NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL FOR THE FIRST CIRCUIT

BAP NO. MB 18-014

Bankruptcy Case No. 18-10543-FJB

GIFTY R. SAMUELS,
Debtor.

GIFTY R. SAMUELS,
Appellant,

v.

WILMINGTON SAVINGS FUND SOCIETY, FSB,
d/b/a Christiana Trust as Owner Trust of the
Residential Credit Opportunities Trust V,
Appellee.

Appeal from the United States Bankruptcy Court
for the District of Massachusetts
(Hon. Frank J. Bailey, U.S. Bankruptcy Judge)

Before
Lamoutte, Tester, and Cary,
United States Bankruptcy Appellate Panel Judges.

David G. Baker, Esq., on brief for Appellant.

February 28, 2019

Per curiam.

Gifty Samuels (the "Debtor") appeals from the bankruptcy court's order (the "Order") granting the Motion for Order Confirming the Absence of a Stay filed by Wilmington Savings Fund Society, FSB (the "Appellee"). In the Order, the bankruptcy court concluded that, because it had previously denied the Debtor's request to extend the automatic stay pursuant to § 362(c)(3)(B), the automatic stay had terminated pursuant to § 362(c)(3)(A) as to the Debtor, her property, and the property of the bankruptcy estate.[1] In this appeal, the Debtor raises a single issue: "[W]hether the automatic stay expires *in toto* when the bankruptcy court denies a motion to extend the stay in a second case filed within one year, or whether it expires only as to the debtor and the debtor's property, but not to property of the estate."[2] The Debtor argues that, in the absence of "binding case law in the First Circuit on the question presented," the Panel should reverse the bankruptcy court's decision in light of the Panel's prior holdings in Jumpp v. Chase Home Fin., LLC (In re Jumpp), 356 B.R. 789 (B.A.P. 1st Cir. 2006), and Witkowski v. Knight (In re Witkowski), 523 B.R. 291 (B.A.P. 1st Cir. 2014), in which a prior panel ruled that the automatic stay terminates only with respect to the debtor and the debtor's property, and not property of the estate.

During the pendency of this appeal, on December 12, 2018, the U.S. Court of Appeals for the First Circuit (the "Court of Appeals") issued an opinion in which it decided this precise issue and ruled that "§ 362(c)(3)(A) terminates the entire automatic stay—as to actions against the debtor, the debtor's property, and property of the bankruptcy estate—after thirty days for

[1] All references to "Bankruptcy Code" or to specific statutory sections are to the Bankruptcy Reform Act of 1978, as amended, 11 U.S.C. §§ 101, et seq.

[2] As discussed later, although the Debtor addressed only one issue throughout this appeal, she now claims—belatedly and incorrectly—that this appeal also encompasses the question of whether the bankruptcy court properly denied her request to extend the stay under § 362(c)(3)(B).

second-time filers." Smith v. Me. Bureau of Revenue Servs. (In re Smith), 910 F.3d 576, 591 (1st Cir. 2018). Thus, the bankruptcy court's decision in this case is consistent with the Court of Appeals' ruling in Smith, which is binding on this Panel. As a result, and for the reasons set forth below, the Order is **AFFIRMED**.

BACKGROUND[3]

I. The Bankruptcy Proceedings

The Debtor filed a chapter 11 petition in February 2018. On her Schedule A/B: Property, the Debtor listed, among other things, real property located at 316 Essex Street, Lynn, Massachusetts (the "Property"), which she valued at $389,500.00. The Appellee, who holds a first mortgage on the Property, filed a proof of claim, asserting a claim in the amount of $780,077.59, secured by a lien on the Property, with pre-petition arrears in the amount of $301,278.26.

