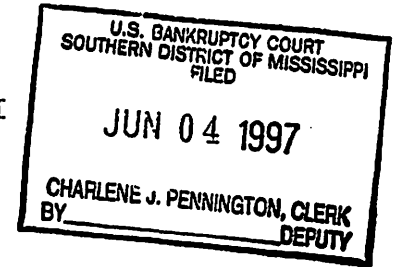


IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION



IN RE: DIXIE SPRINGS SPRING WATER, INC. CASE NO. 8900188JEE

LAKE DIXIE SPRINGS SPRING WATER, INC. PLAINTIFF

VS. ADV. NO. 960094JEE

HERBERT MARTIN DEFENDANT

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Edward Ellington, Bankruptcy Judge

MEMORANDUM OPINION

The Court has before it for consideration the *Motion for Partial Summary Judgment* filed by the Plaintiff, Lake Dixie Springs Spring Water, Inc. In its motion, the Plaintiff seeks a partial summary judgment finding that a certain default judgment against Dixie Springs Spring Water, Inc. was taken in violation of the automatic stay provided by 11 U.S.C. § 362¹. The Plaintiff also

¹ Hereinafter, all code sections refer to the Bankruptcy Code found at Title 11 of the United States Code, unless specifically noted otherwise.

seeks an order setting aside the judgment. After considering the evidence presented to the Court along with the arguments of counsel, the Court finds that the motion is well taken and should be granted. In so finding, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

On January 18, 1989 the Debtor, Dixie Springs Spring Water, Inc. filed a petition for relief under chapter 11 of Bankruptcy Code.

On February 15, 1990 the Defendant, Herbert Martin, filed a complaint for collection on an open account in the County Court of Pike County, Mississippi against Michael Lensing and the Debtor, Dixie Springs Spring Water, Cause No. 16,514. In March of 1990, Michael Lensing filed his answer to the complaint in which he stated that Dixie Springs Spring Water, Inc. had filed bankruptcy.

On April 11, 1990, an order was entered by this Court in the Debtor's chapter 11 case allowing the sale of certain property of the Debtor's estate. Pursuant to this Court's order allowing the sale, a warranty deed dated May 14, 1990, was executed by the Debtor's agent conveying certain property to Lake Dixie Springs Spring Water, Inc.

On September 7, 1990, the Debtor's case was converted to a case under chapter 7 of the Bankruptcy Code.

On June 18, 1991, while the Debtor's chapter 7 case was pending, Herbert Martin caused a default judgment to be entered

against the Debtor, Dixie Springs Spring Water, Inc., in the Pike County action. On the same day, the default judgment was enrolled in the Pike County Circuit Clerk's office at Book Q, Page 63.

On August 8, 1991, the May 14, 1990, warranty deed conveying certain of the Debtor's property to Lake Dixie Springs Spring Water, Inc. was recorded in the land records in the Office of the Chancery Clerk of Pike County, Mississippi.

On March 4, 1994 the Debtor's bankruptcy case was closed. An Order was entered in May of 1996 reopening the case so that the Plaintiff to this action, Lake Dixie Springs Spring Water, Inc., could commence the present adversary proceeding.

On May 20, 1996 the Plaintiff, Lake Dixie Springs Spring Water, Inc., commenced this adversary proceeding by filing a complaint seeking to set aside the Pike County default judgment and seeking to find the Defendant, Herbert Martin, in contempt pursuant to § 362(h) for violating the automatic stay. The Defendant answered the complaint, denying essentially all of the allegations contained in the complaint.

The Plaintiff next filed the present *Motion for Partial Summary Judgment*. In its motion, the Plaintiff seeks a finding that the default judgment was taken in violation of the automatic stay and also seeks an order directing the Defendant to release the judgment. The Plaintiff argues that there are no genuine issues of material fact and that it entitled to judgment as a matter of law.

In support of its motion, the Plaintiff submits copies of the motion to reopen the bankruptcy case, the order reopening the case,

the complaint filed in this adversary proceeding, the answer to the complaint, and excerpts from certain answers by Herbert Martin to certain discovery requests. Attached as exhibits to the adversary complaint are copies of the warranty deed from Dixie Springs Spring Water, Inc. to Lake Dixie Springs Spring Water, Inc., the Debtor's bankruptcy petition and schedules, the complaint filed by Herbert Martin against the Debtor in the County Court of Pike County, Mississippi, the answer to the Pike County complaint filed by Mike Lensing, the order of this Court allowing the sale of the property in question, the default judgment entered against the Debtor in the County Court of Pike County, and the Herbert Martin's answer to the adversary complaint.

In response to the *Motion for Partial Summary Judgment*, the Defendant, Herbert Martin, argues that there are genuine issues of material fact precluding summary judgment and also that the Plaintiff is not entitled to judgment as a matter of law. In his response to the motion, Mr. Martin denies various allegations and makes additional allegations regarding the events in question. However, other than allegations contained in the response, no evidence is offered to support the position of Mr. Martin.

