NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
FOR THE FIRST CIRCUIT

BAP NO. EP 08-085

Bankruptcy Case No. 07-20970-JBH
Adversary Proceeding No. 08-02006-JBH

GERARD ADRIEN GRANGER,
Debtor.

Bankruptcy Case No. 07-21047-JBH
Adversary Proceeding No. 08-02007-JBH
(consolidated with Adv. Pro. No. 08-02006-JBH)

STEPHEN GERARD GRANGER,
Debtor.

GERARD GRANGER and STEPHEN GRANGER,
Plaintiffs-Appellants,

v.

STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION,
Defendant-Appellee.

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

Before
Lamoutte, Hillman, and Boroff,
United States Bankruptcy Appellate Panel Judges.

E. Chris L'Hommedieu, Esq., on brief for Plaintiffs-Appellants.
Elizabeth J. Wyman, Esq., on brief for Defendant-Appellee.

May 6, 2009

Hillman, U.S. Bankruptcy Appellate Panel Judge.

The debtors, Gerard and Stephen Granger (the "Grangers"), filed adversary complaints in their respective bankruptcy cases to determine the dischargeability of debts owed to the Maine Department of Environmental Protection ("MDEP"). The parties filed cross-motions for summary judgment on the stipulated facts, and the bankruptcy court entered an order granting MDEP's motion for summary judgment and denying the Grangers' cross-motion. The Grangers appealed. For the reasons set forth below, we **AFFIRM IN PART** and **REVERSE IN PART.**

BACKGROUND

The material facts are undisputed. The Grangers, who are father and son, are the sole shareholders of Fine Finishes Antiques. In 2002, MDEP, an agency of the State of Maine, commenced a state court action against the Grangers and Fine Finishes Antiques alleging violations of various state environmental laws. The state court entered a Consent Order for Partial Summary Judgment, granting partial summary judgment against the Grangers and Fine Finishes Antiques, and determining them to be jointly and severally liable for all violations alleged in MDEP's complaint.

In 2004, the state court entered a Consent Order Regarding Remedies. The consent order established that MDEP had spent $30,112.30 on site investigation and expected to spend $6,724.40 more on remediation tasks, and that the Grangers were required to reimburse MDEP for those costs pursuant to 38 Me. Rev. Stat. Ann. § 1318-A. Pursuant to the consent order, the Grangers agreed to pay MDEP $36,836.70 in reimbursement costs (the "Reimbursement Debt"), plus a penalty of $40,000, $25,000 of which would be suspended (the "Suspended Penalty") subject to timely payment of the Reimbursement Debt and the first $15,000 of the penalty (the

"Unsuspended Penalty"). Pursuant to paragraph 3 of the consent order, the Grangers were required to remit monthly payments to MDEP for 130 consecutive months ($400 per month for 129 months, and $236.70 for the 130th month), for a total of $51,836.70. The consent order also provided: "Should the [Grangers] fail to make any payment due, the suspended penalty amount of $25,000 shall be automatically added to the remaining amount due, and the total shall become immediately due and owing."

The state court subsequently entered an Amended Consent Order Regarding Payments which revised the payment schedule by reducing the monthly amount and extending it over a longer term, subject to the same conditionally suspended $25,000 portion of the penalty. In the Stipulated Facts, the parties agreed that the Grangers "have made and continue to make payments as required by the Amended Consent Order."

Thereafter, the Grangers each filed a voluntary chapter 7 petition. They also filed adversary complaints alleging their debts to MDEP were dischargeable pursuant to § 523(a)(7). The bankruptcy court consolidated the adversary proceedings, and the parties filed cross motions for summary judgment on the stipulated facts. In an order dated October 8, 2008 ("Summary Judgment Order"), the bankruptcy court granted summary judgment against the Grangers and in favor of MDEP. The Grangers appealed.

