

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF IOWA

In the Matter of :

WALTER STEVEN BROWN, : Case No. 93-00070-C J
DIANE KAY BROWN, : (Dismissed Chapter 12 Case)
:
Debtors. :
:
WALTER STEVEN BROWN, : Civ. No. 4-97-CV-80314
DIANE KAY BROWN, : (Case Commenced in District
 : Court on April 29, 1997)
Plaintiffs, :

v. :

INTERNAL REVENUE SERVICE, :

Defendant. :

MEMORANDUM OF DECISION AND ORDER

**(1) CONSTRUING THE MATTER FILED IN THE DISTRICT COURT AND REFERRED
TO THE BANKRUPTCY COURT AS A MOTION REQUESTING THE BANKRUPTCY
COURT EXERCISE ITS LIMITED RESIDUAL JURISDICTION
IN THE DISMISSED CHAPTER 12 CASE**

AND

(2) DENYING THAT MOTION

RELEVANT HISTORY OF THE BANKRUPTCY CASE

On January 11, 1993 Walter Steven Brown and Diane Kay Brown (the Browns) filed a petition seeking relief under Chapter 12.

On May 10, 1993 the IRS filed a proof of claim for an estimated \$604,251.79 in unpaid income taxes, interest, and penalties. (Unsecured priority claims covered the 1989, 1990, 1991

and 1992 tax years. Unsecured general claims covered the 1987 and 1988 tax years. The IRS indicated the amount of the taxes for 1992 was estimated and the amounts for the other years were based on proposed assessments.) On June 28, 1993 the Browns filed an objection to the IRS proof of claim. On August 6, 1993 the United States of America (USA) filed an objection in response. On September 2, 1993 the clerk of court entered a notice and order for hearing the controversy on September 16, 1993.

On September 14, 1993 the USA filed a motion to dismiss the case on behalf of the IRS and the Farmers Home Administration.

At the conclusion of the September 16, 1993 hearing on the claim controversy, the court entered its findings and conclusions on the record, overruled the Browns' objection to the proof of claim, and deemed the proof of claim allowed as filed. On its own motion, the court dismissed the case. A minute order to that effect was entered on September 20, 1993.

On September 29, 1993 the Browns filed a notice of appeal and a motion for stay pending appeal. On October 21, 1993 the USA filed an objection to the motion and a brief in support of the motion.

On October 5, 1993 the Chapter 12 trustee filed a report of standing trustee following dismissal/conversion of Chapter 12 case. The trustee indicated she had not received any property nor made any payments on account of the estate. She requested the report be approved and she be discharged from her duties.

On November 16, 1993 the court conducted a telephonic hearing on the stay matter. At the conclusion of the hearing, the court indicated it considered the issue moot because the order being appealed was the very dismissal of the case. The court concluded only a final order

dismissing a case triggered 11 U.S.C. section 362(c)(2)(B).”¹ A minute order to that effect was entered the same day.

On December 13, 1993 the USA filed a motion for determination that the automatic stay had been terminated or, in the alternative, for relief from the automatic stay. On December 20, 1993 the Browns filed an objection. On January 7, 1994 the court conducted a telephonic hearing on the matter. At the conclusion of the hearing, the court denied the motion. A minute order to that effect was entered on the same day. On January 18, 1994 the USA filed a notice of appeal from that ruling. On February 2, 1994 the USA filed a motion to dismiss its notice of appeal. On February 18, 1994 the court granted that motion.

On June 13, 1994 the United States District Court for the Southern District of Iowa entered a decision and order reversing this court’s ruling on the objection to the proof of claim, vacating the dismissal of the Chapter 12 case, and remanding for further proceedings consistent with the decision and order.

On February 16, 1995 the court conducted a hearing pursuant to and consistent with the district court decision and order. At the conclusion of the hearing, the court entered its findings and conclusions on the record and again overruled the objection to the IRS proof of claim,

¹ 11 U.S.C. § 362(c)(2) provides the following on the duration of the stay:

(c) except as provided in subsections (d), (e), and (f) of this section—

...

(2) the stay of any other act under subsection (a) of this section continues until the earliest of—

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied.

deemed the proof of claim allowed as filed, and dismissed the case. A minute order to that effect was entered on the same day. On February 23, 1995 the Browns filed a notice of appeal.

