IN THE UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

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| IN RE: | : | CHAPTER 7 |
| STEVEN LODEN DYE, | : | CASE NO. 06-71024-MHM |
| Debtor. | : | |
| BEP CREDITOR'S TRUST, by and through GEORGE W. STEVENSON as TRUSTEE, | : | |
| Movant, | : | |
| v. | : | **CONTESTED MATTER** |
| STEVEN L. DYE, Debtor, NEIL C. GORDON, Chapter 7 Trustee, BARBARA H. DYE, U.S. BANK NATIONAL ASSOCIATION, AMERICAN GENERAL FINANCIAL SERVICES, INC., | : | |
| Respondents. | : | |

**ORDER GRANTING MOTION TO ANNUL STAY AND VALIDATE POST-PETITION CONSENT JUDGMENT**

On February 6, 2007, Movant BEP Creditor's Trust, by and through George W. Stevenson as Trustee, which is the assignee of BEP Services, L.P., ("BEP") filed a Motion to Annul Stay and Validate Post-Petition Consent Judgment [Doc. No. 72] (the "Motion to Annul") seeking an order annulling the automatic stay and validating the Consent Judgment and Final Order entered September 6, 2006 (the "Interpleader Judgment") by the

Superior Court of Fulton County, Georgia in an interpleader action styled *Bank of America, N.A. v. Barbara H. Dye, American General Financial Services, Inc. (DE), U.S. Bank National Association and BEP Services, L.P.*, Civil Action File No. 2006-CV-115788 (the "Interpleader Action"). Proper notice of the Motion to Annul was given to Debtor, the Chapter 7 Trustee, and all creditors and parties in interest. Only Debtor and FXM, P.C. d/b/a Frank X. Moore & Associates ("FXM") objected to the Motion to Annul.

Hearing was held on the Motion to Annul and other matters April 24, 2007, continued to May 2, 2007; May 21, 2007; May 30, 2007; June 4, 2006; June 27, 2007; July 5, 2007; and concluded July 6, 2007. Present at the hearings were Debtor, and his wife, Barbara H. Dye ("Mrs. Dye"); Trustee and attorney for Trustee; counsel for BEP, for American General Financial Services, Inc. ("AGFS"), for Bank of America, N.A. ("BOA"), for Deutsche Bank Trust Company Americas and for FXM. No one appeared for Respondent U.S. Bank National Association ("US Bank").

On February 7, 2006, BOA sold real property commonly known as 2903 Cravenridge Drive, NE, Atlanta, DeKalb County, Georgia 30319 (the "Cravenridge Property") at a non-judicial foreclosure sale. The foreclosure sale of the Cravenridge Property generated proceeds in excess of the amount to pay the full amount of BOA's claim in the amount of $84,033.92 (the "Cravenridge Excess Proceeds"). The Cravenridge Excess Proceeds were interpled into the Superior Court of Fulton County, Georgia in the Interpleader Action. Four respondents/defendants were initially named in the Interpleader

Action as potentially claiming an interest in the Cravenridge Excess Proceeds. They were: AGFS, Mrs. Dye, BEP and U.S. Bank National. Debtor was later added as a respondent in that action. The Interpleader Judgment provides for distribution of the Cravenridge Excess Proceeds.

On March 20, 2007, Trustee filed a Motion to Approve Compromise and Settlement between Trustee and BEP [Doc. No. 91], as supplemented [Doc. No. 115] and amended [Doc. No. 144] (the "Motion to Compromise"), pursuant to which, among other things, Trustee sought approval of an agreement for Trustee to abandon the estate's interest in the Interpleader Action and the Cravenridge Excess Proceeds. Trustee's Motion to Approve Compromise and Motion to Compel Turnover [Doc. No. 165] was granted orally on the record at the conclusion of the hearing held June 4, 2007 and memorialized by order entered June 15, 2007, as amended by a certain Amended Order Granting Trustee's Motion to Approve Compromise [Doc. No. 166] also entered June 15, 2007 (collectively, the "Compromise Order").

