

Automatic Stay
Abandonment
Jurisdiction

Smith v. Kadwell et al. 98-6207-fra
(In re Richard Smith) 694-60379-fra7)

9/3/98 FRA Unpublished

The Debtor took two pianos to Kadwell for restoration and repair work. Kadwell performed services in the amount of \$2,500 and then, while the pianos were still in the possession of Kadwell, Debtor filed bankruptcy in 1994. The Debtor was granted a discharge in May of that year. The pianos were not specifically listed in the schedules, nor was an exemption claimed by the Debtor. When the Trustee learned of the pianos, he claimed them as property of the estate with a value of \$4,500. In early 1996, Kadwell sold one of the pianos to compensate himself for expenses on the alleged advice of his attorneys, Hillier & Scheibmeir, that Washington bailor/bailee law supersedes federal bankruptcy law. In March, 1998, the Trustee filed a notice of abandonment for the pianos which became effective when no objections were forthcoming. The case was closed. The case was reopened on Debtor's motion on July 7, 1998 to allow Debtor to file this adversary proceeding, and closed the following day.

The Debtor named as defendants both Kadwell and Kadwell's attorneys, alleging violation of the automatic stay, conversion, and violation of UCC provisions. He asked for damages, or in the alternative, an order allowing him to redeem the pianos. The responding Defendant filed a motion to dismiss under FRCP 12(b)(6) and on jurisdictional grounds.

The court held that it had subject matter jurisdiction because of the § 362(h) claim, even though the assets were abandoned and the case closed. Because the § 362(h) claim was neither scheduled nor abandoned, however, it remains property of the estate under § 554(d). The alleged § 362 violation occurred in the pre-abandonment period when the property was estate property. Any recovery would thus accrue to the estate, rather than to the debtor. Absent an injury to the Debtor, there can be no recovery. The § 362(h) claim was therefore dismissed under FRCP 12(b)(6). Absent direct jurisdictional authority over the remaining non-core matters, the court declined to hear those remaining matters. The adversary proceeding was dismissed.

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF OREGON

IN RE)
RICHARD MARION SMITH,) Case No. 694-60379-fra7
Debtor.)
RICHARD MARION SMITH,) Adv. Proc. No. 98-6207-fra
Plaintiff,)
v.)
KEN KADWELL, and)
JANE DOE KADWELL, and)
HILLIER & SCHEIBMEIR, PS,)
Defendants.) MEMORANDUM OPINION

BACKGROUND

The Debtor took two pianos to Ken Kadwell for restoration and repair work. On February 3, 1994, while the pianos were still in the possession of Mr. Kadwell and after Mr. Kadwell had completed at least some of the repair work, the Debtor filed bankruptcy under Chapter 7 of the Bankruptcy Code. The pianos were not specifically listed in the schedules, nor was an exemption claimed for the pianos. When the Trustee learned of

1 the existence of the pianos, he claimed them for the estate with
2 a total value of \$4,500. The pianos remained in the possession
3 of Mr. Kadwell, subject to a claimed possessory lien for the
4 value of services rendered in the amount of \$2,500. The Debtor
5 was granted a discharge of debts on May 5, 1994.

6 Sometime later, Kadwell sold one of the pianos to a third
7 party for payment of his costs and fees, upon the alleged advice
8 of attorney Jeffrey Pollack of Hillier & Scheibmeir, P.S. that
9 Washington bailor/bailee law supersedes federal bankruptcy law.
10 The Debtor's attorney informed the Trustee of the sale by letter,
11 but nothing was apparently done by the Trustee in response
12 thereto. On February 14, 1998, the Trustee filed a notice of
13 intent to abandon the estate's interest in the pianos. When no
14 objections to abandonment were forthcoming, the estate's interest
15 in the pianos was deemed abandoned nineteen days thereafter and
16 the case was closed on March 13, 1998. Upon motion by the
17 Debtor, the case was reopened on July 7, 1998 to allow the filing
18 of this adversary proceeding and reclosed on July 8.

19 The complaint alleges improprieties in the foreclosure of
20 Kadwell's alleged possessory lien, imposition of an improper
21 possessory lien, conversion, and violation of the automatic stay.
22 Compensatory damages of \$60,000 and punitive damages are prayed
23 for. Alternatively, the Plaintiff asks for an order allowing
24 redemption of the pianos. The responding Defendant, Hillier and
25 Scheibmeir, P.S., moves for dismissal on jurisdictional grounds
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1 and under Fed. R. Civ. P. 12(b)(6) for failure to state a claim
2 on which relief can be granted.

