

Supreme Court, U.S.
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No. 21-1000

IN THE
SUPREME COURT OF THE UNITED STATES

CLIFFORD ALLEN BRACE, Jr., Petitioner,
v.
Steven M. Speier, et. al.

On Petition for Writ of Certiorari to the California
Ninth District Court of Appeal

PETITION FOR WRIT OF CERTIORARI

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EN PRO SE

A. QUESTIONS PRESENTED FOR REVIEW

1. DUE PROCESS - Whether the Bankruptcy court's order violates the 5th, 8th and 14th amendments of the United States Constitution.
2. BODILY DETENTION - Whether the court abused its discretion and violated the Petitioner's Due Process Rights when it issued a bodily detention order, that ordered the Petitioner to pay \$229,000 to the trustee in 7 days of an order sent by covid-19 mail, without any facts or proof that Petitioner has \$229,000 in his possession, and further pay \$26,080.99 to the trustee as damages for attorney's fee and costs without proof that the Petitioner has the ability to pay.

3. ACTS UNDER 11 U.S.C. - Whether any purported acts of the Petitioner were protected under 11 U.S.C. § 541(b), that would give rise to a reasonable belief that those acts did not violate a purported automatic stay.

4. JURISDICTION - Whether the Bankruptcy court has jurisdiction to issue and order wherein the personal and subject matter jurisdiction over the issues was reserved to the State court under a dismissal and settlement agreement.

5. PROBATE EXCEPTION - Whether the Bankruptcy court has jurisdiction over the assets and administration of a probate estate.

6. CONTEMPT - Whether the court abused its discretion in finding Petitioner in civil contempt for purportedly violating an automatic stay where the only evidence presented by the trustee was a substitution of trustee, signed by the petitioner, and no other relevant facts just unsupported allegations

B. PARTIES INVOLVED

The parties involved are identified in the style of the case.

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F. PETITION FOR WRIT OF CERTIORARI

The Petitioner, CLIFFORD ALLEN BRACE JR, a 75 year old disabled veteran, requests that the Court issue its writ of certiorari and review the judgment of The California Ninth District Court of Appeal entered in this case August 25, 2021 (App.1)¹ and opinion denying rehearing entered in this case on App. 1.

G. BASIS FOR JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1254 to review the final judgment of the California Ninth District Court of Appeal.

¹References to the appendix to this petition will be made by the designation "App" followed by the corresponding number.

H. LEGAL PRINCIPLES INVOLVED

The Eighth Amendment to the United State Constitution U.S. Constitution Amendment VIII precludes the cruel and unusual punishment by the State/ Government, the perpetual bodily retention of the defendant for alleged contempt without ability to purge the contempt constitutes Cruel and Unusual Punishment in violation of the VIII Amendment.

The Fourteenth Amendment to the United State Constitution U.S. Constitution Amendment XIV precludes the State/Government from taking of property without due process of law.

The Fifth Amendment to the United State Constitution U.S. Constitution Amendment V protects the individual of self incrimination

I. STATEMENT OF THE CASE

1. Factual Background

On April 30, 2020 a hearing was held in the Bankruptcy court on the Trustee's, Speier's, motion (OSC), for civil contempt, wherein the Trustee alleged that the Petitioner had willfully violated an alleged automatic stay on real property commonly known as 16270 Chippewa Road, Apple Valley, California.

The Trustee further alleged as grounds that for that purported contempt violation, was that the Petitioner (1) Violated an automatic stay in the Petitioner's case arising under *11 U.S.C. § 362(a)*, (2) Violated a *permissive order*, Omnibus Motion, which stated that if all parties agreed then the Trustee could act under that order. (3) Violated a *Compromise order, between two trustees*, that the Petitioner had never agreed to. (4) That the Petitioner *conducted a foreclosure sale* on the subject property. (5) That the Petitioner *came into possession of \$229,000* in proceeds of the foreclosure

sale. (6) That the Petitioner did not *"return" the \$229,000 to the Trustee.*

The court issued an order that "within 7 days after the entry of this order, Debtor shall purge his contempt by turning over the sum of \$229,000 to the Trustee."

