
In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:)	
)	
TAIYO CORPORATION)	Chapter 11 Case
A Georgia Corporation)	Number <u>93-41092</u>
)	
<i>Debtor</i>)	
)	
)	
)	
SAVANNAH SHERATON)	
CORPORATION)	
)	
<i>Movant</i>)	
)	
)	
v.)	
)	
TAIYO CORPORATION)	
)	
<i>Respondent</i>)	

**ORDER ON MOTION FOR ADDITIONAL STAY RELIEF
AND FOR EXPEDITED HEARING**

The above-captioned Motion was heard on December 22, 1993. Based on stipulations of counsel I find that the following facts are not in dispute:

On June 25, 1993, Taiyo Corporation ("Debtor") filed its Chapter 11 bankruptcy case, and on July 16, 1993, Sheraton Savannah

Corporation ("Sheraton") filed a motion for relief from automatic stay or for dismissal. Prior to the continued hearing on Sheraton's motion on September 19, 1993, Sheraton and Debtor entered into a proposed consent order which provided for stay relief. In consideration for Taiyo's consent, Sheraton agreed to delay advertising the property until November (with a sale on December 7, 1993) so that Taiyo would have additional time within which to continue to negotiate for a sale of the Savannah Sheraton Resort and Country Club. Sheraton also agreed to keep the agreement with Taiyo in confidence so that media publicity would not jeopardize Taiyo's negotiations. Sheraton performed its obligations under the agreement.¹ On November 1, 1993, after notice and a hearing, this court entered an Order modifying the automatic stay to allow Sheraton to exercise its remedies under its deed and applicable state law. *See In the Matter of Taiyo Corp., Ch.. 11 Case No. 93-41092, Slip Op. (Bankr. S.D. Ga. Nov. 1, 1993)*

Sheraton subsequently foreclosed on the property and now asks this Court to grant further relief from the stay consisting in essence of the following:

- (1) Prohibition of Debtor's concealment, alteration, or destruction of various documents or records of the debtor-corporation;

¹ While this consent was executed by counsel for both parties it was not presented to the court for approval nor was notice of any proposed settlement given pursuant to Bankruptcy Rule 4001(d). Rather it was retained by Sheraton's counsel during the pendency of this Court's ruling on the motion for relief.

- (2) Prohibition against Debtor's interference in Sheraton's operation of the hotel property which was the subject of the Motion; and
- (3) Permission to institute dispossessory actions and confirmation of foreclosure actions under applicable state law.

Debtor objected to the entry of the order. Following lengthy argument of counsel for both sides, Debtor's counsel conceded that no aspect of the proposed order sought by Sheraton would be inappropriate but for the fact that a civil action has been filed by the Debtor in the Northern District of Georgia styled Taiyo Corporation v. Savannah Sheraton Corporation, Civil Action No. 1:93-CV-28130DE. In that action, Debtor challenges the effectiveness of this court's Order, entered November 1, 1993, modifying the automatic stay to allow Sheraton Savannah Corp. to exercise its remedies under its deed and applicable state law. Debtor contends in that action that the Order was ineffective with the result that the automatic stay was not lifted and that Sheraton acted in violation of the stay when it foreclosed upon the property which is the subject of that Order. The parties stipulated that no order has been entered in the Northern District of Georgia either in response to the Plaintiff's complaint seeking to set aside the foreclosure or in response to Sheraton's Motion to Dismiss the complaint.

I am faced, as a result, with the question of whether to grant additional relief to Sheraton, which is conceded by all parties to be entirely appropriate, assuming that my November 1st Order is final, binding and *res judicata* on all interested parties. It is conceded that the only reason that the November 1st Order would not be binding on the parties is the pendency of the lawsuit in the Northern District of Georgia. Therefore, while the ultimate

determination of the validity or invalidity of my order or the foreclosure must await the determination of the United States District Court for the Northern District of Georgia, a preliminary evaluation of Debtor's contentions in that litigation is necessary in determining whether the additional relief sought by Sheraton is appropriate for me to entertain at this juncture.

Debtor's basic contention in the litigation pending in the Northern District is that this court's Order in this proceeding, entered November 1 1993, is "ineffective" because a separate judgment was not entered in accordance with Bankruptcy Rule 9021. Thus, according to Debtor, Sheraton acted in violation of the automatic stay when it proceeded to foreclose on the property which was the subject of the November 1st Order without the Clerk having entered a separate judgment upon the docket.

Bankruptcy Rule 9021 provides:

Except as otherwise provided herein, Rule 58 F.R.Civ.P. applies in cases under the Code. Every judgment entered in an adversary proceeding or contested matter shall be set forth on a separate document. *A judgment is effective when entered as provided in Rule 5003.* The reference in Rule 58 F.R.Civ.P. to Rule 79(a) F.R.Civ.P. shall be read as a reference to Rule 5003 of these rules.

