

IT IS SO ORDERED.

Dated: February 13, 2015  
02:53:59 PM

  
*Kay Woods*  
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Kay Woods  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO

IN RE:

PRESTON L. GEALY and  
ANTONETTE M. GEALY,

Debtors.

\* \* \* \* \*

PRESTON L. GEALY,

Plaintiff,

v.

CALIBER HOME LOANS,

Defendant.

CASE NUMBER 10-43693

ADVERSARY NUMBER 14-4066

HONORABLE KAY WOODS

\*\*\*\*\*  
ORDER DENYING MOTION TO STAY ADVERSARY PROCEEDING  
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This cause is before the Court on Motion Pursuant to  
Bankruptcy Rule 5011 to Stay the Adversary Proceeding and All Case

Deadlines ("Motion to Stay") (Doc. 10) filed by Defendant Caliber Home Loans, Inc. ("Caliber") on February 2, 2015. Caliber requests the Court to stay this adversary proceeding pending resolution of a motion to withdraw the reference filed with the United States District Court for the Northern District of Ohio ("District Court") in Case No. 4:15-cv-00141 ("District Court Action"). On February 11, 2015, Plaintiff/Debtor Preston L. Gealy filed Response in Opposition to Defendant's Motion to Stay the Adversary Proceeding (Doc. 13).

The Court held a hearing on the Motion to Stay on February 12, 2015, at which appeared Philip D. Zuzolo, Esq. on behalf of Mr. Gealy and Robert C. Folland, Esq. on behalf of Caliber. Following arguments of counsel, the Court orally denied the Motion to Stay. The Court enters this Order to memorialize that ruling.<sup>1</sup>

By way of background, on September 29, 2010, Mr. Gealy, together with Antonette M. Gealy, filed (i) a voluntary petition pursuant to chapter 13 of the Bankruptcy Code; and (ii) Chapter 13 Plan (Doc. 2), which provides for a 60-month duration. If the Debtors continue to make their monthly payments under the confirmed Chapter 13 Plan, they will be entitled to receive a discharge before the end of this calendar year.<sup>2</sup>

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<sup>1</sup> To the extent the Court's oral ruling and this Order are inconsistent, this Order controls.

<sup>2</sup> The Chapter 13 Plan was confirmed on November 12, 2010 (Doc. 17). Although the Debtors modified the Chapter 13 Plan, its duration remains 60 months.

On December 18, 2014, Mr. Gealy filed Complaint (Doc. 1), which commenced this adversary proceeding. The Complaint contains a single cause of action alleging that Caliber willfully violated the automatic stay in 11 U.S.C. § 362(a)(6) by impermissibly attempting to collect a debt from Mr. Gealy.<sup>3</sup>

On January 20, 2015, Caliber, by and through David C. Nalley, Esq., filed Answer (Doc. 5). On that same date, Caliber, by and through Mr. Folland, filed a motion requesting an extension of time to February 3, 2015 to file an answer or other responsive pleading (Doc. 6). Although the motion to extend time did not address the previously filed Answer,<sup>4</sup> on January 29, 2015, the Court granted Caliber an extension of time through February 3, 2015 to file an answer or other responsive pleading (Doc. 7).

In the Motion to Stay, Caliber states that this proceeding and the District Court Action are factually identical, involve identical parties and arise out of the same transaction and occurrence.<sup>5</sup> Caliber further states that, on January 30, 2015, it

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<sup>3</sup> The automatic stay in § 362 of the Bankruptcy Code is fundamental to the bankruptcy process because it protects debtors from collection efforts by individual creditors and permits the orderly distribution to all creditors. See, *infra* at 8.

<sup>4</sup> On February 2, 2015, Mr. Folland filed Notice of Withdrawal of (i) Answer to Plaintiffs' [sic] Adversary Complaint and (ii) Appearance of Attorney Nalley (Doc. 9), in which he indicated that he and Mr. Nalley mistakenly believed each had been exclusively retained to represent Caliber in this proceeding. A corrective entry was entered the following day stating that the Notice of Withdrawal was procedurally incorrect and would not be addressed by the Court.

