

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

In re:	:	BANKRUPTCY
	:	98-35663
KENNETH A. GREENE	:	
Debtor.	:	ADV. NO. 99-483
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KENNETH A. GREENE	:	CIVIL ACTION
Appellant,	:	
v.	:	
	:	
JOAN ESMONDE, Assistant District Attorney,	:	
in her Official and Individual Capacities, and	:	
COURT OF COMMON PLEAS	:	
OF PHILADELPHIA COUNTY and	:	
FREDERICK BAKER as Trustee	:	
Appellees.	:	NO. 99-4316

MEMORANDUM

Reed, S.J.

September 27, 1999

This is an appeal by appellant Kenneth Allen Greene (“Greene”) from an order of the United States Bankruptcy Court for the Eastern District of Pennsylvania dismissing this latest adversary action brought in his Chapter 7 bankruptcy case. This court has appellate jurisdiction pursuant to 28 U.S.C. § 158(a). For the reasons that follow, I will affirm the court below.

I. Background

Greene is an attorney who has been proceeding *pro se* throughout his bankruptcy case. Prior to filing a complaint and initiating this adversary action, the bankruptcy court dismissed an adversary action brought by Greene against his estranged wife who was also proceeding *pro se*.¹

¹Greene acknowledges that he married Icilyn Wilson-Greene. Nowhere in the record is there any indication that the two are no longer married.

In the original complaint against his estranged wife, Greene asserted claims arising from what he believes to be a wrongful determination by the state court that he is the presumptive father of his estranged wife's child, Kenneth Jr., and that Greene is therefore liable to support the child. The original complaint alleged, among other things, that Greene's child support obligations are dischargeable pursuant to § 523(a)(5) and that the pursuit of contempt by his estranged wife in connection with various orders of the state court requiring him to make support payments after his bankruptcy petition was filed violated the automatic bankruptcy stay and Pennsylvania's Unfair Trade Practices and Consumer Protection Law. The bankruptcy court dismissed the complaint. Greene then appealed the decision of the bankruptcy court.

During the pendency his appeal before this Court, Greene filed a motion with the bankruptcy court to amend the original complaint. The bankruptcy court dismissed the motion because the adversary proceeding had been dismissed and the sole jurisdiction rested with the District Court. Undeterred, Greene filed a subsequent motion with the bankruptcy court in the dismissed adversary action. Again the bankruptcy court dismissed the motion for lack of jurisdiction and directed Greene to cease filing motions in Adversary Case No. 98-0831. Greene then filed a petition for mandamus with this Court, requesting that the bankruptcy court refrain from entering any order in the Adversary Case No. 98-0831. Ironically, Greene argued in his petition that by virtue of his appeal, the bankruptcy court did not have jurisdiction to dismiss his motions or to order him cease filing pleadings and motions in the underlying case.

On July 2, 1999, Greene was discharged from his Chapter 7 bankruptcy. Nevertheless, on July 11, 1999, Greene filed a new complaint, naming as defendants Joan Esmonde, Assistant District Attorney and the Court of Common Pleas of Philadelphia County ("State Court"). On

July 26, 1999, the bankruptcy court granted Greene's motion to order the Chapter 7 trustee to abandon the property of the estate. On July 27, 1999, the bankruptcy court dismissed the complaint against Esmonde and the State Court. It is the complaint against Esmonde and the State Court that is the subject of this appeal.

In dismissing the complaint against Esmonde and the State Court, the bankruptcy court determined that the complaint simply recast the same cause of action--violation of the automatic bankruptcy stay by reason of actions taken in the State Court to enforce child support obligations--which the bankruptcy court had found without merit when asserted against Greene's estranged wife. The bankruptcy court dismissed the complaint, finding that the State Court had already decided that the automatic stay was not applicable to the contempt proceedings. The bankruptcy court noted that but for the pending appeal, the bankruptcy case would be closed.² The bankruptcy court then exercised its discretion to suspend all proceedings in Greene's bankruptcy case pursuant to § 305 of the Bankruptcy Code until his bankruptcy appeal in Adversary Case No. 98-0831 is resolved.

