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IN THE SUPREME COURT
OF THE STATE OF FLORIDA

W. W. GAY MECHANICAL CONTRACTOR, INC., ETC.,

Petitioner,

vs.

CASE NO. 72,357

WHARFSIDE TWO, LTD., and CHANEN CONSTRUCTION COMPANY, INC.,

Respondents.

BRIEF OF PETITIONER W.W. GAY MECHANICAL CONTRACTOR, INC., ON THE SUBJECT OF THE EFFECT OF WHARFSIDE II's BANKRUPTCY PETITION AND THE AUTOMATIC STAY INVOLVED

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STATEMENT OF THE CASE AND FACTS

Reference to Appendix will be by "A- ."

Gay filed one suit in the Circuit Court, Duval County, Florida, against both Wharfside and Chanen (R:1-19). The suit against Wharfside, as owner was to foreclose the Mechanics' Lien. The count against Chanen was to recover the balance due under the contract, with interest, costs, and attorney's fees which were provided for in the subcontract (PX:1). Wharfside counterclaimed against Gay for damages (R:33-38), Chanen counterclaimed against Gay for damages, (R:71-77).

By agreement of the Court and the parties, the Mechanics' Lien foreclosures and the action against Chanen by Gay, along with the countersuits and cross-action were all tried before one jury. In effect, the Court used the jury verdict as advisory in ruling on the Mechanics' Lien foreclosure.

The jury returned a verdict, the form of which was proposed by Defendants (R:458-460). The effect of the verdict was to award Gay $200,000.00 from both Chanen and Wharfside, together with interest; to award Wharfside, the owner, $30,000.00 against Chanen, the General Contractor, together with interest.

Thereafter, on November 3, 1986, the trial court rendered its Final Judgment (R:537-540), awarding the damages, interest, costs, and attorneys fees. An appeal was taken from that Final Judgment by both Wharfside Two and Chanen Construction Company to the District Court of Appeal, First District, which reversed the trial Court with opinion. Pursuant to the Order of the trial court,

Wharfside Two and Chanen Construction Company posted with the Circuit Court a supersedeas bond in the amount of $468,454.75, which bond is still held by that court pending final disposition of the appeal. Following the reversal by the District Court of Appeal, W. W. Gay Mechanical Contractor petitioned for certiorari in this court and the case was argued on its merits on December 7, 1988. At that argument this court was informed that a few days prior to December 7, 1988, Wharfside Two had filed its petition for Chapter 11 bankruptcy, with the Bankruptcy Court in California, raising the question of whether the automatic stay provision of the bankruptcy law would affect this appeal. This court has requested briefs on that question.

The Petitioner here contends that the Automatic Stay provision in the bankruptcy law does not affect this court's determination of the case on appeal.

SUMMARY OF ARGUMENT

The Petitioner here contends that the Petition for Chapter 11 Bankruptcy by Wharfside Two, and the resulting automatic stay under Section 362 of the Bankruptcy Law does not affect this appellate proceeding insofar as Wharfside Two is concerned for the following reasons:

1. The judgment in favor of W. W. Gay Mechanical Contractor, Inc. is "protected" by a supersedeas bond.

2. The judgment in favor of W. W. Gay Mechanical Contractor, Inc. is against both Wharfside Two, Ltd. and Chanen Construction Company, the latter of which is not in bankruptcy.

POINTS OF ARGUMENT

POINT ONE: WHERE A FINAL JUDGMENT HAS BEEN RENDERED BY THE TRIAL COURT AGAINST JOINT DEFENDANTS AND DEFENDANTS TOOK AN APPEAL AND POSTED A SUPERSEDEAS BOND WITH THE TRIAL COURT; AND THEREAFTER ONE OF THE JOINT DEFENDANTS PETITIONED FOR A CHAPTER XI BANKRUPTCY RESULTING IN AN "AUTOMATIC STAY" UNDER THE BANKRUPTCY LAW, WILL THE "AUTOMATIC STAY" PREVENT THE APPEAL FROM FURTHER PROSECUTION AND DECISION BY THE APPELLATE COURT?

