LANDLORD-TENANT

Court Lifts Bankruptcy Stay, Clearing the Way for Eviction

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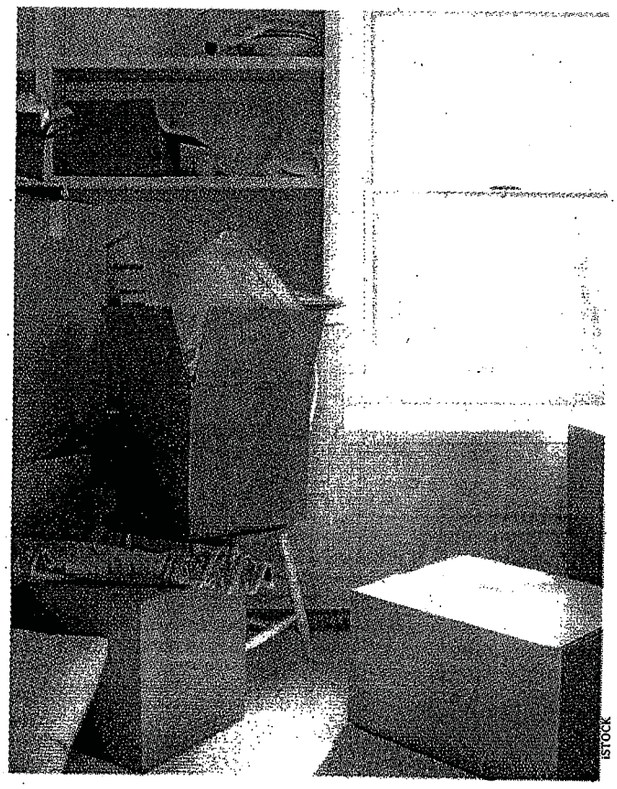
Most landlord-tenant practitioners are generally aware of the Bankruptcy Code provision for an automatic stay of a summary proceeding upon a tenant's filing of a bankruptcy petition. A recent decision by United States Bankruptcy Court, Southern District of New York, Bankruptcy Judge Martin Glenn in *In re Griggsby*,[1] however, shows that there are numerous intricacies that can affect the applicability of that doctrine in a particular fact situation.

In that case, as summarized in the court's decision, the factual background was as follows. The landlord served a notice of termination alleging that the rent-stabilized tenant was responsible for excessive accumulated debris posing a health and fire risk, which the court referred to as "Collyer Conditions."[2] The landlord subsequently commenced a nuisance holdover proceeding in New York City Civil Court. On Jan. 5, 2007, after a hearing, the Civil Court entered an order awarding a final judgment of possession to the landlord. That judgment was based on the presence of the Collyer Conditions and "arrears owed by Griggsby in the amount of $4,640.24 for use and occupancy through January 5, 2007."

The Civil Court stayed execution of the warrant "to permit Griggsby to cure the default by a January 16, 2007 deadline." Griggsby's appeal of the final judgment was dismissed for failure to perfect. On Oct. 17, 2008, after another hearing, the Civil Court entered an order finding that Griggsby had failed to cure the Collyer Conditions and authorizing the landlord to execute the warrant of eviction. Griggsby failed to timely appeal this 2008 order. On Feb. 21, 2009, Griggsby filed a voluntary petition commencing a Chapter 13 bankruptcy case. An eviction scheduled for Feb. 23, 2009 was stayed as a result of that bankruptcy case.

The landlord moved to vacate the automatic stay to permit it to execute the warrant of eviction that had been obtained pursuant to the judgment of possession that pre-dated the filing of the bankruptcy petition. As the court explained, and as is discussed below, pursuant to Bankruptcy Code §362(b)(22), the automatic stay would not apply to an eviction involving residential property based on such a pre-petition judgment unless the debtor was able to successfully invoke Bankruptcy Code §362(l) which provides a limited exception to §362(b)(22). The tenant in *Griggsby* sought to invoke §362(l) by filing the certification and paying the rent required by that provision.



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The issue the court grappled with was whether §362(l) is applicable only where the pre-petition judgment of possession was based on a curable monetary default or whether it is also triggered if that judgment rests in whole or in part on a non-monetary default. The court concluded that:

> ...§362(l) does not apply where, as here, the pre-petition judgment of possession and warrant of eviction are based upon a non-monetary default that cannot be cured by payment of money.[3]

The court granted the landlord's motion to lift the stay to permit the landlord to execute the warrant of eviction. We discuss here the court's reasoning in addressing what it referred to as the "novel issues involved in this matter."

