IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In the Matter of:	:	CIVIL ACTION
ELIZABETH GIMELSON, Debtor.	:	NO. 00-4983

MEMORANDUM

ROBERT F. KELLY, J. APRIL 3, 2001

Presently before the Court is an appeal from an Order of the United States Bankruptcy Court for the Eastern District of Pennsylvania ("Bankruptcy Court") dated September 7, 2000, which granted Appellee, Samuel A. Litzenberger ("Litzenberger"), relief from the Automatic Stay with respect to realty known as 3871 Stump Road, Doylestown, Pennsylvania. Also before the Court is a Motion to Quash this appeal filed by Litzenberger. For the reasons that follow, the Bankruptcy Court Order is affirmed and the Motion to Quash is denied as moot.

I. FACTS.

This case is related to the Matter of Josephine Gimelson, an appeal from the Bankruptcy Court which this Court dismissed with prejudice by Order dated November 9, 2000. On or about September 18, 1995, Josephine C. Gimelson ("the mother") executed a deed transferring 3871 Stump Road, Doylestown, Pennsylvania ("the subject realty") to her children, Elizabeth A. Gimelson ("the daughter"), the Debtor and Appellant herein, and Brian F. Gimelson ("the son"). On October 26, 1996,

Litzenberger, a judgment creditor of the mother, filed a complaint in the Court of Common Pleas of Bucks County, Pennsylvania ("the state court") against the mother, daughter and son, alleging that the September 15, 1995 transfer of the subject realty was a violation of the Pennsylvania Uniform Fraudulent Transfer Act ("UFTA"), 12 Pa. C.S.A. § 5107, et seq.

On February 10, 2000, the mother filed a Chapter 7 bankruptcy petition in the Bankruptcy Court. On March 7, 2000, Judge John J. Rufe of the state court entered an Order in the matter of Litzenberger v. Gimelson, finding the transfer of the subject realty fraudulent and granting Litzenberger certain relief, specifically enjoining the mother, daughter and son from any further disposition of the subject realty and granting Litzenberger the ability to levy execution on the subject realty to pay and satisfy the judgment of record in his favor. (See Br. in Supp. of Appeal, App., Vol. 2 at 63.)

By Order dated April 13, 2000, Litzenberger was granted relief from the Automatic Stay in the mother's Chapter 7 bankruptcy case by the Honorable Bruce Fox of the Bankruptcy Court. Litzenberger then continued with the state court foreclosure proceeding and a Sheriff's Sale was scheduled for July 14, 2000. The mother then sought a voluntary dismissal of her Chapter 7 bankruptcy case. At a hearing held before Judge Fox on July 12, 2000, the mother conceded that she only wanted to

dismiss her case in order to file a Chapter 13 bankruptcy petition on July 13, the next day, in order to invoke the automatic stay provisions thereof and stop the Sheriff's real property sale of the subject realty scheduled for July 14, 2000. Judge Fox denied the mother's request to voluntarily dismiss her bankruptcy case and also chastised her for improper use of the court system.

On July 13, 2000, the following day, the daughter filed the instant Chapter 13 bankruptcy petition and the scheduled Sheriff's Sale was postponed until September 8, 2000. Litzenberger filed a Motion for Relief from the Automatic Stay in the daughter's case and a hearing was held before the Honorable Stephen Raslavich of the Bankruptcy Court on August 16, 2000. At that hearing, the daughter presented no evidence. Litzenberger was subsequently granted relief from the Automatic Stay for cause by Judge Raslavich's Order dated September 7, 2000. This appeal followed and Litzenberger's Motion to Quash was filed on November 2, 2000.

II. STANDARD.

This Court has jurisdiction over "appeals from final judgments, orders and decrees" of the Bankruptcy Court. 28 U.S.C. § 158(a). The Bankruptcy Court's conclusions of law are subject to "de novo" review by this Court. Findings of fact, however, are reviewed under a "clearly erroneous" standard. FED.

R. BANKR. P. 8013.[1]

III. DISCUSSION.

The daughter now appeals from the September 7, 2000 Bankruptcy Court Order, seeking reversal of that Order which granted Litzenberger relief from the automatic stay, and she presents five arguments in support of her appeal.

A. Whether the March 7, 2000 State Court Order is Void.

The daughter first argues that the Bankruptcy Court erred in applying the legal precepts involving a judicial proceeding in violation of the automatic stay. She contends that, because the mother filed her Chapter 7 bankruptcy petition on February 10, 2000, the subsequent March 7, 2000 state court Order finding a fraudulent transfer of the subject realty from the mother to the daughter and the son violated the automatic stay pursuant to 11 U.S.C. section 362(a)(1) and suspended the state court's authority to continue judicial proceedings against

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[1]Federal Rule of Bankruptcy Procedure 8013 provides that:

> [o]n an appeal, the district court . . . may affirm, modify, or reverse a bankruptcy judgment, order, or decree, or remand with instructions for further proceedings. 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 witnesses.