As abandonment of the Interpleader Action and the Cravenridge Excess Proceeds was arguably an integral part of the Motion to Compromise, the Compromise Order could be viewed as having tacitly approved the abandonment. Nevertheless, Trustee had filed a notice of abandonment of the Interpleader Action and the Cravenridge Excess Proceeds May 21, 2007. Debtor and FXM objected to the proposed abandonment. Hearings were held beginning June 27, 2007, continued to July 5, 2007, and concluded July 6, 2007. The

abandonment of the Interpleader Action and the Cravenridge Excess Proceeds was approved by order entered July 12, 2007.

By virtue of the Compromise Order, BEP's claim has been allowed. By virtue of their respective security deeds and judgment liens against the Cravenridge Property, all of which are properly perfected, the claims of BEP, AGFS and US Bank have priority over the interest of the Debtor's estate in the Cravenridge Excess Proceeds and such claims far exceed the total amount of the Cravenridge Excess Proceeds. Additionally, as noted above, the Trustee has abandoned the estate's interest in the Cravenridge Excess Proceeds.

Upon the filing September 5, 2006, of Debtor's voluntary petition under Chapter 13, the automatic stay of 11 U.S.C. § 362(a) became effective. An action taken in violation of the automatic stay is void. *Roberts v. C.I.R.*, 175 F. 3d 889 (11th Cir. 1999); *Borg-Warner Acceptance Corp. v. Hall,* 685 F.2d 1306 (11th Cir. 1982). Under §362(d), however, the bankruptcy court is authorized to annul the automatic stay, which serves to provide retroactive relief therefrom, thereby validating acts that would otherwise be void as a violation of the automatic stay. 11 U.S.C. § 362(d); *Albany Partners, Ltd. v. Westbrook (In re Albany Partners, Ltd.)*, 749 F.2d 670, 675 (11th Cir. 1984); *In re Thomas*, 319 B.R. 910, 912 (Bankr. M.D. Ga. 2004) (Walker, J.); *In re Harris*, 268 B.R. 199, 202 (Bankr. W.D. Mo. 2001).

Courts consider a number of factors in evaluating whether to annul the stay. In *Thomas*, the bankruptcy court interpreted *Albany Partners* as requiring a finding that the

creditor's action was not willful; that it did not interfere with the Debtor's breathing spell created by the stay; and that it did not negatively impact other creditors. *Thomas*, 319 B.R. at 912; *see also In re Brown*, 251 B.R. 916 (Bankr. M.D. Ga. 2000) (Walker, J.) (stay not annulled because no evidence of record from which to determine whether other creditors with an interest in the mortgaged property would be harmed). In *Harris*, the bankruptcy court considered nine factors:

> (1) if the creditor had actual or constructive knowledge of the bankruptcy filing and, therefore, of the stay; (2) if the debtor has acted in bad faith; (3) if there was equity in the property of the estate; (4) if the property was necessary for an effective reorganization; (5) if grounds for relief from the stay existed and a motion, if filed, would have been granted prior to the violation; (6) if failure to grant retroactive relief would cause unnecessary expense to the creditor; (7) if the creditor has detrimentally changed its position on the basis of the action taken; (8) whether the creditor took some affirmative action post-petition to bring about the violation of the stay, such as filing motions or suggestions or the like; and (9) whether the creditor promptly seeks a retroactive lifting of the stay and approval for the action that has been taken.

*Id.* at 203 (citations omitted).

In the instant case, all of the factors identified in *Thomas* and *Harris* either weigh in favor of granting the relief requested in the Motion to Annul or have no significance to the case at bar. When the Interpleader Judgment was entered (one day after Debtor filed his voluntary petition commencing this case as a chapter 13 proceeding), Movant and its counsel were unaware that Debtor had commenced a bankruptcy case. Debtor's own attorney in the Interpleader Action was unaware of Debtor's pending bankruptcy case at

the time the Interpleader Judgment was entered. Consequently, any violation of the automatic stay in obtaining the Interpleader Judgment was not willful.

