

IN THE SUPREME COURT  
STATE OF FLORIDA

W. W. GAY MECHANICAL CONTRACTOR,  
INC.,

Plaintiff/Petitioner,

vs.

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

Defendants/Respondents.

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FILED  
JAN 4 1988

CLERK, SUPREME COURT  
BY *[Signature]*  
Clerk

CASE NO.: 72,357

**BRIEF OF RESPONDENT, WHARFSIDE TWO, LTD.  
ON THE SUBJECT OF THE EFFECT OF  
WHARFSIDE TWO, LTD.'S BANKRUPTCY PETITION  
AND THE AUTOMATIC STAY PROVISIONS OF THE  
BANKRUPTCY ACT**

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STATEMENT OF THE CASE AND FACTS

For the purposes of this brief, on the effect of Wharfside Two, Ltd.'s filing for bankruptcy, Respondent Wharfside Two, Ltd. (hereinafter referred to as "Wharfside"), will accept the Statement of the Case and Facts contained in the brief of the Petitioner, W. W. Gay Mechanical Contractor, Inc. (hereinafter referred to as "Gay").

### SUMMARY OF ARGUMENT

The automatic stay provisions of the present Bankruptcy Act, which govern this matter, prohibit a party from enforcing a lien against property of the bankrupt estate or the debtor. Since the action against Wharfside Two, Ltd. is a proceeding to enforce a mechanic's lien, it has been automatically stayed. The fact that a supersedeas bond has been posted should be of no effect as that does not create one of the exemptions to the stay contained in the Act. To allow Gay to proceed against the bond would be to permit it to circumvent the provisions of the Bankruptcy Code.

Under normal circumstances, the automatic stay does not apply to a co-defendant. However, in this case, there is a special circumstance in that the interests of Wharfside and the co-defendant, Chanen Construction Company, are so intertwined on the issue of the inconsistency of the verdict, that the Court's ruling can not be made against Chanen without effecting, one way or the other, Wharfside. In that situation, the stay should apply to the co-defendant as well.

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?

Petitioner cites a section contained in 2 Collier Bankruptcy Practice Guide, Section 38.02(2), (erroneously cited in Petitioner's brief as "Collier on Bankruptcy"), for the proposition that where a supersedeas bond has been posted by a Defendant taking an appeal, that the automatic stay provisions of the Bankruptcy Act do not apply.

A reading of Collier Bankruptcy Practice Guide reveals that the author of that treatise did not take into consideration the fact that the automatic stay provisions of the Bankruptcy Code of 1978, effective October 1, 1979, differed in many respects from the stays provided by the Rules of Bankruptcy Procedure under the previous Bankruptcy law. See, 2 Bkr L Ed, Section 15.17.

The case cited by Collier for that proposition, Mid-Jersey National Bank v. Fidelity-Mortgage Investors, 518 F. 2d 640 (1975), is a case decided prior to the effective date of the present Bankruptcy Code and its value as authority is questionable.

The applicable sections of the automatic stay provisions of the Bankruptcy Code are found in 11 U.S.C.A., Section 362(a)(4) and (5). That Act provides the following:

"(a) Except as provided in subsection (b) of this action, a petition filed under Section 301, 302 or 303 of this title [11 U.S.C.S., Section 301, 302 or 303], or an application filed under Section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3) [15 U.S.C.S. Section 78eee(a)(b)]), operates as a stay, applicable to all entities of ....

(4) Any act to create, perfect or enforce any lien against property of the estate;

(5) Any act to create, perfect or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title. [11 U.S.C.S. Section 1 et seq]"

As Gay states in its Statement of the Case and Facts, the original procedure against Wharfside was to enforce a mechanic's lien. The automatic stay provisions of the Bankruptcy Code prohibit the enforcement of a mechanic's lien, but not the perfection of it. In the case of In Re: Fiorillo and Co., 19 BR 21, 8 BCD 1169, 6 CBC 2d 607, the Court held that a mechanic's lienor could perfect its lien and file its notice of lien in accordance with state law, notwithstanding the intervention of a Chapter 11 provision. However, the Court further found that the lienor could not take any action to enforce its lien since that would interfere with the reorganization process and be stayed under the stay provisions of Title 11 U.S.C.A., Section 362(a)(5).

