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UNITED STATES BANKRUPTCY COURT

DISTRICT OF ARIZONA

U.S. BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In re)
)
ALFONSO PATION RODRIGUEZ and)
IRMA R. RODRIGUEZ,)
)
Debtors.)

Chapter 13

Case No. 2-03-bk-12360-EWH

ALFONSO PATION RODRIGUEZ and)
IRMA R. RODRIGUEZ,)
)
Plaintiffs,)

Adversary No. 07-ap-00276-EWH

vs.)
)
STATE OF ARIZONA, on behalf of)
PEORIA POLICE DEPARTMENT,)
)
Defendant.)

MEMORANDUM DECISION

I. INTRODUCTION

The issue in this case is whether, in 1995, the State of Arizona violated the automatic stay of 11 U.S.C. § 362(a)¹ by obtaining an Order of Forfeiture and Remission ("Forfeiture Order") against the property of the Debtors during the pendency of their bankruptcy case. The parties have cross-moved for summary judgment. The Forfeiture Order was obtained without obtaining relief from the stay and the in rem action did not fall within any exception to the automatic stay of § 362(a), as it existed in 1995. Accordingly, the Debtors are entitled to judgment as a matter of law that the Forfeiture Order was a violation of the automatic stay and, thus, void.

¹ Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code under Title 11 of the United States Code.

1 II. FACTS

2 The Debtors filed a Chapter 13 petition on May 15, 1995 ("May 1995 case").
3 While the bankruptcy was pending, the Maricopa County Attorney, for the State of
4 Arizona on behalf of the Peoria Police Department ("State"), obtained the Forfeiture
5 Order against the Debtors' home ("Property"), and various personal property belonging
6 to the Debtors. In the Matter of: The Real Property Located at 7458 West Brown,
7 Peoria, Arizona, As More Particularly Described in Appendix One, et al., No. CV 94-
8 09493, Forfeiture Order entered October 18, 1995. The State had commenced the in
9 rem action in Maricopa County Superior Court on June 21, 1994, when the Debtors
10 were not in bankruptcy.² The Forfeiture Order states, at ¶ 3: "Pursuant to City of
11 Tempe v. Dimitriou, 175 Ariz. 237, 854 P.2d 1223 (App. 1993) and A.R.S. [§] 13-
12 2314(L),³ the forfeiture of the property in this matter is remedial in nature and not
13 punitive." The Debtors did not appeal the Forfeiture Order.
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16 The Debtors' May 1995 case was dismissed on November 22, 1995. The
17 Forfeiture Order was filed with Maricopa County Recorder's Office on December 5,
18 1995, but no further action was taken by the State and the Debtors remained in
19 possession of the Property. The Debtors filed their current case on July 15, 2003, and
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22 ² The Debtors' previous Chapter 13 case (94-71-GBN) was dismissed prior to the
23 commencement of the State's action. They also filed for bankruptcy again on October
24 11, 1994, after the State's action was pending, and that case (94-9075-RGM) was
25 dismissed on May 11, 1995. The only bankruptcy case pertinent here, however, is the
26 May 1995 case, which was pending when the Forfeiture Order was entered.

27 ³ A.R.S § 13-2314(L) provides, in part: "A civil action authorized by this section . . . is
28 remedial and not punitive and does not limit and is not limited by any other previous or
subsequent civil or criminal action under this title or any other provision of law."

1 their Chapter 13 Plan was confirmed on July 26, 2004. Their case is still pending.⁴ The
2 Forfeiture Order was recorded again with the County Recorder's Office on
3 December 26, 2006. The State sent the Debtors an eviction notice on April 5, 2007,
4 directing them to vacate the Property by May 7, 2007. The Debtors filed the instant
5 Adversary Proceeding on May 3, 2007. The Debtors have resided at the Property since
6 the Forfeiture Order was issued in 1995 until the present.
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8 III. PROCEDURAL HISTORY AND DEVELOPMENT OF ARGUMENTS

