

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF HAWAII

IN RE)	
)	CASE NO. 16-00239
LEONARD G. HOROWITZ,)	(Chapter 13)
)	
)	
Debtor.)	April 12, 2016
)	10:21 a.m.
)	
)	
)	U.S. Bankruptcy Court
)	1132 Bishop Street
)	Suite 250
)	Honolulu, Hawaii 96813

TRANSCRIPT OF PRELIMINARY HEARING ON MOTION FOR RELIEF FROM THE
AUTOMATIC STAY
BEFORE THE HONORABLE ROBERT J. FARIS
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For Debtor: MARGARET (DUNHAM) WILLE, ESQ.
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1 APRIL 12, 2016

10:21 A.M.

2 THE CLERK: Calling 16-00239, Leonard Horowitz. This
3 case is called for a preliminary hearing motion for relief from
4 the automatic stay.

5 THE COURT: Go ahead, please.

6 MR. SULLA: Good morning, Your Honor, Paul Sulla
7 representing the movant Jason Hester, the Creditor.

8 MS. WILLE: Margaret Wille for the Debtor Leonard
9 Horowitz.

10 THE COURT: All right. And you're Mr. Horowitz -- Dr.
11 Horowitz, excuse me.

12 THE DEBTOR: Yes, sir.

13 THE COURT: Well, first of all, let me say that I
14 typically -- in a Chapter 13 case, we typically don't let
15 attorneys appear for just part of the case. Usually, you're in
16 or you're out, but given the circumstances here, I will go ahead
17 and let you appear for this hearing --

18 MS. WILLE: Okay.

19 THE COURT: -- and let you argue. But, of course, if
20 there's an attorney arguing, the client doesn't get to argue. So
21 it's one or the other.

22 MS. WILLE: Right.

23 THE COURT: And let me just tell you what I think,
24 tentatively, based on the papers, because there have been a lot
25 of papers filed, and I have read them carefully.

1 I mean it seems to me that although the Debtor
2 disagrees strongly with the State Court's orders, the State Court
3 has decided that the Debtor doesn't own this property anymore.
4 That the foreclosure occurred, and was valid, and the title is no
5 longer in the Debtor.

6 As a Federal Court, particularly a Bankruptcy Court, I
7 can't sit as an Appellate Court saying to the State Court; the
8 State Court got it wrong. If you want to attack the State
9 Court's orders, you got to do that through the State Court
10 system, and it seems to me that this case has no chance of
11 success and really no reason for being, unless those orders could
12 be set aside.

13 So my inclination is to grant the motion and send you
14 all back to State Court and let the State Appellate Courts sort
15 out where we stand. So that's my tentative inclination, subject
16 to hearing from you. So, Mr. Sulla, I'll let you go first,
17 because it's your motion.

18 MR. SULLA: Thank you, Your Honor. This motion was
19 more brought as a safe harbor, because of all the litigation
20 we've had, and we're concerned that we would be challenged if we
21 move forward with our writ of ejectment, but in this case, Your
22 Honor, there is absolutely no reason for there to be a stay.
23 There's no record title that ever has been in the Debtor.
24 There's no equitable title. The title has been quieted. There's
25 no possessory interest whatsoever, and it's been found to be a

1 tenant at sufferance.

2 So -- and he does not reside in the property. He
3 resides in Honolulu, as he states in his adversary complaint.
4 He's advertising it and renting it. And now -- recently -- now
5 they're proposing it as a community center in the latest filing.
6 So, you know, basically, his only claim has been through the
7 affiliation with the prior owner, Royal Bank -- excuse me --
8 Royal Bloodline of David and that interest was foreclosed in
9 2010. It was dissolved in 2012. Now, we have a final judgment
10 quieting title against all the interests.

11 So his only claim for possessor interest is very
12 nominal. There's no commercial value. He's a tenant in
13 sufferance. It has been found that way. And so we, basically,
14 lack adequate protection so that -- against his continued
15 holdover, and in our final judgment we needed the writ of
16 possession to go forward with it.

17 And right now we're also asking for a waiver of the
18 Federal Rule 4001(a)(3), to avoid further deterioration of the
19 property, because there's been no rent paid in the six years, no
20 use in occupancy, and there's a tax lien that's pending over us
21 right now and there's been no money on that except my client has
22 come up with money paid in lump sum a few years back, but he
23 can't do it again without getting back into the property.