Therefore, under the Bankruptcy Code as it existed at the time of this petition, this Court is bound by the automatic stay provisions of the Bankruptcy Act since the effect of this appeal is to attempt to enforce a mechanic's lien. The fact that a supersedeas bond has been posted should have no effect as it is not exempted under the exemptions provided for in the Act. Further, to permit Gay to proceed on the theory that it is now only seeking recovery under the supersedeas bond would allow Gay to circumvent the plain language of the stay provisions.

And, although there is a Florida case to the contrary, the federal law is that Title 11 U.S.C.A., Section 362, stays all appeals in proceedings that were originally brought against the debtor, regardless of whether the debtor is the appellant or the appellee. See Assoc. of St. Croix Condominium Owners v. St. Croix Hotel Corp., 682 F. 2d 446 (3rd Cir. 1982).

Therefore it seems clear that under the present Bankruptcy Code, which governs this action, that this appeal must be stayed at this time.

This does not leave Gay without a remedy against Wharfside. Gay can file a motion in the Bankruptcy Court in and for the Central District of California to modify the automatic stay.

As a matter of fact, that is the only Court which has jurisdiction to lift the automatic stay. With all due respect, this Court does not have that power.



The United States District Courts have original and exclusive jurisdiction of all cases under the present Bankruptcy Code. 28 U.S.C. Section 1334(a).

The District Court has exclusive jurisdiction of all property of the debtor, wherever such property is located, and also exclusive jurisdiction of all of the property of the estate that is created by the filing of the bankruptcy petition. 28 U.S.C. Section 1334(b).

The Bankruptcy Judges in each Judicial District are a adjunct of the District Court. Those Bankruptcy Judges are known as the Bankruptcy Court for that district.

Among the proceedings which are heard and determined by the Bankruptcy Judge, under the exclusive jurisdiction of the District Court, are motions to terminate, annul or modify the automatic stay. See 1 Bkr. L. Ed., Section 115 at pages 19 and 20.

Since the Bankruptcy Court has the exclusive jurisdiction under the Code to modify or lift the stay, this stay against Wharfside should stay in effect until Gay moves the Court by motion to lift the stay upon whatever grounds it feels appropriate.

Wharfside agrees with Gay that the automatic stay provisions do not apply in the normal course of events to co-defendants. In the case of Ingersoll-Rand Financial Corp. v. Miller Min. Co.,

817 F. 2d. 1424 (9th Cir. 1987), the Circuit Court of Appeals held that the stay did not apply to a co-defendant "absent special circumstances". The Court did not outline what those special circumstances were.

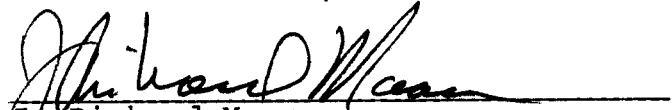
It is submitted that there is a "special circumstance" here insofar as the inconsistency of the verdict is concerned. That question is so intertwined between the co-defendants that a ruling by this Court can not be made without effecting Wharfside. Therefore it is submitted that this Court should recognize the stay, both as to Wharfside and to the co-defendant, Chanen Construction Company and allow Gay to take steps to have the stay lifted or modified so that this matter may proceed to conclusion in this Court.

CONCLUSION

The automatic stay provisions of the Bankruptcy Code should be recognized by this Court and the appellate proceedings against Wharfside should be stayed until the Bankruptcy Court either modifies or lifts the stay.

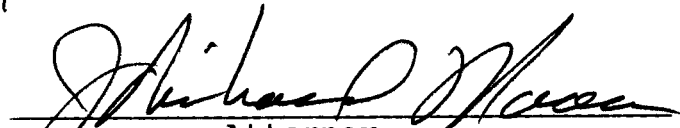
The stay should also be applied to the co-defendant, as the interest of Wharfside will be effected by the ruling on this appeal if the Court proceeds with rendering its opinion as to the co-defendant, Chanen Construction Company only.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, a copy of the foregoing instrument has been furnished to S. Gordon Blalock, Esquire, 2301 Independent Square, Jacksonville, Florida 32202 and Robert C. Gobelman, Esquire, 126 West Adams Street, Suite 700, Jacksonville, Florida 32202, by U. S. Mail, this 30th day of December, 1988.

  
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Attorney