

In re Lewis Edward Graham, Case No. 07-62339-fra11

10/17/2008 FRA

Unpublished

Debtor filed a chapter 13 petition on July 9, 2007, to which a creditor objected on the grounds that Debtor did not qualify for chapter 13 relief under Code § 109(e) and that the petition was filed in bad faith. The bankruptcy was thereafter dismissed on Debtor's motion. Debtor filed a second bankruptcy case, under chapter 11, on August 19, 2007.

Because Debtor's second case was filed within one year of a previous case which was pending during that period but dismissed, the automatic stay would terminate 30 days after the petition date, Code § 362(c)(3)(A), unless a party in interest moved to extend the stay. Code § 362(c)(3)(B). The Debtor moved to extend the stay, a hearing was held, and the Court denied the motion.

A creditor with both secured and unsecured claims against the Debtor filed a "Motion for Order Confirming Automatic Stay is Not in Effect" under Code § 362(j). The aim of the motion was to determine the effect of the court's previous order declining to extend the automatic stay. At the hearing on the motion, the creditor argued that the Court should adopt the "minority" position that the stay was terminated at the end of the 30-day period in its entirety. The Court, however, adopted the "majority" position in ruling that Code § 362(c)(3)(A) is unambiguous and that the stay is terminated at the end of the 30-day period only with respect to the debtor and property of the debtor, not as to property of the estate. Moreover, the stay is only terminated with respect to an "action" taken by a creditor pre-petition. As the moving party had no action pending against the Debtor or property of the Debtor at the petition date, it could enforce its state law rights only with leave of the Bankruptcy Court under Code § 362(d).

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case
LEWIS EDWARD GRAHAM, II,) No. 07-62339-fra11
Debtor.) MEMORANDUM OPINION

Grand Pacific Financing Corp. ("GPFC") filed a motion under § 362(j)¹ seeking an order confirming that the automatic stay of § 362(a) has been terminated. At issue is the effect of an order terminating the automatic stay under § 362(c)(3)(A), which provision was added as part of the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA"). GPFC and the Debtor filed memoranda arguing their respective positions. A hearing was held on October 7, 2008, at the conclusion of which, the matter was taken under advisement.

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¹Unless otherwise indicated, all section references are to the Bankruptcy Code at 11 U.S.C. §101 *et seq.*

1 BACKGROUND

2 Debtor filed a chapter 13 bankruptcy case on July 9, 2007 (07-
3 61896-fra13). A creditor filed a motion to dismiss the case on the
4 grounds that Debtor did not qualify for chapter 13 relief pursuant to §
5 109(e) and that the case was not filed in good faith. Debtor thereafter
6 moved to dismiss and an order of dismissal was entered on July 25, 2007.
7 Debtor filed a second bankruptcy case on August 19, 2007, under chapter
8 11.

9 GPFC has filed two proofs of claim in this case: Claim #17
10 (amended) in the amount of \$4,095,524, secured by various real and
11 personal property of the Debtor, and Claim #18 (amended) in the amount of
12 \$1,588,872, also secured by real and personal property of the Debtor.
13 The claims are based on personal guarantees made by the Debtor for loans
14 made by GPFC. When Debtor filed bankruptcy, the Debtor's property
15 securing GPFC's loans became property of Debtor's bankruptcy estate.

16 Because the Debtor's present case was filed within one year of a
17 previous case which was pending during that period but dismissed,
18 extension of the automatic stay beyond a 30-day cutoff date imposed by
19 the Bankruptcy Code required the filing of a motion by a party in
20 interest. § 362(c)(3)(B). Debtor did so on September 5, 2007. At a
21 hearing on September 13, 2007, the Court issued findings from the bench
22 denying Debtor's motion to extend the automatic stay. GPFC has now filed
23 a "Motion for Order Confirming Automatic Stay is Not in Effect" pursuant
24 to § 362(j), seeking a determination that the automatic stay was
25 terminated with respect to property of the Debtor as well property of the
26 bankruptcy estate.

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2 DISCUSSION

3 Section 362(c) (3) provides in relevant part:

4 (3) if a single or joint case is filed by or against
5 debtor who is an individual in a case under chapter 7, 11,
6 or 13, and if a single or joint case of the debtor was
7 pending within the preceding 1-year period but was
8 dismissed, other than a case refiled under a chapter other
9 than chapter 7 after dismissal under section 707(b)--

10 (A) the stay under subsection (a) **with respect to any**
11 **action taken** with respect to a debt or property securing
12 such debt or with respect to any lease shall terminate
13 **with respect to the debtor** on the 30th day after the
14 filing of the later case;

15 (B) on the motion of a party in interest for
16 continuation of the automatic stay and upon notice and a
17 hearing, the court may extend the stay in particular cases
18 as to any or all creditors (subject to such conditions or
19 limitations as the court may impose) after notice and a
20 hearing completed before the expiration of the 30-day
21 period only if the party in interest demonstrates that the
22 filing of the later case is in good faith as to the
23 creditors to be stayed; [Emphasis added].

