

DEC 07 2005

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OF THE NINTH CIRCUIT**

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT**

6	In re:)	BAP No.	NC-05-1162-SZMa
7	GEORGE PANZER, JR.,)	Bk. No.	04-30120
8	Debtor.)		
9	_____)		
10	GEORGE PANZER, JR.,)		
11	Appellant,)		
12	v.)	MEMORANDUM¹	
13	AARON FUNG; FLORENCE FUNG,)		
14	Appellees.)		
	_____)		

Argued and Submitted on November 16, 2005 at
San Francisco, California

Filed - December 7, 2005

Appeal from the United States Bankruptcy Court
for the Northern District of California

Honorable Dennis Montali, Bankruptcy Judge, Presiding

Before: SMITH, ZURZOLO² and MARLAR, Bankruptcy Judges.

¹ This disposition is not appropriate for publication and may not be cited except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. See 9th Cir. BAP Rule 8013-1.

² Hon. Vincent Zurzolo, United States Bankruptcy Judge for the Central District of California, sitting by designation.

1 This appeal is related to a prior appeal decided by us in
2 George Panzer, Jr. v. Wells Fargo Bank Minnesota, N.A. et al.,
3 BAP Nos. NC-04-1253-BSH and NC-04-1254-BSH, in which we affirmed
4 the annulment of the stay as to a foreclosing lender. We issued
5 our memorandum on March 28, 2005 ("March 28 Decision"); an appeal
6 of the decision is currently pending before the Ninth Circuit
7 (USCA Docket Nos. 05-15968 and 05-15970). The current appeal
8 concerns an order annulling the stay as to the purchasers at the
9 foreclosure sale. We AFFIRM.

10 **I. FACTS³**

11 George Panzer ("Panzer"), aged 80, was unsuccessful in
12 stopping a foreclosure sale of his residence that occurred
13 shortly after the filing of his fourth chapter 13⁴ petition in a
14 ten-month period. The foreclosing creditor, Wells Fargo Bank,
15 had notice of the bankruptcy filing through its servicing agent,
16 Litton Loan Company, LP,⁵ prior to the sale, but mistakenly
17 believed that an order issued in the prior case prevented Panzer
18 from re-filing the current case. The property was sold to Aaron
19 and Florence Fung, who had no notice of the filing at the time of
20 the sale. Though the Fungs later learned of the bankruptcy, they
21 nevertheless proceeded with an unlawful detainer action against
22 Panzer after being advised by the Bank that no stay was in effect

23 _____
24 ³ The facts are set forth in detail in the March 28 Decision
and are summarized herein.

25 ⁴ Unless otherwise indicated, all chapter, section and rule
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and
27 to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036.

28 ⁵ For ease of reference, Wells Fargo and Litton are referred
to herein collectively as the "Bank."

1 on account of the prohibiting order in the prior case.

2 On March 1, 2004, Panzer commenced an adversary proceeding
3 against the Bank, the Fungs, and others seeking, inter alia,
4 injunctive relief, damages for violation of the automatic stay,
5 and the unwinding of the allegedly void sale. The bankruptcy
6 court issued a temporary restraining order, and later, a
7 preliminary injunction enjoining the Fungs from taking possession
8 of the property.

9 The Bank moved for annulment of the stay in April 2004. The
10 chapter 13 trustee's motion to dismiss the case was also pending
11 at that time. Panzer opposed the relief from stay motion but
12 filed no opposition to the trustee's motion to dismiss.⁶ Just
13 prior to the stay hearing, the Fungs "joined" in the Bank's
14 motion. The court granted annulment of the stay and, sua sponte,
15 dissolved the preliminary injunction. In granting the annulment,
16 the court considered and balanced a number of factors, including
17 Panzer's multiple filings, his failure to oppose dismissal of the
18 bankruptcy case, his attempts to reinstate the loan prior to the
19 foreclosure, and prejudice to the Bank and the Fungs. Panzer
20 appealed the orders annulling the stay and vacating the
21 preliminary injunction to this panel.

22 We affirmed both orders and noted, in dicta, that the Fungs'
23 joinder in the Bank's relief from stay motion did not have the
24 effect of expanding the stay relief to include the unlawful
25 detainer action which they had initiated in violation of the
26 stay.

27 The Fungs, thereafter, moved for annulment of the stay

28 ⁶ The bankruptcy case was dismissed on May 17, 2004.

1 ("Annulment Motion"), which the bankruptcy court granted in an
2 order issued on April 14, 2005 ("April 14 Order").

3 Panzer's attempts to stay the April 14 Order and the March
4 28 Decision culminated in the Ninth Circuit's denial of a stay on
5 May 26, 2005.

6 The March 28 Decision is currently pending before the Ninth
7 Circuit. Panzer appeals the April 14 Order to this panel.

8 **II. ISSUES ON APPEAL**

- 9 A. Whether the bankruptcy court lacked jurisdiction
10 to hear the Fungs' Annulment Motion; and
11 B. Whether the court erred in granting the
12 Annulment Motion while Panzer's adversary
13 proceeding concerning title to the property
14 remained pending.

15 **III. JURISDICTION**

16 The bankruptcy court had jurisdiction under 28 U.S.C. § 1334
17 and §§ 157(a), (b) (1), (b) (2) (G), and (b) (2) (K). We have
18 jurisdiction under 28 U.S.C. § 158(c) (1).

