Entered on Docket
February 27, 2006

Hon. Gregg W. Zive
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re:

ROBERT R. HAGER,

Debtor.

Case No. BK-N-99-32815-GWZ

MEMORANDUM DECISION RE: MOTION TO REOPEN BANKRUPTCY CASE

A. Introduction

The State of Nevada ex rel., Division of Environmental Protection ("NDEP") filed its Motion For Reopening Bankruptcy Case No. BK-N-99-32815-GWZ [Robert R. Hager] January 31, 2006. NDEP also filed a Motion for Order Shortening Time in order to hear the Motion to Reopen on an expedited basis. The court set a status hearing to consider the Motion for Order Shortening Time February 7, 2006 at 3:00 p.m. The following appearances were made: William J. Frey on behalf of the movant, NDEP; Donald A. Lattin on behalf of Mactec, formerly Harding ESC, Julia Pierko and Scott Smith; Alan R. Smith, bankruptcy counsel on behalf of the Debtor; Treva J. Hearne, state court litigation counsel on behalf of the Robert Hager Trust; and Lawrence D. Wishart, state court litigation counsel on behalf of Robert R. Hager.

The court took the Motion to Reopen under submission and advised Mr. Lattin to file his joinder by February 10, 2006, and Mr. Smith to file his opposition by February 13, 2006. The court reviewed all the pleadings and exhibits filed in support of and in opposition to the Motion to Reopen, all authority cited therein, and entered

an Order Denying Motion To Reopen Bankruptcy Case February 16, 2006. This Memorandum Decision sets forth the court's analysis underlying the Order Denying Motion To Reopen Bankruptcy Case entered February 16, 2006.

B. Procedural History

1. United States Bankruptcy Court, District of Nevada

The Debtor filed a chapter 11 petition September 9, 1999. The Debtor filed a Motion to Sell Real Property Free and Clear of Liens and Encumbrances (194 Glenbrook Inn Rd.) January 25, 2000. A hearing was held February 2, 2000 and on February 10, 2000 the bankruptcy court entered the Order Approving Sale of Real Property Free and Clear of Liens and Encumbrances [194 Glenbrook Inn Rd., Glenbrook] (the "Glenbrook Sale Order").

On December 8, 2000 the Debtor filed a Motion to Sell Real Property Free And Clear Of Liens And Encumbrances (1301 Highway 50)(the "Cave Rock Property"). The Debtor proposed to sell the Cave Rock Property to Resort Development Associates, LLC for $1.4 million payable in cash upon close of escrow. The proposed sale also included a provision whereby Resort Development could retain the Debtor as a consultant for $50,000. There were two critical conditions in the Debtor's proposed sale: 1) Debtor was to obtain a certification from NDEP that active remediation of the Cave Rock Property had been completed; and 2) the tenants of the general store would be vacated. A hearing was held January 12, 2001. Marlene Ladage and Patrick Taylor (the "Taylors") appeared at the hearing and were represented by Cecelia L. Rosenaur. The Taylors entered a bid for the Cave Rock Property for $1.4 million without the two conditions required by Resort Development Associates, LLC. The court ordered that the Cave Rock Property be sold to the Taylors. On February 21, 2001 the bankruptcy court entered the Order Approving Sale of Real Property [1301 HWY. 50, Cave Rock, Nevada] to Patrick Taylor (the "Cave Rock Sale Order").

The bankruptcy court subsequently entered an order clarifying the Cave Rock

Sale Order, but such clarification is of no relevance to the pending Motion to Reopen.

