

UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH DAKOTA
Western Division

In re:) Bankr. No. 98-50285
) Chapter 7
GARY L. KAISER)
Soc. Sec. No. [REDACTED]-4364) MEMORANDUM OF DECISION RE:
) VIOLATION OF AUTOMATIC STAY
Debtor.) OR POST-DISCHARGE INJUNCTION
)

The matter before the Court is Debtor's request for a determination of whether Richard Kaiser, Executor of the Estate of Edna C. Kaiser, and the law firm of Farrell, Farrell & Ginsbach have violated the post-discharge injunction and whether they should be enjoined from any further actions in state court. This is a core proceeding under 28 U.S.C. § 157(b)(2). This Memorandum of Decision and accompanying order shall constitute the Court's findings and conclusions under F.R.Bankr.P. 7052. As set forth below, the Court concludes that all orders, judgments, decrees, deeds or other actions in state civil case nos. 93-95 or 94-118 on or after May 22, 1998 are void and that state civil action no. 99-68, as presently shown on this record, does not violate the post-discharge injunction so long as all judgments against Debtor which have been discharged are recognized.

I.

Gary L. Kaiser ("Debtor") filed a Chapter 7 petition on May 22, 1998. His schedule of real property included three lots in Hot Springs, South Dakota, on which he said he was a co-owner. He stated the property was worth \$29,000 and that there were no secured claims against it. Debtor claimed this real property exempt and again valued it at \$29,000. On his schedule of secured creditors, he listed the Estate of Edna C. Kaiser, Richard E.

Kaiser, Executor. He acknowledged that the Edna Kaiser Estate held a judgment for \$28,764.59, but stated it was all unsecured. He did not list any co-debtors.

The Clerk gave notice of the commencement of case on May 24, 1998. Among the creditors served with the notice was the Edna Kaiser Estate. The notice set forth the August 31, 1998 deadlines for filing a complaint objecting to the discharge of all claims or to a particular claim against Debtor. The meeting of creditors was held as originally scheduled on July 30, 1998, and was concluded that day.

No timely objections to Debtor's claimed exemptions were filed. See F.R.Bankr.P. 4003(b). No timely objections to Debtor's discharge or to the discharge of a fraud-based debt were filed. See F.Rs.Bankr.P. 4004(a) and 4007(c). A general discharge order was entered September 1, 1998. That order also voided any judgments personally against Debtor.¹ 11 U.S.C. § 524(a). On September 3, 1998, the Clerk served the Edna Kaiser Estate with a copy of the discharge order. On January 28, 1999, the case trustee reported that he had not found any assets to liquidate to pay creditors. The case was closed on March 2, 1999.

On November 2, 1999, Debtor filed *pro se* a letter/motion asking the Court to enjoin or restrain the Edna Kaiser Estate and its counsel, the law firm of Farrell and Ginsbach, from further

¹ On the petition date, the value of Debtor's interest in the realty did not exceed \$30,000. Therefore, there was no equity to support a judgment lien for any judgment creditor, including the Estate of Edna Kaiser.

collection or other legal action against his home. To his letter/motion, Debtor appended his brief that had been filed in response to the Edna Kaiser Estate's summary judgment motion in a state court foreclosure action, state civ. nos. 93-95 and 94-118 (Seventh Judicial Circuit of the State of South Dakota)². He also appended a letter on the matter that he had written United States Senator Tom Daschle on December 16, 1998. The Court set a December 3, 1999 deadline for interested parties to respond.

On November 15, 1999, Debtor filed a similar pleading that was captioned as an *ex parte* motion for a permanent or preventive injunction. The Court ordered interested parties to respond to it by the same December 3, 1999 deadline.

On November 22, 1999, Patrick M. Ginsbach of Farrell, Farrell & Ginsbach, counsel for the Edna Kaiser Estate, filed a response. He acknowledged that any claim the Edna Kaiser Estate had against Debtor had been discharged in the bankruptcy proceeding. He further stated that the pending state court action, state civ. no. 99-68, Seventh Judicial Circuit for the State of South Dakota, was for partition of the subject realty to reflect a one-half interest that the Edna Kaiser Estate had acquired pre-petition from Tina V. Kaiser, and to obtain an accounting of post-petition rents received from the subject realty. Attorney Ginsbach thus concluded that the Edna Kaiser Estate and his law firm had not violated the post-discharge injunction. Appended to his response was a copy of the

² Upon inquiry from the Court, the Fall River County Clerk of Court stated some pleadings in Civil No. 94-118 became mixed with or were erroneously filed in Civ. No. 93-95.

quit claim deed from Tina V. Kaiser dated February 10, 1994, and a copy of the complaint in the pending state court action. The complaint erroneously lists several judgments against the realty that were discharged in bankruptcy, see 11 U.S.C. § 524(a), though Debtor has not yet obtained a judgment discharge order under S.D.C.L. § 15-16-20 that will formally remove them from the county's records.

