

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN THE MATTER OF ARTHUR COUNCIL	:	CIVIL ACTION
	:	NO. 06-1537
	:	
	:	BANKRUPTCY CASE
	:	NO. 05-32144 DWS
	:	
	:	ADVERSARY NO. 05-612

MEMORANDUM

Baylson, J.

October 27, 2006

Arthur Council (“Council” or “Appellant”) appeals the January 5, 2006 Judgment of the Bankruptcy Court dismissing his Adversary Complaint for lack of subject matter jurisdiction, and the March 6, 2006 Order denying his motion for reconsideration. For the reasons set forth below, the decision of the Bankruptcy Court is affirmed.

I. Factual and Procedural Background

For many years, Appellant owned and operated an automobile repair business on the premises located at 3917-27 Lancaster Avenue, Philadelphia, PA (the “Property”). On June 24, 2004, because of delinquent and unpaid real estate taxes, the City of Philadelphia sold the Property to Stephen Weiss (“Weiss”)¹ at a sheriff’s sale for \$82,100.00. Weiss promptly deposited 10% of the bid price with the sheriff’s office and was required to pay the remaining 90% within thirty days of the sale. Because Weiss did not make the outstanding payment within the required time frame, the writ of execution was returned by the Sheriff to the Prothonotary

¹Sometime in November 2004, Weiss assigned his successful bid to co-defendant, 3917 Associates, LLC.

marked “terms of sale not complied with.”

On November 18, 2004, Weiss filed a motion in the Philadelphia Court of Common Pleas to return the writ of execution. The court granted the motion on February 9, 2005, and ordered that Weiss or his assignee pay the balance of the bid price within thirty days of the order. 3917 Associates, LLC, paid the full balance on February 12, 2005, and was issued a sheriff’s deed to the Property on March 28, 2005. Council filed a motion for reconsideration with the Court of Common Pleas on February 28, 2005. The court denied the motion and Council appealed to the Commonwealth Court of Pennsylvania. The court dismissed his appeal on June 24, 2005.

On September 9, 2005, Appellant filed a Chapter 13 bankruptcy petition² in the United States Bankruptcy Court for the Eastern District of Pennsylvania. On September 30, 2005, he initiated an adversary proceeding in the bankruptcy court, filing a complaint against the City of Philadelphia, Stephen Weiss, and 3917 Associates, LLC (“Appellees”). The complaint alleged that Weiss and the City acted in an “illegal and fraudulent” manner in permitting Weiss to restore his bid despite his failure to make the required payment on time. Appellees filed a motion to dismiss the complaint for lack of subject matter jurisdiction under the Rooker-Feldman doctrine.

On January 5, 2006, the bankruptcy court granted Appellees’ motion, treating it as a motion for summary judgment pursuant to Fed. R. Civ. P. 12(b). The court found that under Rooker-Feldman it had no subject matter jurisdiction over Appellant’s complaint because the issues had been resolved by a final state court judgment. In her order, Judge Sigmund observed that Appellant’s complaint “at best” alleged a cause of action for actual fraud which was clearly precluded by the Rooker Feldman doctrine. She further noted that Appellant did not raise the

²The petition was voluntarily converted to a Chapter 7 petition on December 5, 2005.

issue of constructive fraud under 11 U.S.C. § 548(a)(1)(B) until his post-hearing brief. Although the complaint “inton[ed] § 548 in the caption,” Appellant failed to plead any of the necessary elements of constructive fraud. (Bankruptcy Ct. Order Granting Summ. J. 5).

Appellant filed a motion for reconsideration on January 30, 2006, contending that the Bankruptcy Court erred by not permitting him to amend his complaint to state a cause of action for constructive fraud. Appellant interpreted Judge Sigmund’s January 5, 2006 order to mean that if he had adequately set forth a claim of constructive fraud, the bankruptcy court would have had subject matter jurisdiction because, he argued, § 548 is an “exception to the Rooker-Feldman doctrine.” (Appellant’s Br. 8). Judge Sigmund denied Appellant’s motion for reconsideration after a hearing on March 6, 2006, and Appellant appealed to this Court on March 17, 2006. Oral argument was held on October 23, 2006.

