IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-3634

IN THE MATTER OF:

MURRAY W. BRASHEARS

and

MARY F. BRASHEARS,

Debtors,

MURRAY W. BRASHEARS

and

MARY F. BRASHEARS,

Appellants,

VERSUS

ROBERT EUSTIS,

and

EUSTIS MORTGAGE CORP.,

Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA-92-1780-M)

(May 19, 1993)
Before JOHNSON, SMITH, and EMILIO M. GARZA, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

The debtors, Murray and Mary Brashears, appeal from the bankruptcy court's order dismissing their motion to hold creditor Eustis Mortgage Corp. ("Eustis") in contempt for violations of the automatic stay and court orders issued pursuant to the provisions of chapter 13 of the Bankruptcy Code.[1] The bankruptcy court found that no act violative of the automatic stay occurred in this case, and the district court affirmed. Finding no clear error, we affirm.

I.

Eustis owned a promissory note and mortgage guaranteed by the Veterans Administration on the Brashears' home. The Brashears filed a petition in bankruptcy pursuant to chapter 13. Eustis was the only secured creditor and the principal unsecured creditor and submitted a proof of claim in the amount of $11,869.98, which included foreclosure costs, filing fees, sheriff's costs, and attorneys' fees. Eustis opposed confirmation of the plan in bankruptcy and requested the bankruptcy court to lift the automatic stay or, in the alternative, to grant Eustis relief from the automatic stay. The court denied Eustis any relief.

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[*] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

[1] In this appeal, the Brashears for the first time have made Robert Eustis a party to this proceeding. Eustis contends that the inclusion of Robert Eustis in this appeal is improper, and the Brashears agree that Robert Eustis is not a proper party before the court.

Thereafter, Eustis attempted to collect attorneys' fees from the Brashears without the bankruptcy court's knowledge or approval. On June 16, 1989, the Brashears filed a motion requesting that court to find Eustis in violation of the automatic stay. On December 1, 1989, the court granted the motion and awarded the Brashears $105 in attorneys' fees.

The Brashears' mortgage subsequently was purchased by Litton Mortgage Servicing Center (Litton). The Brashears, contending that Eustis thereafter continued to attempt to collect money from them outside the boundaries of the chapter 13 plan,[2] filed a motion to hold Eustis in contempt for further violations of the automatic stay and court orders. After a hearing on March 25, 1991, the bankruptcy court denied the motion. The Brashears appealed to the district court, which affirmed the bankruptcy court's order on September 27, 1991. The Brashears appealed to this court, and we granted Eustis's motion to dismiss the appeal as interlocutory.

On May 1, 1992, the trustee in bankruptcy issued his final report and account, and the bankruptcy case was dismissed. The

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[2] The Brashears asserted that Eustis made repeated attempts to collect late charges, attorneys' fees, inflated arrearages, and other costs without the bankruptcy court's approval. They contended that Eustis's efforts prevented them from closing on a new guaranteed interest rate reduction loan approved on December 4, 1990, by First Coastal Mortgage Corporation, Inc. (First Coastal).

Eustis contended that these alleged further violations of the automatic stay were based upon the "payout statement" from Litton, which included, as "miscellaneous" amounts, post- and prepetition attorneys' fees, court costs, and late charges. Eustis asserted that Litton sent the payout statement to First Coastal at the Brashears's request when the Brashears sought to refinance their loan.

Brashears appealed to the district court for a final judgment on their previous motion to hold Eustis in contempt. The district court, viewing the appeal as essentially an appeal from its previous ruling, referred the parties to its September 27, 1991, order and dismissed the appeal. The Brashears appeal from the district court's dismissal.

II.

The threshold question is whether this court has jurisdiction over this case. When the Brashears brought their first appeal from the district court's order affirming the bankruptcy court's order denying their motion to hold Eustis in contempt, we granted Eustis's motion to dismiss the appeal because the appeal was based upon an interlocutory order of the bankruptcy court.[3] After the bankruptcy court dismissed the Brashears' chapter 13 proceeding, the Brashears again appealed to the district court and, appearing pro se, requested a final judgment from the district court so they could proceed with an appeal to this court.

