BANKRUPTCY PETITION COSTS LITIGANT RIGHT TO APPEAL

Learning the interplay between state rules of judicial procedure and federal bankruptcy law can be a daunting undertaking, but the pitfalls of failing to do so can be severe. A recent example of the importance of being mindful of these issues is *Hewett v. Wells Fargo Bank, N.A. as Trustee*, No. 2D15–1074, 2016 WL 3065014 (Fla. 2d DCA June 1, 2016) where the filing of a bankruptcy petition ultimately cost a foreclosure defendant his right to appeal a final judgment of foreclosure.

The Second DCA summarized the procedural posture of the case as follows:

"The circuit court's final judgment of foreclosure of Mr. Hewett's home was rendered on February 27, 2015, when the order denying Mr. Hewett's motion for rehearing and new trial was filed with the clerk of the circuit court. See Fla. R. App. P.9.020(i)(1). On March 2, 2015, Mr. Hewett filed a petition for bankruptcy in the United States Bankruptcy Court for the Middle District of Florida. Then on March 9 Mr. Hewett filed with the clerk of the Lee County circuit court a notice of appeal challenging the foreclosure judgment. Without argument**, were it not for the filing of his bankruptcy petition, Mr. Hewett's notice would have been timely filed to invoke our jurisdiction**. See Fla. R. App. P. 9.110(b)."

The Second DCA examined a similar, but distinguishable fact pattern in *AmMed Surgical Equipment, LLC v. Professional Medical Billing Specialists, LLC*, 162 So. 3d 209, 211 (Fla. 2d DCA 2015) where the Second DCA concluded that "the filing of a notice of appeal in state court should be considered the 'continuation . . . of a judicial . . . proceeding against' the appellant" that would be prohibited by the automatic stay." However, in *AmMed* the Court accepted the filing of the appeal as timely because a second notice of appeal was filed within the Bankruptcy Code's extended deadlines for "commencing or continuing a civil action" which expire during the application of the automatic stay. *See* 11 U.S.C. § 108(c)(2) (extending deadlines to commence or continue a civil action which expire during the period of the automatic stay by thirty days from the expiration of the automatic stay).

In *Hewett*, however, no notice of appeal was filed within the period described in Section 108(c)(2) of the Bankruptcy Code.

Citing to *AmMed*, Wells Fargo moved to dismiss the appeal on the basis that the notice of appeal was filed in violation of the automatic stay, rendering the notice of appeal void, and that in the absence of some other valid method of invoking the

appellate court's jurisdiction, the appeal ought to be dismissed for lack of jurisdiction. In ruling in favor of Wells Fargo and dismissing the appeal, the Second DCA held:

"These two principles we announced in *AmMed*—that a notice of appeal is a continuation of a judicial proceeding, and that the Bankruptcy Code prohibits the filing of such a notice during an automatic stay—comport with the broader (and broadly held) view that **THE FILING OF A NOTICE OF APPEAL DURING THE PENDENCY OF A BANKRUPTCY STAY SHOULD BE DEEMED VOID AS A VIOLATION OF THE AUTOMATIC STAY**. Consistent with *AmMed*, we agree with these holdings. Therefore, since the only notice of appeal Mr. Hewett ever filed was a nullity, we are without jurisdiction to consider his appeal." (citations omitted).

Perhaps more interesting than the holding of *Hewett* is the dicta concerning constitutional concerns regarding the validity of Section 108(c) of the Bankruptcy Code:

"To be sure, the Bankruptcy Code provides extended, substitute deadlines for 'continuing a civil action' after an automatic stay has expired or been terminated. See 11 U.S.C. § 108(c). Were we in a position to simply engraft that section of the federal Bankruptcy Code into our State's rules of appellate procedure, then the dismissal of Mr. Hewett's appeal, and what appellants in Mr. Hewett's circumstance ought to do to invoke our court's jurisdiction after their bankruptcy cases have concluded, could be easily resolved. But we do not have that power. And it is not entirely clear whether Congress has that power either.

Although Congress may exercise plenary power under the Constitution to 'establish . . . uniform Laws on the subject of Bankruptcies throughout the United States,' art. I, § 8, cl. 4, U.S. Const., the reach of that power might not extend so far as to alter state judicial *procedures* within state court proceedings:

'**Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law**.' *John v. Paullin*, 231 U.S. 583, 585 (1913).

Thus, the kind of pragmatic question our dismissal of this appeal could raise—whether or to what extent 11 U.S.C. § 108(c) may, of its own force, affect the

procedural filing deadline of rule 9.110(b) following the expiration or termination of an automatic stay— appears to be one that has never been squarely decided by any federal court.

So we are left with an appellate rule that does not speak about bankruptcy and a bankruptcy statute that may not be able to speak to our appellate rules. While we recognize this potential conundrum, we cannot attempt to resolve it. In light of these concerns, though, we would commend this issue for the Appellate Court Rules Committee's consideration of whether a new or amended rule of appellate procedure would be appropriate to incorporate the tolling provisions of 11 U.S.C. § 108(c) or another period that explicitly addresses the effect of an automatic stay in bankruptcy on the filing of a notice of appeal." (citations omitted).

Hewett's failure to raise any constitutional concerns in his response to the motion to dismiss ensured that this question will not be resolved any time soon. However, given the frequency with which such fact patterns arise, it would not be surprising if this issue does reach the Second DCA at some point (even in an *en banc* setting given the appearance of a conflict with between the dicta in *Hewett* and outcome of *AmMed*) or the Florida Supreme Court at some stage. It also certainly appears to merit revision to the Florida Rules of Appellate Procedure unless the Florida Supreme Court disagrees with the Second DCA's dicta regarding the possible constitutional issues with Section 108(c). Certainly those who seek to employ Section 108(c) tolling in Florida's appellate courts in the future are likely to be met with motions to dismiss predicated on the dicta in *Hewett* the future.

That being said, diligent practitioners can avoid this conundrum altogether quite easily. **If Hewett had filed his appeal first and then stayed his own appeal by petitioning for bankruptcy, his right to appeal would have been preserved as opposed to destroyed by the application of the automatic stay. This sequencing is certainly recommended for anyone facing this issue in the near future.**

Additionally, if Hewett secured stay relief, even *nunc pro tunc*, within the thirty period within which to appeal under Fla. R. App. P. 9.110(b), the issue likely would have been resolved differently. Nonetheless, by the time the issue reached the Second DCA, Hewett had irrevocably lost his right to appeal by filing his appeal in violation of the automatic stay and failing to remediate the issue before the applicable deadlines (be it Fla. R. App. P. 9.110(b) or Section 108(c) of the Bankruptcy Code) had expired.