UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP NO. EP 00-122

Bankruptcy Case No. 95-20875-JBH
Adversary Proceeding No. 00-2080

IN RE: BRETT MORRISON,
Debtor.

BRETT MORRISON,
Plaintiff/Appellant,

v.

GREENBERG & GREENBERG,
STANLEY GREENBERG, ESQ.,
WOODWARD THOMSEN, CO.,
and THOMAS THOMSEN,
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.*

Stanley Greenberg, Esq. of Greenberg & Greenberg on brief for Appellees, Stanley Greenberg and Greenberg & Greenberg.

Marcus G. Beebe, Jr., Esq. of CASCO Legal Clinic on brief for Appellees, Woodwood Thomsen Co. and Thomas W. Thomsen.

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 defendants/appellees' motion to dismiss the adversary proceeding based on the *res judicata* effect of orders entered in 1996 in the involuntary bankruptcy case.

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).

Background

On October 13, 1995, Woodward Thomsen Co. ("Woodward Thomsen"), though its president, Thomas Thomsen ("Thomsen"), filed an involuntary Chapter 7 bankruptcy petition against Brett Morrison ("Morrison") in the United States Bankruptcy Court for the District of Maine.[1] Woodward Thomsen and Thomsen had obtained a judgment against Morrison in state court in an action for damages. Attorney Stanley Greenberg and the firm of Greenberg & Greenberg represented Woodward Thomsen in their efforts to collect on that judgment, including

[1] The petition was assigned Bankruptcy Case No. 95-20875.

the filing of the involuntary bankruptcy petition. The petitioning creditor, Woodward Thomsen, indicated that its claim is in the amount of $12,263.91, for "goods sold & delivered; judgment." Morrison argues that the "goods" (windows) were never completed, nor delivered, and that Woodward Thomsen had possession of them at all times. Morrison further argues that the "goods" were not a commercial, business-related debt, but rather were consumer goods for his personal residence, and that the amount of the debt was overstated.[2]

After a pretrial hearing on the involuntary petition on December 19, 1995, at which Morrison did not appear, the bankruptcy court issued an Order for Relief on December 21, 1995. According to Morrison, he did not appear because he had moved and did not receive notice of the hearing. An interim trustee, William Howison, was appointed on April 19, 1996.

Morrison filed a motion to overturn the Order for Relief and a motion to dismiss the petition on July 3, 1996,[3] which were denied on August 6, 1996.[4] On January 14, 1997, the

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[2] Morrison argues that the defendants committed perjury and fraud in the filing of the involuntary petition because (1) they stated that the debt was business related and for goods sold and delivered; (2) they misrepresented their eligibility to file the petition; (3) they did not get two additional creditors to join the petition, as required by 11 U.S.C. § 303(b) because Morrison has more than twelve creditors; (4) they did not meet the minimum claim requirement of § 303(b)(i); and (5) they did not file a bond. Therefore, according to Morrison, he is entitled to damages caused by the bad faith filing of the petition, as well as costs and attorney's fees.

[3] The Motion to Overturn Order of Relief and the Motion to Dismiss, which are virtually identical, allege that (1) Attorney Greenberg acknowledged that the debt was mistakenly characterized as a business one and that the "goods" claimed were never delivered; (2) Morrison would have defended his position had he received notice of the hearing at which the Order for Relief was entered; (3) Woodward Thomsen never completed or delivered the "goods" and has always had possession of them; (4) the debt was not commercial as stated in the voluntary petition; (5) the petitioning creditors falsely stated the amount of the debt; (6) the petition was not filed with the required three creditors; and (7) other false statements were made. See Appellant's "Appendix," compiled by the Clerk's office of the Panel pursuant to Morrison's designation of the record on appeal.

[4] Morrison states that "Judge James Goodman failed to recognize, or chose not to recognize, that said Petition was not in accordance with 11 U.S.C. 303(b) as stated," and, further "Judge Goodman ruled that Bankruptcy Court was an improper place, at that time, to attend such allegations. Such allegations needed to be attended to in another venue." Appellant's Brief at p.3.

trustee filed an action objecting to discharge pursuant to 11 U.S.C. § 727; the same was assigned adversary proceeding no. 97-2002. Judge Goodman issued an order on February 27, 1997, granting the trustee's complaint and denying Morrison's discharge. The trustee filed a report of no distribution on March 3, 1997, and a final decree was entered on March 12, 1997, at which time the case was closed.

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. Said actions became adversary proceeding no. 00-2079, subject of another appeal pending before the Panel, and adversary proceeding no. 00-2080 against Greenberg & Greenberg, Stanley Greenberg, Woodward Thomsen Co., and Thomas Thomsen, subject of the appeal herein. The trustee filed a motion to be joined or substituted as a party plaintiff on August 8, 2000, which was granted on August 15, 2000, over the objection of Morrison. Morrison filed a demand for a jury trial on August 22, 2000, and a motion for entry of default judgment on September 6, 2000.

