NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re:	BAP No. WW-07-1411-JuKPa
AQUATIC VENTURES, INC.; KETRON ISLAND UTILITIES, INC.,	Bk. No. 96-32414
Debtors.	Adv. No. 06-04210
CHARLES FAIN,	
Appellant,	
v.	**M E M OR A N D U M**[1]
ROBERT D. STEINBERG, Chapter 7 Trustee, et al.,	
Appellees.	

Argued and Submitted on May 15, 2008
at Pasadena, California

Filed - May 29, 2008

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

Honorable Philip H. Brandt, Bankruptcy Judge, Presiding

Before: JURY, KLEIN, and PAPPAS, Bankruptcy Judges.

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[1] 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.

Appellant Charles Fain ("Fain") appeals pro se[2] the bankruptcy court's judgment in favor of Appellee chapter 7 trustee. Finding no genuine issues of material fact, the bankruptcy court granted the trustee's motion for summary judgment, ruling that excess proceeds realized from tax foreclosure sales of real properties owned by debtors Aquatic Ventures, Inc. ("Aquatic") and Ketron Island Utilities, Co., Inc. ("Ketron") (collectively, the "Debtors") were property of their estates which were not abandoned by operation of law under § 554(c).[3]

We AFFIRM.

I. FACTS

On April 15, 1996, and April 19, 1996, Aquatic and Ketron each filed a voluntary chapter 11 petition, respectively.

Aquatic was involved in real estate development on Ketron Island, Washington, and other locations. Ketron was formed to operate a utility service and maintenance business on Ketron Island. Debtors shared the same business address and common officers.

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[2] Because of Fain's pro se status, we liberally construe his pleadings. Kashani v. Fulton (In re Kashani), 190 B.R. 875, 883 (9th Cir. BAP 1995).

[3] Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as enacted and promulgated prior to the effective date of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23, because the case from which this appeal arises was filed before its effective date (generally October 17, 2005).

In their respective schedules, Aquatic listed fifty-three single family residence building lots and Ketron listed thirteen single family residence building lots. Both sets of schedules identified the sixty-six lots as "SFR Bldg. lots", Ketron Island, WA, but did not provide addresses, lot numbers or tract names.

At various times, creditors obtained relief from stay with respect to thirty-eight[4] of the vacant lots. On March 17, 1997, Debtors' bankruptcy cases were administratively consolidated. On August 13, 1997, the court converted Debtors' cases to chapter 7 and appointed Robert D. Steinberg as the trustee in both cases.

Approximately four years later, on June 1, 2001, the trustee filed his final report in Aquatic's case. The court approved the trustee's final report and application for compensation by order entered July 9, 2001.

Shortly thereafter, on December 5, 2001, the United States District Court for the Western District of Washington (the "District Court") sua sponte entered an order withdrawing the reference of Debtors' cases. The reference was withdrawn because Debtors' principals, including Fain, were convicted in the District Court for violations of various criminal statutes and some of the victims' properties remained in the bankruptcy proceedings. On December 11, 2001, the bankruptcy court transmitted Debtors' case files to the District Court.

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[4] It is unclear how many lots were subject to stay relief orders because this number changes throughout the trustee's pleadings. It is either thirty-eight or forty.

The victims subsequently commenced a civil action against Debtors, Fain, the trustee and others, to quiet title in their names with respect to eight lots titled in Ketron's name. The District Court granted their summary judgment motion and entered a default against Fain, the trustee and others on January 13, 2003.[5]

Over three years after the reference was withdrawn, on January 28, 2004, the clerk, acting under the delegation of authority to enter ministerial orders per Local Bankruptcy Rule 5003-1, entered an order Approving Account, Discharging Trustee and Closing Estate in both cases. On February 3, 2005, the court reopened the cases, the minute orders reflecting that the closures occurred because of an administrative error. The error was that the cases were still pending in the District Court pursuant to the withdrawal of the reference.

