FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
November 4, 2010
Blaine F. Bates
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE KATHLEEN CHRISTINE BISHOP, Debtor.	BAP No. CO-10-032
KATHLEEN CHRISTINE BISHOP, Appellant, v. TOM H. CONNOLLY, Trustee, and JP MORGAN CHASE BANK, N.A., Appellees.	Bankr. No. 09-30885 Chapter 7 OPINION*

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

Before NUGENT, THURMAN, and RASURE, Bankruptcy Judges.

RASURE, 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.

Appellant Kathleen Christine Bishop ("Bishop") appeals the bankruptcy court's order denying reconsideration of its order granting stay relief to Appellee

* This unpublished opinion may be cited for its persuasive value, but is not precedential, except under the doctrines of law of the case, claim preclusion, and issue preclusion. 10th Cir. BAP L.R. 8018-6.

JP Morgan Chase Bank, N.A. ("Chase"). For the reasons stated herein, we REVERSE the order and REMAND the matter to the bankruptcy court.

I. FACTUAL BACKGROUND[1]

On October 2, 2009, Bishop filed her Chapter 7 petition.[2] On March 8, 2010, Chase filed a Motion for Relief from Automatic Stay (the "Motion for Stay Relief") seeking to foreclose on Bishop's rental property in Denver, Colorado (the "Denver Property").[3] Attached to the Motion for Stay Relief was a Notice of Motion for Relief from Stay and Opportunity for Hearing Pursuant to 11 U.S.C. § 362(d), which set April 1, 2010, as the objection deadline, and set a hearing for April 8, 2010.[4] The notice stated that no hearing would be held if no objection was filed, and that if an objection was filed, the objector was required to submit witness and exhibit lists and appear at the hearing.[5]

Because Chase selected a hearing date that was more than thirty days after the Motion for Stay Relief was filed, the bankruptcy court entered an Order Continuing Automatic Stay to prevent the stay from automatically terminating

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[1] Bishop filed her original appendix on July 20, 2010, which was deficient in various aspects. In response to a notice of deficiency, Bishop filed her Corrected Appendix on August 3, 2010. On August 4, 2010, an Order Referring Appendix to the Merits Panel was entered, noting that Bishop's Corrected Appendix did not comply with 10th Circuit BAP Local Rule 8009-3. That rule requires consecutive pagination and a detailed table of contents that includes the bankruptcy court docket number for each document contained therein. Notwithstanding Bishop's non-compliance with the local rule, we nevertheless considered all documents in the Corrected Appendix in our review. Because the documents in Bishop's Corrected Appendix are incomplete, out of order, and not consecutively paginated, however, we refer to the record herein by referring to documents corresponding to the Docket Numbers ("Doc.") in the underlying bankruptcy case, Case No. 09-30885 (Bankr. D. Colo.).

[2] *Voluntary Petition*, Doc. 1.

[3] *Motion for Relief from Automatic Stay*, Doc. 31.

[4] *Notice of Motion for Relief from Stay and Opportunity for Hearing Pursuant to 11 U.S.C. § 362(d)*, Doc. 31, at 36-37.

[5] *Id.*

pursuant to § 362(e).[6] The order provided that Chase "is deemed to have waived the right to a hearing within thirty days and consented to continuance of the automatic stay pursuant to 11 U.S.C. § 362(e)."[7] Thus, the stay was continued until the "conclusion of a final hearing and determination on [Chase's] motion for relief from stay."[8]

On March 17, 2010, the Chapter 7 Trustee ("Trustee") filed a Report of No Distribution, finding the estate contained no unencumbered non-exempt assets. The Trustee further stated that the estate had been fully administered and requested to be discharged from further duties. He further reported "Assets Abandoned" with a value of $408,963.[9]

On April 1, 2010, Bishop, acting *pro se*, filed a pleading called "Combined Notices: (1). Objection to Motion for Relief from Automatic Stay. (2). Request for Extension of Stay as Emergency Relief" (the "Objection").[10] In her Objection, Bishop conceded certain of Chase's allegations, but challenged Chase's entitlement to foreclose on the Denver Property on account of alleged discrepancies in the mortgage documentation.

Due to the accumulation of alleged "discrepancies of information pertaining to establishing the true 'holder of an evidence of debt,'" Bishop also contended that Chase was defrauding Bishop, that Chase was guilty of the federal crime of "Fraud and Swindles," and that Chase intentionally caused Bishop irreparable

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[6] *Order Continuing Automatic Stay*, Doc. 33. Unless otherwise indicated, all statutory references herein are to sections of the Bankruptcy Code, Title 11 of the United States Code.

[7] *Id.*

[8] *Id.*

[9] The report is a text-only entry on the docket sheet, and no docket number was assigned to the entry.

