[NOT FOR PUBLICATION]

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE FIRST CIRCUIT

BAP No. PR 96-010

IN RE ALBERTO A. DAPENA HILERA

ALBERTO A. DAPENA HILERA,
Plaintiff/Appellee

v.

TATO TRUCK SALES, INC. and
HORACIO MALDONADO MIRANDA,
Defendants\Appellants

Appeal from the United States Bankruptcy Court
for the District of Puerto Rico
[Hon. Enrique S. Lamoutte, Bankruptcy Judge]

Before

VOTOLATO, Chief Judge and KENNER and VAUGHN, Bankruptcy Judges.

Jose Ramon Cintron, San Juan, Puerto Rico, was on brief for appellants.

Charles A. Cuprill-Hernandez, with whom Charles A. Cuprill-Hernandez Law Offices, Ponce, Puerto Rico, was on brief for appellee.

July 21, 1997

VOTOLATO, C.J. Tato Truck Sales, Inc. and Horacio Maldonado Miranda (hereinafter "Tato Truck"), appeal an order of the Bankruptcy Court for the District of Puerto Rico assessing damages against them for a willful violation of the automatic stay, 11 U.S.C. § 362(h). The bankruptcy court found that Tato Truck, after making repairs and rendering services, unlawfully retained the Debtor's fuel truck for twenty-eight months, resulting in damages of $91,500.

For the reasons set forth herein, we affirm the bankruptcy court's findings, except as to damages, which are adjusted downward to $36,250.

FACTS

On February 9, 1993, Alberto A. Dapena Hilera ("Dapena"), a private fuel delivery contractor, brought his 1989 International fuel truck to Tato Truck for replacement of the engine. The work was completed within one month, at a total cost of $7,500. Dapena did not pay for the repairs, and under Puerto Rico law[1] Tato Truck refused to release the vehicle. On October 8, 1993, Dapena filed a Chapter 11 case, but did not list Tato Truck either as a creditor or as a custodian of the truck. It is undisputed that Tato Truck did not receive notice of Dapena's bankruptcy until June 20, 1994, when it received a letter from Dapena's counsel demanding return of the truck. Tato Truck did not return the vehicle, and on January 10, 1995, Dapena instituted an adversary proceeding under 11 U.S.C.

[1] The statute upon which Tato Truck relied is 31 L.P.R.A. § 4133, which states: "Retention of work as pledge for payment-- A person who has executed a work on personal property has the right to retain the same as a pledge until he is paid therefor."

§§ 542 and 362(h) seeking possession and damages for loss of income.

At a pretrial conference held on June 23, 1995, the parties were ordered to file a stipulation, within 20 days, regarding turnover of the truck to the Debtor. *See* Minutes of Proceeding, Record at 56. On July 5, 1995, the truck was returned to Dapena, however, the parties never filed the stipulation as ordered. Subsequently, the court issued an order to show cause for failure to file the stipulation. In response, Tato Truck informed the court that the truck had been returned and that the controversy was therefore moot. Thereafter, the adversary proceeding was dismissed. After learning that his Complaint was dismissed, Dapena filed a motion for reconsideration on the ground that his claim for damages resulting from the stay violation had not been addressed. On March 16, 1996, the Bankruptcy Court granted the Debtor's Motion for Reconsideration and reopened the adversary proceeding, and a hearing on damages was scheduled for May 15, 1996. Alleging lack of notice *and* a scheduling conflict, Tato Truck failed to appear at the hearing, which was held notwithstanding its request for a continuance. The Bankruptcy Judge found that the undisputed evidence established loss of income of $3,500 per month. Taking into account the retention of the truck for 29 months, minus one month for repairs, less $7,500 owed for repairs, the Bankruptcy Court found that Tato Truck was liable to Dapena for actual damages in the amount of $91,500.[2]

DISCUSSION

[2] Based on these numbers, the lost income should be $90,500; however, any arithmetic error is moot because we recalculate the damage award.

A. Tato's Motion to Continue the Hearing on Damages

The first issue on appeal is whether the Appellants were denied due process, and whether the Court abused its discretion in denying Tato Truck's emergency motion to continue the hearing on damages. Appellants' arguments are rejected as to both items.