In January 2005, during the time the cases were still pending in the District Court, the Pierce County Assessor's Office conducted tax foreclosure sales of thirty-five lots titled either in Aquatic's or Ketron's name. As a result, Pierce County was holding $108,151.76 in excess proceeds. Pierce County paid out $20,907.70 to Ketron Island Homeowners Moorage Association after it was served with a garnishment.

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[5] We take judicial notice of the complaint, the Order of Default, and the Judgment, which were docketed and imaged by the District Court in Civil Case No. 01-cv-5685-JET at Dkt. No. 7, No. 63, and No. 64, respectively. Atwood v. Chase Manhattan Mortgage Co. (In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

The District Court referred Debtors' cases back to the bankruptcy court by order entered May 9, 2005. At that time, Pierce County was holding $88,194.76 from the tax foreclosure sales.

On November 28, 2006, the trustee filed an adversary proceeding against Pierce County, Fain and other potential claimants, including Terry Wallace ("Wallace"), Fain's criminal defense attorney.[6] The complaint sought declaratory relief to determine entitlement to the proceeds realized from the foreclosure sales and to compel turnover of the estates' property.

The trustee moved for summary judgment. The issues involved were (1) whether the lots were abandoned when the trustee filed his final report or when the order closing the case was entered; (2) whether there was a technical abandonment of the lots even though many were not scheduled and those scheduled were not specifically identified; and (3) if the lots were not abandoned, who was entitled to the sales proceeds.

In response, Fain filed his own motion for summary judgment, contending that the District Court's withdrawal of the

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[6] Wallace states in his answer to the complaint that Fain assigned the excess proceeds from the foreclosure sales to him as payment for attorney's fees incurred in connection with the appeal of Fain's criminal conviction. Fain also acknowledges this assignment in his answer to the complaint. The bankruptcy court expressed its doubt that Fain could either assign or direct payment to Wallace under Washington law if Debtors dissolved. The bankruptcy court further opined that with no discharge of the corporate liabilities, assigning the payment for Fain's benefit, rather than that of the corporate Debtors, would probably be a fraudulent transfer under state law. Nonetheless, the court found it unnecessary to rule on these issues.

reference was void and that Debtors' bankruptcy cases were properly closed and the lots abandoned by operation of law.

The bankruptcy court granted the trustee's motion for summary judgment and denied Fain's motion for summary judgment by order entered October 16, 2007. The bankruptcy court then entered a judgment on November 6, 2007, against Pierce County and the other defendants determining that the proceeds from the tax foreclosure sales were property of Debtors' estates.

Fain timely appealed.

II. JURISDICTION

The bankruptcy court had jurisdiction pursuant to 28 U.S.C. §§ 1334 over this core proceeding under § 157(b)(2)(A) and (E). We have jurisdiction under 28 U.S.C. § 158.

III. ISSUES

A. Whether the orders closing Debtors' bankruptcy cases were void because they were entered after the District Court withdrew the reference of their cases to the bankruptcy court pursuant to 28 U.S.C. § 157(d).

B. Whether the bankruptcy court erred in determining that the excess proceeds from the tax foreclosure sales were property of Debtors' bankruptcy estates.

IV. STANDARDS OF REVIEW

We review the bankruptcy court's decision to grant a motion for summary judgment de novo. Sigma Micro Corp. v. Healthcentral.com (In re Healthcentral.com), 504 F.3d 775, 783 (9th Cir. 2007). Summary judgment is appropriate where the pleadings and the evidence show that there is no genuine issue of any material fact and that the moving party is entitled to a

judgment as a matter of law. See Fed. R. Civ. P. 56(c).[7] In evaluating the motion, we view all facts and inferences in the light most favorable to the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

V. DISCUSSION

Fain's argument for reversal in this appeal[8] rests on his initial premise that the District Court's order withdrawing the reference pursuant to its statutory power under 28 U.S.C.

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[7] Fed. R. Civ. P. 56(c), made applicable to cases under the Code pursuant to Rule 7056, provides in relevant part: "The judgment sought should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law."

