[Cite as *Fifth Third Bank v. L&A Invests.*, 2010-Ohio-3769.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY, OHIO

FIFTH THIRD BANK	:	
	:	Appellate Case No. 23601
Plaintiff-Appellee	:	
	:	Trial Court Case No. 09-CV-1298
v.	:	
	:	(Civil Appeal from
L&A INVESTMENTS, et al.	:	Common Pleas Court)
	:	
Defendant-Appellants	:	
	:	

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O P I N I O N

Rendered on the 13th day of August, 2010.

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BROGAN, J.

{¶ 1} Defendants-appellants L&A Investments, Acuff Equipment Company, Inc., Larry Acuff, and David Liddic appeal from the trial court's May 29, 2009 entry of a default judgment and decree of foreclosure.

{¶ 2} The appellants advance three assignments of error. First, they contend the trial court

{¶ 3} lacked jurisdiction to enter a default judgment and decree of foreclosure because a notice of appeal had been filed three days earlier. Second, they claim the trial court erred in sustaining a Civ.R. 60(B) motion for relief from the judgment presently on appeal. Third, they assert that the trial court erred in modifying an automatic stay issued as the result of one of the party's filing a petition in bankruptcy court.

I. Factual and Procedural Background

{¶ 4} The record reflects that plaintiff-appellee Fifth Third Bank filed its complaint in February 2009 "upon notes and guaranties, for replevin, and for foreclosure and marshaling of liens." The complaint named the appellants as defendants along with the Montgomery County treasurer. It was based on alleged defaults on promissory notes executed by L&A Investments and Acuff Equipment Company. The complaint alleged that Acuff Equipment Company, Larry Acuff, and David Liddic had guaranteed the note executed by L&A Investments. The complaint further alleged that L&A Investments, Larry Acuff, and David Liddic had guaranteed two notes executed by Acuff Equipment Company. The complaint also sought

judgment on a security agreement executed by Acuff Equipment Company and foreclosure on a mortgage executed by L&A Investments.

{¶ 5} Acuff Equipment Company subsequently filed a March 6, 2009 notice of bankruptcy stay. The notice advised the trial court and the parties that Acuff Equipment Company had filed a bankruptcy petition in federal court. The notice indicated that the bankruptcy filing invoked an "automatic stay" under federal law. As a result, Acuff Equipment Company asserted "that no hearings or other proceedings may occur in this matter." In response, Fifth Third Bank filed a March 10, 2009 motion to modify the notice of bankruptcy stay. It argued that the automatic stay applied only to Acuff Equipment Company and not to the other defendants. It asked the trial court to "modify" the notice of bankruptcy stay to so indicate. The trial court sustained Fifth Third Bank's motion on March 26, 2009, clarifying that the stay applied only to Acuff Equipment Company and allowing the action to proceed against the other defendants. Liddic moved for reconsideration of the trial court's ruling on March 31, 2009, arguing that modification of the stay infringed on the bankruptcy court's jurisdiction. The other defendants filed a similar motion on April 2, 2009, urging the trial court to vacate its order modifying the notice of bankruptcy stay.

{¶ 6} On April 23, 2009, the trial court overruled the motion for reconsideration and the motion to vacate. The trial court reasoned that it had not improperly modified the automatic stay issued by the bankruptcy court. Instead, it had modified its own record—to wit: the March 6, 2009 notice of bankruptcy stay—to make clear that the stay issued by the bankruptcy court applied only to the Acuff Equipment Company.

{¶ 7} Thereafter, on May 20, 2009, Fifth Third Bank moved for a default judgment against L&A Investments, Larry Acuff, and Liddic based on their failure to plead or otherwise defend.

