UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP NO. EP 00-120

Bankruptcy Case No. 95-20875-JBH
Adversary Proceeding No. 00-2088

IN RE: BRETT MORRISON,
Debtor.

BRETT MORRISON,
Plaintiff/Appellant,

v.

JENSEN, BAIRD, GARDNER & HENRY,
MERTON HENRY, ESQ., LESLIE LOWRY, III, ESQ.,
JUNE BERRY AND ROBERT BERRY,
Defendants/Appellees.

Appeal from the United States Bankruptcy Court
for the District of Maine
(Hon. James B. Haines, Jr., U.S. Bankruptcy Judge)

Before
LAMOUTTE, DE JESÚS and VAUGHN, U.S. Bankruptcy Appellate Panel Judges.

Brett Morrison, *Pro se*.

F. Bruce Sleeper, Esq., of Jenson, Baird, Gardner & Henry on brief for Appellees, Jenson, Baird, Gardner & Henry, Merton Henry, Esq. and Leslie Lowry, III, Esq.

Daniel L. Cummings, Esq., of Norman, Hanson & DeTroy on brief for Appellees, June & Robert Berry.

December 17, 2002

Lamoutte, U.S. Bankruptcy Appellate Panel Judge.

The issue before the United States Bankruptcy Appellate Panel for the First Circuit (the "Panel") is whether the bankruptcy court (Haines, J.) erred in granting summary judgment for all defendants/appellees and retroactive relief from the automatic stay to defendants/appellees, June and Robert Berry.

Standard of Review

The bankruptcy court's grant of summary judgment, as well as its determination that there are no issues of material fact in dispute, are reviewed *de novo*. McCrory v. Spigel (In re Spigel), 260 F.3d 27, 31 (1st Cir. 2001); Campana v. Pilavis (In re Pilavis), 244 B.R. 173, 174 (B.A.P. 1st Cir. 2000). The bankruptcy court's decision to deem the uncontested material facts as admitted pursuant to the rules of procedure is reviewable for abuse of discretion. CMM Cable Rep, Inc. v. Ocean Coast Properties, Inc. (In re CMM Cable Rep, Inc.), 97 F.3d 1504, 1507 n.1 & 1529 (1st Cir. 1996).

Background

In 1994, the defendants/appellees, Robert and June Berry (the "Berrys"), retained defendant/appellee, Jensen, Baird, Gardner & Henry ("the Firm"), in connection with a real estate transaction involving the debtor, Brett Morrison, and his wife, Pamela Morrison (the "Morrisons"). The Morrisons entered into an agreement to rent, and possibly purchase, a property owned by Mrs. Berry located at 60 Peabbles Point Road, Cape Elizabeth, Maine.[1]

[1] Morrison argues that the parties had a Purchase & Sale Agreement, whereby his "rent" was to be applied to a future sale.

In March of 1996, the Berrys retained the Firm to bring a Forcible Entry and Detainer ("FED") action to evict the Morrisons from the property for non-payment of rent. Defendant/appellee, Leslie Lowry, III ("Lowry"), was the attorney with primary responsibility for that representation. Lowry served a Notice of Termination and Notice to Quit on the Morrisons in March, 1996, and filed an FED Complaint on March 18, 1996. On the day of the hearing, the Morrisons agreed to the entry of an FED Judgment against them if the Berrys would not seek to enforce a Writ of Possession upon the payment of accrued and unpaid rent in the amount of $5,100 by April 8, 1996.