ARGUMENT

An investigation of Collier on Bankruptcy, Section 38-02(2) reveals the statement that where a supersedeas bond has been posted by the defendant there will be no stay of the appellate proceedings.

Collier then cites the case of Mid-Jersey National Bank v. Fidelity-Mortgage Investors, 518 F.2d 640 (1975) decided by the United States Court of Appeals, Third Circuit. In this case

> "A bank instituted an action against a borrower to recover amounts due under a note, and the action was removed to federal district court on the basis of diversity of citizenship. After the United States District Court for the District of New Jersey, Vincent P. Biunno, J., entered judgment in favor of the bank, the borrower deposited a certificate of deposit with the court in lieu of a supersedeas bond, and appealed. The Court of Appeals, Adams, Circuit Judge, held that the institution by the borrower of Chapter XI bankruptcy proceedings did not stay proceedings under the appeal, that prejudgment interest was allowable to the bank at the rate of interest specified in the underlying not, and that the trial court abused its discretion in fixing postjudgment interest at 6%."

The Court further saying:

> "Our interpretation of Rule 11-44(a) is consonant with the purpose of the stay--'to prevent interference with, or diminution of, the debtor's property during the pendency of the Chapter XI proceeding.' The stay 'is intended to prevent a creditor from defeating the jurisdiction of the bankruptcy court over the debtor's property by instituting another action in a different forum.' As Judge Learned Hand has said, 'stays must be ancillary to the main purpose of the [Chapter XI] proceeding and are not lawful when they cannot contribute to execution of the plan.'"

A further search of the cases finds the case of Grubbs v. Federal Deposit Insurance Corporation, 833 F.2d 222 (10th Cir. 1987).

> "Where FDIC moved to exonerate supersedeas bond posted to secure stay of execution of judgments against bank pending appeal.
>
> The Court held that the Mid-Jersey case held that the stay required by Rule 11-44(a) extends only to proceedings that could divest the debtor of property over which bankruptcy court has jurisdiction.
>
> The Court then held that the supersedeas bond was not property of the debtor and is not subject to the jurisdiction of the Chapter XI court.
>
> The deposit must be considered the res of a trust and the court acts as Trustee and is charged with determining the beneficiaries pursuant to the appeal. ...The deposit is not available to the reorganization Court to aid in the execution of the plan in the Chapter XI proceeding."

See also Trionic National Bank v. Sprague, 303 U.S. 406, 58 S.Ct. 612, 82 L.Ed. 926 (1938).

See also In Re Titan Energy, Inc. National Union Fire Insurance Co. of Pittsburgh v. Titan Energy Inc., et al., 837 F.2d

325 (8th Cir. 1988).

Other cases refer to situations where the debt of the judgment debtor is guaranteed or secured. The case of Otoe County National Bank v. W & P Trucking, Inc., Charles E. Froelich, William J. Froelich, Jr., Defendants, and Jack D. Cramer, Defendant-Appellant, 754 F.2d 881 (10th Cir. 1985) was a case in point.

> "In this diversity action Otoe County National Bank, Otoe, a Nebraska resident, sued W & P Trucking , Inc., W & P, an Okalhoma resident, under a security agreement containing nineteen leases of trucks and their equipment. By the terms of the leases W & P was required to pay to Otoe a rental over a 48-month period. The payment was guaranteed by Cramer and two others, all Okalhoma residents. A default judgment was entered against Cramer. His motion to vacate the default was denied and he appeals. We affirm and remand with directions.
>
> ...On May 9, 1983, W & P filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code. On May 11, 1983, at the hearing on Otoe's application for pre-judgment replevin of the collateral underlying the leases, the trial court ordered, R. 194.
>
> ...The Court finds that pursuant to the automatic stay provisions of 11 U.S.C. @ 362(a) further action on behalf of Plaintiff is stayed until further notice.
>
> IT IS THEREFORE ORDERED that this matter be held in abeyance until further [sic] of the Court.
>
> ...Cramer argues that the May 11, 1983, order stayed Otoe from further action against any defendant, not just W & P. He bases his argument on the failure of the order to specify to which of the four defendants it applied and the phrase holding the matter in abeyance. He also argues that the automatice

stay should be interpreted to extend to guarantors of a bankruptcy debtor.

