U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
ENTERED
TAWANA C. MARSHALL, CLERK
THE DATE OF ENTRY IS
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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

In Re:	§	
	§	
BMG INVESTMENTS, INC.	§	CASE NO. 03-20332-RLJ-7
	§	
Debtor	§	
VICTOR MONTES and TERRY MONTES,	§	
	§	
Plaintiffs	§	
	§	
v.	§	ADVERSARY NO. 03-2019
	§	
WELLS FARGO BANK, KEY COMMERCIAL MORTGAGE, and BMG INVESTMENTS, INC.	§	
	§	
Defendants	§	

MEMORANDUM OPINION

At hearing held May 20, 2003, the court considered three matters: the motion for violation of automatic stay filed by BMG Investments, Inc., the debtor; the requested dismissal of the Chapter 7 case submitted by Wells Fargo Bank and Key Commercial Mortgage; and the motion to remand filed by Wells Fargo Bank and Key Commercial Mortgage.

BMG, the debtor, is a defendant in a lawsuit filed June 14, 2002, in the 47th Judicial District Court, Randall County, Texas, styled *Montes v. Wells Fargo, Key Commercial Mortgage and BMG Investments, Inc.* (the "State Court Action"). On January 24, 2003, BMG filed a prior Chapter 7 case, Case No. 03-20066, which case was dismissed without prejudice on February 13, 2003, because of BMG's failure to file Schedules and a Statement of Financial Affairs.

At the time the prior bankruptcy was filed, the plaintiffs in the State Court Action, Victor and Terry Montes, were taking the deposition of Jody Barrett, a non-party witness. The bankruptcy was filed during a break in the deposition and, apparently relying on the imposition of the automatic stay, Jody Barrett did not return for completion of the deposition. Additionally, two other non-party witnesses, Melinda Barrett (wife of Jody Barrett) and Harold Jones (Jody Barrett's father-in-law), who had been subpoenaed to appear for their depositions on January 25, 2003, failed to appear for their scheduled depositions.

On February 28, 2003, plaintiffs Victor and Terry Montes, along with co-defendants in the State Court Action, Wells Fargo and Key Commercial, filed their joint motion to compel discovery and for imposition of sanctions against BMG's attorney, BMG, Jody Barrett, Melinda Barrett, and Harold Jones. Sanctions were sought because Jody Barrett, Melinda Barrett, and Harold Jones failed to appear for the completion of or for their respective depositions after the filing of and during the pendency of the prior bankruptcy case. A hearing on the motion to compel was set for March 27, 2003. On March 25, 2003, two days prior to the hearing, BMG filed its second bankruptcy, the case presently pending before the court. A hearing on the motion to compel was held. Wells Fargo states that it and Key Commercial announced to the state court that they were seeking nothing against BMG. The state court apparently took the matter under advisement.

On April 4, 2003, BMG filed a notice of removal, removing the State Court Action to the bankruptcy court. Wells Fargo, on April 17, 2003, filed its motion seeking to remand counts 1, 2, and 3 of the State Court Action.

In its response to BMG's motion for violation of the automatic stay, Wells Fargo also requests dismissal of BMG's bankruptcy case.

The underlying factual scenario that gives rise to the State Court Action concerns work allegedly performed by the Monteses in stuccoing an apartment complex owned by BMG and, at the time, mortgaged to Wells Fargo. Key Commercial is alleged to be the servicing agent on the mortgage.

The State Court Action contains five counts. Count 1 is based on an alleged fraudulent inducement and seeks recovery against Wells Fargo and Key Commercial; count 2 is based on breach of contract and seeks recovery against Wells Fargo and Key Commercial; count 3 is a quantum meruit claim against Wells Fargo and Key Commercial; count 4 is a breach of contract claim against BMG; and count 5 seeks liquidated damages against all defendants.

