1:12-cv-10720-GAO

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

ST. ANNE'S CREDIT UNION
Appellant

v.

DAVID ACKELL
Appellee

Appeal of Order of the United States Bankruptcy Court for the District of Massachusetts

BRIEF OF APPELLEE, DAVID ACKELL

David Ackell
By his attorney

July 13, 2012

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PROCEDURAL APPELLATE ISSUES

The Debtor, David Ackell, Appellee herein, concedes that St Anne's Credit Union has correctly articulated (1) the basis of appellate jurisdiction, (2) the statement of the issue and applicable standard of review and (3) the statement of the case.[1]

STATUTORY FRAMEWORK--THE BANKRUPTCY ESTATE AND AUTOMTIC STAY

A. The Bankruptcy Estate.

Section 541(a) of the Bankruptcy Code provides that an estate is created by the commencement of a bankruptcy case. The bankrupt estate is a new legal entity, separate from the debtor.[2] The debtor's property as of the date of the petition, except for that specifically excluded by the Code, *see* 11 U.S.C. § 541(b), passes to the estate. Property initially considered part of the bankruptcy estate may be removed from the estate through the exemption process. 11 U.S.C. § 522(b), (l). Certain property may also be added to the bankruptcy estate after the

[1] However, most of the recited undisputed facts are simply irrelevant to resolving the purely legal issue presented in this appeal

[2] *See* In re Mammoth Mart, Inc., 536 F.2d 950, 954 (1st Cir. 1976) (debtor-in-possession is separate legal entity from debtor); In re SeaEscape Cruise, Ltd., 201 B.R. 321, 323 (Bankr. S.D. Fla. 1996) ("The bankruptcy estate is a separate legal entity.") (citing In re Pace, 67 F.3d 187, 192 (9th Cir. 1995); Elmwood Dry Dock and Repair v. H & A Co., Ltd., 1995 WL 686750 (E.D. La. 1995)); In re Bame, 251 B.R. 367, 375 ("the debtor-in-possession is an entity distinct from the Debtor "); In re Storage Technology Corp., 55 B.R. 479, 484 (Bankr. D. Colo. 1985) ("STC as a debtor and STC as a DIP are legally distinct entities."). *See also* In re Jamko, Inc., 240 F.3d 1312, 1313, n.1 (11th Cir. 2001) ("The bankruptcy estate is a separate legal entity."); In re Jess, 169 F.3d 1204, 1207 (9th Cir. 1999) ("A bankruptcy estate becomes a legal entity when a bankruptcy petition is filed"); In re Thompson Boat Co., 252 F.3d 852, 853 (6th Cir. 2001) (affirming grant of partial summary judgment on the ground that "a debtor and his estate are two separate entities"); U.S. v. Lowrance, 2003 WL 22327850 (N.D. Okla. Aug. 28, 2003) *3, ("the filing created a bankruptcy estate, that is, a separate legal entity"); DePaola v. Nissan Hosp. America, Inc., 2005 WL 2122265, *3, n.9 (M.D. Ala. Aug. 29, 2005); Wade v. Bailey, 287 B.R. 874, 880 (S.D. Miss. 2001)("An estate is a separate legal entity"); In re Quality Truck & Diesel Injection Service, 251 B.R. 682, 686 (S.D. W.Va. 2000) ("The bankruptcy estate is a separate legal entity.")

commencement of the case. For example, property acquired by inheritance by the debtor within 180 days of the filing of the petition may become property of the estate. *See* 11 U.S.C. § 541(a)(5). Similarly, proceeds or rents from estate property are property of the estate. *See* 11 U.S.C. § 541(a)(6).

In a chapter 7 bankruptcy case, a trustee is responsible for liquidating property of the estate and paying creditors according to priorities set forth in the Code. *See* 11 U.S.C. §§ 704(a)(1), 726; *In re Vandeventer*, 368 B.R. 50, 53 (Bankr. C.D. Ill. 2007)("a trustee is limited to collecting and reducing to money 'property of the estate'"). In a chapter 13 case, the debtor maintains possession over the property of the estate but must propose a plan detailing how much creditors will be paid. *See* 11 U.S.C. §§ 1306, 1322. A chapter 13 trustee is responsible for ensuring that the debtor's plan is consistent with the Code and that the debtor complies with the plan.

