

January 11, 2005

Barbara A. Schermerhorn
Clerk

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE TENTH CIRCUIT**

IN RE MICHAEL DALE YATES, also
known as Mike Yates, and JENNIFER
NICOL YATES, also known as Jennifer
Nicol Norman, also known as Jennifer
Nicol Williams,

Debtors.

BAP No. WY-04-036

UNIFIED PEOPLE'S FEDERAL
CREDIT UNION,

Appellant,

v.

MICHAEL DALE YATES, JENNIFER
NICOL YATES, and MARK R.
STEWART, Trustee,

Appellees.

Bankr. No. 04-20069
Chapter 13

ORDER AND JUDGMENT*

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

Before BOHANON, CORNISH, and MICHAEL, Bankruptcy Judges.

PER CURIAM.

The Appellant appeals the order of the bankruptcy court granting the Debtors' motion for turnover and imposition of sanctions for a willful violation of the automatic stay. The Appellees did not appear on appeal.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. 10th Cir. BAP L.R. 8018-6(a).

Background

The Appellant, a secured creditor, lawfully repossessed a truck of the Debtors pre-petition. Post-petition, it refused to turn over the truck upon an informal demand. It maintained that it was entitled to retain possession of the truck until it received adequate protection or until a plan was filed or confirmed. Almost two months after the petition, the Appellant filed a motion for relief from the stay regarding various pieces of collateral, including the truck. At approximately the same time, the Debtors moved for turnover of the truck and sought sanctions against the Appellant for violation of the automatic stay.

The matter was set for hearing. At the hearing, both sides presented evidence and argument. The bankruptcy court briefly took the matter under submission and later made a ruling on the record. The bankruptcy court's ruling did not include any explicit findings of fact. The bankruptcy court found that Appellant had willfully violated the automatic stay, ordered the Appellant to turn over the truck, and also ordered the Appellant to pay the Debtors' attorney's fees. The Appellant then filed its notice of appeal.

Because the record did not contain evidence of damages, the bankruptcy court permitted the Debtors' counsel to submit a statement of attorney's fees and later entered an order granting the Debtors' attorneys fees. At appellate argument, the Appellant stated that it had paid those fees.

Discussion

This appeal raises several issues, including:

1. Is the order from which the Appellant appeals a "final order" since the bankruptcy court held the Appellant willfully violated the automatic stay but deferred quantifying the award?
2. Is it proper for this Court to review a decision when the bankruptcy

court failed to make findings of fact?

3. Did the bankruptcy court err in holding that the Appellant violated the automatic stay?

I. Standard of Review

The applicable standard of review is well-settled:

Whether a party's actions have violated the automatic stay is a question of law which is reviewed de novo. We review the bankruptcy court's finding that a creditor's action constituted a willful violation of the stay for clear error. An award of sanctions for a violation of the automatic stay is reviewed for an abuse of discretion.¹

II. Is the order from which the Appellant appeals a “final order” since the bankruptcy court held the Appellant willfully violated the automatic stay but deferred quantifying the award?

The threshold procedural issue is whether the order here is final since it does not fix the amount of attorney's fees for violation of the automatic stay. If we conclude it is not a final order, then we have no jurisdiction to hear this appeal.² We determine that the order is final and that we have jurisdiction to consider the merits of the appeal.

This is an issue of first impression in this circuit. Courts in other circuits that have grappled with this issue have reached differing conclusions.³

¹ *Diviney v. Nationsbank of Tex., N.A. (In re Diviney)*, 225 B.R. 762, 769 (10th Cir. BAP 1998) (internal citations omitted). *See also Safety Nat'l Cas. Corp. v. Kaiser Aluminum & Chem. Corp. (In re Kaiser Aluminum Corp.)*, 303 B.R. 299, 303 (D. Del. 2003) (“As for the question of whether a party has willfully violated the automatic stay, courts have concluded that such questions are questions of fact. Accordingly, the Bankruptcy Court's determination that a stay was willfully violated is reviewed for clear error.”) (internal citations omitted).

² *See* 28 U.S.C. § 158.

³ *See Shimer v. Fugazy (In re Fugazy Express, Inc.)*, 982 F.2d 769 (2d Cir. 1992); *Colon v. Hart (In re Colon)*, 941 F.2d 242 (3rd Cir. 1991); *Calcasieu Marine Nat'l Bank v. Morrell (In re Morrell)*, 880 F.2d 855 (5th Cir. 1989); *In re Fox*, 762 F.2d 54 (7th Cir. 1985); *Guy v. Dzikowski (In re Atlas)*, 210 F.3d 1305 (11th Cir. 2000); *Graham v. W. Va. (In re War Eagle Constr. Co.)*, 249 B.R. 686 (S.D. W. Va. 2000); *United States v. Midway*

(continued...)

