United States Bankruptcy Court
District of New Mexico

Document Verification

Case Title: **John R. Taylor**
Case Number: **02-17508**
Chapter : **13**
Judge Code: **SA**
First Meeting Location: **Albuquerque**
Reference Number: **13 - 02-17508 - SA**

Document Information					
Number:	40				
Description:	Order Granting in Part, Denying in Part [16-1] Motion For Relief From Stay As To taxes by New Mexico Taxation & Revenue Department .				
Size:	8 pages (17k)				
Date Received:	02/07/2003 04:10:10 PM	**Date Filed:**	02/07/2003	**Date Entered On Docket:**	02/10/2003

Court Digital Signature View History

5c 54 53 ff 80 64 39 2a a0 a0 87 5b e6 33 59 9a ac 22 0b a4 70 c2 5a 78 ee ca be 07 5b 17 71 dd ae 6d 47 8b 4f 0e 23 2d 31 e9 65 e7 f0 37 a5 b4 49 e1 58 11 0c 9d 6b 16 62 4d 44 01 96 19 c8 b1 19 8e 51 70 c5 5f 2f 7f 7e 07 a2 9c 2a 8d bd 6b 9d 8b 4e 32 7d dd c5 fd 62 9d 8a cc eb b8 04 82 91 b7 e5 1b 3a 5d d9 7d 8f 18 09 9b 7e 01 37 4c 2f b0 a4 27 04 27 c0 41 8b 17 15 71 4f e9 d6 02

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Comments: Order Granting in Part and Denying in Part Motion of New Mexico Taxation & Revenue Department for Stay Relief

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
JOHN R. TAYLOR,
Debtor.

No. 13-02-17508 SA

ORDER GRANTING IN PART AND DENYING IN PART MOTION OF NEW MEXICO TAXATION & REVENUE DEPARTMENT FOR STAY RELIEF

Taxation and Revenue Department's Motion for Relief from Automatic Stay (doc 16) and the Debtor's response (doc 25) and supplemental response (doc 29) thereto are before the Court on the allegations of the motion and responses, the attachments to the motion and supplemental response, and the written and oral arguments. Donald D. Becker represents the Debtor; James C. Jacobsen represents the Department. On February 3, 2003, the Court issued oral findings of fact and conclusions of law on the record as permitted by Rule 7052 of the Federal Rules of Bankruptcy Procedure, and issued an oral ruling. This order puts that ruling in written form for entry on the docket.

In brief summary, prior to the filing of his chapter 13 petition, the debtor, a licensed attorney, operated a business practicing law but failed to file gross receipts tax returns and pay the required tax for a period of time. The Department filed suit against the debtor and obtained a judgment from the

First Judicial District Court in Santa Fe, New Mexico, that, among other things, found him liable for not filing returns and paying the tax, and required the debtor to cease operating his law-practice business until he had become current. Subsequently the debtor signed an agreement with another practicing attorney to work for that attorney (whether as an associate or as an independent contractor is not considered in this decision) and may have been doing so when a follow-up investigation by the Department led the Department to move the state district court for contempt sanctions alleging a violation of that court's earlier order. Debtor then filed a chapter 13 petition, and the Department filed the instant motion, seeking a ruling either that the contempt motion constituted a criminal proceeding and thus, pursuant to 11 U.S.C. § 362(b)(1), was not stayed, or that the contempt proceeding, if for civil contempt, should be allowed to go forward because there was sufficient "cause" to modify the stay pursuant to § 362(d)(1). The Debtor argued that the alleged contempt was "civil" and that everyone including the Department would be better off if the Debtor could confirm a chapter 13 plan and pay the taxes over time while continuing to work.

The parties submitted a number of cases from the United States Supreme Court, the New Mexico Supreme Court, and the New Mexico Court of Appeals discussing the differences between criminal and civil contempt. Perhaps the single quotation which best summarizes all the discussion is from Gompers v. Buck's Stove & Range Company, 221 U.S. 418 (1911):

> "Contempts are neither wholly civil nor altogether criminal. And it may not always be easy to classify a particular act as belonging to either one of these two classes. It may partake of the characteristics of both.... It is not the fact of punishment, but rather its character and purpose, that often serve to distinguish between the two classes of cases....
>
> "The order for imprisonment [for civil contempt], therefore, is...remedial, and is intended to coerce the defendant to do the thing required by the order for the benefit of the complainant. If imprisoned, he carries the keys of his prison in his own pocket. He can end the sentence and discharge himself at any moment by doing what he had previously refused to do.
>
> "On the other hand, if the defendant does that which he has been commanded not to do, the disobedience is a thing accomplished. Imprisonment cannot undo or remedy what has been done, nor afford any compensation for the pecuniary injury caused by the disobedience. If the sentence is limited to imprisonment for a definite period, the defendant is furnished no key, and he cannot shorten the term by promising not to repeat the offense. Such imprisonment operates not as a remedy coercive in its nature, but solely as punishment for the completed act of disobedience.
>
> "The distinction between refusing to do an act commanded (remedied by imprisonment until the party performs the required act), and doing an act forbidden (punished by imprisonment for a definite

> term), is sound in principle, and generally, if not universally, affords a test by which to determine the character of the punishment."