JURISDICTION

Before addressing the merits of an appeal, the Panel must determine that it has jurisdiction, even if the issue is not raised by the litigants. See Boylan v. George E. Bumpus, Jr. Constr. Co. (In re George E. Bumpus, Jr. Constr. Co.), 226 B.R. 724 (B.A.P. 1st Cir. 1998). The Panel has jurisdiction to hear appeals from: (1) final judgments, orders and decrees; or (2) with leave of court, from certain interlocutory orders. 28 U.S.C. § 158(a); Fleet Data Processing Corp. v. Branch (In re Bank of New Eng. Corp.), 218 B.R. 643, 645 (B.A.P. 1st Cir. 1998). A decision is considered final if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment," id. at 646 (citations omitted), whereas an interlocutory order "only decides some intervening matter pertaining to the cause, and 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)).

Generally, a bankruptcy court order denying a motion for summary judgment is not a final order. See CRS Steam, Inc. v. Engineering Resources, Inc. (In re CRS Steam, Inc.), 233 B.R. 901 (B.A.P. 1st Cir. 1999). However, an order denying a party's motion for summary judgment that also grants an opposing party's cross motion for summary judgment is a final order because it ends the litigation on the merits. See Ragosa v. Canzano (In re Colarusso), 295 B.R. 166, 171 (B.A.P. 1st Cir. 2003), aff'd, 382 F.3d 51 (1st Cir. 2004).

STANDARD OF REVIEW

We review the bankruptcy court's findings of fact for clear error and conclusions of law *de novo*. See T.I. Fed. Credit Union v. DelBonis, 72 F.3d 921, 928 (1st Cir. 1995); Western Auto Supply Co. v. Savage Arms, Inc. (In re Savage Indus., Inc.), 43 F.3d 714, 719-20 n.8 (1st Cir. 1994). Generally, orders granting summary judgment are reviewed *de novo*, construing the record in the light most favorable to the nonmovant and resolving all reasonable inferences in that party's favor. See Gosselin v. Webb, 242 F.3d 412, 414 (1st Cir. 2001) (citing Landrau-Romero v. Banco Popular de Puerto Rico, 212 F.3d 607, 611 (1st Cir. 2000)); see also Jones v.

Svreck (In re Jones), 300 B.R. 133, 137 (B.A.P. 1st Cir. 2003); Rijos v. Vizcaya (In re Rijos), 263 B.R. 382, 388 n.5 (B.A.P. 1st Cir. 2001).

DISCUSSION

I. The Summary Judgment Standard

A motion for summary judgment in an adversary proceeding under § 523(a) to have a debt declared nondischargeable is governed by the same standards applicable to motions under Fed. R. Civ. P. 56. McCrory v. Spigel (In re Spigel), 260 F.3d 27, 31 (1st Cir. 2001) (citing Fed. R. Bankr. P. 7056). Summary judgment is appropriate when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law based on the pleadings, depositions, answers to interrogatories, admissions on file, and any affidavits." Thompson v. Coca-Cola Co., 522 F.3d 168, 175 (1st Cir. 2008); Fed. R. Civ. P. 56(c); see also Razzaboni v. Schifano (In re Schifano), 378 F.3d 60, 66 (1st Cir. 2004) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). "Once the moving party avers the absence of genuine issues of material fact, the nonmovant must show that a factual dispute does exist, but summary judgment cannot be defeated by relying on improbable inferences, conclusory allegations, or rank speculation." Maymi v. P.R. Ports Auth., 515 F.3d 20, 25 (1st Cir. 2008) (citing Ingram v. Brink's, Inc., 414 F.3d 222, 228-29 (1st Cir. 2005)).

II. Section 523(a)(7)

The Bankruptcy Code offers debtors, through discharge, "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt." Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934). "Exceptions to discharge are narrowly construed in furtherance of the Bankruptcy Code's fresh start policy . . . ." Palmacci v. Umpierrez, 121 F.3d 781, 786 (1st Cir. 1997).

