

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
Honorable Howard R. Tallman**

In re:)	
)	
KIMBERLY MICHELLE MAYHEW,)	Case No. 08-10628 HRT
)	Chapter 7
Debtor.)	
_____)	
)	
COLORADO CAPITAL BANK,)	
)	
Plaintiff,)	
)	
v.)	Adversary No. 08-1233 HRT
)	
KIMBERLY MICHELLE MAYHEW,)	
)	
Defendant.)	
_____)	

**ORDER RE: MOTION TO CONFIRM INAPPLICABILITY OF
STAY AND FOR LEAVE TO PROCEED IN STATE COURT**

This case comes before the Court on Colorado Capital Bank’s *Motion to Confirm Inapplicability of Stay and for Leave to Proceed in State Court* (docket #43) [the “Motion”].

On April 7, 2009, the Court heard evidence and argument from the parties with respect to the Motion. The Court has considered its file in this matter as well as the pleadings filed by the parties and their presentations made at hearing.

I. FACTUAL BACKGROUND

Dr. Mayhew, the Debtor in Case No. 08-10628 HRT and Defendant in this adversary case, previously filed a joint bankruptcy petition with Douglas Mayhew on May 10, 2007. She stipulated to the dismissal of that case after the U.S. Trustee filed a motion to dismiss the case under § 707(b). This Court entered its order dismissing that case on December 5, 2007. Less than two months later, on January 21, 2008, Dr. Mayhew commenced her current bankruptcy case under chapter 7.

In the prior joint case, Plaintiff Colorado Capital Bank [the “Bank”] filed an adversary complaint (Case No. 07-1618 HRT) to except its debt from the Debtor’s discharge under § 523(a)(2). That adversary case was dismissed by this Court when the underlying bankruptcy case was dismissed. On December 19, 2007, subsequent to that dismissal, the Bank filed an action in the Boulder County, Colorado, District Court seeking judgment against the Debtor based on the same allegations of fraud. On March 21, 2008, after the Debtor again filed for

bankruptcy protection, the Bank commenced this adversary proceeding based on the same factual allegations.

The Debtor was made a defendant in the Bank's action currently pending in Boulder County. She filed an answer in that case prior to the filing of her current bankruptcy case. On March 26, 2008, more than two months after Debtor's bankruptcy case was filed, the Bank made a motion in the Boulder County case seeking partial summary judgment against Dr. Mayhew based upon the pleadings. The court granted that motion and entered a partial summary judgment against Dr. Mayhew. Subsequently, Dr. Mayhew moved to vacate that judgment, claiming the protection of the automatic stay in bankruptcy. The state court vacated its judgment. Except for moving to have that judgment vacated, Dr. Mayhew has not taken part in the state court case since the filing of her bankruptcy petition.

In its current Motion, the Bank seeks to have this Court confirm that the automatic stay terminated, as a matter of law, 30 days after the filing of Dr. Mayhew's bankruptcy case. Alternatively, if the Court should find that the stay did not automatically terminate, the Bank seeks an order lifting the stay.

II. DISCUSSION

A. 11 U.S.C. § 362(c)(3)

Under § 362(c)(3), where a prior case was pending within one year of the new case, but was dismissed, the automatic stay expires with respect to the Debtor on the 30th day following the filing of the new case unless the debtor moves for an extension and the court makes an order to that effect within the 30 day period.¹ The exception is where a case is filed under another

¹ Section 362(c)(3) states in part:
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 refiled 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;

...
11 U.S.C. § 362(c)(3)(A) (emphasis added). There is disagreement as to whether the phrase "with respect to any action taken" limits the application of § 363(c)(3)(A) to circumstances where the creditor has commenced an action prior to the filing of the second case. *Compare In re Paschal*, 337 (continued...)

chapter after a § 707(b) dismissal. Dr. Mayhew stipulated to dismissal after the UST moved for dismissal under § 707(b). But, the Debtor did not refile under another chapter. Consequently, § 362(c)(3) applies. The automatic stay terminated under the statute, without the necessity of a court order, on February 20, 2008.

