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IN THE UNITED STATES BANKRUPTCY COURT 2006 DEC 22 PM 3:35

FOR THE U.S. BANKRUPTCY COURT
SOUTHERN DISTRICT OF GEORGIA
Augusta Division
SANDY L. LITTLE, CLERK VLR

IN RE:) Chapter 13 Case
) Number 06-10913
Antiony L. Hall)
)
Debtor)
_____)

ORDER DENYING MOTION TO EXTEND THE STAY

This matter comes before the court upon Debtor's "Motion to Continue Stay for Sixty Months for all Creditors Pursuant to 11 U.S.C. §362(c)(3)(B)." ¹ The court has jurisdiction pursuant to 28 U.S.C. § 1334 and this is a core proceeding pursuant to 28 U.S.C. §157(b)(2)(G).

The issue before the court is whether the hearing on the motion to extend the automatic stay pursuant to §362(c)(3)(B) must be completed within 30 days of the filing of the case. For the reasons discussed below, the court finds such hearings must be completed within 30 days of the filing of the case. In this case, since the hearing was not completed within 30 days of the filing of the petition, the motion to continue the stay is DENIED.

¹ Unless expressly noted otherwise, all statutory references in this opinion refer to Title 11 of the United States Code.

FINDINGS OF FACT

The relevant facts are:

- Debtor filed this bankruptcy case on July 19, 2006.
- Twenty-seven days later,² Debtor filed a motion to extend the automatic stay.
- The hearing to consider the motion to extend the stay was held 37 days³ after the case was filed.
- Debtor's proposed bankruptcy plan provides for a 0% dividend to be paid to his unsecured creditors.
- Debtor had one previous Chapter 13 bankruptcy case dismissed within the year preceding the filing of the current case.⁴

CONCLUSIONS OF LAW

Traditionally, upon the filing of bankruptcy, the "automatic stay" immediately went into effect and curtailed virtually all collection activities in order to allow for the orderly distribution of the debtor's assets. With the October 2005 implementation of the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA")

² The motion to extend the stay was filed on August 15, 2006.

³ The hearing was held on August 25, 2006.

⁴ Debtor's previous bankruptcy was filed in the United States Bankruptcy Court of the Southern District of Georgia (Case No. 03-10815), and was dismissed on June 8, 2006.

several provisions of the Bankruptcy Code ("Code") regarding the automatic stay were fundamentally changed. Specifically, under §362(c)(3) of BAPCPA, where an individual Chapter 13 debtor has had one previous bankruptcy case dismissed within the one year period preceding the current bankruptcy ("One-Time Repeat Filer"), the automatic stay expires on the 30th day after the filing of the current case. 11 U.S.C. §362(c)(3)(A).⁵ In such cases, ". . . the

⁵ Section 362(c)(3) provides:

(c) Except as provided in subsections (d), (e), (f), and (h) of this section-

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. .
.

(3) if a single or joint case is filed by or against debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refilled under a chapter other than chapter 7 after dismissal under section 707(b) --

(A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case;

(B) on the motion of a party in interest for continuation of the automatic stay and upon notice and a hearing, the court may extend the stay in particular cases as to any or all creditors (subject to such conditions or limitations as the court may then impose) after notice and a hearing completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed; and

(C) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)--

(i) as to all creditors, if-

(I) more than 1 previous case under any of chapters 7, 11, and 13 in which the individual was a debtor was pending within the preceding 1-year period;

(II) a previous case under any of chapters 7, 11, and 13 in which the individual was a debtor was dismissed within such 1-year period, after the debtor failed to--

(aa) file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be a substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney);

(bb) provide adequate protection as ordered by the court; or

(cc) perform the terms of a plan confirmed by the court; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under chapter 7, 11, or 13 or any other reason to conclude that the later case will be concluded--

(aa) if a case under chapter 7, with a discharge; or

(bb) if a case under chapter 11 or 13, with a confirmed plan that will be fully performed; and

(ii) as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of

court may extend the stay . . . after notice and a hearing completed before the expiration of the 30-day period only if a party in interest demonstrates that the filing of the later case is in good faith. . . ." 11 U.S.C. §362(c)(3)(B) (emphasis added).