On August 24, 2001 and August 28, 2001 the Debtor noticed several Rule 2004 examinations in an attempt to discover information related to the remediation of the Cave Rock Property sold by the bankruptcy court by the order entered February 21, 2001. The Taylors filed a Motion to Quash Orders of Rule 2004 Examination and for Protective Order on September 7, 2001, and NDEP filed a Motion Quash Order of 2004 Examination and/or for Protective Orders on September 12, 2001. The Debtor opposed the motions to quash and argued such examinations were necessary to investigate whether there was collusion between NDEP and Taylor in the purchase of the Cave Rock Property. On October 3, 2001 the court conducted a hearing on the motions to quash. At the hearing the court determined there was not a reasonable basis to permit the 2004 examinations. The court advised the Debtor the Debtor could bring a claim if the Debtor believed there was sufficient basis to do so. The court also ruled that the 2004 examination orders would be quashed without prejudice to the Debtor and that Debtor could seek the same type of relief in the future if the Debtor could show an adequate basis for the examinations

Nearly one year later, on June 28, 2002 the Debtor filed a Motion to Approve Compromise to approve the settlement of the litigation between the Debtor and various parties in state and federal court related to the remediation of the Cave Rock Property (the "NDEP Settlement"). No objections to the motion were filed. A hearing was held July 24, 2002, and on August 19, 2002 the bankruptcy court entered the Order Approving Compromise And Settlement [With The] Nevada Department Of Environmental Protection. The court found that the compromise and settlement with NDEP constituted the Debtor's full and complete resolution of any claim by NDEP against the Debtor for clean-up and remediation related to the Cave Rock Property.

An Order Dismissing Case was entered September 30, 2002. The dismissal was a result of an Order to Show Cause filed by the Office of the United States Trustee.

The order states "It appearing that the Debtor has no further need to reorganize under Chapter 11 . . . and is able to resolve his debts outside of bankruptcy . . . the case is dismissed." The case was closed January 5, 2004.

2. United States District Court, District of Nevada

While his bankruptcy case was pending, the Debtor filed a complaint in the United States District Court, District of Nevada against Harding ESE, Scott Smith, and Julia Pierko, NDEP and various state officials, alleging violations of his due process and equal protection rights, violations of the RICO Act, and various state-law claims on January 4, 2002. The Debtor dismissed the case as to the state defendants on July 29, 2002 as a result of the NDEP Settlement approved by the bankruptcy court. The District Court granted summary judgment in favor of Harding ESE, Scott Smith, and Julia Pierko on October 2, 2003. The Debtor's state-law claims were dismissed without prejudice. The Ninth Circuit Court of Appeals affirmed the United States District Court decision granting summary judgment in favor of Harding ESE, Scott Smith, and Julia Pierko on June 30, 2005.

3. Ninth Judicial District Court of the State of Nevada

Prior to the bankruptcy, on December 28, 1998, NDEP filed suit in the Ninth Judicial District Court of the State of Nevada against the Debtor for alleged violations of state environmental statutes and a related administrative order resulting from the removal of underground storage tanks on the Debtor's Cave Rock Property (the "First State Court Action"). The Debtor hired an environmental consultant firm, Steffen, Robertson & Kirsten, Inc. ("SRK"), to assess and remediate the site. The Debtor executed a deed of trust in favor of SRK on his residence in Glenbrook, Nevada (the "Glenbrook Property"). There was a dispute as to payment and SRK commenced foreclosure on the Glenbrook Property. The Debtor filed his Petition for relief under chapter 11 the day prior to the date set for the foreclosure sale.

After the Debtopr's bankruptcy case was dismissed, on December 9, 2003, the Debtor filed suit against Mactec (aka Harding ESE, Scott Smith, and Julia Pierko) in

the Ninth Judicial District Court of the State of Nevada state-law causes of action for fraud, denial of due process under the Nevada Constitution, interference with prospective economic advantage, breach of third party contract, and breach of professional responsibility (the "Second State Court Action"). Mactec filed a third-party complaint against NDEP based on contractual indemnification. The Debtor did not file a claim against NDEP. Mactec and NDEP filed motions for summary judgment which were denied by the State Court.