Section 523(a)(7) provides:

> A discharge under section 727 . . . of this title does not discharge an individual debtor from any debt to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty . . . .

11 U.S.C. § 523(a)(7).

It is undisputed that the unpaid portion of the Reimbursement Debt does not fall within an exception to discharge and, therefore, is dischargeable. It is also undisputed that the unpaid portion of the penalty levied against the Grangers is nondischargeable under § 523(a)(7). The parties disagree, however, as to whether prepetition payments made by the Grangers should be allocated to the dischargeable Reimbursement Debt or the nondischargeable Penalty Debt.[1] They also disagree as to whether discharge of the unpaid portion of the Reimbursement Debt triggered imposition of the $25,000 Suspended Penalty when there has never been a payment default.

The bankruptcy court concluded as follows:

> As explained below, I conclude that the debtors' pre-bankruptcy payments apply, first to the remediation/ reimbursement component of their debt to [MDEP] and, second, to the penalty component. As a consequence, although the bankruptcy discharge eliminates a substantial portion of that debt, [the Grangers] remain obligated to pay penalties, including the portion of the penalty that was suspended on condition of paying the balance.

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[1] The dispute is significant because if the Grangers had paid $15,000 or more prepetition, and all payments were applied to the nondischargeable Unsuspended Penalty Debt, the Unsuspended Penalty Debt would be deemed paid and the entire Reimbursement Debt would be discharged. If, however, the prepetition payments were applied to the dischargeable Reimbursement Debt, then the $15,000 Unsuspended Penalty Debt would still be due.

The bankruptcy court also stated that: "Discharge of the approximately $22,000 unpaid cost portion does not constitute payment of that portion pursuant to the amended consent order, thus, the [M]DEP is free to treat the entire $40,000 penalty portion (less the amount paid post-petition) as due and owing." The Grangers argue that the bankruptcy court erred by: (1) allocating all prepetition payments to the dischargeable Reimbursement Debt and not to the nondischargeable Unsuspended Penalty Debt; and (2) concluding that the discharge of the Reimbursement Debt triggered imposition of the $25,000 Suspended Penalty.

A. Allocation of prepetition payments

Pursuant to the Consent Orders Regarding Remedies, the Grangers were required to make certain monthly payments to reimburse MDEP for site investigation and clean up costs. The Grangers were also required to pay a $40,000 penalty. If, however, the Grangers made all of the scheduled payments (the full Reimbursement Debt, plus the $15,000 Unsuspended Penalty Debt), the remaining $25,000 of the $40,000 penalty would be suspended. Failure to timely make any payment, however, would result in the full $40,000 penalty being immediately due and owing. The consent order did not specifically set forth how MDEP would allocate the scheduled monthly payments, and MDEP did not produce any evidence as to how the payments were actually allocated.

The Grangers argue that because MDEP did not credit the Grangers' prepetition payments against either the Reimbursement Debt or the Unsuspended Penalty Debt, the bankruptcy court should have resolved the resulting ambiguity against MDEP. As the bankruptcy court stated, the Grangers "overlook the construction to be given the consent decrees." Reviewing the consent decrees in question, it is clear that the parties intended that the Grangers pay the remediation/

reimbursement portion of the debt first, and that they were to pay the penalty portion *after* as punishment. The penalty portion is structured specifically to include the $25,000 Suspended Penalty in order to create an ongoing incentive for the Grangers' timely payment of the Reimbursement Debt. Accordingly it is illogical that the parties would have intended that the Grangers pay the Unsuspended Penalty Debt before payment of the Reimbursement Debt. To so conclude would negate the clear meaning and intention of the consent decrees.

