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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

In re:)	BAP No.	WW-06-1345-KMoR
)		
DEAN S. KALIVAS,)	Bk. No.	06-10093
)		
Debtor.)	Adv. No.	06-01331
)		
_____)		
)		
DEAN S. KALIVAS,)		
)		
Appellant,)		
)		
v.)	MEMORANDUM*	
)		
D. GERARD MCALEESE; LUCILLE)		
MCALEESE; G&L MCALEESE)		
PROPERTIES, INC.)		
)		
Appellees.)		
_____)		

Argued and Submitted on May 23, 2007
at Seattle, Washington

Filed - June 21, 2007

Appeal from the United States Bankruptcy Court
for the Western District of Washington

Honorable Samuel J. Steiner, Bankruptcy Judge, Presiding

Before: KLEIN, MONTALI and RIBLET,** Bankruptcy Judges.

*This disposition is not appropriate for publication. Although it may be cited for whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no precedential value. See 9th Cir. BAP Rule 8013-1.

**Hon. Robin L. Riblet, U.S. Bankruptcy Judge for the Central District of California, sitting by designation.

1 The damages trial in the district court was scheduled to
2 begin at 9:00 a.m. on May 31, 2005. Kalivas did not appear.
3 Although Kalivas contends that he attempted to notify the
4 district court on the morning of May 31 that he had filed a
5 bankruptcy case in Nevada (he asserts that his fax machine notes
6 a 9:05 a.m. transmission), it is conceded that the district court
7 did not learn of the existence of the bankruptcy filing until
8 after it had taken evidence and announced a damages award in
9 favor of the plaintiffs on the fraud and racketeering counts for
10 about \$4 million, together with attorney's fees and costs.

11 Upon learning of the bankruptcy filing, the district court
12 did not proceed further until after relief from stay was obtained
13 in the bankruptcy court. The district court's civil docket
14 reflects that it ordered the plaintiffs to file a status report
15 by the earlier of a date certain or the lifting of the bankruptcy
16 automatic stay.

17 On August 11, 2005, appellees filed an ex parte request with
18 the district court for findings of fact and conclusions of law,
19 and for entry of judgment. No action was taken before March 17,
20 2006, with respect to that filing.

21 On October 12, 2005, the appellees filed a motion for relief
22 from automatic stay in the Nevada bankruptcy court to permit the
23 district court in Oregon to enter judgment against Kalivas.

24 On November 28, 2005, the appellees filed a motion to
25 transfer the Kalivas bankruptcy case to the Western District of
26 Washington.

27 The final hearing on the stay relief motion and the hearing
28 on the transfer motion occurred on December 21, 2005.

1 By order entered January 5, 2006, the Nevada bankruptcy
2 court transferred the bankruptcy case to the Western District of
3 Washington, where it was assigned No. 06-10093.

4 Also by order entered January 5, 2006, the Nevada bankruptcy
5 court denied the stay relief motion without prejudice, making
6 four findings:

7 The court finds that, after the Debtor sent his
8 bankruptcy petition to this court by messenger service on
9 May 26, 2005 and was notified that the petition was on file
10 on May 27, 2005, he did not take any steps to attempt to
11 notify the United States District Court for the District of
12 Oregon or the McAleeses of this bankruptcy case until May
13 31, 2005 after the hearing had commenced in that court. The
14 court finds that, but for the entry of an order transferring
15 this case to the United States District Court for the
16 Western District of Washington, it would grant the Motion in
17 its entirety. The court finds that, solely because it is
18 transferring venue and to eliminate procedural issues that
19 may arise by this court granting the Motion, the court is
20 denying the Motion.

21 Order Denying Motion For Relief From Automatic Stay Without
22 Prejudice, U.S. Bankr. Ct., D. Nev. (No. N-05-51655-GWZ 1/5/06).

23 The transferred case was docketed by the bankruptcy court in
24 the Western District of Washington on January 17, 2006. The
25 appellees filed their renewed motion for relief from stay on
26 January 19, 2006.

27 By order signed March 13 and entered March 14, 2006, the
28 bankruptcy court granted relief from stay to permit the district
court to proceed to judgment.

On March 16, 2006, the appellees filed in the district court
in Oregon a supplemental status report and request for entry of
findings of fact and conclusions of law and for entry of judgment

On March 17, 2006, the district court in Oregon entered
findings of fact and conclusions of law and entered a judgment

1 (which was appealed to the Ninth Circuit as No. 06-35327).

2 On July 25, 2006, Kalivas filed an adversary proceeding
3 against the appellees alleging two violations of the automatic
4 stay provisions of 11 U.S.C. § 362. Kalivas alleged that the
5 automatic stay was violated by the conduct of the damages trial
6 in the district court on May 31, 2005. Kalivas also alleged that
7 the appellees violated the stay when they filed their initial ex
8 parte request to enter findings of fact and conclusions of law
9 and ex parte request for entry of the district court judgment.
10 Kalivas demanded "damages for contempt in the amount of \$10,000."

11 The appellees filed a Motion to Dismiss the complaint on the
12 ground that the district court in Oregon did not act on any
13 request for entry of findings of fact and conclusions of law
14 until March 17, 2006, which was after bankruptcy court in
15 Washington granted relief from stay to permit judgment to be
16 entered.

