

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-20144
Summary Calendar

IN THE MATTER OF: Donald E. Jones and
Eileen V. Jones.

Donald E. Jones and Eileen V. Jones, Debtor.
Appellee,

VERSUS

David Askanase, Chapter 7 Trustee,
Appellant.

Appeal from the United States Bankruptcy Court
For the Southern District of Texas

(CA-H-93-02656)

(September 16, 1994)

Before KING, JOLLY, and DeMOSS, Circuit Judges:

PER CURIAM:*

Background

In May 1984, Donald E. Jones and Eileen V. Jones ("Debtors")

*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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

filed a Joint Petition for Chapter 11 Reorganization with the Bankruptcy Court in the Southern District of Texas ("bankruptcy court"). On June 5, 1984, the Debtors filed their initial statement of liabilities and assets which itemized an office building as being one of their assets. On June 8 an insurance binder was issued covering "office contents" for the amount of \$110,000.00 as an addendum to a policy on the office building which (i) covered the building itself in the amount of \$175,000, and (ii) which had been issued pre-petition. On July 4, 1984, the office building and contents were severely damaged by a fire. The fire insurance carrier initially denied liability on the policy on the grounds that the fire had been intentionally set. Debtors claimed the entire proceeds payable under the terms of the of the policy in the amount of \$275,000. The fire insurance carrier filed an adversary proceeding with the bankruptcy court to determine its liability under the policy. The insurance carrier settled with the first mortgage holder on the office building by paying the mortgage holder \$125,000 and taking an assignment of the first mortgage lien. Ultimately, Debtors filed a Motion to Compromise Controversy with the insurance carrier on the basis that the insurance carrier would pay Debtors the sum of \$120,000 and release Debtors from any of their obligation on the first lien note which had been assigned to the insurance carrier. In this motion the Debtors asserted that the settlement would be, "In the best interests of the Debtors, the estate of the Debtors, and the creditors of that estate." Nothing in the Motion to Compromise Controversy said anything about any of

the "office contents" being owned by the Debtors in any capacity other than as Debtors in possession of the Chapter 11 estate.

On October 4, 1987, the bankruptcy court entered an order approving the settlement with the fire insurance carrier and added thereto a hand written provision that required the Debtors to deposit the insurance proceeds in interest bearing accounts of not more than \$100,000 per bank and requiring the Debtors to not expend such funds, or any part thereof, without further order of the court. Subsequently, the Debtors presented various plans of reorganization which were not approved, but in their First Amended Disclosure Statement the Debtors listed the two certificates of deposits containing fire insurance proceeds as being part of the non-exempt assets of the estate of the Debtors. Later, the proceeding was converted to a Chapter 7 proceeding and a Trustee was appointed. The Trustee discovered that the Debtors had pledged the certificates of deposit, which contained the insurance settlement proceeds, as security for loans made to them in connection with a business which they started after the filing of the original Chapter 11 proceeding. The principal creditor of the estate filed a motion to hold Debtors in contempt for the pledging of these certificates of deposit. After a hearing, the bankruptcy court concluded: "Such pledges were made without Notice to creditors and without authority of this Court and were not made in the ordinary course of business of the Debtor." Additionally, the bankruptcy court found: "Such CD's were (are) property of the estate, in whole or in part, and are subject in part, to a claim of

the lien of [the principal lien holder]." Shortly thereafter the Debtors filed an adversary proceeding against the Chapter 7 Trustee to prevent the Trustee from attempting to recover the certificates of deposit. Additionally, the Trustee filed an adversary proceeding to avoid the unauthorized post-petition incumbrance of the certificates of deposit. The largest certificate of deposit containing insurance settlement proceeds was deposited into the registry of the court because of concern about the solvency of the bank which had issued that certificate.