On September 3, 1999, this Court affirmed the decision of the bankruptcy court to dismiss Greene's original complaint. In re Greene, 1999 WL 689711 (E.D. Pa.). This Court dismissed Greene's petition for mandamus as frivolous. Id. Greene has subsequently appealed the decision of this Court. I turn now to the merits of Greene's appeal from the decision of the bankruptcy court to dismiss his complaint against Esmonde and the State Court and to suspend

²The bankruptcy court also noted that Greene's appeal of the decision of the bankruptcy court to lift the automatic stay with respect to North American Mortgage Company was moot because once Greene was discharged and the property abandoned the automatic stay is no longer applicable. See 11 U.S.C. § 362(c)(2)(C). Indeed, on September 3, 1999, this Court dismissed Greene's appeal as moot.

all proceedings in his bankruptcy case until his appeals are resolved.

II. Standard of Review

Sitting as an appellate court in a bankruptcy case, the district court reviews the bankruptcy court's legal determinations de novo, its findings of fact for clear error and its exercise of discretion for abuse thereof. In re Trans World Airlines, Inc., 145 F.3d 124, 130-31 (3d Cir. 1998).

III. Discussion

The issues presented on appeal are: (1) whether the bankruptcy court abused its discretion in dismissing the complaint *sua sponte*; (2) whether the automatic stay remains in effect until the case is closed; and (3) whether the decision of the bankruptcy court to suspend the bankruptcy case was an abuse of discretion. As a preliminary matter, however, Greene has failed to file the required brief of appellant. Thus, the Court and the opposing parties do not have the benefit of Greene's argument on his own behalf.

Bankruptcy Rule 8009(a) sets time limitations for the filing of briefs with the district court during a bankruptcy appeal.³ The purpose of the briefing schedule in Rule 8009(a) is to

³The Rule states:

Unless the district court or bankruptcy appellate panel by local rule or by order excuses the filing of briefs or specifies different time limits:

(1) The appellant shall serve and file a brief within 15 days after entry of the appeal on the docket pursuant to Rule 8007

(2) The appellee shall serve and file a brief within 15 days after service of the brief of appellant

(3) The appellant may serve and file a reply brief within 10 days after service of the brief of the appellee No further briefs may be filed except with leave of the district court or the bankruptcy appellate panel.

Bankruptcy Rule 8009(a). No other time limits are applicable to this case. (See Scheduling Order,

provide for the “expeditious resolution of bankruptcy proceedings.” Jewelcor Inc. v. Asia Commercial Co., Ltd., 11 F.3d 394, 397 (3d Cir. 1993). The time limits are triggered once the Clerk of Court docket the appeal and gives notice to the parties. Id. at 397. The record shows that the Certificate of Appeal was entered on August 26, 1999, and a briefing schedule stating that “the Appellant shall serve and file his brief within 15 days after entry of the appeal on the docket” was mailed to the parties on August 27, 1999. Thus, the conditions precedent to trigger the obligation of Greene to file a brief have been fulfilled and more than fifteen days have passed. By failing to file his brief, Greene has violated Rule 8009(a).⁴

The Bankruptcy Rules do not provide a sanction for violation of Rule 8009(a). The omission of a provision providing for a sanction in Bankruptcy Rule 8009 does not mean, however, that a sanction cannot be imposed. Compliance with Rule 8009 is entrusted to the discretion of the district judge. In re Haardt, 1991 WL 101555, at *3 (E.D. Pa. June 7, 1991). It is plain that the district court may dismiss a bankruptcy appeal for want of prosecution when the appellant fails to file or timely file a brief as required by Rule 8009(a). See, e.g., Nielsen v. Price, 17 F.3d 1276 (10th Cir. 1994) (dismissal of pro se appeal for failure of appellant to timely file designation of record or brief was not abuse of discretion); In re Wiley, 184 B.R. 759, 763 (N.D. Iowa 1995) (collecting cases). However, because this Court finds that the bankruptcy court did not abuse its discretion and that its decision was without error, this Court will not rest its affirmance of the decision of the bankruptcy court and dismissal of the appeal solely on the

Doc. No. 2).