"It is well established that when the statute's language is plain, the sole function of the courts-at least where the disposition required by the text is not absurd-is to enforce it according to the terms." Lamie v. U.S. Trustee, 540 U.S. 526, 534 (internal quotation marks omitted) (citations omitted). "The preeminent canon of statutory interpretation requires [courts] to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.'" BedRoc Ltd., LLC v. United States, 541 U.S. 176, 183 (2004) (citations omitted). Section 362(c)(3)(B) by its plain language requires the hearing to be completed within 30 days after the filing of the second bankruptcy case. In the case currently before the court, the hearing was not completed within the required 30-day period and therefore the stay cannot be extended.

dismissal of such case, that action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to actions of such creditor.

Id. (emphasis added).

Analysis of §362(c)(3) and §362(c)(4)

Debtor argues that §362(c)(4)⁶ may be used in this case to

⁶ Section 362(c)(4) provides:

(c) Except as provided in subsections (d), (e), (f), and (h) of this section-

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. .

(4) (A) (i) if a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed, other than a case refilled under section 707(b), the stay under subsection (a) shall not go into effect upon the filing of the later case; and

(ii) on request of a party in interest, the court shall promptly enter an order confirming that no stay is in effect;

(B) if, within 30 days after the filing of the later case, a party in interest requests the court may order the stay to take effect in the case as to any or all creditors (subject to such conditions or limitations as the court may impose), after notice and a hearing, only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed;

(C) a stay imposed under subparagraph (B) shall be effective on the date of the entry of the order allowing the stay to go into effect; and

(D) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)--

(i) as to all creditors if--

(I) 2 or more previous cases under this title in which the individual was a debtor were pending within the 1-year period;

(II) a previous case under this title in which the individual was a debtor was dismissed within the time period stated in this paragraph after the debtor failed to

reimpose the stay. The appeal of this argument is that §362(c)(4), unlike §362(c)(3), does not require the hearing be completed within 30 days after the filing of the subsequent case. Rather, §362(c)(4) merely requires that the motion to impose the stay be filed within 30 days of the filing of the subsequent case. 11 U.S.C. §362(c)(4)(B). For the reasons discussed below, the court finds that §362(c)(4) is not applicable to cases filed by One-Time Repeat Filers.

The automatic stay provisions of BAPCPA divide repeat filers into two categories—One-Time Repeat Filers and individual filers who

file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney), failed to provide adequate protection as ordered by the court, or failed to perform the terms of a plan confirmed by the court; or

(III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under this title, or any other reason to conclude that the later case will not be concluded, if a case under chapter 7, with a discharge, and if a case under chapter 11 or 13, with a confirmed plan that will be fully performed; or

(ii) as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such case, such action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to such action of such creditor.

Id.

have had two or more bankruptcy cases dismissed within the year preceding the filing of the current case ("Multiple-Repeat Filers"). Cases filed by One-Time Repeat Filers involve §362(c)(3) and cases filed by Multiple-Repeat Filers involve §362(c)(4). Pursuant to §362(c)(3) the automatic stay terminates on the 30th day after the petition is filed, unless the court extends the stay after notice and a hearing completed within 30 days of the filing of the case. Conversely, when §362(c)(4) applies there is no automatic stay unless the court imposes the stay in response to a motion filed within 30 days after the filing of the subsequent case. Under §362(c)(4) there is no statutory provision requiring a hearing be completed within 30 days of the filing of the subsequent case.

Debtor cites In re Toro-Arcila, 334 B.R. 224 (Bankr. S.D. Tex. 2005) to argue that §362(c)(4) may be used to reimpose the stay in the cases of One-Time Repeat Filers. The In re Toro-Arcila court held while §362(c)(4) (A) applies only to Multiple-Repeat Filers, §§362(c)(4) (B), (C) and (D) establish the substantive law regarding hearings on whether to impose the stay and may be used by One-Time Repeat Filers as well as Multiple-Repeat Filers. Id. at 226. According to In re Toro Arcila, "[i]f the §362(c)(4)(B) hearing applies only to §362(c)(4)(A) cases-i.e. multiple-repeat filers-then the bulk of §362(c)(4)(D) would be rendered meaningless

[surplusage]." Id. at 226. "If the 'later case' referred to in §362(c)(4)(B) must be a later case of a type described in §362(c)(4)(A), then there will be no instances in which the language of §§362(c)(4)(D)(i)(II), (D)(i)(III), or (D)(ii) would ever be considered." Id. at 227.