FED. R. BANKR. P. 8013.

the mother.[2] The daughter claims, therefore, that the Bankruptcy Court erred in its reliance on the state court Order.

Case law reveals that "[o]nce triggered by a debtor's bankruptcy petition, the automatic stay suspends any non-Bankruptcy Court's authority to continue judicial proceedings then pending against the debtor." Maritime Elec. Co., Inc. v. United Jersey Bank, 959 F.2d 1194, 1206 (3d Cir. 1991). Further, "[a]bsent relief from the stay, judicial actions and proceedings against the debtor are void ab initio." Id. at 1206 (citing Kalb v. Feuerstein, 308 U.S. 433, 438-40 (1940)). As the daughter notes, however, the United States Court of Appeals for the Third Circuit has held that 11 U.S.C. 362(d), which requires the

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[2]Section 362, entitled Automatic Stay, provides, in pertinent part:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302 or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of -
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> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title.

11 U.S.C. § 362(a)(1)(emphasis added).

Bankruptcy Court to grant relief from the stay under certain circumstances, also permits such relief to be applied retroactively if the court is requested to do so by a party in interest. (Br. in Supp. of Appeal at 9)(citing In re Siciliano, 13 F.3d 748, 750-51 (3d Cir. 1994) and Constitution Bank v. Tubbs, 68 F.3d 685, 692 (3d Cir. 1995)(recognizing "section 362(d), which requires the Bankruptcy Court to grant relief from the stay under certain circumstances and permits such relief to be applied retroactively, would allow the Bankruptcy Court to grant annulment of a stay, thereby making acts in violation of the stay voidable, rather than void ab initio.")

The Bankruptcy Judge partially based his September 7, 2000 Order on the March 7, 2000 state court Order where he specifically stated:

> the Court finding that [Litzenberger] is the holder of a valid judicial lien against the realty of with respect to which [Litzenberger] seeks relief from the automatic stay under 11 U.S.C. § 362, and the Court further finding that the Debtor has but bare legal title to the subject realty, inasmuch as the title which stands in her name has been previously found by a State Court of competent jurisdiction to have been created as the product of a fraudulent conveyance of said realty to the Debtor from her mother, . . . and the Court noting that the same State Court has heretofore entered an Order permitting [Litzenberger] to proceed with an execution sale of the realty based on the aforesaid circumstances, and [Litzenberger] having presented evidence herein that the said [mother] recently filed her own bankruptcy case in this district, and

> it appearing that such finding was later determined by the Bankruptcy Court to have been an abusive attempt by [the mother] to thwart the legitimate state law rights of [Litzenberger], and the Court being satisfied on the record before it that the present bankruptcy filing merely represents additional bad faith conduct by [the mother], this time in concert with her daughter, . . . in furtherance of their now apparently joint effort to thwart the state law rights of [Litzenberger], and the Court finding in the circumstances of this essentially two party dispute ample cause for the termination of the automatic stay under 11 U.S.C. § 362(d)(1), it is hereby:
> ORDERED, that the Motion of . . . Litzenberger is Granted. The automatic stay in this case is hereby terminated as to the said . . . Litzenberger, with leave granted to him hereafter to forthwith proceed to exercise any and all rights he possesses under applicable non-bankruptcy law with respect to the realty described in his motion and to which his judgment liens attach, including, without limitation, execution sale of the same.

(Br. in Supp. of Appeal, App., Vol. 2 at 65)(emphasis added). Because the Bankruptcy Judge's Order was based, in part, on the March 7, 2000 state court Order, it is unclear if the Judge invoked his ability to retroactively apply section 362(d) and thereby make the March 7, 2000 state court Order against the mother, daughter and son voidable, rather than void ab initio.[3]

[3]A review of the Bankruptcy Court record in this case reveals that the daughter never raised the issue of whether the March 7, 2000 state court Order was void in that court, yet Litzenberger, in his Motion for Relief from the Automatic Stay, informed the Bankruptcy Court that the state court Order was filed subsequent to the mother's bankruptcy petition. (Certificate of Appeal Index, Tab 7 at 3, ¶ 6.) The attachments

Accordingly, although the Bankruptcy Court correctly granted Litzenberger relief from the Automatic Stay, it is directed on remand to issue a specific finding whether it applied section 362(d) relief retroactively, thereby making the state court Order voidable, rather than void ab initio.[4] This affects only the