[8] We question whether Fain is a "person aggrieved" by the bankruptcy court's judgment for purposes of this appeal. See Fondiller v. Robertson (In re Fondiller), 707 F.2d 441, 442 (9th Cir. 1983)(noting that only persons whose rights or interests are directly and adversely affected pecuniarily have standing to appeal). It is unclear what economic interests Fain has that are directly affected by the court's judgment in light of his assignment of the excess proceeds to Wallace and the statutory requirement under § 554(c) that when abandonment occurs by operation of law, the asset goes to the debtor. Nonetheless, we conclude it is unnecessary to adhere to strict standards regarding standing on appeal here because the trustee named Fain as a party-defendant in the adversary proceeding involved in this appeal. Fain fully participated and he lost. See Comjean v. Cruickshank, 191 B.R. 504, 507 (D. Mass. 1995)(noting that imposing the pecuniary loss requirement on a debtor who was named as a party-defendant in adversary proceeding "would paradoxically imply that a party against whom a judgment is entered is not aggrieved by that judgment."). We therefore address the merits of his argument.

§ 157(d)[9] was void. From that premise, Fain maintains that the minute entry in the bankruptcy court's docket closing Debtors' cases on January 28, 2004, was effective. Alternatively, he argues the cases were presumptively closed when the trustee filed his final report. Under either alternative, Fain concludes that the closing of the cases resulted in a technical abandonment of the lots pursuant to § 554(c) and, therefore, the proceeds were no longer property of Debtors' estates. For these reasons, Fain maintains the bankruptcy court erred in granting the trustee's summary judgment motion.

We address Fain's arguments below.

A. The Requirements for Technical Abandonment of the Lots Were Not Met

When they filed their respective petitions, Debtors' legal or equitable interests in the lots became property of their estates. Cusano v. Klein, 264 F.3d 936, 945 (9th Cir. 2001); see also § 541(a)(1). Estate property, such as the lots, would revert to Debtors if the lots were abandoned under § 554(c). The so-called "technical abandonment" may occur automatically upon closing a case because § 554(c) provides, "[u]nless the court orders otherwise, any property scheduled under section 521(1) of this title not otherwise administered at the time of

[9] This section provides in relevant part: "The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown."

the closing of a case is abandoned to the debtor .... "[10] Thus, the plain language of the statute states four requirements: (1) the lots must have been scheduled; and (2) not administered by the trustee; (3) the Debtors' cases must close; and (4) abandonment is to the Debtors. If any one of the statutory requirements is not met, technical abandonment of estate assets would not occur.

We first address the requirement that Debtors' cases must have been closed for abandonment to occur because resolution of that issue is dispositive in this appeal.

The bankruptcy court lacked authority to enter any order, including an order closing the case, because the District Court had withdrawn the reference.

1. The Bankruptcy Court's Orders Closing Debtors' Cases Were Null and Void

After Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982), which held that Congress' grant of encompassing jurisdiction to non-Article III bankruptcy judges was unconstitutional, Congress vested original jurisdiction over cases and proceedings under Title 11 in the district courts. See 28 U.S.C. § 1334(a)-(b).[11] Nonetheless, Congress preserved

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[10] Abandonment of estate property under § 554(c) is referred to as "technical" because the abandonment occurs automatically and without notice or hearing. DeVore v. Marshack (In re DeVore), 223 B.R. 193, 197 (9th Cir. BAP 1998).

[11] 28 U.S.C. § 1334(a) provides "[e]xcept as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11." Subsection (b) provides "[e]xcept as provided in subsection

(continued...)

the bankruptcy courts and under 28 U.S.C. § 157(a)[12] the district court delegates its judicial authority over Title 11 cases or proceedings by referring them to bankruptcy courts.[13] To avoid other constitutional defects identified in Marathon — and to limit the bankruptcy court's jurisdiction and control over matters outside its expertise — the district court may sua sponte withdraw such reference for cause under 28 U.S.C. § 157(d). Thus, the District Court had statutory authority to refer Debtors' cases under Title 11 to the bankruptcy court and to later withdraw that reference for cause. See generally Sec. Farms v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers, 124 F.3d 999, 1008 (9th Cir. 1997).