A. Motion to Extend Automatic Stay

In February 2018, the Debtor filed a Motion for Extension of Automatic Stay ("Motion to Extend Automatic Stay") pursuant to § 362(c)(3)(B) because she had previously filed a bankruptcy petition and the resulting case, which was ultimately dismissed, had been pending within the prescribed one-year period prior to the petition date. See 11 U.S.C. § 362(c)(3).[4]

[3] The background set forth herein is gleaned from the submissions of the parties in this appeal, and from the bankruptcy court's docket. See U.S. Bank N.A. v. Blais (In re Blais), 512 B.R. 727, 730 n.2 (B.A.P. 1st Cir. 2014) (stating the Panel "may take judicial notice of the bankruptcy court's docket and imaged papers").

[4] Section 362(c)(3)(A) provides that if a bankruptcy case is filed by a debtor who had a case pending within the prior year which was dismissed, the stay under § 362(a) terminates on the 30th day after the filing of the later case. 11 U.S.C. § 362(c)(3)(A). Section 362(c)(3)(B) permits the court to extend the automatic stay beyond 30 days on motion of a debtor "after notice and a hearing completed before the expiration of the 30-day period," if the debtor demonstrates that the later case was filed in good faith as to the creditors to be stayed. 11 U.S.C. § 362(c)(3)(B).

The Debtor argued that there had been a "substantial change in her circumstances within the meaning of § 362(c)(3) that justifie[d] extending the stay as to all creditors." After a hearing on March 12, 2018, the bankruptcy court denied the Motion to Extend Automatic Stay. The Debtor did not appeal that decision.

B. Motion for Comfort Order

On April 9, 2018, the Appellee filed a motion ("Motion for Comfort Order") seeking a "comfort order" pursuant to § 362(j) confirming that the automatic stay had terminated *in its entirety* pursuant to § 362(c)(3)(A).[5] The Debtor opposed the Motion for Comfort Order on the grounds that the bankruptcy court had not ruled on the extent to which the automatic stay had expired under § 362(c)(3)(A). She further asserted that a number of courts, including the Panel in In re Jumpp, supra, have ruled that the stay expires only as to the debtor and the debtor's property, and not property of the estate.

C. Order Granting Motion for Comfort Order

The bankruptcy court held a hearing on April 24, 2018, and, two days later, entered the Order granting the Motion for Comfort Order.[6] In the Order, the bankruptcy court confirmed that its denial of the Motion to Extend Automatic Stay "result[ed] in the termination of the automatic stay on or about March 12, 2018." The court then considered the extent to which the automatic stay had terminated under § 362(c)(3)(A).

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[5] Section 362(j) provides: "On request of a party in interest, the court shall issue an order under subsection (c) confirming that the automatic stay has been terminated." 11 U.S.C. § 362(j). An order issued pursuant to § 362(j) is often called a "comfort order," as it is typically requested by a creditor seeking to satisfy a state court that it may proceed with a pending action, such as a foreclosure, despite the pendency of a bankruptcy case. See Thomas v. Fed. Nat'l Mortg. Ass'n (In re Thomas), 469 B.R. 915, 921 (B.A.P. 10th Cir. 2012) (characterizing § 362(j) orders as "comfort orders"); In re Hill, 364 B.R. 826, 828 (Bankr. M.D. Fla. 2007) (same).

[6] The Order was in the form of a "Proceeding Memorandum/Order."

The bankruptcy court recognized that there is a split of authority regarding the extent to which the automatic stay terminates under § 362(c)(3)(A), arising from different interpretations of the phrase "with respect to the debtor." The majority view, expressed by the Panel in In re Jumpp, supra, is that the stay terminates only with respect to actions against the debtor personally and the debtor's non-estate property, but not as to property of the bankruptcy estate. See Jumpp, 356 B.R. at 793-97. The minority view, the court noted, interprets § 362(c)(3)(A), and specifically the phrase "with respect to the debtor," as terminating the stay as to the debtor, the debtor's property, and property of the debtor's estate. The bankruptcy court agreed with the minority view, stating:

> [O]ther courts have ruled that "with respect to the debtor" may well be meant to distinguish between the debtor and the debtor's spouse who did not file prior cases, rather than distinguishing between estate and non-estate assets. See St. Anne's Credit Union v. Ackell, 490 B.R. 141, 145 (D. Mass. 2013). Where there is ambiguity in statutory language, it is appropriate to look at the legislative history of the statute. Here, plainly Congress intended to address the problem of serial bankruptcy filings. Such as the one we have here. In re[ ] Smith, 573 B.R. 298, 303 (Bankr. D. Me. 2017). Under the reading of the Jumpp decision, [§] 362(c) loses much of its vitality. Stated differently, the statute would simply not serve as a barrier to serial filings where secured creditors are seeking to exercise their state law rights, which is precisely what Congress intended. Indeed, in this case the Debtor did not merely "miss" filing its request to extend the stay. Rather, the appropriate motion was filed and this court determined after a full hearing that the Debtor could not carry her burden of producing clear and convincing evidence that her personal or financial circumstances had changed sufficiently to rebut the presumption that this case was filed in bad faith. In short, I agree with the Smith and St. Anne's Credit Union cases that termination of the stay under [§] 362(c) removes the prohibition against actions against the debtor, the assets of the debtor, and the assets of the estate. Hence, the [Motion for Comfort Order] is allowed.

II. The Appeal and Subsequent Events

A. Notice of Appeal, Motion for Certification of Direct Appeal, and Motion for Stay Pending Appeal

The Debtor filed a notice of appeal with respect to the Order. She also filed: (1) a motion requesting certification for a direct appeal to the Court of Appeals; and (2) a motion for a stay pending appeal (the "Bankruptcy Court Stay Motion"). After a hearing on May 1, 2018, the bankruptcy court entered: (1) a formal "Order on Motion for Order Confirming Absence of Automatic Stay," in which the bankruptcy court, "[f]or the reasons set forth in the [Order]," granted the Motion for Comfort Order and confirmed that the automatic stay "has terminated as to the Debtor and accordingly does not stay efforts by the [Appellee] to foreclose its mortgage on the Debtor's real property and otherwise enforce its rights against the Debtor and her property"; (2) an order certifying the appeal to the Court of Appeals;[7] and (3) an order denying the Bankruptcy Court Stay Motion "[f]or the reasons and findings as stated on the record."

B. Petition for Direct Appeal to Court of Appeals

Thereafter, the Debtor filed with the Court of Appeals a petition for permission to take a direct appeal to that court ("Petition for Direct Appeal") and a motion for stay pending appeal (the "COA Stay Motion"). In a judgment dated June 18, 2018, the Court of Appeals denied the Petition for Direct Appeal, stating that it was "not clear . . . that granting direct review will facilitate a rapid resolution of the underlying case." The Court of Appeals also denied the COA Stay Motion as moot, expressing "no view on its merits in the event that the petitioner chooses to renew it in the appeal before the Bankruptcy Appellate Panel."

[7] The bankruptcy court certified to the Court of Appeals: "(1) that the order on appeal involves a question of law as to which there is no controlling decision of the court of appeals for this circuit or of the Supreme Court of the United States and (b) that an immediate appeal from the order may materially advance the progress of the bankruptcy case in which the appeal is taken."

C. Motion for Stay Pending Appeal to Panel

The Debtor then filed a motion for stay pending appeal with the Panel, which the Appellee opposed. On June 22, 2018, the Panel entered an order granting the motion for stay pending appeal, determining that the Debtor had established the four factors required to obtain a stay pending appeal articulated in Sindicato Puertorriqueño de Trabajadores v. Fortuño, 699 F.3d 1, 10 (1st Cir. 2012). Thereafter, the Debtor filed a brief, but the Appellee did not, indicating that it had decided not to incur further expense in defending the appeal.

D. Order to Show Cause and Joint Motion to Dismiss

About a month later, on November 20, 2018, the bankruptcy court issued an order (the "Order to Show Cause") directing the Debtor to show cause why the bankruptcy case should not be dismissed due to her failure to confirm a plan within a reasonable time and her inability to propose a confirmable plan. Shortly thereafter, the Appellee and another creditor filed a Joint Motion to Dismiss Case Pursuant to 11 U.S.C. § 1112(b) (the "Joint Motion to Dismiss").