II. Jurisdiction and Standard of Review

This Court has jurisdiction to hear this appeal pursuant to 28 U.S.C. § 158(a)(1). The appropriate standard of review to be applied by a district court reviewing the rulings of a bankruptcy court depends on the nature of the issues raised on appeal. Factual findings of the bankruptcy court are not reversed unless clearly erroneous. In re Morrissey, 717 F.2d 100, 104 (3d Cir. 1983). Conclusions of law are subject to plenary review, Brown v. Pa. State Employees Credit Union, 851 F.2d 81, 84 (3d Cir. 1988), and decisions involving the exercise of discretion by the bankruptcy judge are reviewed for abuse of discretion, In re Vertientes, Ltd., 845 F.2d 57, 58-59 (3d Cir.1988).

A court’s refusal to permit a plaintiff to amend a complaint under Rule 15(a) is reviewed for abuse of discretion. Adams v. Gould Inc., 739 F.2d 858, 863-864 (3d Cir. 1984). Likewise, a

court's decision not to alter or amend a judgment under Rule 59(e) is reviewed for abuse of discretion, with the exception of matters of law, which are subject to plenary review. Id.

III. Discussion

A. The Bankruptcy Court did not Abuse its Discretion.

Appellant argues that the bankruptcy court erred by dismissing his adversary proceeding without granting him leave to amend his complaint to state a cause of action for constructive fraud. The parties agree that Appellant never filed a specific motion to amend his complaint. In his March 6, 2006 motion for reconsideration filed pursuant to Rule 59(e), Appellant asserted for the first time that the bankruptcy court should permit him to amend his complaint to incorporate a constructive fraud claim. The motion was styled solely as a motion for reconsideration and did not contain a proposed amended complaint. Nevertheless, because of the nature of the relief sought, this Court will treat Appellant's motion as one to amend the judgment under Rule 59(e), and for leave to amend the complaint under Rule 15(a). The parties agree with this characterization of the motion.

Rule 15(a) provides that courts should freely grant leave to amend "when justice so requires." However, if the amendment would be futile or there has been "undue delay, bad faith or dilatory motive on the part of the movant," leave to amend should not be given. Foman v. Davis, 371 U.S. 178, 182 (1962). In this case, because Appellant sought to amend his complaint in a post-judgment motion, "the factors to be considered in determining whether leave should be granted ... under Rule 15(a) are the same as for determining whether the accompanying Rule 59(e) motion should be granted." NAACP v. Town of Harrison, 907 F.2d 1408, 1417 n.14 (3d

Cir. 1990) (citing Adams, 739 F.2d at 864).

The record in this case clearly demonstrates that the bankruptcy court did not abuse its discretion in denying Appellant's motion for reconsideration and leave to amend. Throughout the bankruptcy proceedings, Appellant demonstrated a complete lack of diligence in requesting leave to amend. Appellant was aware of the factual information underlying the proposed amendment as early as February 2005 when the Court of Common Pleas granted Weiss's motion to return the writ of execution. Nonetheless, Appellant failed to raise a claim for constructive fraud in the bankruptcy complaint filed more than seven months later. Moreover, despite many adequate opportunities to do so, he never filed a motion to amend the complaint, and failed to even mention the concept of amendment until after the bankruptcy court granted summary judgment in favor of Appellees. When a movant has no reasonable explanation for delaying to seek an amendment until after judgment has been entered against him, delay becomes undue and "interests in judicial economy and finality of litigation ... become particularly compelling."

Cureton v. NCAA, 252 F.3d 267, 273 (3d Cir. 2001).