Fain's main argument is that cause did not exist for the District Court to withdraw the reference of Debtors' cases. In determining whether cause exists under 28 U.S.C. § 157(d), courts consider the following factors: "the efficient use of judicial resources, delay and costs to the parties, uniformity

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[11](...continued)
(e)(2), and notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11."

[12] This section provides "[e]ach district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district."

[13] All district courts in the country have standing orders which refer jurisdiction of Title 11 cases to the bankruptcy courts. The District Court's Local General Rule 7.1.01 provides for the referral in the Western District of Washington.

of bankruptcy administration, the prevention of forum shopping, and other related factors." Canter v. Canter (In re Canter), 299 F.3d 1150, 1154 (9th Cir. 2002). Fain apparently relies on "other related factors," arguing that the lots involved in the District Court quiet title action were not the lots listed in Debtors' schedules as demonstrated by the plaintiffs' default judgment against the trustee. Fain thus concludes that the civil action in the District Court had no impact on the bankruptcy proceedings and, therefore, cause did not exist to withdraw the reference of Debtors' cases.

We have no authority, however, to review any order of the District Court, including the District Court's order withdrawing the reference of these cases. Rather, our jurisdiction is limited to reviewing judgments, order and decrees "of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title [28]." 28 U.S.C. § 158(a). Thus, we are obliged to accept as valid the District Court's order withdrawing the reference unless and until the court of appeals rules otherwise.

Once the District Court withdrew the reference of Debtors' cases, the bankruptcy court lacked the judicial authority regarding all aspects of Debtors' cases. The orders closing Debtors' cases entered after the reference was withdrawn were therefore null and void. See Sasson v. Sokoloff (In re Sasson), 424 F.3d 864, 876 (9th Cir. 2005)(noting that a final judgment is void for purposes of Fed. R. Civ. P. 60(b)(4) if the court that considered it lacked subject matter jurisdiction); Patterson v. Williamson, 153 B.R. 32 (E.D. Va. 1993)(finding

that bankruptcy court's rulings on discovery matters were null and void because court did not have subject matter jurisdiction over adversary proceeding after district court withdrew the reference).

It follows that the Debtors' cases were never closed for purposes of § 554(c). Accordingly, we hold, as matter of law, that the automatic technical abandonment did not occur. This constitutes an adequate, independent basis to affirm the summary judgment ruling in favor of the trustee.

2. Debtors' Cases Were Not Presumptively Closed

We also reject Fain's argument that the case was automatically closed following the filing of the trustee's final report and the lapse of 30 days without an objection. The closing of a chapter 7 bankruptcy case is governed by § 350(a) and Rule 5009.

Section 350(a) provides that "[a]fter an estate is fully administered and the court has discharged the trustee, the court shall close the case." Rule 5009 provides in relevant part:

> If in a chapter 7 ... case the trustee has filed a final report and a final account and has certified that the estate has been fully administered, and if within 30 days no objection has been filed by the United States trustee or a party in interest, there shall be a presumption that the estate has been fully administered.

Here, the trustee filed his final report and there were no objections filed within the thirty-day period.

Relying on § 350(a), Rule 5009, and case law, Fain contends that the court's approval of the trustee's final report on July 9, 2001, effectively closed Debtors' cases. Citing In re Wade, 991 F.2d 402, 408 (7th Cir. 1992), Fain argues that Debtors'

cases were effectively closed because the duties of the trustee were complete and interested parties relied on the court's orders. Specifically, Fain contends that the trustee acted as if the cases were closed and points out that the Pierce County Assessor's Office certainly acted with the belief the cases were closed.[14]

The Seventh Circuit's decision in Wade is inapposite for two reasons. First, the order closing that case was entered by the district court that had withdrawn the reference, not, as here, by the bankruptcy court from which the reference had been withdrawn. Second, the question was the effect of a closing order that was entered before the final report of the trustee was complete. Wade, 991 F.2d at 405.

