FILED
U.S. Bankruptcy Appellate Panel
of the Tenth Circuit
November 15, 2000
Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE DORA TAPIA, Debtor.	BAP No. KS-00-015
DORA TAPIA, Appellant, v. ROSIE SCHMITT, Appellee.	Bankr. No. 99-42142 Chapter 13 ORDER AND JUDGMENT*

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

Before McFEELEY, Chief Judge, CLARK, and McNIFF[1], Bankruptcy Judges.

McNIFF, Bankruptcy Judge.

The debtor, Dora Tapia, appeals from the March 7, 2000, order of the Bankruptcy Court for the District of Kansas (bankruptcy court), which granted the appellee, Rosie L. Schmitt, relief from the automatic stay. Also before the Court are Schmitt's Motion for Damages and Costs for Frivolous Appeal and Tapia's Motion to Establish Schedule for Response to Schmitt's motion for sanctions.

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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.

[1] Honorable Peter J. McNiff, United States Bankruptcy Judge, United States Bankruptcy Court for the District of Wyoming, sitting by designation.

Finding no abuse of discretion, we affirm the bankruptcy court's order. The motion for sanctions and Tapia's motion for a scheduling order are denied.

I. Jurisdiction

The Bankruptcy Appellate Panel has jurisdiction over this appeal. An order granting relief from the automatic stay is a final order. *Franklin Sav. Ass'n v. Office of Thrift Supervision*, 31 F.3d 1020 (10th Cir. 1994). Tapia filed a timely notice of appeal. The parties have consented to this court's jurisdiction because they did not elect to have the appeal heard by the United States district court. 28 U.S.C. § 158(c)(1); Fed. R. Bankr. P. 8001; 10th Cir. BAP L.R. 8001-1(d).

II. Standard of Review

A decision to lift the stay is reviewed by the appellate court under an abuse of discretion standard. *Pursifull v. Eakin*, 814 F.2d 1501, 1504 (10th Cir. 1987). An abuse of discretion occurs when the trial court "make[s] a clear error of judgment or exceed[s] the bounds of permissible choice in the circumstances," or when the court's decision is "'arbitrary, capricious or whimsical.'" *Moothart v. Bell*, 21 F.3d 1499, 1504-05 (10th Cir. 1994) (quoting *United States v. Wright*, 826 F.2d 938, 943 (10th Cir. 1987).

Tapia argues that the de novo standard of review is applicable here because the bankruptcy court did not hold an evidentiary hearing and because the bankruptcy court based its decision on an erroneous view of state law. In *Pursifull*, the Tenth Circuit court held that no particular type of hearing on a motion to modify the automatic stay is necessary. Only notice and an opportunity for a hearing are required as appropriate to the particular circumstances. *Pursifull*, 814 F.2d at 1505-06. In this case, the facts were conceded to be undisputed, and an evidentiary hearing was unnecessary.

III. Background

In 1994, Tapia and Gabriel Sauz purchased a restaurant from Schmitt under

a written purchase contract. They also entered into an oral agreement to purchase a residence.

Tapia and Sauz defaulted. On August 29, 1995, Schmitt filed an action against Tapia and Sauz in the District Court for Edwards County, Kansas (state court). Tapia answered and filed a counterclaim to rescind the sale contract on the residence.

The state court entered judgment against Tapia on July 17, 1996, for money damages and to vacate the premises, and against Schmitt on Tapia's counterclaim, finding the agreement to purchase the residence invalid. Both parties appealed. The state court ordered a stay pending appeal, conditioned on Tapia posting a cash bond of $30,000. A third party, Chris Breitenbach, posted the funds for the bond. Later, that court increased the bond by $18,000 to stay the order requiring Tapia to vacate the premises. Breitenbach also posted cash for the bond increase.

In July 1999, the Kansas Court of Appeals affirmed the judgment against Tapia, reversed a default judgment against Sauz, and reversed and remanded an issue related to the rental value of the house. In August 1999, Schmitt filed a motion for forfeiture of the supersedeas bond.

Tapia filed her voluntary chapter 13 petition for relief on September 20, 1999. On October 8, 1999, despite the bankruptcy filing, the parties attended a state court hearing on the forfeiture motion. The state court determined on the record that its proceedings were not stayed by the bankruptcy filing and held that the supersedeas bond forfeited to Schmitt in the amount of $45,506.69. However, an order was not entered because Tapia removed the action to the bankruptcy court. The bankruptcy court remanded the case back to the state court on January 5, 2000.