{¶ 8} On May 26, 2009, L&A Investments, Acuff Equipment Company, Larry Acuff, and Liddic filed a notice of appeal from trial court's decision overruling the motion for reconsideration and the motion to vacate. We ultimately dismissed that appeal on September 15, 2009 in *Fifth Third Bank v. L&A Investments, et al.*, Montgomery App. No. 23448, for lack of a final appealable order. On May 29, 2009, however, while that appeal remained pending, the trial court entered a default judgment and decree of foreclosure against L&A Investments, Larry Acuff, and Liddic. The trial court's ruling did not address Fifth Third Bank's claims against Acuff Equipment Company. Because they wanted to appeal the ruling, L&A Investments, Larry Acuff, and Liddic moved to have Civ.R. 54(B) certification added to it on June 29, 2009.

{¶ 9} The trial court initially overruled the motion for Civ.R. 54(B) certification on July 17, 2009. Thereafter, on July 27, 2009, the trial court changed its mind and added Civ.R. 54(B) certification to the default judgment and decree of foreclosure. On August 26, 2009, L&A Investments, Acuff Equipment Company, Larry Acuff, and Liddic filed a notice of appeal challenging (1) the trial court's April 23, 2009 decision overruling the motion for reconsideration and the motion to vacate its stay ruling and (2) the trial court's May 29, 2009 default judgment and decree of foreclosure.

{¶ 10} The following day, August 27, 2009, Fifth Third Bank filed a Civ.R. 60(B) motion, seeking removal of Civ.R. 54(B) certification from the trial court's

default judgment and decree of foreclosure. Although the appellate record does not reveal what became of Fifth Third Bank's motion, the parties have indicated that the trial court sustained the motion on August 28, 2009. The trial court's ruling is not before us, however, because it was made after the notice of appeal was filed.

II. Analysis

{¶ 11} In their first assignment of error, the appellants contend the trial court lacked jurisdiction to enter its default judgment and decree of foreclosure on May 29, 2009 because a notice of appeal had been filed on May 26, 2009.

{¶ 12} In support of their argument, the appellants invoke the general rule that a notice of appeal divests a trial court of jurisdiction to act except over issues not inconsistent with the appellate court's jurisdiction. See, e.g., *Ford Consumer Finance Co., Inc. v. Johnson*, Montgomery App. No. 20767, 2005-Ohio-4735, ¶9. The appellants overlook an exception that applies, however, when the matter being appealed is not immediately appealable. An appeal from a non-appealable order does not divest a trial court of jurisdiction to act while the appeal is pending. *McCoy v. McCoy* (May 16, 1988), Greene App. Nos. 87 CA 76, 87 CA 81; *Indiana Ins. Co. v. Farmers Ins. Co. of Columbus, Inc*., Tuscarawas App. No. 2004 AP 07 0055, 2005-Ohio-1774, ¶58; *Mollette v. Portsmouth City Council*, 179 Ohio App.3d 455, 471, 2008-Ohio-6342, ¶45; *Estate of Beavers v. Knapp*, 175 Ohio App.3d 758, 2008-Ohio-2023, ¶75-76; see, also, *Ruby v. Secretary of U.S. Navy* (6th Cir. 1966), 365 F.2d 385, 388-389 ("The only thing that is accomplished by a proper notice of appeal is to transfer jurisdiction of a case from a district court to a court of appeals. If,

by reason of defects in form or execution, a notice of appeal does not transfer jurisdiction to the court of appeals, then such jurisdiction must remain in the district court; it cannot float in the air. Where the deficiency in a notice of appeal, by reason of * * * reference to a non-appealable order, is clear to the district court, it may disregard the purported notice of appeal and proceed with the case, knowing that it has not been deprived of jurisdiction.").

{¶ 13} In the present case, the May 26, 2009 appeal was taken from the trial court's April 23, 2009 denial of motions to reconsider and to vacate its order modifying the notice of bankruptcy stay. We ultimately dismissed that appeal for lack of a final appealable order in *Fifth Third Bank v. L&A Investments, et al.*, Montgomery App. No. 23448. Therefore, the faulty May 26, 2009 notice of appeal did not deprive the trial court of jurisdiction to enter its default judgment on May 29, 2009. The first assignment of error is overruled.

