

FILED

Samuel L. Kay, Clerk
United States Bankruptcy Court
Brunswick, Georgia
By arowe at 1:03 pm, Apr 12, 2010

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Brunswick Division

IN RE:)	Chapter 7 Case
)	Number <u>09-21056</u>
DAVID ROBERT DESALVO)	
ELIZABETH JO DESALVO)	
)	
Debtors)	
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ELIZABETH JO DESALVO)	Adversary Proceeding
)	Number <u>09-02046</u>
Plaintiff)	
)	
v.)	
)	
HSBC AUTO FINANCE and)	
ASCENSION CAPITAL GROUP)	
)	
Defendants)	

ORDER DENYING DEFENDANTS' MOTION TO DISMISS

This matter comes before me on the Motion to Dismiss Complaint and Dismiss Motion for Contempt and Sanctions for Failure to State a Claim Upon Which Relief Can be Granted ("Motion") filed by Defendants HSBC Auto Finance and Ascension Capital Group. Plaintiff Elizabeth Jo DeSalvo's complaint alleges that the Defendants violated the automatic stay of 11 U.S.C. § 362(a) by repossessing a 2002 Ford Expedition ("Vehicle") and requests both turnover of the Vehicle to the Debtors and sanctions against the Defendants for violation of the

automatic stay. Because the factual allegations in the complaint plausibly support Mrs. DeSalvo's claim that the automatic stay has not terminated by operation of law, the Motion is denied.

FACTS

On August 13, 2009, pro se Debtors David Robert DeSalvo and Elizabeth Jo DeSalvo filed a voluntary joint petition under chapter 7 of the Bankruptcy Code. (See Case Dkt. No. 1.)¹ The Vehicle was listed in the Debtors' schedules, and they claimed an exemption against both the Vehicle and a 2002 Honda Civic in the amount of \$3,500 pursuant to Official Code of Georgia § 44-13-100. (Id. at 13-14.) Defendant HSBC Auto Finance was listed as a secured creditor in the amount of \$9,654, with the value of the Vehicle listed as \$8,315. (Id. at 15.) Included along with the petition was a Statement of Intention, in which the Debtors stated that the Vehicle was to be retained and that they intended to reaffirm the Vehicle's debt. (Case Dkt. No. 1 at 54.)

On September 14, 2009, the § 341(a) meeting of creditors was held at which no creditor appeared.

On some date prior to November 4, 2009, Mrs. DeSalvo sent a signed copy of the proposed reaffirmation agreement to the Defendants by mail. The Defendants acknowledged receipt of the

¹ References to the adversary proceeding docket appear in the following format: "A.P. Dkt. No. ___." References to the chapter 7 case docket appear in the following format: "Case Dkt. No. ___."

proposal on November 4, 2009. (See A.P. Dkt. No. 1 at 1.) No reaffirmation agreement has been filed.

On the night of November 23-24, 2009, the Defendants repossessed the Vehicle. On December 11, 2009, Mrs. DeSalvo filed a Motion for Sanctions for Stay Violation, Request for Turnover of Property, and Request for Expedited Hearing, which was treated as a complaint initiating an adversary proceeding. (See A.P. Dkt. No. 1.) Mrs. DeSalvo alleged that the Defendants refused to turn over the Vehicle unless the Debtors fully repaid the payment arrearages. The Defendants filed their response on January 6, 2010. (See A.P. Dkt. No. 6.)

Also on January 6, 2010, the Defendants filed the Motion on the basis that the complaint fails to state a claim upon which relief can be granted. (See A.P. Dkt. No. 7.) The Motion alleges that, because the Debtors failed to enter into a reaffirmation agreement with the Defendants within 45 days of the § 341(a) meeting of creditors, the automatic stay terminated by operation of law pursuant to § 521(a)(6). (See A.P. Dkt. No. 7 at 4-5.) A hearing on the Motion was held on February 11 2010, and at the close of hearing I took the matter under advisement.

CONCLUSIONS OF LAW

I. Motion to Dismiss Standard

On a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for the failure to state a claim upon which relief can be granted,² the complaint must be construed in a light most favorable to the plaintiff. Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1260 (11th Cir. 2009). In doing so, the court must take all well-pled factual allegations as true and determine whether those allegations "plausibly give rise to an entitlement to relief." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50 (2009). In this analysis, however, unsupported legal conclusions and conclusory statements need not be accepted as true. Id.