On April 1, 1996, at the conclusion of the Chapter 11 confirmation hearing, the Bankruptcy Court reminded Debtor's counsel that the issue of damages in the adversary proceeding was still pending, and ordered him to file a statement detailing the damages claimed, with a copy to counsel for Tato Truck. *See* Appendix to Appellants' Brief, p. 72. Additionally, the Court ordered that the minutes of the confirmation hearing be sent to all parties in the adversary proceeding. *Id.* The minutes, which contained the May 15, 1996 hearing date, were mailed to Tato Truck's counsel on April 10, 1996, *id.*, and on April 19, 1996, Dapena filed its statement of damages, with a copy to Tato Truck. *See* Certificate of Service, Appendix to Appellee's Brief, p. 5.

On May 14, 1996, counsel for Tato Truck and Dapena were contacted by the court staff to determine if the hearing on damages, scheduled for the following day, was still a contested matter. This inquiry prompted several phone calls between counsel and appears to have resulted in confusion as to whether the hearing had been postponed. On May 15, 1996 (the morning of the hearing), the court confirmed by telephone that the matter was still scheduled for hearing, but due to alleged confusion of the parties, the hearing was delayed from 9:00 a.m. to 2:00 p.m.

At the same time the Bankruptcy Judge was trying to accommodate the parties as to the time of the hearing, Tato Truck filed an

emergency motion requesting a continuance, alleging that it had not received notice of the hearing, *and* that counsel had a previous commitment to appear at the District Court of Puerto Rico at 9:00 a.m.

At 2:00 p.m., the Bankruptcy Court proceeded with the hearing, first addressing Tato Truck's emergency motion for continuance. Finding that due notice had been given more than a month in advance of the hearing, and that Tato Truck had a meaningful opportunity to rebut the damage claim, the request for continuance was denied.

Whether to grant a request for continuance is a matter within the discretion of the trial judge, *Ungar v. Sarafite*, 376 U.S. 575, 589 (1964), and is considered a basic part of the court's inherent power to control its docket and to facilitate the timely and orderly disposition of cases. *U.S. v. Waldman*, 579 F.2d 649, 653 (1st Cir. 1978). The denial of a continuance will not be disturbed on appeal absent a finding that the trial court abused its discretion. Such discretion, however, is not unlimited, *Loinaz v. EG & G, Inc.*, 910 F.2d 1, 6-7 (1st Cir. 1990). An abuse of discretion occurs when, in light of a justifiable reason for delay, a court insists on blind adherence to expediency. *E.g. Chandler v. Fretag*, 348 U.S. 3, 75 S.Ct. 1, 99 L.Ed. 4 (1954).

Noting the absence of a standardized test, the First Circuit has looked to several factors in considering whether a decision was an abuse of discretion, including the trial court's interest in managing its calendar, and whether undue prejudice to appellants' case resulted. *Loinaz*, 910 F.2d at 6-7. *See also U.S. v. Hastings*, 847 F.2d 920, 924 (1st Cir.) *cert. denied*, 488 U.S. 925

(1988)(an abuse of discretion occurs when a relevant factor that should have been given significant weight is not considered, when an irrelevant or improper factor is considered and given significant weight, or when all proper and no improper factors are considered, but the court in weighing those factors commits a clear error of judgment)(citations and quotations omitted). None of the foregoing factors are present.

In this case, ample preparation time was provided, and the request for continuance was not made until the last minute. Under these circumstances, denial of the continuance was well within the discretion of the court. *See* 9 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 2353 (2d ed. 1995) and the cases cited therein.

Clearly, every denial of a continuance is not violative of due process, and so the circumstances of each case must be considered to determine whether the denial was so arbitrary and capricious so as to violate a party's rights. *Ungar*, 376 U.S. at 575. Notice and a meaningful opportunity to be heard satisfy due process requirements. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542, 105 S.Ct. 1487, 1492, 84 L.Ed.2d 494 (1985).

There is nothing in the record to show that Appellants' due process rights were violated, and while a judgment may be collaterally attacked and due process found lacking where notice is shown to be insufficient or service defective, the manner of service has not been challenged in this case.

The allegation that notice was not received, without more, is not sufficient to rebut a presumption to the contrary. Although Appellants attempt to bolster their assertion with an affidavit

signed by counsel's secretary claiming that the last item received in the case was Dapena's motion for reconsideration filed on January 19, 1996, said statement is neither persuasive nor credible in light of the fact that counsel's mailing address remained unchanged throughout the case, and that all other notices were received up to that time.