{¶ 14} In their second assignment of error, the appellants contend the trial court erred in granting plaintiff-appellee Fifth Third Bank's Civ.R. 60(B) motion for relief from judgment the day after they filed the present appeal.[1]

{¶ 15} As set forth above, the record reflects that the trial court filed its default judgment and decree of foreclosure against all defendants other than Acuff Equipment Company on May 29, 2009. Thereafter, on July 27, 2009, the trial court added Civ.R. 54(B) certification to the ruling. After obtaining the Civ.R. 54(B) certification, the defendants filed the present appeal on August 26, 2009. Fifth Third

[1]Although the second assignment of error is asserted separately on page one of the appellants' brief, it is argued on page six as part of the first assignment of error.

Bank moved for Civ.R. 60(B) relief on August 27, 2009, seeking to have the "no just reason for delay" language removed from the default judgment and decree of foreclosure. The record before us does not include anything that occurred below after that date. The parties have represented, however, that the trial court sustained the Civ.R. 60(B) motion on August 28, 2009.

{¶ 16} The appellants insist that the trial court lacked jurisdiction to remove its Civ.R. 54(B) certification after they filed their notice of appeal. For its part, Fifth Third Bank concedes that a trial court lacks jurisdiction to rule on a Civ.R. 60(B) motion after a notice of appeal has been filed. This is undoubtedly true. See, e.g., *Zimmer v. Beach Mfg. Co.*, Clark App. No. 2005-CA-50, 2006-Ohio-574, ¶5, citing *Howard v. Catholic Social Serv. of Cuyahoga County, Inc*., 70 Ohio St.3d 141, 1994-Ohio-219. Unfortunately, the act about which the appellants complain—the trial court's alleged untimely granting of Civ.R. 60(B) relief—is not part of the record before us.

{¶ 17} In any event, a grant of Civ.R. 60(B) relief by the trial court while the present appeal was pending would be of no effect and would not impede our ability to proceed in this matter. *Post v. Post* (1990), 66 Ohio App.3d 765; *Kovac v. Whay Corp* (Oct. 20, 1994), Cuyahoga App. No. 65469. Therefore, the issue raised in the appellants' second assignment of error is, as a practical matter, a non-issue. Regardless of what the trial court purported to do below, it cannot divest us of our appellate jurisdiction. Accordingly, the second assignment of error is overruled.

{¶ 18} In their third assignment of error, the appellants contend the trial court erred in modifying the automatic stay issued by the federal bankruptcy court. In particular, they argue that the trial court exceeded its jurisdiction and interfered with

the bankruptcy court's exclusive jurisdiction. The appellants cite numerous cases to support the general proposition that a federal bankruptcy court has sole authority to modify or to grant relief

{¶ 19} from an automatic stay issued under 11 U.S.C. §362(a).[2]

{¶ 20} We do not dispute the foregoing statement of law. But it actually supports the trial court's ruling. Case law uniformly recognizes that the automatic stay created by 11 U.S.C. §362(a) normally applies only to the bankrupt debtor, not to other co-defendants. See, e.g., *Miller v. Sun Castle Ents., Inc*., Trumbull App. No. 2007-T-0054, 2008-Ohio-4669, ¶28; *Woodell v. Ormet Primary Aluminum Corp*., 156 Ohio App.3d 602, 609, 2004-Ohio-1558, ¶14*; Waco Scaffolding and Equipment Co.*, Stark App. No. 2003CA00172, 2003-Ohio-6775, ¶20-22; *Wampum Hardware Co. v. Keffler* (May 8, 1992), Mahoning App. Nos. 88 CA 206, 91 CA 172; *Cardinal Federal Savings & Loan Ass'n v. Flugum* (1983), 10 Ohio App.3d 243, 245.