9 The Debtors' Complaint⁵ alleges that the State violated the automatic stay of
10 § 362(a) by recording its lien on December 26, 2006, and subsequently issuing the
11 eviction notice, because the underlying 1995 civil judgment had expired under state law
12 and was no longer valid when the State took its action. After answering, the State
13 moved for summary judgment, arguing that because the Debtors lost any and all
14 interest they may have had in the Property when the Forfeiture Order was entered, the
15 Property was not part of the bankruptcy estate. The State also argued that the
16 "Renewal of Judgment" statute does not apply to the criminal case that resulted in
17 forfeiture of the Property.
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20 In response, the Debtors cross-moved for summary judgment, raising a new
21 argument -- that the Forfeiture Order had never been valid, not that it had expired. The
22 Debtors argued that the October 1995 Forfeiture Order violated the automatic stay
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25 ⁴ The Debtors received their discharge on January 8, 2008.

26 ⁵ The Complaint is against the State of Arizona, on behalf of the Peoria Police
27 Department. Maricopa County is defending the case, asserting that it is the proper
28 respondent.

1 because they were in bankruptcy at that time, having filed the May 1995 case, which
2 was not dismissed until November 22, 1995. While acknowledging that the underlying
3 action was criminal, the Debtors maintain the forfeiture action was a civil remedy under
4 Arizona law and subject to the automatic stay. The Debtors assert that because the
5 State obtained the Forfeiture Order without obtaining relief from the stay, it violated the
6 automatic stay and was void as a matter of law.

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8 The State countered that the forfeiture action was excepted from the automatic
9 stay because it was an exercise of the government's police or regulatory power. The
10 State contends the forfeiture was a supplemental remedy to the criminal proceedings,
11 which were not subject to the automatic stay, and that the Forfeiture Order fell within
12 the exception for governmental police and regulatory powers. The State relies upon
13 several cases applying the police and regulatory power exception in § 362(b)(4). In
14 their Reply, the Debtors maintain that the in rem forfeiture action was civil in nature and
15 "the only question to be decided by this Court is whether the provisions of 11 U.S.C.
16 § 362(a) were applicable at the time Arizona took the action against the plaintiffs' real
17 property."⁶
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19 20 IV. ISSUE

21 Was the Forfeiture Order, obtained while Debtors' Chapter 13 case was pending,
22 a violation of the automatic stay?
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26 _____
27 ⁶ Reply to Response to Debtors' Cross Motion for Summary Judgment at p.2, II. 19-20.
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V. JURISDICTION

The Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §1334(b). This matter is a core proceeding under 28 U.S.C. §157(b)(2)(G).

VI. DISCUSSION

Summary judgment should be granted when "there is no genuine issue as to any material fact" and "the moving party is entitled to judgment as a matter of law." Fed. R. Bankr. P. 7056. Although the parties' characterization of the facts differ, the material facts are not in dispute. Determining whether an action is exempt from the automatic stay is a question of law. Massachusetts v. First Alliance Mortgage Co. (In re First Alliance), 263 B.R. 99, 106 (9th Cir. BAP 2001).

A. Statutory Framework

The commencement of a case in bankruptcy creates an estate, containing all of the debtor's legal or equitable interests in property. § 541(a). When a debtor files a bankruptcy petition, an automatic stay immediately arises. § 362(a). The scope of the stay is quite broad. Stringer v. Huet (In re Stringer), 847 F.2d 549, 552 (9th Cir. 1988). It preserves the status quo by precluding and nullifying post-petition actions, judicial or nonjudicial, in nonbankruptcy forums against the debtor or affecting property of the estate. Hillis Motors, Inc. v. Hawaii Auto. Dealers' Ass'n, 997 F.2d 581, 585 (9th Cir. 1993) (citation omitted). Actions taken in violation of the automatic stay are void -- not merely voidable. Schwartz v. United States (In re Schwartz), 954 F.2d 569, 571 (9th Cir. 1992).