⁴I also note that in an appeal from the decision to lift the automatic stay as to the North American Mortgage Company, Greene failed to file a brief within the fifteen days provided by the rules and set forth in the scheduling order. Although the Court granted Greene an extension, Greene was apprised of the need to file his brief in a timely manner and is certainly aware of the time frame within which he needs to file his brief.

ground that the appellant failed to file the required brief. Wiley, 184 B.R. at 673-74.

The first issue presented on appeal is whether the bankruptcy court abused its discretion in dismissing the complaint *sua sponte*. I find that the bankruptcy court did not abuse its discretion. Every federal court has a continuing obligation as well as the inherent power to determine its own jurisdiction. Things Remembered, Inc. v. Petrarca, 516 U.S. 124, 131 n.1 (1995) (Ginsburg, J., concurring); Constitution Bank v. Tubbs, 68 F.3d 685, 690 (3d Cir. 1995). Moreover, “[i]t is well established that, even if a party does not make a formal motion to dismiss, the court may, *sua sponte* dismiss the complaint where the inadequacy of the complaint is clear.” Slater v. Skyhawk Transp., Inc., 187 F.R.D. 185, 202 (D.N.J. 1999) (quoting Michaels v. New Jersey, 955 F. Supp. 315, 331 (D.N.J. 1996)); see also Bryson v. Brand Insulations, Inc. 621 F.2d 556, 559 (3d Cir. 1980) (“court may on its own initiative enter an order dismissing the action provided that the complaint affords a sufficient basis for the court’s action.”). Here, the bankruptcy court reasoned that at the time of dismissal there was no estate being administered in bankruptcy as the debtor had been discharged and the estate had been abandoned. Thus, there was no apparent basis for subject matter jurisdiction. In addition, the bankruptcy court found that the State Court had decided that the automatic stay did not apply to the contempt proceedings. The bankruptcy court thus reasoned that a claim based on a violation of the automatic stay as a result of holding contempt hearings in State Court was “devoid of any merit,” i.e., constructively frivolous. Having addressed the issue of whether efforts to enforce Greene’s child support obligations in its dismissal of the original complaint, it was not clear error for the bankruptcy court to *sua sponte* dismiss a subsequent complaint alleging the same underlying cause of action against alternative defendants--the people and organization which prosecuted the support action.

Accordingly, the bankruptcy court did not abuse its discretion when it acted *sua sponte* and dismissed the complaint against Esmonde and the State Court.

The second issue presented on appeal is whether the automatic bankruptcy remains in effect until the bankruptcy case is closed. In the case of an act against the property of the estate, the automatic stay remains in effect until discharge or until the property is no longer property of the estate. 11 U.S.C. §§ 362(c)(1) & (2)(C). Here, Greene was discharged on July 2, 1999, and the property of the estate was abandoned on July 26, 1999. Thus, by operation of law, the automatic stay was extinguished. 11 U.S.C. § 362(c)(1) & (2)(C); In re Burke, 198 B.R. 412, 416 (Bankr. S.D. Ga. 1996) (automatic stay expires upon discharge); In re Trevino, 78 B.R. 29, 37 (Bankr. M.D. Pa. 1987) (stay continues until property is no longer property of the estate, i.e., has been abandoned, or stay remains in effect only until time case is closed, dismissed or discharged). Neither the discharge order nor the abandonment order were stayed and this appeal does not revive the automatic stay. F.R.B.C. 8005; Cf., In re Burke, 198 B.R. at 416 (reopening does not reinstate automatic stay); In re Trevino, 78 B.R. at 37 (once automatic stay has been terminated no statutory provision authorizes continued imposition of automatic stay). Greene is simply mistaken as to the nature of the automatic bankruptcy stay and whether it remains in effect until he has exhausted the appeals process.

