

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
NEWNAN DIVISION

IN THE MATTER OF:	:	CASE NUMBER
	:	
ANNETTE TUCKER,	:	05-15001-WHD
	:	
	:	IN PROCEEDINGS UNDER
	:	CHAPTER 13 OF THE
DEBTOR.	:	BANKRUPTCY CODE

ORDER

Before the Court is the "Motion to Reimpose Stay," filed by the Debtor in the above-captioned bankruptcy case. On October 19, 2005, the Debtor filed a voluntary petition under Chapter 13 of the Bankruptcy Code. On October 20, 2005 the Debtor filed the instant motion, in which she states that "she is a tenant who has filed a Plan to cure the lease arrears and proposes to pay ongoing rent as it becomes due." The Debtor, therefore, "moves this Court for a stay." According to the Debtor's Schedule G, the Debtor is a tenant pursuant to an unexpired rental lease with Frank Nelson. According to the Debtor's Schedule F, the Debtor owes Nelson \$4,644, presumably for pre-petition rent.

At the hearing held on November 3, 2005, the Court was informed that Joe Frank Nelson, the owner of the real property in which the Debtor resides, obtained a writ of possession under applicable Georgia law with regard to the real property from the Troup County Magistrate Court on October 17, 2005. Subsequent to the filing of the Debtor's Chapter 13 petition, Nelson contended that, pursuant to new section 362(b)(22), the automatic stay did not preclude Nelson from evicting the Debtor from the property. In

response, the Debtor moved this Court for the imposition of a stay that would permit the Debtor to remain in the property and to cure the pre-petition arrearage through her Chapter 13 plan, notwithstanding the statutory requirements of sections 362(b)(22) and 362(l).

Following the amendments made to the Bankruptcy Code by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,¹ section 362(b)(22) provides that the "filing of a petition . . . does not operate as a stay, subject to subsection 362(l), under subsection (a)(3), of the continuation of any eviction, unlawful detainer action, or similar proceeding by a lessor against a debtor involving residential real property in which the debtor resides as a tenant under a lease or rental agreement and with respect to which the lessor has obtained before the date of the filing of the bankruptcy petition, a judgment for possession of such property against the debtor." 11 U.S.C. § 362(b)(22). At the hearing, the Debtor did not dispute Nelson's contention that section 362(b)(22) applies in this case. Instead, she requested that the Court use its "broad equitable" discretion to impose a stay that would enable the Debtor to tender one month's rent to Nelson and cure the remainder of the arrearage under the Chapter 13 plan.

As the Court stated during the hearing, the Court will not employ section 105(a) under the existing circumstances to enjoin the Debtor's eviction. First, the Court notes that the Debtor's motion is procedurally defective. The Debtor is requesting injunctive relief.

¹See S. 256, Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Pub. L. No. 109-8, 119 Stat. 23 (2005). Most provisions of the BAPCPA apply to cases filed on or after October 17, 2005.

Rule 7001 of the Federal Rules of Bankruptcy Procedure requires the commencement of an adversary proceeding as a condition to obtaining injunctive relief. *See* FED. R. BANKR. P. 7001(7); *Matter of Zale Corp.*, 62 F.3d 746, 764 (5th Cir. 1995). Accordingly, the fact that the Debtor requested this relief by motion is sufficient reason for the Court to deny the relief. *In re Conxus Communications, Inc.*, 262 B.R. 893 (D. Del. 2001) (reversing bankruptcy court's entry of injunction, noting that the movant's failure "to file the required adversary proceeding was alone sufficient reason for the Bankruptcy Court to deny [Movant's] request for an injunction").

Second, it is not appropriate to employ section 105(a) when doing so would subvert the clear provisions of sections 362(b)(22) and 362(l) and would impair rights or create additional rights that are not provided by the Code. Although section 105(a) provides the Court with authority to "issue any order . . . that is necessary or appropriate to carry out the provisions of" the Bankruptcy Code, "the powers granted by [section 105(a)] may be exercised only in a manner consistent with the provisions of the Bankruptcy Code." *United States v. Sutton*, 786 F.2d 1305, 1308 (5th Cir. 1986). Section 105(a) does not "authorize the bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law, or constitute a roving commission to do equity." *Id.* (citations omitted); *see also In re Simonini*, 69 Fed. Appx. 169 (4th Cir. 2003) ("Given the clear language of § 362(b) excepting all criminal prosecutions from the automatic stay and "the fundamental policy against federal interference with state criminal prosecutions," we hold that an

injunction barring a Nevada state criminal proceeding is not necessary or appropriate to carry out the provisions of the Bankruptcy Code or to prevent an abuse of the process.").

Section 362(b)(22) excepts from the provisions of section 362(a)(3) eviction proceedings involving residential property in which the debtor is a tenant if the lessor has obtained a pre-petition judgment for possession. Section 362(l) provides the debtor with a reprieve from the operation of section 362(b)(22). However, section 362(l) applies only if the debtor files with the petition and serves upon the residential lessor a certification that: 1) under applicable nonbankruptcy law there are circumstances under which the debtor would be permitted to cure the entire monetary default that gave rise to the pre-petition judgment for possession, after that judgment for possession was entered; and 2) that the debtor has deposited with the clerk of the bankruptcy court any rent money that would come due within the thirty-day period after the filing of the petition. *See* 11 U.S.C. § 362(l). Section 362(l) further provides that section 362(b)(22) will apply (*i.e.*, the automatic stay provided by section 362(a)(3) will cease to exist) after the 30-day period, if the debtor fails to cure the entire pre-petition arrearage within that time. Accordingly, the result of the combined provisions of sections 362(b)(22) and 362(l) is that Chapter 13 debtors who fall within the section 362(b)(22) exception to the automatic stay must still cure the entire pre-petition arrearage within thirty days following the filing of the petition and are not permitted to remain in the premises while they cure the pre-petition lease arrearage under a Chapter 13 plan.

In this case, the Debtor has not complied with the requirements of section 362(1). The Debtor is not merely seeking a short extension of the time to comply with section 362(1). For example, she has not exhibited any intent or ability to cure the entire pre-petition arrearage within the thirty-day period following the filing of her petition. Instead, she is requesting a discretionary injunction that would permit her to remain in the premises and to cure the pre-petition lease arrearage over time through a Chapter 13 plan. Permitting the Debtor to do so would be completely contrary to the new provisions of the Code and would exceed the Court's power under section 105(a).

For the above-stated reasons, the Debtor's Motion to Reimpose Stay is hereby **DENIED.**

IT IS SO ORDERED.

At Newnan, Georgia, this 18 day of November, 2005.



W. HOMER DRAKE, JR.

UNITED STATES BANKRUPTCY JUDGE