

UNITED STATES BANKRUPTCY APPELLATE PANEL
FOR THE FIRST CIRCUIT

BAP NO.

97-111

In re:

FRANCIS V. SAMMATARO

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Appellant

v.

FLEET MORTGAGE GROUP, INC.

Appellee

Appeal from the United States Bankruptcy Court
District of Massachusetts
[Hon. Carol J. Kenner, Bankruptcy Judge]

Before

Goodman, Lamoutte, de Jesus, Bankruptcy Judges

Mel Dahl, Esq., Attorney for Appellant.
John K. Britt, Esq., Attorney for Appellee.

March 5, 1999

de Jesús, J.

This appeal challenges the bankruptcy court's ruling granting a motion to annul the automatic stay at the conclusion of a nonevidentiary hearing.¹ Appellant argues the court abused its discretion by refusing his request for a second hearing and ordering the annulment without receiving documentary and testimonial evidence. We affirm, finding a bankruptcy court need not hold an evidentiary hearing before adjudicating all motions under section 362 of the Bankruptcy Code, and in this case, the record shows admitted facts obviated the need for further hearings.

Jurisdiction and Scope of Review

The bankruptcy court's order annulling the automatic stay under 11 U.S.C. § 362(d) is a final order. 3 *Collier on Bankruptcy*, § 362.12, pp. 362-117 (15th ed. rev.). We have jurisdiction under 28 U.S.C. § 158(a)(1) and (b). Since Appellant challenges the bankruptcy court's ruling on grounds of factual and legal error, we review for abuse of discretion. *In re Montclair*, 177 B.R. 663 (9th Cir. BAP, 1995).

Discussion

Appellant first challenges the ruling by claiming all hearings to consider motions filed under 11 U.S.C. § 362 (d) must be

¹ Appellee held the mortgage over Appellant's residence. Appellant attempted to cure the arrears due through a Chapter 13 plan. Appellee filed a motion to annul the stay under 11 U.S.C. § 362(d)(1), claiming arrears as cause and asking that it be allowed to continue with its state foreclosure action.

evidentiary hearings.² The law provides the Court may resolve a motion to terminate, annul, condition or modify the automatic stay "after notice and hearing". 11 U.S.C. § 362(d). Section 102(1) of the Bankruptcy Code defines "after notice and a hearing" as "...after such notice as is appropriate in the particular circumstances, and such *opportunity for a hearing as is appropriate in the particular circumstances...*". (Our emphasis) These two sections allow a bankruptcy court leeway in fashioning the notice and the hearings given and held in section 362 motions to suit the needs of each case, as long as there is no abuse of discretion, or deprivation of procedural due process. Epstein, Nickles & White, *Bankruptcy* Vol. 1 § 3-31 p. 334 (1992); *In re Drislor Associates*, 110 B.R. 937, 940 (D. Colo. 1990). Hence, the law does not require hearings, whether evidentiary or otherwise, before the court adjudicates a section 362 motion.

The second challenge to the ruling claims there are two disputed material facts requiring an evidentiary hearing. First, Appellant avers arrears are not owed and second, Appellant states the plan incorporates an agreement for curing arrears which

² Here the Court scheduled a nonevidentiary hearing . The notice states: "The above hearing shall be nonevidentiary. If in the course of the nonevidentiary hearing, the court determines the existence of a disputed material issue of fact, the court will schedule a further evidentiary hearing. If this is a hearing under Section 362, it will be a consolidated preliminary and final nonevidentiary hearing unless at the conclusion thereof the court sets down an evidentiary hearing." (Excerpts of Record at 61).

precluded Appellee's motion.

Our review of the record on appeal and the transcript of the hearing convinces us the parties agreed to a series of payments and their application which obviated the need for an evidentiary hearing. These show Appellant was four months behind in post petition payments to Appellee. These also show Appellant's claim to an agreement is absurd. Appellee could not have agreed that the Chapter 13 plan cure the admitted arrears because these had not yet accrued on the dates the plan and the amended plans were filed.³

Under these circumstances, the court's ruling is correct. An evidentiary hearing was not needed because the admitted facts did not justify a continuance of the stay in this case.

The Bankruptcy Court's order is AFFIRMED.

³ The transcript of the December 8, 1997 hearing, shows Appellant admitted making these payments which Appellee credited as follows:

April 8, 1997	\$ 2,800.00	pre-petition arrears
April 8, 1997	\$ 700.00	March installment
May 15, 1997	\$ 700.00	April installment
July 11, 1997	\$ 750.00	May installment
August 1, 1997	\$ 697.00	June installment
September 27, 1997	\$ 713.00	July installment
November 17, 1997	\$ 713.00	August installment

(Excerpts of Record at 58,70-78).

The Chapter 13 Plan was dated May 14, 1997. It was modified to increase monthly payment on July 24, 1997. During the December 8, 1997 hearing, Appellee alleged the Appellant owed four post petition monthly installments. (Excerpts of Record at 25, 29 & 64-69).