Fed.R.Bankr.P. 9021 (emphasis added). The Rule contains, in essence, two separate commands. The first is that every judgment in an adversary proceeding or contested matter "shall be set forth on a separate document." Nevertheless, the only provision which deals with whether a judgment is "effective" is the second command of Rule 9021, which provides that a judgment is only effective "when entered as provided in Rule 5003." This sentence, as I interpret Rule 9021, is the enforcement provision of the rule, and does not contain the

additional requirement, as Rule 58 expressly does, that a judgment be set forth on a separate document to be effective.² Rather it is effective when entered as provided in Rule 5003 which provides in relevant part:

(a) The clerk shall keep a docket in each case under the Code and shall enter thereon each judgment, order, and activity in that case as prescribed by the Director of the Administrative Office of the United States Courts. The entry of a judgment or order in a docket shall show the date the entry is made.

In conformity with this Rule the Clerk entered my order dated November 1, 1993, as docket entry number 41 on November 1, 1993. As a result I did not direct nor did the Clerk prepare a separate judgment on my November 1st Order since it was not required to be kept separately under Rule 5003(c).³ The Order was, however, entered on the

² The first and third sentences of Rule 9021 are critical in understanding how Rule 9021 differs from Rule 58. The first sentence states that "[e]xcept as otherwise provided herein, Rule 58 F.R.Civ.P. applies in cases under the Code." One of the things which Rule 9021 "otherwise provides" is found in the third sentence, which states that "[a] judgment is effective when entered as provided in Rule 5003". In contrast, Rule 58 provides that "[a] judgment is effective *only when so set forth* [on a separate document] *and* when entered as provided in Rule 79(a)." (emphasis added). Thus, Rule 9021 does not contain an express requirement, as Rule 58 does, that a judgment be set forth on a separate document to be "effective".

Cases applying Rule 9021 have generally held that judgments must be entered upon a separate document. *See e.g., Reid v. White Motor Corp.*, 886 F.2d 1462 (6th Cir. 1989) *cert. denied*, 494 U.S. 1080, 110 S.Ct. 1809 (1990); *Matter of Seiscom Delta, Inc.*, 857 F.2d 279 (5th Cir. 1988); *Matter of Kilgus*, 811 F.2d 1112 (7th Cir. 1987); *In re Ozark Restaurant Equipment Co.*, 761 F.2d 481 (8th Cir. 1985); *In re Rehbein*, 60 B.R. 436 (9th Cir. BAP 1986); *In re Campbell*, 48 B.R. 820 (D.Colo. 1985). The holdings are not unanimous, however. *See Hendrick v. Avent*, 891 F.2d 583, 586 (5th Cir. 1990), *cert. denied*, 498 U.S. 819, 111 S.Ct. 64 (1990).

Significantly, none of the above-cited cases involved orders on motions for relief from the automatic stay. In fact, with the possible exception of *Reid v. White Motor Corp.*, the entry of a separate judgment was required, not due to the text of Rule 9021, but under Bankruptcy Rule 5003(c) in each of the above-cited cases because they involved awards of monetary damages (*Seiscom*, *Kilgus* and *Ozark*) or affected title to property (*Hendrick* and *Rehbein*).

³ Rule 5003(c) provides as follows:

The clerk shall keep, *in the form and manner as the Director of the Administrative Office of the United States Courts may prescribe, a correct copy of every final judgment or order affecting title to or lien on real property* or for the recovery of money or property, and any other order which the court may direct to be kept. On request of the prevailing party, a correct copy of every judgment or order affecting title to or lien upon real or personal property or for the recovery of money or property shall be kept and indexed with the civil judgments of the district court.

docket by the Clerk in accordance with Rule 5003(a).

The question of whether my Order of November 1st was entered in accordance with Bankruptcy Rule 9021 is now before the United States District Court for the Northern District of Georgia. Even assuming an adverse decision, however, I conclude that the Order is not rendered void, as Debtor contends in the litigation, but merely that Debtor's time to appeal is extended.

The United States Supreme Court has said the following about the separate-document requirement:

The *sole purpose* of the separate-document requirement, which was added to Rule 58 in 1963, was to clarify when the time for appeal under 28 U.S.C. § 2107 begins to run.

