UNITED STATES BANKRUPTCY APPELLATE PANEL
FOR THE FIRST CIRCUIT

BAP NO. EP 00-121

Bankruptcy Case No. 95-20875-JBH
Adversary Proceeding No. 00-2079

IN RE: BRETT MORRISON,
Debtor.

BRETT MORRISON,
Plaintiff/Appellant,

v.

THOMPSON & BOWIE, ATTORNEYS,
MICHAEL SAUCIER, ESQ. and ROBERT GIBBONS, ESQ.,
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.*

Robert C. Hatch, Esq., of Thompson & Bowie on brief for
Defendants/Appellees.

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 the defendants/appellees' motion for summary judgment and denying the plaintiff/appellant's cross motion for summary judgment, and granting the defendants/appellees retroactive relief from the automatic stay.

Jurisdiction and Standard of Review

The Panel has jurisdiction over this appeal pursuant to 28 U.S.C. § 158(a) and (b). The bankruptcy court's order dismissing the adversary proceeding is a final appealable order because it ends the litigation on the merits. Snyder v. Rockland Trust Co. (In re Snyder), 279 B.R. 1, 2 (B.A.P. 1st Cir. 2002) ("Snyder IV"); Bruin Portfolio, LLC v. Leicht (In re Leicht), 222 B.R. 670, 671 (B.A.P. 1st Cir. 1998).

On appeal, the Panel reviews rulings of law *de novo* and findings of fact for clear error. Brandt v. REPCO Printers & Lithographics, Inc. (In re Healthco Int'l, Inc.), 132 F.3d 104, 107-08 (1st Cir. 1997); Jeffrey v. Desmond, 70 F.3d 183, 185 (1st Cir. 1995). A bankruptcy court's legal conclusion to grant summary judgment is reviewed *de novo*. Baybank v. Vermont Nat'l Bank, 118 F.3d 30, 32 (1st Cir. 1997); Campana v. Pilavis (In re Pilavis), 244 B.R. 173, 174 (B.A.P. 1st Cir. 2000).

Background

On July 12, 1995, a Purchase and Sale Agreement was signed by Brett Morrison ("Morrison"), as president of Black Moon, Inc. ("Black Moon"), and defendant Robert Gibbons ("Gibbons") for the purchase of a condominium at 97 Neal Street, Unit #5, in Portland, Maine. A closing date was set for September 1, 1995. Black Moon was unable to close on that date, so an

agreement was entered into which changed the date to September 6, 1995. On that date, Black Moon was again unable to close, but was given three keys to the property. Morrison's mother, Beverly Morrison, moved into the property, and the closing date was extended to September 15, 1995.

On September 15, 1995, Black Moon advised that it would again be unable to close the sale, and the parties entered into an "Addendum to Contract" which rescheduled the closing for September 22, 1995, and set rent payments.[1] According to Morrison, he paid Gibbons $4,000 for rent at the rate of $800 per month, from September 6, 1995 to closing, thereby pre-paying rent for five months. On September 15, 1995, Black Moon was notified by the realtor that no further extensions of the closing would be granted. On September 22, 1995, Black Moon was unable to close, and no further contract for the sale of the property was made.

On September 29, 1995, Gibbons served a Notice of Quit on Black Moon, which required Black Moon to leave the property by October 6, 1995. Black Moon did not leave the property or return the keys; accordingly, Gibbons filed a Forcible Entry and Detainer (FED) complaint, which was served on Black Moon on October 16, 1995, and filed on October 30, 1995. On November 1, 1995, the state court issued judgment for Gibbons, indicating that a Writ of Possession may issue on November 8, 1995.

On November 8, 1995, Morrison represented through the law firm of Hopkinson & Abbondanza that he had $86,760 in trust to purchase the property. On that same date, Black Moon filed a motion to overturn the FED judgment, to which Gibbons objected. On November

[1] Morrison represents that on September 8, 1995, Black Moon was suspended as a corporation for non-payment of state fees, and he became the assignee of the Purchase and Sale Contract.

9, 1995, a Writ of Possession was issued in favor of Gibbons. On November 13, 1995, Black Moon filed a motion to stay the FED judgment. On November 28, 1995, Black Moon filed a response to Gibbon's objection to the motion to overturn the FED judgment, in which Morrison represents that he has the final amount necessary for closing deposited in the escrow account of Attorney Hopkinson. On December 6, 1995, Black Moon filed another motion to stay the FED judgment.

On January 17, 1996, the Maine District Court entered judgment in favor of Gibbons. Subsequently, Morrison hired Attorney Stephen Canders to handle the appeal. On February 15, 1996, they filed an appeal; in the affidavit in support thereof, dated February 16, 1996, Morrison alleges that he has attempted to perform his obligations under the Purchase and Sale Agreement, but that Gibbons refused to close. On March 21, 1996, Canders filed a memorandum on behalf of Black Moon in support of the appeal. By order dated July 29, 1996, the Superior Court granted Gibbon's motion to dismiss the appeal.