The district court, on its own motion, dismissed the appeal as improvidently and improperly filed, opining that the second appeal was merely a pro se plaintiff's version of the appeal from the district court's prior ruling affirming the bankruptcy court order. The district court observed that the Brashears' initiation

[3] We dismissed the appeal prior to the decision in Connecticut Nat'l Bank v. Germain, 112 S. Ct. 1146 (1992), holding that an interlocutory order issued by a district court sitting as a court of appeals in bankruptcy is appealable under 28 U.S.C. § 1292.

of a separate lawsuit was improper in what essentially was an appeal from the court's September 27, 1991, ruling, and it reiterated the court's conclusion in its order of that date. By minute entry dated June 18, 1992, the district court ordered the Brashears' appeal dismissed.

Title 28 U.S.C. § 158(d) states that "[t]he courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section." 28 U.S.C. § 158(d) (Supp. 1992). Subsection (a) provides that "[t]he district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees . . . of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title." 28 U.S.C. § 158(a) (Supp. 1992). "Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a)." Fed. R. Civ. P. 58.[4]

On June 24, 1992, the bankruptcy court entered an order discharging the Brashears and approving the trustee's final report and account. A final order "must generally be one that `ends the litigation . . . and leaves nothing for the court to do but execute the judgment.'" Smith v. Seaside Lanes (In re Moody), 825

[4] Similarly, Bankr. R. 9021 provides that "[e]xcept as otherwise provided herein, Rule 58 F.R.Civ.P. applies in cases under the [bankruptcy] Code. Every judgment entered in an adversary proceeding or contested matter shall be set forth on a separate document." We have held that the separate document requirement of rule 9021 is identical to that of rule 58. Seiscom Delta, Inc. v. Two Westlake Park (In re Seiscom Delta, Inc.), 857 F.2d 279, 285 (5th Cir. 1988).

F.2d 81, 85 (5th Cir. 1987) (citation omitted); County Management, Inc. v. Kriegel (In Re County Management, Inc.), 788 F.2d 311, 313 (5th Cir. 1986) (quoting Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978)).[5] In a bankruptcy case, there must be a "final determination of the rights of the parties to secure the relief they seek in this suit" for an order to be considered final. Moody, 825 F.2d 81 (quoting Sandoz v. Crain Bros. (In re Emerald Oil Co.), 694 F.2d 88, 89 (5th Cir. 1982)).

The order entered by the bankruptcy court discharging the Brashears and approving the trustee's final report and account finally determined the rights of the parties in the chapter 13 proceeding. The Brashears properly appealed from the bankruptcy court's order to the district court pursuant to section 158(a). Path-Sciences Lab., v. Greene County Hosp. (In re Greene County Hosp.), 835 F.2d 589, 591 (5th Cir.), cert. denied, 488 U.S. 820 (1988). After dismissing the Brashears' appeal on its own motion, the district court issued a final order over which this court has jurisdiction. Id. The district court's order constitutes a separate document from which the Brashears can properly appeal.[6]

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[5] In Foster Sec. v. Sandoz (In re Delta Servs. Indus.), 782 F.2d 1267 (5th Cir. 1986), this court stated that it must focus not only upon the finality of the district court decision, but on the nature of the underlying bankruptcy court order, to determine whether appellate jurisdiction exists. We concluded that "we have jurisdiction only if the underlying bankruptcy court order was final." Id.; see also Adams v. First Fin. Dev. Corp. (In re First Fin. Dev. Corp.), 960 F.2d 23, 25 (5th Cir. 1992) (per curiam).

[6] Eustis uses select language from the district court proceeding to support its argument that the Brashears were really attempting to appeal a second time from the bankruptcy court's interlocutory order. Eustis is correct in its assertion that an appeal based upon the bankruptcy court's earlier interlocutory order and the district court's affirmance of that order, an

(continued...)

III.

We review the factual findings of the bankruptcy court under the clearly erroneous standard. Fabricators, Inc. v. Technical Fabricators, Inc. (In re Fabricators, Inc.), 926 F.2d 1458, 1464 (5th Cir. 1991); Wilson v. Huffman (In re Missionary Baptist Found. of Am.), 712 F.2d 206, 209 (5th Cir. 1983). A finding of fact is clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left

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[6](...continued)
appeal that this court previously dismissed, would be improper. Eustis is incorrect, however, in its contention that the Brashears' present appeal is based upon the bankruptcy court's earlier order. The earlier order was interlocutory but has been followed by a order by the bankruptcy court discharging the debtors. The Brashears appeal from that final order and may challenge the bankruptcy and district courts' earlier orders in the present appeal as well. See Picco, 900 F.2d at 849 n. 4 (appellant may challenge earlier interlocutory order in appeal from final judgment).