{¶ 21} It is true that an automatic bankruptcy stay can be applied to a bankrupt debtor's co-defendants in rare circumstances. See, e.g., *Jo-Rene Corp. v. Jastrzebski*, Cuyahoga App. Nos. 79933, 80310, 2002-Ohio-1550. But applying an

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[2]Although we dismissed the prior appeal for lack of an appealable order when the appellants attempted to raise the stay issue, the trial court has entered a default judgment against L&A Investments, Larry Acuff, and Liddic and has affixed Civ.R. 54(B) certification to that ruling. The default judgment is a final judgment as to those defendants, and the Civ.R. 54(B) certification makes it immediately appealable despite the stay of proceedings below against bankrupt Acuff Equipment Company. We have recognized that interlocutory orders merge into a final judgment, and an appeal from a final judgment properly includes all interlocutory orders merged into it. *Grover v. Bartsch*, 170 Ohio App.3d 188, 193, 2006-Ohio-6115, ¶9. Therefore, L&A Investments, Larry Acuff, and Liddic may challenge the trial court's disposition of the stay issue in this appeal.

automatic stay in this way requires modifying it by an extension, which the Eighth District Court of Appeals has concluded the bankruptcy court must do. Id. at *4-*5, citing *Patton v. Bearden* (6th Cir. 1993), 8 F.3d 343, 349; see, also, *Burritt Interfinancial Bancorporation v. Wood* (1994), 33 Conn. App. 401, 404, 635 A.2d 879, 881 ("To benefit from such extension of the stay, the nondebtor must move for the extension in the bankruptcy court."). Substantial additional case law supports the Eighth District's conclusion that only a bankruptcy court has the authority to extend an 11 U.S.C. §362(a) bankruptcy stay to solvent co-defendants. See, e.g., *Alvarez v. Bateson* (2007), 176 Md.App. 136, 145-151, 932 A.2d 815, 820-824 (citing cases from several jurisdictions and holding that "a trial court in Maryland cannot grant a stay of a judicial proceeding, under the automatic stay provision of 11 U.S.C. §362, as to a non-bankrupt co-defendant of a debtor without a prior order granting such a stay from the bankruptcy court administering the debtor's estate"). "Indeed, in those instances where courts have dealt with this procedural issue, the weight of authority holds that, in order for an automatic stay pursuant to section 362 to be applied to a non-bankrupt co-defendant, the debtor must request and obtain a stay from the bankruptcy court where the current action is pending." Id. at 147.

{¶ 22} In the exercise of its inherent power to control its docket, and apart from 11 U.S.C. §362, the possibility presumably remains that a state court could choose to issue a temporary stay of proceedings against non-bankrupt co-defendants until a bankrupt defendant's case is resolved. See, e.g., *Guerriero v. Dept. of Rehab. and Correction*, Ashtabula App. No. 2001-A-0062, 2002-Ohio-5149, ¶16 (recognizing that courts have the inherent power to issue stays to control their dockets). But even if we

assume that the trial court could have stayed all proceedings below pending resolution of Acuff Equipment Company's bankruptcy case, under its inherent power or otherwise, none of the appellants filed a motion asking it to do so. Instead, they adopted the untenable position that the trial court had "modified" the bankruptcy stay by not automatically applying it to all defendants. We disagree.

{¶ 23} As set forth above, the record reflects that Acuff Equipment Company filed its notice of bankruptcy stay on March 6, 2009, indicating that it had filed for bankruptcy protection in federal court and invoking the automatic stay provision. In the notice of bankruptcy stay, Acuff Equipment Company expressed its belief that "no hearing or other proceedings may occur in this matter." Fifth Third Bank then moved to "modify" the notice to clarify that the stay only applied to Acuff Equipment Company. The trial court sustained the motion on March 26, 2009. In so doing, it ordered "that the Stay is hereby modified to stay the instant proceedings only against Defendant Acuff Equipment Company, and the matter shall proceed against the remaining Defendants."