19 **IV. STANDARD OF REVIEW**

20 We review matters concerning jurisdiction de novo. In re
21 Anderson, 149 B.R. 591, 593 (9th Cir. BAP 1992). We review an
22 order to annul the stay for abuse of discretion. In re Nat'l
23 Envtl. Waste Corp., 129 F.3d 1052, 1054 (9th Cir. 1997); In re
24 Fjeldsted, 293 B.R. 12, 18 (9th Cir. BAP 2003). Under the abuse
25 of discretion standard, we must have a definite and firm
26 conviction that the bankruptcy court committed a clear error of
27 judgment in the conclusion that it reached before reversal is
28 proper. In re Black, 222 B.R. 896, 899 (9th Cir. BAP 1998).

1 **V. DISCUSSION**

2 A. The bankruptcy court had jurisdiction to hear the Annulment
3 Motion

4 Panzer argues that the pendency of the appeal of the March
5 28 Decision before the Ninth Circuit divested the bankruptcy
6 court of jurisdiction to entertain and rule on the Annulment
7 Motion. His position on this issue, which is difficult to
8 follow, appears to be two-fold.

9 First, Panzer contends that this panel's passing comments in
10 the March 28 Decision that the Fungs' unlawful detainer action
11 violated the automatic stay effectively constituted an
12 adjudication of the issue. Thus, his argument continues, the
13 Fungs' "failure" to appeal the March 28 Decision somehow
14 precluded them from later seeking annulment of the stay under the
15 doctrine of "law of the case." Second, Panzer believes we did
16 not substantively address his argument regarding the interplay
17 between § 362 annulment of the stay, to summarily validate an
18 otherwise void sale, and the pending adversary proceeding
19 involving the validity of the sale now exclusively before the
20 Ninth Circuit (as to both the Bank and the Fungs). We disagree
21 on all counts.

22 The only matters before the panel in the prior appeal were
23 the order granting the Bank's motion for annulment of the stay
24 and the bankruptcy court's dissolution of the preliminary
25 injunction, the latter of which is not at issue in the current
26 appeal. We simply noted that the Fungs' joinder in the Bank's
27 motion did not have the effect of annulling any actions the Fungs
28 may have taken while the stay was in effect, i.e., proceeding

1 with the unlawful detainer action. Nothing in the March 28
2 Decision precluded the Fungs from thereafter seeking annulment as
3 to the unlawful detainer action. Further, even if the March 28
4 Decision could be construed as a determination that the Fungs
5 violated the automatic stay by prosecuting the unlawful detainer
6 action, such a determination would not preclude a subsequent
7 request for annulment. Indeed, annulment is generally requested
8 when actions have been taken in violation of the stay. Finally,
9 this panel is not aware of any authority, and Panzer has referred
10 us to none, supporting his position that the bankruptcy court is
11 divested of jurisdiction to determine a legal question concerning
12 a party in a case simply because the same or similar legal issue
13 involving another party in the case is pending in an appellate
14 court.

15 B. The bankruptcy court did not err in annulling the stay

16 Panzer contends that because the pending adversary
17 proceeding involved, in part, the validity of the foreclosure
18 sale and the interests of the parties in the property (because of
19 the violation of the automatic stay), it was improper for the
20 bankruptcy court to annul the stay and that, in so doing, the
21 court summarily adjudicated the issue of ownership in the Fungs'
22 favor. Stated otherwise, the bankruptcy court effectively
23 substituted the summary provisions of § 362 for the adjudicative
24 process provided in an adversary proceeding. Panzer further
25 argues that by moving to annul the stay, rather than responding
26 to the complaint in the adversary proceeding, the Fungs engaged
27 in claim splitting in violation of Fed. R. Civ. P. 13(a) (as
28 incorporated by Fed. R. Bankr. P. 7013).

1 We adequately addressed this issue in the March 28 Decision:

2 Panzer asserts his due process rights were transgressed
3 by the bankruptcy court hearing the annulment motion
4 while his [adversary proceeding] on some of the issues
5 was pending, citing In re Conejo Enterprises Inc., 96
6 F.3d 346 (9th Cir. 1996). Panzer's argument is that
7 the court in effect finally determined claims pending
8 in his [adversary proceeding], thus barring him from
9 pursuing his claim for damages for violation of the
10 stay, and a trial by jury

11 This argument fails. First it is predicated on the
12 mistaken position that the preliminary injunction was
13 final. Second, **the bankruptcy court's authority to
14 annul the stay under § 362 is independent of the
15 pending [adversary proceeding]. In considering the
16 Bank's motion to annul, the bankruptcy court was
17 properly interpreting and effectuating the automatic
18 stay, within its ancillary jurisdiction.** Aheong, 276
19 B.R. at 239-40 (citing Taylor, 884 F.2d at 481. See
20 also In re Carraher, 971 F.2d 327, 328 (9th Cir. 1992);
21 In re Giddens, 298 B.R. 329, 337 (Bankr. N.D. Ill.
22 2003).

23 While the [adversary proceeding] and main case relief
24 are intertwined, and orders may impact each other,
25 there was no due process violation here. Panzer
26 received adequate notice and opportunity to be heard.
27 See, Matthews v. Harney County, Or., Sch. Dist. No. 4,
28 819 F.2d 889, 892 (9th Cir. 1987).

March 28 Decision, pp. 18-19 (emphasis added).

18 Nothing in Panzer's arguments in the current appeal
19 persuades us that our analysis in the March 28 Decision is
20 incorrect, incomplete, or otherwise inapplicable to the Fungs'
21 Annulment Motion. Once the bankruptcy court determined that
22 grounds for annulment of the stay had been established,⁷ it was
23 free to grant such relief, irrespective of the impact on that
24 portion of Panzer's adversary proceeding asserting entitlement to
25 the property on the basis of the stay violation.

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28 ⁷ Panzer does not challenge the court's substantive findings
supporting annulment of the stay.

VI. CONCLUSION

Based upon the foregoing, the April 14 Order is AFFIRMED.

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