Because the Brashears appeal from the final order of the bankruptcy court, Eustis's argument that the Brashears' appeal is untimely pursuant to Fed. R. App. P. 4(a) must fail. That rule reads, in pertinent part, "In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from . . . ." Fed. R. App. P. 4(a). The Brashears filed their notice of appeal on July 10, 1992, within 30 days of the district court's dismissal of their appeal dated June 18, 1992. Therefore, no timeliness problems arise.

Eustis also argues that we should dismiss the Brashears' appeal on res judicata grounds. The test for determining whether a claim is barred by res judicata is as follows:

> For a prior judgment to bar an action on the basis of res judicata, the parties must be identical in both suits, the prior judgment must have been rendered by a court of competent jurisdiction, there must have been a final judgment on the merits and the same cause of action must be involved in both cases.

Southmark Properties v. Charles House Corp., 742 F.2d 862, 869 (5th Cir. 1984). A district court's interlocutory order is subject to revision at any time before the entry of final judgment. Golman v. Tesoro Drilling Corp., 700 F.2d 249, 253 (5th Cir. 1983) (citing Fed. R. Civ. P. 54(b)). Accordingly, an interlocutory order has no res judicata effect. See id. (holding that order granting partial summary judgment is interlocutory and has no res judicata effect). Therefore, the district court's previous order affirming the interlocutory order of the bankruptcy court is not a final judgment on the merits and has no preclusive effect on the present appeal.

with a firm and definite conviction that a mistake has been committed." Id. at 209 (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948)). Strict application of the clearly erroneous rule is particularly important where the district court has affirmed the bankruptcy court's findings. Id. When a finding of fact is premised on an improper legal standard, however, or a proper standard improperly applied, that finding loses the insulation of the clearly erroneous rule. Id. We review de novo the legal conclusions of the courts below. Besing v. Hawthorne (In re Besing), 981 F.2d 1488, 1491 (5th Cir. 1993); Bradley v. Pacific Southwest Bank (In re Bradley), 960 F.2d 502, 507 (5th Cir. 1992), cert. denied, 113 S. Ct. 1412 (1993).

In this case, the bankruptcy court did not make any findings of fact or conclusions of law when it reviewed the Brashears' motion to hold Eustis in contempt. The bankruptcy court conducted an evidentiary hearing, and on the basis of the statements of counsel, testimony of witnesses, and review of the evidence presented, denied the Brashears' motion. The district court affirmed without opinion.

This court may affirm if there are any grounds in the record to support the judgment, even if those grounds were not relied upon by the bankruptcy or district court. Besing, 981 F.2d at 1494. Even the complete lack of findings and conclusions by the bankruptcy court on a material issue does not compel reversal if we nevertheless can fully understand and resolve the issue on appeal. Id.

Section 362(a)(6) of the Bankruptcy Code provides that a petition filed under chapter 13 operates as an automatic stay of "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title." 11 U.S.C. § 362(a)(6) (1993). Section 362(h) further provides that "[a]n individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." 11 U.S.C. § 362(h) (1993).

A "willful violation" is "an intentional or deliberate act done with knowledge that the act is in violation of the stay." Lilly v. FDIC, 1990 WL 199281 (E.D. La. 1990), rev'd on other grounds sub nom. Lilly v. FDIC (In re Natchez Corp.), 953 F.2d 184 (5th Cir. 1992); Homer Nat'l Bank v. Namie, 96 B.R. 652, 654 (W.D. La. 1989). Section 362(h) creates a private remedy for an individual injured by a willful violation of a section 362(a) stay. City of Farmers Branch v. Pointer (In re Pointer), 952 F.2d 82, 86 (5th Cir.), cert. denied, 112 S. Ct. 3035 (1992); Pettitt v. Baker, 876 F.2d 456, 457-58 (5th Cir. 1989).

