
IN THE UNITED STATES DISTRICT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Donald D. ARMSTRONG,)	
)	
Appellant,)	OPINION AND ORDER
)	
v.)	
)	District Court No. 2-99-CV-0725K
Steven R. BAILEY and)	
Duanne H. GILLMAN,)	
)	
Appellees.)	
)	
)	

This matter is before the court on an appeal by Donald D. Armstrong (“Armstrong”) from two orders and a judgment of the Bankruptcy Court resulting from an adversary proceeding filed in the Bankruptcy Court for the District of Utah, Central Division. This matter came on for oral argument on May 1, 2000. The appellant Armstrong represented himself. The Appellees were represented by Duane H. Gillman. Oral arguments were heard and the Court took the matter under advisement. The Court has carefully considered all briefs and other materials submitted by the parties. The court has further considered the law and facts relevant to this appeal. Now being fully advised, the court enters the following Opinion and Order.

FACTS

An involuntary bankruptcy was filed on August 20, 1998, against Willow Brook Cottages, L.L.C. (“Willow Brook”). Steven R. Bailey (“Bailey”) was appointed trustee of the estate in September 1998. Bailey hired Duane C. Gillman (“Gillman”) as counsel. Armstrong was the sole shareholder of Mountain Pacific Ventures, Inc. (“MPV”). Armstrong was and continues to be the President of MPV. MPV was the managing member of Willow Brook and

the primary or sole equity interest holder and is also currently in bankruptcy proceedings. Armstrong is the personal guarantor on all debt and some obligations issued by Willow Brook.

Armstrong filed the action giving rise to this appeal on May 24, 1999. The action was filed on Armstrong's behalf personally and on behalf of Willow Brook against Bailey and Gillman, both individually and in their official capacities as trustee and counsel for the trustee. At the same time as the filing of the adversarial action Armstrong also filed a "Motion For Complainant to Seek Damages. . . ."

After Armstrong simultaneously filed the adversary complaint and the motion seeking permission to file the adversary complaint, Appellees filed a document with the Bankruptcy Court which was entitled "Trustee's Application for an Order to Show Cause Why Donald E. Armstrong Should Not Be Held in Contempt for Violating the Automatic Stay."¹ This motion requested the dismissal of Armstrong's actions with prejudice, awarding of attorney fees, costs, and \$25,000 punitive damages.

After holding a hearing to show cause the Bankruptcy Court held that Armstrong had violated the bankruptcy automatic stay provision set forth at 11 U.S.C. 362 by filing his adversary complaint without the court's permission. In two orders entered on July 28th, 1999, the Court held Armstrong in contempt; awarded the trustee \$3,620 in attorney fees, and \$5,000 in punitive damages; and dismissed the adversary proceeding with prejudice. Armstrong then filed this appeal.

STANDARD OF REVIEW

In an appeal of orders from the Bankruptcy Court, there are three standards of review that may be applied. First, where the Bankruptcy Court is the finder of fact, the court's factual determinations will not be set aside unless they are "clearly erroneous." *See* Bankruptcy Rule 8013 and *Taylor v. I.R.S.*, 69 F.3d 411 (10th Cir. 1995). A finding of fact is clearly erroneous

¹Following the appointment of Bailey as trustee, Armstrong took several unsuccessful steps to have Bailey removed as the Trustee. These prior actions filed by Armstrong were not considered as part of Armstrong's contempt hearing, therefore, they will not be considered in evaluating the Bankruptcy Court's ruling concerning Armstrong's alleged violation of the automatic stay.

only if the court has a definite and firm conviction that a mistake has been committed. *See In re Hedged-Investments Associations, Inc.*, 84 F.3d 1267 (10th Cir. 1995). Secondly, a bankruptcy court's ruling involving findings of fact may be overturned if the findings are premised on improper legal standards or on proper legal standards improperly applied. In these instances, the review of this court shall be *de novo*. *See Hall v. Vance*, 887 F.2d 1041 (10th Cir. 1989). Finally, mixed question of law and fact which involve primarily a consideration of legal principles are reviewed *de novo*. *See In re Ruti-Sweetwater, Inc.*, 836 F.2d 1263 (10th Cir. 1988).

The review of the dismissal with prejudice for the alleged violation of the automatic stay will be reviewed *de novo*. The factual determinations of the Bankruptcy Court as to the propriety of the awarding of compensatory and punitive damages will be reviewed under an abuse of discretion standard.

DISCUSSION

Section 362 (a)(3) of the Bankruptcy Code places an automatic stay upon any estate that is in bankruptcy. This stay forbids "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate" without leave of the court. 11 U.S.C. 362 (a)(3). When Armstrong filed an adversary action against the Trustee and Trustee's legal counsel he did so in violation of the automatic stay.

