UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

RICHARD PICARD WEISS AND MINNIE MIRL WEISS,	**CASE NO. 07-02198-NPO**
DEBTORS.	**CHAPTER 13**

ORDER GRANTING DEBTORS' MOTION TO EXTEND AUTOMATIC STAY

On August 13, 2007, there came on for hearing (the "Hearing") the Motion to Extend Automatic Stay (the "Motion") (Second Case[1] Dk. No. 4) filed by Richard Picard Weiss and Minnie Mirl Weiss (the "Debtors"), and the Objection to Motion to Extend Automatic Stay (the "Objection") (Second Case Dk. No. 7) filed by Planters Bank & Trust Company ("Planters") in the above-styled chapter 13 proceeding. At the Hearing, John L. Gadow represented the Debtors, and Douglas C. Noble and Christopher R. Maddux represented Planters. The Court, being fully advised in the premises and having considered the evidence offered at the Hearing and the arguments of counsel, including the letter briefs submitted by counsel for the parties (Second Case Dk. Nos. 19, 20), finds that the Objection is not well taken and the Motion should be granted for the reasons set forth below[2]:

Jurisdiction

This Court has jurisdiction over the parties and the subject matter of this proceeding pursuant

[1] *See* ¶ 6 herein.

[2] The following constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure 7052.

to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (G), and (O). Notice of the Hearing on the Motion and Objection was proper under the circumstances.

Facts

A. The First Case

1. On March 8, 2007, the Debtors filed their voluntary petition (the "First Petition") (First Case Dk. No. 1) for relief under chapter 13 of the Bankruptcy Code[3] in this Court, Case No. 07-00744-EE (the "First Case").

2. On March 29, 2007, the Notice of Chapter 13 Bankruptcy Case, Meeting of Creditors, & Deadlines (the "First Case Notice") (First Case Dk. No. 11) was issued. In that First Case Notice, a meeting of creditors (the "§ 341(a) Meeting") was scheduled for 11:30 a.m. on May 1, 2007.

3. On April 27, 2007, prior to the § 341(a) Meeting, the chapter 13 trustee (the "Trustee") filed his Trustee's Objection to Confirmation (First Case Dk. No. 22).

4. The Debtors did not attend the § 341(a) Meeting. The Trustee filed his Proceeding Memo - Chapter 13 341A Meeting of Creditors (First Case Dk. No. 24) indicating that the Debtors had failed to attend, and Judge Edward Ellington entered the Order Dismissing Bankruptcy Case for Failure to Appear at the Meeting of Creditors Pursuant to §341 (the "Order Dismissing First Case") (First Case Dk. No. 26).

5. The Final Decree/Order Closing Case (First Case Dk. No. 32) was entered on July 2, 2007.

[3] Hereinafter, all code sections refer to the United States Bankruptcy Code located at Title 11 of the United States Code unless otherwise noted.

B. Second Case

6. On July 18, 2007, the Debtors filed in this Court a second voluntary petition (the "Second Petition") (Second Case Dk. No. 1) for relief under chapter 13, Case No. 07-02198-NPO (the "Second Case").

7. On July 19, 2007, the Debtors filed the Motion in compliance with § 362(c)(3).[4]

8. On August 1, 2007, Planters filed the Objection.

9. At the Hearing, the Debtor, James Picard Weiss, testified regarding the facts and circumstances surrounding the dismissal of the First Case. At the time the Debtors filed the First Petition, Mrs. Weiss was working, and Mr. Weiss was unemployed. Although Mr. Weiss thought he would be receiving one or two job offers with significant income soon after the First Petition was filed, he did not receive either of the expected offers. Instead, he accepted a job stocking shelves at Fred's. The job paid $6.50 per hour, far less than he had expected to earn. When he received the Trustee's Objection to Confirmation, he reasoned that he would be unable to defend the Trustee's Objection to Confirmation because he could not fund the chapter 13 plan, and further reasoned that the First Case would be dismissed. Mr. Weiss also asserted that the Second Petition was filed in good faith, and that the Debtors now are able to make the required plan payments because he has been promoted to assistant manager at Fred's, is paid $29,000 annually, and is in line for a promotion

[4] Section 362(c)(3) provides, in pertinent part, that if a chapter 13 case is filed by a debtor who had a case pending within the preceding one year period but that case was dismissed, the automatic stay shall terminate with respect to the debtor on the 30th day after the filing of the later case, but that the debtor may make a motion for continuation of the automatic stay, and upon notice and a hearing, the court may extend the stay as to any or all creditors if the debtor demonstrates that the later case was filed in good faith as to the creditors to be stayed. *See* § 362(c)(3)(A), (B).

to manager.

C. Foreclosure Sale

10. There is no dispute that Planters conducted its foreclosure sale (the "Foreclosure Sale") on July 19, 2007, after the Second Petition was filed, and during the thirty (30) day period in which the automatic stay was imposed under § 362(c)(3).

