

The court incorporates by reference in this paragraph and adopts as the findings and orders of this court the document set forth below. This document has been entered electronically in the record of the United States Bankruptcy Court for the Northern District of Ohio.



Dated: November 27 2006

A handwritten signature in blue ink, appearing to read "Mary Ann Whipple".

Mary Ann Whipple  
United States Bankruptcy Judge

**UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
WESTERN DIVISION**

<b>In Re:</b> Tania Seiler-O'Brien	)	<b>Case No.</b> 06-32800
	)	
	)	<b>Chapter 13</b>
<b>Debtor.</b>	)	
	)	<b>Judge Mary Ann Whipple</b>
	)	
	)	<b>ORDER RE RELIEF FROM</b>
	)	<b>STAY</b>

The court held a preliminary hearing on November 22, 2006, on the Motion for Relief from Stay (the "Motion") filed by Mortgage Electronic Systems, Inc. as nominee for Moore Financial Enterprises ("Movant") [Doc. #15].

This case was commenced on October 6, 2006, and is Debtor's third Chapter 13 filing since April 4, 2005. All occurred on the eve of Movant's scheduled state court foreclosure sales of Debtor's real property. The third filing was a complete filing, including a proposed chapter 13 plan and certificate of credit counseling. The Motion was filed on October 27, 2006. The basis for the Motion was 11 U.S.C. § 362(d)(4), which was added to Bankruptcy Code by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2006. Among other things, § 362(d)(4) provides

for special relief where a Debtor's petition is determined to be "part of a scheme to delay, hinder and defraud creditors" that involved multiple bankruptcy filings affecting real property.

On November 13, 2006, Debtor's attorney filed a motion to continue the preliminary hearing. The stated ground for the continuance was that Debtor could not be present. The reason for her inability to be present was not identified. The Bankruptcy Code requires preliminary hearings on motions for relief from stay to be conducted within 30 days of filing, 11 U.S.C. § 362(e)(1), absent which the stay will be terminated by automatic operation of the statute unless the court orders the stay continued in effect after notice and hearing based on a finding that there is a reasonable likelihood that the Debtor will prevail on the motion. Due to this provision, the court will not continue preliminary hearings on motions for relief from stay unless the moving creditor waives the time limit in § 362(e) or the statutory conditions for a finding of reasonable likelihood to prevail after a preliminary hearing are met. By corrective entry, the clerk notified Debtor's counsel that the motion to continue was defective because it did not indicate the creditor's consent to a continuance. Counsel also filed an opposition to the Motion on the same day.

Thereafter, by letter mailed directly to the judge, Debtor personally requested that the hearing be continued for 30 days. *See* Doc. #28. The letter was dated November 18, 2006, and received by the judge on the morning of November 22, 2006, before the scheduled hearing time of 9:30 a.m. It has since been docketed by the Clerk. The basis for Debtor's direct request was different than the request made by her lawyer, namely that Debtor had fired her lawyer and was meeting with a new, unidentified lawyer on November 27, 2006, to discuss whether she should either "refile it [her case] or Continue [sic] it or her dismiss it." Doc. #28. This letter was preceded by several conversations with Clerk's office staff, in which Debtor was informed that the preliminary hearing would go forward. On November 20, 2006, Debtor's attorney, who is an experienced Chapter 13 practitioner, filed a motion to withdraw from representing her, reporting that his client had fired him. Doc. #29. This was confirmed by an attachment to Debtor's November 18, 2006, letter, in which she stated she had dismissed her lawyer.<sup>1</sup> This letter shows no grounds demonstrating that she is likely to prevail on the Motion.

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Debtor's first two Chapter 13 cases, 05-33102 filed on April 4, 2005, and 05-76326, filed on October 15, 2006, were filed by a different lawyer than this one. They were not listed on Debtor's petition in this case, which was signed under penalties of perjury, and counsel in this case reported that he was not aware of these two other cases. Doc. # 28.

At the time set for the preliminary hearing on November 22, 2006, counsel for Movant appeared by telephone and confirmed, due to the circumstances of this case as being Debtor's third Chapter 13 filing on the eve of state court foreclosure sales, that Movant would not waive the time for conducting a preliminary hearing under § 362(e)(1). Counsel for Debtor appeared in person, because no order had been signed authorizing his withdrawal, but communicated to the court that he had been fired by his client and was not authorized by Debtor to act or speak on her behalf. Debtor did not appear at the hearing.