The court began by summarizing the relevant Bankruptcy Code provisions. Section 362(b)(22) provides that the automatic stay pursuant to §362(a)(3) does not apply to the "continuation of any eviction, unlawful detainer action, or similar proceeding by a lessor against a debtor involving residential property in which the debtor resides as a tenant under a lease or rental agreement and with respect to which the lessor has obtained before the date of the filing of the bankruptcy petition, a judgment for possession of such property against the debtor." (Section 362(a)(3) provides that the filing of a bankruptcy petition automatically stays "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate.")

Section 362(l), however, establishes a limited exception to Section 362(b)(22), both sections having been added to the Bankruptcy Code in 2005. It provides that the automatic stay applies for a 30-day period after the filing of the bankruptcy petition if the debtor files with the petition, and serves on the lessor, a certification under penalty of perjury that "under nonbankruptcy law applicable in the jurisdiction, there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the judgment of possession after that judgment of possession was entered."

The debtor must also deposit with the clerk of the court with the bankruptcy petition any rent that would become due during the 30-day period after the filing of the bankruptcy petition. Per Section 362(l)(2), in order to extend the stay beyond the original 30-day period, within that period, the debtor must cure, "under nonbankruptcy law applicable in the jurisdiction, the entire monetary default that gave rise to the judgment under which possession is sought..."

The court noted that "[c]ase law is silent on [the] question" of whether the §362(l)

A landlord-tenant practitioner needs to have general familiarity with [§362 of the Bankruptcy Code], especially in today's economy. However, in a case where the automatic stay and its lifting or continuation is an issue, a landlord-tenant practitioner would be well served to call upon a bankruptcy practitioner for consultation and guidance.

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"safe harbor" reinstates the automatic stay when the judgment of possession was based in any way on a non-monetary default. The court pointed out that §362(l) by its terms refers to "cur[ing] the entire monetary default that gave rise to the judgment of possession." Thus, the court concluded, "[i]f the judgment of possession was based solely on a non-monetary default, there is no basis to argue from the language of the statute that the automatic stay can be reinstated under §362(l)."

The court then posed the following questions:

> But what if the judgment of possession was based on mixed grounds, monetary and non-monetary? If nonbankruptcy law—in this case, New York law—would permit a debtor to cure monetary and non-monetary defaults [and, the court concluded, under New York law, there are circumstances where this would be permitted], is the stay reinstated if the debtor takes the actions required to cure the monetary default only, or, for that matter, to cure all monetary and non-monetary defaults?[4]

In the court's view, the "language of the [Bankruptcy] Code does not provide clear answers to these questions" and the "legislative history also does not shed much light on the questions." After quoting from the legislative history, however, the court did comment that "[w]ith respect to §362(l), Congress's focus was clearly upon allowing the stay to be reinstated if state law permits a cure of a monetary default; no mention is made of a non-monetary default."

The court discussed §§362(b)(23) and 362(m), which were added to the Bankruptcy Code at the same time as §§362(b)(22) and 362(l) and which, the court noted, were addressed in the legislative history together with the latter two sections. Section 362(b)(23) provides a mechanism for a lessor of residential property to terminate the automatic stay based upon a tenant's "endangerment of such property." The procedure involves the lessor certifying under penalty of perjury that an eviction action based on that ground has been filed or that the debtor, during the 30-day period preceding the date of the filing of the certification, "has endangered property." The court commented that the statute does not define the term, but that endangerment of property "would seem to fit with seeking eviction based on Collyer Conditions."

Section 362(m) provides that if the tenant contests the lessor's certification, then the court is required to hold a hearing with the burden of proof on the debtor to demonstrate that the "situation giving rise to the lessor's certification...did not exist or was remedied." Citing *In re Éclair Bakery Ltd.*,[5] the court, however, noted that where a pre-petition judgment of possession is based on circumstances that meet the test of "property endangerment," the bankruptcy court is precluded from relitigating these issues. The court concluded that:

> ...§362(m) does not apply if the lessor obtained a pre-petition judgment based upon 'property endangerment'; and §362(l) does not apply if the pre-petition judgment of possession is based in whole or in part on a material default that cannot be cured by the payment of money.[6]

In *Griggsby*, the court reiterated, the 2007 judgment of possession was predicated on the Collyer Conditions and also on past-due use and occupancy. The 2008 order authorizing the landlord to execute the warrant "did not indicate the presence of an outstanding monetary default" and the landlord argued, and the debtor did not dispute, that the 2008 order "was based solely upon the Debtor's failure to cure the Collyer Conditions." Therefore, the court held, §362(l) did not apply.

