NOT FOR PUBLICATION

FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
April 1, 2010
Barbara A. Schermerhorn
Clerk

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE JACK GINDI, member, IPS, LLC (Mgr.), officer, director, shareholder Gindi Austin II, Inc., officer, director, shareholder Gindi Enterprises, Inc., partner, Auto Plasa, LLLP, officer, director, shareholder Morton Edwards Management, Inc., officer, director, shareholder Income Property Special, LLC (Mgr.), member, IPS Aquisitions, LLC (Mgr.), member, IPS Holdings, LLC (Mgr.), member, IPS Principle Fund, LLC (Mgr.), member, IPS Development, LLC (Mgr.), member, IPSMMI, LLC (Mgr.), member, IPSMMIII, LLC (Mgr.), officer, director, shareholder JRG. LLC (Mgr.), officer, director, shareholder MG Real Estate, LLC (Mgr.), officer, director, shareholder ROI Comm. Real Estate, LLC (Mgr.), officer, director, shareholder Timbers Completion Fund, LLC (Mgr.), formerly officer, director, shareholder WRPCCC Owners ASSN. (Mgr.), partner, 1431 Pearl, LLLP (Gp), partner, Austin Investor Interests, LLLP (Gp), partner, Franklin Town Homes, LLLP (Gp), officer, director, shareholder Gindi Austin I, Inc., officer, director, shareholder H& G Investments, LLC (Mgr.), partner, Humboldt Town Homes, LLLP (Gp), officer, director, shareholder IPSMMII, LLC (Mgr.),

Debtor.

BAP No. CO-09-068

ANDREAS CHIZZALI,

Appellant,

v.

JACK GINDI and BANK OF THE WEST,

Appellees.

Bankr. No. 09-24436
Chapter 11

OPINION*

* This unpublished opinion is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

Appeal from the United States Bankruptcy Court
for the District of Colorado

Before MICHAEL, RASURE, and KARLIN, Bankruptcy Judges.

KARLIN, Bankruptcy Judge.

The parties did not request oral argument, and 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. Fed. R. Bankr. P. 8012. The case is therefore ordered submitted without oral argument.

Creditor Andreas Chizzali ("Appellant") appeals the bankruptcy court's order that determined (1) the automatic stay imposed by 11 U.S.C. § 362[1] did not apply to enjoin Appellee Jack Gindi, as debtor-in-possession and therefore trustee of the bankruptcy estate (hereinafter "Debtor"), from prosecuting his appeal of a state court judgment entered in favor of Appellant; (2) Appellant was not entitled to relief from the automatic stay in order to permit Appellant and Bank of the West (the "Bank") to litigate an appeal concerning a writ of garnishment wherein both Appellant and the Bank claimed an interest in Debtor's bank account; and (3) Appellant was not entitled to proceed with his appeal of a state court order dismissing a contempt citation against Debtor under the "criminal proceedings" exception to the automatic stay. We affirm.

[1] All further statutory references contained herein are also to the Bankruptcy Code, Title 11 of the United States Code, unless otherwise specified.

I. BACKGROUND

The disputes between Appellant and Debtor derive from their previous joint ownership of Income Property Specialists, LLC and IPS Development, LLC (hereinafter, jointly, "IPS") and their corresponding liability for the companies' debts, including their obligations to Summit Bank & Trust ("Summit"). In 2007, Appellant filed a lawsuit against Debtor, IPS, and others in Colorado state court. In September 2007, Appellant, Debtor, and Summit entered into a stipulation ("Stipulation") that was supposed to resolve all their differences.

One of the Stipulation's terms was that Debtor would, within 60 days, take action necessary to cause Summit to release its lien on Appellant's residence.[2] The Stipulation also provided that Appellant would relinquish to Debtor his interest in IPS. The parties also agreed to submit other matters to binding arbitration, including "what, if anything of IPS will be conveyed to [Appellant] prior to [Debtor] receiving exclusive ownership and control of" IPS.[3]

In October 2007, an arbitration hearing was conducted. In January 2008, an arbitration award was entered requiring Debtor to pay Appellant approximately $2.16 million.[4] In March 2008, the state court confirmed the arbitration award[5] and in July 2008, the state court entered a money judgment in favor of Appellant and against Debtor in the amount of the award.[6] Debtor appealed the confirmation order and judgment to the Colorado Court of Appeals (the

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[2] *Order*, dated January 15, 2008, effective as of January 10, 2008, at 2 *in* Appellant's Appendix ("App.") at 63.

