DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

BANYON INCOME FUND, L.P., BANYON USVI, LLC, BANYON 1030-32, LLC, BANYON RESOURCES, LLC, BANYON FUNDING, LLC, BANYON INVESTMENTS, LLC (DELAWARE), BANYON INVESTMENTS LLC (NEVADA), and **BANYON CAPITAL, LLC,**
Appellants,

v.

HUTCHISON & STEFFEN, LLC,
Appellee.

No. 4D15-256

[August 10, 2016]

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; Jeffrey E. Streitfeld, Judge; L.T. Case No. 11-026515 (07).

Alan B. Rose and Gregory S. Weiss of Mrachek, Fitzgerald, Rose, Konopka, Thomas & Weiss, P.A., West Palm Beach, and Charles I. Cohen and Jason Riogli of Furr & Cohen, P.A., Boca Raton, for appellants.

Raymond L. Robin and D. David Keller of Keller Landsberg PA, Fort Lauderdale, for appellee.

WARNER, J.

Appellants (collectively referred to hereafter as "Banyon"), challenge an order of the trial court dismissing their complaint for legal malpractice against a law firm for failure to serve the firm within the time parameters of Florida Rule of Civil Procedure 1.070(j). Because Banyon showed excusable neglect for failing to serve the complaint within the time parameters of the rule due to the involuntary bankruptcy of the prime plaintiff, we reverse.

Banyon filed a complaint for legal malpractice against its former lawyers, Hutchison & Steffen, LLP ("Hutchison"), who provided legal advice and services to Banyon with respect to investments in the Ponzi scheme

operated by Scott Rothstein.[1] Banyon filed its complaint on October 31, 2011; however, it did not serve it on the defendants within 120 days as required by rule 1.070(j).[2] Before the 120 days had run, an involuntary bankruptcy petition was filed against Banyon, and in December 2011, Robert Furr was appointed as trustee for Banyon. The attorney who filed the lawsuit did not represent the trustee.

Almost a year later, the trial court scheduled a case management conference to address the lack of service of process on Hutchison. On the day of the hearing, the lawyer who had filed the suit for Banyon filed a suggestion of bankruptcy. At the case management conference, the lawyer asserted that the complaint was not served because the involuntary bankruptcy petition had been filed against Banyon and a trustee had been appointed. The court entered an order staying the state court action pursuant to the bankruptcy proceeding. The court directed that the parties make the court aware of the progress of the lifting of the stay.

A year and a half later, the trustee for Banyon, through his own attorneys, filed in the bankruptcy court a motion to lift the stay to allow it to pursue the state court litigation. The court granted the motion, and Banyon finally served Hutchison with the complaint.

Hutchison moved to dismiss based on rule 1.070(j), arguing that after the complaint was filed, process was not served on it for two-and-one-half

---

[1] There is no claim that the law firm was involved in the Rothstein scheme; rather, the basis for the claim against Hutchison was that the law firm gave Banyon erroneous legal advice on issues related to investing with Rothstein and the legality of his proposed investments. The Banyon entities, managed by George Levin, were feeder funds that borrowed money or obtained money from investors, which was then invested in the Rothstein scheme. Banyon had hired Hutchison in 2008 to prepare a series of opinion letters to address legal issues related to Rothstein's activities.

[2] Rule 1.070(j) provides:

> If service of the initial process and initial pleading is not made upon a defendant within 120 days after filing of the initial pleading directed to that defendant the court, on its own initiative after notice or on motion, shall direct that service be effected within a specified time or shall dismiss the action without prejudice or drop that defendant as a party; provided that if the plaintiff shows good cause or excusable neglect for the failure, the court shall extend the time for service for an appropriate period. . . . A dismissal under this subdivision shall not be considered a voluntary dismissal or operate as an adjudication on the merits under rule 1.420(a)(1).

years, and nearly six years after the legal advice was given. Hutchison contended that at the case management conference after which the stay order was issued, Banyon gave no adequate explanation why it had failed to serve Hutchison in the 342 days prior to that hearing. Banyon responded, explaining that it was involved in complicated bankruptcy proceedings which had delayed prosecution of the lawsuit.

A successor judge held three hearings on the motion to dismiss. At the outset, the judge expressed his opinion that there was no automatic stay upon the filing of a suggestion of bankruptcy where the debtor was the plaintiff. The judge made the assumption that Banyon's counsel had misled the prior judge to believe that there would be, within a reasonable time, efforts made to request the bankruptcy court to lift the stay. Because of the running of the statute of limitations and Hutchison's request for a dismissal, the successor judge provided the trustee an opportunity to file affidavits showing why the successor judge should not dismiss the case.

The trustee filed his affidavit stating that, as trustee, he would not pursue a lawsuit against a third party without investigation and determination of the merits of the litigation. His first responsibility at the institution of the bankruptcy was to marshal the assets, review the books and records, and become familiar with the bankruptcy litigation. He also opined that the entry of an order for relief in the involuntary bankruptcy and the appointment of a trustee operated as an automatic stay of the action against Hutchison. The trustee for Banyon also asserted that under 11 U.S.C. section 108 (2011), an incoming bankruptcy trustee has a two-year statute of limitations extension on causes of action. In connection with this litigation, he reviewed the proceedings and determined that the litigation should be pursued. He then applied for and obtained permission from the bankruptcy court to hire special counsel. They moved to be substituted, lift the stay, and proceed with the litigation. He and his legal team believed they were not required to do anything further until the bankruptcy court lifted the stay.

