UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	)	CHAPTER 13
	)	
MARK EVANS PULLEN,	)	
MARY KAY PULLEN,	)	CASE NO. 07-65415-MHM
	)	
Debtors.	)	
	)	
MARK EVANS PULLEN,	)	
MARY KAY PULLEN,	)	
	)	
Plaintiffs,	)	
	)	**ADVERSARY PROCEEDING**
v.	)	**NO. 07-6220**
	)	
REX P. CORNELISON, III,	)	
JOHN A. ZIOLO,	)	
CORNELISON & ZIOLO, LLP,	)	
	)	
Defendants.	)	

ORDER

This adversary proceeding is before the court following trial. Plaintiff's complaint sought relief against Defendants based upon allegations of professional malpractice and fraud. Trial was held beginning November 4, 2008, and continued to December 5, 2008, when evidence was closed. The parties presented closing argument in writing following trial.

FINDINGS OF FACT

Plaintiffs had filed a Chapter 13 bankruptcy petition January 6, 1998 (the "1998 case").[1] Their Chapter 13 plan, filed January 12, 1998, proposed to pay their unsecured creditors 100%. Over the next few years, Plaintiffs completed the plan successfully and received their discharge March 29, 2002. In the 1998 case, however, Plaintiffs had failed to list a judgment debt arising from a judgment entered December 9, 1997, in favor of John D. Ficklen (the "Ficklen Judgment"). The Ficklen Judgment was entered in the amount of $22,365, and a writ of *fieri facias* was recorded on the General Execution Docket December 9, 1997.

On the afternoon of July 31, 2006, Plaintiff Mark Pullen called for an appointment with Defendants. Mr. Pullen appeared at Defendants' offices at approximately 5:00 p.m. that day and spoke first with attorney John A. Ziolo ("Ziolo"), a Defendant. Mr. Pullen told Ziolo that an execution sale on the Ficklen Judgment of Mr. Pullen's interest in his residence (the "Sale") was scheduled to take place the following morning (August 1, 2006) and that Mr. Pullen and his wife, a joint co-owner of the residence, wanted to stop the Sale. Mr. Pullen had little documentation with him but told Ziolo about the 1998 case and about the Ficklen Judgment, which Mr. Pullen believed had been entered in March 1998 while the 1998 case was pending. Mr. Pullen also told Ziolo that Mr. Pullen believed the Ficklen Judgment had been satisfied by a garnishment that had taken place in 2004. Ziolo expressed his desire to consult with his partner, Rex Cornelison

[1] Case No. 98-60300.

("Cornelison"), who returned to the office shortly thereafter and continued the discussion with Mr. Pullen.

When Cornelison inquired of Mr. Pullen the date the judgment had been entered and was told the March 1998 date, Cornelison concluded, without checking any records, that the judgment had been entered in violation of the automatic stay in the 1998 case[2] and then also concluded, erroneously, that the only way to invalidate the judgment as entered in violation of the automatic stay was to reopen the 1998 case. Based upon that erroneous legal conclusion, Cornelison did not consider filing a new Chapter 13 case on behalf of Plaintiffs. Cornelison did know that filing a motion to reopen would not immediately reinstitute the automatic stay and also knew that filing a motion to reopen would not stop the impending Sale. Cornelison concluded that Plaintiffs could also pursue an action to set aside the Sale based upon the satisfaction Mr. Pullen believed had occurred with the garnishment in 2004, but Cornelison did not consider filing an action in state or federal court to obtain a temporary restraining order to stop the Sale. Of course, any bankruptcy attorney knows that filing even a skeletal petition[3] in this court would have invoked the automatic stay of 11 U.S.C. §362(a) and stopped the Sale.

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[2] Defendants' evidence was that Defendants were unable to check the court records because the records from which the 1997 Ficklen Judgment arose had been archived. Arguably, Cornelison had very little time to perform a diligent search of records, but debtors in exigent circumstances are known not to have all their facts straight and Cornelison has represented enough debtors to know that.