The court admitted that the Petitioner filed an opposition to the OSC application and an opposition to the OSC, but failed to consider and address the issues therein, when the Petitioner was unable to appear at the hearing. The court then allowed the Trustee to take unconscionable advantage of the Petitioner by the courts order waiving the seven day waiting period provided for in Local Bankruptcy Rule 9021-1(b)(3).

There was no evidence presented at the hearing that proved that the Petitioner did anything but sign a substitution of trustee as the personal representative of a probate estate the Estate of Geraldine Elizabeth Johnson. The Petitioner *has a*

reasonable belief and is informed that this is not a violation of 11 U.S.C. § 362(a).

(1) When a Bankruptcy case is filed a stay is created under 11 U.S.C. § 362(a). That stay runs with the case until the dismissal and closing of the case, under 11U.S.C. 362(3)(2)(b)," the stay of any other act under sub section (a) of this continues until the earliest of the time the case is dismissed." Only the filing of a Bankruptcy case creates a stay, which was created upon the filing of the All Construction Services Bankruptcy (Case 6:14-bk-17348).

This case was dismissed by the Trustee with no reservation of rights over the subject property at issue. Any reasonable person would read and interpret 11 U.S.C. 362(3)(2)(b) to mean just what it says regarding a stay. That the stay ceased to exist by operation of law.

The Trustee alleges that Petitioner violated a permissive order of the court that had previously been granted relating to the property, an Omnibus Motion, which stated that if all parties agreed then the Trustee could act under that order. Since the

order was a permissive order not a directed order it had no effect on the Petitioner as Petitioner did not agree to or approve of the order and it's contents.

The Trustee went on to allege that the Petitioner was somehow bound by an agreement between two trustees, a Compromise order which the court had approved, wherein property of the All Construction Services Bankruptcy would become property of the Petitioners estate. The compromise agreement and order contains no language which continues a stay, nor was there a motion filed by the Trustees to continue the stay under 11 U.S.C. § 362(c)(3)(B), or a request for the imposition of the automatic stay pursuant to 11 U.S.C. § 362(c)(4)(B). An agreement between two trustees which contains no language as to the continuation of a stay and in the absence of a court ordered stay or reservation of a stay, does not continue a stay or create a stay as in the filing of a bankruptcy. Based upon the above any reasonable person would conclude that there was no stay.

Furthermore, a notice of the hearing to approve compromise on December 19, 2017 was not served as required under Rule 2002(a) or by publication on the primary secured creditor, a party not joined to the bankruptcy, the Estate of Geraldine Elizabeth Johnson, and an address for service was provided thru public record, by that instrument recorded on October 8, 2017 as inst. no. 2017-0414610. Therefore the alleged compromise was not effective against the Estate who's secured claim was evident in and of itself as a matter of public record. The Estate of Geraldine Elizabeth Johnson is the Beneficiary of the purported sum of \$229,000.

The Trustee further alleges, without any proof whatsoever, that the Petitioner conducted a foreclosure sale on the subject property, which was under the control of the Arizona Superior Court, probate estate and a trustee appointed under California CCP 2924. California State Law does not permit the Petitioner to conduct a foreclosure sale.

There was no proof submitted at the hearing by the trustee that the Petitioner had ever come into

possession of the \$229,000 purportedly paid to the Trustee at the sale. Nor any proof that the petitioner had any legal right, title, interest or control over said funds. The order states "and coming into possession of and failing to return to the Trustee the \$229,000 in proceeds of the Foreclosure Sale." Trustee has presented no evidence that the Trustee paid these funds, nor anyone else, and that they legally belong the trustee. The order of the court regarding the property specifically stated, "Title to the Property is vested in Steven Speier, chapter 7 trustee of the bankruptcy estate," of the Petitioner.

If the Trustee now has vested title to the asset what legal right does the Trustee have to the purported \$229,000. The bankruptcy trustee now has vested title to the property and has been made whole.

The court ordered that the Petitioner was to pay damages of \$26,080.99 within 30 days of the entry of the order.

The court failed to clearly tell the Petitioner how the Petitioner living on social security was expected

to pay \$229,000 and \$26,080.99 to the trustee and never gave the petitioner a breakdowns of the amounts owed and legal reason for the charges.

