

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

In the matter of:

ALLARON BROKERAGE
SYSTEMS, INC.
(Chapter 11 Case 92-20098)

Debtor

ALLARON BROKERAGE
SYSTEMS, INC.

Plaintiff

v.

PAUL FILLERS
MARTHA FILLERS

Defendant

Adversary Proceeding

Number 92-2076

FILED

at 8 O'clock & 40 min AM

Date 6/11/93

MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia

SH

MEMORANDUM AND ORDER

On May 4, 1993, the court held a hearing on Debtor's Motion for Reconsideration. Upon consideration of the argument of the parties at the May

hearing, the pleadings in the case, and the evidence adduced in related hearings in Debtor's Chapter 11 case, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Defendants, Paul and Martha Fillers, originally leased certain property to Nella Strickland and Geneva Culpepper. This lease prohibited transfer or assignment without the express consent of the lessor. *See* Lease dated October 17, 1990, attached to Defendant's Motion for Relief from Stay filed March 30, 1992, in Debtor's Chapter 11 case. Mrs. Strickland, personally and as successor to Mrs. Culpepper, assigned the lease to Debtor with rental payments of \$2,000.00 per month beginning November 1, 1991. *See* Assignment filed with Defendant's Motion for Relief from Stay. On or about November 15, 1991, Ron Thomas, a principal of the Debtor, paid the \$2,000.00 rent due on the property to the Fillers. Thomas tendered a check for \$2,000.00 for the December payment; however, this check was not cashed. Defendants never consented to the assignment or transfer of the property and believed the payment accepted from Thomas was actually made on behalf of Mrs. Strickland.

On December 19, 1991, Defendant, Paul Fillers, filed a dispossessory action against Ron Thomas and Euley Morgan in the Magistrate Court of Wayne County. On January 29, 1992, a hearing was held in the dispossessory action before the magistrate judge. On February 6, 1992, the magistrate judge signed a writ of possession ordering that Thomas and Morgan return possession of the property to the Defendants. The judge also rendered judgment for Defendants in the amount of \$4,000.00, the amount of unpaid rent. On February 7, 1992, Defendants executed the writ of possession and dispossessed Thomas and Morgan. Debtor, which operated a nursing home on the premises, argues that the dispossessory action violated the automatic stay. Debtor's bankruptcy petition was filed on January 31, 1992, after the dispossessory hearing and before execution of the writ of possession. Notice of the bankruptcy proceeding was mailed to all creditors, including Defendants, on February 14, 1992.

On February 10, 1992, the magistrate's writ of possession was appealed to the Superior Court. By order dated March 13, 1992, *nunc pro tunc* February 27, 1992, the Superior Court entered an interim order restoring possession of the premises to Debtor and concluding that an issue remained as to the existence of a landlord-tenant relationship between Debtor and Defendants. The Superior Court further

ordered Debtor to pay rent upon being restored to the property and ordered Defendants to provide an accounting of funds received and disbursed between execution of the dispossessory and return of the property to Debtor. The accounting reflects that Defendants took in \$3,840.00 in receipts and disbursed \$4,505.75 during the three week period they were in possession. *See Accounting of Funds* attached to Plaintiff's adversary complaint.

On March 30, 1992, Defendants in the adversary filed a Motion for Relief from Stay to obtain possession of the property at issue. After hearing on May 13, 1992, the court granted the motion in part allowing the State Court proceedings, including a possible jury trial, to continue. The Superior Court appeal was subsequently dismissed without a final ruling on the merits.

On September 14, 1992, Debtor filed the instant adversary proceeding alleging that the dispossessory action violated the automatic stay. Debtor claims that it was damaged by the dispossessory in that Defendants collected rental payments owed to Debtor from the nursing home tenants during the time Defendants maintained possession. Debtor also alleges that four tenants left the care home after Debtor was returned to possession and that the tenant loss caused Debtor's monthly

income to drop.

