IN THE

MISSOURI SUPREME COURT

ROBERT D. CAIN, ET AL.,	)	
	)	
Respondents,	)	
	)	Cause No. SC90511
v.	)	
	)	
SHERRI PORTER,	)	
	)	
Appellant.	)	

ON APPEAL FROM THE MISSOURI COURT OF APPEALS WESTERN DISTRICT

SUBSTITUTE BRIEF OF RESPONDENTS ROBERT D. CAIN ET. AL.

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STATEMENT OF FACTS

Appellant filed for Chapter 13 Voluntary Petition bankruptcy protection on March 5, 2004. (LF, 238.) The Bankruptcy Court confirmed the Appellant's bankruptcy plan on May 3, 2004. (LF, 237.) In August of 2005 Robert Cain and his wife, Elizabeth, filed a petition for damages against Appellant claiming they were injured in a motor vehicle collision that occurred before the filing of Appellant's bankruptcy. (LF, 7.) Appellant was served with summons on October 1, 2005. (LF, 22.) Appellant did not list the Cains her bankruptcy schedules and thus the Cains were unaware of Appellant's bankruptcy petition. (TR, 77.) After Cains' counsel, James Thompson, learned Appellant was a debtor in bankruptcy, Thompson met with Appellant's bankruptcy counsel, David Barlow, and obtained an agreed signed stipulation, granting the Cains relief from the automatic stay to pursue their claims, provided that their recovery would be limited to any insurance covering Appellant's liability. (Supp. LF, 28.) Due to an oversight in Thompson's office, the agreed stipulation was not filed with the Bankruptcy Court. Appellant testified that she understood she was not subject to personal liability on the claim. (TR, 79.)

Believing that the agreed motion and order granting relief from the automatic stay had been filed and the order entered, the Cains proceeded with their suit. Appellant's state court counsel, presumably retained by her insurance company, participated in the state court suit as well. They filed an answer on Appellant's behalf, served discovery on the Cains, and responded to the Cains' discovery on Appellant's behalf. (LF, 32-62.)

The Missouri Court of Appeals, in addressing the validity of Cain's judgment against Appellant, describes the ensuing events:

> The case was tried on September 11, 2006. The Cains appeared with counsel. Neither Porter nor her counsel appeared. The trial court took evidence from the Cains and entered judgment against Porter in the amount of $200,100.24.
>
> Porter moved to set aside the judgment. The trial court denied the motion on November 17, 2006. Porter filed a motion to reconsider on November 30, 2006, in which she asserted, for the first time, that the trial court was without subject matter jurisdiction to enter judgment because the automatic stay in bankruptcy had not been lifted. The trial court denied the motion on March 13, 2007. Porter filed an appeal, but later dismissed it.
>
> Instead, on April 13, 2007, Porter filed a new motion pursuant to Rule 74.06(b)(4), arguing that the judgment was void because it was entered in violation of the automatic stay in bankruptcy. The trial court denied the motion, on the basis that it raised the same issues as Porter's earlier motion for reconsideration. The trial court also held that, by her conduct, Porter had waived her right to rely on the bankruptcy stay. (Supp. LF, 61.)

The Missouri Court of Appeals held that the Circuit Court had jurisdiction to enter a judgment against Appellant notwithstanding the fact that she was a debtor in bankruptcy.

The Court of Appeals did not make this finding on the merits. Rather, the panel found that because the issue of the Circuit Court's jurisdiction to enter a judgment when

the automatic stay was in effect had already been litigated by Appellant to a final unappealed judgment finding that such jurisdiction existed, the matter was *res judicata* and could not be raised again. (Supp. LF, 61-63.) This appeal followed.

POINTS RELIED ON

I. The Trial Court's Denial of Appellant's Rule 74.06 Motion for Relief Must be Affirmed Because the Trial Court Judgment did not Violate the Bankruptcy Proceeding's Automatic Stay and was Therefore not Void *ab initio*.

In re Baldwin-United Corp. Litigation, 765 F.2d 343 (2nd Cir. 1985).