1 The automatic stay of § 362(a) provides, in relevant part:

2 (a) Except as provided in subsection (b) of this section, a
3 petition filed under section 301, 302, or 303 of this title, . . . ,
4 operates as a stay, applicable to all entities, of--

5 (1) the commencement or continuation, including the
6 issuance or employment of process, of a judicial,
7 administrative, or other action or proceeding against the
8 debtor that was or could have been commenced before the
9 commencement of the case under this title, or to recover a
10 claim against the debtor that arose before the
11 commencement of the case under this title;

12 (2) the enforcement, against the debtor or against property of the
13 estate, of a judgment obtained before the commencement of the
14 case under this title;

15 (3) any act to obtain possession of property of the estate or
16 of property from the estate or to exercise control over
17 property of the estate[.]

18 The § 362(a) stay interdicts action by all entities, including governmental entities.

19 See Pearson v. United States (In re Pearson), 917 F.2d 1215, 1216 (9th Cir. 1990).

20 Certain governmental actions, however, are excepted from the § 362(a) stay
21 under § 362(b). Exceptions to the automatic stay should be narrowly read. Hillis
22 Motors, Inc. v. Hawaii Auto. Dealers' Ass'n, 997 F.2d at 590. The "precise wording of
23 the stay and its exceptions should be emphasized." In re Stringer, 847 F.2d at 552 n.5
24 (quoting 2 Collier on Bankruptcy ¶ 362.04[1], p. 362-33 (15th ed. 1988)). At issue here
25 is whether the State's action of obtaining the Forfeiture Order was excepted from the
26 automatic stay. If it was not, the Forfeiture Order was in violation of the automatic stay
27 and, thus, void. In re Schwartz, 954 F.2d at 571.

28 Because the Forfeiture Order was obtained in 1995, the Court must consider
what governmental actions were excepted from the stay, before § 362(b) was amended

1 in 1998. See United States v. Klein (In re Chapman), 264 B.R. 565, 570-71 (9th Cir.
2 BAP 2001). In October 1995, the police and regulatory power exceptions to the stay
3 were found in both §§ 362(b)(4) and (5)⁷ and provided that the filing of a petition did not
4 operate as a stay:

6 (4) under subsection (a)(1) of this section, of the commencement or
7 continuation of an action or proceeding by a governmental unit to enforce
8 such governmental unit's police or regulatory power;

8 (5) under subsection (a)(2) of this section, of the enforcement of a
9 judgment, other than a money judgment, obtained in an action or
10 proceeding by a governmental unit to enforce such governmental unit's
11 police or regulatory power[.]

10 The exception in § 362(b)(5) did not apply to the Forfeiture Order because that section
11 excepted only the "enforcement" of judgments, and only those judgments "obtained
12 before the commencement of the case" that would otherwise be stayed under
13 § 362(a)(2). See Hillis Motors, Inc., 997 F.2d at 591 (section 362(b)(5) is "solely an
14 exception" to a stay imposed under § 362(a)(2)). That leaves the stay exception under
15 § 362(b)(4) to consider.

17 B. Was Obtaining the Forfeiture Order an Action to Enforce the State's Police
18 or Regulatory Power Excepted from the Automatic Stay under § 362(b)(4)?

19 Section 362(b)(4) only excepted actions that would otherwise be stayed under
20 § 362(a)(1), that is, an "action or proceeding **against the debtor** that was or could have
21 been commenced before the commencement of the case under this title, or to recover a
22 claim **against the debtor**. . . ." (emphasis added). See Hillis Motors, Inc., 997 F.2d at
23 591 ("The precise wording of section 362(b)(4) explicitly creates an exception to the stay
24

26 ⁷ In 1998, §§ 362(b)(4) and (5) were combined under § 362(b)(4), and (b)(5) was
27 eliminated.