Fed.R.Bankr.P. 5003(c) (emphasis added). This provision requires additional record-keeping as to certain types of judgments. The Director of the Administrative Office of the United States Courts through the *Clerks Manual, United States Bankruptcy Courts* has elaborated on the emphasized language as follows:

§29.05. Lien Effect

The clerk also is required to keep, in the form and manner prescribed by the Director of the Administrative Office, a correct copy of every final judgment or order affecting title to or lien on real property or for the recovery of money or property, and any other order which the court may direct the clerk to keep. [Bankruptcy Rule 5003(c).] *The effect upon title to or lien on real property is solely that of an actual transfer of title from one party to another or actual lien placed on such real property as a result of an order of the bankruptcy court itself. Orders or judgments, for instance, which merely facilitate proceedings that could later produce other orders that affect title, i.e., an order lifting the stay and permitting foreclosure, are not within the intent of the rule*

Clerks Manual, United States Bankruptcy Courts, Volume III, Second Edition, Revised 12/91 (emphasis added).

In the case before me, the order which I signed November 1, 1993, which was entered by the Clerk on November 1, 1993, is in the latter category. That is, by the terms of the order, no title to real estate was transferred. Instead the order had the effect of permitting a party to exercise its state law remedy, a non-judicial foreclosure and it is the non-judicial foreclosure which "affected the title of the debtor to or the creditor's lien upon" the real property.

Bankers Trust Co. v. Mallis, 435 U.S. 381, 384 98 S.Ct. 1117, 1120 (1978) (per curiam) (emphasis added). The Supreme Court acknowledged in Mallis that the separate-document requirement of Rule 58 should be applied mechanically, but held that the failure of the district court to comply with the requirement was not fatal to the Court of Appeals' appellate jurisdiction because the parties had effected a waiver of the requirement. "The need for certainty as to the timeliness of an appeal . . . should not prevent the parties from waiving the separate-judgment requirement where one has accidentally not been entered." Mallis, 435 U.S. at 386 98 S.Ct. at 1121 (1978).

It is manifest to this court that a party could not waive the separate-document requirement for purposes of appeal if the substantive decision of the lower court contained in the order or judgment not entered on a separate document was rendered void. It is apparent from the Supreme Court's application of the separate-document requirement that the term "effective" means only that the time for appeal does not run until there is such an entry but there is no suggestion that an otherwise valid judgement or order is void. "It is entirely too late in the day and entirely contrary to the spirit of the Federal Rule of Civil Procedure [or Bankruptcy Rules of Procedure] for decisions on the merits to be avoided on the basis of such mere technicalities." Mallis, 435 U.S. at 387 98 S.Ct. at 1121 (1978) (citations omitted).

As a result, I conclude that the November 1, 1993, Order is not void and that the likely result, if Debtor is successful in the District Court litigation, may be a finding that the time to appeal the Order has not begun to run. If so, the proper consideration to be given to the pendency of the District Court litigation is to treat it the same as if it were an appeal

of my November 1st Order. Under those circumstances there would be no stay of the Order merely because a timely appeal was filed by Debtor, in the absence of a supersedeas bond. Bankruptcy Rule 7062 provides that orders granting relief from the automatic stay are "exceptions to F.R.Civ.P. 62(a)." Thus there is no prohibition upon execution on an order granting relief under Section 362 in the absence of posting a bond pursuant to Rule 62(d). No such bond has been obtained in this case.

Accordingly, I find that Sheraton would be free to execute on that Order and, as a result, cause exists under 11 U.S.C. Section 362 for entry of an order granting additional relief to the Movant. IT IS THEREFORE ORDERED that upon Sheraton's consummation of a foreclosure sale of the property, Taiyo shall cooperate in an orderly transition of the property, and after such foreclosure Taiyo shall not take any action of any kind or nature whatsoever, either directly or indirectly, to oppose, impede, obstruct, hinder, enjoin or otherwise interfere with the exercise by Sheraton of any of Sheraton's rights and remedies against or with respect to the property.

IT IS FURTHER ORDERED that pending Sheraton's pursuit of its remedies under its security deed, Taiyo shall not alter, conceal, destroy, or spoliage any of the following:

- (1) Any termite bond and all renewals or extensions thereof;
- (2) Copies of all insurance policies;
- (3) All books and records relating to the property;
- (4) Copies of all contracts relating to the property;

- (5) The operating reports for the property for July, 1993, and August, 1993 (if in existence and readily available);
- (6) Any other agreements between Taiyo and any other party with respect to the property;
- (7) Any accounts payable and accounts receivable lists;
- (8) Copies of any warranties with respect to the property;
- (9) Any and all equipment manuals with respect to any equipment located at the property;
- (10) Any environmental reports with respect to the property; and
- (11) Tax statements and any paid tax receipts related to the property.

IT IS FURTHER ORDERED that Sheraton is permitted to exercise its state law remedies to seek to take possession of the property, if necessary, and to confirm the results of said foreclosure sale in accordance with State law.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This ___ day of January, 1994.