[3] A skeletal petition is the basic 2-page form that initiates a case, plus a mailing matrix attachment, which lists at least one creditor, and may be amended and must be completed with all the schedules and other information required by §521(a) within 15 days. (An additional 15 days may be allowed with a motion for extension of time.) In fact, it is clear that a skeletal petition is contemplated for just such circumstances as Cornelison confronted the day before the Sale.

After agreeing with Mr. Pullen that Mr. Pullen would make a cash payment of $400, followed by installment payments over the next month for a fee totaling $2,500, Mr. Cornelison prepared a motion to reopen the 1998 case and a motion to reimpose the stay, which were filed the following day, August 1, 2006, at approximately 9:00 a.m. Cornelison did not seek expedited consideration of either motion. As a consequence of Cornelison's failure to obtain any order from any court to stay the Sale, the Sale took place at approximately 10:00 a.m. August 1, 2006. Mr. Pullen's half interest in his residence was sold to a third party, a *bona fide* purchaser for value, for $50,000.[4]

Hearing on the motion to reopen and the motion to reimpose the stay was held August 30, 2006. Not until the day immediately prior to that hearing did Cornelison obtain documentation about the Ficklen Judgment and discover that the Ficklen Judgment had been entered prior to the filing of the 1998 case. Mr. Gary Harris, assignee of the Ficklen Judgment from the original judgment holder, his client ("Harris"), appeared at the hearing, opposed the motion to reopen and the motion to reimpose the stay, and related the details of the Sale that had taken place August 1, 2006. The court, by the Honorable C. Ray Mullins, concluded that, although Plaintiffs may have possessed a right of action in state court, no bankruptcy purpose would be served by reopening the case and denied the motion to reopen. The motion to reimpose the stay was thus rendered moot. Following the hearing, Defendants performed no further services for Plaintiffs.

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[4] For a more complete recitation of the facts surrounding the Ficklen Judgment and the Sale, see this court's order entered March 6, 2009, in Adversary Proceeding 08-6010.

DISCUSSION

Cornelison has provided several explanations for his decision to file a motion to reopen the 1998 case rather than to have filed a new Chapter 13 case that would have resulted in an immediate and automatic stay of all creditor actions, including the Sale. A review of all the surrounding facts and circumstances show that the primary reason for his decision was his belief that an action for violation of the automatic stay could be filed only in the case in which the violation occurred. That belief is erroneous. 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). If the action is void, it can be challenged in the original bankruptcy case, any subsequent bankruptcy case, and any other state or federal court proceeding. *Vibratech, Inc. v. Frost,* 291 Ga. App. 133, 661 S.E. 2d 185 (2008); *Pope v. Wagner*, 209 B.R. 1015 (Bankr. N.D. Ga. 1997) (J. Drake).

Cornelison also suggested that reopening the 1998 case was preferable to filing a new Chapter 13 case because a fraud judgment could be discharged in the 1998 case. The 1998 case was filed before the effective date of the amendments to the Bankruptcy Code by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"). BAPCPA, whose effective date was October 17, 2005, amended Chapter 13 of the Bankruptcy Code to eliminate the provisions in §1328(a) that permitted a Chapter 13 debtor to discharge a debt arising from fraud. Under the pre-BAPCPA version of the Bankruptcy Code, however, §1328(a) provided for discharge of a fraud claim, but only if the claim was provided for by the plan or disallowed under §502. As the Ficklen Judgment was not listed in Debtor's schedules in the 1998 case, it was not provided for by

the plan nor disallowed under §502 in the 1998 case; therefore, the claim would not have been dischargeable even if reopening the 1998 case had been allowed.

