

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

In re DIANE BILINSKI,
Debtor.

Civil Action No.96-4268
Bankruptcy No. 92-13403
Chapter 13

Gawthrop J.

October 9, 1998

M E M O R A N D U M

The bankruptcy court held that a creditor with two confessed judgment notes against debtor is a secured creditor, entitled to relief from the automatic stay, and who also is entitled to exercise his non-bankruptcy law rights. Debtor has appealed; I shall affirm.

Background

The relevant facts are as follows. Richard Block, Esq., represented Diane Bilinski, the debtor/appellant, in custody, support, and visitation matters in Pennsylvania state court. In exchange for his representation of her, Ms. Bilinski signed two judgment notes in Mr. Block's favor. In November 1989, and again in April 1990, Mr. Block confessed judgment on the notes in state court for \$6,742.00 and \$4,845.45 respectively.

On June 3, 1992, Ms. Bilinski filed for chapter 13 bankruptcy by voluntary petition, at which time she owned realty

located in Philadelphia with her husband as tenants by the entireties. A divorce action her husband had previously filed was still pending when Ms. Bilinski filed for bankruptcy.

On October 5, 1992, Mr. Block filed an objection to Ms. Bilinski's bankruptcy, arguing that she was solvent. This document, unaccompanied by the required supporting papers and devoid of any request for relief, was filed but never served. No bankruptcy court action was thus taken with respect to this filing.

The deadline set for filing unsecured creditor claims was October 20, 1992. On November 2, 1992, Mr. Block filed a proof of claim, which was never served on Ms. Bilinski, stating an amount of "12000 + interest" as a secured claim and an unsecured nonpriority claim with no amount stated. Based on Mr. Block's proof of claim, the bankruptcy trustee filed a motion to dismiss the case, concluding that the Ms. Bilinski's original proposed chapter 13 plan was not feasible because it called for Mr. Block to receive thousands of dollars less than the value of the confessed judgments. The confirmation hearing date was accordingly postponed. Ms. Bilinski then filed an amended chapter 13 plan, which made no specific provision for any secured claim Mr. Block might have. The trustee approved the modified plan and thus withdrew his motion to dismiss. An order of confirmation of the modified plan was entered on December 8,

1992, and distributed to all creditors, including Mr. Block. No appeal from the confirmation order was filed.

Ms. Bilinski satisfied the modified plan's required payments by February 1995. On February 15, 1995, the court entered a notice of discharge. Mr. Block objected to the entry of the discharge order, alleging that his two confessed judgments against Ms. Bilinski made him a secured creditor, with a secured interest in her marital estate and arguing, inter alia, that, as a creditor, he did not receive the process to which he was due. Mr. Block also sought relief from the automatic stay.¹

On October 13, 1995, Bankruptcy Judge Bruce I. Fox entered an order which discharged Ms. Bilinski's bankruptcy and terminated the bankruptcy stay in favor of Mr. Block so that he could exercise his non-bankruptcy law rights as a secured creditor of Ms. Bilinski based on his confessed judgments. In its opinion, the bankruptcy court held that Mr. Block had not been denied due process in that his was a secured claim and "[h]is property rights as a secured creditor were not adversely affected by the confirmation process." Opinion I at 19.² The

¹ The automatic stay provision of the Bankruptcy Code becomes effective upon a debtor's filing of a bankruptcy petition. 11 U.S.C. § 362(a). The stay prohibits creditors from taking any actions, judicial or extra-judicial, outside of the bankruptcy proceeding to recover amounts owed by the debtor. 11 U.S.C. § 362(a).

² The bankruptcy court also held that Mr. Block was not denied due process in that he "clearly had notice of the debtor's

court stated that "confession of judgment notes in Pennsylvania, if valid, will yield a judgment lien upon real estate owned by the judgment defendant in the county of recordation . . . A holder of a judgment lien is a secured creditor." Opinion I at 25. The bankruptcy court accordingly reasoned that "[i]f Mr. Block's secured claim was not 'provided for' by the plan . . . it survives the bankruptcy case in tact," Opinion I at 21.³

The court concluded that, although not timely filed, Mr. Block's secured claim would be unaffected by the bankruptcy discharge because Ms. Bilinski's confirmed plan did not provide for it. The court noted that "[s]ecured creditors have no obligation to file a proof of claim under Fed. R. Bankr. P. 3002. The rule refers only to unsecured claims." Opinion I at 24. The court thus concluded that "[w]hile the proof of claim was filed

bankruptcy filing, notice of the meeting of creditors, notice of the original confirmation meeting, and notice of the terms of the debtor's modified plan." Opinion I at 13. The court thus concluded that Mr. Block had sufficient notice of the bankruptcy proceedings.

