

In the United States Bankruptcy Court

for the Northern District of Iowa

DAVID HEGG, ELAINE HEGG
Debtors.

Bankruptcy No. 95-62467KW
Chapter 13

DURWIN HEGG,
Plaintiff

Adversary No. 96-6034KW

vs.

CAROL DUNBAR, DAVID R. HEGG, ELAINE
HEGG
Defendants.

RULING

On August 29, 1996, the above-captioned matter came on for trial pursuant to assignment. Plaintiff appeared in person with Attorney Donald Gloe. Defendants David and Elaine Hegg appeared in person with their Attorney Brian Peters. Evidence was presented and the parties were allowed to submit briefs. All briefs have now been filed and this matter is ready for resolution. This matter is a core proceeding pursuant 28 U.S.C. 157(b)(2)(O).

STATEMENT OF THE CASE

Creditor Durwin Hegg seeks a ruling declaring him owner of disputed real estate as a result of his completion of the forfeiture of a real estate contract with Debtors. Debtors allege that Creditor Hegg's completion of the forfeiture violated the automatic stay and is therefore void. Debtors additionally claim that Creditor Hegg previously elected the remedy of foreclosure, and under the election of remedies doctrine, may not subsequently choose to forfeit the contract.

Debtors have filed a Motion for Contempt seeking damages for an asserted violation of the automatic stay. Debtors claim that Creditor Hegg violated the automatic stay by filing a motion in Winneshiek County District Court. Creditor responds that this action was inadvertent and based upon his belief that the automatic stay was no longer in effect, after receiving a notice of dismissal of a previous bankruptcy proceeding filed by Debtors.

Debtors allege Creditor Hegg violated the automatic stay by directing the county sheriff to seize a tractor which was property of Debtors' estate. Creditor Hegg denies this allegation.

Finally, Debtors claim that Creditor Hegg violated the automatic stay by commencing criminal proceedings against Debtors for the conversion of cattle. Debtors claim that this was a collection

attempt in violation of the automatic stay and should be permanently enjoined. Creditor Hegg responds by claiming that the criminal proceedings were commenced as a result of Debtors' criminal conduct and not as an attempt to collect from Debtors.

STATEMENT OF FACTS

Ralph and Esther Hegg entered into a real estate contract with their son, Debtor David Hegg, in September, 1974. The contract was for the sale of real estate in Winneshiek County, Iowa. Ralph Hegg died leaving his interest in the land to his widow Esther Hegg. Esther Hegg conveyed her interest as vendor of the real estate contract to her other son, Durwin Hegg ("Creditor Hegg") in October, 1994. Debtors David Hegg and Elaine Hegg ("Debtors") did not complete the terms of this contract.

Debtors entered into a cow lease agreement with Am and Ed Hess Dairy Cattle in December, 1992. The lease agreement provided that Debtors would lease cattle and pay the lessor \$1,000.00 per month for 38 months. The lease specified that default would occur when any payment was not made in full, and gave the lessor the right to accelerate the lease upon default. The lease prohibited the sale of the cattle without the lessor's permission.

As security for the cow lease agreement, Debtors mortgaged real estate in Winneshiek County to Am and Ed Hess Dairy Cattle in March, 1994. The real estate mortgaged to Am and Ed Hess Dairy Cattle by Debtors was the same real estate that Debtors had contracted to buy from Ralph and Esther Hegg who later assigned the contract to Creditor Hegg.

Debtors' mortgage with Am and Ed Hess was recorded in Winneshiek County. It provided that if Debtors defaulted on the lease agreement, the holder of the mortgage could foreclose and receive a judgement for all amounts due. Debtors further secured Am and Ed Hess Dairy Cattle through several financing statements which created liens on Debtors' interest in cattle, household goods and antiques, as well as tools, machinery, equipment and livestock. Since January, 1994, Debtors have not made the payments required under these agreements.

Am and Ed Hess Dairy Cattle assigned the lease agreement, mortgage and financing statements to Creditor Hegg for \$38,000.00, in September, 1994. The assignment was appropriately recorded and notice was served on Debtors.

