

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

In re: Case No. 02-54689
(Eastern District of Michigan)
Hon. Steven W. Rhodes

John Richards Homes
Building Co., L.L.C.,

Alleged Debtor.
_____ /

Kevin Adell,

Plaintiff, Adv. Pro. No. 9-03-MP-00003

v.

John Richards Homes Building
Company, L.L.C.,

Defendant.
_____ /

Community Bank of Naples, N.A.,

Plaintiff, Adv. Pro. No. 9-03-MP-00013

v.

John Richards Homes Building
Company, L.L.C., and
Kevin Adell,

Defendants.
_____ /

DECISION AND ORDER DENYING MOTION FOR STAY PENDING APPEAL

This proceeding came on for consideration on the
Plaintiff's Motion for a Stay Pending Appeal (Doc. No. 23 in

Adv. Pro. No. 9-03-MP-03) and the Motion for a Stay Pending Appeal (Doc. No. 18 in Adv. Pro. No. 9-03-MP-13)(collectively, "Motions")¹. Kevin Adell (the "Plaintiff" or "Adell") seeks a stay of this Court's Order On All Pending Motions (Doc. No. 17 in Adv. Pro. No. 9-03-MP-03) and Order Denying Kevin Adell's Combined Motion and Memorandum for Abstention and for Attorneys' Fees and Costs (Doc. No. 9 in Adv. Pro. No. 9-03-MP-13) (collectively, "Orders") pending his appeals to the District Court. Here, the Court has considered the record, pleadings and all papers filed, including the arguments of counsel at the hearing held on July 29, 2003 ("Hearing"), before the undersigned. For the following reasons, this Court finds that the Motions are without merit and should be denied.

FACTS

The following facts are of record. On June 24, 2002, Adell filed an involuntary petition against John Richards Homes Building Co., L.L.C. ("JRH") in the Bankruptcy Court in the Eastern District of Michigan. The Honorable Steven W. Rhodes presided over the involuntary and eventually dismissed the petition, ruling that it was filed in bad faith. Thereafter, JRH sought damages under 11 U.S.C. § 303(i) that provides for

¹ The Court also considered JRH's Memorandum of Law in Opposition to Kevin Adell's Motion for Stay Pending Appeal of Order Transferring Interpleader Action to Michigan Bankruptcy Court (Doc. No. 25 in Adv. Pro. 9-03-mp-13) and JRH's Memorandum of Law in Opposition to Kevin Adell's Motion for Stay Pending Appeal of Order Transferring Declaratory Judgment Action to Michigan Bankruptcy Court (Doc. No. 26 in Adv. Pro. 9-03-mp-03).

damages proximately caused by such a bad faith involuntary filing. In a reported decision dated April 25, 2003, *In re John Richards Homes Building Co., L.L.C.*, 291 B.R. 727 (Bankr. E.D. Michigan 2003), Judge Rhodes ruled that JRH was entitled to damages of \$4.1 million and a punitive award of \$2 million under 11 U.S.C. § 303(i), and entered judgment against Adell in favor of JRH in the amount of \$6.3 million ("Michigan Judgment"). At the Hearing, the parties informed this Court that the Michigan Judgment is on appeal but that there was no stay of that Michigan Judgment pending appeal.

On May 8, 2003, within days of the entry of the judgment, Adell purchased a \$2.8 million home in Naples, Collier County, Florida. An order enjoining Adell from dissipating his assets was entered by Judge Rhodes on May 12, 2003 ("Michigan Injunction"). On May 19, 2003, Adell filed this now removed action in the Florida state court seeking a determination that the home he recently purchased was exempt under the Florida Constitution from the Michigan Judgment.

As of the date of the Michigan Injunction, Adell had an account with Community Bank ("Bank") with a balance of approximately \$37,000. The Bank was served with a copy of the Michigan Injunction. Having received conflicting directions from Adell's counsel, in response, the Bank filed this now removed interpleader action in state court on May 23, 2003. The

Plaintiff thereafter also removed the Bank's interpleader action to this Court on May 28, 2003.

On May 20, 2003, JRH filed a motion for miscellaneous or supplementary post-judgment relief before Judge Rhodes. Adell also sought relief from the Michigan Injunction, in part asserting that his home in Michigan was for sale because he had just purchased another in Florida. Additionally, Adell sought to clarify the scope of the Michigan Injunction as it related to the account at the Bank. Adell also filed an emergency motion before Judge Rhodes for permissive and mandatory abstention. Judge Rhodes held an evidentiary hearing on June 4, 2003, and heard arguments on all these issues, including specifically whether the house in Florida constituted his homestead and whether abstention was appropriate.

On June 9, 2003, JRH removed the Florida action to this Court.

Judge Rhodes issued his decision on July 17, 2003, holding that neither mandatory nor permissive abstention was proper. The issue of whether the home purchased in Florida constituted Adell's homestead and is exempt from execution of JRH's judgment was recently decided by Judge Rhodes on September 17, 2003 - who ruled against Adell².