As noted above, even when Appellant filed his motion for reconsideration, he relied exclusively on Rule 59(e) and did not claim that he was seeking leave to amend pursuant to Rule 15(a). Moreover, Appellant did not include a draft amended complaint with his post-judgment motion. Without a draft complaint, the bankruptcy court had "nothing upon which to exercise its discretion." Lake v. Arnold, 232 F.3d 360, 374 (3d Cir. 2000). Appellant's failure to provide the bankruptcy court with a draft is an "adequate basis" upon which the court could deny his request to amend. Id.; see also Cureton, 252 F.3d at 273 (citing Lake for the proposition that "the court may deny a request [to amend the complaint] if the movant fails to provide a draft amended

complaint”). In light of Appellant’s inexplicable delay and lack of diligence in pursuing an amendment to his complaint, the bankruptcy court did not abuse its discretion by denying Appellant’s motion.³

B. Amending the Complaint Would be Futile Because Appellant Lacks Standing.

Alternatively, we affirm the decision of the bankruptcy court because even if Appellant amended his complaint to set forth a cause of action for constructive fraud, he still would not be entitled to relief. See Foman, 371 U.S. at 182 (listing “futility of amendment” as a reason not to grant leave to amend). In this case, Appellant’s proposed amendment is futile because he lacks standing to pursue a claim of constructive fraud under § 548(a)(1)(B).

Appellees contend that a Chapter 7 debtor does not have standing to bring a claim of constructive fraud because § 548 specifically provides that “the trustee” may avoid a fraudulent transfer of the debtor’s property. We agree with Appellees that a Chapter 7 debtor does not hold avoidance powers concurrent with the trustee. Any other conclusion would belie the plain language of § 548, which by its terms applies only to trustees. See In re Ryker, 315 B.R. 664, 668 (D.N.J. 2004) (finding the Ninth Circuit’s decision that a Chapter 13 debtor shares avoidance powers with the trustee to be unpersuasive because it “gives no consideration to the plain

³ During oral argument, counsel for Appellant explained that Appellant did not seek leave to amend in a timely manner because of his *pro se* status. This explanation is unavailing. Although all of Appellant’s bankruptcy court pleadings were nominally filed *pro se*, they were signed “C/O Center for Constitutional and Criminal Justice, Inc.” As Judge Sigmund observed in her order granting summary judgment, it was “clear from Debtor’s appearance at the hearing [on Appellees’ motion to dismiss] that his papers and arguments [were] framed and memorialized by others not disclosed to [the] Court who possess legal knowledge and acumen.” (Bankruptcy Ct. Order Granting Summ. J. 5). Additionally, the record indicates that Appellant was represented by counsel at the March 6, 2006 hearing on his motion for reconsideration.

language of the statute”). In Hartford Underwriters Insurance Co. v. Union Planters Bank, 530 U.S. 1 (2000), the Supreme Court unanimously held that an administrative claimant of a bankruptcy estate did not have standing under § 506(c) to recover unpaid premiums because the “most natural reading of § 506(c) is that it extends only to the trustee.” 530 U.S. at 9. The Court observed that “a situation in which a statute authorizes specific action and designates a particular party empowered to take it is surely among the least appropriate in which to presume nonexclusivity.” Id. at 6. If Congress intended § 506(c) to apply to individuals other than the trustee, it could have employed broader language such as “party in interest” or “entity” as it did in other sections of the Bankruptcy Code. Id. at 7.

Similarly, in In re Knapper, 407 F.3d 573, 583 (3d Cir. 2005), the Third Circuit found that a debtor does not have standing to bring an avoidance action under § 544(b)(1). The court noted that § 544 specifically gives the trustee certain avoidance powers, but does not confer similar authority upon the debtor. Id. The analysis of the Supreme Court and Third Circuit in Hartford Underwriters and Knapper compels this Court to conclude that § 548 exclusively permits trustees to avoid fraudulent transfers. Accord Ryker, 315 B.R. at 667-670 (holding that a Chapter 13 debtor does not have statutory standing to pursue a fraudulent transfer action under § 548(a)).

The structure of the Bankruptcy Code further supports this conclusion. In Chapters 11 and 12, Congress confers standing on debtors to pursue avoidance actions. 11 U.S.C. §§ 1107(a) and 1203 (providing that debtors in possession have the same rights and powers as trustees with limited exceptions). Chapter 7, however, does not contain a similar provision granting avoidance powers to debtors. This omission suggests that Congress knew how to confer standing on

debtors, but deliberately declined to do so for Chapter 7 debtors. See Ryker, 315 B.R. at 669-670 (reaching the same conclusion for Chapter 13 debtors); In re Merrifield, 214 B.R. 362, 364-65 (8th Cir. 1997) (same).

