

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

FILED
DISTRICT OF NEBRASKA
AT _____ M
MAR 5 1985
William L. Olson, Clerk
Deputy
CV ~~84-0-604~~
CV 84-0-674

RAYMOND R FRANZEN and)
SONJA L. FRANZEN,)
)
Debtors.)
)
RAYMOND R. FRANZEN and)
SONJA L. FRANZEN,)
)
Plaintiffs,)
)
vs.)
)
ARCADIA STATE BANK,)
)
Defendant.)

BK 83-2086

CV ~~84-0-604~~
CV 84-0-674

MEMORANDUM AND ORDER

These matters are on appeal from an order of the Bankruptcy Court for the District of Nebraska, entered September 4, 1984, granting the appellee relief from the automatic stay, and from an order entered October 5, 1984, overruling the appellants' motion for stay pending appeal. The issues raised on appeal are whether the Bankruptcy Court erred in holding that the appellants received adequate notice of the September 4, 1984, hearing in which no appearance was made on behalf of appellants and in denying the appellants' stay pending appeal.

The standard of review is as follows:

On an appeal the district court . . . may affirm, modify, or reverse a bankruptcy court's judgment, order, or decree or remand with instructions for further proceedings. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses.

Bankr. Rule 8013.

The appellants, Raymond and Sonja Franzen, filed for protection under Chapter 11 of 11 U.S.C. in December of 1983. On August 9, 1984, the appellee, Arcadia State Bank (a major secured creditor), moved for relief from the automatic stay. Judith Spindler, attorney for the appellee, stated at the October hearing, that on August 13, 1984, notice of the hearing was sent out to the appellants, Mike Heavey, and to Bruce Abrahamson, who was at that time the appellants' attorney of record (filing 64 at 6). A copy of the notice of hearing with a certificate of service signed by Judith A. Spindler was filed with the Bankruptcy Court (filing 35).

The appellants did not appear at the September 4 hearing. They contend they did not receive notice of the hearing in compliance with Fed. R. Civ. P. 4. Thus, the appellants argue it was this lack of formal notice that denied them the opportunity to oppose the motion of Arcadia State Bank. Mr. Bruce Abrahamson appeared "pro se" on his own behalf at the hearing to withdraw as attorney for the appellants. He indicated the appellants were not going to oppose the motion. Finding no objection, the Bankruptcy Court sustained the motion of Arcadia State Bank. The appellants filed an appeal from this decision for the reason mentioned above. They further moved for a stay pending appeal which was denied by the Bankruptcy Court.

The appellants have included in the record a letter dated August 24, 1984, from Bruce Abrahamson that states in part:

As I have advised you by phone, the Arcadia State Bank has refiled their Motion for Relief from the Stay which has been set for September

4, 1984 at 1:30 P.M. . . . Also, if you intend to oppose the Relief from Stay action mentioned hereinabove, I strongly suggest that you have an appraiser prepare an appraisal for you prior to the September 4, 1984, hearing date or I am sure that Judge Crawford will grant their motion. (Filing 45, attachment B).

Mr. Abrahamson also indicated in the letter his intention to withdraw from their case if certain conditions were not met by August 30, 1984. The appellants contend they received this letter on August 31, 1984.

On August 31, 1984, the appellants notified the Bankruptcy Court and Mr. Bruce Abrahamson, by registered mail, return receipt requested, that they were requesting that proper notification of all matters concerning their case pending before the Bankruptcy Court be noticed to the debtors directly, and not through some attorney. (Appellants Brief at 1 and Filing 45A).

The appellants appeared at the hearing on the motion for a stay pending appeal and explained their situation to the Bankruptcy Court. After allowing the appellee a chance to respond, the Bankruptcy Court held "that there was appropriate notice of the motion for the hearing on the motion for vacation of the stay . . . and I find that notice was appropriate either through notice given by the moving party or notice given by the debtor's attorney to the debtor." (Filing 64 at 9-10).

This Court does not find any error with the decision of the Bankruptcy Court. The appellants by their own admission received notice of the hearing from their attorney of record. He did not proceed to withdraw until September 4, 1984. Furthermore, the

Bankruptcy Court did not err in finding notice by the appellee was sufficient, in spite of the allegations by the appellants they did not receive it.

Both the fifth and fourteen amendments of the United States Constitution prohibit governmental actions which would deprive "any person of life, liberty or property without due process of law." U.S. Const. amd. V and XIV. But due process has several different meanings. In the procedural aspect, the clauses guarantee that each person shall be accorded a certain "process" if they are to be deprived of life, liberty or property. "Where the power of the government is to be used against an individual, there is a right to a fair procedure to determine the basis for, and legality of, such action." J. Nowak, R. Rotunda, J. Young, Constitutional Law 526-27 (5th ed. 1983).

The question thus focuses on the nature of the "process" that is "due." "In all instances the state must adhere to previously declared rules for adjudicating the claim or at least not deviate from them in a manner which is unfair to the individual against whom the action is taken." Nowak at 527. The essential elements of the rules are (1) adequate notice; (2) a neutral decision-maker, and (3) an opportunity to be heard. The issue here is the nature of notice required in order for it to be adequate.