Discussion

A. The Debtors' Argument

The Debtors contend that the Motion should be granted because the Second Case was filed in good faith. Additionally, they have experienced a substantial change in their financial affairs since the First Case.

B. Planters' Arguments are Unpersuasive

1. § 109(g)(1)

Planters contends in its Objection that the Motion should not be granted as to Planters based on a two-part argument. First, Planters cites § 109(g)(1) in support of its proposition that the Debtors were ineligible debtors in the Second Case. Section 109(g)(1) provides:

> (g) Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if-
>
> (1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case; . . . .

"Because the effect of § 109(g) is to deprive a debtor of the right to relief under the Code for 180 days, '[t]he denial of eligibility should not be lightly or routinely imposed on the debtor without evidence that the debtor knowingly and intentionally disobeyed an order of court or knowingly and intentionally failed to appear in prosecution of the case.'" In re Pike, 258 B.R. 876, 882 (Bankr. S.D.

Ohio, 2001) (quoting In re Herrera, 194 B.R. 178, 188 (Bankr. N.D. Ill. 1996)); *see also* In re Hollis, 150 B.R. 145, 148 (D. Md. 1993) (quoting In re Surace, 52 B.R. 868, 871 (Bankr. C.D. Cal. 1985)) (§ 109 is "an extraordinary statutory remedy for perceived abuses of the Code").

Planters maintains that in not attending the § 341(a) Meeting, the Debtors willfully failed to abide by an order of the Court, namely the First Case Notice. In support of its position, Planters relies on the case of In re Montgomery, 37 F.3d 413 (8th Cir. 1994). In Montgomery, the debtor's chapter 13 case was dismissed for his failure to attend a § 341 creditors' meeting. The Montgomery court, citing In re Pappalardo, 109 B.R. 622 (Bankr. S.D.N.Y. 1990), determined that a debtor's "[f]ailure to attend a creditors meeting is a failure to obey a court order within the meaning of section 109(g)(1)." In re Montgomery, 37 F.3d at 414.

The Court finds Planters' reliance on Montgomery misplaced for two reasons. First, the Montgomery decision is based on In re Pappalardo. Yet in In re Pappalardo, "the notice issued by the court states that 'It is Ordered and Notice is Hereby Given' as to the time and place for the § 341(a) meeting and that 'The debtor shall appear in person at that time and place for the purpose of being examined.'" In re Pappalardo, 109 B.R. at 625. To the contrary, in the case at bar, the First Case Notice contains no language ordering the Debtors to attend the § 341(a) Meeting. Therefore, the requirement to attend the § 341(a) Meeting in the First Case Notice was not contained in an order of this Court. Rather, the requirement was contained in a form notice. *See* Official Bankruptcy Form 9I (10/06).

Second, even if the First Case Notice were construed as an order of this Court, the Debtors did not willfully violate it. "The court must look to the circumstances of the particular case to determine willfulness." 2 Collier on Bankruptcy, ¶109.08 (Matthew Bender 15th Ed. Rev. 2006).

In Montgomery, the bankruptcy court had entered an order dismissing the case which included the finding that "the facts herein warrant imposition of sanctions pursuant to 11 U.S.C. §109(g)." In re Montgomery, 37 F.3d at 415, n.3. The Eighth Circuit agreed with the district court that that language "is properly read to constitute a finding of willfulness." Id. In the case at bar, the Order Dismissing First Case contained no finding, express or implicit, regarding willfulness.

Moreover, in Montgomery, the debtor offered no evidence regarding his failure to attend the creditors' meeting. Thus, the court in Montgomery found that the debtor had failed in his burden of proof regarding willfulness. In the case at bar, however, Mr. Weiss testified that he believed the First Case was going to be dismissed in that he would be unable to present a defense to dismissal. Therefore, he believed the decision not to attend the § 341(a) Meeting was justified. A "mere failure . . . to appear at the first meeting or a court hearing, will not, in itself, be sufficient to sustain a finding of willful conduct under" § 109(g). In re Nelkovski, 46 B.R. 542, 544 (Bankr. N.D. Ill. 1985); In re Dodge, 86 B.R. 535 (Bankr. S.D. Ohio, 1988). "On the other hand, the court will construe repeated failure to appear . . . as willful conduct." In re Nelkovski, 46 B.R. at 544; *see also* Reischel v. Manufacturers & Traders Trust Co., 222 Fed. Appx. 521 (7th Cir. 2007) (debtor's failure to appear at meeting of creditors as well as a hearing to oppose motion to dismiss constituted willful violation of § 109(g)(1)); In re Pike, 258 B.R. at 884 (where, by her own admission, the debtor willfully failed to abide by court orders entered in her fifth case). Thus, while the First Case was filed in the 180 days preceding the Second Case, the First Case was not "dismissed by the court for willful failure of the debtor to abide by orders of the court." *See* § 109(g)(1).