<sup>5</sup> The District Court Action was filed in the Court of Common Pleas of Mahoning County, Ohio on December 9, 2014 and removed to the District Court on January 23, 2015. (Mot. to Stay at 2.)

filed, in the District Court Action, a motion to withdraw the reference and consolidate this proceeding and the District Court Action ("Motion to Withdraw"). Caliber states that the Motion to Stay serves the purposes of "judicial efficiency and resource conservation" pending resolution of the Motion to Withdraw. (Mot. to Stay at 3.)

In his Response, Mr. Gealy counters that, although based on the same facts as this proceeding, the District Court Action asserts three causes of action - (i) invasion of privacy; (ii) violation of the Telephone Consumer Protection Act; and (iii) violation of the Fair Debt Collection Practices Act - that are different from the alleged violation of the automatic stay, which is the single cause of action in this adversary proceeding. Mr. Gealy argues that this proceeding should not be stayed because its resolution will have no dispositive effect on the District Court Action. He further states the parties have already begun discovery in this proceeding and can continue to attempt to resolve this proceeding without regard to the District Court Action. Finally, Mr. Gealy argues that staying this proceeding could delay the closing of his bankruptcy case.

Federal Rule of Bankruptcy Procedure 5011 states, in pertinent part:

(a) Withdrawal. A motion for withdrawal of a case or proceeding shall be heard by a district judge.

\* \* \*

(c) Effect of Filing of Motion for Withdrawal or Abstention. The filing of a motion for withdrawal of a case or proceeding or for abstention pursuant to 28 U.S.C. §1334(c) shall not stay the administration of the case or any proceeding therein before the bankruptcy judge except that the bankruptcy judge may stay, on such terms and conditions as are proper, proceedings pending disposition of the motion. . . .

FED. R. BANKR. P. 5011(a), (c) (2015). The Advisory Committee Notes to Rule 5011 state, "Motions for withdrawal pursuant to 28 U.S.C. § 157(d) . . . , like all other motions, are to be filed with the clerk . . . . If a bankruptcy clerk has been appointed for the district, all motions are filed with the bankruptcy clerk." FED. R. BANKR. P. 5011 (Advisory Comm. Notes).

"Although BR 5011(c) provides little guidance as to the circumstances under which a bankruptcy court should stay a proceeding, it is clear from the plain language of the Rule that the granting of a stay should be the exception – not the general rule." *Antioch Co. Litig. Trust v. Miller (In re Antioch Co.)*, 435 B.R. 493, 496 (Bankr. S.D. Ohio 2010). "While the term 'may' in [Rule 5011(c)] appears to grant the bankruptcy court broad discretion in determining such a motion, the case law applying the Rule has limited the circumstances under which a stay may be granted to essentially the circumstances under which a preliminary injunction would be appropriate under Federal Rule of Civil Procedure 65." *Id.* at 497. Accordingly, the bankruptcy court

should grant a motion to stay if the movant can demonstrate: "(1) the likelihood that the pending motion to withdraw will be granted (i.e. likelihood of success on the merits); (2) that the movant will suffer irreparable harm if the stay is denied; (3) that the non-movants will not be substantially harmed by the stay; and (4) the public interest will be served by granting the stay." *Id.* (citations omitted).

Mr. Gealy primarily argues in his Response that the Motion to Withdraw is improper, both procedurally and substantively. Mr. Gealy is correct that, while a motion to withdraw the reference is heard by the district court, the motion is to be filed in the bankruptcy court and then transmitted to the district court. Although this Court cannot know how the District Court will choose to address this procedural deficiency, the fact that a motion to withdraw has not yet been properly filed supports denial of the Motion to Stay.