The Morrisons did not pay, so a Writ of Possession was issued and served. Morrison filed a series of motions to delay its execution. The Berrys obtained possession of the property around April 26, 1996. According to the Berrys, they tried repeatedly during the month of May, 1996, to arrange for Morrison to retrieve his personal possessions from the property, finally moving them to their garage. Morrison finally obtained his personal property around June 18, 1996.[2]

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[2] Morrison makes a plethora of allegations against the Berrys with regard to their removal of his belongings from the premises. He argues that they tried to defraud him with a list of missing articles; that they went through his personal and business possessions to extract names and other information about his clients; that they removed business and other equipment "and held them hostage"; they contacted artists and other area businesses to inform them that Morrison was out of business, inciting a criminal investigation by the Portland Police Department; they interfered with his business by refusing to return computers and files without conditions, "in an effort to totally collapse the business"; they filed "abandonment papers" with the state while not allowing Morrison to pick up his belongings; they did not seek civil remedies for rent due and owed, but had him evicted and "all the games were played" while he was under the protection of the automatic stay; they stole computer equipment and jewelry from the premises; and they made "false statements concerning the sale of the Property and agreements concerning sweat equity to the Attorney General's Office and other entities," along with false statements about permission to do work on the property and damage to the property.

On November 26, 1996, Morrison attempted to reopen the FED action by filing a motion to vacate, arguing for the first time that since an involuntary bankruptcy petition was filed against him in October, 1995, the FED action was a violation of the automatic stay. According to the Firm, Lowry and Merton Henry ("the Jensen Baird defendants"), they were previously unaware of the existence of the petition, and had no further contact with Morrison.

On September 30, 1999, Morrison filed a multi-claim complaint in the United States District Court for the District of Maine against the Jensen Baird defendants and the Berrys, alleging violations of the automatic stay and abuse of process. The defendants answered the complaint. On May 3, 2000, the Jensen Baird defendants filed a motion for summary judgment, including a statement of material facts and affidavits in support thereof. On May 9, 2000, the Berrys filed a motion for summary judgment and motion seeking retroactive relief from the stay, along with supporting documents.

On May 15, 2000, the district court extended the time for Morrison to respond to May 30, 2000. On May 31, 2000, Morrison sought a further extension to June 6, 2000; however, a reply was never filed.

On July 20, 2000, the bankruptcy court granted Morrison's request to reopen his Chapter 7 case. Accordingly, on July 25, 2000, the district court referred the current action to the bankruptcy court, which received it as an adversary proceeding in the reopened case. By orders entered on October 25, 2000, the bankruptcy court denied any further extensions of time to oppose the pending motions for summary judgment, as well as requests for additional discovery or relief from deadlines; held that the facts set forth in the statements of material facts were, for summary judgment purposes, deemed admitted; and granted summary judgment for all of the

defendants. The bankruptcy court further granted the Berrys retroactive relief from the automatic stay. Morrison filed a notice of appeal and a motion seeking leave to appeal on November 2, 2000.[3]

The Panel entered several orders on June 4, 2001, in the various Morrison appeals.[4] In the case herein, the Panel found that it has jurisdiction to review the orders granting summary judgment and retroactive relief from the stay; however, it would not exercise its discretion to review the orders denying Morrison's motion for default and mooting Morrison's objection to joinder of the Chapter 7 trustee and demand for jury trial because they were not final, appealable orders.

On November 15, 2001, the Panel entered an order dismissing the appeals for failure to comply with the Conditional Joint Order of Dismissal of May 29, 2001, and the Second and Final Joint Order of Dismissal of August 3, 2001. Morrison filed a motion for reconsideration on December 12, 2001. The Panel entered an order on January 15, 2002, vacating the orders of dismissal, re-opening the cases on appeal, and issuing simultaneous briefing schedules. Oral argument was scheduled for July 19, 2002, at which time all parties were heard.

Discussion

Morrison argues that the bankruptcy court erred in ruling on the motion for summary judgment at a pre-trial status conference without considering all outstanding motions pending at

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[3] The Jensen Baird defendants point out that Morrison did not file an appendix as required by the Bankruptcy Rules and the Panel when it vacated the dismissal of this appeal. To aid the Panel, the Clerk's office of the Panel prepared a compilation of the documents referred to by Morrison as an "appendix" and forwarded them to the Panel on July 2, 2002.