[3] *Id.*

[4] *Id.* at 3 *in* App. at 64.

[5] *Order*, dated March 21, 2008, at 1-2, *in* App. at 7-8.

[6] *Judgment Re: Arbitration Award*, *in* App. at 6.

"Arbitration Appeal"). The appellate court elected to stay the appeal when Debtor filed his bankruptcy petition.

In December 2007, Appellant sold his residence. Because Debtor had not obtained a release of Summit's lien against Appellant's residence as required by the Stipulation, proceeds from the sale in the approximate amount of $328,000 were paid to Summit.[7]

Thereafter, both Appellant and Debtor returned to the state court claiming that the other had breached the terms of the Stipulation. After a hearing, the state court concluded that Debtor, and not Appellant, had breached the Stipulation. In so concluding, the state court stated:

> Having heard the evidence, the Court was not persuaded that [Appellant] materially breached the parties' stipulation. After the stipulation was reached, both parties --- who harbor a fair amount of ill will toward one another --- continued to try to gain strategic advantage over each other. Put another way, both parties were essentially playing litigation "chicken," with (among other things) [Appellant] trying to get out of his personal liability on the line of credit, and [Debtor] holding the lien release over his head.[8]

On January 10, 2008, in an oral decision, the state court judge ordered Debtor to pay Appellant the amount of the sale proceeds that had been paid to Summit due to Debtor's failure to obtain the lien release. On January 15, 2008, the state court entered a written order directing Debtor to pay Appellant "$328,070.30 within 30 days given that [Appellant] should have received these funds at the December 14, 2007 closing" and also requiring Appellant to transfer his interest in IPS to Debtor within 30 days.[9]

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[7] *Order*, dated January 15, 2008, at 3, *in* App. at 64.

[8] *Id*. at 4, *in* App. at 65.

[9] *Id*. at 5, *in* App. at 66.

On March 21, 2008, pursuant to Debtor's motion, the court entered an order (the "Judgment") deleting the sentence requiring Debtor to pay Appellant within 30 days and replacing it with the following:

> Judgment is hereby entered in favor of [Appellant] and against [Debtor] in the amount of $328,070.30. Interest shall accrue on this judgment at the rate of 8% per annum from December 14, 2007.[10]

Thereafter, Appellant apparently filed a motion for citation for contempt alleging that Debtor failed to comply with the 30-day payment requirement set forth in the January 15, 2008, order.[11] On April 30, 2008, the state court clerk issued a contempt citation directing Debtor to appear on July 9, 2008 to show cause why he had not complied with the January 15, 2008, order. Specifically, the contempt citation provided that, "to vindicate the dignity of the Court, a fine or imprisonment may be imposed upon you, and attorneys' fees may be ordered paid by you on behalf of [Appellant]."[12]

On July 9, 2008, the state court granted Debtor's motion to dismiss the contempt citation on the grounds that: 1) the original 30-day payment provision that was the basis for the contempt citation had been an error that was corrected by the Judgment and 2) the Judgment was not enforceable by Appellant through a contempt proceeding.[13] Appellant appealed the dismissal of the contempt citation to the Colorado Court of Appeals ("Contempt Appeal"). The Contempt Appeal

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[10] *Order*, dated March 21, 2008, at 1, *in* App. at 7.

[11] The Contempt Citation indicates that "it has been alleged in the Verified Motion for Contempt Citation" that Debtor violated the court's order, but the citation does not state who filed the verified motion. *Contempt Citation* at 1, *in* App. at 67. The Bankruptcy Court's order states that the contempt citation was issued based on Appellant's motion, but the basis for that fact is not clear from the appellate record. However, neither party has asserted that the statement is incorrect and, more significantly, a determination of whether or not Appellant requested the contempt citation is not necessary to our determination of the issues in this appeal.

[12] *Contempt Citation* at 2, *in* App. at 68.

[13] *Minute Order*, dated July 11, 2008, at 2, ¶¶ 6-7, *in* App. at 10.

was also pending when Debtor filed his bankruptcy petition, and was stayed by the appellate court.