Kent Ries, the Chapter 7 Trustee, has joined the fray. The Trustee filed his response to Wells Fargo's and Key's motion for remand. The Trustee opposes dismissal of this case and seeks an opportunity to investigate the potential assets listed in BMG's Schedules. Such assets consist of alleged claims and causes of action held by BMG against Wells Fargo and Key Commercial, and "potentially" against Jody Barrett, Melinda Barrett, and Harold Jones. The Schedules also list a potential claim against Victor and Terry Montes, Brett D. Anders, Gilbert Arrazolo, and Susan Burnette for alleged stay violations. The listed claims against Wells Fargo, Key Commercial, the Barretts, and Harold Jones presumably arise out of the same set of facts and circumstances giving rise to and described in the State Court Action. Apart from these two claims, the only other assets listed by the Schedules are potential accounts receivable for unpaid rent of an approximate value of $60,000 and office equipment valued at $250. BMG lists no real

property. Other than the parties to the State Court Action, the only other listed creditors are Amarillo Globe News, with a claim of $2,000, and Office Depot, with a claim of $451. The Statement of Financial Affairs references the State Court Action, as well as a foreclosure by Wells Fargo.

BMG contends that all activity in the State Court Action was and is stayed by, first, the prior bankruptcy filing, and, second, by the filing of the present bankruptcy case. In addition, BMG argues that the State Court Action seeks property of the bankruptcy estate, that any potential recovery belongs exclusively to the bankruptcy estate, and that pursuit of such action violates the automatic stay. In effect, BMG requests that this court declare that any action taken to date by the Monteses, Wells Fargo, and Key, the plaintiffs and co-defendants in the State Court Action, is void and that all other action to be taken in the State Court Action should be stayed.

Wells Fargo and Key contend that they have taken no action in connection with the State Court Action that implicates the automatic stay. The depositions being taken at the time of the first bankruptcy filing were solely against non-debtor, non-party witnesses; that they sought no relief against BMG at the hearing on the motion for sanctions; and that BMG's contention that the State Court Action involves claims held by BMG's estate is meritless. Wells Fargo and Key contend that this bankruptcy case is filed in bad faith and should be dismissed.

The court finds there has been no stay violation. The court addresses BMG's motion solely within the context of specific conduct on the part of Wells Fargo, Key, and the Monteses. No stay violation occurred in connection with the depositions being taken at the time the first bankruptcy was filed. *See Arnold v. Garlock Inc.*, 278 F.3d, 426, 436 (5th Cir. 2001) (stay does

not apply to non-debtors). As soon as the filing occurred, the deponents apparently refused to proceed with the depositions. The mere desire to continue on with the depositions of such non-debtor, third-party witnesses, even if the stay arguably applies to prevent such depositions, does not rise to the level of a stay violation. Next, the motion for sanctions was filed after the prior case was dismissed and before the present case was filed. *See* 11 U.S.C. § 362(c)(2)(B) (2003) (stay does not apply after dismissal of case or before filing of case). Plus, there is no evidence that specific relief was sought against BMG at hearing on the motion. *See Haymaker v. Green Tree Consumer Discount Co.*, 166 B.R. 601, 607 (Bankr. W.D. Pa. 1994) (debtor bears burden of proving stay violation).

Finally, there is no indication from the original petition that the Monteses, as plaintiffs in the State Court Action, are seeking to recover property of the bankruptcy estate. The claims as pled make no allegation of fraudulent conveyances from BMG to third-parties or assertion of claims against third-party individuals as alter egos of BMG. BMG's reliance on *In re MortgageAmerica Corp.*, 714 F.2d 1266 (5th Cir. 1983), and *In the Matter of S.I. Acquisition, Inc.*, 817 F.2d 1142 (5th Cir. 1987), is misplaced. The court is not concerned about potential claims against officers, directors, or shareholders that are inferred from questions asked at a deposition. All relief requested by the motion for stay violation will be denied.

The court now turns to Wells Fargo's and Key's request for dismissal of this bankruptcy case. As noted, the Trustee opposes dismissal because he desires an opportunity to review BMG's assets, which consist solely of potential claims against Wells Fargo and Key and "potentially Jody Barnett, Melinda Barnett, and Harold Jones." The bankruptcy estate, which the Trustee represents, consists not only of BMG's assets but also its creditors. BMG's Schedules

list the Internal Revenue Service as a holder of a priority claim. BMG has no secured creditors and, as stated, other than the parties to the State Court Action, has but two other unsecured creditors. Any recovery by the Trustee would, for the most part, inure to the benefit of the very parties involved in the State Court Action.