[4] See Morrison v. Thompson & Bowie Attorneys, et al. (In re Morrison), BAP No. EP 00-121; Morrison v. Greenberg & Greenberg, et al. (In re Morrison), BAP No. EP 00-122.

the time the case was transferred from the district court to the bankruptcy court.[5] Morrison further argues that the bankruptcy judge erred in granting summary judgment because he "ignored his own Order re-opening this involuntary bankruptcy" and "ignored the Federal Rules of Civil Procedure Rule 56 [sic] narrow limitations . . . especially in his use of Summary Judgment as a tool to dismiss the entire case and, in kind, grant retroactive relief. . . ."

The Jensen Baird defendants argue that the bankruptcy court did not err in granting summary judgment because the material facts in support of the request are deemed admitted if they are not controverted and, if there are no issues of material fact, the moving party is entitled to summary judgment as a matter of law. According to these defendants, the factual record is limited to the assertions made in their statement of issues in support of their motion for summary judgment; since Morrison had five months to comply with the local rules and did not, and given that his assertions in his opposition to the summary judgment motion do not admit, deny or qualify the statement of facts, they cannot be part of the summary judgment record.

The Jensen Baird defendants further argue that they did not/could not willfully violate the automatic stay because they did not have actual notice of the stay before, during or even after the FED action. Finally, these defendants argue that the filing of a legal action is a regular use of process and cannot form the basis for an abuse of process claim. According to the defendants, the two elements of an abuse of process claim under Maine law are bad motive and the use of legal process for an improper collateral objective, and neither are present here.

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[5] According to Morrison, the transcript of the telephonic hearing illustrates confusion on the part of Judge Haines.

The Berrys argue that the bankruptcy court properly entered summary judgment because the Federal Rules of Civil Procedure and Local Rules for the District of Maine provide that a party opposing a motion for summary judgment *shall* submit a separate, short, and concise statement of material facts, and that uncontested or improperly contested statements of material fact *shall* be deemed admitted for all further proceedings at trial and on appeal. Since the Berrys submitted a motion for summary judgment with a statement of material facts, to which Morrison did not respond or file an opposition, the bankruptcy court correctly entered summary judgment in their favor, and should be affirmed by this Panel.[6]

Summary judgment should be entered when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); Fed. R. Bankr. P. 7056. The rule further provides, in setting forth the form of affidavits to support a motion for summary judgment, that "[w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). Although the evidence presented is to be viewed in the light most favorable to the nonmoving party, "[a]s to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants

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[6] The Berrys' brief does not address the grant of retroactive relief from the automatic stay; they refer to their motion for summary judgment and "re aver" the legal arguments set forth therein.

summary judgment to the moving party." Spigel, 260 F.3d at 31 (citation omitted); see also Pilavis, 244 B.R. at 175 ("Once the moving party has properly supported its motion for summary judgment, the burden shifts to the non-moving party, who may not rest on mere allegations or denials of his pleading, but must set forth specific facts showing there is a genuine issue for trial.") (citation omitted). "[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." 10 Collier on Bankruptcy ¶ 7056.05 (Lawrence P. King ed., 15th ed. rev. 2002) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)).

The local rules of the United States District Court for the District of Maine and the United States Bankruptcy Court for the District of Maine provide that facts contained in a statement of material facts supporting a motion for summary judgment shall, if not properly controverted, "be deemed admitted." See District Court Local Rule 56(e), Me. Bankr. R. 9029-3. The stated consequences of failure to comply with these rules have been upheld by the United States District Court for the District of Maine and the United States Court of Appeals for the First Circuit. See Lewry v. Town of Standish, 984 F.2d 25, 27 (1st Cir. 1993); Bridges v. MacLean-Stevens Studios, Inc., 35 F. Supp. 2d 20, 28 (D. Me. 1998), aff'd, 201 F.3d 6 (1st Cir. 2000). These rules apply to *pro se* parties as well as those represented by legal counsel. Barstow v. Kennebec County Jail, 115 F. Supp. 2d 3, 4 n.3 (D. Me. 2000); Covillion v. Alsop, 145 F. Supp. 2d 75, 77 (D. Me. 2001).