On July 25, 1995 the district court affirmed the bankruptcy court's decision and order. On August 24, 1995 the Browns filed a notice of appeal to the Eighth Circuit Court of Appeals.

On May 2, 1996 the circuit court affirmed the district court's ruling. A judgment to that effect was entered the same day. On June 14, 1996 the Browns filed a petition for rehearing. On July 9, 1996 the petition was denied. On August 5, 1996 the mandate issued.

On August 8, 1996 the circuit court judgment was filed in the district court.

On August 9, 1996 the circuit court judgment was filed in the bankruptcy court.

On August 13, 1996 the clerk of this court entered a form order discharging the trustee from her duties based on the dismissal of the Chapter 12 case. The clerk then noted on the outside folders of the two files for the case that the case was closed as of August 13, 1996.

THE PENDING CONTROVERSY

On April 29, 1997 the Browns filed a petition against the IRS in the United States District Court for the Southern District of Iowa and an application to proceed in forma pauperis. In the petition, they requested the district court quash an IRS summons requiring them to appear and to provide information to the agency on April 30, 1997. The Browns explained the petition was filed in the district court "because the IRS sighted that this Court had Jurisdiction under 26 USC 7602/7610, however the Plaintiffs believe that this matter should be referred to the Bankruptcy Court for determination if the Assessed Tax Lien was in violation of the 362 Stay, and if so that the IRS be penalized per 11 USC 362(h)."

The Browns attached the following exhibits to their petition:

- (1) A copy of the IRS Summons requiring the Browns to appear for an examination before an IRS Revenue Officer on April 30, 1997 at 10:30 a.m. in Omaha, Nebraska. At the top of the summons, the IRS indicated the tax periods were calendar years 1987 through 1991. In the text of the summons, the IRS directed the Browns to bring records and documents covering the period from January 1, 1997 to April 7, 1997.
- (2) A copy of this court's November 16, 1993 minute order.
- (3) A copy of this court's December 3, 1993 Transmittal of Notice of Appeal (from the September 20, 1993 order).
- (4) A copy of this court's December 21, 1993 Notice Setting Telephonic Hearing on the USA's December 13, 1993 motion.
- (5) A copy of this court's January 7, 1994 minute order.
- (6) A copy of the circuit court's May 2, 1996 judgment affirming the dismissal by the district court and stamped "MANDATE ISSUED AUG 5 – 1996".
- (7) A copy of a page 6 from what the Browns identify as IRS Publication 594 and state they received with the summons.
- (8) A copy of Walter Brown's April 23, 1997 letter to Revenue Officer James M. Daugherty. The letter references the summons and also "two letters from your Des Moines, Iowa office, post marked April 15, 1997, containing Notices of Tax Liens assessed as of July 29, 1996." In the letter Mr. Brown contends the IRS violated the automatic stay by assessing the tax liens before the appeal process was completely closed. Accordingly, he requests the IRS withdraw the summons, release the tax liens, and return the money levied in error at the First Community National Bank in Corning, Iowa.
- (9) A copy of Revenue Officer Daugherty's response advising the Browns that he believed the 1996 assessments were not in violation of the automatic stay because of the district court's ruling in July of 1995.

On May 6, 1997 the district court denied the application to proceed in forma pauperis.

On May 7, 1997 the district court entered an order indicating the Browns' request to proceed in the bankruptcy court would be granted unless the IRS filed an objection by May 23, 1997. On June 20, 1997 the district court entered another order extending the deadline to July 3,

1997. On July 14, 1997 the district court granted the Browns' request that the action be referred to the bankruptcy court.

DISCUSSION

Procedural Treatment

Pursuant to 28 U.S.C. section 157(a)² and the December 1, 1994 General Order of Reference entered by the United States District Court for the Southern District of Iowa, this court has jurisdiction over all the district's cases under 11 U.S.C. section 101 et seq. (Title 11) and over all of the district's proceedings under that Title or arising in or relating to a case under that Title. This court had jurisdiction over the Brown's Chapter 12 case. This court has jurisdiction over 11 U.S.C. section 362(h)³ controversies.