One line of cases holds that an order that decides the merits but defers quantification of attorney's fees is a final, appealable order. These courts conclude that a decision on the merits is separate and distinct from the issue of attorney's fees.⁴ The second line of cases holds that there is no final order where quantification of attorney's fees is deferred to a later time.⁵ These courts reason that this holding eliminates unnecessary duplicative litigation and thus preserves judicial resources.⁶

We find the first line of cases most persuasive. It comports with the Supreme Court's decision in *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988), which arose from this circuit. In *Budinich*, the petitioner was awarded a money judgment against the respondent, but filed various new trial motions and a motion for attorney's fees. The district court denied the motions and found the petitioner was entitled to attorney's fees, but deferred quantifying the amount pending further briefing. Some months later, the district court entered an order on the attorney's fees, and the petitioner filed his notice of appeal. The notice of appeal concerned all of the petitioner's post-trial motions.

The respondent then moved to dismiss the appeal because the petitioner had failed to appeal timely the district court's order denying the motions for new trial. The Tenth Circuit agreed and dismissed the appeal except for the

³ (...continued)
Indus. Contractors, Inc. (In re Midway Indus. Contractors, Inc.), 178 B.R. 734 (N.D. Ill. 1995).

⁴ See *In re Colon*, 941 F.2d at 245-46.

⁵ See *In re Fugazy Express, Inc.*, 982 F.2d at 776; *In re Morrell*, 880 F.2d at 856-57; *In re Fox*, 762 F.2d at 55; *In re Atlas*, 210 F.3d at 1307-08; *In re War Eagle Constr. Co.*, 249 B.R. at 688; *In re Midway Indus. Contractors, Inc.*, 178 B.R. at 736.

⁶ See *In re Morrell*, 880 F.2d at 856-57.

portion of the appeal regarding attorney’s fees.⁷ The Supreme Court upheld the Tenth Circuit’s decision, concluding that:

Now that we are squarely confronted with the question, however, we conclude that the § 1291 effect of an unresolved issue of attorney's fees for the litigation at hand should not turn upon the characterization of those fees by the statute or decisional law that authorizes them.

. . .

[N]o interest pertinent to § 1291 is served by according different treatment to attorney's fees deemed part of the merits recovery; and a significant interest is disserved. The time of appealability, having jurisdictional consequences, should above all be clear. We are not inclined to adopt a disposition that requires the merits or nonmerits status of each attorney's fee provision to be clearly established before the time to appeal can be clearly known. Courts and litigants are best served by the bright-line rule, which accords with traditional understanding, that a decision on the merits is a "final decision" for purposes of § 1291 whether or not there remains for adjudication a request for attorney's fees attributable to the case.⁸

Heeding the holding in *Budinich*, the Court of Appeals for the Third Circuit, in a case very similar to this appeal, held that “the determination of the merits is to be viewed separately from the decision on the right to fees and of course their quantification.”⁹ Relying on *Budinich*, the Third Circuit remarked:

We read . . . [*Budinich*] to treat attorneys' fees apart from the merits for purposes of appeal, and we think this is so even though these proceedings were instituted to assert a violation of the bankruptcy stay provisions. In view of *Budinich*, our conclusion is not altered by the source of the authority for the fees or by the fact that the source of authority purports to make attorneys' fees part of the damages.¹⁰

⁷ See *id.* at 197-98.

⁸ *Id.* at 201-02.

⁹ *In re Colon*, 941 F.2d at 245 (citing *White v. N.H.*, 455 U.S. 445 (1982)).

¹⁰ *Id.* See also *Dunn v. Truckworld, Inc.*, 929 F.2d 311, 312 (7th Cir. 1991) (“*Budinich* adopts a sharp line: the merits and awards of fees are always distinct for purposes of finality. The whole point of the case was to end case-by-case inquiries into the relation between the merits and the fee award. The Supreme Court chose a rule to enable both the parties and the court of

(continued...)

The Tenth Circuit has recognized the effect of the holding in *Budinich* although it has not considered its application under these facts.^{11,12} Earlier decisions from the Tenth Circuit are contrary to *Budinich*.¹³ However, both

¹⁰ (...continued)
appeals to know with certainty when the time for appeal begins and ends.”).