Creditor Hegg filed a petition in Winneshiek County to foreclose on the real estate and security interests in December, 1994. (No. EQCV 022618). The foreclosure action was enjoined in January, 1995, pending resolution of the disputed amount due. Debtors filed for bankruptcy on May 18, 1995. The record in Bankruptcy Court reveals no further proceedings in State court since the filing of bankruptcy.

Based upon the real estate contract conveyed to Creditor Hegg by Esther Hegg, Creditor Hegg also commenced an action in December, 1994, against Debtors for forfeiture of contract. (No. EQCV 022632). The Winneshiek County District Court determined that Creditor Hegg must initiate separate

mediation proceedings, and could not continue those which the previous owner had started. A temporary injunction was issued staying continuation of the forfeiture proceeding. Upon receiving a mediation release, Creditor Hegg served a notice of forfeiture on April 21, 1995.

Debtors filed a Chapter 13 petition in the U.S. Bankruptcy Court for the Northern District of Iowa on May 18, 1995. (No. 95-20920KD). After Debtors filed their petition, Creditor Hegg filed an Affidavit in Support of Forfeiture of Real Estate Contract on May 22, 1995. Due to the stay in Debtors Chapter 13 case, all other proceedings against Debtors were halted.

The order dismissing Debtors' Chapter 13 case (No. 95-20920KD) was entered on November 2, 1995. However, Debtors filed another Chapter 13 petition (No. 95-62467KW) in the U.S. Bankruptcy Court for the Northern District of Iowa on December 18, 1995. After receiving the Notice of Dismissal in the previous bankruptcy, Creditor Hegg attempted to proceed with the foreclosure of mortgage action and the forfeiture of the real estate contract. On February 6, 1996, Creditor Hegg filed a motion to acknowledge the lifting of the stay in the Winneshiek County District Court with a copy of the dismissal of the previous bankruptcy case. Debtors responded by informing the Winneshiek County District Court that another Chapter 13 petition had been filed, and that a stay was in effect at that time.

Creditor Hegg seeks a determination of the property interests involved in the mortgage and the real estate contract. He has completed forfeiture under Iowa Code Chapter 656. Debtors allege that Creditor Hegg elected the remedy of foreclosure and is precluded from using the forfeiture chapter.

Creditor Hegg initiated criminal proceedings against Debtors in Winneshiek County on November 22, 1995. The criminal proceedings against Debtors allege that Debtors committed first degree theft by selling cattle which had been leased to Debtors under the cow lease agreement. This proceeding was also stayed as a result of Debtors' bankruptcy filing.

Debtors allege that Creditor Hegg requested the Winneshiek County Sheriff to seize a tractor rented to Dr. Larry Moore on February 2, 1996. Debtors state that the tractor was property of the estate and Creditor Hegg's request was a violation of the automatic stay. Creditor Hegg denies this allegation.

Debtors filed a Motion for Contempt against Creditor Hegg on April 1, 1996. Debtors allege that Creditor Hegg violated the automatic stay by (1) filing a motion to acknowledge lifting of the automatic stay in Winneshiek County District Court; (2) requesting the Winneshiek County Sheriff to seize a tractor which was property of the estate; and (3) instituting criminal proceedings against Debtors in an attempt to harass and collect from Debtors. Debtors request actual and punitive damages as well as attorney fees, and an order permanently staying the criminal proceedings against Debtors.

Creditor Hegg admits filing a motion to acknowledge lifting of stay in Winneshiek County District Court, but states that the motion was filed inadvertently and did not harm Debtors. Creditor Hegg denies asking the sheriff to seize a tractor which is property of the estate. Creditor Hegg claims that

the criminal proceedings instituted against Debtors did not constitute an attempt to collect from or harass Debtors, but were filed as a result of the criminal actions of Debtors.

ELECTION OF REMEDIES

When a bankruptcy court is adjudicating property rights, the law of the state where the property is situated governs questions of property rights in the absence of any conflict between state law and bankruptcy laws.

Johnson v. First Nat. Bank of Montevideo, 719 F.2d 270, 273 (8th Cir. 1983). "State laws are suspended only to the extent of actual conflict with the federal bankruptcy system." Justice v. Valley Nat. Bank, 849 F.2d 1078, 1085 (8th Cir. 1988).