Debtor transferred his interest in the Cravenridge Property, apparently for no consideration, to his wife, Mrs. Dye, by Quit-Claim Deed dated February 8, 2004, recorded March 8, 2004, in Deed Book 15877, at Page 590, DeKalb County, Georgia records. Such a transfer, which carries some of the indicia of an actual intent to hinder, delay, or defraud a creditor as set forth in OCGA 18-2-74(b),[1] at least raises the question (although not essential to the Court's ruling in the instant proceeding) whether Debtor acted in good faith. Likewise, the question of Debtor's lack of good faith arises from Debtor's failure to notify his attorney in the Interpleader Action that he filed the voluntary petition commencing this case and, instead, authorizing that attorney to consent to the Interpleader

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[1] OCGA 18-2-74(b) provides:

In determining actual intent under paragraph (1) of subsection (a) of this Code section, consideration may be given, among other factors, to whether:

(1) The transfer or obligation was to an insider;
(2) The debtor retained possession or control of the property transferred after the transfer;
(3) The transfer or obligation was disclosed or concealed;
(4) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
(5) The transfer was of substantially all the debtor's assets;
(6) The debtor absconded;
(7) The debtor removed or concealed assets;
(8) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
(9) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
(10) The transfer occurred shortly before or shortly after a substantial debt was incurred; and
(11) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

Judgment. Debtor had filed the bankruptcy petition just the day previous to the entry of the Interpleader Judgment. Additionally, Debtor had some experience with bankruptcy law as a result of an earlier bankruptcy case filed by a business in which Debtor was a principal. Debtor's knowing failure, in the face of his duties under the Bankruptcy Code, to notify his attorney and the other participants, creditors all, in the consent judgment, works to judicially estop Debtor from now claiming the protection of the automatic stay. Additionally, the decision to invoke the automatic stay to protect estate assets is now that of the Trustee, and Trustee announced he had no position on the Motion, a tacit acknowledgment that, as the matter has no value for the Estate, Trustee is not opposed to the Motion to Annul. Indeed, opposition would be illogical.

As Debtor's estate has no equity in the Cravenridge Excess Proceeds,[2] a motion for relief from the automatic stay, if filed, likely would have been granted. As a result of the transfer of Debtor in the Cravenridge Property to his wife two years prior to the foreclosure sale that generated the Cravenridge Excess Proceeds, Debtor had no record interest in the Cravenridge Property at the time of the foreclosure. Even if Debtor had some equitable or inchoate interest (such as pursuant to a fraudulent conveyance theory), any such interest was inferior to the interests evidenced by the security deed of AGFS and the judgment

[2] The Cravenridge Property was foreclosed February 7, 2006, seven months prior to the date Debtor filed his voluntary petition. Thus, only Debtor's interest in the Cravenridge Excess Proceeds (not in the real property itself) can be considered in determining whether Debtor's estate has any equity.

liens of Movant and US Bank.[3] Additionally, the Cravenridge Excess Proceeds are not necessary to an effective reorganization, both because this is a Chapter 7 proceeding and because the excess proceeds are fully encumbered.

All creditors and parties who claim a lien on or interest in the excess proceeds in the Interpleader Action are parties to the Interpleader Judgment and, therefore, are not negatively impacted by its entry. Under the circumstances, including Debtor's pre-foreclosure transfer of the Cravenridge Property to his wife and the lack of equity for Debtor's estate in light of the encumbrances thereon, the breathing spell intended by the automatic stay has not been impaired by the Interpleader Judgment. Debtor's other creditors, especially including unsecured creditors, have not been negatively affected by the Interpleader Judgment because the excess proceeds were fully encumbered by the security deed of AGFS and the judgment liens of Movant and US Bank. Specifically, with regard to FXM, even assuming that FXM is a creditor of Debtor's estate, FXM is an unsecured creditor whose status accords FXM no direct right to the excess proceeds and certainly no right that would have priority over the creditors holding a lien on the Cravenridge Property. Rather, any claim or interest of FXM to or in the excess proceeds that are the subject of the Interpleader Action is derivative of the interest of Debtor's estate