Tato Truck also alleges denial of its due process rights when the court "adjudicat[ed] Appellants' liability under 11 USC §362, in their absence, at the hearing on confirmation of Appellee's Chapter 11 Plan . . . ." The minutes of the confirmation hearing clearly reveal that nothing was adjudicated in Tato Truck's absence. *See* Appendix to Appellants' Brief, p. 72. When the Court scheduled the hearing on damages and ordered Dapena to file a detailed statement of its claim, it was merely doing docket housekeeping of ministerial items. The issue of liability had already been determined adversely to Tato on June 23, 1995. Tato's due process argument is clearly without merit and borders on being frivolous.

B. The Award of Damages

Tato's final point on appeal is that the Bankruptcy Court's award of damages is excessive and not supported by the evidence. We agree. The record does support the Bankruptcy Court's findings: (1) that Tato Truck wilfully violated the automatic stay by retaining the truck after learning of the bankruptcy; (2) that Dapena sustained damages as a result of being deprived of the use of the vehicle; and (3) that the damages amounted to $3,500 per month. We take issue, however, with the number of months for which the court awarded damages.

We review the Bankruptcy Court's application of the law *de novo* and will overturn findings of fact only if clearly erroneous. *Jeffrey v. Desmond*, 70 F.3d 183, 185 (1st Cir. 1995); *In re SPM Mfg. Corp.*, 984 F.2d 1305, 1311 (1st Cir. 1993).

Section 362(h) of the Code states that: "An individual injured by any wilful violation of a stay provided by the section shall recover actual damages, including costs and attorney's fees, and in appropriate circumstances, may recover punitive damages." 11 U.S.C. § 362(h). While the bankruptcy court's finding that Tato Truck's retention of Dapena's vehicle constituted a wilful violation of the automatic stay was not the subject of a separate judgment, the record clearly indicates that liability was established.[3]

The minutes of the June 23, 1995 pretrial conference in the adversary proceeding contain the following Order:

> The parties are hereby granted twenty (20) days to file a stipulation. Upon failure to file the stipulation defendant should show cause why judgment should not be entered in favor of plaintiff pursuant to this Court's Opinion and Order entered in Adversary No. 90-0073, attached to this order.

Record at p. 56. Prior to the pre-trial conference the parties filed a "Proposed Pre-Trial Order," containing, *inter alia*, "statements of admitted facts," "statements of ultimate facts in dispute," and "theories relied upon by the parties." Appendix to Appellants' Brief, pp. 49-55. In the Pre-trial Order the only

[3] While Appellants' argument encompasses broad sweeping statements that they are not liable for violating the automatic stay, not a single legal theory is advanced to support this contention. Moreover, it appears from the record that liability was not challenged in the Bankruptcy Court. Accordingly, we review the record below to determine whether the Bankruptcy Court's findings are clearly erroneous, in relation to the issues raised before the Bankruptcy Court.

defense raised by Tato Truck to the charge that it wilfully violated the automatic stay is that its actions were "unintentional," i.e., that it acted pursuant to 31 L.P.R.A. § 4133, which permits retention of personal property until work performed on the property is paid in full. *See* Note 1, *supra*.[4] Additionally, admitted fact number 4 states: "Defendants have refused to deliver the stated truck to Plaintiff, indicating that they will not do so until such time as plaintiff satisfies Defendants the amount of $7,500 for the aforestated repairs, which amount constitutes a prepetition claim." Appendix to Appellants' Brief, p. 52.

In re Velasco Rentals and Leasing, Inc., BK No. B-89-00666, AP No. 90-0073, slip op. at 4-5 (Bankr. D.P.R. Feb. 21, 1991), appended to the June 23, 1995 Minutes and relied upon by the Bankruptcy Court in ordering the parties to file a stipulation returning the truck to the Debtor, is directly on point. There, the Bankruptcy Court held that a creditor who performs pre-petition services on the debtor's personal property has an unsecured claim for the amount owed, and retention of property under 31 L.P.R.A. § 4133 does not impart custodial status or a security interest in the property. *Velasco* also stands for the proposition that a creditor's subsequent or continued post-petition retention of estate property pursuant to 31 L.P.R.A. § 4133 violates the automatic stay. The circumstances in this case do not vary substantially.

[4] Tato Truck also asserts, without citation, that the Debtor's failure to include the truck as an asset in his schedules somehow bars his claim against Tato. This argument is totally without merit, and requires no discussion.