While it has been the practice of the federal courts in the Tenth Circuit to liberally construe pro se pleadings, Armstrong's pro se status does not excuse his obligation to comply with the same rules of procedure that governs other litigants. *See Murray v. Pizza Hut, Inc.*, 92 F.3d 1996 (10th Cir. 1996). The law requires that permission be received prior to the filing of the adversary action. Simultaneous filing of the adversary action and the motion seeking permission to file the adversary action is inappropriate. Judge Clark in his ruling stated "apparently [Armstrong] believes he can sue on behalf of the estate and ask permission later." June 23, 1999, Hearing to Show Cause Transcript at p. 21. The stay under section 362 of the Bankruptcy Code requires permission first, not after, or even simultaneously with, the filing of an adversary action. Therefore, the Bankruptcy Court properly denied Armstrong's Motion and dismissed his action

on the basis that he violated the automatic stay.

Dismissal with Prejudice

Armstrong next argues that it was error to dismiss the action with prejudice. An automatic stay is equivalent to a court order. Failure to comply with a court order results in dismissal of the motion and such dismissal operates as a dismissal on the merits. *See* Fed R Bankr P 7041; *See* Collier on Bankruptcy, 15th Revised Ed., 362.11[2]. Therefore, the Bankruptcy Court was correct in dismissing Armstrong's claims with prejudice.

The fact that Armstrong was attempting to assert both the claims of the estate and his personal claims against the Trustee and Trustee's counsel does not change the propriety of the Bankruptcy Court's ruling. The automatic stay precludes Armstrong from bringing the claims of the estate. Even personal claims against the Trustee require approval of the Court that appointed the Trustee. *See LehalRealty Associates v. Scheffel*, 101 F.3d 272, 276 (2d Cir. 1999). Therefore, the Bankruptcy Court was correct in dismissing Armstrong's causes of action with prejudice.

Fees and costs

Appellees were awarded two separate monetary awards by the Bankruptcy Court. The first was a \$3,620,50 compensatory award, for fees and costs, the second was a \$5,000 punitive fine. Section 362 (h) of the Bankruptcy Code sets forth the remedies that are available to those who are injured by a violation of an automatic stay.

An **individual** injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

11 U.S.C. 362 (h)(emphasis added).

Armstrong argues that the estate is not entitled to punitive damages because it is not an "individual." Appellees acknowledge that there is a split in the circuits as to whether or not a

corporation can receive damages under section 362(h).² However, this Court is not required to rule upon the meaning of "individual" as used in section 362(h). Due to the fact that each circuit that has found that damages to corporations are not appropriate under 362 (h) has also found that the damages are appropriate under 105 (a) of the Bankruptcy Code which states that:

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, *sua sponte*, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent abuse of process.

11 U.S.C. 105 (a). Therefore, the Bankruptcy Court was acting within its discretion in awarding \$3,620.50 compensatory damages to a corporation under the Bankruptcy Code.

Punitive Damages

Greater constitutional protection is provided for those accused of criminal violations, therefore, "[t]he distinction between criminal and civil contempt is important." *Law v. National Collegiate Athletic Association ("NCAA")*, 134 F.3d 1438, 1442 (10th Cir. 1998). First, it must be determined whether the \$5,000 monetary contempt sanction, which was referred to by both the Bankruptcy Court and the Appellees as "punitive" damages, was criminal or civil in nature.

Several courts have dealt with the difficult issue of determining whether contempt awards are criminal or civil in nature. For instance, one factor in determining the nature of the sanction is to ask who will receive the fine paid by the sanctioned party. If the court is to be the recipient of the monetary sanction, then usually the sanction is criminal. On the other hand, if it is the opposing party who is to be the recipient of the monetary sanction, it is usually a civil sanction. *See Hicks v. Feiock*, 485 U.S. 624, 632 (1988). However, the Tenth Circuit has indicated that these factors are not dispositive. *See NCAA* at 1442, 43 ("Despite the generalization in *Hicks* we believe the [Bankruptcy Court] could not make a noncompensatory fine civil simply by requiring

² The Third and the Fourth Circuits allow corporations to receive damages, the Second, Ninth, and Eleventh Circuits do not.

it to be paid to complainant instead of to the court.").

Both of the parties rely upon *In Re Skinner*, 917 F.2d 444 (10th Cir. 1990). *Skinner* is a bankruptcy case that dealt with the priority of contempt sanctions. The lower court had entered an order "finding appellant in contempt and imposing sanctions against it in the amount of \$3,500 compensatory damages and \$4,721.12 attorneys fees and costs." *Id.* at 446. The *Skinner* court articulated a workable framework for determining whether monetary contempt sanctions are criminal or civil in nature.

Civil contempt orders serve either or both of two purposes: (1) to compel or coerce obedience of a court order; and (2) to compensate parties for losses resulting from the contemtor's [sic] non-compliance with a court order. Criminal contempt orders, on the other hand, serve the purpose of punishing the contemner for violating a court order. Criminal contempt is a crime in the ordinary sense and convictions for criminal contempt are indistinguishable from ordinary criminal convictions.