The election of remedies doctrine exists to prevent double recovery for a single wrong. J.C.A. Partnership v. Wenzel Plumbing and Heating, 978 F.2d 1056, 1061 (8th Cir. 1992). It requires a party to adopt one of two or more coexisting and inconsistent remedies which may be pursued based on the same set of facts. Vesta State Bank v. Independent State Bank, 518 N.W.2d 850, 855 (Minn. 1994). The doctrine is not favored and is ordinarily applied in a strict and limited manner. Gottschalk v. Simpson, 422 N.W.2d 181, 185 (Iowa 1988).

An election of remedies defense consists of three elements. Reid v. Hansen, 440 N.W.2d 598, 600 (Iowa 1989); Parks v. City of Marshalltown, 440 N.W.2d 377, 379 (Iowa 1989); 25 Am. Jur. 2D Election of Remedies 8 (1996). These elements are (1) the existence of two or more remedies; (2) an inconsistency between them; and (3) a choice of one of the remedies. Reid, 440 N.W.2d at 600; Parks, 440 N.W.2d at 379. All three elements must exist before a remedy is barred. Parks, 440 N.W.2d at 380.

The first element, existence of two or more remedies, is essentially a factual determination. Id.

The second element, inconsistency, is established if the facts relied on as the basis for one remedy are "repugnant and contradictory" to the facts relied upon as the basis for another remedy. Id. This second element requires the two remedies to be so inconsistent that a party can not pursue one remedy without renouncing the other. Id.

The third element of the defense of election of remedies requires that a choice of one of the remedies has been made. Id. at 379. The choice of remedy occurs only when a party has "carried a case to a conclusion and obtained a decision on the issue." Id. at 380. When a remedy has not been pursued to its conclusion, an election of remedies has not occurred. Gottschalk, 422 N.W.2d at 185.

The affirmative defense of an election of remedies applies when a party has elected, pursued and obtained a remedy, and then attempts to assert a different inconsistent remedy. In re Phillips, 124 B.R. 712 (Bankr. W.D. Tex. 1991). Only when a party has chosen and accepted the benefit from pursuing the initial remedy does an election of remedies occur. Crown Life Ins. v. American Nat. Bank & Trust

Co., 35 F.3d 296, 299 (7th Cir. 1994). The mere commencement of an action does not constitute an election of remedies. Id.

Debtors have failed to satisfy all of the required elements of their affirmative defense of election of remedies under Iowa law. The first element is arguably met. Creditor Hegg has two methods of gaining control of one piece of real estate - i.e., foreclosure of mortgage and forfeiture of contract.

On the second element, the Court must determine whether these two remedies are so inconsistent that by pursuing foreclosure Creditor Hegg is renouncing forfeiture of contract. The circumstances underlying each action differ. Creditor Hegg is a vendor forfeiting a real estate contract assigned to him by his mother. He is also a mortgagor pursuant to assignment of the Am and Ed Hess mortgage. Whether he pursues foreclosure of the mortgage or forfeiture of the contract, the other interest he holds remains intact. Thus, enforcing the mortgage and the contract are not repugnant to each other or inconsistent.

The third element of the doctrine of election of remedies, a choice of one of the remedies, is not present in this situation. Debtors argue that Creditor Hegg is barred from forfeiture of the contract because he chose instead to foreclose on the mortgage on the same property. Creditor Hegg, however, has been stayed from completing mortgage foreclosure due to Debtors' filing of bankruptcy. Because Creditor Hegg has not pursued one of the remedies to its conclusion or obtained a remedy, he has not made "a choice of one of the remedies." As a result, Creditor Hegg has not made an election of remedies and the affirmative defense of election of remedies raised by Debtors does not apply.