{¶ 24} Although the trial court purported to "modify" the stay, it later explained in its April 23, 2009 entry that what it really did was clarify the effect of the notice of bankruptcy stay "to reflect that the Stay issued by the United States Bankruptcy Court was applicable to Acuff Equipment Company, Inc. only." We agree with the trial court's characterization of what occurred. As set forth above, an automatic stay under 11 U.S.C. §362(a) only applies to the bankrupt debtor unless a bankruptcy court extends it. Nothing before us indicates that the bankruptcy court extended the

automatic stay or, for that matter, that any party ever sought such relief.[3] Therefore, the trial court correctly concluded that the bankruptcy stay applied only to Acuff Equipment Company. In making this determination, the trial court did not modify or extend the automatic stay in violation of the bankruptcy court's exclusive jurisdiction.[4]

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[3]Parenthetically, it is not clear that extending the bankruptcy stay to the non-bankrupt appellants would be appropriate in this case. Cf. *Boucher v. Shaw* (9th Cir. 2009), 572 F.3d 1087, 1092 ("'[S]ection 362(a) does not stay actions against guarantors, sureties, corporate affiliates, or other non-debtor parties liable on the debts of the debtor.' * * * We have refused to extend the automatic stay to enjoin claims against a contractor-debtor's surety, even though a surety bond guarantees the contractor-debtor's performance."); *Wampum Hardware*, supra, at *2 ("The appellant's liability on the unconditional guaranty is not dependent upon judgment entered against the principal, Keffler and Rose Enterprises, Inc. The Bankruptcy Code protection extends only to the debtor principal and not to guarantors on obligations undertaken by debtor principals."); *Alvarez*, 932 A.2d at 819, quoting *Collier v. Eagle-Picher Indus., Inc*. (1991), 86 Md.App. 38, 585 A.2d 256 ("'It is universally acknowledged, however, that an automatic stay of proceeding accorded by § 362 may not be invoked by entities such as sureties, guarantors, co-obligors, or others with a similar legal or factual nexus to the Chapter 11 debtor.'"). We have no occasion to decide, however, whether the bankruptcy stay under 11 U.S.C. §362(a) should be extended to the non-bankrupt appellants because that specific issue is not before us.

[4]In opposition to this conclusion, the appellants have attached to their brief a copy of an Ohio Supreme Court entry in a case captioned, *The Ohio Hospital Assn., et al. v. Armstrong World Indus., et al.*, Case No. 2000-1030. The short June 22, 2009 entry noted that the appeal had been stayed "pending termination of the automatic stay under the Bankruptcy Code." The appellants cite this entry as proof that an automatic bankruptcy stay requires the entire case to be stayed against all defendants. We reject this argument for at least two reasons. First, the brief entry is so devoid of context or analysis to be of little precedential value. Second, a review of the underlying case, as set forth by the Eighth District Court of Appeals in *The Ohio Hosp. Assn., et al. v. Armstrong World Indus., et al.* (April 6, 2000), Cuyahoga App. No. 76067, reveals that, despite its caption, the only real parties to the appeal were appellant Trumbull Memorial Hospital and appellee W.R. Grace & Co. In particular, Trumbull Memorial Hospital appealed from the trial court's entry of summary judgment in favor of W.R. Grace. The Eighth District affirmed. Therefore, the only two parties participating in the appeal before the Ohio Supreme Court were plaintiff-appellant Trumbull Memorial Hospital and defendant-appellee W.R. Grace. Necessarily, then, the entire proceeding halted in the Ohio Supreme Court when W.R. Grace filed its notice of bankruptcy. As explained above, the present case is easily distinguishable because it includes several defendants who did not seek bankruptcy protection. Acuff Equipment Company's

Accordingly, we overrule the appellants' third assignment of error.

III. Conclusion

{¶ 25} The judgment of the Montgomery County Common Pleas Court is affirmed.

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FAIN and FROELICH, JJ., concur.

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bankruptcy filing did not automatically stay Fifth Third Bank's case against those non-bankrupt defendants.