Hanna v. Bricton Mfg. Co., 62 F.2d 139 (8th Cir. 1932).

Reynolds v. Tinsley, 612 S.W.2d 828 (Mo. App. E.D. 1981).

Murphy v. De France, 13 S.W. 756 (Mo. 1890).

Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939).

Rule 74.06.

II. The Trial Court's Denial Must be Affirmed Even if There was a Violation of the Automatic Stay Because Judgments Obtained in Violation of the Automatic Stay are Voidable, not Void *ab initio.*

In re Sapp, 91 B.R. 520 (Bkrtcy. E.D. Mo. 1988).

In re Adams, 215 B.R. 194 (Bkrtcy. W.D. Mo. 1997).

In re Lett, 238 B.R. 167 (Bkrtcy. W.D. Mo. 1999).

In re Brooks, 79 B.R. 479 (9th Cir. 1987).

Matter of Holtkamp, 669 F.2d 505 (7th Cir. 1982).

In re Williams, 257 B.R. 297 (Bkrtcy. W.D. Mo. 2001).

In re Advanced Ribbons and Office Products, Inc., 125 B.R. 259 (9th BAP 1991).

In re Edwin A. Epstein, Jr. Operating Co., Inc., 314 B.R. 591 (Bkrtcy. Tex. 2004).

Easley v. Pettibone Michigan Corp., 990 F.2d 905 (6th Cir. 1993).

In re Hoskins, 266 B.R. 872 (Bkrtcy. W.D. Mo. 2001).

In re Carter, 240 B.R. 767 (Bankr. W.D. Mo. 1999).

In re Smith, 245 B.R. 622 (Bankrtcy. W.D. Mo. 2000).

In re Cobb, 88 B.R. 119 (Bankrtcy. W.D. Tex. 1988).

In re Vierkant, 240 B.R. 317 (8th Cir. B.A.P. 1999)

Matthews v. Rosene, 739 F.2d 249 (7th Cir. 1984).

Vaughn v. Ripley, 446 S.W.2d 475 (Mo. App. 1969).

Brown v. Armstrong, 949 F.2d 1007 (8th Cir. 1991).

11 U.S.C.A. § 362

Rule 55.08

III. The Trial Court Decision Denying Appellant's Rule 74.06 Motion for Relief Must be Affirmed Because the Doctrine of Collateral Estoppel Bars Appellant From Raising the Issue of Subject Matter Jurisdiction.

Allison v. Allison, 253 S.W.3d 91 (Mo. App. S.D. 2008).

Spino v. Bhakta, 174 S.W.3d 702 (Mo. App. W.D. 2005).

Underwriters Nat. Assur. Co. v. North Carolina Life and Acc. and Health Ins. Guaranty Ass'n, 455 U.S. 691 (1982).

McCracken v. Wal-Mart Stores East, LP, 298 S.W.3d 473 (Mo. 2009).

Heins Implement Co. v. Missouri Highway & Transp. Com'n, 859 S.W.2d 681 (Mo. 1993).

Winthrop Sales Corp. v. Shelton, 389 S.W.2d 70 (Mo. App. 1965).

White v. Wilks, 357 S.W.2d 908, (Mo. 1962).

Rule 55.27.

Rule 74.06.

ARGUMENT

I. The Trial Court's Denial of Appellant's Rule 74.06 Motion for Relief Must be Affirmed Because the Trial Court Judgment did not Violate the Bankruptcy Proceeding's Automatic Stay and was Therefore not Void *ab initio*.

a. Standard of Review.

"[T]he applicability of the automatic stay to a pending matter is an issue of law within the competence of the appellate court." In re Vierkant, 240 B.R. 317, 320 (8th Cir. BAP 1999).

b. The trial court judgment did not violate the automatic stay.

