

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE: §
KELVIN RICARDO KIDD, §
D E B T O R. § CASE NO. 01-33653-SAF-13
§

MEMORANDUM OPINION AND ORDER

Tobbie and David Phillips move the court for an order directing the payment of a claim from the Texas Real Estate Recovery Fund. Kelvin Kidd, the debtor, and the Texas Real Estate Commission oppose the motion. The court conducted a hearing on the motion on September 25, 2002. Having considered the matter, the court concludes that the motion should be abated until further court order, without prejudice to the Phillips filing a motion to modify the automatic stay of 11 U.S.C. § 362(a) to allow the Phillips to pursue their relief before the Commission and/or in state court.

On May 1, 2001, Kidd filed a petition for relief under Chapter 13 of the Bankruptcy Code. In his schedules, Kidd reported that he is employed by the City of Dallas as a senior

real estate specialist. He conceded at the hearing that he holds a license under the Texas Real Estate License Act.

On August 24, 2001, Tobbie and David Phillips filed a proof of an unsecured claim of \$12,000 based on fraud. Kidd objected to the claim. On January 28, 2002, the court held an evidentiary hearing on the allowance of the claim. On January 28, 2002, the court issued findings of fact and conclusions of law from the bench, allowing an unsecured claim of \$6,212.00. On January 31, 2002, the court entered an order allowing the claim in the amount of \$6,212.00. Neither Kidd nor the Phillips filed a motion for new trial nor an appeal.

By order entered May 21, 2002, the court confirmed Kidd's Chapter 13 plan. The plan requires that Kidd pay the Standing Chapter 13 Trustee \$13,101 over 60 months, with the first payment as of June 15, 2001. Kidd's final plan payment will be due in June 2006. The plan projects only a one percent dividend to general unsecured creditors, including the Phillips. If Kidd successfully completes the plan, he will receive a discharge. The discharge will include the Phillips' claim.

In the instant motion, the Phillips contend that the Commission should be directed to pay their claim from the Fund pursuant to § 8(e) of the Texas Real Estate License Act. Tex. Rev. Civ. Stat. Ann. art. 6573a, § 8(e) (Vernon Supp. 2002). They contend that this court's order allowing their claim has become

final. As such, the Phillips argue that it constitutes a final judgment for purposes of the Act. Since Kidd's plan will not pay the claim, the Phillips request that this court direct the Commission to pay the claim from the Fund.

The Commission responds that the order allowing the claim does not constitute a judgment, but, if it does, the Phillips have not attempted execution as required by the Act. In addition, the statute contains a puzzling provision, since repealed, that the judgment cannot be subject to a stay or discharge in bankruptcy. The Commission observes that the judgment is presently subject to both a stay and a discharge. The Commission argues that the claim for payment is, therefore, not ripe for determination. If, however, the claim is ripe for payment by the Commission, the Commission observes that the Commission only pays actual out of pocket expenses. The Commission asserts that the entire allowed claim covers more than merely out of pocket expenses.

Kidd argues that the Phillips must commence an adversary proceeding against the Commission to obtain an order directing the payment of the claim. In addition, Kidd argues that the allowed claim is subject to a discharge, making the motion premature. Kidd also contends that the Commission would revoke his license if it paid the claim, thereby jeopardizing Kidd's ability to complete his Chapter 13 plan.

Both the Commission and Kidd request that the court abate consideration of the motion pending the outcome of the bankruptcy case.

Texas Real Estate Recovery Fund

The Texas Real Estate License Act creates the Texas Real Estate Commission, consisting of members appointed by the Governor of Texas upon the advice and consent of the Texas Senate. Tex. Rev. Civ. Stat. Ann. art. 6573a, § 5(a) (Vernon Supp. 2002). The Commission pays money derived from provisions of the Act to the Texas State Treasury to be held in a separate fund for administration of the Act. Tex. Rev. Civ. Stat. Ann. art. 6573a, § 5(k) (Vernon Supp. 2002). The Commission compiles a biennial report, which the Governor submits to the Texas Legislature. Tex. Rev. Civ. Stat. Ann. art. 6573a, § 5(w) (Vernon Supp. 2002).

The Commission has established, by legislative fiat, the Fund to reimburse "aggrieved persons who suffer actual damages by reason of certain acts committed by a duly licensed" person under the Act, "provided recovery is ordered by a court of competent jurisdiction." Tex. Rev. Civ. Stat. Ann. art. 6573a, § 8(a) (Vernon Supp. 2002). The Fund may only be used to compensate a person aggrieved under § 15(a)(3) or (6) of the Act. Section 15(a)(3) applies to misrepresentation or fraudulent actions by a licensee when selling, buying, trading or renting real property

in the licensee's name. Tex. Rev. Civ. Stat. Ann. art. 6573a, § 15(a) (3) (Vernon Supp. 2002). The allowed claim is within § 15(a) (3).