Although § 522(h) authorizes a debtor to stand in the shoes of the trustee and avoid certain transfers, Appellant does not qualify for derivative standing under this section. Section 522(h) permits a debtor to avoid a fraudulent transfer under § 548 to the extent he could have exempted the property under § 522(g)(1) if the trustee had avoided the transfer. In turn, § 522(g)(1) permits a debtor to exempt property if: (1) the transfer was not voluntary; (2) the debtor did not conceal the property; and (3) the debtor could have exempted the property under subsection (b) if it had not been transferred. Subsection (b) references various pieces of personal and real property that are subject to exemption including the debtor's interest in his homestead, motor vehicles, household goods etc. Appellant has not argued in any of his papers filed with this Court or the bankruptcy court that the Property is subject to exemption under § 522(b), nor did he pursue this claim at oral argument. In fact, the record indicates that Appellant did not even file a Schedule C list of exemptions in the underlying Chapter 7 bankruptcy proceeding. Accordingly, Appellant may not employ § 522(h) to avoid the sheriff's sale.

C. The Rooker-Feldman Doctrine.

In granting summary judgment to Appellees, Judge Sigmund relied on the Rooker-Feldman doctrine, and found that the bankruptcy court did not have subject matter jurisdiction over Appellant's complaint because the issues had been resolved by a final state court judgment. Because Appellant did not raise a claim of constructive fraud under § 548 in the bankruptcy

court, Judge Sigmund's dismissal based on Rooker-Feldman was proper. On appeal, Appellant contends that amending his complaint to state a claim under § 548 would cure the jurisdictional defect because § 548 is an exception to the Rooker-Feldman doctrine. In view of the reasons stated above, we need not consider whether Rooker-Feldman applies to a § 548 claim that was not raised in either the state court or bankruptcy court proceedings, but which Appellant seeks to raise now.⁴

IV. Conclusion

For the foregoing reasons, the Court will affirm the January 5, 2006 Judgment of the Bankruptcy Court granting summary judgment in favor of Appellees, and the March 6, 2006 Order denying Appellant's motion for reconsideration. An appropriate order follows.

⁴ At oral argument, counsel for Appellees argued that Rooker-Feldman applies to claims under § 548 because state courts share concurrent jurisdiction with federal courts over fraudulent conveyance claims. In contrast, Appellees asserted, claims for automatic stays under § 362 fall within the exclusive jurisdiction of the federal courts and are thus clearly an exception to Rooker-Feldman. We question the validity of Appellees' distinction. In Beard v. Braunstein, 914 F.2d 434 (3d Cir. 1990), the Third Circuit observed that "a proceeding is core ... if it invokes a substantive right provided by title 11 or if it is a proceeding that, by its nature, could arise only in the context of a bankruptcy case." 914 F.2d at 444 (quoting In re Wood, 825 F.2d 90, 97 (5th Cir. 1987)) (internal quotations omitted). Claims brought pursuant to both § 362 and § 548 are core proceedings. See 28 U.S.C. § 157(b)(2)(G) (listing "motions to terminate, annul, or modify the automatic stay" as core proceedings); § 157(b)(2)(H) (listing "proceedings to determine, avoid, or recover fraudulent conveyances" as core proceedings). The fact that both claims are considered core proceedings seems to undercut the "exclusive-concurrent jurisdiction" distinction drawn by Appellees.

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ORDER

AND NOW, this 27th day of October, 2006, it is hereby ORDERED that the January 5, 2006 Judgment of the Bankruptcy Court granting summary judgment in favor of Appellees, and the March 6, 2006 Order denying Appellant's motion for reconsideration are AFFIRMED. The Clerk shall close this case.

BY THE COURT:

/s/ Michael M. Baylson

Michael M. Baylson, U.S.D.J.