On January 26, 2000, Schmitt filed a motion for relief from the automatic stay seeking relief to conclude the forfeiture proceedings in the state court. Tapia

objected. The bankruptcy court granted the motion, ruling that the state court was the proper forum to determine the issues of state law and the relative interests of the parties in the bond. The court did not determine whether the estate had an interest in the bond, but it ruled that if the bond exceeded the amount forfeited to Schmitt, the excess proceeds were subject to the jurisdiction of the bankruptcy court. The bankruptcy court also granted a stay pending this appeal.

IV. Discussion

A. *Relief from the Automatic Stay*

The issue in this case is whether the bankruptcy court abused its discretion in granting Schmitt relief from the automatic stay to pursue forfeiture of the supersedeas bond in the case pending in the state court. The debtor's arguments are various, but the crux of them is that, due to error in the application of Kansas law, the Edwards County District Court improperly granted Schmitt's motion for forfeiture of the bond; therefore, the bond fund is property of the bankruptcy estate (the funds are allegedly a loan from Breitenbach to Tapia), and if there is a dispute over whether the bond fund is property of the estate, the question should be resolved in the bankruptcy court.

Under 11 U.S.C. § 362(a), the filing of a petition operates as a stay against the continuation of any pending judicial proceeding to recover a prepetition claim against the debtor or to obtain possession of property of the estate. The Bankruptcy Code, under § 362(d), provides that the court shall grant relief from the automatic stay on a showing of cause.

Although cause is not defined in the Code, Congress intended that the automatic stay could be modified to permit pending litigation involving the debtor to continue in a nonbankruptcy forum. *In re Blan*, 237 B.R. 737, 739 (8th Cir. BAP 1999). Courts determine whether discretionary relief is appropriate on a case-by-case basis. *Industrial Ins. Servs., Inc. v. Zick (In re Zick)*, 931 F.2d 1124,

1129 (6th Cir. 1991).

Factors relevant to the determination of whether to modify the stay to permit litigation in another forum include "the interest of judicial economy and the expeditious and economical determination of litigation for the parties" and "the impact of the stay on the parties and the 'balance of hurt.'" *In re Curtis*, 40 B.R. 795, 800 (Bankr. D. Utah 1984) (citing twelve nonexclusive factors) (quoting *In re San Clemente Estates*, 5 B.R. 605, 611 (Bankr. S.D. Cal. 1980). The bankruptcy court's decision must be upheld so long as the court does not exceed the bounds of permissible choice. *In re Peterson*, 116 B.R. 247, 250 (D. Colo. 1990).

In this case, the bankruptcy court did not abuse its discretion when it concluded that cause existed to lift the automatic stay. The Kansas litigation included parties not before the bankruptcy court, the state court litigation (pending for over four years) was nearly concluded, and the state court was familiar with the litigation. The extent of each party's interest in the bond fund is a question of Kansas law. Finally, to the extent the estate has an interest in the bond proceeds, the bankruptcy court protected that interest by retaining jurisdiction. The bankruptcy court's decision appears reasonable under the circumstances and is not an abuse of discretion. Accordingly, the bankruptcy court's decision must be affirmed.

B. *Request for Sanctions*

Schmitt filed a Motion for Damages and Costs for Frivolous Appeal, seeking attorney fees and costs under Fed. R. Bankr. P. 8020. That rule provides: "[i]f a . . . bankruptcy appellate panel determines that an appeal from an order, judgment or decree of a bankruptcy judge is frivolous, it may . . . award just damages and single or double costs to the appellee." Fed. R. Bankr. P. 8020. An appeal is frivolous if "the result is obvious, or the appellant's arguments of error

are wholly without merit." *Braley v. Campbell*, 832 F. 2d 1504, 1510 (10th Cir. 1987); *Doyle v. Oklahoma Bar Ass'n*, 998 F.2d 1559, 1571 (10th Cir. 1993).

Schmitt has not met this difficult standard, and, therefore, her motion for sanctions must be denied. As a result, Tapia's motion to establish a schedule for a response to the motion for sanctions is also denied as moot.

V. Conclusion

The bankruptcy court did not abuse its discretion when it ordered that cause existed to grant Schmitt relief from the stay to conclude pending state court litigation and forfeiture of the supersedeas bond. Accordingly, the bankruptcy court's decision is AFFIRMED. For the reasons stated, Schmitt's motion for sanctions and Tapia's motion for a scheduling order are DENIED.