

Iouldacheva v Filene's Basement Corp.

2004 NY Slip Op 30326(U)

July 6, 2004

Sup Ct, NY County

Docket Number: 0602280/00

Judge: Emily Jane Goodman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: EMILY JANE GOODMAN

PART 17

0602280/2000

IOULDACHEVA, MASOUDA
VS
FILENE'S BASEMENT CORP.

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

SEQ 1

DISMISS ACTION

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion


THIS MOTION IS DECIDED IN ACCORDANCE
WITH THE ACCOMPANYING MEMORANDUM DECISION

FILED

JUL 12 2004

NEW YORK COUNTY CLERK

Dated: 7/6/04


EMILY JANE GOODMAN

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

-----x
MASOUDA IOULDACHEVA,
Plaintiff,

Index No. 0602280/00

-against-

FILENE'S BASEMENT CORP.,
Defendant.
-----x

FILED
JUL 12 2004
NEW YORK
COUNTY CLERK'S OFFICE

GOODMAN, J.:

In this false imprisonment action, defendant Filene's Basement Corp., moves to dismiss the complaint filed against it by plaintiff Masouda loudacheva on the ground that it violated the automatic stay provisions of the Bankruptcy Code and/or the discharge injunction imposed by the Confirmation Order. Plaintiff opposes this motion.

BACKGROUND

The underlying action concerns an incident that occurred on June 28, 1999, while plaintiff was shopping at defendant's store located at 2220 Broadway in New York City. Plaintiff alleges that, on that day, she was unlawfully detained and arrested after defendant wrongfully accused her of shoplifting. Plaintiff was later acquitted after a criminal trial.

On August 23, 1999, defendant filed for bankruptcy protection with the United States Bankruptcy Court for the District of Massachusetts, Eastern Division (the Bankruptcy Court), pursuant to Chapter 11 of Title 11 of the United States Code (the Bankruptcy Code).

Approximately nine months later, in a complaint dated May 11, 2000, plaintiff brought this action against defendant, asserting causes of action for false imprisonment and malicious prosecution. As a result of her alleged injuries, plaintiff seeks two million dollars plus punitive

damages from defendant. Defendant did not file an answer to the complaint and at no time did plaintiff seek relief from the Bankruptcy Court to pursue this action. In fact, since defendant was served with the complaint on June 16, 2000, no action whatsoever was taken by either party in this matter, until this motion to dismiss.

On October 23, 2000, an order was entered by the Bankruptcy Court confirming defendant's amended joint plan of liquidation dated June 16, 2000 (the Confirmation Order). Paragraph 7 of the Confirmation Order states that all creditors with a claim arising before August 23, 1999 were required to file a proof of claim by June 8, 2000. Paragraph 7 further states:

Any such claim that was not filed prior to that time is forever barred and shall be conclusively deemed discharged and disallowed for the purposes of voting on the Plan or receiving any distributions thereunder.

DISCUSSION

Defendant seeks to dismiss the complaint on the ground that it violated the automatic stay provisions of the Bankruptcy Code and/or the discharge injunction imposed by the Confirmation Order.

As an initial matter, this court has jurisdiction to determine whether the automatic stay applies to proceedings before it (see In re Bona, 124 RR 11 [US Dist Ct, SD NY 1991]; In re Neuman, 71 BR 567, 583-74 [Bankr SD NY 1987] [state court could have decided whether automatic stay applied to proceedings before it]; see also Janis v Janis, 179 Misc 2d 199, 201-202 [Sup Ct, Westchester County 1998]). This court also has the power to determine the effect of a discharge in bankruptcy (see Lumbermans Mut. Casualty Co. v Morse Shoe Co., 218 AD2d 624 [1st Dept 1995]).