[10] *Combined Notices: (1). Objection to Motion for Relief from Automatic Stay. (2). Request for Extension of Stay as Emergency Relief*, Doc. 43.

harm and a "public defamation of [Bishop's] character,"[11] for which Bishop requested actual and punitive damages, treble damages, and sanctions against Chase and its counsel,[12] as well as compensation for responding to Chase's Motion for Stay Relief.[13]

On April 7, 2010, Chase filed its witness and exhibit list,[14] and on April 8, 2010, the hearing on Chase's Motion for Stay Relief and Bishop's Objection was held. The Minutes of the hearing evidence that Chase appeared through its counsel, Bishop failed to appear, Chase's Exhibits 1-5 were admitted, and the bankruptcy court made oral findings and conclusions of law, and granted Chase the relief it sought– *i.e.*, modification of the automatic stay.[15] The bankruptcy court entered an order terminating the automatic stay with respect to the Denver Property in order to permit Chase to "proceed to pursue its state law rights and remedies allowed under the Note and Deed of Trust against the property" (the "Stay Relief Order").[16] Notwithstanding that Bishop timely filed the Objection, however, the Stay Relief Order mistakenly recites that no response to the Motion for Stay Relief had been filed. In addition, although the Stay Relief Order may have implicitly overruled Bishop's opposition to the Motion for Relief, it did not

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[11] *Id.* at 5-6, ¶¶ 28-30, 36-39.

[12] *Id.* at 6, ¶¶ 1-4.

[13] *Id.* at 7, ¶ 5.

[14] *List of Witnesses and Exhibits*, Doc. 45.

[15] *Minutes of Proceedings*, Doc. 46. Because Bishop did not order a transcript of the hearing, we cannot review whether Chase met its burden of establishing entitlement to stay relief. To the extent that Bishop contends that Chase was not entitled to stay relief based on the testimony and exhibits presented at the hearing, Bishop has failed to present an adequate record for review.

[16] Doc. 47.

address or dispose of Bishop's requests for damages and other affirmative relief.[17]

On April 22, 2010, Bishop filed a Motion for Reconsideration of Order, alleging that she was unable to attend the April 8th hearing due to "an emergency medical issue" and that she was unable to competently defend herself due to side effects from some prescription medication.[18] Accordingly, she requested that the bankruptcy court vacate the Stay Relief Order, reimpose the stay for a period of 120 days, and reschedule a hearing on the Motion for Stay Relief.[19] On April 26, 2010, Bishop filed an Amended Motion for Reconsideration of Order[20] (collectively with the original motion, the "Motion to Reconsider"). Chase did not respond to the Motion to Reconsider, and the bankruptcy court did not hold a hearing on the motion.

On April 29, 2010, the bankruptcy court entered its Discharge of Debtor, granting Bishop a Chapter 7 discharge.[21] On May 11, 2010, the bankruptcy court entered an order denying the Motion to Reconsider (the "Appealed Order"),[22] based on the following reasoning:

> [Chase] filed a Motion for Relief from Stay, seeking to pursue its right to foreclose on the Debtor's property. The Motion was set for hearing on April 8, 2010. The Debtor failed to appear at the scheduled April 8, 2010 hearing and, accordingly, the Court granted relief from stay. Section 362(e) of the Bankruptcy Code provides that, unless a court orders otherwise, the stay *automatically* lifts as to property of the estate within thirty days after the motion is filed. This is why the Court must hold a hearing, if the request is opposed, within 30 days of the filing of the motion. Bankruptcy Rule 4001(a)(3) does not extend the effective date of the Order beyond the statutory thirty days. Thus, the Court is without authority to

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17 *Id.*

18 *Motion for Reconsideration of Order*, Doc. 56, at 1-2.

19 *Id.* at 2.

20 *Amended Motion for Reconsideration of Order*, Doc. 57.

21 *Discharge of Debtor*, Doc. 58.

22 *Order*, Doc. 60.

> reimpose the stay in this case. Nothing in this Order prevents the Debtor from attempting to work out a suitable arrangement with [Chase], but this Court cannot force such a result. Accordingly, it is hereby ORDERED that the Motion for Reconsideration of Order and the Amended Motion for Reconsideration of Order are DENIED.[23]

On May 25, 2010, Bishop filed a Notice of Appeal in which she appealed the order denying the Motion to Reconsider.[24] In her briefs, Bishop argues that her Motion to Reconsider established that she had a good excuse (*i.e.*, a "life threatening" emergency medical condition) for missing the April 8th hearing, and therefore the bankruptcy court erred in refusing to vacate the Stay Relief Order and refusing to schedule a new hearing on the Motion for Stay Relief.[25]

Although Bishop has received a discharge and the Trustee has filed his Report of No Distribution, the bankruptcy court has not discharged the Trustee or closed the bankruptcy case, most likely because this appeal is pending.

