appeal, the Lease is expired and there is nothing to assume, in which case adequate assurance is not an issue.

Adequate protection is not meant to be a guarantee that a creditor will be paid in full. Instead, the court must determine whether the creditor's interest is protected as nearly as possible against the possible risks to that interest. *See Pistole v. Mellor (In re Mellor)*, 734 F.2d 1396, 1401 (9th Cir. 1984). In this case, the record indicates that the renewal rent payment under the Lease is $2,742.63 per month. Hillside's property manager testified that Hillside could rent the premises for almost twice that figure, or $5,200.00 per month, which Pomodoro did not controvert. This latter figure, together with common area maintenance fees, was awarded as adequate protection, providing Hillside with a comfortable cushion of protection. Although this figure does not include Utah state court treble damages, we do not find the award to be clearly erroneous and decline to disturb the order of the bankruptcy court.

V. Conclusion.

For the reasons set forth above, the order of the bankruptcy court is AFFIRMED.