¹¹ See *Tyler v. City of Manhattan*, 118 F.3d 1400, 1402 n.1 (10th Cir. 1997) (citing *Budinich* and noting that “[t]he judgment in this case, ordering injunctive relief, resolved all remaining issues on the merits and effectively ended the litigation. The fact that the original judgment left open the issue of costs and attorney fees did not deprive the judgment of finality for purposes of appeal.”).

¹² We are aware of the Tenth Circuit’s decision in *Lampkin v. Int’l Union, United Auto. Workers (UAW)*, 154 F.3d 1136 (10th Cir. 1998), which discusses at length *Budinich*. In *Lampkin*, a jury returned a verdict for an employee-plaintiff that the unions-defendants had breached their duty to the employee. The unions sought relief under Rule 50 of the Federal Rules of Civil Procedure, which the district court denied on March 22, 1996. It later entered a judgment on May 14, 1996, in favor of the employee for attorney’s fees as compensatory damages, and the unions filed their appeal on May 28, 1996.

The Tenth Circuit *sua sponte* raised the issue of whether it had jurisdiction where the notice of appeal was filed more than 30 days after entry of the March 22 order and concluded that it did have jurisdiction since “[u]nder the circumstances of this case the award of attorneys’ fees is an award of compensatory damages for breach of the duty of fair representation . . . which only incidentally happens to be measured in this instance solely by the attorneys’ fees incurred by the plaintiff Lampkin.” *Id.* at 1140.

The Tenth Circuit carefully considered *Budinich* and concluded that “[i]n spite of the Court’s recognition of the need for a bright-line rule, the holding is not universally applicable.” *Id.*

We construe *Lampkin* to apply to the unusual circumstances of that case in which the attorney’s fees were inseparable from the merits. See *Barr v. Nat’l Conference of Bar Exam’rs*, 1999 WL 317547, 182 F.3d 931 (10th Cir. 1999) (unpublished decision) (noting the unusual facts of *Lampkin* are distinguishable). In our view, the bankruptcy court’s conclusion that the Appellant violated the automatic stay and award of attorney’s fees against the Appellant is separate and collateral to the quantification of those fees. Unlike *Lampkin*, the amount of the fees here was separable from the merits. Therefore, *Lampkin* is inapplicable to this case.

¹³ See *Phelps v. Washburn Univ.*, 807 F.2d 153 (10th Cir. 1986) (holding an appeal of an award of attorney’s fees for which an amount has not been fixed was premature and not a final order). See also, *Thomas v. Metroflight, Inc.*,

(continued...)

Phelps and *Thomas* were decided before the Supreme Court announced its decision in *Budinich*, and we believe it clearly controls in this case.

Here, the issue of attorney's fees is separate and collateral to the merits of the case because the bankruptcy court's decision on whether the Appellant had violated the automatic stay effectively ended the litigation. We therefore hold that we have jurisdiction since the order from which the Appellant appeals is final.

Our holding rejects the line of cases that holds that there is no final order until attorney's fees have been quantified. Those cases reject the approach we adopt because they claim it causes duplicative litigation and wastes judicial resources.¹⁴ The Court of Appeals for the Eleventh Circuit followed the line of cases contrary to our decision here in *In re Atlas*, 210 F.3d at 1308. The Eleventh Circuit acknowledged *Budinich* but ruled that the Supreme Court's decision in *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737 (1976) controlled.¹⁵ The Eleventh Circuit reasoned that:

Therefore, we conclude that *Wetzel* controls the disposition of this case, not *Budinich*. This case does not fall within the parameters of *Budinich* because this case concerns an award of damages, not just attorney's fees, which has not yet been assessed. This distinction is crucial to our analysis.¹⁶

We do not agree with the Eleventh Circuit because it fundamentally ignores the Supreme Court's teaching in *Budinich* for the need of "a uniform rule that an unresolved issue of attorney's fees for the litigation in question does not prevent judgment on the merits from being final" and that "[c]ourts

¹³ (...continued)
814 F.2d 1506 (10th Cir. 1987) (finding the facts similar to *Phelps*, but deciding not to impose the rule in *Phelps* retroactively).

¹⁴ See e.g., *Morrell*, 880 F.2d at 857.

¹⁵ See *In re Atlas*, 210 F.3d at 1307.