FORFEITURE PROCEEDINGS AND THE AUTOMATIC STAY

The automatic stay under 362(a) stays an "act, proceeding or enforcement of a right." In re Vacation Village Ltd. Partnership, 49 B.R. 590, 593 (Bankr. N.D. Iowa 1985). In Iowa, when the notice of contract forfeiture has been served, the contract vendor need not act, proceed, or enforce a right to achieve forfeiture. Id. If the notice of forfeiture has been served prior to the filing of bankruptcy, the rights of the parties have become fixed. In re Byker, 64 B.R. 640, 642 (Bankr. N.D. Iowa 1986). No action to complete forfeiture is necessary, other than the running of the statutory time period. Id. The automatic stay does not stay the running of the statutory time period. Id.; Vacation Village, 49 B.R. at 592 (applying Johnson v. First National Bank of Montevideo, 719 F.2d 270 (8th Cir. 1983)).

Filing an Affidavit in Support of Forfeiture of Real Estate Contract pursuant to Iowa Code 656.5 after the debtor has filed bankruptcy is not a violation of the automatic stay. Byker, 64 B.R. at 642. The affidavit is a notice to third parties concerning the completion of the contract forfeiture, and is not an essential step to completion of the forfeiture. Id. (citing Abodeely v. Cavaras, 221 N.W.2d 494 (Iowa 1974)).

The recording of this affidavit does not constitute an act, proceeding or enforcement of right which would violate the automatic stay. Byker, 64 B.R. at 642.

Creditor Hegg served the Notice of Forfeiture of Real Estate Contract to Debtors on April 21, 1995. No bankruptcy procedure was pending at that time. Debtors filed bankruptcy on May 18, 1995. The

Affidavit in Support of Forfeiture of Real Estate Contract was recorded on May 22, 1995. Based on these facts, under the principles announced in Vacation Village and Byker, Creditor Hegg has not committed a violation of the automatic stay. Notice of forfeiture was served prior to bankruptcy, and Creditor Hegg did not need to act, proceed or enforce a right to complete forfeiture. Forfeiture was completed after the statutory time period had run. The automatic stay did not stop the running of the time period.

MOTION FOR CONTEMPT

A violation of the automatic stay is punishable by a contempt order and damages. In re Knaus, 889 F.2d 773, 776 (8th Cir. 1989). When a violation of the automatic stay has occurred, 362(h) permits the awarding of actual damages, and in appropriate circumstances, punitive damages. Id. Costs and attorney fees incurred as a result of the violation of the automatic stay may be included in the award for actual damages. Id. at 775. However, when the only damages the debtor incurs result from his attempt to bring sanctions for the automatic stay violation, the court may determine that the debtor has not proven actual damages warranting sanctions. Lovett v. Honeywell, 930 F.2d 625, 629 (8th Cir. 1991); In re Roche, No. 93-10546LC, slip op. at 4 (Bankr. N.D. Iowa June 10, 1993).

As a general rule, violations of the automatic stay constitute civil contempt for which the court may impose a remedy. In re LaTempa, 58 B.R. 538, 540 (Bankr. W.D. Va. 1986). However, a violation of the automatic stay will not support a finding of contempt in all cases. Id.; In re Carter, 16 B.R. 481, 483 (W.D. Mo. 1981), aff'd 691 F.2d 390 (8th Cir. 1982). If the violation of the automatic stay is inadvertent or technical, contempt is not the appropriate remedy. Id. at 541. If a violation is willful, the remedy under 362(h) may apply. Id.; In re Olson, 38 B.R. 515, 518 (Bankr. N.D. Iowa 1984).

Punitive damages should only be awarded in appropriate circumstances. Lovett, 930 F.2d at 628. Proving that the automatic stay was willfully violated is not sufficient to find that punitive damages should be awarded. Id. "Egregious, intentional misconduct" is required to support an award of punitive damages. Id.

The moving party has the burden of proving civil contempt by clear and convincing evidence. Hazen v. Reagen, 16 F.3d 921, 925 (8th Cir. 1994); In re Mayex II Corp., 178 B.R. 464, 470 (Bankr. W.D. Mo. 1995)(applying Hazen standard in bankruptcy proceedings). The movant must establish that an order of the Court was in effect, the defendant knew of the order and the defendant failed to comply with the order. Maytex, 178 B.R. at 470. The purpose of a civil contempt sanction is to compensate the moving party for losses incurred as a result of the defendant's disobedience of a court order or to coerce the defendant into complying with the court order. In re Babbidge, 175 B.R. 708, 721 (Bankr. W.D. Mo. 1994).