The court further ordered the bodily detention of the Petitioner because Petitioner did not pay the sum of \$229,000 within 7 days of the order to the trustee or file a written response by June 4, 2020. Petitioner filed the ordered response on April 17, 2020 but it is clear that the court disregarded the content of said response.

Furthermore the Petitioner did not receive notice of the courts order by mail within 7 days, since the post office took 8 days to deliver the order under its covid -19 operations, it was therefore impossible for the Petitioner to not be in contempt

2. Jurisdiction Claim

The Bankruptcy court lacks jurisdiction over the subject matter property and enforcement of said dismissal by way of contempt, as jurisdiction to enforce was reserved under a State court dismissal

based upon a settlement agreement signed by the Petitioners BK Trustee. This issue was raised in the Bankruptcy court, the District court and the Ninth circuit. The issue of Jurisdiction may be raised at any time, Hilltop Developers v. Holiday Pine Service Corp. 78 So. 2d 368 (Fla 2nd DCA 1985). The Ninth rejected the issue of jurisdiction as "without merit," The dismissal of the state court action was done as a part of the settlement agreement. The compromise order in the All Construction Services, Inc. bankruptcy was based upon the state court settlement agreement. The Omnibus motion and its approval was based upon the state court settlement agreement and the compromise motion. Going back to the beginning the court's reservation of jurisdiction flows with the subject matter and as such The Federal Bankruptcy court has no jurisdiction over the subject matter. Furthermore, the bankruptcy trustee in the Petitioner's Bankruptcy was a signer and a party to said settlement agreement and agreed to the state courts settlement rules thus binding the Federal Bankruptcy court to the reservation

3. Abuse of Discretion Claim:

"The bankruptcy court abuses its discretion when it applies an incorrect legal rule or when its factual findings are clearly erroneous," *Rediger Inv. Corp. v. H Granados Commc'ns*, 503 B.R. 726, 731 (9th Cir. BAP 2013). In this case the actual findings made by the Bankruptcy court are clearly erroneous as they are not based upon facts and are impossible under California Law, CCP 2924 and the allegations purported to be facts in the motion are not admissible as evidence under FCCP and the actual documented facts contradict the allegations. The motion alleges Petitioner *conducted a trustee's sale*, California Law only allows the trustee or trustee's agent acting under the deed of trust to conduct the sale and the notice of trustee's sale is proof of who conducted the sale as its states "Trustee or party conducting sale: Mond H. Habeeburrehman." The motion alleges that the petitioner came into possession of the sale proceeds, \$229,000, but does not state how this happened and is contradictory to the notice of sale, entered into evidence, which states that all funds are to be paid to the foreclosure trustee

"Only funds made payable to Mohd H. Habeeburrehman will be accepted at sale,"and under California Law those funds legally become the property of the Beneficiary of record in the deed of trust, the Estate of Geraldine Elizabeth Johnson, as assets of the probate. The motion further alleges that the Petitioner's acts violated a purported automatic stay, which is not logical as the Petitioner was not the foreclosure trustee, not the sales agent and not the beneficiary. The only evidence connecting the petitioner to the motion was a substitution of trustee signed by the Petitioner as the personal representative of the estate, an act required by the Arizona probate code and protected under 11 USC 541(b). The motion further alleges that based upon all the purported acts above the Petitioner violated other court orders, which is ludicrous, if there are no facts of record and other proof that the Petitioner did noting that was alleged then how could these other orders be the basis for contempt? Therefore all the allegations contained in the original motion are illogical, implausible, and not supported by the record and do not support the court's order.

4. Abuse of Process Claim

The Trustee's motion and subsequent order directed against the Petitioner is part of a scheme concocted by the Trustee and supported by the court to coerce the Petitioner, in that a failure to perform an act will result in perpetual physical restraint, bodily detention, and is a direct abuse of the legal process where there are no facts to support said motion and court order.

The bodily detention order is an order designed by the trustee in his scheme to coerce the Petitioner to violate Petitioners fiduciary duties to the Johnson Estate and the legal duties imposed upon Petitioner under the Arizona Probate Code and the orders of the Arizona Superior court. This was done to obtain an unlawful collateral advantage over the assets of the Johnson Estate, a party not involved in the Petitioners Bankruptcy. The assets of the Johnson Estate are not within the subject matter jurisdiction of the court. Probate assets and administration of those assets of a probate estate are exempt from federal bankruptcy law and outside the jurisdiction

of the bankruptcy court Marshall v. Marshall 547 US 293 (2006).

