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Gasprom v Fateh: Abandonment vs Lifting the Stay

Roger Bernhardt
Golden Gate University School of Law, rbernhardt@ggu.edu

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Abandonment vs Lifting the Stay

Trustee's abandonment of gas station did not terminate aspect of automatic stay protecting gas station as property of debtor. *Gasprom, Inc. v Fateh (In re Gasprom, Inc.)* (BAP 9th Cir 2013) 500 BR 598

In a Chapter 7 case, the bankruptcy court authorized Trustee to abandon a nonoperational gas station (Debtor's principal asset) and entered a written abandonment order that was silent as to the automatic stay. Later that same day, the holder of a first deed of trust against the gas station proceeded with a foreclosure sale. The bankruptcy court held that the postpetition foreclosure sale did not violate the automatic stay because the stay had terminated by operation of law as a result of Trustee's abandonment of the gas station, and alternatively held that it would sua sponte annul the stay in order to retroactively validate the foreclosure sale.

The bankruptcy appellate panel reversed, holding that the bankruptcy court erred as a matter of law in concluding that, immediately on abandonment, the automatic stay no longer enjoined foreclosure. Trustee's abandonment of the gas station earlier on the day of the foreclosure sale did not fully terminate the automatic stay as to the gas station. By operation of law, the abandonment order terminated only the aspect of the stay protecting *estate* property. On abandonment, title to the gas station reverted to Debtor. However, the abandonment did not by operation of law terminate the aspect of the stay protecting property of *Debtor*, which arises under 11 USC §362(a)(5). Without an order from the court granting relief from that aspect of the stay to permit foreclosure, §362(a)(5) continued to protect the gas station. In light of clear statutory language, the appellate panel declined to follow *In re D'Annies Restaurant, Inc.* (Bankr D Minn 1981) 15 BR 828, on which the bankruptcy court had relied, which excluded corporate and partnership debtors from the protection of §362(a)(5).

The bankruptcy court abused its discretion when it held that it would sua sponte annul the stay because it did not attempt to balance the equities or give the parties an opportunity to develop the record concerning the equities.

THE EDITOR'S TAKE: The debtor, the creditor, and the bankruptcy judge all believed that the trustee's abandonment of an asset in a Chapter 7 proceeding amounted to a lifting of the automatic stay against the creditor's completing its foreclosure proceeding against that asset. However, now the bankruptcy appellate panel has informed us all that that is wrong. Abandoning property may ipso facto eliminate the stay as against the *estate*, but the item then reverts back to the *debtor*, who has independent protection under that same stay.

In creating the stay, in 11 USC §362(a)(3), (4), Congress protected property of the *estate*, while in §362(a)(5), (6), it protected only property belonging to the *debtor*, and in §362(a)(2), it referred to both the debtor *or* the estate. That means that a stay against one is different from a stay against the other, so that removing an asset from the estate while restoring it to the debtor does not automatically mean that no stay is any longer in force.

A creditor should therefore not believe that having the trustee abandon the property means that it can safely complete its foreclosure. Nor, as I discussed in a column 10 years ago with James Stillman, should a purchaser at that foreclosure sale automatically trust that its status as a BFP will protect it if it turns out that the stay had not been properly lifted. See *Balancing the Automatic Stay,* 26 CEB RPLR 144 (July 2003).—*Roger Bernhardt*