FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit

September 14, 1998

Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE KAREN MARIE KLINE, Debtor.	BAP No. NM-98-009
KAREN MARIE KLINE, Appellant, v. JEFFREY LEWIS, Appellee.	Bankr. No. 97-13074 Chapter 11 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the District of New Mexico

Before CLARK, BOHANON, and PEARSON, Bankruptcy Judges.

BOHANON, Bankruptcy Judge.

After examining the briefs and appellate record, the Court has determined unanimously that oral argument would not materially assist in the determination of this appeal. See Fed. R. Bankr. P. 8012; 10th Cir. BAP L.R. 8012-1(a). The case is therefore ordered submitted without oral argument.

APPELLATE JURISDICTION

The parties have not raised any issues regarding our jurisdiction over this appeal. Nonetheless, we must independently assess whether we have jurisdiction

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* This order and judgment has no precedential value and may not be cited, except for the purposes of establishing the doctrines of law of the case, res judicata, or collateral estoppel. 10th Cir. BAP L.R. 8010-2.

to hear this appeal. See Bender v. Williamsport Area School District, 475 U.S. 534, 541 (1986) (federal appellate court must satisfy itself that it has jurisdiction over an appeal even if the parties concede it). Accord, City of Chanute v. Williams Natural Gas Company, 31 F.3d 1041, 1045 n.8 (10th Cir. 1994), cert. denied, 513 U.S. 1191 (1995).

The Bankruptcy Appellate Panel of the Tenth Circuit has general appellate jurisdiction to hear appeals from the bankruptcy courts within the Tenth Circuit, unless the appellant, at the time of the filing of the appeal, or any other party, within thirty days of service of the notice of appeal, elect to have the district court hear the appeal. 28 U.S.C. § 158; 10th Cir. BAP L.R. 8001-1(a) & (d). In this matter, neither the appellant nor the opposing party made such an election. Thus, this court has general appellate jurisdiction.

A decision is ordinarily appealable if it is a final decision. See 28 U.S.C. § 158; 28 U.S.C. § 1291. 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.'" Quackenbush v. Allstate Insurance Company, 517 U.S. 706, 712 (1996) (quoting Catlin v. United States, 324 U.S. 229, 233 (1945)).

Also, with regard to stay orders, an order for relief from a stay order is final and, thus, appealable. Franklin Savings Association v. Office of Thrift Supervision, 31 F.3d 1020, 1022 n.3 (10th Cir. 1994). As this matter concerns relief from a stay order and as there is no additional judicial activity required of the bankruptcy court, this order is final and appealable.

Finally, a notice of appeal must be filed with the clerk within ten days of the date of entry of the order appealed. However, the bankruptcy court has the authority to extend the time for filing the notice of appeal. Fed. R. Bankr. P. 8002. This appeal was timely filed.

Therefore, this Court has jurisdiction to hear this appeal.

STANDARD OF REVIEW

The Bankruptcy Appellate Panel may affirm, modify, or reverse a bankruptcy court's judgment, order, or decree or remand with instructions for further proceedings. Fed. R. Bankr. P. 8013. "For purposes of standard of review, decisions by judges are traditionally divided into three categories, denominated questions of law (reviewable de novo), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion')." Pierce v. Underwood, 487 U.S. 552, 558 (1988).

BACKGROUND

The debtor-appellant, Karen Marie Kline, has been pro se throughout this bankruptcy case.

The debtor-appellant, Karen Marie Kline, has a property interest in a condominium in which, at all relevant times, she never resided but kept as an investment property. The appellee, Jeffrey Lewis, held a mortgage on the condominium. The appellant defaulted on the mortgage and the appellee obtained a foreclosure judgment. Thereafter, he purchased it at a judicial sale. On May 27, 1997, after the sale, but prior to the entry of the order confirming the sale, Kline filed for protection under Chapter 11.

In June of 1997, without modifying the automatic stay, Lewis obtained a state court order confirming the foreclosure sale and took possession of the condominium. Lewis testified that the property was in great disrepair due to the lack of maintenance by Kline, and that it had been vacant since the spring of 1996. Lewis also testified that he made approximately $3,000 in repairs and, commencing in September of 1997, rented it to a third party for a term of six months for $595 per month and $55 per month for the homeowner's association dues. A security deposit was also required. Additionally, Lewis paid approximately $4,200 in back taxes, homeowner's fees, and assessments.

Subsequently, Kline appealed the confirmation order of the sale of the property to the state court of appeals. The state court of appeals set the order aside, finding that it had been entered in violation of the automatic stay. Kline then demanded of Lewis, by letter, that he turn over all the rents he had collected on the property. However, Kline did not seek any relief from the bankruptcy court.