The improper motion caused the court to issue a civil warrant for the Petitioners bodily detention, which would if served deprive petitioner life, liberty and the pursuit of happiness and result in Petitioners perpetual incarceration as Petitioner does not "carry the keys to his prison in his own pocket", Gompers 221 U.S. at 442, 31 S. Ct. at 498 (quoting In re Nevitt, 117 F. 448, 451 (C.C.A. 8th Cir., 1902).

The bodily detention order states "if taken into custody at a place 100 miles or more from the Courthouse, he shall be brought without unnecessary delay before the nearest available United States magistrate judge, bankruptcy judge, or district judge. If, after hearing, the magistrate judge, bankruptcy judge, or district judge finds the person in custody is the Debtor, Clifford Allen Brace Jr., or if Mr. Brace waives a hearing, the magistrate judge, bankruptcy judge, or district judge shall *order removal*, and Mr. Brace shall be released only on conditions ensuring prompt appearance before this court; and the

provisions of this order are *civil not criminal*." The Federal Code of Civil procedure 4.1.(b), states "Any other order in a civil-contempt proceeding may be served only in the state where the issuing court is located or elsewhere in the United States within 100 miles from where the order was issued." Only in the case of *criminal contempt* is a contemnor when arrested subject to *removal* to the district in which punishment may be imposed and only that court that was allegedly defied by a contumacious act can hear the case.

Service of this process, warrant of bodily detention, under the Federal Code of Civil procedure is the taking into custody of the Petitioner. If the Petitioner is outside the State of issuance and beyond 100 miles then service of process is not legally permissible if it is civil contempt.

5. The 8th Amendment Claim

The courts order to pay damages of \$26,080.99 within 30 days after the entry of the order constitutes an excessive fine under the 8th

amendment. There was never any evidence presented to the court to support such a monetary judgement.

6. The Due Process Claim

The courts order in and of itself violates Petitioner's right to due process under the 5th and 14th amendments.

The Petitioner was denied due process by the order of the 9th which included adjudication of the Petitioner's separate Emergency Motion for stay of the bodily detention order. The issue of bodily detention was raised in the original appeal and again in a separate emergency motion filed with the 9th. The court failed to address this issue in its ruling and further denied Petitioner's right to a hearing on the emergency motion and thus did not allow the Petitioner due process as required by law, but disregarded this issue in both the original appeal and the emergency motion.

The Petitioner has pled the issues, stated the facts, and denied the allegations in the bankruptcy court and in the District court and in The Ninth Circuit, but no court as yet has addressed the issues, looked at the facts, the court took the Trustee's bogus allegations as evidence, "the trustee showed by clear and convincing evidence that Petitioner knew of the automatic stay," as stated in the memorandum of August 25, 2021. A reasonable person looking at all the facts and the law would come to a totally different conclusion since there was no clear and convincing evidence what so ever as required *Knupfer v. Lindblade* (in re Dyer), 322 F.3d 1178, 1191 (9th Cir. 2003) (a party seeking an order of contempt has the burden to show by clear and convincing evidence that the contemnor violated the automatic stay (citation and internal quotation marks omitted)).

The Ninth in its decision failed to allow Petitioner due process under the law as required under a *de novo standard*, there were several genuine issues of material fact that Petitioner stated in the appeal and that the Petitioner has reiterated above. The trustee

was not entitled to a judgement as a matter of law. This is a misuse of a judicial proceeding that would be improper in the regular prosecution of a claim or charge. Furthermore, it is the use of the legal process against the Petitioner to accomplish an improper and illegal purpose thru the issuance of a warrant for bodily detention to force the Petitioner to violate Probate court orders.

J. REASONS FOR GRANTING THE WRIT

Whether the Court should resolve the issues of contempt and bodily detention, which if not resolved will result in the Petitioners perpetual incarceration as the Petitioner doesn't hold the "Keys to his release."