Appellant's sole argument in this case is centered on the premise that the trial court proceeding was void *ab initio* because it was in violation of the automatic stay resulting from Appellant's voluntary Chapter 13 bankruptcy proceeding. Accordingly, to prevail, Appellant must show that the trial court judgment violated the automatic stay. No other basis to grant relief from the trial court's judgment was either claimed or available to Appellant under Rule 74.06. Notably absent from the legal file submitted by Appellant is *any* finding or determination whatsoever that Respondents violated the automatic stay. On the other hand, notably prominent is the recent finding by Judge Arthur Federman of the U.S. Bankruptcy Court that Respondents "…did not violate the automatic stay while it was in effect". (Supp. LF, 99-100.)

The question whether the automatic stay has been violated is within the jurisdiction of the Bankruptcy Court. In re Baldwin-United Corp. Litigation, 765 F.2d 343, 347 (2nd Cir. 1985). On October 26, 2009 Appellant invoked the Bankruptcy Court's jurisdiction when she filed a motion to reopen her closed bankruptcy estate for the sole purpose of seeking the Bankruptcy Court's ruling that the trial court judgment was null and void on the basis that it was obtained in violation of the automatic stay. (Supp. LF, 18-20.) On January 15, 2010 the Bankruptcy Court in clarifying its previous order denying Appellant's motion stated that "Since Plaintiffs did not violate the automatic stay while it was in effect, and since the stay is no longer in effect, the Debtor's Motion to Declare Judgment Void for Violation of the Automatic Stay is once again DENIED as being moot." (Supp. LF, 99-101.) Since Appellant sought out and invoked the Bankruptcy Court's jurisdiction it is now bound by that Court's decision that the Cains did not violate the stay. Without a violation of the automatic stay there is no basis upon which to claim that the judgment is void *ab initio*.

Bankruptcy courts indisputably have jurisdiction over all questions pertaining to bankruptcy and the administration of insolvent estates. Hanna v. Bricton Mfg. Co., 62 F.2d 139, 145 (8th Cir. 1932). As such, Judge Arthur Federman's January 15, 2010 ruling that the Cains "…did not violate the automatic stay while it was in effect" constitutes a final and authoritative ruling on the issue. (Supp. LF, 99-101.) Judge Federman's order became final pursuant to Bankruptcy Rule 8002 on January 29, 2010 because it was not appealed. Therefore the issue of voiding the trial court's judgment as in violation of the automatic stay has been preclusively decided and is now barred by the doctrine of

collateral estoppel. Furthermore, whether the Bankruptcy Court abused its broad discretion is irrelevant as collateral estoppel applies to issues regardless of whether they were decided legally correct. Reynolds v. Tinsley, 612 S.W.2d 828, 830 (Mo. App. E.D. 1981); Murphy v. De France, 13 S.W. 756, 757 (Mo. 1890) (noting that the question is not whether the prior court decided the point correctly, but rather did it decide, and is the decision final).

This result is consistent with the United States Supreme Court's holding in Treinies v. Sunshine Mining Co., 308 U.S. 66, 78 (1939). In Treinies two different state supreme courts reached conflicting results on the merits of a case. The Supreme Court held that "[e]ven where the decision against validity of the original judgment is erroneous, it is a valid exercise of judicial power… [o]ne trial of an issue is enough. The principles of res judicata apply to questions of jurisdiction as well as to other issues…." Id. at 78.

Because the Bankruptcy Court's January 15 ruling constitutes a definitive, and now final, ruling on the issue of any automatic stay violation, this Court may not usurp the Bankruptcy Court's jurisdiction by overturning its determination that the stay was not violated.

II. The Trial Court's Denial Must be Affirmed Even if There was a Violation of the Automatic Stay Because Judgments Obtained in Violation of the Automatic Stay are Voidable, not Void *ab initio.*

a. Appellant's actions did not violate congressional intent behind the § 362 automatic stay.