II. Applicable Bankruptcy Code Provisions

A. Relation Between Section 521(a)(2) and Section 521(a)(6)

Where a chapter 7 debtor files a statement of intention indicating that a debt secured by property of the estate is to be reaffirmed, one of two provisions of the Bankruptcy Code provides the deadline for acting on that intention. Under 11 U.S.C. § 521(a)(2)(B), the debtor must "perform his intention" designated in the statement of intention within 30 days after the

² Rule 12(b) is made applicable in adversary proceedings pursuant to Federal Rule of Bankruptcy Procedure 7012(b).

first date set for the § 341(a) meeting. 11 U.S.C. § 521(a)(2).³ Section 521(a)(2)(C) provides the consequence for failure to meet that deadline, which is the application of 11 U.S.C. § 362(h)(1). See id. Section 362(h)(1) provides that, where the debtor has failed to "take timely the action specified" in the statement of intention by the § 521(a)(2) deadline, the automatic stay terminates as to the subject property and the property is no longer property of the estate. 11 U.S.C. § 362(h).⁴

³ 11 U.S.C. § 521(a)(2) states in pertinent part:

(a) The debtor shall—

(2) if an individual debtor's schedule of assets and liabilities includes debts which are secured by property of the estate—

(A) within thirty days after the date of the filing of a petition under chapter 7 of this title or on or before the date of the meeting of creditors, whichever is earlier, or within such additional time as the court, for cause, within such period fixes, the debtor shall file with the clerk a statement of his intention with respect to the retention or surrender of such property and, if applicable, specifying that such property is claimed as exempt, that the debtor intends to redeem such property, or that the debtor intends to reaffirm debts secured by such property;

(B) within 30 days after the first date set for the meeting of creditors under section 341(a), or within such additional time as the court, for cause, within such 30-day period fixes, the debtor shall perform his intention with respect to such property, as specified by subparagraph (A) of this paragraph; and

(C) nothing in subparagraphs (A) and (B) of this paragraph shall alter the debtor's or the trustee's rights with regard to such property under this title, except as provided in section 362(h)

⁴ 11 U.S.C. § 362(h)(1) states in pertinent part:

(1) In a case in which the debtor is an individual, the stay provided by subsection (a) is terminated with respect to personal property of the estate or of the debtor securing in whole or in part a claim, or subject to an unexpired lease, and such personal property shall no longer be property of the estate if the debtor fails within the applicable time set by section 521(a)(2)—

(A) to file timely any statement of intention required under section 521(a)(2) with respect to such personal property or to indicate in such statement that the debtor will either surrender such personal

The other Bankruptcy Code provision that might apply in such cases is 11 U.S.C. § 521(a)(6). That section provides that a debtor must enter into a reaffirmation agreement not later than 45 days after the first meeting of creditors. 11 U.S.C. § 521(a)(6).⁵ If the debtor "fails to so act within the 45-day period," the automatic stay is terminated as to the property and the property ceases to be property of the estate. Id. Section 521(a)(6), however, only applies in chapter 7 cases where the property secures a purchase money security interest ("PMSI").

property or retain it and, if retaining such personal property, either redeem such personal property pursuant to section 722, enter into an agreement of the kind specified in section 524(c) applicable to the debt secured by such personal property, or assume such unexpired lease pursuant to section 365(p) if the trustee does not do so, as applicable; and

(B) to take timely the action specified in such statement, as it may be amended before expiration of the period for taking action, unless such statement specifies the debtor's intention to reaffirm such debt on the original contract terms and the creditor refuses to agree to the reaffirmation on such terms.

⁵ 11 U.S.C. § 521(a)(6) states in pertinent part:

(a) The debtor shall—

(6) in a case under chapter 7 of this title in which the debtor is an individual, not retain possession of personal property as to which a creditor has an allowed claim for the purchase price secured in whole or in part by an interest in such personal property unless the debtor, not later than 45 days after the first meeting of creditors under section 341(a), either—

(A) enters into an agreement with the creditor pursuant to section 524(c) with respect to the claim secured by such property; or

(B) redeems such property from the security interest pursuant to section 722.