The court also reasoned that even assuming, arguendo, that the automatic stay could be reinstated under §362(l), cause would exist to lift that stay under §362(d)(1). That section provides that a court may grant relief from the automatic stay "for cause, including the lack of adequate protection of an interest in property of such [moving] party." The court noted that "the prepetition issuance of a warrant may provide 'cause' to terminate the automatic stay pursuant to §362(d)(1)."

New York Real Property Actions and Procedures Law (RPAPL) §749(3) is relevant to the court's analysis. That statute, which the court quoted, provides that the issuance of a warrant annuls the relation of landlord and tenant, but further provides that "nothing contained herein shall deprive the court of the power to vacate such warrant for good cause shown prior to the execution thereof..." The court found "instructive" the case of *In re Éclair Bakery Ltd.*, where Bankruptcy Judge Robert E. Gerber set forth the following standard for whether the pre-petition issuance of a warrant should be cause for relief from the automatic stay:

> Thus, where state court litigation under the escape valve provided under the second clause of RPAPL §749(3) [the clause quoted above in this article] is pending, or the basis for good faith litigation is apparent...a continuation of stay protection, at least for a limited time, may be appropriate. By contrast, where state court litigation is not pending or in the cards, or where the debtor has failed to show any basis for a belief that the state court will grant relief, the prepetition termination of the landlord-tenant relationship will at least normally provide cause for relief from the stay.[7]

Applying that standard to the facts before it, the court in *Griggsby* concluded that cause would exist to lift the automatic stay, pursuant to §362(d)(1), even were it to be reinstated under §362(l). The court concluded that, like the debtor in the *Éclair Bakery* case, the debtor in *Griggsby* had "failed to show grounds upon which the Civil Court would vacate the warrant of eviction." The court further commented:

> And rather than requesting the Civil Court to vacate the warrant before the scheduled February 23, 2009 eviction, Griggsby filed this Chapter 13 case, with a bare-bones petition and no required schedules or supporting information. The Court is left with the firm conviction that this Chapter 13 case was not filed in good faith, but rather for the purpose of thwarting the Landlord's efforts to evict her.[8]

In *Griggsby*, the court terminated the automatic stay. Its opinion is instructive, though, on the limitations of such a Bankruptcy Court stay even had it been continued by the court. The court pointed out that notwithstanding the issuance of a warrant of eviction, before its execution, the tenant still retained an equitable interest in the property and the potential to reinstate the landlord-tenant relationship. However, the court continued, "the bankruptcy court cannot in any event reinstate the landlord-tenant relationship in New York once a warrant of eviction has issued—only the state court may do so." Thus, in cases where a warrant of eviction has issued, "stay relief from the bankruptcy court can only provide the debtor with a brief window to go back to state court, usually to request that the warrant of eviction be vacated."

In short, as the *Griggsby* case demonstrates, the automatic stay provision, §362 of the Bankruptcy Code, is a complex web. A landlord-tenant practitioner needs to have general familiarity with that statutory section, especially in today's economy. However, in a case where the automatic stay and its lifting or continuation is an issue, a landlord-tenant practitioner would be well served to call upon a bankruptcy practitioner for consultation and guidance.

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1. NYLJ, April 23, 2009, p. 30, col. 3 (Bankr. S.D.N.Y.).
2. The court cited various cases for the proposition that "[u]nder New York law, the term 'Collyer condition,' alternately spelled 'Collier condition,' or 'Collier-like condition,' refers to an excessive accumulation of debris and clutter in a residential apartment that poses a safety, health or fire hazard." See, e.g., *Zipper v. Haroldon Court Condominium*, 39 A.D.3d 325, 835 N.Y.S.2d 43 (1st Dept. 2007), *Gazivoda v. Sherman*, 29 A.D.3d 458, 816 N.Y.S.2d 417 (1st Dept. 2006). The term is derived from the Collyer brothers, recluses who obsessively collected newspapers, books, furniture and other items in the Harlem brownstone where they lived and were found dead surrounded by over 100 tons of rubbish they amassed over several decades.
3. NYLJ, April 23, 2009, at p. 31, col. 1.
4. Id.
5. 255 B.R. 121 (Bankr. S.D.N.Y. 2000).
6. NYLJ, April 23, 2009, at p. 31, col. 2.
7. 255 B.R. at 136.
8. NYLJ, April 23, 2009, at p. 31, col. 3.