NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP NO. MW 03-042

Bankruptcy Case No. 01-42828-HJB
Adversary Proceeding No. 01-4301-HJB

NICHOLAS CHRISTAKIS,
Debtor.

NICHOLAS CHRISTAKIS,
Appellant,

v.

GERALD MCMAHON,
Appellee.

Appeal from the United States Bankruptcy Court
for the District of Massachusetts
(Hon. Henry J. Boroff, U.S. Bankruptcy Judge)

Before
VOTOLATO, VAUGHN, and KORNREICH,
U.S. Bankruptcy Appellate Panel Judges

David Baker, Esq.,
on brief for the Appellant.

Jon H. Kurland, Esq., and Kurland & Grossman, P.C.,
on brief for the Appellee.

March 23, 2004

KORNREICH, U.S. Bankruptcy Appellate Panel Judge.

Nicholas Christakis ("Christakis"), a Chapter 7 debtor in a case pending before the United States Bankruptcy Court for the District of Massachusetts, commenced an adversary proceeding in that court against a creditor, Gerald McMahon ("McMahon"), for violation of the automatic stay. Christakis has appealed the bankruptcy court's judgment in favor of McMahon. We affirm the judgment and also impose sanctions against Christakis pursuant to Fed. R. Bankr. P. 8020.

I. Background

In a published opinion, the bankruptcy court made extensive findings of fact, none of which are in dispute on appeal. See Christakis v. McMahon (In re Christakis), 291 B.R. 9 (Bankr. D. Mass. 2003); Appellant's App. at 17. Accordingly, we recount only those facts necessary to provide context for the issue before us.

On October 17, 2000, McMahon commenced a small claims action in Lowell District Court against Christakis for the balance owed for electrical services that he provided on premises located at 265 Boston Road in Billerica. Christakis moved to dismiss that state court action, arguing that his mother Pagona Christakis, as trustee of the JCNP Realty Trust, was the owner of the property and the proper defendant. Despite that motion, judgment was entered against Christakis in the amount of $2,019.00. Christakis failed to satisfy the judgment and a contempt hearing was scheduled in the state court. Christakis filed his Chapter 7 case on April 26, 2001 before that hearing took place. A suggestion of bankruptcy was filed in the state court action and the contempt hearing was stayed pursuant to § 362 of the Bankruptcy Code.[1] Christakis did not

[1] Unless otherwise noted, all statutory references herein are to the Bankruptcy Reform Act of 1978, as amended, 11 U.S.C. § 101, *et seq.*

list McMahon on his bankruptcy schedules and McMahon was not served with the suggestion of bankruptcy.

McMahon then filed a new motion in the state court to substitute JCNP Realty Trust ("Pagonas [sic] Christakis, Trustee") for Christakis on the judgment. That motion was served by constable on Christakis at his place of business. The requested relief was apparently granted by the state court. Christakis, 291 B.R. at 12. Christakis commenced an adversary proceeding in the bankruptcy court alleging that McMahon's service of the motion was a violation of the automatic stay. With leave of the bankruptcy court, Christakis also amended his complaint to allege that McMahon had made several post-petition phone calls to collect his debt.

After a two-day trial, the bankruptcy court: (1) granted judgment for McMahon; (2) denied McMahon's request for Fed. R. Civil P. 11 sanctions against Christakis because McMahon failed to comply with the "safe harbor"provision of Fed. R. Bankr. P. 9011(c)(1); and (3) ordered Christakis to show cause why he should not be held in violation of Federal Rule of Bankruptcy Procedure 9011(b)(1) and/or (3).

Initially, Christakis appealed both the judgment and the show cause order. By prior order the Panel determined the show cause order to be interlocutory because it did not end the Rule 11 litigation. Consequently, that aspect of the bankruptcy court's order is not presently before us. See the Panel's September 30, 2003 order denying the Appellant's Emergency Motion for Stay Pending Appeal. Thus, the only issue before us is the judgment entered in favor of McMahon.