³ Specifically, the bankruptcy court explained:

It is discretionary with the chapter 13 debtor whether to provide for a secure claim through the provisions of her plan. The plan itself need not provide for all allowed secured claims. 11 U.S.C. § 1322(b)(permissive provisions of plans).

With certain exceptions, liens will pass through bankruptcy unaffected by any discharge. 11 U.S.C. § 502(d)(2).

Opinion I at 21.

untimely [as to an unsecured claim] . . . no such timeliness issue exists as to a secured claim." Opinion I at 25. The bankruptcy court thus granted Ms. Bilinski's chapter 13 discharge.

The bankruptcy court then addressed Mr. Block's separate request for relief from the automatic stay. The bankruptcy court found that Ms. Bilinski was estopped from asserting that her chapter 13 bankruptcy plan had in fact provided for Mr. Block's claim, thus obviating the need for relief from the stay. The bankruptcy court stated that, in connection with both the confirmation of the plan and the discharge of bankruptcy, Ms. Bilinski had consistently maintained that her plan did not provide for Mr. Block's claim. Under the discretion afforded a bankruptcy court to decide whether to modify, terminate, condition, or annul a bankruptcy stay under § 362(d) of the Bankruptcy Code,⁴ the bankruptcy court concluded that "[s]ince Mr. Block's secured claim is not being paid through the terms of the amended plan, this demonstrates 'cause' for relief [from the automatic stay]." Opinion I at 27 (citation omitted).⁵

⁴ "On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay . . . such as terminating, annulling, modifying, or conditioning such stay - (1) for cause, including lack of adequate protection of an interest in property of such party in interest." 11 U.S.C. § 362.

⁵ The court noted that "the entry of discharge would seem to have that effect by virtue of section 362(c)(2)(C)." Opinion I at 3. That provision pertains to termination of the automatic

At my request, the bankruptcy court provided further factual findings and conclusions of law to explain his conclusion that Mr. Block had a secured claim. Although recognizing that "Pennsylvania law does not permit a creditor of one spouse to execute upon entirety property," the bankruptcy court, analyzing Pennsylvania law, concluded that "a Pennsylvania judgment creditor possesses an 'inchoate' lien on the judgment debtor's right of survivorship in real property which the judgment debtor and the judgment debtor's spouse own as tenants by the entirety." Bankruptcy Court Opinion II ("Opinion II") at 17. The bankruptcy court further stated that "as the holder of an inchoate lien under state law, this creditor is a secured creditor within the meaning of the Bankruptcy Code." Opinion II at 18. Thus, the court concluded that "whatever rights Mr. Block had as a secured creditor under Pennsylvania law . . . survived this bankruptcy case." Opinion II at 20 (emphasis in original).

Standard of Review

In exercising appellate review, this court must accept the factual findings of the bankruptcy court unless those findings are clearly erroneous. In re Jersey City Medical Center, 817 F.2d 1055, 1059 (3rd Cir. 1987). Review of the bankruptcy court's legal conclusions is plenary. Id.

Discussion

stay upon the discharge of bankruptcy.

Ms. Bilinski argues that, because she owned the property in question with her husband as tenants by the entirety, Mr. Block cannot hold a lien on the property creating a secured claim. She further contends that, as an unsecured creditor, Mr. Block's claim was untimely and was discharged by the bankruptcy. Ms. Bilinski thus argues that the bankruptcy court should not have granted Mr. Block relief from the automatic stay.

I turn to the precise question presented: did the bankruptcy court err, as a matter of law, in finding that Mr. Block has a secured claim, in the form of an inchoate lien, on Ms. Bilinski's real property, held as a tenancy by the entirety, thus entitling him to relief from the automatic stay? I conclude that it did not.

It is, of course, true that entirety property in Pennsylvania cannot be encumbered by a lien of a creditor of only one spouse. See Stop 35, Inc. v. Haines, 543 A.2d 1133, 1135 (Pa. Super. 1988). The bankruptcy court, however, did not contradict this black-letter doctrine. Instead, while acknowledging the existence of that hoary rule, thus making Mr. Block's lien presently unenforceable, the court looked ahead, holding that Mr. Block had an inchoate lien against Ms. Bilinski's right of survivorship in the property. In so holding, the bankruptcy judge relied heavily upon his reasoning in an earlier, unrelated case, In re Hope, 77 B.R. 470 (Bankr. E.D. Pa.

1987), which reached the same conclusion. There, Judge Fox analyzed Pennsylvania caselaw as to whether a judgment against a debtor is a lien on the debtor's interest in real property held by the entirety. He concluded that a judgment creditor holds a present, but unenforceable, lien against one spouse's right of survivorship in property held by the entirety. Id. at 475.