If the debtor fails to so act within the 45-day period referred to in paragraph (6), the stay under section 362(a) is terminated with respect to the personal property of the estate or of the debtor which is affected, such property shall no longer be property of the estate, and the creditor may take whatever action as to such property as is permitted by applicable nonbankruptcy law

Ariz. Fed. Credit Union v. DeSalvo (In re DeSalvo), 2009 WL 5322428, at *4 (Bankr. S.D. Ga. Nov. 16, 2009).

In an earlier order in the underlying case, I had the opportunity to consider the interplay between § 521(a)(2) and § 521(a)(6). See id. at *1 (Case Dkt. No. 42). I determined that § 521(a)(6) "provides the controlling time period in the limited circumstances in which it applies," while § 521(a)(2) provides the controlling time period if § 521(a)(6) is inapplicable. Id. at *3.

B. It is Unclear Whether Section 521(a)(6) Applies

Although the Defendants argue that the Debtors failed to comply with the 45-day deadline for entering into a reaffirmation agreement under § 521(a)(6), I cannot determine whether § 521(a)(6) applies in the present case. There is no copy of the loan agreement in the record, and the Debtors have not characterized the debt as arising from a PMSI. Given that I must construe the facts in a light most favorable to the plaintiff on a motion to dismiss, I cannot determine that the loan is in fact a PMSI. Given that the Vehicle is a 2002 model and the loan attached in April 2007 (Case Dkt. No. 1 at 15), it is plausible that the debt arose from a loan wherein the Debtors pledged their Vehicle as collateral, as opposed to a PMSI. Therefore, § 521(a)(2)—not § 521(a)(6)—could apply.

III. Dismissal is Unwarranted Because the Stay Might Remain in Effect if 11 U.S.C. § 521(a)(2) Applies.

In order to "perform his intention" as required by § 521(a)(2)(B), a debtor must, at a minimum, "take steps to act on an intention to either retain or surrender." Price v. Del. State Police Fed. Credit Union (In re Price), 370 F.3d 362, 372 (3d Cir. 2004) (stating that the code provision should not be interpreted to "mandate" that the intention be "consummate[d]" by the deadline);⁶ accord In re Hinson, 352 B.R. 48, 50 (Bankr. E.D.N.C. 2006). Likewise, in discussing termination of the automatic stay under § 362(h)(1), Collier on Bankruptcy suggests that it may not be clear whether a debtor has acted in a timely manner on his intention to reaffirm because "the parties may not conclude negotiations of an agreement" by the § 521(a)(2) deadline. 3 Collier on Bankruptcy ¶ 362.10A (15th ed. rev. 2006). I agree with the foregoing authority and conclude that the automatic stay does not terminate by operation of law pursuant to § 521(a)(2) and § 362(h)(1) if a debtor takes some steps towards completing performance of his intention.

Mrs. DeSalvo has pled sufficient facts to support a plausible claim that the automatic stay has not terminated by operation of law. The complaint states that a reaffirmation agreement was returned to the Defendants, and that the Defendants

⁶ Although In re Price was decided before the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), it interpreted the phrase "perform his intention," which was unchanged by BAPCPA.

confirmed receipt of that proposed agreement on November 4, 2009. This indicates that the Debtors made some effort to perform on their obligations as required by § 521(a)(2)(B). Whether that action was sufficient is a determination to be made at a later stage in the proceedings. For the purposes of a motion to dismiss, it matters only that the complaint support a plausible claim upon which relief can be granted. I conclude that Mrs. DeSalvo's complaint plausibly supports such a claim.

ORDER

Mrs. DeSalvo's complaint raises a plausible claim that the automatic stay remains in effect, and therefore the case should not be dismissed. The Defendants' Motion to Dismiss Complaint and Dismiss Motion for Contempt and Sanctions for Failure to State a Claim Upon Which Relief Can be Granted is **ORDERED DENIED**.



JOHN S. DALIS
United States Bankruptcy Judge

Dated at Brunswick, Georgia,
this 12th day of April, 2010.