E. Stay of this Appeal Pending the Court of Appeals' Decision in Smith

While this appeal was pending, the U.S. District Court for the District of Maine issued a decision affirming In re Smith, 573 B.R. 298 (Bankr. D. Me. 2017) ("Smith I"), in which the bankruptcy court adopted the minority view that § 362(c)(3)(A) terminates the stay as to the debtor, the debtor's property, and property of the debtor's estate. See Smith v. Me. Bureau of Revenue Servs., 590 B.R. 1 (D. Me. 2018) ("Smith II"). The debtor then appealed Smith II to the Court of Appeals. Recognizing that the issue before the Panel in this appeal was the same issue before the Court of Appeals in Smith, the Panel, on August 24, 2018, entered an order

("Order Staying Appeal") sua sponte staying this appeal until the Court of Appeals rendered a decision in Smith.[8]

On December 12, 2018, the Court of Appeals affirmed the bankruptcy court's ruling in Smith I. See Smith, 910 F.3d at 591.[9] In its opinion, the Court of Appeals identified the sole issue before it as follows: "Does § 362(c)(3)(A) terminate the automatic stay as to actions against property of the bankruptcy estate?" Id. at 578. After examining the text of § 362(c)(3)(A), the statutory context, and Congress' intent in enacting BAPCPA, the Court of Appeals ruled that "§ 362(c)(3)(A) terminates the entire automatic stay—as to actions against the debtor, the debtor's property, and property of the bankruptcy estate—after thirty days for second-time filers." Id. at 591.

F. The Dismissal Order

On December 18, 2018, the bankruptcy court held a hearing with respect to both the Order to Show Cause and the Joint Motion to Dismiss. On January 9, 2019, the bankruptcy court entered an order and a separate proceeding memorandum (the "Dismissal Order") dismissing the Debtor's bankruptcy case under § 1112(b)(2) for failure to: identify "unusual circumstances" establishing that dismissal was not in the best interests of creditors and the estate; demonstrate a reasonable likelihood that a plan would be confirmed in a reasonable period of time; and establish a "reasonable justification" for her failure to confirm a plan within a reasonable period of time. The Debtor filed a notice of appeal with respect to both the Dismissal Order and a prior interlocutory order denying confirmation of her chapter 11 plan. That appeal is pending before

[8] The Panel noted that the Debtor had expressly "defer[red] to the Panel as to whether this matter should be held in abeyance pending the First Circuit's decision."

[9] By the terms of the Order Staying Appeal, the stay issued by the Panel lifted once the Court of Appeals issued its decision.

the Panel. See Samuels v. Wilmington Savings Fund Society, FSB (In re Samuels), BAP No. MB 19-003 (B.A.P. 1st Cir. filed Jan. 9, 2019).

G. Status Reports

On January 9, 2019, the Appellee filed with the Panel a notice ("Notice of Dismissal") informing the Panel of the Dismissal Order and requesting the Panel to "enter such orders as it deems appropriate."

The Debtor filed a response to the Notice of Dismissal, asserting among other things that, despite the dismissal of her bankruptcy case, this appeal is not moot as she has appealed the Dismissal Order and the Order Denying Plan Confirmation. She also claimed, for the first time, that "the question of whether the order on appeal properly denied an extension of the stay is encompassed within the Notice of Appeal."

On February 26, 2019, the Panel issued an order determining that oral argument is not needed in this case because the dispositive issue has been authoritatively decided, the facts and legal arguments were fully presented in the Debtor's brief, and the decisional process would not be significantly aided by oral argument. See Fed. R. Bankr. P. 8019(b); 1st Cir. BAP L.R. 8019-1(d).

APPELLATE JURISDICTION

The Panel is "duty-bound" to determine its jurisdiction before proceeding to the merits, even if not raised by the litigants. Rivera Siaca v. DCC Operating, Inc. (In re Olympic Mills Corp.), 333 B.R. 540, 546-47 (B.A.P. 1st Cir. 2005) (citation omitted). In order to properly assess the Panel's jurisdiction, we must first identify the subject of the appeal, as the Debtor now claims that this appeal encompasses more than the bankruptcy court's ruling as to the extent to which the automatic stay expired under § 362(c)(3)(A).