The court disagrees with the contention that applying §362(c)(4) solely to Multiple-Repeat Filers renders the language of §§362(c)(4)(D)(i)(II), (III) and (D)(ii) "meaningless surplus." Under general statutory construction provisions, distinct paragraphs within Code sections are read alone. Statutes generally follow a hierarchal scheme:

- (1) subsections start with "a";
- (2) paragraphs start with "1";
- (3) subparagraphs start with "A"; and
- (4) clauses start with "i".

Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 60 (2004) citing House Legislative Counsel's Manual on Drafting Style, HLC No. 104-1, p. 24 (1995).

Section 362(c)(4)(A) begins with "if a . . . case is filed by . . . a debtor . . . and if 2 or more . . . cases of the debtor were pending within the previous year but were dismissed . . . the stay . . . shall not go into effect upon the filing of the later case. . . ." 11 U.S.C. §362(c)(4)(A)(i). Section 362(c)(4)(B) goes on to provide "if, within 30 days after the filing of the later case, a party in interest requests the court may order the stay to take effect . . . after notice and a hearing, only if the party in interest demonstrates that the filing of the later case

is in good faith. . . ." 11 U.S.C. §362(c)(4)(B). Then, §362(c)(4)(D) provides "for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary). . . ." 11 U.S.C. §362(c)(4)(D). There is nothing to suggest that §362(c)(4)(B) or any of the subparagraphs or clauses of §362(c)(4) deal with anything other than Multiple-Repeat Filers. Under the hierarchal statutory interpretation, §362(c)(3) and §362(c)(4) should each be read alone, with §362(c)(3) applying only to One-Time Repeat Filers and §362(c)(4) applying only to Multiple-Repeat Filers.

As pointed out by In re Whitaker, 341 B.R. 336 (Bankr. S.D. Ga. 2006),⁷ limiting the application of §362(c)(4) to Multiple-Repeat Filers does not render a substantial part of §362(c)(4)(D) meaningless or surplus. Id. at 344. For purposes of considering whether to impose the stay under §362(c)(4), there is a presumption that a case is not filed in good faith as to all creditors if:

- (1) 2 or more cases were pending within a year of the commencement of the current case (§362(c)(4)(D)(i)(I));
- (2) a previous case was dismissed for failure to comply with some general statutory requirements without substantial excuse (§362(c)(4)(D)(i)(II)); or
- (3) there has not been a substantial change in the financial or personal affairs of the debtor since the most recent dismissal, or any other reason to conclude that the current case will not be successfully concluded (§362(c)(4)(D)(i)(III)).

⁷ In In re Whitaker, on the 27th day after filing for bankruptcy, a One-Time Repeat Filer filed a motion to reimpose the stay pursuant to §362(c)(4). In re Whitaker, 341 B.R. at 340. The hearing was held 54 days after the case was filed. Id.

"[T]he [three] disjunctive factors listed in §362(c)(4)(D) place consecutive burdens on the multiple repeat filer to establish good faith. If an interested party moves for imposition of the stay under section 362(c)(4)(B), then the burden of rebutting the presumption [that the] filing is 'not in good faith' arises automatically, since '2 or more cases under this title in which the individual was a debtor were pending in the 1-year period.'" In re Whitaker, 341 B.R. at 344. A party in interest cannot overcome this presumption without proving a "substantial excuse" for debtor's previous failure to comply with basic bankruptcy requirements (see, 11 U.S.C. §362(c)(4)(D)(i)(II)) and a "substantial change" in the debtor's financial or personal affairs sufficient to conclude, in a Chapter 7 case, that the case will result in a discharge, or, in a Chapter 11 or 13 case, that the plan will be confirmed and fully performed (see, 11 U.S.C. §362(c)(4)(D)(i)(III)). Id. at 344-45.