The Grangers have not offered any evidence or cogent argument to the contrary. They opted to move for summary judgment on a stipulated record, and, therefore, cannot complain that the bankruptcy court had insufficient facts upon which to base its decision. When reviewing a case submitted on a stipulated record, the court must "review the record, draw such inferences as are reasonable, apply governing law, and enter the appropriate judgment." Bunch v. W.R. Grace & Co., 532 F. Supp. 2d 283, 287 (D. Mass. 2008), aff'd,555 F3d 1(1st Cir. Jan. 29, 2009). Here, the bankruptcy court reviewed the stipulated facts, drew reasonable inferences regarding the parties' intentions based on the language of the consent orders, applied § 523(a)(7) and entered judgment in favor of MDEP. Based on the foregoing, we find that the bankruptcy court did not err in concluding that all prepetition payments should be allocated first to the Reimbursement Debt and that any remaining Reimbursement Debt was discharged.

B. $25,000 Suspended Penalty

The Grangers also argue that the bankruptcy court erred in concluding that the discharge of the unpaid portion of the Reimbursement Debt triggered imposition of the Suspended Penalty, making the entire $40,000 penalty due and owing to MDEP. According to the Grangers, the Suspended Penalty could be imposed only if they failed to make their monthly payments on time, and it was undisputed that they had made, and continue to make, all their monthly payments timely. They also argue that because the unpaid portion of the Reimbursement Debt was discharged, that debt "effectively ceased to exist," and, therefore, failure to make payments on a discharged debt could not trigger the penalty.

The latter argument has no merit. A chapter 7 discharge only extinguishes personal liability on a debt and does not constitute payment or satisfaction of that debt. See In re Pecora, 297 B.R. 1, 3 (Bankr. W.D.N.Y. 2003) (citing Dewsnup v. Timm, 502 U.S. 410 (1992); Johnson v. Home State Bank, 501 U.S. 78 (1991)); see also Arruda v. Sears, Roebuck & Co., 273 B.R. 332, 350 (D.R.I. 2002) (noting that bankruptcy discharge does not eliminate the debt but discharges the personal obligation to pay money), aff'd, 310 F.3d 13 (1st Cir. 2002). Therefore, discharge of the unpaid portion of the Reimbursement Debt did not extinguish that debt - only the obligation to pay it. The fact that the debt was discharged in bankruptcy and the Grangers were no longer *obligated* to pay the outstanding portion of the Reimbursement Debt does not mean that the debt was *paid*.

On the other hand, the bankruptcy discharge alone did not trigger the imposition of the Suspended Penalty. The consent decrees did not list bankruptcy discharge as an event of default. The only stated trigger was a payment default. Pursuant to the plain language of the consent order, the Suspended Penalty would be triggered "should the [Grangers] fail to make any payment due." That event of default has not occurred. The parties have stipulated that the

Grangers continue to remit monthly payments to MDEP, and MDEP continues to accept such payments.[2] And the Grangers are free to continue doing so. See 11 U.S.C. § 524(f).

Based on the foregoing, we conclude that the bankruptcy court erred in concluding that the triggering event occurred by virtue of the bankruptcy discharge alone and that the $25,000 Suspended Penalty is now due and owing. But, while the Grangers are not personally obligated to pay the Reimbursement Debt and may continue to do so as long as they wish, if those payments cease, the Suspended Penalty will then be triggered and become due and owing to MDEP as a nondischargeable debt.

CONCLUSION

For the reasons set forth above, the Summary Judgment Order is **AFFIRMED IN PART** and **REVERSED IN PART**. We affirm the bankruptcy court's conclusion that all prepetition payments were intended to be allocated first to the Reimbursement Debt, that any remaining Reimbursement Debt was discharged, and the unpaid portion of the penalty is nondischargeable; however, we reverse the bankruptcy court's conclusion that the triggering event has occurred and that the $25,000 Suspended Penalty is now due and owing to MDEP.

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[2] The Grangers' counsel represented at oral argument that the Grangers continue to make timely monthly payments even after the unpaid portion of the Reimbursement Debt was discharged. MDEP's counsel did not refute that statement.