24 Actions Subject to Stay Termination

25 As mentioned previously, the Court declined to extend the
26 automatic stay after notice and a hearing held on September 17, 2007.
27 GPFC urges the Court to adopt the minority position regarding the extent
28 of the stay termination, and rule that § 362(c) (3) (A) terminated the stay
29 in its entirety. See e.g. *In re Curry*, 362 B.R. 394, 400-02 (Bankr.
30 N.D.Ill. 2007), *In re Jupiter*, 344 B.R. 754, 759 (Bankr. D.S.C. 2006).
31 These courts have ruled that the language of § 362(c) (3) (A) is ambiguous,
32 i.e. is capable of more than one interpretation, that legislative history
33 indicates that Congress intended the automatic stay to terminate in its
34 entirety, and that interpreting the statute in this manner is consistent

1 with other provisions added by BAPCPA and with the broader context of the
2 statute as a whole. These courts find that the phrase "with respect to
3 the debtor," defines not the property for which stay protection is
4 terminated, but *which* debtor is affected by stay termination. The
5 example given is a joint bankruptcy case where only one of the co-debtors
6 had a case dismissed within the previous year. See *In re Jupiter* at 759-
7 60. The automatic stay would remain in place respecting the other co-
8 debtor.

9 Debtor, on the other hand, urges the Court to adopt the position
10 of the majority of courts confronted with this issue which holds that
11 there is no ambiguity in the statute, and that § 362(c)(3)(A) terminates
12 the stay with respect to the debtor and property of the debtor, but not
13 property of the estate. See *e.g. In re Jumpp*, 356 B.R. 789 (BAP 1st Cir.
14 2006), *In re Holcomb*, 380 B.R. 813 (BAP 10th Cir. 2008). As indicated in
15 *Holcomb*, these courts reason that if Congress meant to terminate the stay
16 in its entirety, it could have done so in plain language, as it did in §
17 362(c)(4)(A)(i)².

18 I find that the better approach is the one taken by the majority
19 of courts that have ruled on this issue, and hold that § 362(c)(3)(A)
20 terminates the automatic stay with respect to the debtor and property of
21 the debtor, but leaves the stay in place respecting property of the
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23 ²This section reads: "if a single or joint case is filed by or
24 against a debtor who is an individual under this title, and if 2 or more
25 single or joint cases of the debtor were pending within the previous year
26 but were dismissed . . . , the stay under subsection (a) shall not go
into effect upon the filing of the later case." This language clearly
refers to the automatic stay in its entirety. *In re Nelson*, 391 B.R. 437,
449 (9th Cir. BAP 2008).

1 estate. In making this holding, I adopt the rationale of the Panel in
2 *Holcomb* in finding that there is no ambiguity in the language of the
3 statute and that reading the statute in accordance with its plain meaning
4 is consistent with the policies of the Bankruptcy Code. *Holcomb* at 816.

5 "With Respect to Any Action Taken"

6 Section 362(c)(3)(A) terminates the stay at the end of the 30-day
7 period "with respect to any action taken" regarding a debt or property
8 securing such debt or regarding a lease. In *In re Paschal*, 337 B.R. 274
9 (Bankr. E.D.N.C. 2006), the court compared the term "act" found in
10 sections 362(a)(3), (a)(4), (a)(5), and (a)(6) with the term "action"
11 found in § 362(a)(1), in various subsections of § 362(b) and at §
12 362(c)(3)(C)(ii). From that comparison, it determined that the term
13 "action," as used in § 362(c)(3)(A) refers to a "formal action, such as a
14 judicial, administrative, governmental, quasi-judicial, or other
15 essentially formal activity or proceeding." Moreover, because the section
16 refers to "action taken," it follows that the action referred to must
17 have occurred pre-petition. *Id.* at 280. That the action must have been
18 taken pre-petition also follows from the fact that an action taken post-
19 petition (i.e. during the 30 days after the petition date when the
20 automatic stay is in effect) would be void *ab initio*. *In re Schwartz*, 954
21 F.2d 569 (9th Cir. 1992). The *Paschal* court concluded that §
22 362(c)(3)(A) terminates the automatic stay only with regard to an action
23 taken by a party prior to the petition date. *Paschal* at 280-81. The
24 holding in *Paschal* is well reasoned and is hereby adopted by this Court.

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1 CONCLUSION

2 Section 362(c) (3) (A) terminates the automatic stay with regard to
3 any action pending on the petition date to the extent the action is
4 limited to the debtor or property of the debtor. As GPFC did not have
5 any action pending at the time the present case was commenced, it cannot
6 proceed to enforce its lien rights without leave under § 362(d). The
7 Court will enter an order consistent with this Memorandum Opinion.
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13 FRANK R. ALLEY, III
14 Bankruptcy Judge
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