CONCLUSIONS OF LAW

Rule 56 of the Federal Rules of Civil Procedure as made applicable by Rule 7056(e) of the Federal Rules of Bankruptcy Procedure provides that in order for this Court to sustain a motion for summary judgment, the Court must find that "[t]he pleadings,

depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." See also Celotex Corp. v. Catrett, 477 U.S. 317, 322-34, 106 S.Ct. 2548, 2552-58, 91 L.Ed.2d 265 (1986). Additionally, the Court must view the available evidence in the light most favorable to the nonmoving party. Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587-88, 106 S.Ct. 1348, 1356-57, 89 L.Ed.2d 538, 553 (1986).

Mr. Martin asserts that there are genuine issues of material fact which preclude the granting of partial summary judgment in favor of the Plaintiff. However, Mr. Martin has attached neither affidavits nor any other type of evidence to support his position. Rule 56 of the Federal Rules of Civil Procedure provides in relevant part as follows:

Rule 56. Summary Judgment.

.....
(e) Form of Affidavits; Further Testimony; Defense Required. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

Since no proof has been offered by Mr. Martin to show the existence of a genuine issue as to any material fact, the Court

finds that the Plaintiff has established the nonexistence of any genuine issue as to any material fact regarding the relief sought in the Plaintiff's *Motion for Partial Summary Judgment*.

Next the Court must determine whether the Plaintiff is entitled to judgment as a matter of law, based on the evidence before the Court. Section 362(a) of the Bankruptcy Code contains eight different categories of actions that are stayed by the filing of a petition for relief under 11 U.S.C., providing in pertinent part as follows:

11 USC § 362

§ 362. Automatic stay.

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, ... operates as a stay, applicable to all entities, of-

(1) The commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

. . . .

(3) any act to obtain possession of property of the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

. . . .

The complaint filed by Mr. Martin in the County Court of Pike County against the Debtor was commenced while the Debtor's bankruptcy case was pending. Likewise, the default judgment was entered during the pendency of the Debtor's bankruptcy case. Mr. Martin did not obtain relief from the automatic stay in order to commence the Pike County action or to obtain the default judgment. Therefore, his actions in commencing the Pike County action and in obtaining the default judgment were in violation of the automatic stay.

The Plaintiff argues that the default judgment taken in violation of the automatic stay is void. "It is well-settled that 'actions taken in violation of the automatic stay are not void, but rather they are merely voidable, because the bankruptcy court has the power to annul the automatic stay pursuant to section 362(d).'" Jones v. Garcia (In re Jones), 63 F.3d 411, 412 (5th Cir. 1995) (citing Picco v. Global Marine Drilling Co., 900 F.2d 846, 850 (5th Cir. 1990)).

Since the default is merely voidable and not void, the Court must exercise its discretion in deciding whether the judgment should be voided. From the evidence presented to the Court, Mr. Martin had notice of the Debtor's bankruptcy case at least as early as the date on which Co-Defendant, Mike Lensing, filed his answer to the Pike County complaint where he asserted that Dixie Springs Spring Water, Inc. had filed for bankruptcy protection. Mr. Martin has offered no proof to show that in the interest of equity, the Court should refuse to void the judgment.

In his response to the motion for partial summary judgment, Mr. Martin offers unsubstantiated factual allegations and arguments based on those allegations. However, without evidence to support his allegations and arguments, the Court will find that the default judgment taken in violation of the automatic stay should be voided.

A separate judgment consistent with this opinion will be entered in accordance with Rules 7054 and 9021 of the Federal Rules of Bankruptcy Procedure.

This the 4TH day of June, 1997.


UNITED STATES BANKRUPTCY JUDGE

U.S. BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI
FILED
JUN 04 1997
CHARLENE J. PENNINGTON, CLERK
BY _____ DEPUTY

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

IN RE: DIXIE SPRINGS SPRING WATER, INC. CASE NO. 8900188JEE

LAKE DIXIE SPRINGS SPRING WATER, INC. PLAINTIFF

VS. ADV. NO. 960094JEE

HERBERT MARTIN DEFENDANT

FINAL JUDGMENT

In accordance with the Court's opinion entered contemporaneously herewith on the Plaintiff's *Motion for Partial Summary Judgment* on its complaint, the Court finds that the motion shall be, and hereby is, granted.

IT IS, THEREFORE, ORDERED AND ADJUDGED as follows:

1. Pursuant to 11 U.S.C. § 362, the default judgment obtained by Herbert Martin against the Debtor, Dixie Springs Spring Water, Inc., in the County Court of Pike County, Mississippi, Herbert Martin vs. Dixie Springs Spring Water, Inc., Cause No. 16,514, is hereby voided and held for naught.

2. The Circuit Clerk of Pike County, Mississippi, is to enter on the judgment roll that the judgment of Herbert Martin in Herbert Martin vs. Dixie Springs Spring Water, Inc., Cause No. 16,514 has been CANCELED by this order and a certified copy of the order is to be placed in the suit file. The Plaintiff's attorney will ensure compliance with this provision.

3. The aforesaid clerk is authorized to a charge fee for this service as otherwise authorized by state law.

SO ORDERED this the 4th day of June, 1997.


UNITED STATES BANKRUPTCY JUDGE