In Napotnik v. Equibank & Parkvale Savings Ass'n, 679 F.2d 318 (3d Cir. 1982)--a case heavily relied upon by Ms. Bilinski--the Third Circuit, in dicta, similarly stated that "a creditor of either spouse may obtain a presently unenforceable lien upon that spouse's expectancy of survivorship -- a lien that becomes enforceable only when the other spouse dies." Napotnik, 679 F.2d at 319. The Napotnik court, recognizing the uncertainty of the law in this respect, acknowledged that an inchoate lien may exist against a debtor-spouse.⁶

The holder of an inchoate lien is a secured creditor.⁷ I thus find that Mr. Block's inchoate lien, resulting from the

⁶ The question at issue in Napotnik was whether a creditor holding a judgment against both spouses may levy upon property held as tenants by the entirety.

⁷ Section 101(37) of the Bankruptcy Code defines "lien" as a "charge against or interest in property to secure payments of a debt or performance of an obligation." 11 U.S.C. § 101(37). Further, the legislative history of § 101(37) makes clear that term "lien . . . includes inchoate liens." H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 312 (1977); S. Rep. No. 95-989, 95th Cong., 2d Sess. 25 (1978), reprinted in 1978 U.S. Code Cong. & Admin. News 5787, 5810, & 6269.

confessed judgments, made him a secured creditor.⁸ Accordingly, because Ms. Bilinski's plan failed to address his claim, Mr. Block's lien passed through bankruptcy unaffected.⁹ As a secured creditor whose claim was not provided for by Ms. Bilinski's plan, Mr. Block was entitled to relief from the automatic stay.¹⁰

⁸ Ms. Bilinski also alleges that Mr. Block's confessed judgments "are not a judicial lien secured by real property," suggesting that Mr. Block violated various provisions of Pennsylvania statutory law. Bilinski Br. at 14. Nowhere, however, does Ms. Bilinski provide support for the contention that Mr. Block did not properly confess judgment against her. In any event, whether Mr. Block has complied with state law requirements for confessing judgment against Ms. Bilinski's residential real property is a question for state court.

⁹ Ms. Bilinski argues that § 552 of the Bankruptcy Code exempted her entireties estate from bankruptcy. Although it is unclear precisely in what way Ms. Bilinski contends this provision applies, it appears to be a re-characterization of her primary argument, namely, Mr. Block had no interest in the real estate because it was held as tenants by the entireties.

Section 552 allows for the exemption of entireties property "to the extent such interest is immune from process." 11 U.S.C. § 552(b)(2)(B). Here, the bankruptcy court explained that the property is not exempt from process because Mr. Block has an interest in the right of survivorship, giving rise to an inchoate lien. See Napotnik, 679 F.2d at 319 (stating that "'exempt from process' mean[s] 'immune from process,'" and that this section intended to "allow the debtor to exempt an interest in entireties property that could not . . . be reached by creditors.").

¹⁰ Mr. Block filed a proof of claim, albeit 13 days after the deadline. Ms. Bilinski states that the proof of claim was never served and that "[b]ut for the filing of the purported secured claim, BLOCK's claim would be void under section 506(d)." Debtor's Br. at 16.

First, Ms. Bilinski had to have been aware of Mr. Block's claim. She included it in her first chapter 13 plan. The trustee moved to dismiss on the basis of infeasibility, citing to Ms. Bilinski's treatment of Mr. Block's claim. Ms. Bilinski responded by modifying her plan. See Findings of Fact, ¶ 8, Opinion II at 4 ("it appears clear that debtor's counsel was made

Beyond that, this case no longer presents a case or controversy. Ms. Bilinski's bankruptcy has been discharged, which terminated the automatic stay. 11 U.S.C. § 362 (c)(2)(C). Since there is no longer a stay in effect, Mr. Block does not need relief from that stay, thus permitting him to pursue, in state court, whatever state law non-bankruptcy rights he may have. To grant Ms. Bilinski's requested relief and overturn the bankruptcy court's finding that Mr. Block was entitled to relief from the automatic stay would accomplish nothing.

An order follows.

aware that Mr. Block filed a proof of claim not later than March 1993."). As Judge Fox found, "the debtor has never objected to this proof of claim." Opinion II at 5.

Second, as to § 506(d), that Ms. Bilinski never objected to Mr. Block's claim during the pre-discharge period prevents her from now disallowing or avoiding it. Further, as noted by the bankruptcy court, whether Mr. Block's claim is "allowed" under § 506 is not relevant to the instant appeal of the grant of Mr. Block's motion for relief from the stay. "The effect . . . of a chapter 13 plan not providing for a secured claim is the same as if the secured proof of claim were never filed." Opinion II at 12.

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O R D E R

AND NOW, this day of October, 1998, Debtor's Appeal is
DENIED.

BY THE COURT:

Robert S. Gawthrop, III J.