Lewis then moved the bankruptcy court for an order declaring that the automatic stay did not apply or, in the alternative, for relief from the automatic stay. At the hearing, Lewis dropped his argument that the stay did not apply and argued that it should be lifted for cause based on the lack of adequate protection and the debtor-appellant's failure to offer the same. He asked for, at a minimum, the amount he had spent on back due debts and repairs, totalling $7,200, and ongoing adequate protection payments on the first of each month to ensure against the further decline of the property. He also requested a "drop dead" clause upon a ten-day delinquency of any adequate protection payment and for the failure to confirm a plan within a given period.

By order filed on January 20, 1998, the bankruptcy court denied Lewis' motion in part and granted it in part. The court held that: (1) the automatic stay would be continued; (2) Lewis was entitled to retain, and the tenant was to pay to Lewis, all rents due under the lease which was scheduled to terminate at the end of February 1998; (3) Lewis was required to pay the homeowner's dues or condominium assessments due prior to the end of February, and all tax assessments due as of 1997; (4) Lewis was entitled to the rent payments to compensate for the repairs made to the property and the expenses he had incurred; (5) the debtor-appellant was entitled to immediate possession of the property, subject to the terms of Lewis' tenant's lease; (6) commencing March 1, 1998, the debtor-appellant was required: to pay Lewis $300 per month as adequate

protection for his interest in the property; to pay Lewis all homeowner's dues or condominium assessments coming due on or after March 1, 1998; and to provide Lewis proof of payment of the latter; (7) if the debtor-appellant defaulted in any of the payments that she was required to make, the automatic stay would terminate without further notice upon the filing of an affidavit by counsel for Lewis that such default had persisted for a period of ten days following the due date of such payment; and (8) the stay would automatically terminate with respect to the property on October 1, 1998, unless on or before that date the court has confirmed a Chapter 11 plan in this matter.

The debtor-appellant filed a motion for reconsideration which the bankruptcy court summarily denied on January 28, 1998. Subsequently, the debtor-appellant appealed paragraphs (2), (3), (4), (6), and (8) listed above, as delineated in her corrected notice of appeal.

The debtor-appellant also filed several motions, all of which were addressed by the motions panel. However, her motion to correct and supplement the record should be addressed here. This motion was denied as the debtor-appellant was attempting to place before this Court a number of documents which had not been entered into evidence before the bankruptcy court, including a Supplemental Appendix. Pages 1-46 of the Supplemental Appendix were subsequently stricken. However, she was allowed to add the bankruptcy docket sheets and transcripts of the hearing, which begin on page 47 of the Supplemental Appendix.

ANALYSIS

The appellant first asks this Court to review whether appellee's mortgage still exists and whether the order of the bankruptcy court should have specified the previously established mortgage payments rather than the court-ordered rate of $300. Appellant also notes that she filed a Motion to Clarify That Lewis'

Mortgage Has Not Been Extinguished.

It is a well established principle of law that an issue not raised before the trial court will not be considered before an appellate court. See Garrick v. Weaver, 888 F.2d 687, 695 (10th Cir. 1989); Blondo v. Bailar, 548 F.2d 301, 305 (10th Cir. 1977). In this matter, the appellant did not raise these issues before the trial court and, thus, it is inappropriate for this Court to consider them. Moreover, appellant has withdrawn her motion to clarify.

Second, the appellant raises the issues of whether the bankruptcy court erred in allowing the appellee to keep the postpetition rental payments and in ordering the payment of $300 per month to the appellee as adequate protection.

Adequate protection is permitted to protect an entity's interest in property held by a trustee where the entity is prohibited from enforcing its interest due to the automatic stay. 11 U.S.C. § 361; 3 Collier on Bankruptcy, ¶ 361.02 (Lawrence P. King ed., 15th ed. rev. 1998). Periodic payments are one suggested form of adequate protection. 11 U.S.C. § 361; 3 Collier on Bankruptcy, ¶ 361.03[2] (Lawrence P. King ed., 15th ed. rev. 1998).

In this matter, it is clear from the record that the appellee has an interest in the property in question (i.e., his mortgage and foreclosure judgment) which he cannot enforce because of the automatic stay. It is also clear from the record that the award of the monthly rental payments and the $300 payments were done in contemplation of providing the appellee with adequate protection for his interest in the property.