Mactec removed the Second State Court Action to United States District Court, District of Nevada November 11, 2005. NDEP joined the removal. On November 29, 2005, the Debtor filed a motion to remand the case back to the State court arguing the removal was untimely, and that the District Court lacked jurisdiction. NDEP and Mactec opposed the remand and argued that the District Court had jurisdiction because the state court proceeding was "an improper collateral attack on a federal court decision." On January 4, 2006, the District Court entered an Order granting the Debtor's motion to remand concluding that the federal court lacked subject matter jurisdiction and that "this case does not involve a collateral attack on a federal judgment."

C. Legal Standard

"A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor or for other cause." 11 U.S.C. § 350(b). "A case may be reopened on motion of the debtor or other party in interest . . .." Fed. R. Bankr. P. 5010.

While the Court is considering only the Motion to Reopen at this time, it is necessary to look at the underlying relief NDEP is seeking in its Complaint for Temporary Restraining Order And Permanent Injunction (Motion to Reopen, Ex. A) and Motion for Injunctive Relief Including Temporary Restraining Order And Permanent Injunction (Motion to Reopen, Ex. B) in order to determine if the court should reopen the case.

D Discussion

In seeking to reopen the bankruptcy case, NDEP and Mactac argue that the Second State Court Action is a collateral attack on the Glenbrook and Cave Rock Sale Orders. In response, Debtor argues that the bankruptcy court lacks subject matter jurisdiction; that NDEP and Mactec lack standing to reopen the bankruptcy case; that NDEP and Mactec are asking the bankruptcy court to sit as an appellate court and review prior orders of the State Court and United States District Court; and, that NDEP and Mactec are acting in bad faith. Upon review of all the pleadings and exhibits filed in support of and in opposition to the Motion to Reopen, all authority cited therein, the court declines to reopen the case.

1. The Debtor did not sue NDEP.

The wrongs complained of by NDEP demonstrate NDEP's misunderstanding of the facts and the legal standards applicable in this case. NDEP argues that the State Court lacks any authority or jurisdiction to hear or decide a civil case filed by the Debtor against NDEP. However, the Debtor did not file a complaint against NDEP, Mactec did. The Debtor is precluded from filing a complaint against NDEP pursuant to the NDEP Settlement entered into between NDEP and the Debtor in the First State Court Action, and approved by the bankruptcy court August 19, 2002 after notice and a hearing. The Debtor expressly agreed to "forever" discharge the State of Nevada from all actions that arise out of the cleanup of the Cave Rock Property and related litigation. The NDEP Settlement also provides that the Debtor did not forego any claims the Debtor may have against HLA, Harding ESE, Scott Smith and Julia Pierko (now known as Mactec).

2. The Bankruptcy Court is not an appellate court.

NDEP is asking this court to reconsider orders entered by the State Court denying Mactec and NDEP's motions for summary judgment. The State Court denied Mactec's Motion for Summary Judgment on its First, Second, and Third Claims for Relief (the only remaining claims) and found "there remains a genuine issue of

material fact regarding whether or not the sale of the Cave Rock property in bankruptcy was voluntary." Mactec argued the Debtor's claims were barred by the doctrine of res judicata in support of its Motion for Summary Judgment and the State Court denied the Motion for Summary Judgment. Mactec cannot come before this court now and ask this court to determine the res judicata effect of the Cave Rock Sale Order when the State Court has already found a genuine issue of material fact exists. This court will not conduct an appellate review of the State Court's decisions.

3. The Bankruptcy Court lacks subject matter jurisdiction.

The United States District Court (and thus the bankruptcy court based on referral) has jurisdiction over all proceedings arising under title 11 or arising in or related to cases under title 11. 28 U.S.C. § 1334(b). "An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankruptcy estate." Fietz v. Great Western Savings, 852 F.2d 455, 457 (9th Cir. 1988)(quoting Pacor, Inc. v. Higgins, 743 F.2d 984, 994 (3d Cir. 1984). If "the outcome of the proceeding could conceivably have any effect on the estate being administered in bankruptcy," then the proceeding falls within the bankruptcy court's "related to" jurisdiction, id. (quoting Pacor, 743 F.2d at 994); on the other hand, bankruptcy courts have no jurisdiction at all "over proceedings that have no effect on the estate of the debtor." Celotex Corp. v. Edwards, 514 U.S. 300, 309 n. 6 (1995).