“The filing of a Chapter 11 bankruptcy petition triggers an automatic stay of any judicial proceeding or other act against the property of the [debtor] that was or could have been commenced before the filing of the petition” [In re Dairy Mart Convenience Stores, Inc., 351 F3d 86, 90 [2d Cir 2003], citing 11 USC § 362(a)]. The automatic stay has been described by the Second Department as follows:

The automatic stay is one of the fundamental debtor protections provided by the bankruptcy law (see Midlantic Natl. Bank v New Jersey Dept. of Envtl. Prot., 474 US 494, 503 [1986]; In re Best Payphones, 279 BR 92, 97 [US Dist Ct, SD NY 2002]; Eastern Refractories Co. v Forty Eight Insulations, 157 F3d 169, 172 [2d Cir 1998]). It is effective immediately upon filing without further action (see Best Payphones, 279 BR at 97; Eastern Refractories, 157 F3d at 172; Rexnord Holdings v Bidermann, 21 F3d 522, 527 [2d Cir 1994]). Moreover, it is not limited to the litigants, and extends to the non-bankruptcy court as well. “Once 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. This is so because section 362’s stay is mandatory and ‘applicable to all entities’, including state and federal courts” (Maritime Elec. Co. v United Jersey Bank, 959 F2d 1194, 1206 [3d Cir 1991], quoting 11 USC § 362(a); see Best Payphones, 279 BR at 97)

(Carr v McGriff, ___ AD2d ___, 2004 WL 1341842, *1 [2d Dept 2004]).

Plaintiff’s alleged ignorance of defendant’s bankruptcy proceeding does not alter the application of the automatic stay, because the automatic stay is triggered as against all entities upon the filing of a bankruptcy petition, irrespective of whether the parties to the proceedings stayed are aware that a petition has been filed (see NLT Computer Services Corp. v Capital Computer Systems, Inc., 755 F2d 1253, 1258 [6th Cir 1985]; In re Boston Business Machines, 87 BR 867, 870 [Bankr ED Pa 1988]; In re Koresko, 91 BR 689, 701 [Bankr ED Pa 1988]). In any event, while plaintiff denies knowledge of defendant’s bankruptcy proceeding at the time she commenced her action, plaintiff has been aware of defendant’s bankruptcy proceeding since at

least August 2002, when defendant sent a letter to plaintiff's counsel advising him of the bankruptcy filing and the automatic stay.

The majority of Federal Appeals courts, including the Second Circuit and the First Circuit (the location of the Bankruptcy Court), hold that "any proceedings or action described in section 362(a)(1) are void and without vitality if they occur after the automatic stay takes effect." (Best Payphones, 279 BK at 97-98 [citations omitted]; see also In re Soares, 107 F3d 969, 976 [1st Cir 1997]).

Courts in the First Department follow the majority rule (see e.g., Drexel Burnham Lambert, Inc. v Trex Corp., 184 AD2d 328 [1st Dept 1992] [affirming lower court's dismissal of defendant's affirmative defenses and counterclaims as subject to the automatic stay and directing that defendant obtain relief from the stay from the bankruptcy court]; Evans v Schneidel, 183 Misc 2d 114, 116 [Civ Ct, NY County 1999], aff'd 188 Misc 2d 193 [App Term, 1st Dept 2001] ["acts taken in violation of automatic stay created by filing of bankruptcy petition are generally deemed void", citing Kalb v Feuerstein, 308 US 433 (1940)]; 151-69 Nagle Ave Assoc. v Jiminez, 147 Misc 2d 443 [Civ Ct, NY County 1990] [debtor's entry into a stipulation of settlement post-petition deemed null and void]; see also Carr, 2004 WL 1341842 [orders entered by the Supreme Court while the automatic stay was in effect were void]; Bell v Niagra Mohawk Power Corp., 173 Misc 2d 1042 [Sup Ct, Albany County 1997] [slip-and-fall action commenced during pendency of bankruptcy case is void ab initio]).

In accordance with the above, the court holds that the commencement of this action was in violation of 11 USC § 362 and was, therefore, void and without vitality.

Notwithstanding the fact that the filing of this action violated the automatic stay and is,

therefore, void, plaintiff contends that she should be authorized to pursue her claim against defendant. Specifically, plaintiff contends, *inter alia*, that since she did not receive notice of defendant's bankruptcy proceeding, she could not file a timely proof of claim in accordance with the Confirmation Order.

Upon the entry of the Confirmation Order, the automatic stay was extinguished and replaced with a permanent injunction under section 524(a) of the Bankruptcy Code, which operates as an injunction against the commencement or continuation of an action or an act to collect a discharged debt (see 11 USC § 524(a)(2); 11 USC 363[c][2][c]).