During the pendency of all this litigation, an involuntary petition was filed against Morrison in his personal capacity, but not against Black Moon, on October 13, 1995. According to Gibbons, he was never, in any of these many filings, or otherwise, notified of the filing of the bankruptcy petition until he received a letter from Morrison on November 24, 1996. Eventually, a final decree was entered and the involuntary bankruptcy case was closed on March 12, 1997.

On June 27, 2000, Morrison filed a motion to reopen his case, which was granted by the bankruptcy court on July 20, 2000. On that same date, the bankruptcy court received on referral two actions which were pending before the District Court, one of which became adversary proceeding no. 00-2079, subject of the appeal herein.

The bankruptcy court held a hearing on October 24, 2000, and subsequently entered two orders on October 25, 2000. The first denied Morrison's motion to strike the answer of defendants Thompson & Bowie and denied his request for default judgment. The second order declared moot the request for a jury trial and objection to joinder of the Chapter 7 trustee. On October 26, 2000, a third order was entered, vacating the previously-mentioned order as it was entered in error in the wrong adversary proceeding.

On November 2, 2000, Morrison filed a notice of appeal of these three orders, as well as a motion seeking leave to appeal. The appeal was assigned BAP No. EP 00-121, the matter presently before the Panel.

On February 12, 2001, the defendants filed a motion for summary judgment and request for retroactive relief from the stay. Morrison filed a cross-motion for summary judgment on February 23, 2001. A pre-trial hearing was held on March 8, 2001, and the bankruptcy court took the matter under advisement. A status hearing was held on April 12, 2001, at which time the bankruptcy court granted summary judgment in favor of the defendants, as well as retroactive relief from the stay, and denied Morrison's request for summary judgment. The order further provides that "[t]his is the final order addressing all pending issues in this adversary proceeding."

Morrison filed a motion for leave to appeal with a request to consolidate[2] on April 20, 2001. The Panel entered several orders on June 4, 2001, in the various Morrison appeals.[3] In the

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[2] On November 2, 2000, Morrison filed a motion for leave to appeal the October 25, 2000 order of the bankruptcy court which denied Morrison's motion to strike the defendants' answer and find them in default.

[3] See Morrison v. Jensen, Baird, Gardner & Henry, et al. (In re Morrison), BAP No. EP 00-120; Morrison v. Greenberg & Greenberg, et al. (In re Morrison), BAP No. EP 00-122.

case herein, the Panel entered an order denying the defendants' motion to dismiss the appeal, and also entered an order denying Morrison's motion for leave to appeal and request to consolidate, finding they were rendered moot by the bankruptcy court's subsequent order of April 12, 2001, which is a final, appealable order.

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.

Morrison argues that the bankruptcy court ruled on the motions for summary judgment without notice and a hearing; rather, the bankruptcy court gave notice for a pre-trial conference, at which Judge Haines held an "impromptu" trial on the cross-motions for summary judgment.[4] He alleges that there were material issues of fact, such as who paid Gibbons - Black Moon or Morrison. According to Morrison, the bankruptcy court in Maine did not timely process his requests for transcripts of the March 8, 2001 and April 12, 2001 hearings.[5] Furthermore, Morrison argues that the bankruptcy judge erred in granting summary judgment because he "ignored his own Order re-opening this involuntary bankruptcy" and "ignored Federal Rule of

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[4] Morrison implies in his brief that defendant Bowie, as counsel for Gibbons, was "prepared and situated" for this "impromptu trial." See Appellant's Brief at p.6.

[5] Morrison implies that the bankruptcy court in Maine is "holding up" the transcripts and only processed his request after the Panel vacated its order of dismissal of this case and two others. See Appellant's Brief at pp. 5, 7.

Civil Procedure Rule 56 [sic] narrow limitations . . . especially in his use of Summary Judgment as a tool to dismiss the entire case."

Defendants argue that the bankruptcy court correctly found that they did not willfully violate the automatic stay, first, because their actions were directed at Black Moon, not Morrison, and second, because they had no knowledge of the bankruptcy filing. Defendants further argue that they are entitled to retroactive relief from the automatic stay because they had no actual notice of the petition. Finally, defendants argue that the bankruptcy court correctly ruled that, even if the FED judgment and Writ of Possession are void, Morrison is not entitled to damages because they had no knowledge of the bankruptcy filing and acted in good faith upon the state court's orders.

Morrison admitted at oral argument that he did not notify the defendants of his pending bankruptcy; rather, he believes that they should have discovered the existence of the case in the course of due diligence, as the same was a matter of public record.

Discussion

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 summary judgment to the moving party." McCrory v. Spigel (In re Spigel), 260 F.3d 27, 31 (1st Cir. 2001) (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 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 defendants 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. It is clear from the record that the defendants' state court action was against Morrison's business, Black Moon, and not against Morrison himself. That being so, the bankruptcy court properly entered summary judgment on

the defendants behalf and, further, was correct in giving the defendants retroactive relief from the stay, it appearing from the record that they had no notice of the filing of the involuntary petition.[6]

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

[6] 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.