

IN THE SUPREME COURT OF THE STATE OF NEVADA

FAYEK (FRANK) BIASHARA, A/K/A
FRANK BESHARA, A/K/A FRANK
BISHARA,
Appellant/Cross-Respondent,
vs.
MARY BISHARA,
Respondent/Cross-Appellant,
and
IDA BISHARA; HELEN BISHARA;
ATEFF RAFLA; ODETTE FALTAS;
TAMER RAFLA; RAMEZ RAFLA;
WELLS FARGO BANK NATIONAL
ASSOCIATION, A NEVADA
CORPORATION; AND CITIBANK
(WEST) FSB,
Respondents.

No. 49970

FILED

JUN 10 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER DISMISSING APPEAL AND CROSS-APPEAL

On April 3, 2008, this court entered an order noting that appellant/cross-respondent (appellant) had filed for bankruptcy. Because it appeared that appellant was the plaintiff below, it appeared that this appeal was not subject to the automatic stay provisions of federal bankruptcy law. Accordingly, our order declined to take any action regarding the bankruptcy filing.

Respondent/cross-appellant (respondent) has now filed a motion to reconsider our April 3, 2008, order. Therein, respondent informs this court that a counterclaim was filed against appellant in the case below. Our review of the district court docket entries confirms that a counterclaim was filed against appellant in the district court.

The filing of a bankruptcy petition operates to stay, automatically, the "continuation" of any "judicial . . . action . . . against the

debtor.” 11 U.S.C. § 362(a)(1). An appeal, for purposes of the automatic stay, is considered a continuation of the action in the trial court. Consequently, an appeal is automatically stayed if the debtor was the defendant in the underlying trial court action. See Ingersoll-Rand Financial Corp. v. Miller Mining, Co. Inc., 817 F.2d 1424 (9th Cir. 1987). A counterclaim against a plaintiff who becomes a bankruptcy debtor is considered an action against the debtor. 11 USCA 362(a)(1). As appellant was a counterdefendant below, this appeal and cross-appeal are stayed pursuant to the automatic stay provisions of federal bankruptcy law. Accordingly, we grant respondent’s motion for reconsideration.

Given the applicability of the automatic stay, this appeal and cross-appeal may linger indefinitely on this court’s docket pending final resolution of the bankruptcy proceedings. Accordingly, we conclude that judicial efficiency will be best served if this appeal and cross-appeal are dismissed without prejudice. Because a dismissal *without prejudice* will not require this court to reach the merits of this appeal and cross-appeal and is not inconsistent with the primary purposes of the bankruptcy stay—to provide protection for debtors and creditors—we further conclude that such dismissal will not violate the bankruptcy stay.¹ See Independent Union of Flight Attendants v. Pan American World Airways, Inc., 966 F.2d 457, 459 (9th Cir. 1992) (holding that the automatic stay


¹The automatic stay provides a debtor “with protection against hungry creditors” and gives it a “breathing spell from its creditors” by stopping all collection efforts. Dean v. Trans World Airlines, Inc., 72 F.3d 754, 755 (9th Cir. 1995). Further, it assures creditors “that the debtor’s other creditors are not racing to various courthouses to pursue independent remedies to drain the debtor’s assets.” Id. At 755-6.


does not preclude dismissal of an appeal so long as dismissal is “consistent with the purpose of the statute [11 U.S.C. §362(a)”]; Dean v. Trans World Airlines, Inc., 72 F.3d 754, 755 (9th Cir. 1995) (holding that a post-bankruptcy petition dismissal will violate the automatic stay “where the decision to dismiss first requires the court to consider other issues presented by or related to the underlying case”).


Accordingly, we dismiss this appeal and cross-appeal. This dismissal is without prejudice to the parties’ right to move for reinstatement of this appeal and cross-appeal upon either the lifting of the bankruptcy stay or final resolution of the bankruptcy proceedings, if such a motion is deemed appropriate at that time.

Attorney David J. Winterton of David J. Winterton & Associates, LTD., has moved to withdraw as counsel for respondent. The motion was served on respondent by mail on May 21, 2008. See Womack v. Warden, 95 Nev. 806, 603 P.2d 267 (1979). To date, respondent has not opposed or otherwise responded to the motion. Cause appearing, we grant the motion. See SCR 46(2); RPC 1.16(b)(5) and (6). The clerk shall remove David J. Winterton as counsel for respondent on this court’s docket.

It is so ORDERED.


_____, C. J.
Gibbons


_____, J.
Maupin


_____, J.
Saitta

cc: Hon. Lee A. Gates, District Judge
Robert F. Saint-Aubin, Settlement Judge
Anderson Legal Associates
Ida Bishara
Odette Faltas
Newman Morris & Dachelet, Ltd.
Ateff Rafla
Ramez Rafla
Tamer Rafla
Wilde Hansen, LLP
David J. Winterton & Associates, Ltd.
Eighth District Court Clerk
Mary Bishara