Adequate protection is a question of fact and any award of adequate protection turns upon the value to be protected. MBank Dallas, N.A. v. O'Connor (In re O'Connor), 808 F.2d 1393, 1396-97 (10th Cir. 1987). Thus, because it is a question of fact, this Court will reverse the bankruptcy court only if the decision was clearly erroneous. Id.

As a matter of law, it is the trustee's or the debtor-in-possession's responsibility to propose adequate protection or to offer evidence that the creditor is adequately protected. Travelers Insurance Company v. American Agcredit Corporation (In re Blehm Land & Cattle Company), 859 F.2d 137, 139 (10th Cir. 1988) (per curiam). The burden of proof of these issues is, by law, on the appellant. See 11 U.S.C. § 362(g)(2).

In this matter, the appellant did not present any such proposal or evidence to the bankruptcy court. Thus, pursuant to 11 U.S.C. § 362(d)(1), the bankruptcy court could have terminated the automatic stay and allowed the appellee to take possession of the property. However, the bankruptcy court chose not to do so, possibly in deference to the appellant's pro se status. Instead, the appellant was permitted to retain possession of the property and the appellee was awarded adequate protection in the form of periodic payments and retention of the rent.

Thus, the question must be examined whether the bankruptcy court's award of adequate protection was clearly erroneous. Lewis testified that he had spent approximately $7,200 in his postpetition investment on the property. The bankruptcy court awarded, at most, approximately $5,970 as adequate protection.[1] Although this figure does not equal Lewis' testified investment, this Court cannot say that it was clearly erroneous. One factor that could have been considered by the bankruptcy court was that Lewis had violated the automatic stay. Another factor could have been the credibility of the testimony and evidence presented by

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[1] This figure is arrived at by multiplying the number of months of the lease by the rent (6 X 595 = $3,570) and adding the result to the number of months of payments time the rate of payment (8 X 300 = $2,400) which yields $5,970. The number of months of payment is arrived at by calculating the number of months from the date of inception (March 1st) to the date that the automatic stay would lift (October 1st) as the creditor could then enforce his interest in the property. However, this figure would be reduced if a plan was approved prior to October 1st, as stated in the bankruptcy court's order. See In re Campbell, 205 B.R. 288 (Bankr. D. Colo. 1997) (holding that adequate protection payments have no application once a plan has been confirmed).

Lewis, which is a consideration within the purview of the bankruptcy court.

Although neither the appellant nor the appellee did introduced any evidence of the actual value of the property in question, it cannot be argued that the adequate protection granted by the bankruptcy court was excessive. Indeed, the adequate protection that the court did award was less than the investment made by the appellee. Thus, the lack of any establishment of value to the property is not material to the validity of the order of the bankruptcy court or to the disposition of this appeal.

In any event, this Court notes that, as a matter of equity, a bankruptcy court has considerable discretion in balancing the factors in awarding adequate protection. Further, any such determination of adequate protection is to be done on a case-by-case basis. MBank Dallas, N.A. v. O'Connor (In re O'Connor), 808 F.2d 1393, 1395-97 (10th Cir. 1987); 3 Collier on Bankruptcy ¶ 361.03[4][b] (Lawrence P. King ed., 15th ed. rev. 1998)

As the amount invested in the property by the appellee constitutes some value and the amount of adequate protection awarded was less than the amount invested, it appears that the award of the adequate protection was not clearly erroneous, despite the dearth of any evidence that there was any value in the property, prepetition. Moreover, the appellant has failed to present any argument which would illustrate that the bankruptcy court has clearly erred. However, each of the appellant's arguments will be addressed.

The appellant claims that the order of the bankruptcy court, by allowing the appellee to keep the rents, is contrary to the ruling of the state appellate court. This argument is erroneous, as the order of the bankruptcy court clearly states that the stay will continue, giving full weight to the state appellate court ruling.

The appellant also claims that the rents should not have been awarded to the appellee because they are property of the estate. However, the appellant

presents no arguments in support of this argument. Even granting the position that the rents are part of the estate, appellant presents no arguments or authorities showing that the bankruptcy court must subordinate the appellee's right to adequate protection to maximizing the value of the estate. Indeed, it is well established that funds of the estate are used in payment of legitimate estate expenses (e.g., administrative expenses). Thus, this argument is meritless.

The appellant maintains that there is substantial evidence that the appellee had misrepresented a number of facts to the bankruptcy court. However, no evidence of these alleged misrepresentations was presented to the bankruptcy court. The appellant attempted to enter evidence of these allegations to this Court, but, as previously explained, this is not the appropriate time or forum and the offered documents were stricken. Thus, this argument must also be rejected.

