

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:) Case No. 05-11873
)
STEVEN H. KERR,) Chapter 13
)
Debtor.) Judge Pat E. Morgenstern-Clarren
)
) **MEMORANDUM OF OPINION**

The Pension Benefit Guaranty Corp. (PBGC) moves for retroactive relief from the automatic stay to validate a default judgment it holds against the debtor Steven Kerr. (Docket 46, 52). The debtor opposes that request. (Docket 51). For the reasons stated below, the PBGC's motion is denied.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered on July 16, 1984 by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2)(G).

FACTS

The parties submitted this matter for decision on these stipulated facts:¹

1. On October 8, 2004, PBGC filed a complaint ("Complaint") against Steven H. Kerr, the Debtor herein, alleging that Mr. Kerr breached his fiduciary duties to the Cleveland Air Cargo, Inc. Pension Plan ("Pension Plan") within the meaning of 29 U.S.C. § 1106 and claiming damages of at least \$66,062.24, plus interest.

¹ Docket 53.

2. PBGC, as statutory trustee for the Pension Plan, pays Mr. Kerr a pension benefit of approximately \$395 per month.
3. PBGC's Complaint sought, among other things, an order allowing PBGC to set off Mr. Kerr's benefit as a participant of the Pension Plan against his liability to the Pension Plan resulting from his fiduciary breaches.
4. On October 27, 2004, PBGC attempted to effect personal service of process on Mr. Kerr.
5. PBGC effected service on Mr. Kerr on January 12, 2005. According to process server Purser, he served Mr. Kerr at his home. In his affidavit dated January 14, 2005, Mr. Purser stated that the individual he served in January was the same individual he had served in October 2004.
6. Mr. Kerr did not answer PBGC's Complaint.
7. On February 10, 2005, PBGC filed a Request for Entry of Default by the Clerk of Court under Fed. R. Civ. P. 55(a).
8. On February 11, 2005, the District Court, having not received the proof of service and believing that service had not been effected, dismissed the case.
9. On February 14, 2005, bankruptcy counsel for Mr. Kerr reviewed the docket in the District Court case and noted that the case had been dismissed on February 11, 2005.
10. On February 14, 2005, PBGC filed a motion to reopen the District Court case because its dismissal was based on a mistake of fact, *i.e.* that the defendant, Mr. Kerr had not been timely served. The motion to reopen was served on Mr. Kerr by first class mail.
11. Mr. Kerr did not respond to the motion, nor did he inform PBGC of his bankruptcy, filed in this court on February 17, 2005.
12. The District Court reopened PBGC's case, and on February 24, 2005, the Clerk of the District Court entered notice of default under Fed. R. Civ. P. 55(a). The Court *sua sponte* set a hearing date on the default judgment for March 4, 2005.

13. On February 25, 2005, PBGC filed a motion for a default judgment, for which the hearing date had already been set for March 4, 2005. PBGC served Mr. Kerr with notice of the motion by overnight courier.
14. Mr. Kerr did not respond to the motion for default judgment, nor did he notify PBGC's counsel of his ongoing bankruptcy.
15. The District Court signed the default judgment on the hearing date, March 4, 2005 and closed the case on that same date.
16. The default judgment awarded to PBGC damages of \$211,697.58, including principal and interest, and allowed PBGC to offset the damages against its payment of the pension benefits to Mr. Kerr.
17. On March 7, 2005, PBGC received its first notice that on February 17, 2005, Mr. Kerr had filed a petition for relief under Chapter 13 of the Bankruptcy Code.
18. After receiving notice of the . . . bankruptcy, counsel for PBGC called Mr. Kerr's counsel to inform him of the default judgment, and request that he take action in the district court to correct the situation.
19. Mr. Kerr's counsel then filed a Suggestion of Stay with the District Court, suggesting that the filing of the bankruptcy petition stayed the District Court action. On March 18, 2005, the District Court found the Suggestion of Stay moot because a default judgment had been entered.
20. The present value of Mr. Kerr's benefit is approximately \$42,443 (as of September 30, 2004). PBGC and Mr. Kerr are aware of no party, other than Mr. Kerr, having a legal interest in the benefit.

DISCUSSION

The filing of a bankruptcy petition operates as an automatic stay of “the commencement or continuation . . . of a judicial . . . action or proceeding against the debtor that was or could have been commenced before the commencement of the case[.]” 11 U.S.C. § 362(a)(1). The automatic stay provides “fundamental protection to the debtor.” *Easley v. Pettibone Michigan*

Corp., 990 F.2d 905, 910 (6th Cir. 1993). After the debtor filed his chapter 13 petition in this case—but before PBGC knew about it—PBGC requested and received a default judgment against him. PBGC acknowledges that this violated the automatic stay.