II. JURISDICTION

This Court has jurisdiction to hear timely filed appeals from "final judgments, orders, and decrees" of bankruptcy courts within the Tenth Circuit unless one of the parties elects to have the district court hear the appeal.[26] Neither of the parties elected to have this appeal heard by the United States District Court for the District of Colorado, and therefore appellate review by this Court is by consent.

A decision is considered final "if it 'ends the litigation on the merits and

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[23] *Id.*

[24] *Notice of Appeal*, Doc. 62. In the Notice of Appeal, Bishop does not purport to appeal the Stay Relief Order.

[25] Appellant's Corrected Brief at 2.

[26] 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002; 10th Cir. BAP L.R. 8001-3.

leaves nothing for the court to do but execute the judgment.'"[27] An order denying reconsideration of an order granting stay relief is a final order, and thus this Court has jurisdiction to review the Appealed Order.[28]

Chase contends that the Court lacks jurisdiction over this appeal because the appeal is moot. Chase asserts that the automatic stay terminated by operation of law under § 362(c),[29] and thus this Court cannot afford any effective relief to Bishop.[30] Section 362(c) provides–

> (1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; [and]
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> (2) the stay of any other act under subsection (a) of this section continues until the earliest of–
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> (A) the time the case is closed;
>
> (B) the time the case is dismissed; or
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> (C) if the case is a case under chapter 7 of this title concerning an individual . . . , the time a discharge is granted or denied[.][31]

Chase contends that the automatic stay of *in personam* proceedings against Bishop terminated pursuant to § 362(c)(2)(C) on April 29, 2010, the date of Bishop's discharge, and that the stay of *in rem* proceedings against the Denver Property also terminated, albeit under § 362(c)(1), when "the Chapter 7 Trustee filed his Report of No Distribution on March 22, 2010 abandoning any assets of

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[27] *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)).

[28] *In re Jones*, 381 B.R. 417, 2007 WL 3268431, at * 2 n.21 (10th Cir. BAP) (citing *In re Rodriguez Camacho*, 361 B.R. 294, 299 (1st Cir. BAP 2007)).

[29] 11 U.S.C. § 362(c).

[30] Response Brief of Appellee JP Morgan Chase Bank, N.A., Successor by Merger to Bank One ("Appellee's Brief") at 4-5.

[31] 11 U.S.C. § 362(c)(1) and (2).

the bankruptcy estate."[32] According to Chase, the automatic stay was dissolved by operation of law even in the absence of the Stay Relief Order, and therefore this Court is powerless to afford any effective relief to Bishop, *even if* it concludes that the bankruptcy court erred in refusing to reconsider the Stay Relief Order.

Chase is correct that the automatic stay terminated by operation of § 362(c)(2) as to *in personam* actions against Bishop. However, the record does not reflect that the Denver Property was ever properly abandoned, and therefore the Denver Property is still property of the estate. While the Trustee's Report of No Distribution indicates the Trustee's *intent* to abandon the property, until the Trustee abandons after notice and a hearing, and an order approving abandonment is entered, or the case is closed, the Denver Property remains in the estate.[33]

Accordingly, the Stay Relief Order is not surplusage at this point, as argued by Chase, but is necessary to permit Chase to pursue its collateral in state court. Because reversal of the Appealed Order could result in the bankruptcy court reexamining the propriety of the Stay Relief Order and/or rehearing the Motion for Stay Relief, this appeal is not moot.

III. STANDARD OF REVIEW

A motion for reconsideration filed within the time parameters of Rule 59 of the Federal Rules of Civil Procedure may be deemed a motion for new trial, a motion to alter or amend an order, and/or a motion for relief from an order pursuant to Rule 60 of the Federal Rules of Civil Procedure.[34] Bankruptcy Rule

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[32] Appellee's Brief at 4.

[33] *See* 11 U.S.C. § 554(c) ("Unless the court orders otherwise, any property scheduled under section 521(1) of this title not otherwise administered at the time of the *closing of a case* is abandoned to the debtor and administered for purposes of section 350 of this title.") (emphasis added).

[34] *In re Jones*, 381 B.R. 417, 2007 WL 3268431, at * 2-3 (10th Cir. BAP (continued...)

9023 incorporates Rule 59, and permits a motion for new trial or a motion to alter or amend an order to be filed within fourteen days of the entry of the order subject to the motion.[35] Bankruptcy Rule 9024 incorporates Rule 60 of the Federal Rules of Civil Procedure, and permits the filing of a motion for relief from an order (*i.e.*, vacatur, as requested by Bishop) based on mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, fraud, or any other reason justifying relief, within one year of the entry of the challenged order.[36]

Bishop filed her Motion to Reconsider on the fourteenth day following entry of the Stay Relief Order, and therefore it was timely under both Rule 59 and Rule 60.[37] As Bishop alleged that a life threatening medical condition and prescribed drug-induced incapacity prevented her from attending the April 8th hearing, her Motion to Reconsider could be deemed a motion for relief under Rule 60(b)(2) or (b)(6) due to inadvertence, excusable neglect or "any other reason justifying relief."

