

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN RE: §
§
ANTHONY CAMPBELL, §
Debtor. § CASE NO. 01-45325-DML-13
§

MEMORANDUM OPINION AND ORDER

Before the Court is the Motion of Debtor to Reopen Chapter 13 Bankruptcy (the “Motion”) brought on behalf of Debtor by Houston attorney Chuck Newton (“Mr. Newton”). The Court considered the Motion at a hearing on June 10, 2002, and at that time indicated it would enter an order granting the relief sought subject to reconsideration. Though no Order has yet entered, the Court, upon review of the relevant facts and law, has determined for the reasons stated below that the Motion should instead be denied without prejudice.

The Motion initiated a core proceeding over which the Court has jurisdiction pursuant to 28 U.S.C. §§ 157 and 1334. This memorandum opinion constitute the Court’s findings of fact and conclusions of law. FED. R. BANKR. P. 7052 and 9014.

I. Background

This Chapter 13 case was commenced by Debtor, represented by Dallas attorney Patrick D. West (“Mr. West”), on July 25, 2001. On his Schedule D Debtor listed debt of \$8,000 owed to First City Servicing Corp., secured by a 1997 Mitsubishi Galant.

Shortly after commencing this case Debtor fell ill and, as a result, was unable to make pre-confirmation payments as required by his preliminary plan and the Chapter 13 Standing Trustee (the “Trustee”). The Trustee therefore sought dismissal of the case. On October 12, 2001 an order was

entered by Hon. Barbara J. Houser dismissing the case pursuant to the Court's General Order 98-4 because of Debtor's "failure to timely pay the Trustee the first payment specified in Debtor's Preliminary Plan. . . ." On October 24 (still using the services of Mr. West), Debtor filed a motion to reinstate his chapter 13 case.

The Court (per Dennis Michael Lynn, J.) considered the motion to reinstate at a hearing, on November 20, 2001. At that hearing, Mr. West advised the Court that Debtor could not make payments required by the Trustee and so could not continue to pursue his motion for reinstatement. Mr. West also advised the Court that Debtor had been unable to make his first payment to the Trustee because America On Line ("AOL") had automatically drawn almost \$300.00 from Debtor's bank account pursuant to a prepetition authorization. In response to a question from the Court, Mr. West agreed that AOL's action might have violated the automatic stay and informed the Court that Debtor was consulting with other counsel respecting the possible stay violation. Upon further inquiry, Mr. West agreed that the stay violation might not be actionable if Debtor's case were dismissed.¹ Mr. West, however, also informed the Court that AOL had not been provided notice of Debtor's chapter 13 filing,² and, remarking that lack of notice would be a flaw in any action pursuing AOL, the Court thereupon ruled the case would be dismissed. The Court entered an order dismissing the case on January 28, 2002, and the case was closed on March 20.

Apparently at some time between July 25, 2001 and January 28, 2002, Debtor's Mitsubishi Galant was stolen. At the June 10, 2002 hearing Mr. Newton advised the Court of this and informed

¹ Counsel representing Debtor in connection with AOL's stay violation did not attend the November 20 hearing. There is no reason to suppose that counsel was other than Mr. Newton.

² AOL is listed on neither Debtor's creditor matrix nor the list of creditors notified by the Trustee of entry of the order for relief.

the Court that Debtor wished his case reopened because Drive Financial Services, L.P. (“DFS”) had provided to Debtor’s insurer an affidavit of foreclosure during pendency of the case and so received the insurance proceeds from the car.³ Debtor now contends that DFS’s conduct not only deprived him of the proceeds and violated the automatic stay then in effect, but was the proximate cause of his inability to perform his chapter 13 plan.

The situation is complicated by Debtor’s filing on February 4, 2002, of another chapter 13 petition initiating case number 02-40816 (the “2002 Case”).⁴ The 2002 Case was subsequently dismissed by Order entered June 5 on the same basis that Debtor’s first case was dismissed. Debtor filed a motion to reinstate the 2002 Case on June 10, and that motion is set for hearing in July.

II. Discussion

A. Does Pendency of the 2002 Case Affect the Court’s Decision?

The first question that must be addressed is whether pendency of the 2002 Case affects resolution of the Motion. The Court concludes it does not create a procedural bar to reactivation of the prior case.