On May 21, 2008, Appellant sought to enforce the Judgment by serving on Bank of the West ("Bank") a writ of garnishment of Debtor's accounts. At that time, Debtor's account at the Bank contained approximately $264,000. On May 22, 2008, the Bank set off the entire account against a debt owed by Debtor to the Bank. On June 2, 2008, the Bank mailed its answer to the garnishment writ to the court, but the answer was not docketed until June 9, 2008, apparently because it did not contain sufficient case-identifying information.[14] After the answer was mailed, but before it was docketed by the court, Appellant filed a motion for default against the Bank, and the clerk issued an entry of default. The Bank then filed a motion to set aside the entry of default.

On August 15, 2008, the state court granted the motion to set aside the entry of default on the grounds that "the neglect [by the Bank] was excusable, the defense of set-off vis-a-vis [Debtor] was meritorious, and the relief was consistent with equitable considerations."[15] Appellant appealed the order setting aside the clerk's entry of default to the Colorado Court of Appeals ("Garnishment Appeal"). The issues in the Garnishment Appeal were consolidated with the Contempt Appeal, and both appeals were argued before the Colorado Court of Appeals on June 1, 2009.

On July 20, 2009, before any of the three appeals were decided, Debtor filed a voluntary Chapter 11 petition, and the appeals were stayed either by the

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[14] *Minute Order*, dated August 15, 2008, at 2, ¶ 3(e), *in* App. at 20. The Bank's Answer to the garnishment writ was due either on Monday, June 2, 2008, or on Thursday, June 5, 2008, depending on whether the state court's 3-day mailing rule was applicable. *Id.* ¶ 3(c). The state court did not resolve this issue, as it was not necessary to do so in order to decide the Bank's motion to set aside its default.

[15] *Id.* ¶ 3(f).

automatic stay and/or by an order of the appellate court. Shortly thereafter, Appellant filed a motion in the Bankruptcy Court seeking: 1) a declaration that the Contempt Appeal (and any subsequent proceeding, if the dismissal of the contempt citation is reversed) is a criminal proceeding excepted from the automatic stay pursuant to § 362(b)(1), and 2) relief from the automatic stay to pursue the Garnishment Appeal (and any subsequent action) against the Bank in order to recover funds that were in Debtor's account at the Bank when the garnishment writ was served.

Debtor filed his own motion in the Bankruptcy Court seeking a declaration that the automatic stay was inapplicable to him, as debtor in possession, as it related to his prosecution of the Arbitration Appeal. Debtor's motion was granted. The Bankruptcy Court's order denying Appellant's motion and granting Debtor's motion is the subject of this appeal.

II. APPELLATE JURISDICTION

The order denying Appellant's motion and granting Debtor's motion was entered on November 3, 2009 (the "Order"), and Appellant filed a timely Notice of Appeal on November 5, 2009. Along with the Notice of Appeal, Appellant filed a motion in the Bankruptcy Court: 1) for leave to appeal the Order as an interlocutory order and 2) seeking a stay of the Order pending appeal. On November 18, 2009, the Bankruptcy Court denied the motion for stay pending appeal and ordered the Clerk of Court to transmit the motion for leave to appeal to this Court for determination pursuant to Rule 8003 of the Federal Rules of Bankruptcy Procedure.

This Court issued an order on December 2, 2009, concluding that the Order was a final order so leave to appeal under Rule 8003 was unnecessary.[16] Because the appeal was timely taken from a final order, and neither party elected to have

[16] Appellant did not request a stay pending appeal from this Court.

the matter heard by the district court, this Court has appellate jurisdiction over this appeal.[17]

III. ISSUES

Appellant argues three issues in this appeal. First, he contends that the Bankruptcy Court erred in denying his request for a declaration that the contempt proceeding was criminal in nature and therefore not precluded by the automatic stay. Second, he contends that the money in Debtor's account at Bank belongs either to Appellant or to Bank, and not to Debtor, and therefore, the garnishment proceeding does not involve estate property and is not subject to the automatic stay. Finally, Appellant contends, contrary to Tenth Circuit precedent, that Debtor should be precluded from pursuing his own appeal of the Arbitration Order because that appeal is from a lawsuit that was filed against him by a creditor. No evidentiary hearing was held in the Bankruptcy Court, so all of these issues involve only legal questions. Legal issues are reviewed on appeal *de novo*.[18] However, a Bankruptcy Court's ultimate decision whether to grant or deny relief from the § 362 stay is reviewed for abuse of discretion.[19]

IV. DISCUSSION

A. Criminal Contempt

Appellant asserts that the § 362 automatic stay is inapplicable to the contempt proceedings because the issuance of a contempt citation constituted "the commencement or continuation of a criminal action or proceeding against the debtor."[20] He contends that the contempt proceedings in state court were criminal in nature, rather than civil, and that the Colorado Court of Appeals is therefore

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17 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002.