Appellate courts generally review the denial of a motion to reconsider under an abuse of discretion standard.[38] "To the extent the bankruptcy court based its ruling on discretionary factors, we review for abuse of discretion."[39] "[T]o the extent its ruling was based on its findings of fact and conclusions of

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[34] (...continued)
2007).

[35] Fed. R. Bankr. P. 9023; Fed. R. Civ. P. 59.

[36] Fed. R. Bankr. P. 9024; Fed. R. Civ. P. 60(b), (c).

[37] *See, e.g., In re Rodriguez Camacho*, 361 B.R. 294 (1st Cir. BAP 2007) (motion to reconsider was filed within time parameters of Rule 59, but alleged grounds for relief from the order under Rule 60(b)).

[38] *See Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 727-28 (10th Cir. 1993); *Jones*, 2007 WL 3268431, at * 2.

[39] *Jones*, 2007 WL 3268431, at * 2.

law, however, we apply the traditional review reserved for those determinations; clearly erroneous for the findings of fact and *de novo* for the legal conclusions."[40]

IV. DISCUSSION

The bankruptcy court concluded that it was without authority to reimpose the stay on the grounds that the stay automatically terminated under § 362(e)[41] on the thirtieth day after the Motion for Stay Relief was filed. However, under the facts of this case, § 362(e) does not apply because Chase waived the benefit of automatic termination of the stay on the thirtieth day when it selected a hearing date more than thirty days after the filing of its Motion for Stay Relief. Pursuant to the Order Continuing Automatic Stay, Chase was "deemed to have waived the right to a hearing within thirty days and consented to continuance of the automatic stay pursuant to 11 U.S.C. § 362(e)," and the automatic stay remained in effect until the "conclusion of a final hearing and determination on [Chase's]

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[40] *Id. See also Orner v. Shalala*, 30 F.3d 1307, 1309 (10th Cir. 1994); *Lyons*, 994 F.2d at 727-28 (a trial court "would necessarily abuse its discretion if it based its ruling [under Rule 60(b)] on an erroneous view of the law or on a clearly erroneous assessment of the evidence") (internal quotation marks omitted).

[41] Section 362(e)(1) provides–

> Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be concluded not later than thirty days after the conclusion of such preliminary hearing, unless the 30-day period is extended with the consent of the parties in interest or for a specific time which the court finds is required by compelling circumstances.

11 U.S.C. § 362(e)(1).

motion for relief from stay."[42] Accordingly, the stay did not automatically terminate under § 362(e), but rather terminated by virtue of the Stay Relief Order. A bankruptcy court has the authority to reexamine its own stay relief order on a motion for reconsideration, and has broad discretion in determining whether such an order should be vacated and whether the matter should be reheard.[43]

But the bankruptcy court did not exercise its discretion in this case because it erroneously concluded, as a matter of law, that it was powerless to grant the relief requested by Bishop. This Court expresses no opinion as to whether Bishop's motion stated cause under Rule 59 or Rule 60(b) to reconsider or vacate the Stay Relief Order or to set a new hearing on the Motion for Stay Relief, as those are matters the bankruptcy court must determine in the first instance.[44]

V. CONCLUSION

Accordingly, the Appealed Order is REVERSED and the matter is REMANDED to allow the bankruptcy court to rule on the merits of Bishop's Motion to Reconsider.

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[42] *Order Continuing Automatic Stay*, Doc. 33. *See also In re Wedgewood Realty Group, Ltd.*, 878 F.2d 693, 698 (3d Cir. 1989) (creditor is deemed to have waived the thirty-day provision if it "takes some action which is inherently inconsistent with adherence to the time constraints of section 362(e)"); *In re McNeely*, 51 B.R. 816, 821 (Bankr. D. Utah 1985) (implied waiver where creditor fails to schedule a final hearing within thirty day period) (dicta).

[43] *See State Bank of S. Utah v. Gledhill (In re Gledhill)*, 76 F.3d 1070, 1080-82 (10th Cir. 1996) (bankruptcy court has wide discretion in determining a motion to reconsider and vacate a stay relief order under Bankruptcy Rule 9024 and Rule 60(b)).

[44] *See, e.g., In re Rodriguez Camacho*, 361 B.R. 294, 296, 299-301 (1st Cir. BAP 2007) (reversing bankruptcy court's denial of reconsideration of stay relief order because bankruptcy court erroneously concluded that "[o]nce the stay is lifted–there is no reconsideration available"; the BAP remanded the matter to the bankruptcy court to determine whether Rule 60(b) relief was appropriate).