B. The Automatic Stay.

The automatic stay is a fundamental cornerstone of the bankruptcy system established under the Bankruptcy Code. *See* H.R. Rep. No. 95-595, 95th Cong., 1st Sess. at 340 (1977). It serves two primary purposes: 1) it grants the debtor breathing room and provides time to attempt reorganization, and 2) it prevents creditors from racing to the courthouse in an attempt to drain the debtor's assets.

Section 362(a) defines the scope of the stay and distinguishes between acts against the debtor, acts against property of the debtor and acts against property of the estate. Section 362(a)(1) stays actions or proceedings "against the debtor." Section 362(a)(2) stays enforcement of a judgment "against the debtor or against property of the estate." Section 362(a)(3) stays "any act to obtain possession of property of the estate or of property from the

estate." Similarly, sections 362(a)(4), 362(a)(5) and 362(a)(6) stay certain actions, respectively, against property of the estate, against property of the debtor, and against the debtor.

Section 362(b) identifies twenty-eight exceptions to the automatic stay. None of these exceptions apply in this case. Section 362(c) details when the automatic stay terminates. It also distinguishes between the stay of acts against property of the estate and the stay of other acts. Subsection (c)(1) continues the stay against property of the estate until the property is no longer property of the estate. Subsection (c)(2) continues the stay of any other act until the case is closed, dismissed or a discharge is granted or denied. Sections 362(c)(3) and 362(c)(4) limit the applicability of the automatic stay in cases of repeat filings. Finally, subsections (d), (e), (f) and (g) provide the process by and conditions under which the court may grant relief from the automatic stay on the request of a party in interest.

UNDER THE PLAIN LANGUAGE OF 11 U.S.C. § 362(c)(3)(A), THE AUTOMATIC STAY TERMINATES ONLY WITH RESPECT TO THE DEBTOR, NOT WITH RESPECT TO THE PROPERTY OF THE ESTATE

The starting point for the court's inquiry should be the statutory language of 11 U.S.C. § 362(c)(3)(A). *See Lamie v. U.S. Trustee,* 540 U.S. 526, 534, 124 S.Ct. 1023, 1030 (2004). It is well established that when a "statute's language is plain, the sole function of the court, at least where the disposition required by the text is not absurd, is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (internal quotations omitted). "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which the language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S. Ct. 843, 136 L.Ed. 2d 808 (1997). The plain language of a statute will be deemed absurd only if it is unthinkable, bizarre or demonstrably at odds with the intentions of its drafters. *See In re*

Spradlin, 231 B.R. 254, 260 (Bankr. E.D. Mich. 1999) (citing *Public Citizen v. Dept. of Justice*, 491 U.S. 440, 109 S. Ct. 2558, 105 L.Ed.2d. 377 (1989)).

When a debtor files for bankruptcy within one year of dismissal of a previously filed bankruptcy case, section 362(c)(3)(A) provides that:

> the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate *with respect to the debtor* on the 30th day after the filing of the later case.