The third issue presented on appeal is whether the bankruptcy court abused its discretion when it suspended the bankruptcy case. Pursuant to 11 U.S.C. § 305(a), a court, after hearing and notice, may dismiss or suspend all proceedings in a case under title 11, if the interests of

creditors and the debtor would be better served by such action.⁵ 11 U.S.C. § 305. The decision to dismiss or suspend under § 305(a) is discretionary and must be made on a case-by-case basis. In re A&D Care, Inc., 90 B.R. 138, 141 (Bankr. W.D. Pa. 1988). Although the application of § 305(a) is an extraordinary remedy, it is appropriate when the interests of the creditors and the debtor are best served by dismissal or suspension.⁶ In re Mazzocone, 200 B.R. 568, 575 (E.D. Pa. 1996). “In applying § 305(a), courts have considered a wide range of factors, including but not limited to who filed the bankruptcy petition, the availability of another forum to resolve the pending disputes, the necessity of federal proceedings to achieve a just and equitable solution, the expense of the federal proceedings in comparison with the proceedings in another forum, the purpose of the party seeking to remain in bankruptcy court, the economy and efficiency of having the bankruptcy court handle the matter and the possible prejudice to various parties.” Id. Another “key” consideration under § 305(a) is the economy and efficiency of administration in the bankruptcy court. In re Business Information Co., Inc., 81 B.R. 382, 387 (Bankr. W.D. Pa.

⁵Nowhere in the record does it appear that the bankruptcy court gave notice that it was considering suspending the case pursuant to § 305(a) or that it provided a separate § 305(a) hearing. Nevertheless, the requirement of notice and a hearing is not a rigid requirement and requires only such notice as is “appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstances.” In re Mazzocone, 200 B.R. 568, 574 (E.D. Pa. 1996) (quoting 11 U.S.C. § 102(1)(A)). Here, the relevant issues have been addressed by the bankruptcy court in its dismissal of the original complaint. Furthermore, the issues were fully briefed and argued in an appeal to this Court. This Court affirmed the decision of the bankruptcy court. Thus, the substantive element of the hearing requirement has been met.

In addition, the bankruptcy court ordered Greene to cease filing pleadings after the adversary case was dismissed. It can be inferred that the bankruptcy court understood this newest complaint--based upon the same legal cause of action as was dismissed in the original complaint--as an attempt to make an end run around the decision of the bankruptcy court and to further delay the resolution of this case. Under these particular circumstances, where the case would be closed but for the pendency of an appeal, and where the debtor has been ordered to cease filing pleadings and the relevant issues have been addressed prior to the decision of the bankruptcy court to suspend the case, the requirements of § 305(a) for notice and a hearing have been met.

⁶Although the bankruptcy court did not expressly address the interests of the creditors and the debtor, its reasoning relied upon the absence of any interest the debtor or his creditors may have in maintaining this bankruptcy case because the debtor had been discharged and the property of the estate had been abandoned. Indeed, the bankruptcy court noted that the case would be closed but for the pendency of an appeal.

1988). However, the exact factors and the weight to be given each of them is “highly sensitive to the facts of each individual case.” Id.

In reaching its decision, the bankruptcy court considered that but for the appeal pending at the time Greene filed his complaint, the bankruptcy case would be closed. In addition, the bankruptcy court found that the focus of Greene’s litigation claims before the bankruptcy court involved a domestic relations dispute that implicated purely state law issues of paternity and the related duty of support. The bankruptcy court further found that the continued filing of motions and complaints do not further any valid bankruptcy objective and have taxed the bankruptcy court’s limited resources. In addition, the bankruptcy court observed that because the property of the estate had been abandoned and the debtor discharged, there did not appear to be any basis for jurisdiction. Finally, the bankruptcy court noted that impediments to jurisdiction have nonetheless not deterred Greene from filing pleadings. Accordingly, the bankruptcy court ordered that the case be suspended. The findings of the bankruptcy court were not clearly erroneous and it did not abuse its discretion in suspending the case.

IV. Conclusion

Based upon the foregoing, the decision of the bankruptcy court will be affirmed. An appropriate Order follows.

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JOAN ESMONDE, Assistant District Attorney,	:	
in her Official and Individual Capacities, and	:	
COURT OF COMMON PLEAS	:	
OF PHILADELPHIA COUNTY and	:	
FREDERICK BAKER as Trustee	:	
Appellees.	:	NO. 99-4316

ORDER

AND NOW, this 27th day of September, 1999, upon consideration of the entire record (Doc. No. 1), for the reasons set forth in the foregoing memorandum, it is hereby **ORDERED** that the order of the Bankruptcy Court dated July 27, 1999, dismissing appellant's complaint is **AFFIRMED**.

This is a final Order.

LOWELL A. REED, JR., S.J.