No. 04-283

In the Supreme Court of the United States

ITAMAR LUBETZKY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in dismissing petitioner's appeal for lack of diligent prosecution.

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OPINION BELOW

The opinion of the court of appeals (Pet. Sep. App. 1-2)[1] dismissing the appeal is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. Sep. App. 1-2) was entered on September 11, 2003. A petition for rehearing was denied on January 5, 2004 (Pet. App. 1-2). The petition for a writ of certiorari was filed on April 5, 2004 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] Petitioner filed a separate appendix (Sep. App.), dated August 25, 2004, which contains the judgment of the court of appeals.

STATEMENT

1. Media Forum, Inc., failed to pay federal income and social security taxes withheld from the wages of its employees. 01-2357 Gov't C.A. Br. at 4. The Internal Revenue Service assessed a $78,239.45 penalty against petitioner, an officer of Media Forum, for Media Forum's default. See 26 U.S.C. 6672. Petitioner paid $2897.42 of the assessment, and on July 27, 2000, filed a complaint in the United States District Court for the District of Massachusetts, seeking a refund of the amount paid and an abatement of the assessment. 01-2357 Gov't C.A. Br. at 4. The United States filed a counterclaim to recover the unpaid balance. *Ibid.*

Following a trial, a jury returned a verdict finding that petitioner was responsible for Media Forum's unpaid taxes. Accordingly, in June 2001, the district court entered judgment for the United States on its counterclaim and dismissed petitioner's complaint. Pet. App. 10-11. The district court subsequently denied petitioner's motions for a new trial and for judgment as a matter of law.

2. In August 2001, petitioner filed a Chapter 7 bankruptcy petition. Pet. 3. Soon thereafter, on September 25, 2001, petitioner filed a notice of appeal of the district court's judgment; that appeal was assigned docket No. 01-2357. Petitioner then moved for a stay of the appeal, citing the bankruptcy automatic-stay provision, 11 U.S.C. 362(a).

On December 10, 2001, the court of appeals denied petitioner's request for a stay, but noted that the proceedings regarding the government's counterclaim were automatically stayed under 11 U.S.C. 362(a). 01-2357 Docket Entry at 5. Petitioner subsequently indicated that he was no longer appealing the dismissal

of his refund claim, but was contesting only the judgment entered for the government on its counterclaim. Because that latter claim was automatically stayed under 11 U.S.C. 362(a), the court of appeals, on February 26, 2002, revoked the briefing schedule and ordered petitioner to file a status report every 90 days and to notify the court when the automatic stay was lifted. Docket Entry at 6.

Petitioner filed a status report stating that he received his bankruptcy discharge on June 5, 2003. Pet. 3. The court of appeals accordingly set a new briefing schedule. Briefing has been completed, and argument was heard on September 8, 2004.

3. Meanwhile, on June 27, 2003, following his discharge from bankruptcy, petitioner filed a second notice of appeal from the district court's June 2001 judgment. This second appeal (the appeal at issue in this petition) was assigned docket No. 03-1931. On August 4, 2003, the court of appeals entered an order stating that the second notice of appeal "appears to be untimely" and "duplicative of appeal No. 01-2357." Pet. App. 3-4. The court directed petitioner either to show cause why appeal No. 03-1931 should not be dismissed as untimely and duplicative or to move for voluntary dismissal of the appeal. *Ibid.* The order warned that the failure to take either action would result in a "dismissal of the appeal for a lack of diligent prosecution." *Id.* at 3.

In response, petitioner filed a "Motion to Reconsider and to Consolidate." The motion cited 11 U.S.C. 108(c)(2), which pertains to the tolling of civil actions during the pendency of a bankruptcy, but did not explain why the tolling provision applied to the appeal. Nor did the motion explain why the appeal was not redundant; indeed, it acknowledged that appeal No. 03-

1931 was likely "superfluous" if appeal No. 01-2357 was still "viable." Pet. App. 7-8.