Greenberg & Greenberg filed a motion to dismiss the case on August 24, 2000. A hearing on the motion was scheduled that same day for September 19, 2000, on which date the bankruptcy court had already scheduled the pre-trial hearing. On September 6, 2000, Morrison filed a response to the motion to dismiss, along with a motion for entry of default and motion for default judgment. The bankruptcy court held a telephonic hearing on September 6, 2000, scheduling a hearing on the motion for default on September 19, 2000. On September 15, 2000, Morrison filed a motion to continue the hearing, which was granted and the hearing was rescheduled for October 24, 2000. The telephonic hearing was held, as scheduled, on October 24, 2000, at which time the bankruptcy court indicated that it would review all outstanding

motions and enter orders on those issues that could be decided on the filings currently before the court.

On October 25, 2000, the bankruptcy court issued three orders. First, it granted the Greenberg defendants' motion to dismiss, and *sua sponte* dismissed the proceeding as to the remaining defendants, finally and with prejudice. The court found:

> Having reviewed the plaintiff's complaint, and construing its allegations liberally in favor of the plaintiff, and having considered that the plaintiff is proceeding without counsel, I will GRANT the motion to dismiss, taking judicial notice of the court's file in underlying Bankruptcy Case No. 95-20875. Issues raised by the complaint were raised, or could have been raised, in the plaintiff's motion to dismiss the bankruptcy case and his motion to vacate the order for relief, each of which were heard by Judge Goodman and by denied orders dated August 7, 1996.

See Appellant's "Appendix" at tab "B." In other orders, the bankruptcy court denied Morrison's motion for default, and declared moot the objection to joinder of the Chapter 7 trustee and demand for a jury trial. Id. Morrison filed a notice of appeal and a motion for leave to appeal regarding all three orders on November 2, 2000.

On January 12, 2001, Morrison filed a notice of appeal of the orders entered by Judge Goodman on August 7, 1996, denying his motion to vacate the Order for Relief and denying his motion to dismiss, the orders which Judge Haines found to be *res judicata* herein. The appeal was assigned BAP No. EP 01-007. On June 4, 2001, the appeal was dismissed, the Panel finding that it was not timely filed and, therefore, that the Panel lacked jurisdiction over the matter.

The Panel entered several other orders on June 4, 2001 in the various Morrison appeals.[5] In the case herein, the Panel found that it has jurisdiction to review the order dismissing the adversary proceeding; however, it would not exercise its discretion to review the orders denying

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[5] See Morrison v. Jensen, Baird, Gardner & Henry, et al. (In re Morrison), BAP No. EP 00-120; Morrison v. Thompson & Bowie Attorneys, et al. (In re Morrison), BAP No. EP 00-121.

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 that time, Morrison was heard, although the defendants waived oral argument and submitted their case on the briefs.

Discussion

Morrison argues that the bankruptcy court (Haines, J.) erred in dismissing the adversary proceeding based on *res judicata*, ruling that the issues were already tried and decided when the bankruptcy court (Goodman, J.) denied Morrison's motions to overturn the Order for Relief and dismiss the petition. Morrison alleges error because at the hearing on those motions, "Defendants were never accused, questioned, tried or adjudged." Appellant's Brief at p.4. According to Morrison, Judge Goodman "made an improper and illegal decision concerning the involuntary bankruptcy Petition" and should have dismissed the same *sua sponte* because it did not comply with the provisions of 11 U.S.C. § 303 pertaining to involuntary cases. Id. Morrison argues that Judge Goodman barely gave his motions a second thought, and that to base the dismissal of the adversary proceeding on his ruling is "ludicrous."[6] Morrison admits that he did

[6] Morrison notes that as a result of the "improper and totally illegal filing" of the involuntary petition against him, he ended up the defendant in a criminal proceeding where, allegedly as a result of his being the subject of an involuntary bankruptcy proceeding, he was denied counsel and had to represent himself. He goes on to allege that after Judge Goodman dismissed the case and denied the discharge, an order which was entered the day before his sentencing in the criminal matter, he was given

not timely appeal Judge Goodman's rulings, explaining that at the time he was incarcerated and did not know how to handle the appeal himself.

The defendants argue that Morrison's claims in the adversary proceeding are barred by the doctrine of *res judicata* because he did not appeal the bankruptcy court's orders of August 7, 1996, and, therefore, Judge Haines' dismissal of the adversary proceeding should be affirmed. In reply, Morrison argues that, since the bankruptcy court re-opened the involuntary case, the appeal period for interlocutory and final orders is expanded until the case is closed again.

It is undisputed that Morrison did not timely appeal the decision of Judge Goodman to deny his motion to overturn the Order for Relief and motion to dismiss. Said appeal was filed on January 12, 2001, some four years and five months after the order was entered on August 6, 1996. The same was noted by the Panel in dismissing the appeal on June 4, 2001, the Panel finding that it lacks jurisdiction over an appeal which does not comply with the Federal Rules of Bankruptcy Procedure, which allow only ten days for taking an appeal. Since the appeal was not properly taken, the decision to deny the motion to overturn the entry of an order for relief in the involuntary petition, as well as to deny the involuntary debtor's motion to dismiss, becomes a final, unappealable order, with *res judicata* effect.