Morrison argues that the defendants' answers to his requests for admission, which objected to the same as they call for conclusions of law, should constitute an admission. However, his contention is without merit. The rule of civil procedure governing requests for

admission provides that a matter is "admitted unless, within 30 days after service of the request . . . the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter . . . ." Fed. R. Civ. P. 36(a). In this case, as noted before, the defendants did answer, and object to, the request(s). Morrison has not pointed to any legal authority in support of deeming the defendants' answers an admission.

Furthermore, as the Jensen Baird defendants correctly note, Morrison's untimely factual assertions, which do not admit, deny or qualify the statement of facts, cannot be part of the summary judgment record. See Barstow, 115 F. Supp. 2d at 5, n.4; District Court Local Rule 56(c), 56(e); Bridges, 35 F. Supp. 2d at 28; Doe v. Rowe, 156 F. Supp. 2d 35, 38 (D. Me. 2001). Accordingly, the Panel finds that the bankruptcy court did not err in deeming the defendants' statement of material facts admitted. Furthermore, in light of that admission, the bankruptcy court was correct in granting the defendants' motions for summary judgment.

The Bankruptcy Code provides for the award of actual damages and, in some cases, punitive damages, to an individual who is injured by a willful violation of the automatic stay. 11 U.S.C. § 362(h). "A willful violation does not require a specific intent to violate the automatic stay. The standard for a willful violation of the automatic stay under § 362(h) is met if there is knowledge of the stay and the defendant intended the actions which constituted the violation." Fleet Mortgage Group, Inc. v. Kaneb, 196 F.3d 265, 269 (1st Cir. 1999) (emphasis added). Where the creditor receives actual notice, the court must presume that the violation was deliberate. Id. "The debtor has the burden of providing the creditor with actual notice; once the creditor receives actual notice, the burden shifts to the creditor to prevent violations of the automatic stay." Id.

Morrison admits that he did not notify the defendants of the existence of his involuntary petition; rather, he asserts that they should have known because it was a matter of public record. His position is without legal merit. It is clear that there must be actual knowledge, and that the defendants herein did not have actual knowledge of the petition; therefore, the bankruptcy court was correct in finding that the defendants did not willfully violate the automatic stay.

Finally, the United States Court of Appeals for the First Circuit has held that 11 U.S.C. § 362(d) permits bankruptcy courts to lift the automatic stay retroactively and thereby validate actions which otherwise would be void. Soares v. Crockton Credit Union (In re Soares), 107 F.3d 969 (1st Cir. 1997). Citing Soares, this Panel has previously found that retroactive relief should be the exception, with a strict standard for granting such relief, and the bankruptcy judge's discretion to accord such relief is limited to facts which are "both unusual and unusually compelling." Melendez Colon v. Castellanos Rivera (In re Melendez Colon), 265 B.R. 639, 644 (B.A.P. 1st Cir. 2001). This Panel finds that the bankruptcy court did not err in granting retroactive relief from the automatic stay to the Berrys, because it is clear from the record that they did not have notice of the filing of Morrison's involuntary petition.

Conclusion

Morrison's arguments on appeal mis-characterize the role of summary judgment in bankruptcy court proceedings. The error he attributes to the bankruptcy court's decision is, in fact, the very purpose of a summary judgment proceeding - to resolve issues in the pre-trial stage as to which there appear to be no material facts in controversy. In this case, the request for summary judgment was pending in the district court for two months before being transferred to the bankruptcy court where it awaited decision for another three months, during which time the

motion for summary judgment was never opposed, nor was the statement of facts put forth by the movants ever controverted. Accordingly, the bankruptcy court properly entered summary judgment on the defendants' behalf and, further, was correct in giving the Berry defendants retroactive relief from the stay, it appearing from the record that they had no notice of the filing of the involuntary petition.[7]

The bankruptcy court's order granting summary judgment in favor of all defendants and granting retroactive relief from the automatic stay to the Berry defendants is affirmed.

[7] It is not necessary, as Morrison argues, for the bankruptcy court to resolve all pending matters before granting a motion for summary judgment, nor does the fact that the bankruptcy judge granted Morrison's request to re-open his bankruptcy proceeding indicate that material facts were at issue which would inhibit the entry of summary judgment.