The Act provides:

When an aggrieved person recovers a valid judgment in a court of competent jurisdiction against a registrant, real estate broker, or real estate salesperson, on the grounds described in Subsection (a) of this section that occurred on or after May 19, 1975, the aggrieved person may, after final judgment has been entered, execution returned nulla bona, and a judgment lien perfected, file a verified claim in the court in which the judgment was entered and, on 20 days' written notice to the commission, and to the judgment debtor, may apply to the court for an order directing payment out of the real estate recovery fund of the amount unpaid on the judgment, subject to the limitations stated in Subsection (n) of this section.

Tex. Rev. Civ. Stat. Ann. art. 6573a, § 15(e) (Vernon Supp. 2002).

On an application for a court order directing the Commission to pay a claim from the Fund, the aggrieved person must, among other requirements, show that "the person has obtained a judgment under Subsection (e) of this section that is not subject to a stay or discharge in bankruptcy, stating the amount of the judgment and the amount owing on the judgment at the date of the application." Tex. Rev. Civ. Stat. Ann. art. 6573a, § 8(f) (3) (Vernon Supp. 2002) (Section 17 of Acts 2001, 77th Leg., ch. 997 repeals this provision effective for causes of action arising after September 1, 2001). "The court shall make an order directed to the commission requiring payment from the real estate recovery fund of whatever sum it finds to be payable on the

claim, pursuant to and in accordance with the limitations contained in this section," if all requirements have been met. Tex. Rev. Civ. Stat. Ann. art. 6573a, § 8(h) (Vernon Supp. 2002). The Commission would be a party to the application. "The commission may relitigate any issue material and relevant in the hearing on the application that was determined in the underlying action on which the judgment in favor of the applicant was based." Id.

The Commission may revoke a license upon payment of a claim from the Fund. Tex. Rev. Civ. Stat. Ann. art. 6573a, § 8(i) (Vernon Supp. 2002).

The Application

The Phillips' motion raises several issues concerning the application of § 8(a) of the Act. First, this court must address whether a federal bankruptcy court may order the Commission to pay the Phillips' claim from the Fund. The Act provides that when an aggrieved person recovers a judgment "in a court of competent jurisdiction," the court may direct payment of the claim from the Fund, upon application and a finding that all prerequisites have been established. This court must therefore be a "court of competent jurisdiction" under the Act in order to direct the Commission to pay a claim from the Fund.

As determined by the United States District Court for the Northern District of Texas, unless provided otherwise by a

specific Texas statute, Texas recognizes "that a court of competent jurisdiction means a court that has *in personam* as well as subject matter jurisdiction." Landscape Design & Constr., Inc. v. Transp. Leasing/Contract, Inc., NO. CIV. A. 3:00-CV-0906-D 2002 WL 257573, at *3 (N.D. Tex. Feb. 19, 2002) (analyzing res judicata issue). The Texas Legislature has specifically provided that in criminal cases, a court of competent jurisdiction means a "court that has jurisdiction over the offense." Hultin v. Texas, 171 Tex. Crim. 425, 434, 351 S.W.2d 248, 255 (1961). The Texas Legislature has also specifically provided that for judicial proceedings relating to a close corporation, a court of competent jurisdiction means "a district court in the county in which the close corporation has its principal office." Tex. Bus. Corp. Act Ann. art. 12.51 (Vernon Supp. 2002). Neither specific provision applies to this case. This court has not found any other specific situations. Accordingly, the court applies the general Texas definition of a court of competent jurisdiction.

Kidd voluntarily filed his Chapter 13 petition thereby submitting himself to *in personam* jurisdiction in this court. The Phillips voluntarily filed their proof of claim, thereby submitting themselves to *in personam* jurisdiction.

Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 58-59 fn. 14 (1989). This court has subject matter jurisdiction to enter a final order adjudicating the Phillips' claim. 28 U.S.C.

§§ 157(b) (2) (B), 1334. This court is therefore a court of competent jurisdiction to enter a final order allowing the Phillips' claim against Kidd and his bankruptcy estate.

The Texas Real Estate License Act authorizes a court of competent jurisdiction that enters a final judgment to issue an order to the Commission to pay the claim from the Fund. The Act does not distinguish between a state or federal court. In its pleading and at the hearing, the Commission did not contend otherwise.

Second, the court must determine whether the application must be brought by an adversary proceeding. The Act requires a judgment, which connotes that initially a civil complaint would have been filed against the licensee. However, once the judgment had been obtained, the Act allows the aggrieved person to proceed by an application before the court that entered the judgment. The Commission becomes a party on the application. Accordingly, if a claim allowance process in a bankruptcy case meets the Act's judgment requirement, an application making the Commission a party would be equivalent to an application making the Commission a party in the civil proceeding.

Third, the court must determine if an order allowing a claim in a bankruptcy case constitutes a judgment for purposes of the Act. Texas courts have recognized that an order allowing a claim in a bankruptcy case may be a final judgment on the merits of the

claim. Blum v. Restland of Dallas, Inc., 971 S.W.2d 546, 551 (Tex. App.--Dallas 1997, no writ). Accordingly, Texas would treat the order allowing the claim as a final judgment.