Debtor filed a reply on November 30, 1999. He stated that the Edna Kaiser Estate had obtained in bad faith its one-half interest in the realty and that the quit claim deed may have been back-dated. He appended copies of Attorney Ginsbach's response, a 1994 divorce summons and petition by Tina Kaiser against him in Illinois⁴, the divorce judgment from Illinois, the summary judgment brief he filed in state court on October 23, 1996, the 1994 quit claim deed, a May 27, 1998 sheriff's deed from Debtor and his former wife to mortgagee Norwest Bank's assignee, the Edna Kaiser Estate, Debtor's answer and counterclaim in the 1999 state court partition action, his bankruptcy discharge order, a December 19, 1997 order from the state court allowing the Edna Kaiser Estate to obtain entry to Debtor's home, and the 1999 state court partition complaint.

Debtor also filed a letter on November 30, 1999. Therein, he asked the Court to have the attorneys involved in the state court matters investigated for improprieties.

The Edna Kaiser Estate filed a response to Debtor's Motion for

⁴ The divorce petition indicates Debtor has three children, a fact not disclosed in his petition.

Permanent or Preventive Injunction on December 6, 1999. The Edna Kaiser Estate essentially restated its earlier response to Debtor's letter/motion seeking the same injunction relief.

The Court received and docketed another letter from Debtor on December 10, 1999. Therein, Debtor disputed some facts stated in the Edna Kaiser Estate's December 6, 1999 response, including what the Estate offered and subsequently paid for its one-half interest in the realty. He also argued that the assignment of the mortgage from Norwest Bank to the Edna Kaiser Estate was fraudulent and that the mortgage had actually been paid in full before the foreclosure and assignment. Appended to this letter were: a letter to Debtor's attorney from the Farrell law firm offering Debtor \$3,000 for his interest in the real property, a letter from Debtor's attorney that rejected the offer and that also stated the mortgage assignment from Norwest was invalid; a copy of the assignment; a copy of the note and mortgage with Norwest; a notice of setoff letter from Norwest to the Edna Kaiser Estate dated November 3, 1993, which also states that this pays off the installment note with Norwest; a check to Norwest from Debtor dated November 4, 1999 that was returned to him; an account assignment by Edna Kaiser dated August 5, 1992; a newspaper foreclosure sale notice reflecting an October 16, 1997 foreclosure judgment by the Edna Kaiser Estate (sale set for November 24, 1997); a certificate of service by Attorney Ginsbach that says he served Debtor with a copy of the Certificate of Sale; the Certificate of Sale that was filed November 24, 1997 (successful bidder was the Edna Kaiser Estate); and Debtor's December 16, 1998 letter to Senator Daschle.

The Court received and docketed another letter from Debtor on December 13, 1999. Therein, Debtor related some details of a state court hearing. He also acknowledged that Attorney David Huss is representing him in the state court partition action and he acknowledged that an answer was filed late in that case due to a death in his attorney's family.

II.

VIOLATION OF THE AUTOMATIC STAY

When a bankruptcy case is filed, a stay is automatically placed on any further debt collection efforts. 11 U.S.C. § 362(a). In a Chapter 7 case, the stay against property continues until the property is no longer property of the estate. 11 U.S.C. § 362(c)(1). Assuming the case is not dismissed, all other acts are stayed until the debtor receives his discharge. 11 U.S.C. § 362(c)(2)(C). Any collection action taken by a creditor that violates the automatic stay is generally deemed void. *LaBarge v. Vierkant (In re Vierkant)*, 240 B.R. 317, 320-25 (B.A.P. 8th Cir. 1999).