(emphasis added). The words "with respect to the debtor" are clear and have plain meaning in the context of the Bankruptcy Code. The words are clear because there are no words subject to multiple meanings; there are no "fuzzy" words; there are no words requiring a dictionary. *See Rinard*, 451 B.R. at 19-20 (describing the text of the statute as "crystal clear"). The majority of courts agree that this language is unambiguous and that, when applicable, section 362(c)(3)(A) only terminates the stay with respect to the debtor, not with respect to property of the estate. *See*, *e.g.*, In re *Mortimore*, 2011 WL 6717680 (D.N.J. Dec. 21, 2011); In re *Holcomb*, 380B.R. 813 (B.A.P. 10th Cir. 2008); In re *Jumpp*, 356 B.R. 789 (B.A.P. 1st Cir. 2006); In re *Scott-Hood*, 2012 WL 2260115 (Bankr. W.D. Tex. 2012); In re *Rinard*, 451 B.R. 12, 20 (Bankr. C.D. Cal. 2011); In re *Alvarez*, 432 B.R. 839, 842-43 (Bankr. S.D Cal. 2010); In re *Stanford*, 373 B.R. 890 (Bankr. E.D. Ark. 2007); In re Tubman, 364 B.R. 574 (Bankr. D. Md. 2007); In re *McFeeley*, 362 B.R. 121, 125 (Bankr. D. Vt. 2007); In re *Pope*, 351 B.R. 14 (Bankr. R.I. 2006); In re *Murray*, 350 B.R. 408 (Bankr. S.D. Ohio 2006); In re *Brandon*, 349 B.R. 130 (Bankr. M.D.N.C 2006); In re *Gillcrese*, 346 B.R. 373 (Bankr. W.D. Pa. 2006); In re *Williams*, 346 B.R. 361 (Bankr. E.D. Pa. 2006); In re *Harris*, 342 B.R. 274 (Bankr. N.D. Ohio 2006); In re *Jones*, 339 B.R 360 (Bankr. E.D.N.C. 2006); In re *Moon*, 339 B.R. 668 (Bankr. N.D. Ohio 2006); In re *Johnson*, 335 B.R 805 (Bankr. W.D. Tenn. 2006).

The words "with respect to the debtor" have plain meaning because bankruptcy law and cases interpreting it have long differentiated between the debtor, property of the debtor, and property of the estate.[3] "Nowhere in § 362 does Congress use the phrase 'with respect to the debtor' as incorporating the debtor, the debtor's separate property, and property of the estate." *Holcomb*, 380 B.R. at 816. To the contrary, the distinction between the debtor, the property of the debtor, and property of the estate is found throughout the Bankruptcy Code. For example, sections 362(a)(1), (a)(2), and (a)(3) apply the automatic stay, respectively, to actions against the debtor, to the enforcement of judgments against property of the debtor, and to actions to obtain property of the estate. Sections 362(b)(2)(B) permits collection of domestic support obligations only from "property that is not property of the estate." *See* In re *Anderson*, 463 B.R. 871, 877 (Bankr. N.D. Ill. 2011) (property acquired after filing of chapter 7 bankruptcy including post-bankruptcy earnings is not property of the estate and is subject to collection free of the automatic stay). Section 362(c)(1) and section 362(c)(2) distinguish between acts against property of the estate and any other acts. Section 521(a)(6) differentiates between property of the estate and property of the debtor, and section 704(a)(1) authorizes the trustee to collect and reduce to money "property of the estate." These sections demonstrate that Congress recognized the difference between the debtor, property of the debtor, and property of the estate. *See* In re *Alvarez*, 432 B.R. 839 (Bankr. S.D. Cal. 2010); In re *Tubman*, 364 B.R. 574, 583 (Bankr D. Md. 2007). In section 362(c)(3)(A), Congress chose to terminate the stay only with respect to the debtor, not property of the estate.

[3] The creation of a separate estate has been a feature of bankruptcy dating back to the Bankruptcy Act of 1898. Under Section 70a of the former Bankruptcy Act, from which section 541 of the Bankruptcy Code is derived, the trustee was "vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this Act, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located."

TERMINATION OF THE STAY WITH RESPECT TO THE DEBTOR DOES NOT PRODUCE ABSURD RESULTS

Just as the majority of courts have concluded that the language of 362(c)(3)(A) is unambiguous and its meaning clear, so too have the majority of courts held that this plain reading of the words "with respect to the debtor" make sense and are consistent with the other provisions of section 362 and other sections of the Bankruptcy Code. *See, e.g., Holcomb*, 380 B.R. at 816; *Rinard*, 451 B.R. at 19. Bankruptcy has two main purposes: to provide a fresh start for the debtor and to facilitate the fair and orderly repayment of creditors to the extent possible. *Kokoszka v. Belford*, 417 U.S. 642, 645 (1974). To achieve these twin objectives, the Bankruptcy Code creates the bankruptcy estate and employs the automatic stay to ensure that creditors receive an orderly and appropriate payment of their claims, instead of having to engage in a "race to the courthouse."