The Court takes Debtor's point that it is customary to file motions concerning the automatic stay in the main bankruptcy case. However, the Debtor clearly had adequate notice of the motion; responded timely; and appeared at the hearing. The Debtor cannot reasonably claim to have been deprived of due process in this regard. Moreover, this motion was filed under § 362(j) seeking a declaration that the stay was terminated. It is not a motion that even requires notice and a hearing. That is because it is not a matter that is subject to factual dispute. All of the facts necessary for the Court to issue the requested order are apparent from the face of the Court's own files. It was this Court's choice to afford the Debtor an opportunity to respond and be heard with respect to the Bank's Motion but it need not have done so.

The Debtor argued essentially equitable grounds in opposition to the Bank's motion. But, under these circumstances, those arguments can have no bearing on the Court's action. Under § 362(c)(3) the stay simply terminates automatically. The Court is not being asked to lift the stay, it is merely being asked to declare whether or not § 362(c)(3) has operated to automatically terminate the stay. The Court is directed by § 362(j) to provide such a declaration upon request by a party in interest. Even if the Court were persuaded that the absence of the automatic stay in this case would have negative effects upon the Debtor or confer an advantage upon the Bank, that could not change the Court's obligation to provide a declaration of the termination of the stay under § 362(c)(3) upon the Bank's request.

B. The *Curtis* Factors

Both the Bank and the Debtor argue the *Curtis* factors in their submissions to the Court. Because the stay terminated automatically and the Court is not being asked to lift a stay that is currently in existence, the Court need not reach any analysis of the *Curtis* factors.

Nonetheless, if the context were different and the Court were analyzing whether or not to lift the automatic stay, it would do so.

¹(...continued)

B.R. 274, 280 (Bankr. E.D. N.C. 2006) ("the action with respect to which the stay terminates is an 'action taken,' which means an action in the past, prior to the filing of the debtor's bankruptcy petition") with *In re James*, 358 B.R. 816, 820 (Bankr. S.D. Ga. 2007) (§ 362(c)(3)(A) is not limited to "actions taken prior to the commencement of the current case."). But that is not a relevant issue here because the Bank did commence its state court action before the Debtor filed her current bankruptcy case.

The *Curtis* factors from *In re Curtis*, 40 B.R. 795, 799-800 (Bankr. D. Utah, 1984), are commonly used by bankruptcy courts as an aid to determine whether the stay should be lifted to allow litigation to proceed in another court. Those factors are follows:

1. Whether the relief will result in a partial or complete resolution of the issues.

This factor weighs slightly in favor of the Debtor because the state court cannot make the § 523 dischargeability determination and an element of the controversy will remain for resolution in this Court. But that's a relatively minor matter because the parties will be bound by the state court factual determinations and that will significantly reduce the complexity of the case once it comes back to this Court.

2. The lack of any connection with or interference with the bankruptcy case.

This factor weighs in favor of the Bank. There is no interference with the bankruptcy case here. It does not matter whether the litigation goes forward in state court or this Court, the Debtor is going to litigate these issues. Defending in state court is little different than defending the same allegations in this Court.

3. Whether the foreign proceeding involves the debtor as a fiduciary.

This factor is inapplicable.

4. Whether a specialized tribunal has been established to hear the particular cause of action and that tribunal has the expertise to hear such cases.

This weighs in favor of the Debtor. The issues fall well within the expertise of the state court, but it is no better equipped to hear them than this Court.

5. Whether the debtor's insurance carrier has assumed full financial responsibility for defending the litigation.

This factor is neutral. The Debtor is the one who bears the financial responsibility for the litigation. But she either has to defend in the state court or in this one. The financial burden is the same.

6. Whether the action essentially involves third parties, and the debtor functions only as a bailee or conduit for the goods or proceeds in question.

Here, the Debtor is not a mere bailee, but is the real party in interest, so this factor weighs in favor of the Debtor.

7. Whether litigation in another forum would prejudice the interests of other creditors, the creditors' committee and other interested parties.

This factor weighs in favor of the Bank. Everyone needs to get these matters litigated and decided. It likely makes little difference which forum. The only prejudice comes from continued delay in having these matters finally heard.

8. Whether the judgment claim arising from the foreign action is subject to equitable subordination under Section 510(c).