The doctrine of *res judicata* provides that parties may not litigate a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions that could have been, but was not, raised in the first suit. "Federal res judicata principles govern the res judicata effect of a judgment entered in a prior federal suit, including judgments of the bankruptcy court." Iannochino v. Rodolakis (In re Iannochino), 242 F.3d 36, 41 (1st Cir. 2001).

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an attorney to represent him at sentencing. It was after he was released from prison that he realized he could reopen the bankruptcy case, and he did so in order to proceed against the various defendants whom he believes violated his rights, to hold them responsible.

Res judicata pertains to the preclusive effect of a prior adjudication, and is actually composed of two doctrines. The first is "claim preclusion," under which the effect of a judgment extends to the litigation of all issues relevant to the same claim between the same parties, whether or not raised at trial; the second is collateral estoppel or "issue preclusion," which bars the re-litigation of issues actually adjudicated, and essential to the judgment, in a prior litigation between the same parties. 18 Charles Alan Wright and Arthur R. Miller, Federal Practice and Procedure § 4402 (1981) (citing Kaspar Wire Works, Inc. v. Leco Eng'g & Mach., Inc., 575 F.2d 530, 535-36 (5th Cir. 1987)); see also Parkland Hosiery Co., Inc. v. Shore, 439 U.S. 322, 327 n.5 (1979).

Res judicata prevents a party from re-litigating a cause of action, thereby giving finality to legal proceedings. Kelley v. South Bay Bank (In re Kelley), 199 B.R. 698, 702 (B.A.P. 9th Cir. 1996). Four elements must be satisfied for *res judicata* to apply: (1) a final judgment on the merits; (2) the judgment was rendered by a court of competent jurisdiction; (3) a second action involving the same parties; and (4) the same cause of action involved in both cases. Id. See also Grella v. Salem Five Cent Savings Bank, 42 F.3d 26 (1st Cir. 1994). "Once these elements are established, claim preclusion also bars the relitigation of any issue that was, or *might have been*, raised in respect to the subject matter of the prior litigation." Id. at 30 (emphasis in original).[7]

[7] On the other hand, "the principle of collateral estoppel, or issue preclusion, bars re-litigation of any factual or legal issue that was *actually* decided in previous litigation between the parties, whether on the same or a different claim." Id. The essential elements of issue preclusion are: (1) the issue sought to be precluded must be the same as that involved in the prior action; (2) the issue must have been actually litigated; (3) the issue must have been determined by a valid and binding final judgment; and (4) the determination of the issue must have been essential to the judgment. Id. "An issue may be 'actually' decided even if it is not *explicitly* decided, for it may have constituted, logically or practically, a necessary component of the decision reached in the prior litigation." Grella, 42 F.3d at 30-31 (emphasis in original).

See also Rhode Island Hospital Trust Nat'l Bank v. Bogosian (In re Belmont Realty Corp.), 11 F.3d 1092, 1098 (1st Cir. 1993).

In order to be considered final, a bankruptcy court order "need not resolve all the issues raised by the bankruptcy" but "must completely resolve all of the issues pertaining to a discrete claim, including issues as to the proper relief." Iannochino, 242 F.3d at 43 (citation omitted). In determining whether sufficient subject matter identity exists between an earlier suit and a later action, federal courts employ a transactional approach; that is, "[t]he necessary identity will be found to exist if both sets of claims - those asserted in the earlier action and those asserted in the subsequent action–derive from a common nucleus of operative facts." Gonzalez v. Banco Central Corp., 27 F.3d 751, 755 (1st Cir. 1994).

The doctrines of *res judicata* and collateral estoppel "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication." Abco Metal Corp. v. Equico Lessors, Inc. (In re Abco Metal Corp.), 36 B.R. 344, 347 (Bankr. N.D. Ill. 1984) (citation omitted). *Res judicata* is based on a public policy favoring an end to litigation and "serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case." Id. at 349 (citation omitted). "[T]he doctrine of *res judicata* is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the court." Federated Dep't v. Moitie, 452 U.S. 394, 401 (1981).

Judge Goodman's decision to deny Morrison's request to overturn the entry of relief in the involuntary petition and dismiss the same was not appealed in a timely fashion, and therefore became final. In the adversary proceeding currently before the Panel, Morrison is claiming that

the defendants illegally and improperly filed an involuntary petition against him, which resulted in him suffering harm and incurring damages. These are the same issues which were, or should have been, raised before Judge Goodman when he decided whether to grant Morrison's request to overturn the entry of relief and dismiss the involuntary petition. The same parties are involved in both proceedings. Since Judge Goodman's decision was not timely appealed, it constitutes a final judgment on the merits. Accordingly, Judge Goodman's decision is *res judicata* to the adversary proceeding subject of this appeal, and Judge Haines did not err in so finding and dismissing the case.

Conclusion

The decision of the bankruptcy court (Haines, J.), granting the defendants' motion and dismissing Morrison's adversary proceeding, based upon a finding that the bankruptcy court's previous decision (Goodman, J.) is *res judicata* to the issues raised in the adversary proceeding, is hereby AFFIRMED.