Skinner at 447 n. 2 (internal quotations, cites, and ellipsis omitted).

Because criminal contempt sanctions may also be coercive, further distinction is needed to determine whether the coercive sanction is civil or criminal. The distinction developed is a simple one. "Courts have upheld as civil, fines intended to coerce, as long as the offending party can avoid them by complying with the court's order." *NCAA* at 1443. Applying this framework to the facts of this case, we must now determine whether or not the "punitive damage" contempt sanction imposed by the lower court was criminal or civil in nature.

It is unclear to this Court whether the fine imposed by the Bankruptcy Court was intended to be coercive. The Bankruptcy Court, in its ruling from the bench stated, "I don't know what amount would be necessary to deter [Armstrong from] continuing such kinds of action in the future or that any amount would be sufficient." Hearing to Show Cause Transcript at 21:13-15. The fact that the Bankruptcy Judge was not sure whether or not the amount was sufficient to coerce Armstrong from violating the automatic stay in the future is not as significant as the fact that Armstrong was never afforded a way to "avoid [the sanctions] by complying with the court's order." *NCAA* at 1443. Therefore, even if the sanction had a coercive effect it fails to meet the opportunity-to-avoid-the-sanction prong which is necessary to be deemed a civil sanction.

"Criminal contempt is a crime in the ordinary sense, and criminal penalties may not be

imposed upon someone who was not afforded the protections that the Constitution requires of such criminal proceedings." *NCAA* at 1442 (quoting *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 826 (1994)(string cite omitted). Bankruptcy Rule 9020 sets forth the procedural protections that every person is entitled with respect to contempt proceedings. Bankruptcy Rule 9020 (a) deals with contempt committed in the presence of the Bankruptcy Judge and requires that "the facts" leading to the contempt charge shall be recited in the order.³ Subsection (b) deals with other types of contempt and requires "the notice shall be in writing, shall state the essential facts constituting the contempt charged and describe the contempt as criminal or civil and shall . . . allow[] reasonable time for the preparation of the defense."⁴ While it is not clear whether the filing of an adversary complaint in violation of an automatic stay is considered to be an act done in the "presence of the Bankruptcy Judge," it is immaterial, as there were significant defects under either subsection.

It appears that the punitive damages came solely from the filing of the adversary action in violation of the automatic stay.⁵ Had Armstrong just filed the motion to lift the automatic stay or sought permission to personally sue the Court Appointed Trustee as he should have, Appellees would have been subjected to a hearing to discuss the propriety of the motion. They would have also gone through the same effort to defeat the motion that they were required to go through with the simultaneous filing of the adversary filing and the motion to lift the stay. Appellees were never required to, nor did they ever address the merits of Armstrong's complaint. Also, Appellees were being fully compensated for defending the motion from the assets of what had been Armstrong's property, Willow Brook.

³ The Order indicates that the \$5,000 sanction was for violation of the automatic stay.

⁴ The only notice that Armstrong received was the Appellee's "Trustee's Application for an Order to Show Cause Why Donald E. Armstrong Should Not Be Held in Contempt for Violating the Automatic Stay." According to the Bankruptcy's Docket filing Appellee's Application was accepted by the Bankruptcy Judge as an Order to Show Cause. The fifth paragraph of this document states, "an appropriate sanction for the violation of the automatic stay under these circumstances is . . . punitive damages of \$5,000." *Id.* at 3.

⁵Both Appellees' motion requesting an order to show cause and the Judge's Order state that the reason for the punitive fine was Armstrong's violation of the automatic stay.

Further, if the contempt proceeding was brought under subsection (b) of Bankruptcy Rule 9020, as it appears to have been, the notice sent to Armstrong required that he be informed whether or not the contempt being considered against him was "criminal or civil." This was not done.

Considering the fact that Armstrong simultaneously filed a motion asking that the automatic stay be lifted so that he could proceed with the complaint, the award of \$5,000 in punitive damages is an abuse of discretion. Armstrong's procedural defect simply does not merit the awarding of punitive damages based upon criminal contempt.

Because Armstrong was never afforded the protections of the Constitution, or the Bankruptcy Rules regarding criminal contempt charges against him the "punitive damages" award is reversed and the contempt charges are set aside.

Armstrong's Motion to Supplement the Record

Armstrong's motion to supplement the record on appeal is denied. Further, the issue that he asks the Court to consider (i.e. the denial of his motion to dismiss Appellees' claims against him for an alleged violation of the automatic stay in his personal bankruptcy) is not a final order and is not appealable.

For the reasons stated herein, it is hereby ORDERED that the Judgment in the Bankruptcy Court is AFFIRMED in part and REVERSED in part.

Dated this _____ day of May, 2000.

DALE A. KIMBALL
United States District Judge