Debtor filed his bankruptcy petition on May 22, 1998. The Edna Kaiser estate continued its foreclosure action thereafter and obtained the issuance of a sheriff's deed on May 27, 1998. However, all of the Edna Kaiser Estate's collection actions after May 22, 1998, including the sheriff's deed and any orders and judgments, are void since they violated the automatic stay.

III.

VIOLATION OF THE POST-DISCHARGE INJUNCTION

When a bankruptcy debtor receives a discharge of his debts, creditors are permanently enjoined from collecting those discharged

debts from the debtor. 11 U.S.C. § 524(a)(2) and (3); *Atkins v. Martinez (In re Atkins)*, 176 B.R. 998, 1006-07 (Bankr. D. Minn. 1994). This discharge injunction applies to any judgment obtained at any time, as well as any act to enforce a debtor's liability on account of a debt. *Id.* at 1007. When a creditor violates this post-discharge injunction, the debtor may seek enforcement of the injunction through a motion for contempt (violation of a court order) or through a declaratory judgment action. *Insurance Company of North American v. NGC Settlement Trust & Asbestos Claims Management Corp. (In re National Gypsum Co.)*, 118 F.3d 1056, 1063 (5th Cir. 1997); *Bowen v. Residential Financial Corp. (In re Bowen)*, 89 B.R. 800, 807 (Bankr. D. Minn. 1988).

At this time, it does not appear that the Edna Kaiser Estate is violating the post-discharge injunction through its partition action. The Edna Kaiser Estate is not attempting to enforce its foreclosure judgment; it is instead seeking a partition of its one-half interest in the realty and any interest it may have in rent proceeds from the realty. Debtor's concerns about the legality of the quit claim deed and the validity of the mortgage assignment must, therefore, be brought before the state court. Those are issues that do not affect Debtor's discharge or other matters related to this bankruptcy proceeding. Therefore, this Court does not have jurisdiction over them. See 28 U.S.C. §§ 157 and 1334.

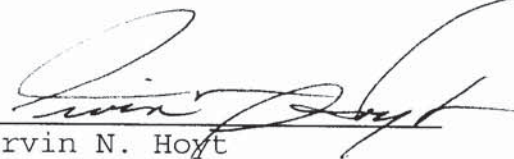
The state court partition decision will, of course, need to recognize those judgments against Debtor that have been discharged under § 524(a). Although Debtor has not yet completed the

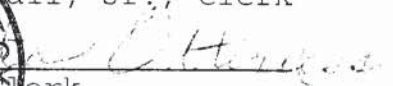
administrative task under S.D.C.L. § 15-16-20 of having the discharged judgments removed from county records, the judgments are nonetheless unenforceable. A copy of this decision will be sent to Debtor's bankruptcy counsel and partition action counsel so that they will know that a § 15-16-20 motion before this Court is needed.

An order will be entered stating that all orders, judgments, decrees, deeds or other actions in state civil case nos. 93-95 and 94-118 on or after May 22, 1998 are void and stating that state civil action no. 99-68, as presently shown on this record, does not violate the post-discharge injunction so long as those judgments against Debtor which have been discharged are recognized as discharged.

Dated this 17th day of December, 1999.

BY THE COURT:


Irvin N. Hoyt
Bankruptcy Judge

APPROVED BY
Charles L. Nail, Jr., Clerk
By 
Deputy Clerk
SEAL (SEAL)

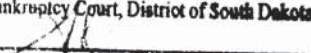
NOTICE OF ENTRY
Under F.R. Bankr.P. 9022(a)
Entered

DEC 17 1999

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court
District of South Dakota

I hereby certify that a copy of this document was mailed, hand delivered, or faxed this date to the parties on the attached service list.

DEC 17 1999

Charles L. Nail, Jr., Clerk
U.S. Bankruptcy Court, District of South Dakota
By 

Case: 98-50285 Form id: 122 Ntc Date: 12/17/1999 Off: 3 Page : 1
Total notices mailed: 6

Aty Huss, David J. 919 Main Street, Ste 102, Rapid City, SD 57701
Trustee Whetzal, Dennis C. PO Box 8285, Rapid City, SD 57709
Aty Gering, Bruce J. Office of the U.S. Trustee, #502, 230 South Phillips Avenue, Sioux Falls, SD 57104-6321
Aty Ginsbach, Patrick M. 441 N. River Street, Hot Springs, SD 57747
Aty Ridgway, Michael E. PO Box 5073, Sioux Falls, SD 57117-5073