Section 350 of the Bankruptcy Code governs whether a case may be reopened. There is no language in that section that would prohibit reopening a prior case concerning a debtor after the filing by the debtor of a second case. The sole “requirement” for reopening a case is that the case has been closed. *In re King*, 214 B.R. 334 (Bankr. W.D. Tenn. 1997); *Armel Laminates, Inc. v.*

³ The Court finds nothing in the record to explain the discrepancy between the listing of First City Servicing Corp. as the lienholder on the Mitsubishi and its foreclosure by DFS. DFS was not listed by Debtor in the schedules or creditor matrix filed in this case.

⁴ Mr. West is again representing the Debtor. This reinforces the Court’s supposition that the cast of characters was the same last November as now, and Mr. Newton was the unnamed attorney mentioned by Mr. West during the November 20 hearing.

Lomas & Nettleton Company (In re Income Property Builders, Inc.), 699 F. 2d 963 (9th Cir. 1982).

The only logical reason why a pending case would bar the reopening of a prior case would be that a debtor may not have two cases pending simultaneously. Yet a debtor clearly may *commence* a case before the closing of a prior case. See *In re Whitmore*, 225 B.R.199 (Bankr. D. Idaho 1998). Indeed, to hold otherwise would impose a requirement for filing beyond those established by Congress in section 109 of the Code. Clearly this would be inappropriate under controlling Supreme Court authority. See *Toibb v. Radloff*, 501 U.S. 157 (1991); *Johnson v. Home State Bank*, 501 U.S. 78 (1991). It would be inconsistent with these cases as well as contrary to the plain meaning rule to read into section 350 a requirement that no new case be pending for reopening of a prior case to occur.⁵

B. Is Debtor Entitled to Relief on the Motion?

Having concluded that the Motion is not barred, the next issue is whether it should be granted. This turns on, first, whether the need to prosecute a violation of the automatic stay is an appropriate reason to provide relief under section 350, and, second, whether the facts presented by Debtor justify relief in the instant case.

1. Section 350 Allows Reopening of a Case to Prosecute a Stay Violation.

⁵ It is quite conceivable that a prior case might require further administration even after a new case has been commenced. The business undertaken in a case – from claim objections to asset collections – often outlasts the case’s vitality as a remedy for the debtor’s insolvency. If closing a case always ended the need for further administration, section 350 would be redundant. If a subsequent filing does not moot the need to finish items left open in a prior case and if a prior case may be reopened to complete administration, there is no reason a closed case may not be reopened because of a subsequent filing.

Section 350(b) of Code provides that a “case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause.” The bankruptcy court has broad discretion considering a motion brought under FED. R. BANKR. P. 5010 to reopen a case pursuant to section 350(b). *See* 3 COLLIER ON BANKRUPTCY ¶350.03 (15th ed. rev. 2002); *see also In re Shondel*, 950 F.2d 1301 (7th Cir. 1991).

While the Court has found no case in which section 350 was invoked in aid of bringing an action for violating the stay, there is no basis for so limiting the provision. On its face, section 350 authorizes reopening a case to afford relief to the debtor. While the situation may be rare where the relief required by the debtor will turn on the automatic stay,⁶ there is no reason to exclude the possibility that such a case may arise.⁷

2. The Instant Case

The final question is whether the Court should exercise its discretion to grant the Motion. In making this determination the Court must consider not only Debtor’s need for relief but also the equities, the substance of the Motion and the Debtor’s conduct leading to pursuit of the Motion. *See* 3 COLLIER ON BANKRUPTCY ¶350.03[5] (15th ed. rev. 2002); *see Hawkins v. Landmark Fin. Co. (In re Hawkins)*, 727 F.2d 324 (4th Cir. 1984).

The Court is hobbled in considering the Motion by an inadequate record. The November 20, 2001 and June 10, 2002 hearings consisted of representations by counsel (in the first, by Mr. West, in the second, by Mr. Newton). No testimony was provided in support of those representations. The

⁶Usually the debtor may look to section 524(a) as a replacement for the protection of the automatic stay. *See In re Tall*, 79 B.R. 291 (Bankr. S.D. Ohio 1987); 3 COLLIER ON BANKRUPTCY ¶ 350.03[4] (15th ed. rev. 2002).

⁷It may be that the debtor will need an order of the court declaring a post-petition, pre-case-closing foreclosure void. It does not appear that 11 U.S.C. § 524 would offer a remedy to a debtor wishing to clear title to property that was improperly foreclosed during the debtor’s chapter 13 case.

files for this case offer little help beyond showing that Debtor owed more for his car than it was worth and that DFS had no notice of Debtor's chapter 13 filing. Certainly the record is not sufficient for the Court to infer that notice to First City Servicing, Corp., could be imputed to DFS. Without notice, Debtor's proposed complaint against DFS suffers from the same deficiency as his potential case against AOL.