This factor is inapplicable.

9. Whether movant's success in the foreign proceeding would result in a judicial lien avoidable by the debtor under Section 522(f).

The concern here is the futility of allowing an action to go forward in another forum to establish a lien that would just be avoided under § 522(f). Since that is not a concern here, that factor weighs in favor of the Bank.

10. The interest of judicial economy and the expeditious and economical determination of litigation for the parties.

This factor weighs substantially in favor of the Bank. To exclude Dr. Mayhew from the state proceedings risks inconsistent rulings and means both courts have to address the same merits issues with different parties. If Dr. Mayhew is involved in the state court case, only that court needs to address the merits. The binding effect of the fact determinations made by the state court will substantially limit the litigation that needs to take place in this Court.

11. Whether the foreign proceedings have progressed to the point where the parties are prepared for trial.

This factor weighs somewhat in favor of the Bank. The state case and the adversary case in this Court have taken parallel tracks. Debtor has had an opportunity to conduct discovery and participate in Doug Mayhew's deposition in this case. The parties in the state court action have done their discovery and have been given a trial date. All parties should be substantially prepared for trial. It is clear that a trial date was set by the state judge without input from Debtor's

counsel. Also, with all parties participating in the state court action, there may be a need to reopen discovery in that court. This Court has every confidence that these are issues that will be topics of discussion in the state court and that they will be fairly addressed.

12. The impact of the stay on the parties and the “balance of hurt.”

This factor weighs in favor of the Debtor. The Bank saves time and money by litigating the merits with all interested parties in one forum. The Debtor will be inconvenienced. She will have to litigate the merits in state court then, if she loses on the merits in that court, she will have to defend the dischargeability action in this Court. However, here the issue would center on the preclusive effect of the state court judgment and whether the Bank’s § 523 dischargeability case has been established by the findings made in the state court. There is no doubt that the Debtor would benefit from combining a trial on the merits with the unique § 523 issues all in this one forum.

Application of the *Curtis* factors is not accomplished by a mechanical tally of the factors. The *Curtis* factors are simply issues that a bankruptcy court should consider in making a determination whether to lift the automatic stay and allow an action to go forward in another forum. Not all factors necessarily receive the same weight. In this case some factors weigh in favor of each party. But the most important factor is the issue of judicial economy and avoiding the risk of inconsistent rulings.

Court rules concerning joinder of parties and claims reveal a strong public policy interest in the avoidance of piecemeal litigation. For the Debtor to be separated out from the case going forward in the state court and to have a nearly identical trial conducted in this Court is exactly the type of situation that the joinder rules seek to avoid. Not only does it raise the specter of inconsistent rulings, it would be an unnecessary imposition on the courts, the parties and the witnesses. So, even if § 362(c)(3) were not applicable to this case such that the automatic stay did not terminate 30 days following the petition date, the Court would lift the stay to allow the Debtor to fully participate in the state court case.

Moreover, the Court understands the Bank’s concerns. It had originally begun an action in this Court during the Debtor’s prior joint case. That case was dismissed when the joint case was dismissed. Because there is a motion to dismiss pending in the Debtor’s current bankruptcy case, the Bank’s concern over that risk cannot be discounted. To allow the Bank to proceed against the Debtor as part of its current state court action and without interference from the Debtor’s bankruptcy case allows the primary issues to be addressed and decided in a single forum with all of the interested parties present. That is as it should be.

In accordance with the above discussion, it is

ORDERED that Colorado Capital Bank's *Motion to Confirm Inapplicability of Stay and for Leave to Proceed in State Court* (docket #43) is GRANTED. The Court hereby confirms that the automatic stay in this case terminated with respect to the Debtor, under 11 U.S.C. § 362(c)(3), on the 30th day following the filing of Debtor's bankruptcy Case No. 08-10628 HRT and is no longer in effect. It is further

ORDERED that this adversary case shall be held in abeyance until after a final judgment is entered in Case No. 07CV1112 pending in the Boulder County, Colorado, District Court.

Dated this 9th day of April, 2009.

BY THE COURT:



Howard R. Tallman, Chief Judge
United States Bankruptcy Court