24 And as far as the other pleadings, Your Honor, Mr.
25 Horowitz likes to confuse things with the complaint. There was

1 one action in 2005, which was a judicial attempt by predecessor,
2 which didn't result in much, actually, at all. And then, again,
3 in the 2010 case where we have basically -- the 2010 foreclosure
4 was when the term of the note was over and there's been no
5 payments. He stopped paying.

6 So then we further went on -- there was a gap, because
7 there was a defamation case that went on for many years here in
8 this case. That's finally been, basically, dismissed. Further,
9 with the quiet title action, we have that now and the only
10 equitable title the Debtor has is basically speculation based on
11 the outcome of the appeal.

12 And they have a hearing at the end of the month for
13 their stay with the State Court, the writ of possession where
14 that's where they have their chance for the stay. They filed
15 stays already, Your Honor. I'm sure they will file a few more
16 before then, but that's what we're looking for now.

17 THE COURT: Okay.

18 MR. SULLA: So we're looking to have the relief of
19 the stay -- or, actually find that there is no stay and have
20 immediate right to exercise our writ. Thank you, Your Honor.

21 THE COURT: Okay. Go ahead, please.

22 MS. WILLE: Yes. Yes, Your Honor. First, I want to
23 say that the pending -- the quiet title case is still pending,
24 and we do have a hearing. And so, there's no final determination
25 on that. There was a writ of ejectment given, but, you know, in

1 my opinion it was given wrongly and the Court has now asked for a
2 hearing on that, that it should have been issued.

3 I think just in terms of adequate protection that's
4 being discussed in terms of removing it for cause and also for
5 waiving the Rule 4001(a)(3), the, you know, statutory -- the hold
6 over, basically I think the key -- or the one potentially
7 legitimate argument I see there is that it's about to go up to a
8 tax sale, and that's not true, and I do have letters from the Tax
9 Office substantiating that this is not in jeopardy. This is his
10 home. There is hundreds of thousands of dollars in improvements,
11 and money into that.

12 The property is critical for reorganization. It's also
13 not just in terms of whether it's used as a B&B or agritourism,
14 but also there's an adjoining property that it could be
15 consolidated, broken off. We would succeed in that. I think the
16 key argument or issue that you're talking about is really sort of
17 the Rooker-Feldman or if you get into the res judicata
18 preclusion.

19 THE COURT: Right.

20 MS. WILLE: I disagree on that, because really, you
21 know, the Ninth Circuit, Seventh Circuit read that whole theory
22 or that principle more narrowly and that if you do have an
23 independent claim, and you don't have a final decision, which we
24 don't have a final decision in this case, the Court is at liberty
25 to move forward -- does honor concurrent --

1 THE COURT: Well, why do you say there's no final
2 judgment in the State Court? I thought -- Mr. Sulla said the
3 hearing later this month is on a stay pending appeal.

4 MS. WILLE: That's what --

5 THE COURT: You're talking about the appeal; is that
6 it?

7 MS. WILLE: -- his house had gone to -- there's no
8 final decision in terms of appeal, it's still pending. And there
9 are cases that --

10 THE COURT: Oh, I see. So the State Court has -- the
11 trial court has made its final decision, but the appeal is
12 ongoing.

13 MS. WILLE: Yeah.

14 THE COURT: Okay. Now, I understand what you're
15 saying.

16 MS. WILLE: And the cases, I can give one example,
17 Anderson v. Anderson, 2014 U.S. Appellate, Lexus 2777, 2014. If
18 it's -- until it's settled and no longer on appeal, it is not
19 considered final for purposes of that principle. I think -- and
20 here, basically, what they're looking at is a separate issue is
21 the whole -- I would say calling it extrinsic fraud -- the whole
22 -- how this came about from the beginning and, basically, trying
23 to sell it to one party before them, and then they brought an
24 action for fraud, and then my client had to be paying garnishment
25 to that other party, and then they sold it to them again,

1 representing no encumbrances -- more encumbrances, and all along
2 the way, both from the original mortgagee seller to now, Hester
3 standing in their shoes, and I could run through a number -- all
4 of the different issues.

