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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000892-MR

MORRIS BOBO AND
MILDRED BOBO — APPELLANTS

APPEAL FROM MCCRACKEN CIRCUIT COURT
v. HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 02-CI-00048

NATIONAL SERVICE INDUSTRIES; BADHAM INSULATION; HENRY A. PETTER SUPPLY COMPANY; 4520 CORPORATION; GEORGIA-PACIFIC CORPORATION; ROBERTSON-CECO CORPORATION; WESTINGHOUSE ELECTRIC; GENERAL ELECTRIC COMPANY; RAPID AMERICAN; GENERAL REFRACTORIES; CERTAINTEED CORPORATION; FLEXITALLIC; GARLOCK, INC; ANCHOR PACKING COMPANY; JOHN CRANE; METROPOLITAN LIFE; BRAUER SUPPLY COMPANY; DRESSER INDUSTRIES; PLIBRICO FLINTKOTE COMPANY; PITTSBURGH CORNING; UNITED STATES MINERAL PRODUCTS; ARMSTRONG WORLD INDUSTRIES; UNITED STATES GYPSUM; W.R. GRACE; A.P. GREEN; AC & S, INC.; KAISER ALUMINUM; AND OWENS-CORNING FIBERGLAS CORPORATION — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, KELLER, AND STUMBO, JUDGES.

STUMBO, JUDGE: Morris and Mildred Bobo appeal from an order of the McCracken Circuit Court dismissing without prejudice their personal injury action against numerous bankrupt and non-bankrupt defendants. The Bobos argue that a bankruptcy stay rendered in United States Bankruptcy Court divested the McCracken Circuit Court of jurisdiction, thus barring it from dismissing the action as against the bankrupt defendants. The Bobos also contend that the court erred in applying the factors set out in *Ward v. Housman*, 809 S.W.2d 717 (Ky. App. 1991), as a basis for dismissing the action against both the bankrupt and non-bankrupt defendants. For the reasons stated below, we affirm the order on appeal.

The facts are not in dispute. On January 17, 2002, the Bobos filed the instant action against 24 defendants in McCracken Circuit Court alleging that Mr. Bobo contracted an asbestos-related disease as a result of his occupational exposure to products allegedly manufactured and/or sold by the defendants. The action languished in circuit court for several years, during which time many of the defendants filed petitions for Chapter 11 bankruptcy protection in United States Bankruptcy Court. The filing of the petitions resulted in the issuance of automatic stays which barred further action in state court against the bankruptcy petitioners.

On February 29, 2008, the McCracken Circuit Court rendered a *sua sponte* Notice to Show Cause pursuant to Kentucky Rules of Civil Procedure (CR) 77.02 as to why the action should not be dismissed for lack of prosecution. After the Bobos filed a response, the court rendered an order dismissing the action as to all defendants. The Bobos then filed a Motion to Reconsider, arguing that their inaction as against the bankrupt defendants resulted from the automatic stays rendered by the bankruptcy court. As to both the bankrupt and non-bankrupt defendants, the Bobos argued that the factors set out in *Ward v. Housman*, 809 S.W.2d 717 (Ky. App. 1991), required the state court action to continue. That Motion to Reconsider was overruled, and this appeal followed.

The Bobos now argue that the McCracken Circuit Court erred in dismissing the action as against both the bankrupt and non-bankrupt defendants. As to the bankrupt defendants, the Bobos direct our attention to 11 U.S.C. §362, which they contend provides that the filing of a petition under the bankruptcy code operates as a stay against further proceedings against the bankruptcy petitioners in state court. They maintain that because the automatic stay was not lifted, the McCracken Circuit Court lacked jurisdiction to decide all issues related to the bankrupt Appellees, including whether to dismiss the state court action due to lack of prosecution. And while acknowledging that there is no Kentucky or Sixth Circuit published opinion on the issue, they point to *Pope v. Manville Forest Products Corporation*, 778 F. 2d 238 (5th Cir. 1985), in support of their claim that a bankruptcy stay prohibits the dismissal of a state court proceeding against a

bankrupt defendant. The Bobos also argue that the factors set out in *Ward*, *supra*, which provide for dismissal for lack of prosecution, are not applicable in the instant case as against either the bankrupt or non-bankrupt defendants. They seek an order reversing the trial court's dismissal and remanding the matter for further proceedings.