The bankruptcy case was dismissed by order entered September 30, 2002 because the Debtor had no further need to reorganize under Chapter 11 and was able to resolve his debts outside of bankruptcy. The Declaration of Robert R. Hager also provides that all creditors have been paid in full, or will be paid in full over time. Neither Mactec nor its predecessors' in interest were creditors of the estate. NDEP withdrew its proof of claim as a condition of the NDEP Settlement with the Debtor.

The Debtor is not seeking to set aside the Cave Rock Sale Order. The Debtor

has not named Taylor in the Second State Court Action and the Debtor is not challenging Taylor's status as a good faith purchaser pursuant to 11 U.S.C. § 363(m). There has been no appeal of the Cave Rock Sale Order. There was no motion for reconsideration of the Cave Rock Sale Order. The fact that there was no appeal or reconsideration of the Cave Rock Sale Order was discussed at length at the hearing on the motions to quash on October 3, 2001. After the hearing, the Debtor did not file a motion for reconsideration of the Cave Rock Sale Order pursuant to Fed. R. Civ. P. 60(b) as incorporated by Fed. R. Bankr. P. 9024(b) even though at the hearing the Debtor suspected a fraud may have occurred. The Cave Rock Sale Order is final.

Nor does the Second State Court Action involve the interpretation of the bankruptcy court's Cave Rock Sale Order. The bankruptcy court made its decision based on the facts and evidence made available to the court at the time of the hearing. None of the Debtor's claims against Mactec require an analysis or interpretation of the evidence presented to the court at the hearing on the sale of the Cave Rock Property. A decision by the State Court in the Second State Court Action will have no effect on the administration of the Debtor's estate. Therefore, this court is has no jurisdiction over the matters raised in NDEP and Mactec's pleadings.

4. The applicability of res judicata.

The United States District Court entered an order granting the Debtor's motion to remand and concluded that "this case does not involve a collateral attack on a federal judgment." and the federal court "does not have subject matter jurisdiction." The doctrine of res judicata (claim preclusion) bars relitigation of claims between the same parties if those claims were or could have been litigated. In re Lowenschuss, 202 B.R. 305, 310-11 (Bankr. D. Nev. 1996)(internal citations omitted). Res judicata applies when there is: (1) a final judgment on merits; (2) the judgment was rendered by court of competent jurisdiction; (3) the second action involving same parties; and (4) the same cause of action is involved in both cases." In re Kelley, 199 B.R. 698, 702 (9th Cir. BAP 1996).

The District Court Order is a final judgment on the merits rendered by a court of competent jurisdiction. The time for appeal has passed and neither Mactec nor NDEP appealed the decision. There is no question that the District Court action involves the same parties as this action. Furthermore, the same cause of action is involved in both cases. In the context of the Debtor's Motion to Remand the parties had ample opportunity to, and did, brief the issue of the District Court's subject matter jurisdiction and whether or not the Second State Court Action was a collateral attack on the Cave Rock Sale Order. If the District Court does not have subject matter jurisdiction, it necessarily follows that the bankruptcy court does not have subject matter jurisdiction. See Fietz v. Great Western Savings, 852 F.2d 455, 457(9th Cir. 1988).

The District Court Order analyzes and concludes "this case does not involve a collateral attack on a federal judgment." and the federal court "does not have subject matter jurisdiction. Mactec and NDEP are barred from re-litigating those issues before this court.

E. Conclusion.

Based on the foregoing analysis, the court concludes it does not have jurisdiction to hear NDEP's complaint, and further that NDEP and Mactec are barred from relitigating the issue of the court's subject matter jurisdiction and whether the Second State Court Action is a collateral attack on the Cave Rock Sale Order. Therefore, the court denies the Motion to Reopen.