NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP No. MW 06-068

Bankruptcy Case No. 06-42478-JBR

WILLIAM H. SHAUGHNESSY,
Debtor.

UNITED STATES OF AMERICA, INTERNAL REVENUE SERVICE,
Appellant,

v.

WILLIAM H. SHAUGHNESSY,
Appellee.

Appeal from the United States Bankruptcy Court
for the District of Massachusetts
(Hon. Joel B. Rosenthal, U.S. Bankruptcy Judge)

Before
Votolato, de Jesús, and Vaughn,
United States Bankruptcy Appellate Panel Judges.

Peter Sklarew, Esq., on brief for Appellant.

William H. Shaughnessy, *pro se*, on brief for Appellee.

August 17, 2007

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de Jesús, U.S. Bankruptcy Appellate Panel Judge.

The United States of America (the "IRS") appeals from the bankruptcy court order denying its motion for relief from stay to proceed with a sale of the Debtor's residence in satisfaction of tax liens. Because we conclude that the bankruptcy court abused its discretion by misapplying 11 U.S.C. § 362(d)(1), and because the IRS demonstrated cause for lifting the stay, we reverse.

BACKGROUND

The Appellee ("the Debtor") filed a Chapter 7 petition on November 13, 2006. He scheduled his residence, valued it at $500,000, claiming it was completely exempt. The residence is encumbered by a mortgage in the amount of $43,000[1] and tax liens held by the IRS totaling $265,870.75.[2]

Shortly after the Debtor filed his petition, the IRS moved for relief from stay in order to proceed with a scheduled sale of the Debtor's residence. The motion sought relief for "cause" on the grounds that the IRS would be harmed by postponing the sale, that a sale would not harm the estate as Debtor's homestead exemption exhausted all equity in the property, leaving no interest for the estate and leaving an interest only for the tax lien preserved as to exempt property under 11 U.S.C. § 522(c). The motion detailed the following sequence of events showing the IRS's efforts, time and resources expended to collect on its lien. In May, 2005, the District Court

[1] State Street Bank also held a lien on the residence in the amount of $134,000 that was later avoided by the Debtor.

[2] Although the Debtor scheduled tax liens totaling $150,000, the IRS asserts the Debtor owes taxes for the years 1995 through 2004 amounting to $265,870.75.

permitted the IRS to levy upon the Debtor's residence.[3] The Debtor appealed that order, and filed an Offer in Compromise pursuant to 26 U.S.C. § 7122, requiring the IRS to delay the sale. In June, 2006, the Court of Appeals affirmed the District Court's order. In October, 2006, the IRS issued a notice of sale, scheduling the sale of the Debtor's residence for November 15, 2006. Two days before the sale date, Debtor filed his petition for bankruptcy under Chapter 7, and the IRS moved for relief from stay to proceed with the sale as scheduled.

The Debtor objected to the motion for relief on the grounds that the IRS had made no showing of lack of adequate protection or irreparable harm. The trustee did not object, stating that in light of the value of the residence and the combined encumbrances and homestead exemption, there appeared to be no equity available for unsecured creditors. The bankruptcy court denied the emergency motion without prejudice, authorizing the IRS to continue the sale process while the matter was decided on the merits, and set the matter for evidentiary hearing.

After the hearing, the bankruptcy court denied the IRS's motion, stating that the Debtor has equity in the property, and that nothing in the language of § 362(d)(1) suggests " that lack of equity for unsecured creditors, without more, is sufficient cause" for setting aside the automatic stay. The order further explained that the trustee's statement is not dispositive of the issue. The IRS filed a timely appeal.

JURISDICTION

We have jurisdiction to hear appeals from "final judgments, orders and decrees . . . or with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in

[3] The IRS stated it had provided the Debtor with various opportunities over the course of several years to reach a settlement and avoid the seizure of his home. App.'s Brief at 6 n.5.

cases and proceedings referred to the bankruptcy judges under § 157 of this title." 28 U.S.C. § 158(a); see also Fleet Data Processing Corp. v. Branch (In re Bank of New England Corp.), 218 B.R. 643, 645 (B.A.P. 1st Cir. 1998). "A decision is final if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" In re Bank of New England, 218 B.R. at 646. An interlocutory order "'only decides some intervening matter pertaining to the cause, and which requires further steps to be taken in order to enable the court to adjudicate the cause on the merits.'" Id. (quoting In re American Colonial Broad. Corp., 758 F.2d 794, 801 (1st Cir. 1985)).

An order denying relief from stay is a final, appealable order when it "decide[s] the relevant dispute between the parties." United States v. Fleet Bank of Mass. (In re Calore Express Co., Inc.), 288 F.3d 22, 34-35 (1st Cir. 2002); Caterpillar Fin. Serv. Corp. v. Braunstein (In re Henriquez), 261 B.R. 67, 68-69 (B.A.P. 1st Cir. 2001).

The Debtor argues the order is interlocutory, and that the Panel therefore lacks jurisdiction to hear this appeal, citing In re Henriquez, 261 B.R. at 67. In Henriquez, the parties disputed who held the senior security interest in a certain piece of equipment. Id. at 68-69. The bankruptcy court held a non-evidentiary hearing and denied the appellant's motion for relief without resolving all issues between the parties with respect to the equipment. Id. at 69. Under those circumstances, the Panel ruled the order was not final. Id.

We reject the Debtor's argument, because here the bankruptcy court resolved the only issue between the parties after an evidentiary hearing by denying the IRS's request to move forward with the sale of the residence. Consequently, the order on appeal is final as it ended the

litigation of the contested matter on the merits. In re Calore Express, 288 F.3d at 34-35; In re Bank of New England, 218 B.R. at 646.