[3] The claim of BEP alone [Claim No. 3-1, as amended by Claim No. 3-2], which claim has been allowed in the full $693,763.04 amount filed by virtue of the Court's order [Doc. No. 165, as amended by Doc. 166] entered June 15, 2007, exceeds the total amount of Cravenridge Excess Proceeds. Even without BEP's claim, however, Debtor's estate could claim no equity in Cravenridge Excess Proceeds, after their application to the claims of AGFS and US Bank.

therein, which is in turn subject to the liens of AGFS, Movant and US Bank. FXM cannot unilaterally substitute its legal analysis and opinion for that of the Trustee, and has convinced neither Trustee nor the Court that any of FXM's arguments are strong enough to merit a string of suggested lawsuits FXM is anxious to pursue – to the possible detriment of the estate.

If the Motion to Annul is denied, BEP and respondents AGFS, US Bank, Mrs. Dye and Debtor would be required[4] to continue litigation of the Interpleader Action or to negotiate and present a new consent judgment to the Fulton County Superior Court, after obtaining relief from the 362(a) stay in this court to do so. Such an exercise would waste the time and resources of both courts and unnecessarily increase the litigation expenses of the parties for little or no additional benefit. The legal theories of FXM, while earnestly raised and vehemently maintained, are not practical causes of action for the estate. Trustee has accurately and solidly assessed the various potentially litigable issues raised in the Motion to Compromise and has proceeded in the best interest of the Estate. Furthermore, arguably Movant and other parties to the Interpleader Judgment have changed positions to their detriment as a result of agreeing to compromise approved by the Compromise Order.

The Court was informed of the Interpleader Action and Movant filed the Motion to Annul promptly after the case was converted and a chapter 7 trustee was appointed. The

[4] The parties may be required to obtain relief from the stay before proceeding with the state court Interpleader Action.

Interpleader Judgment was executed by an attorney who indicated on the face of the Interpleader Judgment he was acting on behalf of both Debtor and Mrs. Dye. He was engaged to represent both Debtor and Mrs. Dye; he had been negotiating the substance of the Interpleader Judgment for some time prior to its entry; prior to the date the Interpleader Judgment was signed, Debtor and Mrs. Dye were aware of the terms of the parties' settlement later memorialized in the Interpleader Judgment; the Dyes' attorney specifically discussed the Interpleader Judgment with Debtor on the date he signed it; and the attorney was expressly authorized by Debtor to execute the Interpleader Judgment. A client is bound by an attorney acting within the bounds of his apparent authority. *Scott v. Carter*, 239 Ga. App. 870, 872, 521 S.E.2d 835, 837 (1999), *cert. dismissed* (2000). *See also Speed v. Muhanna*, 274 Ga. App. 899, 619 S.E.2d 324 (2005), *cert. denied* (2006). If and to the extent credibility is a relevant consideration, the Dyes' attorney was more credible in his testimony than Debtor's evidence.

Finally, Trustee's abandonment of the Interpleader Action and the Cravenridge Excess Proceeds would further render superfluous any action to enforce the automatic stay with respect to the Interpleader Judgment. In light of all the factors considered above, and all other relevant facts and circumstances which have been made known to the undersigned during the many hearings held in this case, it is appropriate to annul the stay and validate the Interpleader Judgment. Accordingly, it is hereby

**ORDERED** that the Motion to Annul is GRANTED: the automatic stay of 11 U.S.C. § 362 is annulled; the Interpleader Judgment is validated; and Movant, AGFS and US Bank each are permitted to collect, retain and apply all funds disbursed or to be disbursed to them pursuant to the Interpleader Judgment without prejudice to their right to pursue any deficiency both in Debtor's bankruptcy case and against third parties, if any, liable to them with the Debtor.

**IT IS SO ORDERED**, this the 12th day of July, 2007.

MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE

Draft Prepared and presented by:

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