18 *In re Kirkland*, 86 F.3d 172, 174 (10th Cir. 1996).

19 *Pursifull v. Eakin*, 814 F.2d 1501, 1504 (10th Cir.1987).

20 § 362(b)(1).

not stayed from issuing a ruling in the Contempt Appeal. He also argues that once such ruling is issued, he is not stayed from pursuing his claims.

Pursuant to Colorado law, whether indirect contempt [21] is considered to be criminal or civil depends "on the purpose and character of the sanctions sought to be imposed in the citation."[22] The difference between these two types of indirect contempt is that:

> Unlike remedial [civil] contempt, which the contemnor may purge by complying with the court order in question, punitive [criminal] contempt cannot be so purged. Rather, the punishment imposed must be served by the contemnor because he or she has been convicted of a willful violation of a court order.[23]

Criminal contempt is imposed to punish "conduct that is found to be offensive to the authority and dignity of the court," whereas civil contempt is primarily intended "to enforce obedience to a trial court's order."[24] The standard is the same in the Tenth Circuit, which considers a contempt citation to be civil if it is "for the benefit of the complainant," and to be criminal if it is imposed to vindicate the authority of the court itself.[25]

Appellant contends that the contempt proceedings against Debtor were criminal because, once the January 15, 2008 Order was superceded by the Judgment, there was no order from which Debtor could purge himself.[26] However, the contempt citation at issue specifically identified the contempt as

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[21] Indirect contempt occurs outside of the presence of the judge. A party's failure to make payment in accordance with a court's order, if contemptuous, is an indirect contempt.

[22] *Groves v. District Court*, 806 P.2d 947, 948 (Colo. 1991).

[23] *In re Marriage of Nussbeck*, 974 P.2d 493, 498 (Colo. 1999).

[24] *Id.* at 498-99. *See also* Colo. R. Civ. P. 107(a)(4).

[25] *Lucre Mgmt. Group, LLC v. Schempp Real Estate, LLC (In re Lucre Mgmt. Group, LLC)*, 365 F.3d 874, 876 (10th Cir. 2004).

[26] Opening Brief of Appellant at 11.

Debtor's "neglect and refusal to comply with the Court Order heretofore entered herein on September 11, 2008 and January 15, 2008, *nunc pro tunc*, January 10, 2008." The only directive in that order that could have resulted in a finding of contempt against Debtor was Debtor's failure to pay Appellant within 30 days. But that directive was eliminated by the Judgment prior to issuance of the contempt citation. Therefore, no contempt could be established. Regardless of the "stock" language contained in the contempt citation regarding the "dignity of the Court," the citation was solely intended to obtain compliance with the 30 day payment provision of the January 15, 2008 Order. Therefore, the citation was remedial, rather than punitive, in nature.

Where "contempt is invoked as a sanction for failure to pay a judgment for money . . . the proceedings are not exempt from the automatic stay."[27] Moreover, criminal contempt proceedings are instigated and pursued by courts rather than by litigants, whose motivation for pursuing a contempt citation is presumably monetary. Where, as here, a court dismisses its own contempt citation, it is effectively declining to pursue it further. If a litigant continues to pursue the contempt proceedings, despite the dismissal, such a proceeding is clearly civil in nature. Accordingly, any appeal of the dismissal is subject to the automatic stay.[28]

B. Garnishment Proceedings

Appellant contends that his dispute with the Bank over funds in Debtor's account at the Bank does not involve property of the estate and therefore the Garnishment Appeal is not subject to the § 362 stay. Appellant argues that when

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[27] *In re Marriage of Lytle*, 435 N.E.2d 522, 525 (Ill. App. Ct. 1982).