Furthermore, the record raises questions about Debtor's conduct leading up to the filing of the Motion. First, though Debtor contemplated pursuing a stay violation at the time of the November 20 hearing, his counsel for stay violation matters did not attend the hearing. Second, the "stay violation" with which the Debtor was then concerned was not pursued; a different stay violation is asserted in the Motion. Third, on November 20 Mr. West advised the Court that AOL's action had caused Debtor's chapter 13 to fail; on June 10 (and in the Motion) Mr. Newton blamed the failure on DFS. Fourth, though of limited relevance, the Court is also concerned by Debtor's repeat performance of his first case in the 2002 Case – filing, failure to make the first required payment, dismissal, motion to reinstate.

Moreover, and most significantly, Court questions the merit of the case against DFS – and so the substance of the Motion. Not only did DFS not receive notice, but the value of Debtor's car was less than the claim against it. Even if the notice hurdle is cleared,⁸ it is questionable whether Debtor suffered damage through the actions of DFS. Had DFS not acted, Debtor could only have recovered the insurance proceeds still burdened by DFS's (or First City Servicing Corp.'s) lien. The funds would have been cash collateral and not subject to disposition by Debtor without court order.

⁸The notice problem may be exacerbated through dismissal of Debtor's case. The Court cannot tell from the record when DFS made its affidavit of foreclosure or obtained the insurance money from the car. It may have occurred after dismissal of Debtor's case. Thus, even if DFS had notice of the case, it may have believed the case dismissed.

Such an order would, in turn, require a showing of adequate protection. Debtor's inability as of November 20 (and before) to perform his plan suggests he could not have provided adequate protection to DFS.

If Debtor was not damaged by DFS's actions, it is doubtful that the Court should grant the Motion. *See In re Still*, 117 B.R. 251, 254-5 (Bankr. E.D. Tex. 1990) (court refused to "ennoble" by award for attorneys fees a "de minimus [sic] violation of the stay" which did no actual damage to the debtor).

This Court is acutely aware of the importance of enforcing the automatic stay. No creditor or other party should doubt its willingness to impose the maximum appropriate sanctions when a debtor or the debtor's rehabilitation is adversely affected by a violation of the stay. However, the Court must be alert to abuse of the automatic stay as well. The stay is intended as a shield, not a sword. *See Winters v. George Mason Bank*, 94 F. 2d 130, 136 (4th Cir. 1996); *In re Edgins*, 36 B.R. 480, 484(B.A.P. 9th Cir. 1984); *In re Braniff*, 159 B.R. 117, 125 (E.D.N.Y. 1993). In enacting section 362 of the Code Congress did not intend to create a means for a debtor to profit at the expense of creditors – much less a fee-generating mechanism for attorneys.

In the case at bar the limited record offers hints that Debtor and his counsel could be abusing the stay. The Motion appears to have little purpose beyond serving as a basis for sanctions. If this is the reason the Motion was filed, the Motion is unquestionably an abuse of invocation of the stay. The Court is not prepared to conclude that Debtor's motives were so limited, however.⁹

On the other hand, there has surely been an insufficient showing – considering the record from November 20 as well as that of June 10 – to justify imposing on DFS the burden of defending

⁹Faced with clear abuse by a party or counsel of the automatic stay, the Court would be compelled to utilize the provisions of FED. R. BANKR. P. 9011 to deal with the offending individuals.

itself in an action for violation of the stay. Even an action based on an unintentional, technical - *de minimus* – violation of the stay is often resolved by the defendant through settlement to avoid incurrence of costs. Thus the Court may have no other opportunity than, in connection with the Motion, to determine whether the Debtor and counsel are improperly using the stay. Given the indicia that this may be the situation in the instant case, granting the Motion is therefore also inappropriate.

III. Conclusion

For the reasons stated above, the Motion must be denied. Nevertheless, the Court will not preclude Debtor from seeking relief under section 350 upon a more complete showing of entitlement. It is, therefore,

ORDERED that the Motion be, and it hereby is, DENIED without prejudice to refiling.

SIGNED this the ____ day of June, 2002.

D. MICHAEL LYNN
UNITED STATES BANKRUPTCY JUDGE