Within this framework, Congress enacted two provisions to discourage repeat filings by debtors. One provision, section 362(c)(4), applies to debtors with two or more dismissed bankruptcy cases in the year prior to the filing of a petition for bankruptcy, and provides that the automatic stay does not go into effect (other than a case refilled under section 707(b)). However, the debtor or another party interest may seek an order imposing the stay. In section 362(c)(4), Congress has placed the burden on the debtor or other party in interest to demonstrate that a stay is justified.

The second provision, section 362(c)(3), applies to debtors with a single dismissed case in the year prior to filing a second petition for relief. This provision is more moderate than section 362(c)(4) in both timing and scope. Instead of terminating the stay in its entirety, section 362(a)(3)(A) ends the stay only with respect to the debtor. Instead of restricting the stay from the outset of the case, section 362(c)(3)(A) gives the debtor thirty days to seek additional relief.

The limited scope of 362(c)(3)(A) demonstrates that Congress sought to balance the interests of the debtor and his various creditors. By maintaining the stay for property of the estate, Congress has chosen to protect other creditors who would be harmed if a single creditor, such as St. Anne's, had full access to property of the estate. Additionally, if Congress had intended the stay to terminate in its entirety on the account of one prior case dismissed, it could easily have done so by simplifying the language of 362(c)(3)(A) as follows:

> the stay under subsection (a) ~~with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease~~ shall terminate ~~with respect to the debtor~~ on the 30th day after the filing of the later case.

Congress did not choose the language above. Instead, it opted to terminate the stay only with respect to the debtor. *See* In re *Brandon*, 349 B.R. 130 (Bankr. M.D.N.C. 2006) (Congress could have removed the stay it in entirety as it did under 362(c)(4), but it did not do so).

Contrary to the assertions of St. Anne's, the language of 362(c)(3)(A) has practical effect, too. When the stay is terminated with respect to the debtor, creditors are free to collect their debt from post-petition wages of and most other post-petition assets acquired by a chapter 7 debtor without violating the automatic stay. Creditors could enforce car leases or apartment leases with respect to the debtor. In chapter 13, exempt property that leaves the estate upon confirmation could also be pursued without violating the stay under section 362(c)(3)(A). Section 362(c)(3)(A) has meaning and has consequence when read in the context of the Bankruptcy Code as a whole. There is no reason to conclude that the statute is absurd because the consequences are not as extreme as the creditor in this case desires. See Tubman, 364 B.R. at 585 (providing less than complete termination of the stay is consistent with Congress's efforts to balance competing interests).

THE "SPOUSAL—EXCLUSION" HYPOTHESIS URGED BY SAINT ANNE'S IS NOT SUPPORTED BY THE LANGUAGE OF THE STAUTE AND HAS BEEN REJECTED BY THE MAJORITY OF COURTS

St. Anne's urges this Court to follow the minority view and to conclude that the stay terminates as to the debtor, his property, and property of the estate. That is, section 362(c)(3)(A) terminates the stay in its entirety. Such a result is not supported by the plain language of the statute. The minority view, adopted by only a handful of courts, finds that the language "with respect to the debtor" serves only to distinguish between the debtor with a prior filing and a co-filing spouse with no prior filings. *See* In re *Reswick*, 446 B.R. 362 (B.A.P. 9th Cir. 2011); In re *Daniel*, 404 B.R. 318 (Bankr. N.D. Ill. 2009); In re *Curry*, 362 B.R. 394 (Bankr. N.D. Ill. 2009); In re *Jupiter*, 344 B.R. 754 (Bankr. D.S.C. 2006). This view is based on the analysis of the court in *Jupiter* where the court stated, "it is evident that the intent of the drafters was to terminate all protections of the automatic stay under this new subsection." 344 B.R. at 761. However, reference to legislative history is unnecessary when the statutory language is clear, as it is in this case. *See Lamie v. United States Trustee*, 540 U.S. 526. 534, 124 S.Ct. 1023, 157 L.Ed 1024 (2004). Accordingly, the majority of courts have rejected this interpretation. *See, e.g.*, In re *Rinard*, 451 B.R. 12, 20 (Bankr. C.D. Cal. 2011); In re *Tubman*, 364 B.R. 574 (Bankr. D. Md. 2007).