It is generally accepted that actions taken in violation of the automatic stay are not void, but voidable. See In re Sapp, 91 B.R. 520 (Bkrtcy. E.D. Mo. 1988); In re Williams, 257 B.R. 297 (Bkrtcy. W.D. Mo. 2001); In re Adams, 215 B.R. 194 (Bkrtcy. W.D. Mo. 1997); In re Lett, 238 B.R. 167 (Bkrtcy. W.D. Mo. 1999); In re Brooks, 79 B.R. 479 (9th Cir. 1987) (noting that a trustee *may* void certain post petition actions in violation of automatic stays). This view is consistent with congressional intent behind 11 U.S.C.A. § 362. The legislative history to § 362 clearly indicates that Congress recognized that the stay should be lifted in appropriate circumstances. It states:

> It will often be more appropriate to permit proceedings to continue in their place of origin, when no great prejudice to the bankruptcy estate would result, in order to leave the parties to their chosen forum and to relieve the bankruptcy court from many duties that may be handled elsewhere.

Matter of Holtkamp, 669 F.2d 505, 508 (7th Cir. 1982) (citing S. Rep. No.989, 95th Cong. 2d Sess. 50, reprinted in (1978) U.S. Code Cong. & Ad. News 5836) (internal punctuation omitted).

Congress intended the automatic stay of § 362 to protect (1) the debtor; (2) property of the estate; and (3) property of the debtor. In re Advanced Ribbons and Office Products, Inc., 125 B.R. 259, 263 (9th Cir. BAP 1991), thereby preventing a "chaotic and uncontrolled scramble for the debtor's assets in a variety of uncoordinated proceedings in different courts." Matter of Holtkamp, 669 F.2d at 508.

The Cains' actions in this case do not violate the spirit of § 362. Despite Appellant's assertion the Cains made no attempt to lift the bankruptcy stay, Cains'

counsel did in fact meet with Appellant's bankruptcy counsel and drafted a stipulation signed by Appellant's counsel which lifted the automatic stay, *but only to the extent of Respondent's insurance coverage on her vehicle*. (TR, 87.) Ms Porter testified she consented to and was aware that her bankruptcy counsel agreed to lift the automatic stay to the extent of her automobile insurance coverage. (TR, 87.) Appellant knew she would not be subject to personal liability. (TR, 87.) Appellant cannot agree to lift the automatic stay then seek to have the ensuing judgment voided because the Cains did exactly what the stipulation allowed them to do. Cains' counsel admits that, regrettably, due to an oversight within his office, the stipulation was not filed with the Bankruptcy Court. At no time during the proceedings however did the Cains make any claim against (1) Appellant personally; (2) the property of Appellant's estate; or (3) Appellant's property. Accordingly the Cains' actions at the trial court level were in good faith and did not violate the protection Congress intended the automatic stay to provide.

b. Bankruptcy law permits retroactive validation of acts taken in violation of the automatic stay.

Regardless of whether the trial court's judgment violated the automatic stay at the time it was rendered, bankruptcy law permits the subsequent validation of acts taken in violation of the automatic stay. In re Edwin A. Epstein, Jr. Operating Co., Inc., 314 B.R. 591, 601 (Bkrtcy. S.D. Tex. 2004). Courts have recognized that equitable principles allow retroactive validation of acts violating the automatic stay if the creditor unreasonably withholds notice of the stay to the debtors prejudice, or if the debtor is attempting to use the stay unfairly as a shield to avoid an unfavorable result. Easley v. Pettibone Michigan

Corp., 990 F.2d 905, 911 (6th Cir. 1993). The Easley factors apply squarely to the instant case and the Bankruptcy Court impliedly validated the trial court's ruling when it made a specific finding that it did not violate the automatic stay.

The very case which Appellant claims supports her argument actually expressly refutes it. In In re Hoskins, 266 B.R. 872 (Bkrtcy. W.D. Mo. 2001), contrary to Appellant's assertions, the Bankruptcy Court acknowledged its authority to retroactively validate a creditor's state court actions which violated the automatic stay. The Hoskins Court noted that a bankruptcy court may grant retroactive relief from the automatic stay "sparingly and in compelling circumstances." Id. at 878; See also In re Carter, 240 B.R. 767, 769 (Bankr. W.D. Mo. 1999) (citing In re Vierkant, 240 B.R. 317 (8th Cir. B.A.P. 1999)). The Hoskins Court noted that when a court exercises its authority to annul the stay retroactively, "the action in question is not void because no stay violation has occurred." Hoskins, 266 B.R. at 878-89 (internal punctuation omitted) (citing In re Smith, 245 B.R. 622, 624 (Bankrtcy. W.D. Mo. 2000).