3 DISCUSSION

4 Jurisdiction

5 The Defendant argues that the bankruptcy court does not have
6 jurisdiction over this matter because the outcome of the
7 proceeding could not conceivably have any effect on the estate
8 being administered in bankruptcy. This is so because the
9 property of the estate has been abandoned and the case has been
10 closed.

11 Jurisdiction of the bankruptcy court is governed by 28
12 U.S.C. § 1334. That section gives exclusive jurisdiction to the
13 federal district court (and through referral to the bankruptcy
14 court) over bankruptcy cases, and concurrent jurisdiction with
15 other competent nonbankruptcy courts of all civil proceedings
16 "arising under title 11 or arising in or related to cases under
17 title 11." The Defendant is correct that the test for
18 determining whether a civil proceeding is "related to" a case
19 under title 11 is to determine whether there is any conceivable
20 effect on a bankruptcy case being administered. If this court's
21 jurisdiction were based solely on "related to" jurisdiction,
22 there is no doubt that jurisdiction would be lacking. However,
23 the Plaintiff bases part of his complaint on a violation of the
24 automatic stay and his action is brought in part under 11 U.S.C.
25 § 362(h). To that extent, it is a civil proceeding "arising
26 under" title 11 rather than "related to" a case under title 11.

1 This court therefore has subject matter jurisdiction over this
2 proceeding regardless of any possible effect on the underlying
3 bankruptcy case.

4 Violation of Automatic Stay

5 11 U.S.C. § 362(h) states that "An individual injured by any
6 willful violation of a stay provided by this section shall
7 recover actual damages, including costs and attorneys' fees, and
8 in appropriate circumstances, may recover punitive damages." The
9 key to recovery is the ability to prove an injury. In the
10 context of the alleged violation of the automatic stay of § 362,
11 this is where the Plaintiff's case fails.

12 The complaint alleges that the stay violation occurred while
13 the pianos were property of the estate. That being the case, the
14 claim for damages under § 362(h) is likewise vested in the
15 estate. Under 11 U.S.C. § 554(c), "any property scheduled under
16 section 521(1) of this title not otherwise administered at the
17 time of the closing of the case is abandoned to the
18 debtor. . . ." Under § 554(d), "property of the estate that is
19 not abandoned under this section and that is not administered in
20 the case remains property of the estate." The claim for damages
21 under § 362(h), being neither scheduled nor abandoned, remains
22 property of the estate under § 554(d). The Debtor is therefore
23 not the proper party to bring the action.

24 Moreover, the Debtor was not injured by the alleged
25 violation of the automatic stay during the pre-abandonment period
26 in which the pianos were property of the estate. The Debtor had

1 no equity in the nonexempt property; any damage to estate
2 property or recovery of the assets during this period would have
3 accrued to the estate rather than to the Debtor. See In re
4 Weisberger, 205 B.R. 727 (Bankr. M.D. Penn. 1997); In re Adams,
5 212 B.R. 703 (Bankr. D. Mass. 1997). Absent an injury, there can
6 be no recovery under 11 U.S.C. § 362(h). The claim under 11
7 U.S.C. § 362(h) must therefore be dismissed.

8 Avoidance of Post-petition Transfer

9 11 U.S.C. § 549(d) allows the trustee to avoid an
10 unauthorized post-petition transfer of property of the estate.
11 To the extent that the Debtor is attempting to avoid the effects
12 of Kadwell's foreclosure of his lien on the piano under § 549, it
13 must fail for a number of reasons. First, the provision allows a
14 trustee to avoid the transfer, not a debtor. Second, the piano
15 is no longer property of the estate, having been abandoned by the
16 Trustee. Third, § 549(d)(1) states that a proceeding under that
17 section may not be brought after two years after the date of the
18 transfer sought to be avoided. The Debtor, while not giving the
19 exact date that the alleged transfer took place, states in his
20 complaint that he was informed by Kadwell in February, 1996 that
21 one of the pianos had been sold. An action under § 549 would
22 thus have had to occur at the latest by February, 1998. As this
23 adversary proceeding was filed on June 15, 1998, an action under
24 § 549 is time barred.

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1 enter a default judgment as to Defendant Kadwell is denied. An
2 order and judgment consistent herewith will be entered.

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FRANK R. ALLEY, III
Bankruptcy Judge