² See, *In re Adell*, ___ B.R. ___, 2003 WL 22138468 (Bankr. E.D. Mich. September 17, 2003).

On July 29, 2003, prior to Judge Rhodes' decision regarding Adell's homestead, Adell argued before this Court to have this Court remand the action back to state court for the state court to decide on the very issue that was already before Judge Rhodes. Adell also argued before this Court that the Bank's interpleader action should be similarly remanded to state court. Upon the adverse rulings by this Court, Adell currently seeks to stay this Court's decisions pending appeal.

Adell sought leave to appeal this Court's interlocutory decisions from the District Court on or about August 21, 2003 (collectively, "Motions for Leave to Appeal"). As of the date of this memorandum, these Motions for Leave to Appeal are still pending before the District Court.

DISCUSSION

JRH argued that the Motions are moot because the District Court does not have jurisdiction to hear Adell's appeals of this Court's interlocutory orders. The jurisdiction of the District Court is not a matter for this Court to decide. However, a related argument that JRH may, but did not raise, is whether Adell's Motions are ripe for adjudication. Both legal doctrines of mootness and ripeness apply to preclude the courts from adjudicating disputes that are "abstract disagreements." *Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1315 (11th Cir. 2000). Mootness

precludes review by a court when there is no longer a "present, live controversy" and the court can no longer provide "meaningful relief." *Nyaga v. Ashcroft*, 323 F.3d 906, 913 (11th Cir. 2003). Here, the District Court has yet to rule on Adell's motions for permission to appeal the interlocutory orders. If it had decided to decline permission, then the Motions before this Court would be moot. However, ripeness may be a more appropriate doctrine to apply than mootness. Under the ripeness doctrine, a court must determine whether the claim is sufficiently mature and the issues sufficiently defined and concrete, to permit effective decision-making by the court. *Digital Properties, Inc. v. City of Plantation*, 121 F.3d 586, 589 (11th Cir. 1997). Here, the controversy is arguably not ripe because the District Court has yet to grant permission to appeal the interlocutory orders. If the District Court had decided to permit the interlocutory appeals, only then would the Motions be arguably ripe for adjudication. This Court finds that the ripeness is a bar to preclude review of the Motions.

However, this Court rules in the alternative. Even if the doctrine of ripeness were not a bar to the adjudication of the Motions, this Court would nonetheless substantively deny the Motions. In order to obtain a stay pending appeal, this Court must consider four factors, including: (1) whether the movant has made a showing of likelihood of success on the merits; (2)

whether Movant has made a showing of irreparable injury if the stay is not granted; (3) whether granting of the stay would substantially harm the other party, and (4) whether the granting of the stay would serve the public interest. *In re Brown*, 290 B.R. 415, 424 (Bankr. M.D. Fla. 2003). The Court finds that the movant has not met its burden for a stay.

The crux of Adell's position is that this Court lacks jurisdiction over this removed proceeding. Thus, Adell sought to have this Court abstain from hearing the controversy and remand the proceeding back to the state court. On the other hand, JRH argued that the proceeding should be transferred to Judge Rhodes since he is most familiar with the proceeding and already had these issues pending before him.

Importantly, at the Hearing, Adell admitted that Judge Rhodes had already decided the issue of abstention but argued that the issue of remand was not before Judge Rhodes because the state action had not yet been removed. Among other cases, at the Hearing, Adell relied on four main cases in support of his position for a remand back to the state court because this Court lacked jurisdiction. *Rivet v. Regions Bank of Louisiana*, 522 U.S. 470 (1998); *Beneficial National Bank v. Anderson*, 123 S.Ct 2058 (2003); *Husvar v. Rapoport*, 337 F.3d 603, 2003 WL 21697897 (6th Cir. July 23, 2003); *Balcorta v. Twentieth Century-Fox Film Corp.*, 208 F.3d 1102 (9th Cir. 2000). However, these cases are

distinguishable on one very crucial point. In each of the cited cases, no pending federal court action existed at the time these cases were removed from state court. In contrast, in this case, there is a federal judge already presiding over the contested matter. That federal judge had heard evidence and ruled on the identical issue that is the heart of the dispute that Adell seeks to have the state court re-examine – i.e., whether Adell is entitled to a homestead exemption.³

Moreover, Judge Rhodes already decided that he has jurisdiction over the dispute and denied Adell's motion to abstain. Given the sequence of events that followed the judgment, this Court infers that Adell's action smacks of improper forum shopping. In essence, Adell would have this Court improperly sit as an appellate court over Judge Rhodes and overturn his decision regarding the jurisdiction of a bankruptcy court over this controversy. Adell would have this Court not only improperly sit as an appellate court but also condone his attempt to forum-shop in state court.

There is sound analogous support for this Court's decision found in the application of the "first-to-file rule" used by federal courts. *Cadle Co. v. Whataburger of Alice, Inc.*, 174 F.3d 599 (5th Cir. 1999). This rule is used by courts to

³ Given that Judge Rhodes ruled on this substantive issue that Adell sought to have the state court decide, this may arguably render this Court's decision moot and may even arguably render his appeals moot. Nonetheless, in the interests of judicial economy, this Court will still press on.