In the last two adversary proceedings described, the Debtors, for the first time took the position that the insurance proceeds placed in the two certificates of deposit actually belonged to them individually and were not part of the bankruptcy estate of the Debtors because in the interval between filing of their original Chapter 11 proceeding and the office building fire in question, they borrowed \$18,000 from another bank and used those funds to purchase office supplies and equipment which were in the building when it was damaged by fire. Resolution of these adversary proceedings dragged out over some period of time, but finally the Trustee filed a Motion to Approve the Compromise of the Controversy worked out between the Trustee and the principal lien holder. Under the terms of this compromise, the sum of \$125,000 would be released to the Trustee (such sum consisting of the original \$90,000 certificate of deposit and all interest accrued thereon which was then in the registry of the U.S. Court, and the sum of \$6,735 out of the second certificate of deposit containing

insurance proceeds) and the balance of the insurance proceeds funds in the second certificate of deposit would be turned over to the principal lien claimant. In approving such compromise, the bankruptcy court made an express finding as follows:

2. The money which the Trustee is to recover from the registry of the court and from Fidelity National Bank is property of the estate.

The Debtors appealed the Order of the bankruptcy court approving the compromise to the district court. In reversing the bankruptcy Court, the district court held:

Whether the insurance proceeds are property of the estate is a question of law based generally on a factual inquiry;

And then concluded:

The compelling basis that the Debtors were denied the relief sought, is the fact that the Debtors lost credibility with the bankruptcy court. While this may bear upon a factual dispute before the court, it does not control on questions of law.

The Trustee duly perfected his appeal to this Court. We REVERSE the district court and REINSTATE and AFFIRM the judgment of the bankruptcy court.

Opinion

Federal Rule of Bankruptcy Procedure 8013 prescribes the standard that a district court employs in reviewing a bankruptcy court's finding of fact. It provides in relevant part:

Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly

erroneous and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses.

When reviewing a bankruptcy court's decision in a "core proceeding," a district court functions as an appellate court and applies the same standard of review applied in a federal appellate court. In the Matter of Hipp, 895 F.2d 1503, 1517 (5th Cir. 1990.) The determination of whether or not property constituted an asset of the bankruptcy estate and what liens were applicable thereto, are clearly "core proceedings" in our judgment. See 28 U.S.C. 157(b)(2). The district court should have applied the "clearly erroneous" test to the bankruptcy court's finding of fact that the insurance proceeds were assets of the estate. We see nothing in the district court's judgment or memorandum which would indicate that the district court applied the "clearly erroneous" test. To the contrary, by characterizing the issue as "a question of law" and declining to give the bankruptcy court the benefit of credibility assessments, we think the district court applied a standard of *de novo* review. In so doing, we think the district court erred.

We have carefully reviewed the briefs, the record excerpts, and relevant portions of the record itself. We are unable to conclude that the bankruptcy court's finding, that the insurance proceeds were an asset of the estate, was clearly erroneous for the following reasons:

1. The insurance binder covering "office contents" was attached to an insurance policy which covered a building

which was clearly an asset of the bankruptcy estate; and such policy had been issued prior to the initial Chapter 11 Petition and would have clearly become an asset of the bankruptcy estate. If Debtors truly intended to insure "office contents" which were acquired post-petition, they could and should have done that insuring in an entirely separate policy;

2. Numerous pleadings filed by the Debtors in their Chapter 11 proceeding recognize that the fire insurance proceeds were an asset of the bankruptcy estate;
3. The delay of several years by the Debtors in asserting, for the first time, their contention that the insurance proceeds covered "office contents" not belonging to the bankruptcy estate, clearly raises a credibility factor which the bankruptcy court was entitled to consider; and
4. Given the bankruptcy court's long familiarity with these Debtors and their prior actions, which were inconsistent with their responsibilities as Debtors in possession under a Chapter 11 proceeding, we think the deference required under Bankruptcy Rule 8013 for the bankruptcy court's assessment of the credibility of witnesses is clearly applicable in this case.

Accordingly, the judgment of the district court is REVERSED and the judgment of the bankruptcy court is REINSTATED and AFFIRMED. See In re Matter of Webb, 954 F.2d 1102 (5th Cir. 1992.)