Usually a party seeking relief under section 362(h) brings such an action while the underlying chapter case is pending. If the case has already been closed pursuant to 11 U.S.C. section 350(a)⁴ and Federal Rule of Bankruptcy Procedure 5009⁵, that party files a motion to reopen the case pursuant to

² 28 U.S.C. § 157(a) provides:

- (a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

³ 11 U.S.C § 362(h) provides:

- (h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

⁴ 11 U.S.C. § 350(a) provides:

- (a) After an estate is fully administered and the court has discharged the trustee, the court shall close the case.

⁵ Federal Rule of Bankruptcy Procedure 5009 provides:

11 U.S.C. section 350(b)⁶ and Federal Rule of Bankruptcy Procedure 5010.⁷ A court, however, can not reopen a dismissed case because such a case is not one that has been fully administered and reopening such a case would render dismissal meaningless. In re King, 214 B.R. 334 (Bankr. W.D. Tenn. 1997); In re Statistical Tabulating Corp., Inc., 166 B.R. 322 (N.D. Ill. 1994); In re Woodhaven, Ltd., 139 B.R. 745 (Bankr. N.D. Ala. 1992); In re Garcia, 115 B.R. 169 (Bankr. N.D. Ind. 1990); and In re Income Property Builders, Inc., 669 F.2d 963 (9th Cir. 1982).⁸ The court may have residual jurisdiction in a dismissed case but it is limited. In re Elias, 215 B.R. 600, 602 (9th Cir. BAP 1997), citing Kokkonen v Guardian Life Insurance Co. of America, 511 U.S. 375, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994).

The Brown's petition before the district court requested the district court (1) quash the summons to appear on April 7, 1997, (2) permit the debtors to proceed in forma pauperis, and (3) refer the section 362(h) matter to the bankruptcy court. The first request appears to be moot. The district court denied the second request and granted the third. The district court's reference

If in a chapter 7, chapter 12, or chapter 13 case the trustee has filed a final report and final account and has certified that the estate has been fully administered, and if within 30 days no objection has been filed by the United States trustee or a party in interest, there shall be a presumption that the estate has been fully administered.

⁶ 11 U.S.C. § 350(b) provides:

(b) A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause.

⁷ Federal Rule of Bankruptcy Procedure 5010 provides:

A case may be reopened on motion of the debtor or other party in interest pursuant to § 350(b) of the Code. In a chapter 7, 12, or 13 case a trustee shall not be appointed by the United States trustee unless the court determines that a trustee is necessary to protect the interests of creditors and the debtor or to insure efficient administration of the case.

of the section 362(h) controversy does not create a new chapter case. The Browns' allegations regarding the violation of the stay sound only in the dismissed Chapter 12 case. Accordingly, this court shall treat what remains of the petition originally filed in the district court as a pending motion requesting the bankruptcy court to exercise its limited residual jurisdiction in the dismissed Chapter 12 case.

Disposition on the Pleading

Based upon a review of the petition and attached exhibits filed in the district court on April 29, 1997, the court concludes further notice and hearing is not warranted because consideration of the Browns' request for relief under section 362(h) would exceed its limited residual jurisdiction in this dismissed case.

Even assuming that the IRS assessed a tax and filed a notice of tax liens on or about July 29, 1996⁹ and that the automatic stay remained in effect until August 5, 1996,¹⁰ nothing suggests the IRS acted willfully. Exhibit 9 only evidences the Omaha IRS Revenue Officer's speculation that the Des Moines IRS Office relied upon the district court's July 25, 1995 affirmance of the bankruptcy court's February 16, 1995 dismissal of the Chapter 12 case rather than upon the

⁸ Though some of the cited cases analyze their facts alternatively under Federal Rule of Bankruptcy Procedure 9024, that incorporates Federal Rule of Civil Procedure 60, such analysis by this court is inappropriate given the dismissal of the Chapter 12 case was subject to further review and decisions at the district and circuit levels.

⁹ The Browns did not attach the letters or notices referenced in exhibit 8 to their petition. The only support for their allegation of assessments on or about July 29, 1996 is exhibit 9 (the letter from the IRS Revenue Officer seemingly acknowledging assessments occurred in 1996 but not specifying the date or dates).