[28] *Id. See also, In re Wiley*, 315 B.R. 682, 687 (Bankr. E.D. La. 2004) (actions for civil contempt are subject to stay); *In re Kearns*, 168 B.R. 423, 426 (D. Kan. 1994) (contempt proceedings intended to coerce payment of monetary obligations are within the protection of the automatic stay).

the garnishment writ was served, a lien arose in Debtor's account in favor of Appellant; the Bank contends that it had a right of setoff against Debtor's account that was prior to any rights arising in favor of Appellant on account of the garnishment writ. Thus Appellant asserts that Debtor had no interest in the funds as of the petition date.

The United States Supreme Court has held in *United States v. Whiting Pools, Inc.*,[29] however, that by virtue of §§ 541 and 542(a), even property that is subject to a pre-petition lien and is not in the possession of the debtor nonetheless constitutes property of the estate. Based on *Whiting Pools*, the Colorado Bankruptcy Court has previously held that the decisive factor in determining whether garnished funds are property of the estate is the point in time when ownership of seized property transfers from the debtor to the creditor.[30] Thus, unless Debtor's interest in the account was "irrevocably severed" prior to the filing of his bankruptcy petition, the estate retains an interest in the account that is protected by the § 362 stay from a third-party's further efforts to obtain it.[31] Pursuant to Colorado law, objections and claims of exemptions to garnishments are heard prior to entry of an order or judgment of garnishment.[32] As such, until all defenses to a garnishment have been heard and resolved, and a garnishment judgment entered, neither the garnishor's nor the debtor's rights to the funds have

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[29] 462 U.S. 198, 209 (1983). *See also In re Yeary*, 55 F.3d 504, 508-09 (10th Cir. 1995) (estate includes property subject to a creditor's security interest).

[30] *In re Seay*, 97 B.R. 41, 43 (Bankr. D. Colo. 1989).

[31] *Id.* at 44.

[32] *See, e.g.*, Colo. Rev. Stat. § 13-54.5-106 and -108 (specifying debtor's rights in the garnishment of non-wage personal property); Colo. Rev. Stat. § 13-54.5-109 (specifying the procedure for objections and claims of exemption). It is not clear from the appellate record whether or not Debtor filed any objection to the garnishment, nor whether he was properly notified of it.

been established. Thus, prior to entry of a garnishment judgment, the debtor's interest has not been irrevocably severed under Colorado law.[33]

As no garnishment judgment had been entered prior to Debtor's initiation of bankruptcy proceedings, Debtor still retained an interest in the bank account as of the date of filing. Any post-petition effort by Appellant to obtain the funds is, therefore, precluded by the automatic stay. Since we have rejected Appellant's legal argument that the Bankruptcy Court erred in concluding that the automatic stay applies to the Garnishment Appeal, we affirm the denial of Appellant's motion, and find that the Bankruptcy Court's denial was not an abuse of discretion.[34]

C. Applicability of the Automatic Stay to Debtor's Own Appeal

Appellant urges this Court to follow the lead of some other jurisdictions that have held that the automatic stay precludes a debtor from proceeding with an appeal that he took from an adverse judgment entered against him. However, this position was specifically rejected by the Tenth Circuit Court of Appeals in *Chaussee v. Lyngholm (In re Lyngholm),* which holds, pursuant to both § 362 and Rule 6009 of the Federal Rules of Bankruptcy Procedure, that "the automatic stay does not apply to the continued prosecution of actions by the trustee or debtor in possession. Those entities may continue to pursue litigation without leave of court (or release of stay under section 362)."[35] Neither this Court nor the Bankruptcy Court is free to disregard this precedent.

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[33] *In re Seay*, 97 B.R. at 45 ("as of the moment the state court completes its statutory hearing, determines the correlative rights of parties to garnisheed funds, and orders turnover of funds to the respective parties, then the debtor's ownership rights to the funds are fixed with finality").

[34] Appellant did not argue on appeal that the Bankruptcy Court abused its discretion by denying the motion, asserting only that it erred in determining that the automatic stay was applicable.

[35] 24 F.3d 89, 91-92 (10th Cir. 1994).

V. CONCLUSION

Because Appellant has not established that the Bankruptcy Court erred in denying his motion seeking a declaration that the Contempt Appeal was excepted from the automatic stay and seeking relief from the stay to pursue the Garnishment Appeal, or in granting Debtor's motion seeking a declaration that he was not barred from prosecuting the Arbitration Appeal, we affirm.