Another contention Cornelison argued as a reason for his decision not to file a new bankruptcy case in 2006 was that he did not believe Mr. Pullen could propose a feasible Chapter 13 plan. The basis for that belief, however, is also lacking, as Cornelison failed to initiate or to complete any inquiry. Cornelison did not question Mr. Pullen regarding his or Mrs. Pullen's income or other debts. Early in his discussion with Mr. Pullen, Cornelison decided on the strategy to reopen the 1998 case and thereafter explored the possibility of filing a new case no further. Cornelison also pointed out that Mr. Pullen had not obtained the prepetition credit counseling required under §109(h). It is common knowledge, however, that such counseling can be obtained *via* telephone or the Internet within an hour and thus might have been obtained before filing a case the next morning; alternatively, Plaintiffs would have been eligible for a waiver under §109(h)(3) because of the exigent circumstances prompting the filing. Additionally, ineligibility under §109(h) does not affect the jurisdiction of the bankruptcy court nor does it invalidate the effectiveness of the automatic stay. *See In re Ross*, 338 B.R.134 (Bankr. N.D. Ga., Feb. 8, 2006) (J. Bonapfel); *In re Parker,* 351 B.R. 790 (Bankr. N.D. Ga. 2006) (J. Diehl).

Finally, Cornelison contended, based upon Mr. Pullen's statements regarding the garnishment in 2004, that the Ficklen Judgment had been satisfied. Even if the Ficklen Judgment had been satisfied, however, a sale of Mr. Pullen's interest in the residence to a *bona fide* purchaser for value probably could not have been avoided in any bankruptcy or state law case unless the Sale violated the automatic stay. Plaintiffs *may* have been able

to obtain a money judgment against Harris, the assignee of the Ficklen Judgment, for a wrongful sale, but the transfer to a third party (i.e. the sale to a *bona fide* purchaser) would likely withstand challenge. The simple expedient of filing a new case, with a new automatic stay, would have preserved the *status quo* and permitted the resolution of the issues between the parties at a more deliberate pace. Nothing else is as efficacious.

Instead of filing a new Chapter 13 bankruptcy case that would have stopped the Sale and preserved all issues between the parties, based upon a faulty understanding of the law, Cornelison charged Plaintiffs $2,500 to file a motion to reopen that provided none of the relief Mr. Pullen had sought when he employed Defendants. As a result, Plaintiffs have incurred the expense of filing a subsequent, new Chapter 13 case and the lengthy and numerous hearings resulting from litigation with Harris to invalidate the Sale and avoid foreclosure of the first mortgage (now held by Harris' son) on the residence.

CONCLUSIONS OF LAW

Plaintiffs assert that Mr. Pullen employed Defendants to stop the Sale. Plaintiffs also assert that the strategy Defendants chose, of filing a motion to reopen the 1998 case, would not have accomplished that goal, that Defendants knew the motion to reopen would not stop the Sale, and that Defendants misrepresented that fact to Plaintiffs. Plaintiffs contend that misrepresentation constitutes fraud by Defendants for the purpose of obtaining the legal fees paid by Plaintiffs.

Defendants do not deny that the chosen strategy of reopening the 1998 case would not have prevented the Sale even if the motion had been granted. Defendants failed to adequately explain to Mr. Pullen that the decision to file a motion to reopen the 1998 case would not prevent the Sale and Defendants failed to adequately advise Mr. Pullen of the

risks attendant upon a sale to a third party *bona fide* purchaser for value. Defendants' conduct evidences poor communication, poor habits as an attorney, and a poor understanding of the law but does not rise to the level of fraud.

A threshold issue to consideration of the professional malpractice claim is Defendants' challenge to Plaintiffs' failure to present expert testimony on the standard of care. Under Georgia procedural law, O.C.G.A. §9-11-9.1, in any professional malpractice case, a plaintiff must include with the complaint the affidavit of an expert. In this adversary proceeding, however, the federal rules of pleading apply. *Casta v. Hennessey,* 281 F. 2d 1569 (11th Cir. 1986) *citing Hanna v. Plummer*, 380 U.S. 460 (1965). *See also Brown v. Nichols,* 8 F. 3d 770 (11th Cir. 1993).

Defendants do not challenge the sufficiency of Plaintiffs' complaint, but Defendants do challenge the quantum of evidence presented by Plaintiffs to establish that Defendants breached the standard of care. Defendants assert that Plaintiffs' failure to present expert testimony is fatal to their malpractice claim.