The "act" that the Brashears claim constituted a violation of the automatic stay is made up of what they characterize as repeated attempts by Eustis to collect attorneys' fees and late charges. Prior to the hearing on the Brashears' motion, the bankruptcy court had granted a motion brought by the Brashears requesting the court to hold Eustis in violation of the automatic stay for attempting to collect attorneys' fees without permission

from the court. In granting the motion, the court awarded the Brashears attorneys' fees but did not find that Eustis's act in violation of the stay was willful.

The Brashears testified in the March 25, 1991, hearing that Eustis had continued in its attempts to collect fees and late charges. The Brashears had requested a payout statement from Litton in order to obtain the newly-approved loan from First Coastal after the court had given them permission to refinance their mortgage. Litton sent the Brashears a payout statement that included late charges and fees. The inclusion of these fees raised the total amount due on the mortgage, and First Coastal refused to close on the new loan until an accurate payout statement was received. The Brashears attempted unsuccessfully to obtain a payout statement from Litton that did not indicate the fees or late charges.[7]

Eustis's attorney admitted that Eustis had not obtained the required court approval for collection of fees from the Brashears. He emphasized, however, that Eustis never had attempted to collect the fees indicated on the payout statements. The bankruptcy court expressed its concern regarding the unapproved fees and late charges but denied the Brashears' motion for contempt and violation of the automatic stay. The court stated that if there

[7] The Brashears also point to two letters from Litton rejecting their monthly payment. The amount Litton requested included charges for attorneys' fees. According to Mr. Brashears' testimony, Litton acknowledged its error and requested him to resubmit a check in the proper amount. Thereafter, Litton once again returned the check. Mr. Brashears responded with a letter that fully explained his position and the terms of the chapter 13 plan. The record gives no indication that Litton thereafter continued to reject payments.

were an improper claim, the appropriate action would have been for the Brashears to object to the claim. The court indicated that it would rule on attorneys' fees when the parties presented the court with a motion to set fees or an objection to the fees filed in Eustis' original proof of claim.

The Brashears argue that the bankruptcy court did not apply the correct legal standard in ruling on their contempt motion, and that, therefore, we should not give deference to the factual findings of the bankruptcy court that were tainted by the legal error. The Brashears urge that upon independent examination of the testimony given in the hearing before the bankruptcy judge, we must conclude that Eustis committed an act in violation of the automatic stay and that Eustis's act was willful, rendering it liable for damages pursuant to section 362(h).

The bankruptcy court's remarks in the transcript of the hearing do not indicate that it used an incorrect legal standard. The court did not set out the standard for a "willful violation" of the automatic stay, as urged by the Brashears. We may infer from his denial of the Brashears' motion, however, that the court, after hearing the testimony presented, examining the documents, and evaluating the credibility of the witnesses, did not find that any act to collect, assess, or recover a claim in violation of the automatic stay had occurred. The court first must find that an act violative of the automatic stay occurred pursuant to section 362(a)(6) before it can determine whether a violation was "willful" pursuant to section 362(h). A finding that such an act

occurred or did not occur is a finding of fact that we cannot overturn absent clear error. No indication of clear error exists on the record.[8]

Because no indication exists that the bankruptcy court's finding that no act violative of the automatic stay had occurred was clearly erroneous, we need not address the Brashears' contention that the court should have awarded damages under section 362(h), or, in the alternative, equitably subordinated Eustis's claim. The court did not find that Eustis committed any act in violation of the stay or that Eustis was guilty of any misconduct.

Despite the lack of formal findings of fact or conclusions of law by the bankruptcy court, an examination of the record enables us to resolve this issue on appeal. No clear error exists in the bankruptcy court's finding that no act violative of the automatic stay occurred. The order from which the Brashears appeal is AFFIRMED.

[8] The Brashears engage in a detailed discussion of the facts surrounding the charges for attorneys' fees that appeared on the payout statements. They urge that they had reached an agreement with Eustis, embodied in a consent order, in which Eustis dropped its request for fees in exchange for changing the Brashears' payment due date. Eustis strongly denies this contention. Whether an agreement was reached, however, is irrelevant. The bankruptcy court acknowledged that Eustis had failed to obtain approval for charging fees and took that fact into account when making its ruling on the Brashears' motion.