"maximize judicial economy and minimize embarrassing inconsistencies by prophylactically refusing to hear a case raising issues that might substantially duplicate those raised by a case pending in another court." *Id.* at 604. Cadle, a creditor, sought in bankruptcy court, to recover or avoid certain allegedly improper transfers by the debtor. The bankruptcy court ruled that it lacked standing for such a suit. *Id.* at 601-602. The creditor was "[a]pparently unwilling to leave matters in the hands of the bankruptcy court" and filed a complaint based on the same factual predicate in the District Court for the Western District of Texas. *Id.* at 602. The District Court declined to take jurisdiction because the "issues pending before the bankruptcy court substantially overlapped those raised by the suit." *Id.* In so ruling, the district court noted that there "are proper appellate procedures a dissatisfied litigant can employ." *Id.* at 603. Cadle appealed this ruling and argued that the bankruptcy court lacked jurisdiction over the claims. *Id.* at 602-603. However, the Fifth Circuit declined to adopt such a requirement that the court must first look at the jurisdiction of the first court as a precondition to apply the first-to-file rule. *Id.* at 603. The rationale is that the rule is a forward looking one and from this perspective, the second court is not binding the litigants before it to a ruling of the first court and thus, there is

no reason to examine the jurisdiction of the first filed court. Such a requirement would actually undercut the values of economy, consistency, and comity that the rule is designed to maximize: the jurisdictional ruling of the second-filed court would either conflict with a ruling already made, rehash an issue already decided, or trench on a sister court's treatment of an issue before it has been reached there.

Id. at 604. Instead, the Fifth Circuit ruled that jurisdiction is but one factor that may be considered in the application of the rule.

Similarly, Adell would have this Court embroil itself in the jurisdictional question already decided by a sister court. If this Court were to rule in his favor, he would have the parties rehash and relive the issues already currently before Judge Rhodes. This removed action is the second-filed action and should be similarly transferred to Judge Rhodes for all the reasons of comity and values of consistency in rulings, as would be justified under the first-to-file rule. If Adell were to prevail, this Court would impermissibly be sitting as a "super appellate court" and trenching on the authority of its sister courts - abuses that the first-to-file rule is designed to prevent. *Id.* at 606.

Moreover, Judge Rhodes has issued an injunction against Adell's dissipation of assets - regarding the Bank Account and this transfer of assets to his alleged homestead. Courts have

recognized the "significance of a trial court's continuing power to supervise its own injunctions." *Common Cause v. Judicial Ethics Committee*, 473 F. Supp. 1251, 1253-1254 (D. Ct. 1979) (*inter alia*, citing to *Mann Manufacturing, Inc. v. Hortex, Inc.*, 439 F.2d 403 (5th Cir. 1971); *Bergh v. State of Washington*, 535 F.2d 505, 507 (9th Cir.), cert. denied, 429 U.S. 921 (1976)).

Obviously, to allow a stay would substantially harm JHR. JHR has gone through a lengthy process, from Adell's filing of an improper involuntary petition to the section 303(i) judgment and its effort to enforce the judgment.

Additionally, this Court finds that granting a stay under these circumstances will not serve the public interest. Apart from the above-mentioned problems associated with such circumstances -- comity, conflicting orders, orderly administration of justice, improper use of other sister courts as "super-appellate" forums -- there is also an appearance of impermissible forum shopping under these circumstances. Judge Rhodes has already decided the jurisdiction issue adverse to Adell and he has been presiding over this matter from the inception of the involuntary petition to JHR's attempts to enforce its judgment. This Court can only come to one conclusion that Judge Rhodes is the court most familiar with this case. He has already had an evidentiary hearing on the very issue that Adell seeks to have the state court adjudicate.

To allow a stay under these circumstances would only lead to the appearance that such forum shopping is condoned. Accordingly, it is:

ORDERED that the Motions are denied.

DONE AND ORDERED in Tampa, Florida, on October 1, 2003.

/s/ Michael G. Williamson
Michael G. Williamson
United States Bankruptcy Judge

Copies to:

Counsel for Kevin Adell: Asher Rabinowitz, Esq., Ruden, McClosky et al., 401 E. Jackson Street, 27th Floor, Tampa, FL 33602

Counsel for John Richards Homes Building Company, L.L.C.: Lynn J. Griffith, Esq., 6338 Presidential Court, Suite 101, Fort Myers, FL 33919

Counsel for Community Bank of Naples, N.A.: Gregory N. Woods, Esq., Porter, Wright, Morris & Arthur, 5801 Pelican Bay Boulevard, #300, Naples, FL 34108

Hon. Steven W. Rhodes, Chief Judge, United States Bankruptcy Court, Eastern District of Michigan, Comerica Building, 211 West Fort Street, Detroit, MI 48226