

UNPUBLISHED

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH

In re)	
)	
CASCADE ENERGY & METALS CORPORATION,)	Bankruptcy Case No. 87C-01916
)	Chapter 11
Debtor.)	
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CASCADE ENERGY & METALS CORPORATION,)	Adversary Proceeding No. 88PC-0861
)	
Plaintiff,)	ORDER DENYING PLAINTIFF'S
)	MOTION FOR RELEASE OF
vs.)	THE RECORDED LIEN OR FOR
)	A SUPERSEDEAS BOND, AND
JEFFREY G. BANKS, et al.,)	GRANTING DEFENDANTS'
)	MOTION FOR SANCTIONS UNDER
Defendants.)	BANKRUPTCY RULE 9011

The matter presently before the court is a motion by the plaintiff, Cascade Energy & Metals Corporation, seeking an order requiring the defendants in the above-captioned adversary proceeding to release a lien on certain property located in San Bernardino County, California ("California property") or to post a bond in the amount of \$2,600,000.00. The defendants have requested sanctions pursuant to Bankruptcy Rule

9011 against the plaintiff's counsel. A hearing was held on December 14, 1990. The plaintiff was represented by Delano S. Findlay, Esq. The defendants were represented by Ronald W. Goss, Esq. Counsel presented argument after which the court took the matter under advisement. The court has reviewed the file, the arguments of counsel, and has made an independent review of the pertinent authorities. Now being fully advised, the court renders the following decision DENYING the plaintiff's motion and GRANTING the defendants' motion.

JURISDICTION

The instant matter involves issues concerning the court's judgment as to the first cause of action asserted in the plaintiff's amended adversary complaint ("July 7, 1989 Judgment").¹ Specifically, the court ruled that a judgment lien that the defendants filed against the plaintiff's California property was not properly perfected. The defendants have appealed the July 7, 1989 Judgment. Bankruptcy Rule 8005 provides that a motion for approval of a supersedeas bond or "other relief pending appeal must ordinarily be presented to the bankruptcy judge in the first instance." Accordingly, this matter is properly before this court.

¹Recently, the court dismissed the remainder of the plaintiff's complaint because it determined that it does not have subject matter jurisdiction to determine the post-confirmation issues it raised.

DISCUSSION

On September 16, 1985, the United States District Court for the District of Utah entered a final judgment which awarded, inter alia, money judgments in favor of the defendants. Cascade Energy & Metals Corp. v. Banks, et al., No. C-82-1223C. The court also awarded a judgment lien on the California property to secure payment of the money judgments. The lien was made effective as of December 31, 1980. On April 10, 1986, the defendants caused a copy of the district court judgment to be recorded in San Bernardino, California.

On April 27, 1987, the plaintiff filed a petition seeking relief under Chapter 11 of the Bankruptcy Code. On October 27, 1988, it filed the present adversary complaint in this court seeking a determination, inter alia, as to the validity of the lien. In its July 7, 1989 Judgment, this court held that the judgment lien had not been properly perfected. The defendants have appealed the court's decision. At this time, the lien that was recorded in California has not been released. The defendants, however, have filed a copy of the July 7, 1989 Judgment in California.

(1) Release of the Lien

In support of its motion, the plaintiff directs the court to California Code of Civil Procedure § 697.410 for the proposition that upon notice the defendants were statutorily required to release their lien against the California property. It further maintains that it

is entitled to be restored to the position that it occupied prior to the alleged improper recording.

First, although the statutory provision as quoted to the court in the plaintiff's memorandum seems to support its position, it has come to the court's attention that the plaintiff has not accurately quoted the statute. In fact, when one inserts those portions of the statute that the plaintiff has omitted in its quotation, it is clear that the statute does not have any application to the case at hand. See discussion on sanctions infra at 5-7.

As to the status quo argument, the court notes that the lien was recorded in April, 1986. The plaintiff filed bankruptcy in April, 1987. The present adversary complaint was not filed until October, 1988. The court finds that the status quo is best maintained by allowing the lien to remain recorded. This is especially so given the fact that the defendants have filed a copy of the July 7, 1989 Judgment in California thereby informing interested parties of the status of the lien.

(2) Supersedeas Bond

Supersedeas bonds are provided for in Federal Rule of Civil Procedure 62(d) which is made applicable to bankruptcy cases by Bankruptcy Rule 7062(d). The trial judge has the inherent authority to set supersedeas bonds for the purpose of securing the prevailing party against loss that it may sustain as a result of an ineffectual appeal.