On a motion for relief from stay, the movant has the burden of initially demonstrating its prima facie entitlement to relief on the grounds asserted. *See In re Webber*, 314 B.R. 1, 5 (Bankr. N.D. Okla. 2004); *Mooney v. Gill*, 310 B.R. 543, 547 (N.D. Tex. 2002). The facts set forth in the Motion are confirmed by the court's dockets in the three Chapter 13 cases that Debtor has filed in the last 18 months. The court takes judicial notice of its own dockets and case files. In addition, the court takes judicial notice of the Chapter 13 Trustee's website, which shows that Debtor has failed to make any proposed payment of \$1,162 due under her proposed plan; her first payment of \$1,162 was due by November 6, 2006. *See* 11 U.S.C. § 1326(a)(1). None have been made. Moreover, the Chapter 13 Trustee has filed a motion to dismiss under 11 U.S.C. § 521(e)(2)(A)(i) due to Debtors' failure to provide her most recently filed tax return. Debtor has also sought the continuance of the first meeting of creditors and the hearing confirmation, despite the fact that this is her third Chapter 13 case in 18 months.

All of these facts constitute a prima facie showing of an intent by Debtor to hinder and delay Movant in the exercise of its rights. However, Congress has written the statute in the conjunctive, requiring a showing of a "scheme to hinder, delay and [emphasis added] defraud creditors." *Cf.* 11 U.S.C. § 727(a)(1)(disjunctive hinder, defraud or delay). A "scheme" is defined by Black's Law Dictionary (8<sup>th</sup> Ed. 2004) as "an artful plot or plan" or "a connected or orderly arrangement" and "defraud" is defined by Black's Law Dictionary (8<sup>th</sup> Ed. 2004) as "to cause injury or loss by deceit." In turn, "deceit" is defined as giving a false impression or making a false statement of fact intentionally or recklessly. The record shows that Debtor is again grasping at the relief available under Chapter 13 to prevent a state court foreclosure, as most Chapter 13 Debtors do. But the court record, which is all that Movant is relying on, does not show the level of planned connectedness or fraudulent intent to constitute a prima facie scheme to defraud as required for relief under § 362(d)(4); examples of a planful scheme to defraud could be tag team serial filings by co-

owners of property under certain circumstances or a series of bare bones filings with unpaid filing fees. Debtor's filing was essentially complete, including a plan, schedules and certificate of credit counseling. The court offered to continue the hearing to allow development of the record on this point, however, Movant declined. Thus, the court cannot find that there has been a prima facie showing of the grounds for relief under 11 U.S.C. § 362(d)(4) because it does not find that a "scheme to defraud" has been shown by this record distinct from hindrance and delay of Movant's exercise of its legal rights.

The court does find from the record that there has been a prima facie showing of grounds for relief on the basis of cause under 11 U.S.C. § 362(d)(1); the cause shown is delay and lack of good faith in the commencement and prosecution of her third Chapter case in the last 18 months, *see In re Laguna Associates Ltd. Partnership*, 30 F.3d 734, 737-38 (6<sup>th</sup> Cir. 1994). Debtor has the burden of proving that she is entitled to the stay and thus of lack of cause. *See* 11 U.S.C. § 362(g). She has not contested any of the facts set forth in the Motion, in writing or otherwise. No payments have been made to the Chapter 13 Trustee and she has sought to continue both the confirmation hearing and the first meeting of creditors. Moreover, as this is Debtor's second filing in less than a year and the second case was voluntarily dismissed on January 18, 2006, the automatic stay has statutorily terminated already to the extent provided by 11 U.S.C. § 362(c)(3)(A). The court will grant the Motion as to relief from stay under § 362(d)(1), but not as to the additional relief sought under § 362(d)(4).

No basis has been shown upon which the court can find that Debtor will be likely to prevail on Movant's request for relief from the automatic stay. Moreover, insufficient grounds for a continuance have been shown by Debtor such that the court would be willing to consider same under 11 U.S.C. § 105. Debtor's decision to fire her lawyer appears motivated by a desire to obtain further delay in the proceedings, as the initial case filing was complete, including a proposed Chapter 13 plan. The two motions to continue the hearing will also be denied by separate order of the court.

**IT IS, THEREFORE, ORDERED:**

The Motion [Doc. #15] is granted and the automatic stay imposed by § 362 of the Bankruptcy Code is terminated with respect to Movant, its successors, and assigns to the extent not previously terminated by operation of the statute.