1 imposed under section 362(a)(1).” The forfeiture action here, In the Matter of: The
2 Real Property Located at 7458 West Brown, Peoria, Arizona, As More Particularly
3 Described in Appendix One, et al., was an in rem action against the Debtors’ property
4 and not the Debtors themselves. Consequently, the forfeiture action did not constitute
5 an action to which the stay of subsection (a)(1) applied and from which § 362(b)(4)
6 created an exception.⁸ Instead, the civil forfeiture action fell within the scope of
7 § 362(a)(3), which stays “any act to obtain possession of property of the estate or of
8 property from the estate or to exercise control over property of the estate.”
9 Section 362(b)(4) did not except governmental action that was stayed under § 362(a)(3).
10 See Hillis Motors, Inc., 997 F.2d at 591 (“There is no governmental powers exception to
11 section 362(a)(3).”).
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14 The forfeiture action was subject to the automatic stay provision of § 362(a)(3) as
15 an act “to obtain possession” or “to exercise control” of the estate property. Because the
16 State did not obtain relief from the automatic stay,⁹ the Forfeiture Order violated the
17 § 362(a) stay and was void. In re Schwartz, 954 F.2d at 571. Accordingly, the State has
18 never had a valid forfeiture.
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21 ⁸ Because the Forfeiture Order did not fall within the subsection to which § 362(b)(4)
22 applies, there is no need to address whether the governmental action fell within the
23 § 362(b)(4) exception under the tests applied in the Ninth Circuit. See In re First
Alliance, 263 B.R. at 107.

24 ⁹ The State’s argument that it had no notice of the bankruptcy is of no consequence to
25 finding a violation. The automatic stay is effective immediately upon the filing of the
26 petition. “Formal service of process is not required, and no particular notice need be
27 given in order to subject a party to the stay.” 3 Collier on Bankruptcy ¶ 362.02, p. 362-
28 12.11 (15th ed. rev. 2006). In other words, “a party may violate the stay without
realizing that it has taken effect.” Id. at ¶ 362.11, p. 362-122.

1 The State cannot overcome this outcome. The State argues that the Forfeiture
2 Order was a result of the criminal proceedings and, therefore, not stayed by § 362.¹⁰
3 Regardless of the nature of the proceedings leading up to the forfeiture action, the
4 Forfeiture Order, on its face, was civil in nature -- from its caption and civil action number
5 to its terms and remedy.¹¹ Further, the Order specifically characterized the forfeiture of
6 the Property as "remedial in nature and not punitive," signifying the traditional distinction
7 that "in rem divestiture serves substantially 'civil-remedial' rather than 'criminal-punitive'
8 purposes."¹² Georgia v. Bell (In re Bell), 215 B.R. 266, 269 n.5 (Bankr. N.D. Ga. 1997).
9 In contrast, criminal forfeiture is a proceeding in personam and punitive. See United
10 States v. Lazarenko, 476 F.3d 642, 647 (9th Cir. 2007): Although the State is correct
11 that one of the purposes of forfeiture is to deprive the defendant of means to commit
12 further offenses,¹³ that does not convert a civil in rem forfeiture action, remedial in
13 nature, into a criminal proceeding.
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18 ¹⁰ The State does not cite any section of the Bankruptcy Code for this exception, but
19 presumably the State is referring to § 362(b)(1), which excepts from the stay the
20 commencement or continuation of a criminal action or proceeding against the debtor.

21 ¹¹ The Court partially granted the State's Motion for Summary Judgment based upon a
22 preponderance of the evidence. Forfeiture Order at p.1.

23 ¹² This distinction is further supported by the Forfeiture Order's citations to City of
24 Tempe v. Dimitriou (In re Ten Thousand and Ninety-Eight Dollars), 175 Ariz. at 238,
25 which begins "this case involves a civil *in rem* action," and to A.R.S. § 13-2314(L),
26 which states that "[a] civil action authorized by this section . . . is remedial and not
27 punitive." Forfeiture Order at ¶ 3.

28 ¹³ As support, the State cites In re Ten Thousand and Ninety-Eight Dollars, 175 Ariz. at
29 240, which is the civil in rem forfeiture action cited in ¶ 3 of the Forfeiture Order for the
30 proposition that the forfeiture was remedial, i.e., civil.