The Hoskins Court found that although a debtor cannot ordinarily waive the protection of the automatic stay, when a debtor appears and defends a suit on any basis other than application of the automatic stay, the debtor is deemed to have waived the automatic stay as to that particular action. To hold otherwise would be manifestly unjust and "would allow a debtor to have a trump card that he could play if he did not like the outcome of the action, but allowing him to take a favorable judgment. Id. at 878-879 (citing In re Cobb, 88 B.R. 119, 121 (Bankrtcy. W.D. Tex. 1988)). Accordingly, the

Bankruptcy Court retroactively lifted the automatic stay and validated the creditor's state court actions. Id. at 879.

Hoskins is on point and controls this case. The Bankruptcy Court entered its order confirming Appellant's bankruptcy plan on May 3, 2004. (LF, 237.) Appellant was served with process in the trial court action on October 1, 2005. (LF, 22.) Appellant filed an answer to Respondents' petition (LF, 32), raised affirmative defenses (LF, 33), and engaged in discovery in the trial court action. (LF, 30.) The trial court entered its judgment against Appellant, *in absentia,* on September 11, 2006. (LF, 71.) Appellant had over eleven months to raise the bankruptcy proceedings as an affirmative defense, as described by Missouri Rule 55.08, before judgment was entered. Appellant only raised the bankruptcy as a defense after the trial of this matter. The only conclusion is that Appellant chose not to do so in order to unfairly gain a tactical advantage.

This result is consistent with prior holdings that § 362 is subject to equitable considerations. The equitable doctrine of laches bars a debtor who unreasonably and inexcusably delays in asserting a claim against state court jurisdiction to the bankruptcy court if the result would seriously prejudice the creditor. Matthews v. Rosene, 739 F.2d 249, 251 (7th Cir. 1984). The Rosene court noted that § 362 is designed as a shield to protect debtors from harassment, not a sword to thwart the judicial process and bar claimants acting in good faith. A debtor may not abuse the bankruptcy code's protections by remaining "stealthily silent" while the automatic stay is being violated because of the debtor's unreasonable behavior. In re Smith, 876 F.2d 524, 526 (6th Cir. 1989).

Appellant's assertions that the Cains' counsel knew Appellant's counsel was across the hall in another trial and purposely did not mention that fact to the trial judge is of no avail. A lawyer is charged during the progress of a cause with the duty, and in fact presumed, to know what is going on in his case. Vaughn v. Ripley, 446 S.W.2d 475, 480 (Mo. App. 1969). A lawyer must vigilantly follow the progress of a case in which he is involved. Id. Regardless, Cains' counsel expressly denies that he had any knowledge of Appellant's counsel's whereabouts during the trial court proceedings. (TR, 41-42.)

The fundamental purpose of bankruptcy is to prevent creditors from stealing a march on each other and the automatic stay is essential to accomplishing this purpose. Brown v. Armstrong, 949 F.2d 1007, 1009-10 (8th Cir. 1991). Appellant had ample time to raise the affirmative defense of subject matter jurisdiction to the trial court. Appellant either floundered for nearly a year in doing so or, more likely, chose to use the automatic stay as a strategic "stealthy defense." In doing so, Appellant thwarted the bankruptcy code's laudable purpose by cunningly exploiting its protections to gain an unfair tactical advantage. This Court must affirm the trial court's ruling otherwise it effectively sanctions Appellant's perverting the judicial process in order to get "two bites at the apple".

III. The Trial Court Decision Denying Appellant's Rule 74.06 Motion for Relief Must be Affirmed Because the Doctrine of Collateral Estoppel Bars Appellant From Raising the Issue of Subject Matter Jurisdiction.