“Before a debtor can obtain a discharge of a claim in bankruptcy ... the Due Process clause of the Fifth Amendment dictates that a debtor's creditors receive notice of the debtor's bankruptcy case and applicable bar date so that creditors have an opportunity to make any claims they may have against the debtor's estate” (In re XO Communications, Inc., 301 BR 782, 791-792 [**Bankr** SD NY 2003]). However, notwithstanding whether plaintiff received adequate notice of defendant's bankruptcy proceeding, no valid claim against defendant currently exists because this action is void ab initio. Even if this court was to find plaintiff's claim nondischargeable, defendant maintains that plaintiff would be time-barred from filing suit, since the alleged injury occurred in 1999, and is governed by a one-year statute of limitations under CPLR 215 (3).

Furthermore, plaintiff's assertion that the complaint operated as *an* informal proof of claim is without merit. “To qualify as an informal proof of claim, a document purporting to evidence such claim must (1) have been timely filed with the bankruptcy court and have become part of the judicial record, (2) state the existence and nature of the debt, (3) state the amount of

the claim against the estate, and (4) evidence the creditor's intent to hold the debtor liable for the debt" In re Houbigant, Inc., 190 BR 185 [Bankr SD NY 1995]; see also In re Northeast Office and Commercial Properties, Inc., 178 RR 915 [Bankr D Mass 1995]). According to the record, plaintiff's claim did not appear in the record of the defendant's bankruptcy case. Therefore, the complaint cannot qualify as an informal proof of claim.

Moreover, Lumbermans (218 AD2d 624), relied upon by plaintiff for the proposition that defendant's insurer remains obligated to defend the complaint, is factually distinguishable. In Lumbermans, the plaintiff sought to recover from the debtor's insurer after the debtor was discharged in bankruptcy [*id.* at 626]. However, in Lumbermans, the statute of limitations on the plaintiff's claim was not at issue. Here, by contrast, no valid, unexpired claim exists since the statute of limitations has clearly run.

This court does not have jurisdiction to annul the automatic stay to revive the void complaint (see In re Cavanaugh, 271 BR 414,423 [Bankr D Mass 2001]), nor has plaintiff provided this court with any authority to allow her to file a new complaint notwithstanding the running of the statute of limitations. Thus, plaintiff may be time-barred from filing a new complaint.¹

However, plaintiff may not be without remedy. The Bankruptcy Court has the power to modify the discharge injunction (see Perez v Cumberland Farms, Inc., 213 BR 622 (Bankr D

¹Pursuant to section 108 of the Bankruptcy Code, if the statute of limitations governing a plaintiff's claim against a debtor expires during the pendency of the automatic stay, the plaintiff has 30 days to refile the action from the time of notice that the bankruptcy court has ordered the stay lifted (see 11 USC 108[c]). Although plaintiff contends that she did not receive notice of defendant's discharge, she has been aware of the bankruptcy proceeding since at least 2002, but made no motion before this court or the Bankruptcy Court to preserve her rights.

Mass 1997), as well as the power to validate an action taken in violation of the automatic stay (see Soares, 107 F3d at 976). Thus, upon appropriate motion, the Bankruptcy Court may: (1) find that the statute of limitations is tolled pursuant to section 108 of the Bankruptcy Code, if plaintiff did not receive adequate notice of defendant's discharge; or (2) reopen defendant's bankruptcy case and annul the automatic stay to allow plaintiff to continue this action. Thus, this decision is without prejudice to plaintiff's right to petition the Bankruptcy Court for such relief, if so advised.

CONCLUSION

Accordingly, it is

ORDERED that the motion by defendant to dismiss the complaint is granted to the extent of staying further prosecution of any proceedings in this action, except for an application to vacate or modify said stay; and it is further

ORDERED that any application for relief made to the Bankruptcy Court in the proceeding known as In re FBI Distribution Corp. f/k/a Filene's Basement, Inc., before the United States Bankruptcy Court for the District of Massachusetts, Docket No. 99-16984, must be brought within 90 days of the date of this order; and it is further

ORDERED that either party may make an application by order to show cause to vacate or modify this stay upon the final determination of, modification of, or vacatur of the automatic stay issued by the Bankruptcy Court in the proceeding known as In re FBI Distribution Corp. f/k/a Filene's Basement, Inc., or if no application for relief is made to the Bankruptcy Court within 90

days of the date of this order.

Dated: July 6, 2004

ENTER:



J.S.C.
EMILY JANE GOODMAN

FILED
JUL 12 2004
NEW YORK
COUNTY CLERK'S OFFICE