The Court next finds that Caliber will not suffer irreparable harm in the absence of a stay. Caliber states that granting the Motion to Stay will save the parties the costs of conducting discovery, drafting pleadings and attending hearings. However, the parties will incur the same costs relating to discovery, pleadings and attending hearings regardless of whether the alleged stay violation is heard before this Court or the District Court. Furthermore, this Court's Adversary Case Management Initial Order

(Doc. 2) states that, unless ordered otherwise, discovery is to be completed 120 days following service of the Summons and the Complaint. Based upon the Notice of Appearance by Mr. Nalley (Doc. 4), service was effective at least by December 30, 2014. As a consequence, discovery is to be completed no later than April 29, 2015 – approximately two-and-one-half months from now. In fact, Mr. Gealy represented that he has served Caliber with discovery requests. Because discovery is under way and the Answer has already been filed, this Court finds that Caliber will not suffer irreparable harm if the Motion to Stay is denied. In fact, the parties may save costs by resolving this proceeding in an expeditious manner irrespective of the District Court Action.

The third factor in determining whether to grant a stay is whether Mr. Gealy will be substantially harmed by imposition of a stay. The Debtors' Chapter 13 Plan is to be completed before the end of this calendar year. Until this adversary proceeding is resolved, the Court cannot close the Debtors' chapter 13 case. Because granting the Motion to Stay could significantly delay closing of the Debtors' bankruptcy case, the Court finds that Mr. Gealy could be substantially harmed if this proceeding is stayed.<sup>6</sup>

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<sup>6</sup> The Court notes that, had Mr. Gealy filed a motion for contempt for willful violation of the automatic stay, rather than this adversary proceeding, resolution of such a motion would have permitted a more expeditious resolution of this matter.

Finally, the Court finds that the public interest would not be served by granting the Motion to Stay. The automatic stay is a creation of the Bankruptcy Code and it comes into existence immediately upon the filing of a bankruptcy petition. See *In re Benchmark Capital, Inc.*, 490 B.R. 566, 569-70 (Bankr. E.D. Tenn. 2013). Generally speaking, the automatic stay continues throughout a debtor's bankruptcy case and is intended to promote the equal treatment of creditors. Enforcement of the automatic stay is fundamental to the proper administration of a bankruptcy case, and disputes concerning the automatic stay are core proceedings that bankruptcy courts adjudicate on a routine basis.<sup>7</sup> For these reasons, there is no public interest that would be served in having the alleged violation of the automatic stay heard before the District Court.

Furthermore, hearing this cause of action together with the causes of action for invasion of privacy and violations of the Telephone Consumer Protection Act and the Fair Debt Collection Practices Act would not promote judicial economy because each cause of action has distinct elements. It is not disputed that the District Court Action and this adversary proceeding are based on the same underlying facts; however, the elements of the proceedings

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<sup>7</sup> Caliber admits that this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). (Compl. ¶¶ 2-3; Ans. ¶ 1.)

are different and they involve different damages.<sup>8</sup> A debtor seeking damages for violation of the automatic stay pursuant to § 362(k)(1) need only establish that "(1) the actions taken were in violation of the automatic stay; (2) the violation was willful; and (3) the violation caused actual damages." *In re Glanzer*, Case No. 07-17109, 2008 Bankr. LEXIS 1141, at \*4 (Bankr. N.D. Ohio Apr. 2, 2008) (citations omitted). Mr. Gealy could establish each of these elements irrespective of his claims in the District Court Action. Moreover, judicial economy would not be served by staying this adversary proceeding because, as stated above, it is already substantially under way. As a consequence, granting the Motion to Stay would not promote the public interest.

For the reasons set forth above, the Court hereby denies the Motion to Stay. If Caliber chooses to file an amended answer,<sup>9</sup> it is hereby ordered to do so no later than February 26, 2015.

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<sup>8</sup> Section 362(k) provides that "an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages." 11 U.S.C. § 362(k) (2015).

<sup>9</sup> At the hearing on the Motion to Stay, Mr. Folland represented that Caliber anticipated amending its Answer.