A bankruptcy court is required to grant relief from an automatic stay or request of a party in interest and after notice and a hearing. 11 U.S.C. § 362(d). "After notice and a hearing,"

is a term of art in the law with a special meaning in the Bankruptcy Code:

In this title . . . 'after notice and a hearing,' or a similar phrase . . . means after such notice as is appropriate in the particular circumstances, and such opportunity for a hearing as is appropriate in the particular circumstance. . . .

11 U.S.C. § 102(1)(A).

Bankr. Rule 9007 provides "[W]hen notice is to be given under these rules, the court shall designate, if not otherwise specified herein, the time within which, the persons to whom, and to whom, and the form and manner in which notices shall be given."

The order of the Bankruptcy Court dated August 10, 1984, required the requesting party's attorney to serve a copy of the request on the parties against whom relief is requested and their attorneys. If service is by mailing compliance shall be sufficient if the mailing is deposited in the mail within four business days from the date of the order. The requesting party's attorney was also ordered to file proof of service at least three business days prior to the hearing.

Bankr. Rule 7004 provides that Fed. R. Civ. P. 4(a), (b), (d), (e) and (g)-(1) applies. The Rule further states:

(b) SERVICE BY FIRST CLASS MAIL. In addition to the methods of service authorized by Rule 4(d) F. R. Civ. P., service may be made within the United States by first class mail postage prepaid as follows:

(1) Upon an individual other than an infant or incompetent, by mailing a copy of the summons and complaint to his dwelling house or usual place of abode or to the place where he regularly conducts his business or profession.

The appellee's attorney complied both with the order of the Court and this rule by mailing a copy to the Franzens at their address. Proper notice was given.

Fed. R. Civ. P. 4(g) states that "[f]ailure to make proof of service does not affect the validity of the service." Regardless, the Court believes proof of service to be adequate in this case. First, contrary to the appellants' argument, Fed. R. Civ. P. 4(c) does not apply to bankruptcy cases, therefore, the portion of Fed. R. Civ. P. 4(g) that states, "If service is made under subdivision (C)(2)(C)(ii) of this rule, return shall be made by the sender's filing with the court the acknowledgment received pursuant to such subdivision," is not applicable.

Furthermore, Local Rule 17 provides, "[P]roof of service may be made by certificate of counsel, or by written receipt, or by affidavit, or by return of the United States Marshal, or by other proof satisfactory to the court. The proof of service shall show the name and address of each person served."

The certificate of counsel and counsel's testimony the letter was not returned to the sender are sufficient to create the presumption that notice was given. The Bankruptcy Court did not err in finding the appellants failed to overcome the presumption. Arkansas Motor Coaches, Ltd. v. Commissioner, 198 F.2d 189, (8th Cir. 1952) (strong presumption letters duly mailed are received). In re Thole, 31 B.R. 548 (Bankr. D. Minn. 1983) (presumption of receipt not rebutted by mere allegations of non-receipt when letter deposited first class mail, properly addressed, postage

prepaid and never returned by the postal service). But see In re Levins, 563 F.2d 1223, 1224-25 (5th Cir. 1977) (Court noted placing of letter in mailbox does not provide creditor's notice of its contents, only receipt can do that. The Court never reached the issue of whether notice of the contents to the creditor's attorney was sufficient. However, in that case, a specific date was not included in the notice to the attorney and there was no indication either the creditor or creditor's attorney was aware of the specific deadline, unlike in the case at bar, where both the appellants and their attorney were fully aware in advance of the time and place of the hearing.)

One of the reasons that a return receipt is required under 4(c) is to insure that a party has been properly served to ensure that the court has jurisdiction over the parties. That is not at issue in this case. The appellants filed the bankruptcy petition. Thus, they already subjected themselves to the jurisdiction of the Court. Therefore, the actual notice of the time and place of the hearing that the appellants admit receiving would be sufficient to satisfy due process, especially under this particular fact pattern. Formal notice was received by the appellants' attorney of record who in his then-authorized capacity informed the appellants of the hearing. One of the reasons for giving notice of the hearing to a party's attorney is so that he or she can keep the client informed, which the attorney did in this case.

The Bankruptcy Court's decision that a stay should not be granted the Franzens pending this appeal was not clearly erroneous. The standards governing discretionary stay pending an appeal are:

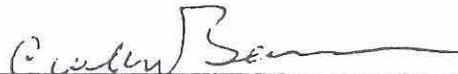
- (1) the likelihood of success on the merits of the appeal;
- (2) the injury suffered by the appellant in denying a stay;
- (3) the injury to the appellee by granting the stay; and
- (4) the harm to the public interest.

In re Howley, 38 B.R. 314, 315 (Bankr. D. Minn. 1984); Reserve Mining Co. v. United States, 498 F.2d 1073 (8th Cir. 1974), stay denied, 419 U.S. 802, application denied, 420 U.S. 1000, modified in part, 514 F.2d 492 (8th Cir. 1975). At the hearing on the motion for stay, the appellants did not establish there was any chance of success on the merits. In addition, the appellee raised sufficient issues that it would suffer damage if the stay were reinstated.

IT IS THEREFORE ORDERED that the judgment of the Bankruptcy Court is affirmed.

DATED this 5th day of March, 1985.

BY THE COURT:



C. ARLEN BEAM
UNITED STATES DISTRICT JUDGE