The law of the Ninth Circuit draws a clear distinction between filing a final report and closing a case. The filing of a final report "in and of itself cannot result in abandonment unless the court closes the case." See Schwaber v. Reed (In re Reed), 940 F.2d 1317, 1321 (9th Cir. 1991). We also observe that if Congress intended to treat the filing of the trustee's final report as a dispositive legal event with respect to any

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[14] We do not address whether Pierce County relied upon the court's orders closing Debtors' cases because Pierce County is not a party to this appeal. Moreover, the issue of Pierce County's or Fain's reliance on the court's orders closing Debtors' cases was not raised or considered by the bankruptcy court. Fain also brought up the extraneous issue in his reply brief regarding whether Pierce County violated the automatic stay, which would have remained in place if Debtors' cases were never closed as we now hold. However, this issue was also not raised nor considered by the bankruptcy court. Accordingly, we do not consider any of these issues now. Healthcentral.com, 504 F.3d at 789.

abandonment issue, it could have provided for that result in § 554, but it did not do so. Instead, the plain language of § 554(c) requires that the bankruptcy case close before the technical abandonment of estate assets can occur.

Fain's reliance on Rule 5009, which has been read to create a presumption, is also misplaced. Here, the presumption has been rebutted when, as a matter of law, the bankruptcy court did not have judicial authority to enter the orders closing Debtors' cases after the District Court withdrew the reference. Finally, Rule 5009 cannot be construed to trump § 554(c), which by its plain language requires the closing of a case. See Beaty v. Selinger (In re Beaty), 306 F.3d 914, 924 (9th Cir. 2002)(noting that a bankruptcy rule cannot create an exception to the Code and cannot abridge, enlarge or modify any substantive right). Accordingly, we reject Fain's argument and conclude that Debtors' cases were not presumptively closed.

B. The Description of the Lots in the Schedules

In addition to ruling that technical abandonment did not occur because the cases never closed, the court below also found no abandonment because the lots were not properly identified in the schedules. Fain contends the court erred by applying an improper standard in making its determination. However, we need not delve into whether the court so erred. Because we can affirm the bankruptcy court's judgment on another ground, any such error would not affect Fain's substantial rights and would

be harmless under Fed. R. Civ. P. 61.[15]

VI. CONCLUSION

We conclude, as a matter of law, Debtors' cases were never closed because the bankruptcy court did not have judicial authority to enter such an order after the District Court withdrew the reference for Debtors' cases. Thus, the bankruptcy court's orders closing Debtors' cases were null and void. It follows that there could be no technical abandonment of the lots or their proceeds and, therefore, the lots were property of Debtors' estates when the taxing authority foreclosed upon them. Accordingly, the bankruptcy court properly entered judgment in favor of the trustee, finding the excess sale proceeds were property of Debtors' estates.

For these reasons, we AFFIRM.

KLEIN, Bankruptcy Judge, concurring:

I join the majority decision and write separately to clarify that Fain's suggestion that Pierce County's tax sales were invalid is a red herring.

It does appear that the tax sales were conducted at a time

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[15] Fed. R. Civ. P. 61, made applicable to cases under the Code pursuant to Rule 9005, provides: "Unless justice requires otherwise, no error in admitting or excluding evidence — or any other error by the court or a party — is ground...for vacating, modifying, or otherwise disturbing a judgment or order. At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights."

when the automatic stay was in effect and could be attacked as being void ab initio. Schwartz v. United States (In re Schwartz), 954 F.2d 569, 572-73 (9th Cir. 1992). Nevertheless, the bankruptcy court is also authorized to annul the stay in a manner that would retroactively validate the tax sales. 11 U.S.C. § 362(d); Schwartz, 954 F.2d at 573; cf. 40235 Washington St. Corp. v. Lusardi, 329 F.3d 1076, 1080 n.2 (9th Cir. 2003)(no order entered granting retroactive relief).

Here, the trustee has elected to proceed only to recover the surplus proceeds remaining from the tax sales, rather than rescinding the sales. Implicit in the trustee's request for relief and in the bankruptcy court's order is an assumption that the tax sales should be allowed to stand. In other words, it is apparent that, if the tax sales were actually to be called into question by a party with standing (Fain lacks standing because any properties would belong to the trustee), the court would annul the stay.