17 At the hearing, the court dismissed the adversary
18 proceeding, making the following ruling:

19 THE COURT: Well, I tell you, as I see it, when I
20 entered that order granting relief from the stay, then the
21 plaintiffs in the Oregon suit could go ahead and get their
22 judgment entered. I also feel that that order granting
23 relief from the stay, for all intents and purposes, annulled
24 the stay retroactively throughout the entire suit.

25 I am going to dismiss the Kalivas lawsuit against the
26 McAleeses based on the violation of the automatic stay.

27 Tr. of Hearing 8/11/06, at p. 30.

28 A motion for reconsideration was filed within ten days of
entry of the dismissal order and was denied.

This timely appeal ensued.

1 JURISDICTION

2 The bankruptcy court had jurisdiction via 28 U.S.C.
3 § 1334(b). We have jurisdiction under 28 U.S.C. § 158(a)(1) and
4 (c)(1).

5
6 ISSUE

7 Whether the bankruptcy court erred when it dismissed
8 Kalivas' adversary complaint.

9
10 STANDARD OF REVIEW

11 The bankruptcy court's decision to dismiss the debtor's
12 adversary complaint is reviewed de novo. Zimmer v. PSB Lending
13 Corp. (In re Zimmer), 313 F.3d 1220, 1222 (9th Cir. 2002). A
14 complaint should not be dismissed unless it appears beyond doubt
15 that the debtor can prove no set of facts in support of his claim
16 that would entitle him to relief. Educ. Credit Mgmt. Corp. v.
17 McBurney (In re McBurney), 357 B.R. 536, 539 (9th Cir. BAP 2006).

18
19 DISCUSSION

20 At the oral argument of this appeal, Kalivas made two basic
21 contentions and one concession. First, he contended that the
22 filing in the United States District Court in Oregon of a request
23 for entry of findings of fact and conclusions of law and of
24 judgment, violated the automatic stay. Second, he contended that
25 the language of the stay relief order entered March 14, 2006,
26 permitting appellees "to pursue entry of the Judgment" did not
27 also authorize entry of findings of fact and conclusions of law.
28 Finally, when asked what defense he would have to a motion to

1 annul the stay, he was unable to articulate a defense. We
2 address these points in order.

3
4 I

5 The filing of the request for entry of findings of fact and
6 conclusions of law in the district court in Oregon on August 11,
7 2005, was, in the light most favorable to Kalivas, harmless. The
8 district court declined to act until after relief from stay was
9 obtained. The docket of the district court reflects that Kalivas
10 filed nothing in response.

11 The sole allegation of damages is the assertion in paragraph
12 11 of the Amended Complaint that "failure to correct these
13 violations has damaged Plaintiff by causing him to seek redress
14 through the filing of this complaint."

15 Beyond doubt, there is no set of facts alleged in the
16 Amended Complaint that would entitle Kalivas to relief on this
17 theory.

18
19 II

20 Next, Kalivas contends that the bankruptcy court's order
21 granting relief from stay permitting the appellees to "pursue
22 entry of judgment" did not also permit entry of findings of fact
23 and conclusions of law to support the judgment.

24 The language of the order is as follows:

25 IT IS HEREBY ORDERED that relief from the automatic
26 stay is granted to creditors to pursue entry of the Judgment
27 against the debtor in the case tried on May 31, 2005, before
28 the United States District Court for the District of Oregon,
entitled Denis Gerard McAleese, Lucille McAleese, and
McAleese, Inc. v. Dean Kalivas, aka "Dean Kalivas, attorney
at law" (USDC(OR)No. CV 03 865 BR), wherein the Honorable

1 Anna J. Brown found in favor of the plaintiffs in their
2 fraud and racketeering claims.

3 The direct answer is that an order granting relief from stay
4 "to pursue entry of judgment" necessarily subsumes those matters
5 that are part of the process of obtaining a judgment. A judgment
6 following a bench trial must be supported by findings of fact and
7 conclusions of law. Fed. R. Civ. P. 52(a). In other words, the
8 order modified the automatic stay in a manner that permitted
9 entry of findings of fact and conclusions of law appropriate to
10 support the judgment.

11 Beyond doubt, there is no set of facts alleged in the
12 Amended Complaint that would entitle Kalivas to relief on this
13 theory.

14
15 III

16 Finally, we can affirm for any reason supported by the
17 record. Dittman v. California, 191 F.3d 1020, 1027 n.3 (9th Cir.
18 1999); Donald v. Curry (In re Donald), 328 B.R. 192, 204 (9th
19 Cir. BAP 2005).

20 Kalivas conceded that merely annulling the automatic stay
21 would retroactively cure the defects about which he complains.
22 11 U.S.C. § 362(d)(1). See 40235 Washington St. Corp. v.
23 Lusardi, 329 F.3d 1076, 1080 n.2 (9th Cir.), cert. denied, 540
24 U.S. 983 (2003).

25 When asked what defense he would have to a motion to annul
26 the stay, he was unable to articulate a defense to annulling the
27 stay.