Having studied the written arguments, the record and the law, we find no error in the trial court's dismissal without prejudice of the bankrupt defendants. Title 11 U.S.C. §362(a) provides in relevant part that,

> . . . a petition filed under [the bankruptcy code] 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 . . . .

Title 11 U.S.C. §362(b) sets out a comprehensive list of exceptions to the stay, allowing for – among many other proceedings - the prosecution of criminal actions, family law matters and tax collection proceedings. Our research has not revealed, nor have the Bobos so cited, any provision of the federal statute either expressly barring the dismissal of state court proceedings against debtors/petitioners, or allowing for them under the laundry list of exceptions to the automatic stay.

Similarly, neither Kentucky statutory law nor case law addresses the question of whether a bankruptcy stay divests a state court of jurisdiction to dismiss a claim against petitioner-defendants. The Bobos acknowledge the non-existence of any published Kentucky or 6th Circuit case addressing this issue.

In the absence of any Kentucky or 6th Circuit case law on point, our resolution of the issue at bar turns on two factors: first, the legislative purpose of the automatic stay, and second, our recognition that the Bobos bear the burden of demonstrating the existence of error arising in the circuit court. As to the first factor, the Legislative Report of the 1978 Acts notes that, "[T]he automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy." See House Report for the Bankruptcy Reform Act, H.R.Rep. 95-595, 95th Congress, 2d Session 340, U.S. Code Cong. & Admin. News 1978, p. 5787. Similarly, legislative commentary appended to a subsequent amendment to the Code states that, "[S]ection 362(a)(1) of the House amendment adopts the provision contained in the Senate amendment enjoining *the commencement or continuation of* a judicial, administrative, or other proceeding to recover a claim against the debtor that arose before the commencement of the case." (Emphasis added). See annotations to 11 U.S.C. §362.

It is readily apparent from the legislative history of the Code that the primary purpose of the automatic stay is to give "the debtor a breathing spell from his creditors" and to protect the debtor from proceedings to recover claims.[1] The question then is whether the dismissal without prejudice of a petitioner-defendant from state court action thwarts the legislative purpose of protecting the debtor. We must conclude that it does not. To the contrary, the dismissal of a bankruptcy petitioner from a state court action would *further* the goal of protecting the petitioner from "the financial pressures that drove him into bankruptcy." House Report, *supra*. Similarly, the dismissal of a state court action against a bankrupt defendant is not "the *commencement or continuation* of a judicial, administrative, or other proceeding to recover a claim against the debtor" which the Legislature sought to enjoin by the enactment of the automatic stay provision. (Emphasis added). See generally the commentary to the 11 U.S.C. §362(a)(1) amendment. The Bobos' reliance on the extra-jurisdictional case of *Pope v. Manville Forest Products Corporation*, 778 F. 2d 238 (5th Cir. 1985), does not alter this conclusion.

It is also worth noting that the automatic stay does not divest the state court of jurisdiction; rather, it merely limits the type and scope of actions which may be prosecuted against the bankruptcy petitioner. This is evidenced by the long list of exceptions to the stay which are set out in 11 U.S.C. §362(b). "While the filing of a bankruptcy petition operates as a stay of claims against the bankrupt

[1] The automatic stay provision is also intended to protect creditors by removing the impetus for them to "race to the courthouse" to protect their pecuniary interests before the debtor's assets are dissipated. See generally, 11 U.S.C. §362(b).

debtor, the courts retain jurisdiction." *Parker v. Henry A. Petter Supply Company*, 165 S.W.3d 474, 477 (Ky. App. 2005). As such, we are not persuaded that the McCracken Circuit Court lacked the jurisdiction to dismiss the bankrupt defendants.

As to both the bankrupt and non-bankrupt defendants, *Ward*, *supra*, is controlling. As the parties are well aware, *Ward* established a set of factors to be considered when ruling on the question of whether involuntary dismissal was appropriate under CR 41.02(1). Those factors are 1) the extent of the party's personal responsibility, 2) the history of dilatoriness, 3) whether the attorney's conduct was willful or in bad faith, 4) the merit of the claim, 5) the prejudice to the other party, and 6) alternative sanctions.