Generally, expert testimony is required to establish the standard of care in a professional malpractice case. No expert testimony is required, however, when the ordinary experience of the fact-finder provides a sufficient basis for judging the adequacy of the professional's service or the professional's conduct falls below any standard of care. *Kranis v. Scott,* 178 F. Supp. 2d 330 (E.D. N.Y. 2002); *Nobile v. Schwartz*, 265 F. Supp. 2d 282 (S.D. N.Y. 2003); *Belmar v. Garza*, 319 B.R. 748 (Bankr. D.D.C. 2004). The trial in this adversary proceeding was a bench trial, so the bankruptcy judge acted as fact-finder. A bankruptcy judge has sufficient expertise to evaluate the professional

competence of an attorney in a bankruptcy case without expert assistance. *McCord v. Hoffman, (In re Monahan Ford Corp.),* 390 B.R. 493 (Bankr. E.D. N.Y. 2008).

Defendants also assert that they have no liability to Mrs. Pullen, apparently because she was not a client. Defendants, however, signed pleadings representing both Plaintiffs in the motion to reopen the 1998 case, which was a joint case filed for both Plaintiffs. Additionally, although the Ficklen Judgment was against Mr. Pullen and not Mrs. Pullen, Defendants knew that Plaintiffs owned the residence jointly and that any cloud on the title or transfer of any interest in the residence would affect Mrs. Pullen's interest in the residence. Although Mrs. Pullen was not present at the meeting with Defendants on July 31, 2006, Defendants clearly undertook representation of both Mr. Pullen and Mrs. Pullen, and it begs credulity to argue otherwise.

As discussed above, Defendants' decision to proceed with a motion to reopen the 1998 case was based upon a faulty understanding of bankruptcy law and did not accomplish the express purpose sought by Plaintiffs. Although Mr. Pullen's delay to the last business hours before the Sale complicated the situation, a debtor's delay in seeking bankruptcy relief until the last possible moment is not an unusual occurrence.[5] In any given month, the numbers of cases filed immediately prior to foreclosure day peak, and typically include cases filed on the morning of foreclosure day. The obstacles enumerated by Defendants to filing a new bankruptcy case were far from insurmountable. Additionally, Defendants failed to adequately explore the facts before deciding *not* to file

[5] Also, the electronic case filing system is open 24 hours a day, seven days a week, with only rare exceptions usually announced in advance.

a new case. Most importantly, the filing of a new case would have prevented the Sale[6] and preserved the *status quo*.

Because Defendants failed to prevent the Sale, Plaintiffs have incurred substantial legal fees to pursue unwinding the Sale in an adversary proceeding in their 2007 bankruptcy case[7] and in connection with this adversary proceeding. Accordingly, it is hereby

ORDERED that judgment will be entered in favor of Defendants on Plaintiffs' fraud claim. It is further

ORDERED that judgment will be entered in favor of Plaintiffs on the professional malpractice claim. It is further

ORDERED that a scheduling conference on damages will be held at 2:30 p.m. on June 1, 2009, in Chambers, 1290 U.S. Courthouse, 75 Spring Street, SW, Atlanta, Georgia.

IT IS SO ORDERED this 31st day of March, 2009.

MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE

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[6] The good faith purchaser defense is inapplicable to a transfer that is void because it violated the automatic stay. *Ford v. Loftin,* 296 B.R. 537 (Bankr. N.D. Ga. 2003) (J. Bonapfel); *40235 Washington Street Corp. V. Lusardi,*, 329 F. 3d 1076 (9th Cir. 2003). *See also Glendenning v. Third Federal Savings Bank,* 243 B.R. 629 (Bankr. E.D. Pa. 2000); *Smith v. London*, 224 B.R. 44 (Bankr. E.D. Mich. 1998). Therefore, if a new bankruptcy case had been timely filed, even if Harris had failed to receive actual notice of the bankruptcy filing until after the Sale had occurred, the Sale would have been void and the third party purchaser would not have been protected.

[7] Judgment was entered in that adversary proceeding, 06-6010, invalidating the Sale, but that judgment is currently on appeal.