¹⁶ *Id.* at 1308.

and litigants are best served by the bright-line rule.”¹⁷ Also, the Supreme Court decided *Budinich* after *Wetzel*. Moreover, *Wetzel* involved a situation where the trial court found liability but granted no relief whatsoever, which is clearly not the case before us.¹⁸

In conclusion, we hold that we have jurisdiction to entertain the Appellant’s appeal even though the order it appeals did not quantify attorney’s fees. The attorney’s fees were a separate and collateral issue apart from the merits of the bankruptcy court’s order on the merits.

III. Is it proper for this Court to review a decision when the bankruptcy court failed to make findings of fact?

Rule 52 provides that “[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon.”¹⁹ Bankruptcy Rule 9002(1) defines an “action” to include contested matters.²⁰ A motion for sanctions under § 362(h) is a contested matter governed by Bankruptcy Rule 9014.²¹ Rule 52 is made applicable to adversary proceedings by Bankruptcy Rule 7052.²² Unless the bankruptcy court directs otherwise, which it did not do in this case, Rule 9014 provides that Bankruptcy Rule 7052 applies to any proceedings

¹⁷ *Budinich*, 486 U.S. at 202.

¹⁸ *See Wetzel*, 424 U.S. at 742 (“They requested an injunction, but did not get one; they requested damages, but were not awarded any; they requested attorneys' fees, but received none.”).

¹⁹ Fed. R. Civ. P. 52(a).

²⁰ Fed. R. Bankr. P. 9002(1). *See Fairchild v. IRS (In re Fairchild)*, 969 F.2d 866, 868 (10th Cir. 1992).

²¹ *Patton v. Shade*, 263 B.R. 861, 865 (C.D. Ill. 2001) (citing *Matter of Gledhill*, 76 F.3d 1070, 1077-78 (10th Cir.1996)).

²² Fed. R. Bankr. P. 7052.

concerning a contested matter.²³ Thus, under Rule 52(a), as adopted by Bankruptcy Rules 7052 and 9014, in ruling on a motion for sanctions under § 362(h), a bankruptcy court is required to make findings of fact and conclusions of law. This rule “serves to (1) engender care on the part of trial judges in ascertaining the facts; and (2) make possible meaningful appellate review.”²⁴

The standard for making findings of fact has been articulated by the Supreme Court as follows:

It may be that adequate evidence as to these matters is in the present record. On that we do not pass, for it is not the function of this court to search the record and analyze the evidence in order to supply findings which the trial court failed to make. Nor do we intimate that findings must be made on all of the enumerated matters or need be made on no others; the nature of the evidentiary findings sufficient and appropriate to support the court's decision as to fairness or unfairness is for the trial court to determine in the first instance in the light of the circumstances of the particular case. We hold only that there must be findings, stated either in the court's opinion or separately, which are sufficient to indicate the factual basis for the ultimate conclusion.²⁵

In the Tenth Circuit, “the touchstone for whether findings of fact satisfy Rule 52(a) is whether they are 'sufficient to indicate the factual basis for the court's general conclusion as to ultimate facts' so as to facilitate a 'meaningful review' of the issues presented. If a district court fails to meet this standard—i.e. making only general, conclusory or inexact findings—we must vacate the

²³ Fed. R. Bankr. P. 9014. See *Fairchild*, 969 F.2d at 868.

²⁴ *Joseph A. ex rel. Wolfe v. N.M. Dep't of Human Servs.*, 69 F.3d 1081, 1087 (10th Cir. 1995.) See also *Colo. Flying Acad., Inc. v. United States*, 724 F.2d 871, 877 (1984) (“The Rule [52(a)] is designed to provide the appellate court with a clear understanding of the basis of the trial court's decision and to aid the trial court in considering and adjudicating the facts.”).

²⁵ *Kelley v. Everglades Drainage Dist.*, 319 U.S. 415, 421-22 (1943).

judgment and remand the case for proper findings.”²⁶ “It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court.”²⁷

In this case, we cannot meaningfully review the appealed order because the bankruptcy court failed to make sufficient findings of fact for this Court to render a decision on appeal. At the hearing on the Debtors' motion for turnover, the court made reference to “several occasions” on which it had heard Chapter 13 cases where “the creditor will repossess the piece of collateral prior to the bankruptcy being filed, and then is requested to return the collateral and refuses to do so for a variety of reasons.”²⁸ The court listed a number of the reasons given by the Appellant for refusing to turn over the truck. Without making any other findings of fact or conclusions of law, the court immediately granted the Debtors' motion for turnover, and deferred the decision on sanctions, ordering Debtors' attorney to file a motion on that issue. The court subsequently issued its order granting Debtors' motion for sanctions, which again included no findings of fact.