¹⁰ This court has been unable to locate any statute or case law specifying that the automatic stay would have remained in effect during the interval between the July 9, 1996 circuit court's denial of the petition for rehearing of its May 2, 1996 judgment upholding dismissal of the case and its August 5, 1996 issuance of the mandate reconfering jurisdiction upon the district court. Federal Rule of Appellate Procedure 41(a) indicates that a mandate must issue 7 days after entry of an order denying a petition for rehearing unless the court orders

circuit court's disposition on appeal.¹¹ According to the allegations in the petition, the IRS assessment and notice of filing tax liens took place after the circuit court's July 9, 1996 denial of the Browns' petition for rehearing.¹²

Even if the petition and attached exhibits had presented some evidence of willful violation, nothing suggests the Browns sustained any actual damages.¹³ They have not set forth how the assessment and notice of filing tax lien seven days before the circuit court mandate

otherwise. The court is unable to discern why the mandate issued twenty days after the entry of the order denying the petition for rehearing.

¹¹ When the Browns asked for a stay pending their appeal from this court's first dismissal of the case, this court ruled that only a final order dismissing a case triggered 11 U.S.C. section 362(c)(2)(B). The Browns did not make a similar request after filing their appeal from this court's second dismissal of the case. Presumably they relied on the court's prior ruling being final and applicable to the subsequent appeal to the district court and then to the circuit court. From the limited information available on the district and circuit dockets, it does not appear that the USA challenged the collateral estoppel effect of this court's November 16, 1993 ruling on the stay issue during the second appeal process.

¹² While this case was pending, Congress expanded 11 U.S.C. section 362(b)(9), that had provided an exception from the automatic stay only for "the issuance to the debtor by a governmental unit of a notice of tax deficiency," to read as follows:

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay –

...

(9) under subsection (a), of –

- (A) an audit by a governmental unit to determine tax liability;
- (B) the issuance to the debtor by a governmental unit of a notice of tax deficiency;
- (C) a demand for tax returns; or
- (D) the making of an assessment for any tax and issuance of a notice and demand for payment of such an assessment (but any tax lien that would otherwise attach to property of the estate by reason of such an assessment shall not take effect unless such tax is a debt of the debtor that will not be discharged in the case and such property or its proceeds are transferred out of the estate to, or otherwise revested in, the debtor).[;]

Bankruptcy Reform Act of 1994, Pub.L No. 103-394, section 116 (Oct. 22, 1994). The amendment became effective on October 22, 1994 but does not apply to cases that were pending before that date. Id. at section 702(b)(1).

¹³ Exhibit 8 contains a passing reference to a levy but does not set forth any details about that alleged action.

issued interfered with their reorganization effort so as to justify a monetary recovery.¹⁴ Indeed, it must be remembered that this court determined in September of 1993 and again in February of 1995 that the Browns' Chapter 12 case should be dismissed. Absent the alleged violation of the automatic stay by the IRS in 1996 within days of the delayed mandate being issued, the Browns enjoyed a protracted stay while their various appeals were considered and decided. Granting them any monetary relief despite the early assessment that the reorganization case should not go forward would amount to granting them new and extraordinary relief. The court will not set that precedent.

CONCLUSION

WHEREFORE, based on the foregoing discussion, the court finds that:

(1) What remains of the petition filed in the district court and referred to the bankruptcy court should be construed as a motion requesting the bankruptcy court to exercise its limited residual jurisdiction in the dismissed chapter 12 case;

(2) The petition and attached exhibits fail to set forth sufficient grounds warranting further notice and hearing;

(3) The pending request for relief under 11 U.S.C. section 362(h) amounts to a request for new and extraordinary relief that exceeds the court's limited residual jurisdiction in this dismissed case; and

(4) The motion must be denied.

¹⁴ While this case was pending, Congress amended 11 U.S.C. section 106(a) to provide, among other things, that a court may not issue an award of punitive damages against a governmental unit for violation of the automatic stay. Bankruptcy Reform Act of 1994, Pub.L. No. 103-394, section 113 (Oct. 22, 1994). The amendment became effective on October 22, 1994 and does apply to bankruptcy cases filed before, on or after that date. *Id.* at section 702(b)(2)(B).

ORDER

THEREFORE, IT IS ORDERED that the motion requesting the bankruptcy court exercise its limited residual jurisdiction in the dismissed chapter 12 case is denied.

Dated this 27th day of March, 1998

Lee M. Jackwig
U.S. Bankruptcy Judge