In the matter at bar, the circuit court expressly found that the factors set out in *Ward* warranted the dismissal of the claims against all defendants. In its ruling rendered on April 18, 2008, and styled Order Denying Plaintiff's Motion to Reconsider The Court's Order of Dismissal, the circuit court adopted the rationale set out in Defendant/Appellee General Electric's response to the Bobos' motion to reconsider. In examining the *Ward* factors, General Electric first noted that the Bobos were represented by experienced counsel and bore the non-delegable duty to remain apprised of the progress of the case and to take reasonable steps to bring it to fruition. See generally, *Gorin v. Gorin*, 167 S.W.2d 52 (Ky. 1942). As for the second *Ward* factor, i.e., the history of dilatoriness, General Electric claimed that the action remained dormant for over six years without any affirmative step made

by the Bobos to move it forward.[2] While General Electric did not contend that the Bobos' counsel acted in bad faith, it claimed that the lengthy delay in prosecuting the case amounted to willful neglect.

As to the fourth *Ward* factor – the merit of the claim – General Electric claimed that the Bobos failed to propound any written discovery or to take any deposition, and after six years, produced no evidence that Mr. Bobo was exposed to the defendants' products, much less injured by them. The fifth *Ward* factor is the prejudice to the defendants, and in this case, General Electric contends that the dilatory nature of the Bobos' action severely prejudiced the defendants' ability to defend the case and resulted in considerable costs. On this issue, General Electric maintained that over the course of the many years in which this action has remained dormant, witnesses' recollections inevitably diminish, some witnesses may no longer be available and documentary and other evidence becomes more difficult to produce resulting in substantial prejudice to the defending parties. And lastly, General Electric maintains that alternative sanctions are not available. It notes that the Bobos have not engaged in a one-time dilatory act, but that they have failed to meet their burden of prosecuting their claim and moving the action forward for a period of years.

[2] The record does not reveal that any action was taken by the Bobos between the December 13, 2004, filing of Mr. Bobo's deposition and the court's *sua sponte* Notice to Show Cause rendered on February 29, 2008. Further, the record is bare of any activity by any of the 26 parties between October 24, 2005, and the February 29, 2008, Notice to Show Cause.

We are also compelled to recognize that because the action was dismissed without prejudice, the dismissal does not constitute a "death sentence" to the Bobos' claim. As such, the Bobos may re-institute the action at such time they are prepared to move the action forward, subject to any applicable statute of limitations and the outcome of the bankruptcy proceeding. The burden rests with the Bobos to demonstrate that the trial court abused its discretion in dismissing the action for lack of prosecution. *Jenkins v. City of Lexington*, 528 S.W.2d 729 (Ky. 1975) ("Thus, the sole question in this appeal is whether the circuit court abused its discretion in dismissing the action for failure to prosecute."). "[T]he test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Miller v. Eldridge,* 146 S.W.3d 909, 914 (Ky. 2004). The Bobos have not demonstrated that the McCracken Circuit Court abused its discretion in dismissing without prejudice an action over which it retained jurisdiction and which had languished in complete dormancy for several years. When the record is viewed in its entirety, coupled with the circuit court's application of the *Ward* factors to the record, we find no basis for concluding that the circuit court erred in dismissing the action as to both the bankrupt and non-bankrupt defendants. Accordingly, we find no error.

For the foregoing reasons, we affirm the Order of Dismissal of the McCracken Circuit Court.

ALL CONCUR.

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JOINT BRIEF FOR NON-BANKRUPT APPELLEES: NATIONAL SERVICE INDUSTRIES; 4520 CORPORATION; ROBERTSON-CECO CORP.; GEORGIA-PACIFIC CORPORATION; JOHN CRANE; GENERAL ELECTRIC COMPANY; CERTAINTEED CORPORATION; GARLOCK, INC.; ANCHOR PACKING COMPANY; HENRY A. PETTER SUPPLY COMPANY; WESTINGHOUSE ELECTRIC; AND RAPID-AMERICAN

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NO BRIEF WAS FILED FOR THE BANKRUPT APPELLEES