

In the United States Bankruptcy Court

for the Northern District of Iowa

JAMES ALLEN KIMBALL
Debtor.

Bankruptcy No. 96-2126KD
Chapter 7

ORDER

On October 4, 1996, the above-captioned matter came on for hearing pursuant to assignment. The matters before the Court include a Motion for Order to Show Cause filed by Debtor seeking to hold Attorney Karen Harris in contempt for violating the automatic stay. Ms. Harris has filed a resistance to the rule to show cause and, in addition, seeks sanctions on her own behalf asserting that Debtor's attorney is attempting to harass and intimidate her. Secondly, the client of Attorney Karen Harris, the Estate of Eugene Behrend, seeks relief from the automatic stay in order to proceed against Debtor in a wrongful death action. Specifically, the Behrend Estate seeks access to Debtor's insurance coverage and other discoverable information. Debtor resists modification of the stay asserting that this action violates the automatic stay. He seeks sanctions arising out of this motion.

The hearing was held by telephone conference call. After discussion with counsel and pursuant to the record made, it appears that the operative facts are not in dispute. On October 23, 1994, an act occurred which caused the death of Eugene Behrend. It is the position of the Estate of Eugene Behrend that Debtor James Allen Kimball is in some manner responsible for that death. The facts also establish that on May 22, 1996, Debtor filed a voluntary Chapter 7 petition in United States Bankruptcy Court for the Northern District of Iowa. It is uncontested that Debtor did not schedule Eugene Behrend, the Estate of Eugene Behrend, or any other entity associated with the decedent which could reasonably be construed as providing notice of the pendency of the Chapter 7 filing. The facts also establish that on August 16, 1996, the Estate of Eugene Behrend filed a wrongful death action in the Iowa District Court, in and for Dubuque County. Defendant James Allen Kimball is the only named Defendant in that action. The Court is apprised that, at this time, the action is based solely on a theory of negligence.

The parties agree that on August 26, 1996, Attorney Thomas McKay addressed a letter to Attorney Karen Harris advising her of the pendency of the bankruptcy petition. Without discussing the full content of the letter, it appears that Mr. McKay sought voluntary dismissal of the State court action. A reply letter was received by Mr. McKay on August 29, 1996 in which Ms. Harris, on behalf of her client, refused to dismiss this action. Thereafter, Debtor filed the presently pending Rule to Show Cause on September 11, 1996. The Estate of Eugene Behrend filed a Motion to Modify Automatic Stay on September 29, 1996 and a resistance to the Rule to Show Cause on September 25, 1996. Debtor filed a resistance to the Motion to Modify Automatic Stay on September 26, 1996. It is these matters which are before the Court for resolution.

The Court discussed the foregoing matters at length with counsel. Counsel stipulated that the foregoing facts are not contested. The Court offered counsel the opportunity for a full hearing and the parties stated that the Court could make its ruling based upon the foregoing record.

It is axiomatic that a discharge entered under 11 U.S.C. 727 does not discharge an individual debtor from any debt neither listed nor scheduled under 521(1) with the name of the creditor to whom such debt is owed, in time to permit a filing of a proof of claim, unless a creditor had notice or actual knowledge of the case in time to file a notice of claim. In this case, the Behrend Estate was neither listed nor scheduled under 521(1) of the Code. The Estate did not have actual notice until two or three days prior to the entry of the discharge on August 30, 1996. It is the conclusion of this Court that this notice, by way of a letter from Attorney Thomas McKay, provided insufficient time for the Behrend Estate to file a proof of claim.

Additionally, as the Behrend Estate did not receive actual notice of the pendency of the State court action until August 27 or August 28, 1996, the Estate cannot be sanctioned for violation of the automatic stay. As the action was brought without knowledge of the automatic stay, the Court concludes that no contempt action lies and no sanctions are appropriate against either the Estate or counsel for the Estate under these circumstances.

Attorney McKay represented Debtor throughout the bankruptcy proceedings. He was not advised at the initiation of the bankruptcy that there was a potential claim outstanding by the Behrend Estate against Debtor. Throughout these proceedings he has attempted to diligently protect his client's interest. In so doing, he wrote a letter to counsel for the Behred Estate when he acquired knowledge that a lawsuit was pending against his client based upon facts which presumably occurred prior to the filing of the bankruptcy petition. Based on these facts, it is the conclusion of this Court that Mr. McKay was acting in good faith in seeking dismissal of the State court action and asserting a violation of the automatic stay against Plaintiffs in the State court action. As such, it is the conclusion of this Court that no sanctions are appropriate against Attorney McKay or Debtor based on the facts presented in this case.

The Court has had an opportunity to reexamine these facts and the law in this case subsequent to the hearing. The Court enters the following Orders which address only the relief sought in the respective pleadings. The relief in this order formulated by the Court does not go beyond that sought by the parties. If any additional options exist for Debtor or Debtor's estate or the Behrend Estate, the Court does not address any such issues beyond those specifically addressed in the pleadings and those which will be found in the relief entered hereafter. If any of the matters contained in this order appear more limiting than the Court's discussion at the time of hearing, it is this order which will control the conduct of the parties.

WHEREFORE, for all the reasons set forth herein, the Court enters the following Order:

1. The Court finds that the Motion for Rule to Show Cause filed by Debtor on September 11, 1996 is not supported by the record and the Rule to Show Cause is, therefore, **DENIED**.

2. As the Rule to Show Cause is denied, any sanctions sought against Attorney Karen Harris, both individually, and as Attorney for the Estate of Eugene Behrend, as well as any other sanctions sought, are hereby DENIED.
3. The Application for Sanctions filed by the Estate of Eugene Behrend against Attorney Thomas McKay arising out of the Rule to Show Cause is without factual support and is, therefore, DENIED.
4. The Estate of Eugene Behrend seeks modification of the automatic stay provisions of 362 to allow discovery of insurance and other discovery matters subject only to the limitation that recovery shall be limited to any insurance coverage that may be maintained by Debtor. This is the specific relief sought by the Behrend Estate and this relief is GRANTED.
5. The stay provisions of 362 of the Bankruptcy Code are hereby modified to permit Amanda L. Behrend and Brenda Benson, as Personal Representatives of the Estate of Eugene F. Behrend, Kelby W. Behrend, Kevin C. Behrend, Perry D. Behrend, Amanda L. Behrend and Brenda Benson, Individually, to proceed with the prosecution of that certain lawsuit presently pending in the Iowa District Court in and for Dubuque County, with the limitation that any recovery or judgment that may be sought from Debtor in this case shall be limited to any insurance coverage that may have been maintained by Debtor at the time the actions alleged in the complaint in said cause may have occurred.
6. The foregoing ruling addresses all matters which were raised in the respective pleadings. The parties are specifically advised that this ruling is limited to those provisions and does not address any other collateral issues which may exist arising out of the facts previously recited.

SO ORDERED this 10th day of October, 1996.

Paul J. Kilburg
U.S. Bankruptcy Judge