Grubb v. Fed. Deposit Ins. Corp., 833 F.2d 222, 226 (10th Cir. 1987); Miami Int'l Realty

Co. v. Paynter, 807 F.2d 871 (10th Cir. 1986). "[A] supersedeas bond should be in a sum sufficient to indemnify the appellee not only for costs, damages and interest but for the value of the judgment itself." 9 Moore's Federal Practice ¶ 208.06[2] (2d ed. 1980).

In this case, the plaintiff has not presented any evidence as to its costs, damages, interest, or the value of the July 7, 1989 Judgment. Specifically, the debtor has not presented evidence of its ability to make economic use of the property between the present time and the time in which the appeal is decided. Nor has it brought forth evidence of past, present, or future harm. On page 11 of its brief, the plaintiff has mentioned that it may be entitled to \$1,200,000.00 because that was the amount of annual rent paid on the property in 1980. Furthermore, the plaintiff directs the court's attention to a \$300,000.00 bond that was ordered by the district court in May of 1986. This information, however, is neither reliable nor sufficient evidence of harm that the plaintiff will suffer during the pendency of the defendant's appeal. Accordingly, the court will not order a supersedeas bond in this case.

(3) Sanctions

The defendants in this case have moved the court pursuant to Bankruptcy Rule 9011 for sanctions against the plaintiff's attorney, Delano Findlay, on the basis that he signed a memorandum that contained material misrepresentations of law. In particular, Findlay sought to persuade the court to order the defendants to release a lien on the

plaintiff's California property. In support of his argument, Findlay cited California Code of Civil Procedure § 697.410 to the court and stated that it was entitled "Lien; release; damages; attorney's fees." In fact, the title of this section is "Release of erroneous judgment lien on real property." As the proper title of the statute indicates, it provides remedies to property owners who have had judgment liens erroneously filed against their property due to the similarity of their name with that of an actual judgment debtor. In his memo, Findlay has deleted all references in the statute to erroneously identified property owners (see Appendix).

Bankruptcy Rule 9011 states, in relevant part, that:

Every petition, pleading, motion and other paper served or filed in a case under the Code on behalf of a party represented by an attorney ... shall be signed by at least one attorney of record in the attorney's individual name, whose office address and telephone number shall be stated. ... The signature of an attorney ... constitutes a certificate that the attorney ... has read the document; that to the best of the attorney's ... knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass, to cause delay, or to increase the cost of litigation. ... If a document is signed in violation of this rule, the court on motion or on its own initiative, shall impose on the person who signed it, the represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including a reasonable attorney's fee.

In this case, Findlay has quoted the statute to the court to read as he would like it to read. When one inserts the language that he omitted from his quote, it is obvious that the statute does not stand for the proposition that he claims it supports. On the basis of the facts presented,² it is clear that the quote was meant to mislead the court. This behavior will not be tolerated. Accordingly, sanctions under Rule 9011 are authorized.

ORDER

Accordingly it is HEREBY ORDERED that the plaintiff's motion for release of the recorded lien or for a supersedeas bond is DENIED. The defendants' motion for sanctions under Bankruptcy Rule 9011 is GRANTED. Defendants' attorney is directed to submit an affidavit indicating the fees and costs that he has incurred in bringing the present motion. The court reserves the right to impose such additional sanctions as in its judgment are the minimum necessary to deter this type of misconduct or grossly negligent conduct.

DATED this 18 day of January, 1991.

BY THE COURT:



GLEN E. CLARK, CHIEF JUDGE
UNITED STATES BANKRUPTCY COURT

²In support of his motion, the defendants' attorney made a detailed presentation to the court. Findlay did not rebut the argument of counsel or present contrary evidence other than to state that this has been a hard-fought case and the defendants have requested sanctions at every hearing. While this may be true, it does not diminish Findlay's blatant misrepresentations.

APPENDIX

California Code of Civil Procedure § 697.410(a) (1983) provides:

Release of erroneous judgment lien on real property.

(a) If a recorded abstract of a money judgment or certified copy of a money judgment appears to create a judgment lien on real property of a person who is not the judgment debtor because the name of the property owner is the same as or similar to that of the judgment debtor, the erroneously identified property owner may deliver to the judgment creditor a written demand for a recordable document releasing the lien. The demand shall be accompanied by proof to the satisfaction of the judgment creditor that the property owner is not the judgment debtor and that the property is not subject to enforcement of the judgment against the judgment debtor.

Findlay has quoted § 697.410(a) as follows:

Lien; release; damages; attorney's fees.

(a) If a recorded ... copy of a money judgment appears to create a judgment lien on real property of a person who is not a judgment debtor ... the ... property owner may deliver to the judgment creditor a written demand for a recordable document releasing the lien. The demand shall be accompanied by proof to the satisfaction of the judgment creditor that ... the property is not subject to enforcement of the judgment against the judgment debtor.

Plaintiff's memorandum at 10.