In the Sixth Circuit, actions taken in violation of the automatic stay are “invalid and voidable and shall be voided absent limited equitable circumstances.” *Id.* at 911. Such circumstances exist “only where the debtor unreasonably withholds notice of the stay and the creditor would be prejudiced if the debtor is able to raise the stay as a defense, or where the debtor is attempting to use the stay unfairly as a shield to avoid an unfavorable result[.]” *Id.* This exception “must be applied sparingly.” *Id.* (quoting *In re Smith*, 876 F.2d 524, 527 (6th Cir. 1989)). If the court finds that appropriate equitable circumstances exist, the debtor loses the protection of the automatic stay.

ISSUE

Does equity favor lifting the automatic stay retroactively, which would have the effect of permitting PBGC’s default judgment against the debtor to stand?

THE POSITIONS OF THE PARTIES

PBGC argues that the debtor acted unreasonably in failing to stop the district court litigation and that it has been prejudiced because the district court closed the case after granting the default judgment. As a result of that prejudice, PBGC maintains that the stay should be lifted retroactively. The debtor counters that he did not unreasonably withhold notice of his bankruptcy filing and that he is entitled to the protection of the automatic stay.

DISCUSSION

PBGC must show that the debtor unreasonably withheld notice of his bankruptcy filing and that it will be prejudiced if the debtor receives the benefit of the automatic stay. The stipulated facts do not support either contention. While it is clear that the debtor did not take *extraordinary* efforts to notify PBGC of his bankruptcy filing, the evidence does not indicate that he delayed unreasonably in doing so. The court finds it significant that the disputed activity took place within a short time span. The district court dismissed the case on February 11, 2005; debtor's counsel learned of the dismissal before filing the chapter 13 case; PBGC moved to reopen the case on February 14, 2005 serving the debtor by regular mail; and the debtor filed his bankruptcy case on February 17, 2005 not knowing that PBGC had filed a motion to reopen. Believing that PBGC's action was dismissed, the debtor gave PBGC regular notice of the bankruptcy filing rather than expedited notice. The district court, not knowing of the bankruptcy filing, granted judgment two weeks later on March 4, 2005. When the debtor received PBGC's motion for default judgment, he should have notified PBGC of his bankruptcy filing. The failure to do so in this short time frame does not show unreasonable delay.

Nor has PBGC proven that it will be prejudiced if the stay is honored. The only prejudice PBGC identifies is that the district court closed the case after entering the default judgment. The district court, however, reopened the case once on PBGC's motion and there is no evidence that this avenue would now be foreclosed to PBGC if the judgment is voided.² PBGC also can go forward on its claim in this court. It is apparent that the only "prejudice" PBGC will suffer if the

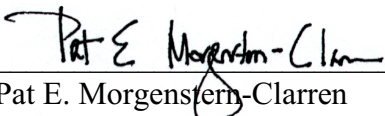
² This assumes, of course, that PBGC would follow the correct procedures for moving to lift the stay to go forward with the district court action.

judgment is voided is that it will have to prosecute the issue on the merits, either in this court or the district court. This is not the kind of legal prejudice that would warrant granting equitable retroactive relief from stay.

CONCLUSION

For the reasons stated, PBGC's motion for retroactive relief from stay is denied. Consequently, the default judgment entered against debtor Steven Kerr by the district court is void. A separate order will be entered in accordance with this memorandum of opinion.

Date: 24 August 2005



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

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THIS OPINION NOT INTENDED FOR PUBLICATION

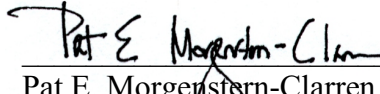
UNITED STATES BANKRUPTCY COURT
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In re:)	Case No. 05-11873
)	
STEVEN H. KERR,)	Chapter 13
)	
Debtor.)	Judge Pat E. Morgenstern-Clarren
)	
)	<u>ORDER</u>

For the reasons stated in the memorandum of opinion filed this same date, the motion of the Pension Benefit Guaranty Corp. for retroactive relief from the automatic stay is denied. (Docket 46). Consequently, the default judgment entered in favor of the Pension Benefit Guaranty Corp. against debtor Steven Kerr by the district court is void.

Date: 24 August 2005



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

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