1 § 362(b)(4). Id. at 50-51. In declining to follow that decision, the Third Circuit ignored
2 the Ryan court's determination that the exception applied "only to actions against the
3 debtor stayed under section 362(a)(1), and not to actions against the property of the
4 debtor or the estate stayed under other subsections of section 362(a)." Id. at 50.
5
6 Instead, the Third Circuit focused its criticism on the Ryan court's finding that the
7 legislative history of § 362(b)(4) limited the type of governmental action excepted from
8 the stay to "action against the Debtor necessary to 'prevent or stop violation of fraud,
9 environmental protection, consumer protection, safety, or similar police or regulatory
10 laws.'" Id. at 50 (quoting In re Ryan, 15 B.R. at 519, which, in turn, was quoting H.R.
11 Rep. No. 595, 95th Cong., 1st Sess. 343 (1977)). The analysis here does not turn on
12 § 362(b)(4)'s legislative history; instead, it is based upon the "precise wording" of
13 § 362(b)(4) which, until it was amended, created an exception to the stay limited to
14 actions against the debtor under § 362(a)(1). Hillis Motors, Inc., 997 F.2d at 591.

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16 The other case cited by the State, In re Brewer, is distinguishable because it
17 involved a judgment obtained before bankruptcy. In that case, the United States
18 obtained a final consent judgment of forfeiture against the debtor's property over ninety
19 days before the debtor filed bankruptcy. 209 B.R. at 576. The judgment provided that if
20 the debtor paid the United States \$40,000 within forty-five days of the judgment date,
21 the property would not be forfeited. Id. The debtor was granted an extension of another
22 forty-five days by the district court and, on the same day, the debtor filed bankruptcy.
23
24 The extension expired without the debtor making the payment. In bankruptcy court, the
25 debtor argued, inter alia, that the forfeiture was stayed by § 362(a). Id. Although the
26 opinion discussed § 362(b)(4) in finding that the action was an exercise of police power,
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1 the court's holding relied upon § 362(b)(5), excepting the enforcement of a judgment
2 obtained before bankruptcy, in denying the debtor's request for a stay. Id. at 577.

3 Consequently, the case is inapposite.

4
5 Before 1998, § 362(b)(4) applied only to actions within the ambit of § 362(a)(1),
6 which were actions against the debtor. There is no other applicable exception for the
7 Forfeiture Order obtained against the Property of the Debtors during the pendency of
8 their bankruptcy case. Because the State did not obtain relief from the automatic stay,
9 the Forfeiture Order violated the § 362(a) stay and was void. In re Schwartz, 954 F.2d at
10 571. Accordingly, the Debtors' motion for summary judgment is granted.

11
12 The Debtors also seek a finding that the violation of the stay was willful under
13 § 362(h) (which is now § 362(k)(1)), and an award of sanctions. There is no evidence
14 that the State willfully violated the stay, so sanctions are not appropriate. A willful
15 violation requires that the party knew of the bankruptcy, and its actions in violation of the
16 stay were intentional. See Abrams v. Southwest Leasing and Rental, Inc. (In re
17 Abrams), 127 B.R. 239, 243 (9th Cir. BAP 1991). Because the State did not have
18 knowledge of the May 1995 case,¹⁵ its actions were not a willful violation. Consequently,
19 the Debtors are not entitled to any other relief.
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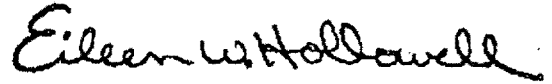
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26 ¹⁵ According to the State's Statement of Facts, at ¶ 6, the State was not listed in the
27 Debtors' May 1995 bankruptcy. The Debtors did not dispute this fact and it is thus
28 deemed admitted. Local Rule Civ. 56.1(b).

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VI. CONCLUSION

The foregoing constitutes the Court's findings of fact and conclusions of law as required by Fed. R. Bankr. P. 7052. An order consistent with this Memorandum Decision will be entered this date.

Dated this 18th day of January, 2008.



EILEEN W. HOLLOWELL
UNITED STATES BANKRUPTCY JUDGE

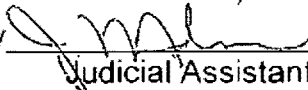
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