II. Jurisdiction

Pursuant to 28 U.S.C. §§ 158(a) and (b), the Panel may hear appeals "from final judgments, orders, and decrees." 28 U.S.C. § 158(a)(1). A final judgment "ends the litigation on

the merits and leaves nothing for the court to do but execute the judgment." Catlin v. United States, 324 U.S. 229, 233 (1945). The bankruptcy court's entry of judgment in favor of McMahon is such a final judgment. See Fleet Data Processing Corp. v. Branch (In re Bank of New England Corp.), 218 B.R. 643, 646-47 (B.A.P. 1st Cir. 1998).

III. Standard of Review

Generally, the Panel evaluates a bankruptcy court's findings of fact pursuant to the "clearly erroneous" standard of review and its conclusions of law *de novo*. Grella v. Salem Five Cent Savings Bank, 42 F.3d 26, 30 (1st Cir. 1994); see also Fed. R. Bankr. P. 8013;[2] Palmacci v. Umpierrez, 121 F.3d 781, 785 (1st Cir. 1997). "A finding of fact is clearly erroneous, although there is evidence to support it, when the reviewing court, after carefully examining all the evidence, is 'left with the definite and firm conviction that a mistake has been committed.'" Palmacci, 121 F.3d at 785 (citing Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985)).

IV. Discussion

Although the bankruptcy court found that McMahon did serve the motion to amend on Christakis after bankruptcy, it concluded that such service was not in violation of the stay. The bankruptcy court also found no credible evidence to support Christakis's allegations that

---

[2] Federal Rule of Bankruptcy Procedure 8013 provides as follows:

> On appeal the district court or bankruptcy appellate panel may affirm, modify, or reverse a bankruptcy judge's judgment, order or decree or remand with instructions for further proceedings. Findings of fact whether based on oral or documentary evidence shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses.

Fed. R. Bankr. P. 8013.

McMahon contacted any other person for the purpose of collecting the prepetition debt, a determination not challenged on appeal.

We find no error in the bankruptcy court's legal reasoning regarding service of the motion on Christakis. As the bankruptcy court pointed out, the automatic stay prohibits "the commencement of continuation . . . of a judicial . . . action *against the debtor* that was or could have been commenced before the commencement of the case . . . ." § 362(a)(1) (emphasis added). The service of the motion to substitute a non-debtor party for Christakis in the state court judgment was neither the commencement nor continuation of an action against Christakis after bankruptcy; rather, it was an unambiguous attempt by McMahon to pursue Christakis' mother in her capacity as owner of the property. The automatic stay does not protect a non-debtor in a chapter 7 case. The bankruptcy court's authorities are correct on this point. See Austin v. Unarco Industries, Inc., 705 F2d 1, 4 (1st Cir. 1983), cert. dismissed, 463 U.S. 1247 (1983); Apollo Molded Products, Inc. v. Kleinman (In re Apollo Molded Products, Inc.), 83 B.R. 189, 191 (Bankr. D. Mass. 1988). Christakis has presented us with no authorities to the contrary, nor has he provided support for his assertion that service of the motion was harassment or an attempt at post-bankruptcy debt collection.

Christakis also suggested in his brief and at oral argument that McMahon's use of a constable was, in and of itself, harassment and an attempt to collect the debt in violation of the stay, apart from the service of the motion to amend. On that basis he would like us to reverse the judgment, even if service by other means would have been permissible after bankruptcy. This contention does not appear in the pleadings. We have reviewed the limited portions of the transcript included by the parties in their appendices, and they do not inform us whether the issue

was raised before the bankruptcy court. See 1st Cir. BAP R. 8009-1(c) ("The parties shall include in their respective appendices all portions of the transcript required for adequate review of the issues before the BAP."). We therefore have no way of knowing if the mere presence of the constable was raised as separate violation of the stay at trial. Arguments raised for the first time on appeal should not considered. See U.S. v. Taylor, 54 F.3d 967, 972 (1st Cir. 1995).