Section 362(c)(3)(C) places similar burdens on a party in interest moving to continue the stay for a One-Time Repeat Filer. The comparable language of §362(c)(3)(C)(i)(I) creates a presumption that the subsequent case of a One-Time Repeat Filer is not filed in good faith. A party in interest moving to continue the stay under §362(c)(3)(B) cannot overcome this presumption without proving a "substantial excuse" for the debtor's previous failure to comply with basic bankruptcy requirements (see, 11 U.S.C. §362(c)(3)(C)(i)(II)) and a "substantial change" in the debtor's financial or personal affairs sufficient to conclude, in a Chapter

7 case, that the case will result in a discharge, or, in a Chapter 11 or 13 case, that the plan will be confirmed and fully performed (see, 11 U.S.C. §362(c)(3)(C)(i)(III)).

A verbatim comparison of the language of §362(c)(3) with §362(c)(4)⁸ shows that §362(c)(4) tracks §362(c)(3) with the only

⁸ Below is a verbatim comparison of §§362(c)(3) with (c)(4). The different language of §362(c)(4) is shown as stricken through; the different language of §362(c)(3) is shown as double underlined; and the identical language appearing in both paragraphs is shown in plain text:

(c) Except as provided in subsections (d), (e), (f), and (h) of this section-

~~(4)(A)(i) if a single or joint case is filed by or against a debtor who is an individual in a case under this title chapter 7, 11, or 13, and if ~~2 or more~~a single or joint cases of the debtor ~~were~~was pending within the ~~previous year~~preceding 1-year period but ~~were~~was dismissed, other than a case refiled under section 707(b), a chapter other than chapter 7 after dismissal under section 707(b) --~~

(A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall not go into effect upon the filing of the later case; and

~~(ii) on request of a party in interest, the court shall promptly enter an order confirming that no stay is in effect; (B) if, within 30 days~~terminate with respect to the debtor on the 30th day after the filing of the later case;

(B) on the motion of a party in interest requests the court may order the stay to take effect in the case for continuation of the automatic stay and upon notice and a hearing, the court may extend the stay in particular cases as to any or all creditors (subject to such conditions or limitations as the court may then impose); after notice and a hearing, completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed;

~~(C) a stay imposed under subparagraph (B) shall be effective on the date of the entry of the order allowing the stay to go into effect; and~~

(D) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary) --

(i) as to all creditors, if-

substantive differences⁹ being that §362(c)(3) references One-Time Repeat Filers, while §362(c)(4) references Multiple-Repeat Filers. The "later case" reference in §362(c)(3)(B) refers to the subsequent case of a One-Time Repeat Filer, while the "later case" reference in §362(c)(4)(B) refers to the subsequent case of a Multiple-Repeat Filer. Such an interpretation does not render the bulk of §362(c)(3)(C) or §362(c)(4)(D) "meaningless surplusage." Interestingly, one of the differences reflected by the comparison of the two paragraphs is the language of §362(c)(4)(D)(i)(II) which

(I) ~~2 or more than 1~~ any of previous cases ~~under this title~~ any of chapters 7, 11, and 13 in which the individual was a debtor ~~werewas~~ pending within the preceding 1-year period;

(II) a previous case ~~under this title~~ any of chapters 7, 11, and 13 in which the individual was a debtor was dismissed within ~~the timesuch 1-year period stated in this paragraph,~~ after the debtor failed ~~to~~ to--

(aa) file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be a substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney), ~~failed to;~~

(bb) provide adequate protection as ordered by the court, ; ~~or failed to~~

(cc) perform the terms of a plan confirmed by the court; or (III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case ~~under this title~~ chapter 7, 11, or 13 or any other reason to conclude that the later case will ~~not be concluded,~~ concluded-

(aa) if a case under chapter 7, with a discharge, ~~and;~~ or

(bb) if a case under chapter 11 or 13, with a confirmed plan that will be fully performed; ~~or~~ and

(ii) as to any creditor that commenced an action under subsection (d) in a previous case in which the individual was a debtor if, as of the date of dismissal of such case, ~~such that~~ action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to ~~such actions~~ of such creditor.

⁹ For purposes of this opinion.

expressly limits its application to Multiple-Repeat Filers by providing that a case is presumed to be not in good faith if a previous case ". . . was dismissed within the time period stated in this paragraph. . . ." 11 U.S.C. §362(c)(4)(D)(i)(II) (emphasis added). Pursuant to the hierarchical nature of statutes, "paragraph" references §362(c)(4), not §362(c)(3). See, Koons, 543 U.S. 50 at 60 (2004). This is further indication that §362(c)(4) is designed to only apply to Multiple-Repeat Filers.