Furthermore, there is no legislative history that demonstrates that the statutory language of section 362(c)(3)(A) is demonstrably at odds with the intentions of the drafters. With respect to the 2005 amendment to the Bankruptcy Code, which added sections 362(c)(3) and 362(c)(4), there is no conference report, no senate committee report, and no floor statements. The House Report relied on by the court in *Jupiter* merely mimics the statutory language; it does not explain its purpose or contradict the plain language of the statute. The court in *In re* Daniel, 404 B.R.

318, 327-29 (Bankr. N.D. Ill. 2009) reviews earlier iterations of the 2005 amendments to the Code, but presumes that the legislative intentions of Congress four years earlier can be imputed to the intentions of the Congress that enacted the law.

The minority view has been criticized as "out of thin air" and unsupported by the statutory text, which contains no reference to direct the reader to consider the impact on a spouse who did not file. In re *Mortimore*, 2011 WL 6717680 n.3 (D.N.J. Dec. 21, 2011); *see also* In re *Tubman*, 364 B.R. at 583 n.16 ("[i]t is difficult to discern how the words 'the debtor' could naturally be limited to mean only a co-debtor in a jointly filed case"). Further, it does not make sense for the words "with respect to the debtor" to be incorporated in section 362(c)(3)(A) but not in section 362(c)(4)(A) if the language was meant to protect the innocent spouse non-filer. *Id.*

The minority view urged by St. Anne's in this case it not supported by the plain language of the statue, is not supported by any legislative history, and does not make sense when considered in light of other parts of section 362 and other sections of the Bankruptcy Code.

ST. ANNE'S IS NOT WITHOUT RECOURSE BECAUSE IT MAY SEEK RELIEF FROM THE AUTOMATIC STAY UNDER SECTION 362(d)

St. Anne's suggests that the plain reading of section 362(c)(3)(A), which terminates the stay only with respect to the debtor, somehow deprives secured creditors of the ability to pursue recovery by exercising its in rem rights against their collateral. (St. Anne Br. at 12). This is not true. Section 362(d) provides the grounds for any party in interest, including secured creditors, to request relief from the stay. *See Tubman*, 364 B.R. at 585. It provides that the court may grant relief, for example, by terminating, annulling, modifying, or conditioning of the stay "for cause, including the lack of adequate protection of an interest in property." In addition, the court may grant relief from the stay of an act against property if the debtor has no equity in the

property and the property is not necessary for an effective reorganization. The flexibility of section 362 in terminating, annulling, modifying or conditioning the stay permits the court to fashion the relief to the particular circumstances of each case. Stay relief under section 362(d) is available to any party in interest, which includes secured creditors such as St. Anne's. In this case, even though they stay was not terminated with respect to property of the estate, St. Anne's may still seek relief from stay if sufficient cause exists.

CONCLUSION

The Bankruptcy Court correctly interpreted the applicability of the automatic stay. It's decision should be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that I have this date electronically filed an Appellee's Brief in this case with the Clerk of this Court using the CM/ECF System. The following CM/ECF System participants in this case eligible to receive notice of the filing of such paper(s) electronically:

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I further hereby certify that I have this date served a copy of the above-referenced papers on the following non CM/ECF participants by first class mail, postage prepaid, at the address noted below:

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