At the next two hearings, the successor judge persisted in his belief that Banyon's former attorneys had misrepresented to the prior judge that the case was automatically stayed pursuant to bankruptcy law. Due to his belief that the attorneys had misrepresented the law to the prior judge, the successor judge conducted a *Kozel*[3] hearing. After extensive hearings, the successor judge entered its order dismissing the suit. The successor judge found that there was no good cause or excusable neglect for the plaintiffs' failure to timely serve the complaint. The successor judge stated that he

[3] *Kozel v. Ostendorf*, 629 So. 2d 817 (Fla. 1993).

had considered the implications of the statute of limitations and assumed that the dismissal in this case, although without prejudice, will act as a final adjudication because the statute of limitations will likely bar any subsequent filing. The successor judge also found that the order staying proceedings was improvidently granted at Banyon's behest because the bankruptcy code does not provide for an automatic stay. Finally, the successor judge found that Banyon's extensive delay in service was prejudicial to Hutchison because Hutchison did not have the opportunity to participate in the prior depositions of Scott Rothstein and may be permanently prevented from being able to take the deposition or otherwise obtain his testimony, arguably the single most important witness in the case. The successor judge was satisfied that if Hutchison had been timely served, it would have been permitted to participate in depositions of Rothstein, which were conducted under the auspices of the federal bankruptcy court. The successor judge found prejudice and dismissed the case. Banyon appeals the dismissal.

An order dismissing a complaint for failure to serve process within 120 days as required by Florida Rule of Civil Procedure 1.070(j) is reviewed for abuse of discretion. *Carter v. Winn-Dixie Store, Inc.*, 889 So. 2d 960 (Fla. 1st DCA 2004). "In situations where the statute of limitations has run, the trial court should normally exercise discretion in favor of giving the plaintiff additional time to perfect service." *Sly v. McKeithen*, 27 So. 3d 86, 87 (Fla. 1st DCA 2009) (quoting *Chaffin v. Jacobson*, 793 So. 2d 102, 104 (Fla. 2d DCA 2001) ("[T]he purpose of Rule 1.070(j) is to speed the progress of cases on the civil docket, but not to give defendants a 'free' dismissal with prejudice.")); *see also Mitschke-Collande v. Skipworthe Props. Ltd.*, 41 Fla. L. Weekly D757 (Fla. 3d DCA Mar. 23, 2016).

Banyon argues that it demonstrated good cause for the delay in service of process on Hutchison because of the pending bankruptcy proceedings. Under 11 U.S.C. section 362(a)(3), the granting of an order for relief in an involuntary bankruptcy case operates as an automatic stay of any action to obtain possession of property. That section provides that upon the filing of the petition of bankruptcy, an automatic stay is in effect for "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate." 11 U.S.C. § 362(a)(3) (2015). A chose in action can constitute property of the estate subject to the automatic stay. *See In re Muhling*, 494 B.R. 755 (S.D. Fla. 2013) (wrongful death action filed by debtor against tobacco companies for his damages for the death of his mother subject to automatic stay in bankruptcy); *In re Merrick*, 175 B.R. 333 (9th Cir. 1994) (finding fraud suit filed by debtor was a chose in action subject to automatic stay and citing the Congressional Record: "[T]his paragraph will include choses in action

and claims by the debtor against others . . . ." (S.Rep. No. 95-989, at 82–83 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5787, 5868)). Although the bankruptcy stay provisions may not prevent a defendant in a suit by a debtor from "protecting their legal rights," it does require the stay of a suit where the debtor is attempting to obtain possession of assets of the estate. *Cf. Martin-Trigona v. Champion Fed. Sav. & Loan Ass'n*, 892 F. 2d 575, 577 (1989) ("True, *the bankrupt's cause of action is an asset of the estate*; but as the defendant in the bankrupt's suit is not, by opposing that suit, seeking to take possession of it, subsection (a)(3) is no more applicable than (a)(1) is." (Emphasis added)).

The premise upon which the successor judge based his entire analysis of whether good cause was shown was his belief that there was no automatic stay in bankruptcy of actions filed by the debtor and thus the prior judge was misled into staying the proceedings. As the foregoing shows, the successor judge appears to be mistaken on this issue, where the chose in action constitutes "property" of the estate. At the very least, the issue is arguable. And the successor judge even admitted that he would have most likely granted a stay once the bankruptcy was filed, even though he did not deem it automatic.

Moreover, whether or not the stay was automatic, the prior judge had entered a stay, and there is nothing in the record to show that the original attorneys for Banyon intentionally misled the prior judge into entering the stay. Since the stay was entered, the trustee and his legal team could rely on it. The trustee conducted his due diligence to determine whether to continue with the lawsuit. Because the trustee could rely on the prior judge's order until it was vacated, it was error for the successor judge to invalidate the effect of that order retroactively.

Hutchison complains that it has been substantially prejudiced because of the delay in service. It was not allowed to attend the deposition of Scott Rothstein, a significant witness in the underlying lawsuit. Whether Hutchison has been prejudiced and to what extent are issues to resolve in the context of the litigation. The trial court will still have remedies available if Hutchison can demonstrate prejudice by the inability to attend Rothstein's deposition.

Where good cause is shown to extend the time of service pursuant to rule 1.070, the trial court must extend the time for service of process an appropriate time. *See Sly*, 27 So. 3d at 87 n.1. Because Banyon showed good cause, the successor judge abused his discretion in dismissing the case after the statute of limitations had passed. We reverse for reinstatement of the cause of action.

Reversed and remanded.

TAYLOR and GERBER, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.