As for the alternative situation described in § 109(g)(1), the Debtors' failure to attend the § 341(a) Meeting in the First Case cannot be characterized as a failure "to appear before the court

in proper prosecution of the case" since the § 341(a) meeting must be conducted out of the presence of the court. *See* § 341(c)[5]; In re Pappalardo, 109 B.R. at 625.[6] In that such attendance is not an appearance before the Court, the Debtors did not violate § 109(g)(1) on that basis.

2. § 362(b)(21)

As to the second part of its argument, Planters contends that it could proceed with the Foreclosure Sale in spite of the Second Case based on its interpretation of § 362(b)(21) which provides:

> (b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay-
>
> . . . .
>
> (21) under subsection (a), of any act to enforce any lien against or security interest in real property-
>
> (A) if the debtor is ineligible under section 109(g) to be a debtor in a case under this title; or
>
> (B) if the case under this title was filed in violation of a bankruptcy court order in a prior case under this title prohibiting the debtor from being a debtor in another case under this title; . . . .

"The provision creates an exception to the automatic stay section of 362(a) with respect to any act to enforce a lien against or security interest in real property if the debtor is ineligible for relief under section 109(g) or if the bankruptcy case was filed in violation of an order in a prior case prohibiting the filing of the subsequent case." 2 Collier on Bankruptcy, ¶109.08[1] (Matthew Bender 15th Ed. Rev. 2006). Again, however, neither situation contained in § 362(b)(21) is relevant in the Second Case. The Debtors are eligible debtors under § 109 because Planters' arguments under

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[5] Section 341(c) provides that the "court may not preside at, and may not attend, any meeting under this section including any final meeting of creditors."

[6] Although there is case law to the contrary, *see,* e.g., In re King, 126 B.R. 777, 781 (Bankr. N.D. Ill. 1991), the Court does not find it applicable to the case at bar.

§ 109(g)(1) fail. Moreover, there was no court order in the First Case prohibiting the Debtors from being debtors in another case under title 11.

C. Violation of the Automatic Stay

Upon the filing of the Second Petition, the automatic stay provision of § 362 took effect to prevent any action by Planters to foreclose any lien against property of the estate. Section 362 provides:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, . . . operates as a stay, applicable to all entitles, of - -
>
> > (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
> >
> > (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title; . . . .
> >
> > . . . .
> >
> > (4) any act to create, perfect, or enforce any lien against property of the estate;
> >
> > (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title; . . . .

11 U.S.C. § 362 (a)(1), (2), (4), (5); *see also* Elbar Investments, Inc. v. Pierce (In re Pierce), 272 B.R. 198, 203 (Bankr. S.D. Tex. 2001) ("When a bankruptcy case is filed, section 362 of the Bankruptcy Code automatically and immediately imposes a statutory stay of the enforcement of any judgment obtained before the commencement of the case and a stay of any act to enforce a lien against property of the estate."). The stay is effective automatically by operation of law upon the filing of the case and regardless of whether an affected party has notice of the bankruptcy filing. Id.; *see also* Jones

v. Garcia (In re Jones), 63 F.3d 411, 412 n. 3 (5th Cir. 1995); In re Abusaad, 309 B.R. 895, 898 (Bankr. N.D. Tex. 2004). Accordingly, the Foreclosure Sale by Planters violated the automatic stay provisions of § 362, applicable to the Debtors' estate.

D. Effect of the Violation of the Automatic Stay

In the Fifth Circuit, "an unknowing violation of the automatic stay is voidable, not void." *See* Sikes v. Global Marine, Inc., 881 F.2d 176, 179 (5th Cir. 1989). A voidable transaction or occurrence is one "that was invalid or had no legal effect when it occurred, but might be made valid by a subsequent judicial act or ratification." In re Pierce, 272 B.R. at 208; In re Abusaad, 309 B.R. at 899 (an action taken in violation of the stay is invalid and of no effect unless and until the action is made valid by subsequent judicial action annulling the automatic stay). Simply put, the Foreclosure Sale in this case was a transaction in violation of the automatic stay which is "specifically prohibited by federal law, section 362 of the Bankruptcy Code." In re Pierce, 272 B.R. at 205. Such "an action . . . taken in violation of the automatic stay . . . is invalid and of no effect at the time of its occurrence." In re Abusaad, 309 B.R. at 899. Consequently, since the Court finds that the Foreclosure Sale was a violation of the automatic stay, it was invalid when it occurred and is of no effect.

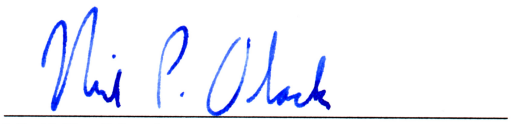
For the foregoing reasons, the Motion should be granted based on the Debtors' compliance with the requirements of § 362(c)(3)(B). As a result, the automatic stay should be extended as to all creditors including Planters.

A separate final judgment will be entered in accordance with Federal Rules of Bankruptcy Procedure 7054 and 9021.

IT IS THEREFORE ORDERED that the Objection is denied.

IT IS FURTHER ORDERED that the Motion is granted.

SO ORDERED,



Neil P. Olack
United States Bankruptcy Judge
Dated: August 16, 2007