5 But I think the key thing is, you know, where you -- it
6 doesn't apply where the State Court appeal is pending, and it
7 doesn't apply when there's independent claim being brought. And
8 some of the cases are, for example, where there's a corrupt state
9 judicial process to obtain that favorable thing.

10 We do have a 2016, a March 5th -- 26th fifth final
11 judgment saying foreclosure denied, it's your property. It's
12 Horowitz's property and that there is no need for a deficiency
13 hearing.

14 So we've got one case where the foreclosure was denied,
15 based on the judicial foreclosure, and then the quiet title case
16 based on a non-judicial foreclosure, which we're challenging a
17 lot of what went on in that.

18 So -- and I agree that there's -- it's no assurance
19 whether the property would go to Hester or whether they owe him
20 money unless that State Court case wins, but I think then you get
21 down to, setting aside Rooker-Feldman, does preclusion or res
22 judicata apply and often those get sort of merged, but you need a
23 decision on the merits. There's never been a decision on any of
24 these issues on the merits for res judicata, or claim preclusion,
25 or issue preclusion.

1 So, you know, I don't -- you know, I think that there
2 is something here, and that they do have a right to that
3 concurrent jurisdiction, and it is necessary. It's really the
4 one asset around which they can reorganize, even with regard to
5 that separate piece of property.

6 So, I mean, I would ask that at least -- that the stay
7 be in place at least say four months, and then come back and look
8 at it, and go over it.

9 THE COURT: Okay. All right. Thank you. Any reply?

10 MR. SULLA: Yeah, I just again would like to point out
11 that it has never been the Debtor's property. He has never had
12 title. He has never had any claim that he would -- there was --
13 the earlier case is on appeal. The quiet title action is on
14 appeal. The parties have a chance to stay it if they're willing
15 to do that. There should not be any other interference here.

16 To have this Debtor, all of a sudden, claim he's got
17 some kind of superior interest or possessory interest, or need
18 for reorganization is pulling a rabbit out of a hat, because he
19 didn't have it to begin with, so how would he get it and be given
20 it through the Bankruptcy Court? That's the question here.
21 There's never been any discussion about money.

22 And reorganization is fine, if they want to get in, but
23 the way they've been going about it is to try to stall, and
24 delay, and use the courts, and be as litigious as possible, so
25 that they can keep their rights or defend as much as possible.

1 So in this case, Your Honor, there is no interest in this Estate.
2 Thank you.

3 THE COURT: Okay. Thank you. Okay. Well, I will
4 grant the motion primarily for the reasons I gave in my tentative
5 ruling, which I'll adhere to. The bottom line, it seems to me,
6 this case has been going on for a long time in the State Court.
7 There's an appeal going in the State Court, there's a motion for
8 a stay pending appeal in the State Court.

9 It just seems to me that the case ought to stay in the
10 State Court for the final adjudication. And, at this point,
11 based on the State Court's orders, which are on appeal, but based
12 on the orders that have been entered, this Debtor doesn't have an
13 interest in the property.

14 So for all those reasons, I will grant the motion. I
15 will not, however, grant the requested in rem relief. I don't
16 think that showing has been made in this case. There's only one
17 bankruptcy file for this case. There's a long showing of
18 litigation in the State Court, but I don't think the in rem
19 requirements have been met.

20 And I also don't think this is the kind of
21 extraordinary case where the waiver of the automatic stay of the
22 order is warranted, but other than that I'll grant the motion,
23 and I'll ask Mr. Sulla to please prepare a proposed order.

24 MS. WILLE: Let me just ask, so the -- he's going to
25 prepare the order, and then once you sign it, then it would be 14

1 days from then. How does that --

2 THE COURT: Right. Well, the rule basically -- the
3 rule basically spells out what happens, but the order lifting the
4 stay goes into effect, basically, 14 days after it's entered.

5 MS. WILLE: Fourteen days after you sign that order.

6 THE COURT: The Court enters it, right. The Clerk --

7 MS. WILLE: Okay.

8 THE COURT: -- puts the electronic stamp on it.

9 MS. WILLE: Okay. Thank you.

10 THE COURT: Okay. Thank you.

11 MR. SULLA: Thank you, Your Honor.

12 (Proceedings Concluded)

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CERTIFICATE

I, Jessica B. Cahill, court approved transcriber, certify that the foregoing is a true and correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

Dated: May 27, 2016



Jessica B. Cahill, CETD**-708