attorney fees

Mitchell v. Pedersen & Slominski BAP No. OR-91-2044-RJAs
Adv. No. 90-3493

In re Hanna Case No. 390-33990-S11

12/14/92 BAP aff'g Judge Luckey unpublished

The bankruptcy court awarded judgment in favor of the trustee for money had and received based on the debtor's overpayment on a lease. The judgment resulted in a net award to the trustee after offset of the outstanding payments owed by the debtor. The court did not mention attorney fees.

The BAP affirmed the judgment. The trustee prevailed on a money had and received theory rather than for breach of contract. Since the lease was not clear about whether the trustee was entitled to fees on the money had and received action, the BAP could not say the bankruptcy court abused its discretion by implicitly declining to award fees. All other issues on appeal were dismissed by the parties.

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NOT FOR PUBLICATION

U.S. BANKRUPTCY COURT
DISTRICT OF OREGON
FILED

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U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE NINTH CIRCUIT

In re DANIEL C. HANNA, et al, Debtors.	BAP No. OR-91-2044-RJAs BK. No. 390-33990-S11 ADV. No. 90-3493
JOHN MITCHELL, INC., Trustee, Appellant, v. RICHARD A. PEDERSEN, PAUL J. SLOMINSKI, Appellee(s).	MEMORANDUM

Argued and Submitted on
July 24, 1992 at Portland, Oregon

Filed - DEC 14 1992

Appeal from the United States Bankruptcy Court
for the District of Oregon

Honorable C. E. Luckey, Bankruptcy Judge, Presiding

Before: RUSSELL, JONES and ASHLAND, Bankruptcy Judges.

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The lessors of real property and equipment appealed the recovery of rent overpayments made by the debtor. The Trustee cross-appealed and asserted that the bankruptcy court erred by not awarding attorney's fees. The lessors dismissed their appeal leaving only the cross-appeal. We affirm.

I. FACTS

Charles M. Kaady ("Kaady") entered into one equipment lease and two real property leases with Richard A. Pedersen and Paul J. Slominski ("P&S") who were the lessors of car wash related equipment and properties. Although the debtor in this case, Daniel C. Hanna, ("Hanna") appears as guarantor on the subject leases, Hanna operated the car wash on the leased property, using the leased equipment. Hanna made all the required lease payments and exercised the options available under the lease.

Both the equipment and property leases were based upon an initial ten-year term, with an option to renew for an additional five years. On the equipment lease, the rent during the five-year option period was substantially less than that during the initial ten-year period. Hanna made all rental payments required under the initial ten-year term and chose to exercise the applicable options on the real property and equipment, paying a combined rent of $3,567.33 per month to P&S through May 1985, when the initial ten-year term expired. Thereafter, during the option period, Hanna continued to pay rent at the rate of $3,567.33 per month even though the total monthly payment due under the leases had decreased to $2,071.56,

resulting in an overpayment of $86,735.52 ($1,495.77 per month for the period between June 23, 1985 and March 23, 1990). Hanna also expressed intent to exercise the purchase option for $1,500, however, this sum was not paid to P&S.

Neither Hanna nor Kaady paid the real property taxes for the years 1986, 1987 and thereafter. Under the terms of the real property leases, the tenant was responsible for the payment of all real and personal property taxes. P&S paid $10,775.23 to county tax authorities. An additional $41,872.03 was owed for delinquent taxes for the years 1987-88 through 1990-91 as of May 1991.

The Trustee brought an action to recover the $86,735.52 in overpayments from P&S on theories of "money had and received" and breach of contract. The Trustee also sought declaratory relief stating that the debtor Hanna was the owner of the subject equipment. P&S disputed the Trustee's right to recovery by contending, inter alia, that Hanna was not a party to the leases, but merely a guarantor, and thus had no rights under them, and that various defaults existed including failure to pay rent from March 1990, unpaid property taxes and interest owing thereon.

P&S counter-claimed for breach of contract, attorney's fees and declaratory relief stating that Hanna had no interest in the property leases or the equipment.

The bankruptcy court awarded judgement to the Trustee based upon the action for money had and received in the amount of

$86,735.52. This judgement was subject to a set-off of $66,601.85 in favor of P&S[1]. The court ordered P&S to pay the Trustee in the amount of $65,678.05 representing the claim less the $10,775.23 paid by P&S to county tax authorities on the debtor's behalf, the $1,500 purchase money and the $8,782.24 for prepetition rent. The court also found in favor of the Trustee on the request for declaratory relief, finding that the trustee has all rights and duties under the real property and equipment leases. Additionally, the court dismissed P&S's counterclaims with prejudice.

However, the bankruptcy court did not rule on attorney's fees or on pre-judgment interest on either the Trustee's $86,735.52 or the off-setting $66,601.85.

P&S appealed the judgment, the grant of declaratory relief, and the failure of the court to award attorney's fees and pre-judgment interest. The Trustee filed a cross-appeal also challenging the court's failure to award attorney's fees and pre-judgment interest.

P&S subsequently filed a motion to dismiss their appeal (OR-91-2011), which was granted by an order entered October 5, 1992, leaving only the Trustee's cross-appeal (OR-91-2044). The issue of pre-judgment interest was withdrawn by the Trustee at

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[1] The set-off was comprised of: the delinquent real property taxes totaling $53,555.30; delinquent personal property taxes of $2,764.31; the purchase option money for the equipment of $1,500; and prepetition equipment and real property rent from April 23, 1990 until May 23, 1990 of $2,071.52 per month, and from June 23, 1990 until July 27, 1990 of $2,319.60 per month, totaling $8,782.24.

oral argument, leaving only the issue of the Trustee's attorney's fees. We AFFIRM.

II. ISSUE

Whether the bankruptcy court erred by not awarding the Trustee attorney's fees as the prevailing party.

III. STANDARD OF REVIEW

Bankruptcy court determinations regarding attorneys' fees will not be disturbed on appeal absent an abuse of discretion or erroneous application of the law. In re Riverside-Linden Inv. Co., 945 F.2d 320, 322 (9th Cir. 1991); In re Nucorp Energy, Inc., 764 F.2d 655, 657 (9th Cir. 1985).

IV. DISCUSSION

With P&S' dismissal of their appeal, issues surrounding the judgment, declaratory relief, their attorney's fees and pre-judgment interest are eliminated. All that remains is the question of the Trustee's attorney's fees.

In its order, the bankruptcy court makes no mention of attorney's fees. The Trustee's remaining cross-appeal asserts that the court erred because the lease provisions specifically provide that in the event of a dispute, the prevailing party shall be entitled to attorney's fees.

We note that the Trustee prevailed on the "money had and received count," not the breach of contract count. The provision granting attorney's fees is part of the lease

contract. The contract is unclear, however, about whether the trustee is entitled to fees based on the money had and received action alone. We cannot say that the bankruptcy court abused its discretion by implicitly declining to award fees. We therefore affirm.

V. CONCLUSION

We AFFIRM the bankruptcy court's denial of attorney's fees.