I. Subject of the Appeal

In her response to the Notice of Dismissal filed by the Appellee, the Debtor asserted that, although the pleadings filed in the present appeal addressed a single issue of law—namely, "whether the automatic stay expires after thirty days if not extended"—the notice of appeal in this matter "specifically includes 'every part' of the order on appeal, not merely the continuation or expiration of the automatic stay." Thus, the Debtor contended, "the question of whether the order on appeal properly denied an extension of the stay is encompassed within the Notice of Appeal." Although the Debtor did not acknowledge the Court of Appeals' ruling in Smith, supra, her assertion implies that Smith is not dispositive of this appeal because there is an additional, outstanding issue—namely, whether the bankruptcy court properly denied her Motion to Extend Automatic Stay.

Contrary to the Debtor's assertion, however, this appeal does not encompass any issues relating to the bankruptcy court's denial of her request to extend the automatic stay. First, the bankruptcy court did not deny the Debtor's Motion to Extend Automatic Stay as part of the Order at issue in this appeal. Rather, the court made that ruling in a separate order issued on March 12, 2018. The Debtor did not appeal the order denying the Motion to Extend Automatic Stay, and, therefore, it has become final and unappealable. See In re Flynn, 582 B.R. 25, 27 (B.A.P. 1st Cir. 2018) (stating that bankruptcy court's denial of a motion to extend the automatic stay under § 362(c)(3)(B) is a final order) (citations omitted). She cannot challenge that ruling now. See Asociación de Titulares de Condominio Castillo v. DiMarco (In re Asociación de Titulares de Condominio Castillo), 581 B.R. 346, 353 (B.A.P. 1st Cir. 2018) (stating that the timely filing of a notice of appeal is a jurisdictional prerequisite for the Panel to review a decision of the bankruptcy court) (citations omitted). Second, the Debtor has not raised any

issues relating to the bankruptcy court's refusal to extend the automatic stay in connection with this appeal. She did not raise the issue in her statement of the issues on appeal, and, in every pleading filed in connection with this appeal (including her Petition for Direct Appeal to the Court of Appeals, the three motions for stay pending appeal filed with the bankruptcy court, the Panel and the Court of Appeals, and her appellate brief), she identifies only one issue in this appeal: "[W]hether the automatic stay expires *in toto* when the bankruptcy court denies a motion to extend the stay in a second case filed within one year, or whether it expires only as to the debtor and the debtor's property, but not to property of the estate." Therefore, she has not preserved the issue of whether the bankruptcy court properly denied her Motion to Extend Automatic Stay for consideration in this appeal. See United States v. Bayard, 642 F.3d 59, 63 (1st Cir. 2011) (stating an appellant's failure to brief an issue waives it); City Sanitation, LLC v. Allied Waste Servs. of Mass., LLC (In re Am. Cartage, Inc.), 656 F.3d 82, 91 (1st Cir. 2011) (stating an issue omitted from the statement of issues is waived). As a result, there is only one issue before the Panel in this appeal—whether the bankruptcy court erred in ruling that, because it had denied the Debtor's request to extend the automatic stay pursuant to § 362(c)(3)(B), the automatic stay terminated pursuant to § 362(c)(3)(A) as to the Debtor, her property, and the property of the bankruptcy estate.

