

ORIGINAL



0000080801

57

RECEIVED

BEFORE THE ARIZONA CORPORATION COMMISSION

2008 MAR -4 P 1:38

COMMISSIONERS

MIKE GLEASON, Chairman
WILLIAM A. MUNDELL
JEFF HATCH-MILLER
KRISTIN K. MAYES
GARY PIERCE

Arizona Corporation Commission
DOCKETED CONTROL

MAR 4 2008

DOCKETED BY [Signature]

In the matter of:	DOCKET NO. S-20520A-07-0155
LEONARD FRANCIS ALCARO (a/k/a "LENNY ALCARO"), and	SECURITIES DIVISION NOTICE OF PROVISION OF APPLICABLE
MARY BRIGID LAVIN ALCARO, husband and wife,	BANKRUPTCY LAW TO THE JUDGE
1140 West San Lucas Circle, Tucson, Arizona 85704,	Hearing Dates: March 4, 5 & 6, 2008
Respondents.	Assigned to Administrative Law Judge Marc E. Stern

The Securities Division ("Division") of the Arizona Corporation Commission provides the Administrative Law Judge with applicable law regarding the voluntary, joint Chapter 7 bankruptcy filed by the Respondents as husband and wife on May 10, 2005 in the U.S. Bankruptcy Court, District of Arizona, No.: 4:05-bk-02539-EWH (the, "Bankruptcy").

The Division alleges that many of the investors' investments were identified in the Respondents' Bankruptcy records as community debts. Respondent Mary Brigid Lavin Alcaro has argued that the Division's case is moot because many of the investors' claims were discharged in the Respondents' 2005 Bankruptcy.

In response, the Judge indicated an interest in knowing whether applicable bankruptcy law supports Mrs. Alcaro's argument during the parties' November 27, 2007 telephonic status conference with the Judge.

Under 11 U.S.C. §§ 523(a)(19)(a)(A) & (B), debts arising from violations of the Arizona Security Act like those alleged in this matter are not dischargeable. See, *In re Dupree*, 336 B.R. 520, 531 (M.D.Fla. 2005)("523(a)(19) allows a securities claim to be prosecuted through final

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

1 judgment, order or settlement agreement despite the filing of bankruptcy, and provides that such
2 claim (or arbitration award) would be nondischargeable...Accordingly, in this case, although an
3 order had not been entered by the State Court confirming the [NASD] arbitration award, the
4 Debtor's motion for summary judgment as to Count III should be denied."); *also*, 11 U.S.C.
5 523(a)(2)(A)(debts incurred through fraud are non-dischargeable).

6 Section 523(a)(19) of the Bankruptcy Code was promulgated on April 20, 2005 pursuant to
7 the Bankruptcy Abuse and Prevention and Consumer Protection Act of 2005 ("the Act") enacted on
8 April 20, 2005. In essence, the amendment closes the discharge loop-hole to provide that Section
9 523(a)(19) is applicable to all state securities violation judgments, orders or settlement agreements.
10 Section 523(a)(19) was made retroactive to July 30, 2002 under the Sarbanes-Oxley Act. Applied
11 here, because the *Respondents' Bankruptcy was filed after* the promulgation of Section 523(a)(19),
12 the violations of the Arizona Securities Act alleged in this matter are not affected by the
13 Respondents' Bankruptcy filing. *See, In re Weilein*, 328 B.R. 553, 555 (N.D. Iowa 2005)(held that
14 debtor's obligations on securities fraud claims did not have to be reduced to judgment, order or
15 settlement prior to commencement of debtor's bankruptcy case in order for such obligations to be
16 excepted from discharge under the special securities-fraud non-dischargeability provision that was
17 made retroactive to July 30, 2002); *In re Weilen*, 328 B.R. 553, 555-556 (N.D.Iowa 2005)(held that
18 debtor's obligations on securities fraud claims did not have to be reduced to judgment, order or
19 settlement prior to commencement of debtor's bankruptcy case in order for such obligations to be
20 excepted from discharge under the special securities-fraud nondischargeability provision, as
21 amended by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005).

22 Respondents' argument also fails to acknowledge that 11 U.S.C. § 362(b)(4) expressly
23 exempts this matter from the automatic stay relating to the Respondents' previous Bankruptcy.
24 Thus, under § 362(b)(4), the Division does not have to file a motion to lift the stay to proceed with
25 this matter. *Also, SEC v. Towers Financial Corporation*, 205 B.R.27, 31 (S.D.N.Y. 1997)(court in
26

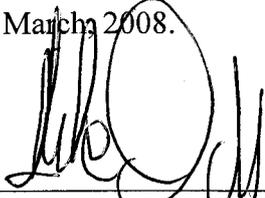
1 *Towers* noted that according to the, “Ninth Circuit Court of Appeals, the policy behind §362(b)(4)
2 is to prevent the bankruptcy court from becoming a haven for wrongdoers.”); As the *Towers* Court
3 stated:

4 Where a governmental unit is suing a debtor to prevent or stop violation of fraud, ...
5 or similar police or regulatory laws, or attempting to fix damages for violations of
6 such law, the action or proceedings is not stayed under the automatic stay.”

7 *Id* at 29-30 (citing *S.RepNo.95-989* at 52, reprinted in 1978 U.S. Code Cong. and Admin.News at
8 5787, 5838, court held that SEC’s action against Chapter 7 debtor, arising from alleged Ponzi
9 scheme involving sale of promissory notes, which sought injunctive relief and disgorgement from
10 debtor, was not stayed under automatic stay, as it was instituted by governmental unit to protect
11 public from future fraud, rather than for pecuniary gain); also, *ACity of New York v. Exxon*, 932
12 F.2d 1020, 1024 (2nd Cir. 1991)(governmental actions under the CERCLA to recover costs
13 expended in response to completed environmental violations are not stayed by the violator's filing
14 for bankruptcy).

15 Thus, contrary to Respondent Mrs. Alcaro’s arguments, the Respondents’ Bankruptcy has
16 no impact in this matter, other the fact it constitutes proof of the Respondents’ community liability
17 for violations of the Arizona Securities Act.

18 **RESPECTFULLY SUBMITTED** this ^{4th} day of March, 2008.

19
20 
21 J. Micheal Dailey, Esq.
22 Enforcement Attorney
23 Securities Division
24 1300 West Washington, Third Floor
25 Phoenix, Arizona 85007
26

ORIGINAL AND THIRTEEN (13) COPIES

1 of the foregoing filed this 4th day of
2 March, 2008 with:

3 Docket Control
4 Arizona Corporation Commission
5 1200 West Washington
6 Phoenix, Arizona 85007

7 Copy of the foregoing hand-delivered this 4th day
8 of March, 2008 to:

9 Mr. Marc Stern
10 Administrative Law Judge
11 Arizona Corporation Commission
12 Hearing Division
13 1200 West Washington
14 Phoenix, Arizona 85007

15 Copy of the foregoing
16 Mailed/hand-delivered
17 this 4th day of March, 2008 to:

18 Michael J. Vingelli, Esq.
19 VINGELLI & ERRICO
20 Bank of America Plaza
21 33 North Stone Avenue, Suite 1800
22 Tucson, Arizona 85701
23 Attorneys for Respondent Mary Alcaro

24
25
26
By: Stephan Kich