The appellant also argued that, pursuant to 11 U.S.C. § 542, she has a right to have the rents placed into the estate. However, the appellant presented no argument or authority in her brief in support of this claim. Further, she did not initiate an action seeking turnover under 11 U.S.C. § 542 and Fed. R. Bankr. P. 7001(1). Moreover, even if the appellant's argument was timely, properly commenced, and allowed by the bankruptcy court, her right to turnover under 11 U.S.C. § 542 would still have been conditioned on Lewis receiving adequate protection of his interest in the property. See United States v. Whiting Pools, Inc., 462 U.S. 198, 207 (1983); World Communications, Inc. v. Direct Marketing Guaranty Trust (In re World Communications, Inc.), 72 B.R. 498, 502 & n.12 (D. Utah 1987). Thus, even if the rents were turned over to the estate, the same amount as the rents would have likely been paid to the appellee as adequate protection, and the estate would have been reduced by the same amount. Thus, this argument has no merit.

The appellant also argues that the rents are essential to her ability to

reorganize. There is no evidence in the record which would support this position. Indeed, until the appellee repaired the property, the appellant was, apparently, receiving nothing from it. Further, this argument is premised on the idea that she has no obligation to the appellee, who is a secured creditor. This is obviously incorrect.

The appellant apparently also argues that the failure of Lewis to turn over the rents to the estate violated the status quo and caused her to incur significant expense. But, as previously explained, she never commenced an action pursuant to 11 U.S.C. § 542. Further, the appellee, Lewis, requested relief from the automatic stay from the bankruptcy court and he acted in accordance with the order of the bankruptcy court. In this situation, the bankruptcy court, by ordering that the property be returned to the appellant, in fact, maintained the status quo. The rents were not a part of the status quo, prepetition, as the appellant had let the property remain vacant. Moreover, the expense that the appellant claimed was not presented to the bankruptcy court and, thus, will not be considered here. Thus, this argument is unpersuasive.

Finally, the appellant argues that her due process rights were violated for three reasons: (1) Lewis wrongfully argued adequate protection, (2) Lewis allegedly told appellant that he would not argue that the stay did not apply, and (3) Lewis' motion did not state with particularity that he was seeking adequate protection. Appellant, in her Reply Brief, acknowledges that Lewis was addressing the issue of the lifting of the automatic stay. 11 U.S.C. § 362(d) specifically states that adequate protection is an issue to be considered when considering whether to lift a stay. The appellant's lack of understanding of the law is not a basis for a due process claim. Further, her claim as to Lewis' alleged statement that he would not make a particular argument is not supported by the record. Finally, although Lewis' motion did not specifically state that he was

seeking adequate protection, as it was the appellant who requested that the stay be continued in her Memorandum in Support of Continuing the Stay, it was her responsibility to ensure that Lewis was adequately protected. Thus, the appellant's due process argument is without basis.

Thus, all of the appellant's contentions in support of her argument that the bankruptcy court erred in its award of adequate protection to Lewis are without merit. Therefore, under the clear error standard of review, this Court declines to disturb the order of the bankruptcy court.

Third, the appellant argues that the bankruptcy court erred by including a drop dead clause in its order. She argues that this clause should be reversed because: (1) it only allows six months to confirm a plan, and (2) it is complex and she has been busy with another related legal matter. 11 U.S.C. § 105(a) authorizes a court to enter drop dead clauses. See Mendoza v. Temple-Island Mortgage Corporation (In re Mendoza), 111 F.3d 1264, 1270 (5th Cir. 1997) ("Because of the equitable nature of bankruptcy in seeking a balance between debtors and creditors, bankruptcy courts should be afforded the latitude to fashion remedies they consider appropriate under the circumstances, including 'drop dead' orders, as long as the bankruptcy court follows the Bankruptcy Code's statutory mandate."). Thus, it was not an abuse of discretion for the court to include such a clause. Id. (drop dead clauses are subject to abuse of discretion standard of review).

Further, contrary to what the appellant claims, the order and the clause do not mandate that a plan be approved within six months. Rather, the order and clause state that the automatic stay shall be lifted by October 1st, unless a plan is confirmed by that date. Moreover, at the time of the order, the case had already been active for almost a year. Thus, the claim of the appellant is without basis in fact. Concerning the appellant's claim that she is busy with another related legal

matter and the complexity of the law, this Court rejects her argument. Even as a pro se party, the appellant has the responsibility to be knowledgeable of the law.

CONCLUSION

For the reasons set forth above, the order of the bankruptcy court is AFFIRMED.