II. Finality

Having determined the appropriate subject of the appeal, we proceed to a discussion of finality. "Pursuant to 28 U.S.C. §§ 158(a) and (b), the Panel may hear appeals from 'final judgments, orders, and decrees[.]'" Fleet Data Processing Corp. v. Branch (In re Bank of New Eng. Corp.), 218 B.R. 643, 645 (B.A.P. 1st Cir. 1998); see also Bullard v. Blue Hills Bank, 135 S. Ct. 1686, 1692, 1695 (2015) (discussing the Panel's jurisdiction to hear bankruptcy appeals

under 28 U.S.C. § 158(a)). A bankruptcy court's order determining the extent to which the automatic stay has terminated under § 362(c)(3)(A) is a final, appealable order. See In re Jumpp, 356 B.R. at 791. Therefore, the Panel has jurisdiction to consider this appeal.[10]

STANDARD OF REVIEW

The Panel reviews the bankruptcy court's findings of fact for clear error and its conclusions of law de novo. Jeffrey P. White & Assocs., P.C. v. Fessenden (In re Wheaton), 547 B.R. 490, 496 (B.A.P. 1st Cir. 2016) (citation omitted). "The extent to which the automatic stay terminates pursuant to [§] 362(c)(3)(A) is a question of law that the Panel [ ] reviews de novo." In re Jumpp, 356 B.R. at 791 (citation omitted); see also In re Flynn, 582 B.R. at 28 (citation omitted).

DISCUSSION

The extent to which the automatic stay terminates after 30 days under § 362(c)(3)(A) has been the subject of much debate, generating a split of authority. This debate is the result of diverging interpretations of the phrase, "with respect to the debtor." Two approaches have emerged—the "majority view" and the "minority view." The so-called "majority view," expressed by the Panel in In re Jumpp, supra, is that the stay terminates only with regard to actions against the debtor personally and his non-estate property. See 356 B.R. at 796-97. The "minority view" interprets § 362(c)(3)(A), and specifically the phrase "with respect to the debtor," to terminate the stay as to the debtor, that debtor's property, and property of the debtor's

[10] We acknowledge that the underlying bankruptcy case has been dismissed, and that an affirmance of the dismissal likely would render this appeal moot as the Panel would be unable to fashion any relief with respect to the automatic stay. See Sepulveda Soto v. Doral Bank (In re Sepulveda Soto), No. PR 12-053, 2013 WL 1932118 (B.A.P. 1st Cir. May 8, 2013) (dismissing as moot an appeal of a bankruptcy court order granting relief from stay following the Panel's affirmance of the bankruptcy court's dismissal of the underlying bankruptcy case). However, this appeal is not currently moot due to the pendency of the Debtor's appeal of the Dismissal Order.

estate, but not as to the debtor's spouse in a joint case if that spouse is not also a repeat filer. See, e.g., St. Anne's Credit Union, 490 B.R. at 144-46; Reswick v. Reswick (In re Reswick), 446 B.R. 362, 366 (B.A.P. 9th Cir. 2011). The bankruptcy court found the minority view to be more persuasive and ruled that, upon its denial of the Motion to Extend Automatic Stay, the automatic stay terminated under § 362(c)(3)(A) not only with respect to the Debtor and her property, but also as to property of the bankruptcy estate.

At the time the bankruptcy court issued the order on appeal, the Court of Appeals had not rendered a decision as to the correct interpretation of § 362(c)(3)(A), and courts within the First Circuit had adopted different approaches. The Court of Appeals has since addressed the precise issue presented in this appeal, ruling that "§ 362(c)(3)(A) terminates the entire automatic stay—as to actions against the debtor, the debtor's property, and property of the bankruptcy estate—after thirty days for second-time filers." Smith, 910 F.3d at 591. Thus, the bankruptcy court's decision in this case is consistent with the Court of Appeals' ruling in Smith, which is binding on this Panel. See Perez v. Deutsche Bank Nat'l Trust Co. (In re Perez), 556 B.R. 527, 528 (B.A.P. 1st Cir. 2016) (affirming bankruptcy court's decision because the Panel was "bound by First Circuit precedent"). As we are bound by the Court of Appeals' ruling in Smith, we must conclude that, upon the bankruptcy court's denial of the Motion to Extend Automatic Stay, the automatic stay terminated under § 362(c)(3)(A) not only with respect to the Debtor and her property, but also as to property of the bankruptcy estate. Therefore, the bankruptcy court did not err in rendering its decision.

CONCLUSION

Based on the foregoing, the Order is hereby **AFFIRMED**.