Section 362(a) provides:

> 'Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title...operates as a stay applicable to all entities, of (1) the commendement or continuation, including the issuance or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title...' (Emphasis supplied.)

Section 362(a) automatically stays proceedings against the debtor only and not co-debtors."

In the case of Lincoln Lynch, et al. v. Johns-Manville Sales Corporation, et al., 710 F.2d 1194 (6th Cir. 1983) the court says:

> "It is universally acknowledged that an automatic stay of proceeding accorded by @ 362 may not be invoked by entities such as sureties, guarantors, co-obligors, or others with a similar legal or factual nexus to the Chapter 11 debtor."

> "In Paden v. Union for Experimenting Colleges & Universities, 7 B.R. 289 N.D. Ill. 1980), the stay was construed as designed to prevent the dissipation or diminution of the bankrupt's assets during the pendency of the Chapter XI proceeding...and to avoid the multiplicity of claims in different forms against the estate."

A slightly different approach is taken by the Court of Appeal of Louisiana in the case of C. K. Pinsonat v. W. H. Skinner, 125 So.2d 216 (1960).

In that case a money judgment was rendered for plaintiff and defendant appealed. The Louisiana court held:

> "[3] The mere fact that voluntary bankruptcy proceedings instituted by defendant-appellant may have been pending in the United States District Court on the day this case was submitted to usm, does not have the effect of ousting this court of jurisdiction in the instant case, in the absence of an order of the bankruptcy court restraining the prosecution of suits against the bankrupt, as authorized by the Bankruptcy Act, 11 U.S.C.A. Section 29."

The Louisiana court also cited an additional case of Lorina v. Charles Rowe Co., et al., 48 So.2d 103 (Court of Appeal of Louisiana 1950).

Counsel for Defendant Wharfside Two, Ltd., cites in his Notice of Supplemental Authority filed with this court in connection with the Suggestion of Bankruptcy, the case of Shop in the Grove, Ltd. v. Union Federal Savings and Loan Association, 425 So.2d 1138 (3rd Fla. DCA 1982) which holds:

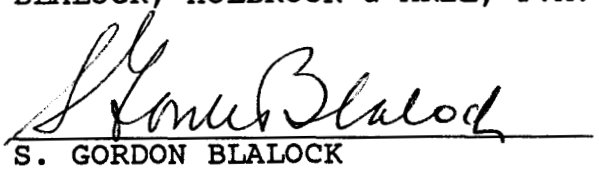
> "Appeals initiated and to be prosecuted by debtor from judgments rendered against debtor were not continuation of a proceeding against debtor nor proceeding for enforcement of judgments previously obtained nor an act to obtain possession of its property, for purposes of automatic stay provision, and debtor's motion to stay appeals was accordingly denied."

CONCLUSION

In view of the posture of the case, the presence of an additional defendant--judgment debtor, the existence of the supersedeas bond posted by both defendants after judgment, and the filing of a Chapter XI bankruptcy petition during pendency of the appeal, the automatic stay incident to the bankruptcy petition of Wharfside Two, Ltd. will not stay these proceedings which may continue to decision.

Respectfully submitted

BLALOCK, HOLBROOK & AKEL, P.A.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to ROBERT C. GOBELMAN, ESQ., 1500 American Heritage Life Bldg., Jacksonville, FL 32202-3385; and J. RICHARD MOORE, ESQ., 500 N. Ocean Street, Jacksonville, FL 32202, by U.S. Mail, this 20th day of December, 1988.

S. GORDON BLALOCK