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to Litzenberger's Motion also reveal that the mother filed her Chapter 7 voluntary bankruptcy petition on February 10, 2000. (Id., Tab 7, Ex. 3.) In the Debtor's Brief in Opposition to Litzenberger's Motion for Relief from the Automatic Stay, the daughter does not contest the validity of the March 7, 2000 state court Order. (Id., Tab 9.) Rather, she raised the following two issues in that pleading: 1) "[d]id the Order of March 7, 2000 void the transfer of [the subject realty] and thereby terminate [the daughter's] interest in said property;" and 2) "[w]hether [Litzenberger's] judicial lien, for which [the daughter] has no personal liability, is a 'claim' within the meaning of the Bankruptcy Code, subject to inclusion in a Chapter 13 plan of reorganization." (Id.)

[4]This decision has no effect on the relief from the automatic stay granted to Litzenberger in the mother's Chapter 7 bankruptcy petition since Judge Fox, in his July 10, 2000 Order, stated:

> by Order dated April 13, 2000, I granted the motion of Samuel Litzenberger to terminate the stay. . . . I did not attempt to determine the debtor's interest in the realty or the validity of Mr. Litzenberger's asserted lien interest. Rather, I concluded that the trustee had no desire to administer the asset and therefore "cause" existed under section 362(d)(1) to terminate the stay. The effect of this order was to leave to the state court the determination of the creditor's lien interest, if any, and the debtor's property interest, if any, in the realty.

(Br. in Supp. of Appeal, App., Vol. 2 at 65.) Thus, Judge Fox did not expressly rely on the March 7, 2000 state court Order in lifting the automatic stay as to Litzenberger.

daughter's bankruptcy case.

B. Whether the Bankruptcy Court Committed Error in Its Interpretation of the Pennsylvania UFTA.

The daughter's second argument in this appeal is that the September 7, 2000 Bankruptcy Court Order granting Litzenberger relief from the automatic stay should be reversed by this Court because the finding "the Debtor has but bare legal title to the subject realty" was an incorrect interpretation of the Pennsylvania Uniform Fraudulent Transfer Act ("UFTA"), 12 Pa. C.S.A. § 5107, et seq., and the March 7, 2000 state court Order. She argues that although the UFTA allows a court to strip a transferee's interest in the realty to bare legal title upon a finding of fraudulent transfer, such relief is not automatic upon the finding of a fraudulent transfer and the March 7, 2000 state court Order specifically declined to grant such relief to Litzenberger.

In positing this argument, the daughter fails to provide the entire finding by the Bankruptcy Judge, specifically:

> the Court further finding that the Debtor has but bare legal title to the subject realty, inasmuch as the title which stands in her name has been previously found by a State Court of competent jurisdiction to have been created as the product of a fraudulent conveyance of said realty to the Debtor from her mother.

(Br. in Supp. of Appeal, App., Vol. 2 at 65.) This omitted language does not reveal that Judge Raslavich interpreted the

UFTA or the state court Order. Rather, it reveals the Bankruptcy Court's careful avoidance of such interpretation or determination of the daughter's interest in the subject realty. The effect of the court's words "inasmuch as" leaves the determination of the debtor's property interest, if any, in the subject realty to the state court. Thus, the daughter's second argument in this appeal fails.

C. Whether the Daughter Has the Right to Satisfy Litzenberger's Judgment of Record Through her Chapter 13 Bankruptcy Plan.

The third argument presented by the daughter in this appeal is that Litzenberger's right to execute on the daughter's property puts his judicial lien into the category of a claim which should be included in the daughter's Chapter 13 plan of reorganization and the Bankruptcy Court erred in applying the legal precepts of the Bankruptcy Code to the contrary. In furtherance of this claim, the daughter argues that she meets the eligibility requirements for relief under Chapter 13 and Litzenberger's judicial lien against the subject realty is a claim against her, therefore Litzenberger's judicial lien on the subject realty may be modified and satisfied through her Chapter 13 bankruptcy plan. This identical argument was raised by the daughter in the Bankruptcy Court in her Response to Litzenberger's Motion for Relief from the Automatic Stay. The Bankruptcy Judge found, however, that there was "ample cause for

the termination of the automatic stay under 11 U.S.C. § 362(d)(1)" and ordered the automatic stay terminated as to Litzenberger. Thus, this argument is denied.

D. Whether Litzenberger Failed to Meet the Requirements for the Automatic Stay, Thereby Rendering the Bankruptcy Court's Order Granting Litzenberger Relief from the Automatic Stay Improper.