Id., at 441-43 (internal quotation marks, citations and portions of text omitted), quoted in Jencks v. Goforth, 57 N.M. 627, 633-35, 261 P.2d 655, 658-660 (1953) as "the basic theory [which] cannot be better stated".

At this stage, this Court cannot clearly tell from the contempt motion whether the Department seeks criminal or civil sanctions, or both, against the Debtor in the state court litigation. But even if the contempt motion sought only criminal sanctions and this Court could discern that, the state court judge is not limited to granting relief solely in the form requested. In other words, the State Court could assess civil or criminal contempt sanctions, or a combination of both, and, as Gompers makes clear, it is the sanction imposed that determines whether the contempt proceeding is civil or criminal. This distinguishes this kind of proceeding from the far more typical action in which it is clear at the outset whether an action is criminal or civil; for example, a standard collection action against the debtor is hardly likely to morph into a criminal action.

Another aspect of the matter is the value of not permitting the Debtor to use the bankruptcy code to prevent

the State Court from upholding and vindicating its dignity and authority. Whether the State Court treats the Department's motion as merely a further collection attempt or as a basis for making the Debtor recognize the authority of the State Court as the judicial representative of the people of New Mexico would be a key factor in deciding whether the stay should be modified. And it is really only the State Court, rather than this Court, that has the ability to make that decision.

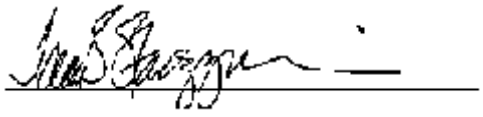
It is also important to remember that the jurisdiction to determine whether the stay is applicable to a matter pending before a state court is not limited to bankruptcy courts; state courts may also make those decisions, and do so when the parties put the question to them rather than a bankruptcy court. E.g., Erti v. Paine Webber Jackson & Curtis, Inc. (In re Baldwin-United Corp. Litig.), 765 F.2d 343, 347 (2nd Cir. 1985) ("The court in which the litigation claimed to be stayed is pending has jurisdiction to determine not only its own jurisdiction but also the more precise question whether the proceeding pending before it is subject to the automatic stay."); Siskin v. Complete Aircraft Services, Inc. (In re Siskin), 258 B.R. 554, 563 (Bankr. E.D. N.Y. 2001)(Court adopts "majority view" that state courts have concurrent

jurisdiction to decide whether the automatic stay applies to a prepetition state court action.). See also Carlos J. Cuevas, The Rooker-Feldman Doctrine and the Automatic Stay, 21 Am. Bankr. Inst. J. 8 (2002)("The majority rule is that the state and federal courts have concurrent jurisdiction to determine the applicability of the automatic stay."); contra, Gruntz v. County of Los Angeles (In re Gruntz), 202 F.3d 1074, 1083 (9th Cir. 2000) (“In sum, by virtue of the power vested in them by Congress, the federal courts have the final authority to determine the scope and applicability of the automatic stay.” [Footnote omitted.]). If the automatic stay applies, only the bankruptcy court may grant relief from it, however. Farley v. Henson, 2 F.3d 273, 275 (8th Cir. 1993); In re Glass, 240 B.R. 782, 787 n. 5 (Bankr. M.D. Fla. 1999) (“A careful distinction must be made between determining the applicability of the automatic stay and the granting of relief from its otherwise operative provisions.”).

In this instance, rather than this Court ruling in anticipation of the various ways that the State Court might rule, or requiring the Department to clarify or specify for this Court what sort of relief it seeks in the state court action, it is more reasonable and efficient to permit the parties to return to state court, let the State Court rule on

whether to impose sanctions and, if it does determine that sanctions are appropriate, rule on what the sanctions should be. At that point, the parties can decide if they want the State Court or this Court to determine the applicability of the stay to further proceedings before the State Court.

IT IS THEREFORE ORDERED that Taxation and Revenue Department's Motion for Relief from Automatic Stay is granted to the extent needed to permit the First Judicial District Court to hear and determine the issues of (1) whether sanctions should be imposed on the Debtor, and (2) if so, what those sanctions should be. At that point, the parties may request the State Court or this Court to determine the applicability of § 362 to the state court proceedings, assuming the issue is not moot by that time. Should any relief from the stay be sought, that relief must be pursued in this court. The Department's motion is otherwise denied.



Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that on February 7, 2003, a true and correct copy of the foregoing was either electronically transmitted, faxed, delivered, or mailed to the listed counsel and parties.

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