Even if the Bankruptcy Court had determined that the trial court's judgment violated the automatic stay, the Appeals Court decision must be affirmed because

Appellant had a full and fair opportunity to raise lack of subject matter jurisdiction regarding the automatic stay to the trial court.

Missouri Courts apply preclusion principles to issues of subject matter jurisdiction. Allison v. Allison, 253 S.W.3d 91 (Mo. App. S.D. 2008). In Allison a mother was barred from raising subject matter jurisdictional objections to an earlier dissolution decree by way of a motion for relief from under Rule 74.06(b). Because the mother had a full and fair opportunity to litigate the court's decree declaring that it had subject matter jurisdiction, collateral estoppel precluded her from relitigating the issue in her Rule 74.06 motion to set aside judgment. Allison is on point with the instant case and bars Appellant from relitigating the issue of subject matter jurisdiction.

Preclusion principles can apply to bar a party from raising arguments in a Rule 74.06(b) motion where that party has previously raised the identical arguments prior to the entry of final judgment in the underlying action, even when the judgment was entered in default. Spino v. Bhakta, 174 S.W.3d 702, 707 (Mo. App. W.D. 2005). This case is on point with Spino. Appellant's first motion to set aside the trial court's judgment was denied on November 17, 2006, it made no mention of lack of subject matter jurisdiction relating to the automatic stay. (LF, 93.) Appellant did not raise lack of subject matter jurisdiction court until her November 30, 2006 motion to reconsider the denial to set aside the judgment, which the trial court denied on March 13, 2007. (LF, 96.) Appellant filed an appeal but later dismissed it. An appellant is given one opportunity to raise subject matter jurisdiction. Allison, 253 S.W.3d at 94. As the United States Supreme Court noted, "this Court has long recognized that the principles of res judicata apply to

questions of jurisdiction as well as other issues." Underwriters Nat. Assur. Co. v. North Carolina Life and Acc. and Health Ins. Guaranty Ass'n, 455 U.S. 691, 706 (1982). To hold otherwise would allow a litigant to raise the same arguments in perpetuity.

Lack of subject matter jurisdiction is an affirmative defense. Rule 55.27(a)(1). Although lack of subject matter jurisdiction is generally not subject to waiver, Missouri Courts recognize that "if a matter is not jurisdictional but rather is a procedural matter required by statute or rule or an affirmative defense of the sort listed in Rule 55.08, then it generally may be waived if not raised timely. McCracken v. Wal-Mart Stores East, LP, 298 S.W.3d 473, 476 (Mo. 2009).

In Heins Implement Co. v. Missouri Highway & Transp. Com'n, 859 S.W.2d 681, 685 (Mo. 1993) the Court stated that where the facts giving rise to an affirmative defense, are known to the defendant from the inception of the lawsuit, the affirmative defense must be plead in a timely fashion. The requirement that an affirmative defense be pleaded is not a mere technicality, it is necessary to the fair and orderly administration of justice. Winthrop Sales Corp. v. Shelton, 389 S.W.2d 70, 73 (Mo. App. 1965) (citing White v. Wilks, 357 S.W.2d 908, 913 (Mo. 1962)).

Appellant has had four bites at the jurisdictional apple; she (1) actively participated in the trial court proceedings for approximately eleven months without raising subject matter jurisdiction, (2) she failed to raise jurisdiction in her first motion to set aside the judgment, (3) but did raised it before the trial court in her Motion to Reconsider which the trial court denied, and (4) Appellant appealed and then dismissed her appeal of the trial court's denial. (LF, 180.) This Court must not grant Appellant's

request for a fifth opportunity at the apple or it will encourage endless appeals from future litigants.

Conclusion

For these reasons, this Court should affirm the trial court's denial of Appellant's Motion for Relief under Rule 74.06.

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 4,371 words, excluding the cover, this certification and the appendix, as determined by Microsoft Word 2007 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 16th day of February, 2010, to:

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APPENDIX