It is true that the bankruptcy court in this case faced a common scenario: “debtor buys car on credit, debtor defaults, creditor repossesses, debtor files a

²⁶ *Wolfe*, 69 F.3d at 1087 (internal citations omitted). *See also Roberts v. Metro. Life Ins. Co.*, 808 F.2d 1387, 1390 (10th Cir. 1987) (“[Under Rule 52(a)], the trial court must include as many of the subsidiary facts as necessary to permit us to determine the steps by which [it] reached its ultimate conclusion. Where the trial court provides only conclusory findings, unsupported by subsidiary findings or by an explication of the court’s reasoning with respect to the relevant facts, a reviewing court simply is unable to determine whether or not those findings are clearly erroneous.”) (internal citations and quotation omitted).

²⁷ Fed. R. Civ. P. 52(a).

²⁸ Recorded Transcript of Hearing Proceedings, March 16, 2004, Appendix W, Appellant’s Corrected Appendix to Opening Brief, at 83, 130.

petition and demands that the car be returned, creditor refuses to return car absent showing of adequate protection.”²⁹ If only life were that simple. The exercise of the court's jurisdiction is dependant on the existence of a case or controversy.³⁰ Federal courts are prohibited from rendering an advisory opinion.³¹ Instead, a court's “judgments must resolve a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.”³² This Court has no doubt that the decision rendered by the bankruptcy court in this case was based on definite and articulable facts in a real and substantial controversy. While the court likely considered all of the specific facts available to it in reaching its decision to grant Debtors' motion for sanctions, this is not reflected in either the oral or written orders made by the court. In its judgment and order, the bankruptcy court made only conclusory findings, without providing a reviewing court with any subsidiary findings or an explication of the court's reasoning with respect to the relevant facts.³³

In the absence of findings of fact to support the bankruptcy court's decision, this Court is unable to review whether the bankruptcy court committed clear error when it found that the Appellant willfully violated the automatic stay. This case, like all cases, did not strictly adhere to the standard script. For example, although Debtors' attorney had made a demand for return

²⁹ *In re Fitch*, 217 B.R. 286, 288 (Bankr. S.D. Cal. 1998).

³⁰ U.S. Const. art. III, § 2; *see generally United States v. Chavez-Palacios*, 30 F.3d 1290, 1292 (10th Cir. 1994).

³¹ *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975); *Chavez-Palacios*, 30 F.3d at 1292-93 (10th Cir. 1994).

³² *Preiser*, 422 U.S. at 401 (internal quotation omitted).

³³ *See Roberts*, 808 F.2d at 1390.

of the truck on more than one occasion, it also appears that the Debtors made oral representations to the Appellant that they “had no intentions of attempting to keep” the truck and denied any knowledge that their attorney was attempting to recover the truck.³⁴ The Appellant claims that it made repeated unsuccessful attempts to contact the Debtors' attorney in the days after the petition was filed.³⁵ The truck at issue in this case apparently had no engine, and was not in working condition during its tenure under Appellant's control.³⁶ Most importantly, it is unclear what, if any, offer of adequate protection was provided by the Debtors to the Appellant in the days and weeks following the petition date. In the absence of findings of fact from the court, we are unable to ascertain what impact, if any, these facts may have had on the court's judgment. This Court reiterates the statement made in *Kelley*, that it is “not the function of this court to search the record and analyze the evidence in order to supply findings which the trial court failed to make.”

IV. Did the bankruptcy court err in holding that the Appellant violated the automatic stay?

This Court is unable to review the judgment of the court below due to the lack of findings of fact. Courts are divided on the issue of whether a creditor may await a ruling by a bankruptcy court regarding the adequate protection of their collateral under § 363(a)(3) before being required to return it to a debtor. We acknowledge that this case presents a substantial question of law, which is an issue of first impression in the Tenth Circuit. Due to the controversial nature of the issue presented in this case, this Court will not proceed on the basis of inadequate factual findings.

³⁴ Appellant's Corrected Opening Brief at 7.

³⁵ *Id.* at 1.

³⁶ *Id.* at 5.

Conclusion

We VACATE the judgment entered below, and REMAND with directions that the bankruptcy court make findings of fact and conclusions of law and enter judgment in accordance with those findings and conclusions.