The daughter's entire fourth argument in this appeal is that:

> As Elizabeth Gimelson possesses a fee simple ownership interest in the subject realty, the Bankruptcy Court's termination of the automatic stay is unwarranted and must be reversed. Whether the State Court finding of fraudulent conveyance is found to be void as a violation of the automatic stay or Elizabeth Gimelson's continuing ownership in the subject property is recognized, the grounds for terminating the automatic stay cited by the Bankruptcy Court in its Order of September 7, 2000 are an incorrect application of the legal precepts of the Bankruptcy Code and Pennsylvania law.

(Br. in Supp. Appeal at 15.) Again, because no information is provided by the daughter upon which this Court may reverse a finding of the Bankruptcy Judge and no information is provided to support the premise that the grounds for terminating the automatic stay are an incorrect application of the legal precepts of the Bankruptcy Code and Pennsylvania law, this argument fails.

E. Whether a Statement in the September 7, 2000 Bankruptcy Court Order is Incorrect and Clearly Erroneous.

The daughter's fifth and final argument is that the September 7, 2000 Bankruptcy Court Order contained language that

was incorrect and clearly erroneous. Specifically, the daughter states that the following language: "it appearing that such filing (Josephine Gimelson's bankruptcy filing) was later determined by the Bankruptcy Court to have been an abusive attempt by Josephine Gimelson to thwart the legitimate state law rights of . . . [Litzenberger]" is clearly erroneous and unsubstantiated. Although the daughter concedes that Litzenberger alleged in his Motion for Relief from the Automatic Stay that the mother's filing for bankruptcy was abusive, but she argues that none of the Orders entered in the mother's bankruptcy case includes a determination of abuse. For support, she directs this Court to three specific pages of the Bankruptcy Court record located at her Appendix, Vol. Two, pages 61, 64 and 68.

Although nowhere in these three pages is it specifically stated that the mother's filing for bankruptcy was abusive, a review of the entire July 13, 2000 Order denying the mother's petition for voluntary dismissal of her Chapter 7 case reveals the following language:

> Furthermore, the debtor knew at the time of her bankruptcy filing that the transfer of her residence had been challenged. The unfavorable (to her) outcome of that challenge does not establish cause to dismiss. . . . More specifically, courts have denied a chapter 7 debtor's motion to voluntarily dismiss a case when the debtor intends immediately to file another bankruptcy petition as such conduct would misuse the bankruptcy system.

. . .

> Indeed, because an order terminating the stay has already been entered in this case, . . . were the instant motion granted, this debtor would be ineligible to file any further bankruptcy cases for a period of 180 days. In other words, this debtor could not file any further bankruptcy cases for six months were this case dismissed on her motion, as such a voluntary dismissal would follow the filing (and granting) of a motion by a creditor to terminate the automatic stay. Therefore, the purpose sought for dismissal in this instance is not legitimate.

(Br. in Supp. of Appeal, App., Vol. 2 at 71, 72)(citations omitted and emphasis added). This language belies the daughter's argument that the September 7, 2000 Bankruptcy Court Order contained incorrect and clearly erroneous language and none of the Orders entered in the mother's bankruptcy case includes a determination of abuse. In the July 13, 2000 Order, cited above, the Bankruptcy Court used the term "misuse." One of the definitions of abuse is misuse. BLACK'S LAW DICTIONARY 10 (5th ed. 1979). Accordingly, the disputed language in the September 7, 2000 Order was not incorrect or erroneous, and the Order is affirmed.

F. Litzenberger's Motion to Quash.

Because this Court has affirmed the September 7, 2000 Bankruptcy Court Order, Litzenberger's Motion to Quash will not be examined. It will therefore be denied as moot.

IV. CONCLUSION.

For the foregoing reasons, the September 7, 2000 Order of the Bankruptcy Court is affirmed and the daughter's instant appeal is dismissed. The Bankruptcy Court is directed on remand to issue a specific finding whether it applied section 362(d) relief retroactively, thereby making the March 7, 2000 state court Order voidable, rather than void ab initio. In addition, Litzenberger's Motion to Quash is denied as moot.

An Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In the Matter of:	:	CIVIL ACTION
ELIZABETH GIMELSON, Debtor.	:	NO. 00-4983

ORDER

AND NOW, this 3rd day of April, 2001, it is hereby ORDERED that:

1. the Debtor's Appeal is DISMISSED and the Bankruptcy Court's Order dated September 7, 2000 is AFFIRMED;

2. on remand, the Bankruptcy Court is DIRECTED to issue a specific finding whether it applied section 362(d) relief retroactively, thereby making the March 7, 2000 state court Order voidable, rather than void ab initio; and

3. Litzenberger's Motion to Quash (Dkt. No. 4) is DENIED as moot.

BY THE COURT:

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Robert F. Kelly, J.