RENDERED: August 6, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1996-CA-002468-MR

TERRY C. CROSS, and
ESSIE MAY MASON — APPELLANTS

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE EDWIN A. SCHROERING, JR., JUDGE
ACTION NO. 92-CI-005833

CITY OF ST. MATTHEWS, KENTUCKY,
PETRIE STORES CORPORATION, and
MALL ST. MATTHEWS LIMITED PARTNERSHIP — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: GUDGEL, CHIEF JUDGE, COMBS, and McANULTY, JUDGES.

McANULTY, JUDGE: This is an appeal from an order dismissing with prejudice an action for wrongful arrest and detention. Appellants Terry Cross ("Cross") and Essie Mae Mason ("Mason") assert that the trial court's dismissal violated the automatic stay imposed by the bankruptcy proceeding of Appellee Petrie Stores Corporation ("Petrie") and, alternatively, that dismissal as a sanction was inappropriate in this case. Appellee Petrie, Appellee Mall St. Matthews Limited Partnership ("Mall"), and Appellee City of St. Matthews, Kentucky ("City") argue that

Appellants lack standing to assert a violation of the automatic stay and the dismissal was an appropriate sanction considering counsel's repeated failure to take action as directed by the court. We hold that Appellants lack standing to attack a violation of the stay and the dismissal with prejudice was not an abuse of discretion.

This action resulted from an alleged wrongful arrest and detention by St. Matthews police after Cross and Mason were shopping in a Jean Nicole store owned by Petrie and located in the Mall St. Matthews. Appellants filed their complaint on September 15, 1991. On May 11, 1994, the trial court ordered Appellants to appear and explain their lack of progress. Appellants responded by taking the deposition of the Chief of Police in October. In June of 1995, Appellants requested a pretrial conference for August 29th but failed to appear. The conference was reassigned for September 5th and trial was set for February 20, 1996.

On October 12, 1995, Petrie initiated a Chapter 11 bankruptcy proceeding and one month later filed a motion to hold the action in abeyance and cancel the trial date. On January 20, 1996, the trial court remanded the case from the trial docket until Appellants could obtain a waiver of the automatic stay from the bankruptcy court. By April, counsel for Appellants had only written a letter of inquiry to the Bankruptcy Trustee concerning lifting the stay. Three days before the June 13, 1996 pretrial conference, counsel for Appellants wrote a letter of inquiry to Petrie's bankruptcy counsel about a voluntary lift. At the

conference, the trial court ordered Appellants to formally file a motion to lift the stay. One month later, counsel still had not filed a motion and failed to appear at the next pretrial conference. The trial court dismissed the case with prejudice on July 30th. In August, the court gave counsel one last chance to file a motion to lift the stay but instead Appellants filed this appeal.

The first issue before this court is whether the action of the trial court violated the automatic stay imposed by Petrie's bankruptcy proceeding. Title 11 U.S.C. § 362 states in relevant part, as follows:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title ... operates as a stay, applicable to all entities, of —
> (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 . . .

Once an automatic stay is imposed, court proceedings may not continue until a motion to lift the stay is granted by the bankruptcy court. 11 U.S.C. § 362(d). The automatic stay provisions of the Bankruptcy Code primarily serve as a protection for debtors and provide a debtor with a "breathing spell from its creditors." Lynch v. Johns-Manville Sales Corp., 710 F.2d 1194, 1197 (6th Cir. 1983). Protection to creditors is secondary but aids the general principles of bankruptcy to treat all creditors

equally and encourage an orderly reorganization or liquidation. Id.

Appellants claim that the trial court's dismissal with prejudice violates § 362(a)(1) since the action against the debtor was commenced before the bankruptcy petition. Appellants rely on Easley v. Pettibone Michigan Corp., 990 F.2d 905 (6th Cir. 1993) to demonstrate that the action by the court is a violation of the automatic stay and thereby renders the action invalid. In response, Appellees assert that Appellants lack standing to argue that the stay was violated. We agree with Appellees.

Current case law supports the proposition that only the debtor or bankruptcy trustee may attack a violation of the automatic stay. The Ninth Circuit Bankruptcy Appeals Court stated that:

> Other parties affected by the stay are afforded no substantive or procedural rights under these [§ 362] provisions of the Bankruptcy Code. In re Stivers, 31 B.R. 735 (Bankr. N.D. Cal. 1983). Consequently, if the debtor or the trustee chooses not to invoke the protections of § 362, no other party may attack any acts in violation of the automatic stay.

In re Brooks, 79 B.R. 479 (B.A.P. 9th Cir. 1987). The U.S. Court of Appeals agreed that "other parties cannot use such violations to their advantage." In re Globe Inv. & Loan Co., 867 F.2d 556, 560 (9th Cir. 1989)(quoting In re Fuel Oil Supply and Terminaling, Inc., 30 B.R. 360, 362 (Bankr. N.D. Tex. 1983)). These decisions correspond with the primary concern of protecting the debtor in bankruptcy proceedings.

Since Appellants are not the debtors in this case, they lack the standing to attack the stay violation. Therefore, we decline to decide whether the trial court's dismissal was a violation of the § 362 automatic stay provisions.

The second issue is whether dismissal with prejudice was an appropriate remedy for the failure to comply with the court order to file a motion to lift the automatic stay. Appellants assert that counsel made a good faith attempt to obtain relief from the stay and less harsh sanctions were available to the trial court. Appellants cite Ward v. Houseman, Ky. App., 809 S.W.2d 717 (1991), to demonstrate six nonexclusive factors in determining whether involuntary dismissal is appropriate. These factors include the party's personal responsibility, history of dilatoriness, willful or bad faith conduct by counsel, meritoriousness of claim, prejudice to the other party, and alternative sanctions. Id. at 717. Appellees counter that the factors in Ward support the trial court's decision to dismiss the action. We agree with Appellees.

CR 41.02(1) states as follows:

> (1) For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him.

Dismissal under this rule is subject to the sound discretion of the trial judge. Ward, 809 S.W.2d at 720. The aforementioned factors in Ward may be used as guidelines.

There is no evidence that the Appellants knew that their counsel failed to comply with specific orders of the court. They were not personally responsible for his inaction. However,

counsel's continued refusal to file a formal motion to lift the automatic stay supports the trial court's action. The trial court expressly ordered counsel to file the motion and yet it was never done. Unlike the "one-time dilatory act" in Ward, the failure to comply in this case was repeated. The trial court warned that the case would be dismissed with prejudice and even gave counsel an additional opportunity to file after entry of the dismissal. His inaction has increased the costs of Appellees and furthered the delay in this case. Based on these facts, we cannot say that the decision by the trial court to order an involuntary dismissal under CR 41.02 was an abuse of discretion.

We affirm the trial court's order dismissing with prejudice.

ALL CONCUR.

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