Instituting criminal proceedings against the Debtor does not violate the automatic stay. Section 362(b) (1) exempts the continuation or commencement of criminal proceedings against the Debtor. If the purpose of the criminal proceeding is to enforce the law or "get even" with the debtor, the criminal prosecution is not a violation of the automatic stay. In re DeLay, 48 B.R. 282, 285 (W.D. Mo. 1984). However, if the criminal prosecution is instituted against the debtor with the principal purpose of

collecting a debt, the criminal prosecution violates bankruptcy law. Id.

The Bankruptcy Court has authority under 105(a) to stay state criminal proceedings in appropriate circumstances. In re Larkin Hotels Ltd. Partnership, No. 94-10388KC, slip op. at 3 (Bankr. N.D. Iowa April 6, 1994). However, when the Bankruptcy Court is requested to stay criminal prosecutions, the Court must consider the "extreme reluctance of federal courts to enjoin state criminal prosecutions," even though the authority to do so exists. Id. at 4.

Debtors allege in their motion for contempt and civil damages that Creditor Hegg has violated the automatic stay in three ways. First, Debtors allege that Creditor Hegg violated the automatic stay by filing a motion in Winneshiek County District Court to lift the stay. Creditor Hegg admits that the motion was filed, but states that said motion was filed inadvertently and caused Debtors no damage. LaTempa states that an inadvertent violation of the automatic stay does not alone support a finding of contempt. LaTempa, 58 B.R. at 540. Creditor Hegg inadvertently filed his motion to lift stay in reliance on receiving a dismissal of Debtors' prior bankruptcy case. No action was taken by the Winneshiek County District Court which was harmful to Debtors. Therefore, Debtors request for a contempt citation and damages against Creditor Hegg for this action should be denied.

Debtors claim that Creditor Hegg should be held in contempt and ordered to pay civil damages for requesting the Winneshiek County sheriff to reclaim a tractor which constituted property of the estate. Creditor Hegg denies this allegation. The record contains+ no information to support either Debtors' or Creditor Hegg's positions. Debtors have the burden of proving such an incident occurred. They have failed to meet this burden.

Finally, Debtors allege in their motion for contempt and civil damages that Creditor Hegg commenced criminal proceedings in an effort to harass and collect from Debtors. The statement of Creditor Hegg indicates that the reason for the filing of the criminal charges was not to collect payment from Debtors. The Court has considered the evidentiary record made in this case and concludes, as a matter of fact, that Debtors have failed to establish by clear and convincing evidence their allegation that Creditor Hegg commenced the criminal proceedings to harass Debtors and collect on this obligation.

WHEREFORE, for all of the reasons set forth in this opinion, the Court enters the following Orders:

1. The Court finds that Debtors have failed to establish that Creditor Durwin Hegg made an election of remedies thereby preventing completion of Creditor Durwin Hegg's forfeiture of the real estate contract in question.
2. The Court finds that Debtors have failed to establish that Creditor Durwin Hegg violated the automatic stay in the process of completion of the forfeiture proceeding.
3. Debtors have failed to establish by clear and convincing evidence that Creditor Durwin Hegg committed an act of contempt in any of the three particulars alleged by Debtors. As Debtors have

failed to establish contempt by clear and convincing evidence, the Application for Rule to Show Cause and Motion for Contempt filed by Debtors is dismissed.

4. That Creditor Durwin Hegg has complied with existing Iowa and Federal Bankruptcy law in completing the forfeiture proceedings against the real estate in question. The Court finds that Creditor Durwin Hegg has established compliance with the forfeiture provisions of Iowa Code sec. 656.

5. Creditor Durwin Hegg is determined by this Court to be the owner of the real estate in dispute as a result of his successful completion of the forfeiture of the real estate contract with Debtors David and Elaine Hegg.

6. Judgment for all of the foregoing is entered in favor of Plaintiff/Creditor Durwin Hegg and against Debtors/Defendants David R. Hegg and Elaine Hegg.

SO ORDERED this 30th day of September, 1996.

Paul J. Kilburg
U.S. Bankruptcy Judge