This is a Chapter 7 case. As a corporation, BMG will not receive a discharge. The Statement of Financial Affairs reflects that BMG has no present officers or directors. The first bankruptcy was filed to halt the scheduled depositions of the Barretts and Harold Jones. The present bankruptcy case was filed to stop the hearing on the motion for sanctions. BMG failed to file schedules in the first case, hence it was dismissed without prejudice.

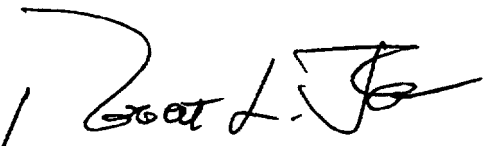
The removal of the State Court Action by BMG was made shortly after hearing on the motion for sanctions in state court and before ruling by the state court judge on the motion. This certainly lends credibility to Wells Fargo's contention that the hearing in state court on the motion for sanctions did not go well for the Barretts and Jones. The court can only conclude that the removal was yet another tactic employed to halt the proceedings in the State Court Action.

The two bankruptcy filings of BMG are nothing more than attempts to shield non-debtor individuals from the State Court Action. *See Mother African Union Methodist Church v. Conference of AUFCMP Church*, 184 B.R. 207, 223 (Bankr. D. Del. 1995) (dismissal of Chapter 7 case warranted where filing was litigation tactic to frustrate state court proceedings). The court discerns no legitimate purpose for the bankruptcy filings. *See Tamechi v. Frank (In re Tamechi)*, 229 F.3d 205, 207 (3d Cir. 2000) (once debtor's good faith is called into question burden shifts to debtor to prove good faith to avoid dismissal). BMG has no hard assets to administer. *See Mother African Union Methodist Church*, 184 B.R. at 223 (dismissal warranted where debtor has

no meaningful assets to administer). BMG has no officers or directors; it has no direction or anyone with authority to act. Given the circumstances, this case will be dismissed with prejudice to refiling. *See* 11 U.S.C. § 707(a); *id.* (dismissal warranted where bankruptcy has no legitimate purpose, and "no meaninful creditor interests" to protect).

Given dismissal of the bankruptcy case, the State Court Action, as removed to this court, will be remanded back to state court. *See Gagel v. Kingston-Greene Partners Ltd. (In re GWF Invs. Ltd.)*, 85 B.R. 771, 780-81 (Bankr. S.D. Ohio 1988) (remand of adversary appropriate when bankruptcy case is dismissed). All other relief requested will be denied.

DATED: June 27, 2003.



ROBERT L. JONES
UNITED STATES BANKRUPTCY JUDGE

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IN RE:	§	
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BMG INVESTMENTS, INC.,	§	CASE NO. 03-20332-RLJ-7
	§	
DEBTOR	§	

MEMORANDUM OPINION

The court considers the motion filed on May 7, 2003, by Wells Fargo Bank (Wells Fargo) and Key Commercial Mortgage (Key Commercial) seeking sanctions against counsel for the debtor BMG Investments, Inc. The motion was heard August 7, 2003; it relates to three other matters previously considered by the court – the motion for violation of the automatic stay filed by BMG Investments, Inc.; the requested dismissal of the Chapter 7 case by Wells Fargo and Key Commercial; and the motion to remand filed by Wells Fargo and Key Commercial.

On June 27, 2003, the court issued its memorandum opinion regarding the three matters. A copy of the June 27 memorandum opinion is attached hereto and incorporated herein. The findings and conclusions made therein are hereby adopted for purposes of the instant motion.

Wells Fargo and Key Commercial request sanctions in accordance with Rule 9011 of the Rules of Bankruptcy Procedure, specifically contending that BMG's motion for violation of automatic stay was meritless and filed for an improper purpose. In reviewing BMG's motion, the court notes that BMG made three substantive allegations.