STANDARD OF REVIEW

A bankruptcy court has considerable discretion in deciding whether to grant or deny relief from the automatic stay, and its decision should be disturbed only if there is an abuse of that discretion. Soares v. Brockton Credit Union (In re Soares), 107 F.3d 969, 973 n.4 (1st Cir. 1997); Peerless Ins. Co. v. Rivera, 208 B.R. 313, 314-15 (D.R.I. 1997). Abuse of discretion occurs when a court ignores important and relevant factors in making its decision, considers improper factors, or errs in balancing factors that were properly considered. Peerless Ins. Co. v. Rivera, 208 B.R. at 315.

DISCUSSION

The IRS moved for relief from stay pursuant to 11 U.S.C. § 362(d)(1)[4], which provides:

> (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay--
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> > (1) for cause, including the lack of adequate protection of an interest in property of such party in interest.

[4] The IRS argues that the bankruptcy court's statement regarding the Debtor's equity indicates it applied § 362(d)(2) instead of § 362(d)(1). The IRS's motion clearly sought relief under § 362(d)(1). Such relief may be denied if the Debtor shows there is an equity cushion favorable to the moving creditor. The undisputed facts in the instant case show any equity in the Debtor's home inured to his benefit under his claimed homestead exemption. The record does not indicate how the Debtor intended to use his equity cushion to ensure payment of the secured tax claim and obtain his "fresh start". The record does show Debtor insists that he is entitled to a court order requiring the IRS to submit the collection of its secured tax claim to mediation. However, the final order of the District Court authorizing the IRS to sell the residence militates against this request, and the Debtor does not respond to this argument, so that we consider he abandoned it. United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990); Ramallo Bros. Printing, Inc. v. El Día, Inc., 2007 WL 1732889 (1st Cir. 2007).

Under § 362(d)(1), cause exists when the harm that would result from a continuation of the stay would outweigh any harm that might be suffered by the debtor or the debtor's estate if the stay is lifted. Id. Courts have identified many factors to be considered in determining whether cause exists. Goya Foods Inc. v. Unanue-Casal (In re Unanue-Casal), 159 B.R. 90, 95-96 (D.P.R. 1993), aff'd, 23 F.3d 395 (1st Cir. 1994). The factors most relevant to our inquiry are: (1) whether the relief will result in a partial or complete resolution of the issues; (2) the lack of any connection with or interference with the bankruptcy case; (3) the interest of judicial economy and the expeditious and economical determination of litigation for the parties; and (4) the impact of the stay on the parties and the "balance of the hurt". Id. at 95-96.

The bankruptcy court's decision failed to discuss any of these factors, and did not evaluate the relative harms to the parties. Instead, the decision focused on the following two arguments raised by the IRS :

> The IRS, however, argues that it is entitled to relief from the automatic stay under 11 U.S.C. § 362(d)(1) for cause because there is no equity for unsecured creditors. Section 362(d)(1), however, simply speaks to the issue of whether there is "cause, including a lack of adequate protection." There is nothing in the language to suggest that lack of equity for unsecured creditors, without more, is sufficient cause. To accept the IRS's position would thwart the Debtor's fresh start. The IRS also argues that cause exists to terminate the automatic stay because the Chapter 7 Trustee does not object to relief from stay. . . . Not only is the result not required by the language of the Bankruptcy Code and would thwart the Debtor's right to a fresh start, the decision to grant relief is one entrusted to the Court, not a Chapter 7 trustee.
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> No evidence of bad faith was proffered by the IRS.

Appellant's Appendix Exhibit 4 at 1-3. While we do not disagree with these statements regarding the two factors that were considered (i.e. lack of equity for unsecured creditors and the "no objection" by the Chapter 7 trustee), there is nothing in the decision that indicates that the

bankruptcy court considered the other relevant factors such as: the balance of harms between the parties, the interest of judicial economy, and the lack of any real connection between the underlying dispute and the bankruptcy case.

The record of this contested matter demonstrates that harm to the IRS from a continuance of the stay outweighs any harm that might be suffered by the Debtor or the estate if the stay is lifted. First, the relief would result in complete resolution of the issue; the IRS would be allowed to move forward with the sale. Second, the sale would not interfere with the liquidation of the estate taking place in the bankruptcy case. Third, and most significantly, allowing the IRS to move forward with the sale--more than ***two years*** after the District Court entered its order permitting the IRS to levy upon the Debtor's residence--is in the interest of judicial economy, although it is perhaps a stretch to describe a sale at this point in the process as "expeditious" or "economical". Fourth, the stay harms the IRS more than lifting the stay harms the Debtor or the estate. The IRS holds a lien on the property that cannot be avoided, and as such the IRS will eventually collect on its lien. As the Debtor's homestead exemption exhausts all equity in the property, leaving nothing for unsecured creditors, allowing the IRS to move forward with the sale will not harm the estate. Forcing the IRS to continue the sale is only postponing the inevitable and is actually causing harm to the Debtor by eroding any equity in his home on account of the accruing interest on the IRS debt.

CONCLUSION

Accordingly, the Panel concludes that the IRS has demonstrated cause for lifting the stay, and that the bankruptcy court abused its discretion by misapplying 11 U.S.C. § 362(d)(1). We, therefore, **REVERSE** the bankruptcy court order denying the IRS's motion for relief from stay to

proceed with a sale of the Debtor's residence in satisfaction of tax liens, and **REMAND** the matter to the bankruptcy court for entry of an order consistent with this opinion. Pursuant to Fed. R. Bankr. P. 8014, $284.16 for the cost of two transcripts shall be taxed against the Appellee.