Fourth, before filing an application for payment, the aggrieved person must have attempted execution on the judgment, with the "execution returned nulla bona" and "a judgment lien perfected." Neither has occurred, nor can they occur during the bankruptcy case unless the Phillips obtain relief from the automatic stay.

Fifth, the judgment cannot be "subject to a stay or discharge in bankruptcy." Of all the requirements in the Act at issue, the court expressed at the hearing the most trouble with this requirement. The Texas Legislation appears to be telling aggrieved persons that the Fund is not available to them if the judgment is stayed in a bankruptcy case or subject to a bankruptcy discharge. That is, if the debtor can shield paying an aggrieved person by the bankruptcy process, the aggrieved person cannot receive compensation from the Fund. The court would have assumed that the Fund would pay the aggrieved person especially when the debtor does not pay because of bankruptcy protection. The Phillips argue that the provision only applies if the debt has been discharged. The Commission argues that the Legislature was concerned that the debt remain a liability of the licensee. If a person had been aggrieved, as defined by the Act,

by a licensee, then the Act established the Fund to compensate that person if the licensee has not compensated the person by satisfying the judgment. The legislative focus in establishing the Fund was on the aggrieved person, not on the bankruptcy option of the licensee. The Act arms the Commission with the power to revoke a license if it has to pay the aggrieved person. But the Commission argues that the revocation power under § 8(i) does not fall within the state's police power excepted from the automatic stay by 11 U.S.C. § 362(b)(4).

The Commission stipulates that the provision does not apply if the licensee has not filed a bankruptcy case. The court accepts that position. But, if a bankruptcy case has been filed and the bankruptcy court grants stay relief to allow a claim to be pursued against a debtor in state court, the state court would have to determine if a resulting judgment would be subject to a discharge. This court questions whether that means the state court would have to decide whether the judgment would be excluded from a discharge by the provisions of 11 U.S.C. § 523(a)(2)(A), addressing debts based on fraud. This court questions whether the Act imposes an advisory function on a state court. Furthermore, the state court would have to consider the chapter of the Bankruptcy Code invoked by the licensee and whether the bankruptcy case would continue under that chapter, since whether the fraud debt would be subject to discharge in bankruptcy may

turn on whether the licensee files a case under Chapter 7 or Chapter 13 of the Code.

In any event, in the instant case, if Kidd successfully completes his Chapter 13 plan, the claim will be discharged. Kidd has 45 months remaining to complete his plan. The court cannot speculate whether Kidd will successfully complete the plan. If he does, then the claim would be discharged. Presumably, that would preclude an order directing that the Commission pay the claim from the Fund, a paradoxical result considering the Legislature intended to protect aggrieved persons. If Kidd does not successfully complete the plan, the case will either be dismissed or converted to a case under Chapter 7 of the Code. If dismissed, the claim would not be subject to discharge and, accepting the Commission's reading of the Act on this issue, the Phillips could pursue the matter in state court. But, they could not pursue the matter in the court of competent jurisdiction that allowed the claim, since the bankruptcy case would be dismissed. If converted, the discharge issue would be resolved by an adversary proceeding under 11 U.S.C. § 523(a)(2)(A). The court, however, could not compel that the case be converted to Chapter 7, as Kidd would have a right to dismiss the Chapter 13 case. 11 U.S.C. § 1307(b). Consequently, the question of dismissal or conversion will turn on Kidd's need for relief under the Bankruptcy Code.

With the discharge issue unresolved but subject to potential resolution as the bankruptcy case continues, the court should defer consideration of the motion. The Commission requests that the court abate consideration of the motion. Kidd supports that approach. The Act provides that "[n]o action for a judgment which subsequently results in an order for collection from the real estate recovery fund shall be started later than two years from the accrual of the cause of action." Tex. Rev. Civ. Stat. Ann. art. 6573a, § 8(d) (Vernon Supp. 2002). This court considers the filing of the proof of claim as the commenced date for purposes of this section. With that protection, the court concludes that the motion should be abated until the discharge issue is resolved or until further court order.

The court remains concerned that the process may impede the Phillips' ability to obtain payment from the Fund. The court will, therefore, abate the motion without prejudice to a motion by the Phillips for relief from the automatic stay to test their position in state court. Stay relief, if granted, will not however permit actual execution on the allowed claim, as that would interfere with the Chapter 13 process. The Phillips may request other relief that may allow them to present the order allowing the claim in a civil proceeding in state court to attempt to pursue recovery from the Fund.

Based on the foregoing,

IT IS ORDERED that the motion of Tobbie and David Phillips for an order directing payment of their claim from the Texas Real Estate Recovery Fund is **ABATED** until further court order, without prejudice to a motion for relief from the automatic stay under 11 U.S.C. § 362.

Signed this _____ day of October, 2002.

Steven A. Felsenthal
United States Bankruptcy Judge