First, by paragraphs 3 and 4 of the motion, BMG asserts that on January 25, 2003, the plaintiffs in the referenced state court action, Victor and Terry Montes, along with the co-defendants in the state court action, Wells Fargo and Key Commercial, proceeded with the taking of a deposition in a state court action involving the parties despite imposition of the automatic stay caused by the January 24, 2003, bankruptcy filing of BMG.

Second, BMG's motion alleges that the same parties, the Monteses, Wells Fargo, and Key Commercial, filed a motion to compel and for imposition of sanctions against BMG, its counsel, and certain principals of BMG – Jody Barrett, Melinda Barrett, and Harold Jones – "because Jody Barrett, Melinda Barrett, and Harold Jones failed to appear for the continuation of or for their respective depositions subsequent to the filing of and during the pendency of the previous bankruptcy."

Third, BMG's motion asserts that the Monteses, Wells Fargo, and Key Commercial, were, by the state court action, seeking to obtain control of property of the estate, specifically, claims the debtor alleged to hold against Jody Barrett, Melinda Barrett, and Harold Jones, who are officers and shareholders of BMG. BMG's motion requested that the court declare the actions taken by the Monteses, Wells Fargo, and Key Commercial to be void and to "render its direct order that all actions in the state court lawsuit are stayed unless and until relief from the automatic stay is obtained . . . ."

In effect, BMG asserted by its motion that Wells Fargo and Key Commercial (and the Monteses) violated the automatic stay imposed by section 362 of the Bankruptcy Code by (1) desiring to proceed with the depositions of non-debtor witnesses being taken on January 25, 2003,

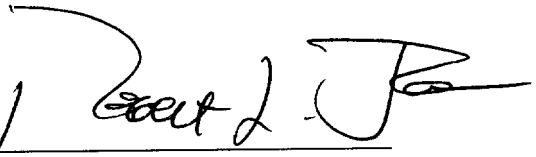
one day after the bankruptcy filing of BMG; (2) filing and prosecuting a motion to compel and for sanctions in a state court action; and (3) seeking to obtain property alleged to belong to the bankruptcy estate.

The allegations made by BMG's motion were indeed meritless. As set forth in the memorandum opinion, the third-party witnesses, whose depositions were being taken on January 25, 2003, refused to proceed with the deposition. As stated, "[t]he mere desire to continue on with the depositions of such non-debtor, third-party witnesses, even if the stay arguably applies to prevent such depositions, does not rise to the level of a stay violation." Memorandum Opinion at 5. With respect to the motion for sanctions, the court noted in its memorandum opinion that the motion for sanctions was filed after the prior bankruptcy case was dismissed and before the present case was filed. *Id.* Plus, there was no evidence provided that specific relief was sought against BMG at the hearing on the motion for sanctions.

Finally, no evidence was submitted that the Monteses, as plaintiffs, or Wells Fargo and Key Commercial, were asserting claims in the state court action that belonged to the bankruptcy estate. As the court concluded in the memorandum opinion, the two bankruptcy filings of BMG were done for the sole purpose of attempting to delay the pending state court action. Just as there was no legitimate purpose for the bankruptcy filing, there was no legitimate purpose for BMG's motion. The court therefore concludes that an award of sanctions is justified. The court has reviewed the affidavit of Brett Anders submitted in support of the motion for sanctions. By such affidavit, Mr. Anders, on behalf of the firm of Polsinelli, Shalton & Welte, asserts total fees and costs of $9,790.00. The court finds that an order directing payment of a portion of these fees is warranted

to deter repetition of such conduct or comparable conduct by others similarly situated. *See* Rule 9011(c)(2). The court finds that the sum of $3,500.00 is sufficient under the circumstances. The court will issue its order directing payment of such fees and expenses against Kent Canada and the firm with which he is affiliated, Hancock & Canada, L.L.P.

DATED: August 29, 2003.



ROBERT L. JONES
UNITED STATES BANKRUPTCY JUDGE