For these reasons, since Debtor is a One-Time Repeat Filer and the hearing to continue the stay was not completed within 30 days following the filing of the current case, the court denies Debtor's request to reimpose the stay under §362(c)(4). Other courts have agreed that the motion to extend the stay for One-Time Repeat Filers must be completed within 30 days after the case is filed. See, In re Norman, 346 B.R. 181 (Bankr. N.D. W. Va. 2006); In re Wilson, 336 B.R. 338 (Bankr. E.D. Tenn. 2005).

Automatic Extensions; Local Rules and Advisory Opinions

Next, Debtor argues that some jurisdictions are considering adopting local rules that would automatically extend the stay until a hearing may be held. In the Southern District of Georgia, there are no local rules or orders in place "automatically" extending such statutorily prescribed deadlines.¹⁰ Also, since the court has denied

¹⁰ Debtor cites two cases involving local rules: (1) In re Wilson, 336 B.R. 338 (Bankr. E.D. Tenn. 2005) (which applied §362(c)(3) to One-Time Repeat Filers and held that while the hearings were held within 30 days of the filing of the petition, creditors were not provided adequate notice pursuant to local rules

Debtor's request to continue the stay because the hearing was not completed within 30 days of the filing of the current case, the adequacy of the notice to parties in interest need not be addressed.

Debtor also requests that the court invoke its powers under §105 to extend the stay. Pursuant to §105(a), "[t]he court may issue any order . . . that is necessary or appropriate to carry out the provisions of [the Code]. 11 U.S.C. §105(a). While the court acknowledges the harshness of the result in this case, §105 does not allow the court to change the explicit language of the Code. The Code expressly requires the hearing to be completed within 30 days of the filing of the petition and that was not accomplished in this case. Section 105 does not authorize the court " . . . to create substantive rights that are otherwise unavailable under applicable law, or constitute a roving commission to do equity." United States v. Sutton, 786 F.2d 1305, 1308 (5th Cir. 1986). Because §362(c)(3) is clear on its face and requires a hearing to be completed within 30 days of the filing of the bankruptcy case, the court cannot invoke its powers under §105(a) to impose the stay.¹¹

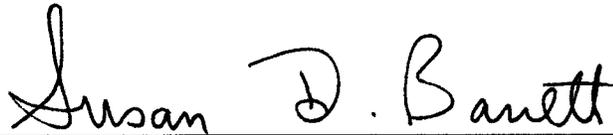
and the debtors failed to overcome the presumption of bad faith therefore the court declined to extend the stay; and applied §362(c)(4) to a Multiple-Repeat Filer and held that adequate notice was not provided and the debtor failed to overcome the presumption of bad faith and, therefore, the court declined to extend the stay); and In re Taylor, 334 B.R. 660 (Bankr. D. Minn. 2005) (which held mailing notice to creditors 5 or 8 days in advance of the hearing was insufficient and therefore declined to extend the stay).

¹¹ But see, In re Whitaker, 341 B.R. 336 (Bankr. S.D. Ga. 2006) (unlike the current case, In re Whitaker involved a debtor who

Finally, Debtor requests the court order that the failure to extend the stay, only terminates the stay with respect to Debtor personally and not to property of the estate. This is one of the most contested matters currently being litigated under BAPCPA. The first time Debtor raised this issue is in Debtor's brief filed only with the court. As such, this request is in the nature of a request for an advisory opinion, which the court declines to issue. "The oldest and most consistent thread in the federal law of justiciability is that federal courts will not give advisory opinions." 13 Wright, Miller, Cooper, Federal Practice and Procedure §3529.1, page. 293 (1984).

Conclusion

It is therefore ORDERED that the Motion to Continue Stay for Sixty Months for all Creditors Pursuant to 11 U.S.C. §362(c)(3)(B) is DENIED.



SUSAN D. BARRETT
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 22nd Day of December, 2006.

proposed to pay a 100% dividend to unsecured creditors); and In re Reed (Ch. 13, Case No. 05-25051, (Bankr. N.D. Ga, February 28, 2006) (J. Brizendine).