On September 11, 2003, the court of appeals entered a judgment dismissing appeal No. 03-1931. Although stating that it lacked jurisdiction over the appeal because it was untimely, the court expressly based its dismissal on petitioner's lack of diligent prosecution. The court explained that it had "requested that [petitioner] make a showing in regard to jurisdiction and explain why the appeal was not duplicative of an earlier one," but that petitioner had "failed to address these issues" in his response. Pet. Sep. App. 1. "Therefore," the court concluded, "appeal number 03-1931 is *dismissed* for lack of diligent prosecution." *Ibid.* The court of appeals subsequently denied a petition for a panel rehearing, stating that "[a]ppeal No. 03-1931 was properly dismissed as it is entirely duplicative of appeal No. 01-2357 from the same judgment." Pet. App. 1. The court also denied a petition for rehearing en banc. *Ibid.*

ARGUMENT

1. Petitioner contends that this Court should grant certiorari because, by dismissing appeal No. 03-1931, the court of appeals "created a direct conflict" with the Eighth Circuit's decision in *In re Hoffinger Industries, Inc.*, 329 F.3d 948 (2003), regarding the applicability of 11 U.S.C. 108(c)(2). That perceived conflict, however, is based on a mischaracterization of the court of appeals' judgment of dismissal in this case.

In *Hoffinger*, the Eighth Circuit held that when a debtor triggers the automatic stay provision, 11 U.S.C. 362(a), by filing a bankruptcy petition, Section 108(c)(2) of the Bankruptcy Code tolls the time for filing a notice of appeal in any nonbankruptcy proceeding involving a

claim against the debtor until thirty days after the stay has been lifted. See 329 F.3d at 952-954; 11 U.S.C. 108(c)(2). In this case, however, the court of appeals did not dismiss appeal No. 03-1931 as untimely; it dismissed the appeal "for lack of diligent prosecution" because petitioner, in his response to the order to show cause, "failed to address" whether appeal No. 03-1931 was timely and whether it was duplicative of appeal No. 01-2357. Pet. Sep. App. 1. That ruling plainly does not conflict with *Hoffinger* because it does not implicate Section 108(c)(2). Petitioner does not argue that the dismissal for lack of prosecution was erroneous, and, in any event, the fact-specific question whether petitioner adequately addressed the First Circuit's concerns does not warrant review by this Court.

2. In its denial of the petition for rehearing (Pet. App. 1), the court of appeals stated that the dismissal of appeal No. 03-1931 was also proper because that appeal sought the same relief as appeal No. 01-2357, which is still pending. That ruling also does not conflict with *Hoffinger* because it does not address the applicability of Section 108(c)(2).

3. Finally, petitioner may obtain a ruling on the merits of his appeal in No. 01-2357, which is still pending.[2] Accordingly, there is no need for further review in

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[2] It is unclear whether the notice of appeal in No. 01-2357 was covered by the automatic bankruptcy stay. The relevant bankruptcy provision states that a bankruptcy petition "operates as a stay, applicable to all entities, of * * * [the] continuation * * * of a judicial * * * action or proceeding against the debtor." 11 U.S.C. 362(a). Courts have interpreted that provision to apply to an appeal by a debtor in an action "against" that debtor, *Simon* v. *Navon*, 116 F.3d 1, 4 (1st Cir. 1997), but not to an appeal in a suit filed by the debtor, see, *e.g.*, *Alpern* v. *Lieb*, 11 F.3d 689, 690 (7th Cir. 1993); *Carley Capital Group* v. *Fireman's Fund Ins. Co.*, 889

this case, which would be rendered moot by a disposition on the merits in appeal No. 01-2357.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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F.2d 1126 (D.C. Cir. 1989); see also *Heck-Dance* v. *Cardona-Jimenez*, 102 Fed. Appx. 171 (1st Cir. 2004). Because the judgment appealed from originally encompassed not only the United States' counterclaim but also petitioner's own claim against the United States, the court of appeals may conclude that the notice of appeal in No. 01-2357 was proper, and the government has not challenged the court of appeals' jurisdiction to resolve that appeal on the merits.