The treatment of the constable in the bankruptcy judge's written opinion does not remove our concern in this regard, but it does give us some leeway. That portion of the court's narrative may be viewed as an analysis of the constable's role as a functionary in the service of the motion; or, to be generous to Christakis, it may be understood as the court's ruling on Christakis' contention that the constable's presence was a discrete form of harassment. We will go with the latter and consider Christakis' argument.

The bankruptcy court stated:

> As for service by the constable, this too seems reasonable in context. This Court has heard the tape of the proceeding before the state court judge, admitted into evidence. The Debtor seemed no more credible there than here. At one point, he even denied knowing McMahon. Service by constable ensured the availability of a disinterested witness to testify as to the effectiveness of service upon a litigant with a poor history of truthfulness. A reasonable person could do no less. It was self-protection that informed McMahon's actions, not harassment.

Christakis, 291 B.R. at 18. Since Christakis has failed to direct us to contrary facts in the transcript, we are unable to discern if the bankruptcy court's findings are clearly erroneous. Christakis must bear the responsibility for this void in the record. See In re Abijoe Realty Corp., 943 F.2d 121, 123 (1st Cir. 1991). He has left us with no alternative. On the record before us we conclude that the bankruptcy court's findings and conclusions are right. There was no violation of the stay.

V. Motion for Sanctions

Federal Rule of Bankruptcy Procedure 8020, which adopts Federal Rule of Appellate Procedure 38, states as follows:

> If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.

Fed. R. Bankr. P. 8020. Rule 8020 sanctions may be imposed to penalize an appellant who files a frivolous appeal and to compensate an appellee for the delay and expense of defending such an appeal. See Burlington N. R.R. v. Woods, 480 U.S. 1, 7 (1987). The Panel may impose "'just damages' and single or double costs as sanctions. Damages may be either in the form of a lump-sum monetary penalty or attorney's fees." 10 Lawrence P. King, Collier on Bankruptcy ¶ 8020.07 (15th ed. rev. 2002).

Imposing sanctions under Rule 8020 is a two-step process. Maloni v. Fairway Wholesale Corporation (In re Maloni), 282 B.R. 727, 734 (B.A.P. 1st Cir. 2002); 10 Collier on Bankruptcy ¶ 8020.06. First, the Panel must determine whether the appeal is frivolous. Second, the Panel must examine whether the procedural requirements of Rule 8020 have been met. Maloni, 282 B.R. at 734.

In determining whether an appeal is frivolous, several factors may be considered including (1) the appellant's bad faith; (2) whether the argument presented on appeal is without merit in part or in toto; and (3) whether the appellant's arguments (a) address the issues on appeal, (b) fail to cite any authority, (c) cite inapplicable authority, (d) make unsubstantiated factual assertions, (e) make bare legal conclusions, or (f) misrepresent the record. Id., citing 10 Collier on Bankruptcy ¶ 8020.04[1]. Motive is not important "because the rule seeks to

compensate an appellee who has had to waste time defending a meritless appeal." Maloni, 282 B.R. at 734.

We have no difficulty in finding Christakis' appeal to be frivolous. It is patently obvious that McMahon did not violate the stay in moving to amend a state court judgment to substitute a non-debtor party. Christakis has failed to provide authorities in support of his legal arguments and there is little in the record to support his notion of the facts. McMahon should be compensated for defending this appeal.

The procedural requirements have been satisfied. McMahon has requested sanctions by separate motion and sufficient notice and opportunity to respond has been given to Christakis. Fed. R. Bankr. P. 8020. Accordingly, we hereby direct counsel for McMahon to file a statement of his attorney's fees and costs within 30 days of the entry of this decision. Thereafter, the Panel will determine the amount to be awarded without further notice and hearing.

VI. Conclusion

For the reasons set forth above, we conclude that the bankruptcy court did not err in its determination that there was no stay violation. We also conclude that this appeal is frivolous. Accordingly, the judgment below is AFFIRMED. Sanctions in an amount to be determined in the manner set forth above shall be awarded without further notice and hearing.