It is undisputed that the truck is property of the estate as defined by 11 U.S.C. § 541(a)(1).[5] It is also well established that violation of the automatic stay, Section 362(a)(3),[6] occurs when a creditor continues to hold property of the estate post-petition even though the initial pre-petition retention was lawful. *Knaus v. Concordia Lumber Co., Inc. (In re Knaus)*, 889 F.2d 773, 774 (8th Cir. 1989); *Putnam v. Rymes Heating Oils, Inc. (In re Putnam)*, 167 B.R. 737, 740 (Bankr. D.N.H. 1994); *Abrams v. Southwest Leasing & Rental, Inc. (In re Abrams)*, 127 B.R. 239, 242 (9th Cir. BAP 1991). A lawful prepetition detention of property becomes an illegal seizure once notification of the debtor's bankruptcy is received by the creditor, and is subject to the turnover provision of section 542 of the Bankruptcy Code.[7] *E.g.*

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[5] 11 U.S.C. § 541(a)(1) provides in pertinent part:
The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
(1) . . . all legal or equitable interests of the debtor in property as of the commencement of the case.

[6] 11 U.S.C. § 362(a)(3) provides:
Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Protection Act of 1970, operates as a stay, applicable to all entities, of --
(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate; ...

[7] 11 U.S.C. § 542(a) states:
Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title . . . shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

Knaus, 889 F.2d at 776. Failure to voluntarily turnover property of the estate to the debtor or trustee upon notification of the bankruptcy constitutes a wilful violation of the automatic stay under 11 U.S.C. § 362(h). *E.g. Abrams*, 127 B.R. at 242-43 (§ 362(h) provides the remedy for failure to turn over property of the estate pursuant to § 542); 3 Lawrence P. King et al., *Collier on Bankruptcy* ¶ 362.02 (15 ed. 1997).

In determining whether Tato Truck's retention of the truck was wilful under Section 362(h), two elements must be present: 1) the creditor must have had knowledge of the bankruptcy filing; and 2) the act which violated the stay must have been intentional. *Putnam*, 167 B.R. at 740 (rejecting the narrow definition that creditor's action must be deliberate and intentional with knowledge that the act is in violation of the stay). *See also Johnson Envtl. Corp. v. Knight (In re Goodman)*, 991 F.2d 613, 618 (9th Cir. 1993); *Crysen/Montenay Energy Co. v. Esselen Assoc. (In re Crysen/Montenay Energy Co.)*, 902 F.2d 1098, 1105 (2d Cir. 1990); *Cuffee v. Atlantic Bus. & Community Dev. Corp. (In re Atlantic Bus. & Community Dev. Corp.)*, 901 F.2d 325, 329 (3d Cir. 1990); Budget Serv. Co. v. Better Homes, Inc., 804 F.2d 289, 290 (4th Cir. 1986).

It is undisputed that: (1) Tato Truck was not listed on the Debtor's schedules; and (2) Tato Truck first received notice of Dapena's bankruptcy on June 20, 1994, when the Debtor sent Tato Truck a letter demanding immediate turnover of the truck. After June 20, 1994, there is no doubt that a violation of the automatic stay occurred and that the violation was wilful.

While not argued or briefed, the Proposed Pretrial Order indicates that appellants relied on local law to justify their retention of the property, on the ground that any violation was not intentional. Whether the violation of the stay was intentional or otherwise is inconsequential.[8] *Crysen*, 902 F.2d at 1105 (where there is knowledge of the bankruptcy filing and the existence of a stay, any deliberate act taken in violation of the stay justifies a monetary award). As to the amount of damages, that determination is reviewed for clear error. *Reilly v. U.S.*, 863 F.2d 149, 166 (1st Cir. 1988) (once the fact of damage is established, the trial judge . . . has much latitude in fixing the amount) (citations and quotations omitted).

The $3,500 monthly damage claim for loss of income due to retention of the truck is supported by the debtor's testimony. We are unable to say the same, however, as to the bankruptcy court's finding that damages began to accrue one month after the truck was delivered for repairs. First, at that time the Debtor had not yet filed for bankruptcy, and more importantly, the evidence is that Tato Truck did not receive notice of the bankruptcy until June 20, 1994. The truck was returned to Dapena some twelve months later, on July 5, 1995. Taking into account the retention of the truck for twelve months and fifteen days and the undisputed offset of $7,500 for the repairs made by Tato Truck, we calculate that Dapena sustained compensable damages in the amount of $36,250 on account of Tato Truck's violation of the automatic stay. Accordingly, the

[8] Although Appellants do not argue ignorance of the law, we note that *In re Velasco* was decided in 1991 and, to our knowledge, has not been overruled.

bankruptcy court's order is AFFIRMED, except that the damage award is MODIFIED to $36,250.

SO ORDERED.