Upon motion of the United States Trustee, Debtor's Chapter 11 case was dismissed by order filed November 9, 1992. However, Debtor's adversary proceeding against Defendants remained pending and was set for trial on February 12, 1993. Debtor failed to appear and an order dismissing the adversary proceeding was filed March 2, 1993. On March 16, 1993, Debtor filed a Motion for Reconsideration. Debtor argued at the May 4, 1993, hearing on the motion that the State Court proceedings should not be considered *res judicata* as Debtor was not a named party to the action. Defendants opposed the motion citing the history of the dispossessory proceeding and Debtor's bankruptcy case.

CONCLUSIONS OF LAW

The automatic stay provisions of 11 U.S.C. Section 362 protect the debtor from repossessions of property. *See* 11 U.S.C. §362(a)(3), (4) and (5). Specifically, Section 362(a)(3) operates to stay "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate. This subsection has been interpreted as staying an attempted

ouster or dispossession of a lessee after commencement of a bankruptcy case. See 2 Collier on Bankruptcy, ¶362.04[3] at 362-38 (15th Ed. 1993). See also Matter of Mimi's of Atlanta, Inc., 5 B.R. 623, 627 (Bankr. N.D.Ga. 1980), aff'd, 11 B.R. 710 (N.D.Ga. 1981); In re Butler, 14 B.R. 532, 535 (S.D.N.Y. 1981); In re Lowry, 25 B.R. 52, 55 (Bankr. E.D.Mo. 1982).

In order to recover damages under 11 U.S.C. §362(h) for an alleged violation of the automatic stay, the Debtor must show injury caused by a willful violation of the automatic stay. A violation is "willful" if the violator commits an act proscribed by Section 362(h) with knowledge that a bankruptcy case is pending, or knowledge of "sufficient facts which would cause a reasonably prudent person to make further inquiry" to determine whether a petition had been filed. In re Bragg, 56 B.R. 46, 49 (Bankr. M.D.Ala. 1985). A debtor's statement that he has filed bankruptcy is adequate notice; an "official" notice from the court is not necessarily required. Id.

According to the court's file, Debtor mailed notice of the Chapter 11 petition to creditors on February 14, 1992, the deadline set forth in the court's order of February 6, 1992. Therefore, it is clear that Defendants did not have "official" notice of the bankruptcy proceeding until after the dispossession warrant was executed

and there was no evidence that Defendants had actual knowledge of the filing on February 7, 1992. Also, it is not clear that Defendants knew of or understood Debtor's possible interest in the property. Under these facts there can be no willful violation of the automatic stay, particularly where the dispossessory was filed only against non-debtor individuals.

Second, the order complained of issued only against Thomas and Morgan individually and not Debtor. The execution of the writ against a non-debtor provides no avenue of recovery for a stay violation. Debtor argues, however, that in evicting Thomas and Morgan, the Debtor corporation was, in fact, evicted, if not by the express terms of the order, and that such constitutes a stay violation. However, the issue of whether the writ was executed against the real party in interest was raised on appeal to the Superior Court where the Debtor corporation argued that the writ issued against the individuals was a legal nullity. When that appeal was dismissed on November 18, 1992, under principals of *res judicata* there can be no further attack on the validity of the writ as issued. I. A. Durbin, Inc. v. Jefferson Nat. Bank, 793 F.2d 1541, 1549 (11th Cir. 1986). Debtor as a party in privity with the Defendants in the dispossessory is bound by the Superior Court's order dismissing the appeal of the dispossessory which made the judgment of the magistrate final. Debtor may not

prosecute a second claim, based upon the same contentions that were abandoned in the prior proceeding, in this court.

For the foregoing reasons the Motion to Reconsider is denied.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that Plaintiff's Motion for Reconsideration is denied. This adversary proceeding is dismissed with prejudice in accordance with the court's order filed March 2, 1993.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 9th day of June, 1993.