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JUN 13 2006

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

_____| |
IN RE: CASE NO. 06-65467

Sandra Jackson Sheppard,

Debtor. CHAPTER 7
JUDGE MASSEY

_____| |
Sandra Jackson Sheppard ,

Movant,
v. CONTESTED MATTER

Wells Fargo Financial Leasing, Inc.,

Respondent.

ORDER DENYING EMERGENCY MOTION TO STAY STATE COURT ACTION

Debtor Sandra Shepard sued Wells Fargo Financial Leasing, Inc. and another company, Superior Photocopy Co. of Atlanta, Inc., in the Superior Court of Gwinnett County, Georgia early in 2006, alleging fraud and breach of a contract in connection with a lease of office equipment. Wells Fargo answered but did not file a counterclaim. It moved to dismiss that lawsuit with prejudice on March 6, 2006 on the ground that the venue provisions in the contract required that any litigation concerning the contract be initiated in Iowa. The Superior Court scheduled a hearing on the motion to dismiss for May 30, 2006 at 1:30 p.m. On May 12, 2006, Ms. Shepard filed this Chapter 7 case, and she disclosed the lawsuit in her statement of financial affairs. When it became apparent that Wells Fargo intended to go forward on its motion to dismiss, Ms.

Sheppard filed an emergency motion in this Court action at 2:16 p.m. on May 30 to stay the state court action. The Superior Court went ahead with the hearing and granted the motion to dismiss.

Debtor contends that the automatic stay imposed by section 362 of the Bankruptcy Code barred prosecution of Wells Fargo's motion to dismiss. Wells Fargo argues that the automatic stay does not apply to lawsuits initiated by a debtor, citing *Crosby v. Monroe County*, 394 F.3d 1331n.2 (11th Cir. 2004). In that case, the debtor in a Chapter 13 case prosecuted an action against a county in Alabama and a deputy sheriff for unlawful arrest. In a footnote, the Court of Appeals stated that the fact that Debtor was in bankruptcy did not deprive it of jurisdiction. The Court gave two reasons: (1) the automatic stay does not apply to lawsuits in which the debtor is the plaintiff and (2) in a Chapter 13 case, the debtor is empowered to bring actions that constitute property of the estate. The second reason is the holding set forth in the footnote, but the first is dictum. The automatic stay was not implicated because the plaintiff had the authority to bring the suit.

In support of the proposition that the automatic stay does not apply to suits initiated by a debtor, the Eleventh Circuit cited *Martin-Trigona v. Champion Fed. Sav. & Loan Assn.*, 892 F.2d 575 (7th Cir. 1989) (Posner, J.), a case on which Wells Fargo also relies. In *Martin-Trigona*, the debtor in a bankruptcy case sued Champion in state court, and on Champion's motion, the case was dismissed. The debtor's appeal was dismissed for failure to prosecute. Prior to the appeal, the bankruptcy trustee abandoned the cause of action on which the debtor had initiated the suit. Several years later, the plaintiff, no longer in bankruptcy, filed a new action against Champion in federal district court, contending that Champion's motion to dismiss in state court was a violation of the automatic stay. The district court disagreed and dismissed.

Holding that the automatic stay did not apply to the former debtor's state court suit, the Seventh Circuit affirmed the dismissal. Judge Posner pointed out section 362(a)(1) refers only to an action against a debtor and not to suits brought by a debtor. He also held that section 362(a)(3), barring acts to take possession or exercise control over property of the estate, was inapplicable:

True, the bankrupt's cause of action is an asset of the estate; but as the defendant in the bankrupt's suit is not, by opposing that suit, seeking to take possession of it, subsection (a)(3) is no more applicable than (a)(1) is.

Id. at 577.

It should be noted, however, that these cases do not speak to the rights of a Chapter 7 trustee. When a bankruptcy case is filed, the debtor's property interests become property of the estate, 11 U.S.C. § 541, and in a Chapter 7 case, the trustee is the representative of the estate.

The Court of Appeals has explained the significance of section 541 in these terms:

Generally speaking, a pre-petition cause of action is the property of the Chapter 7 bankruptcy estate, and only the trustee in bankruptcy has standing to pursue it. *Barger v. City of Cartersville*, 348 F.3d 1289, 1292 (11th Cir.2003). Section 541 of the Bankruptcy Code provides that virtually all of a debtor's assets, both tangible and intangible, vest in the bankruptcy estate upon the filing of a bankruptcy petition. 11 U.S.C. § 541(a)(1) (providing that the bankruptcy estate includes "all legal or equitable interest of the debtor in property as of the commencement of the case"). Such property includes causes of action belonging to the debtor at the commencement of the bankruptcy case. *Barger*, 348 F.3d at 1292. Thus, a trustee, as the representative of the bankruptcy estate, is the proper party in interest, and is the only party with standing to prosecute causes of action belonging to the estate. 11 U.S.C. § 323; *Barger*, 348 F.3d at 1292.

Once an asset becomes part of the bankruptcy estate, all rights held by the debtor in the asset are extinguished unless the asset is abandoned back to the debtor pursuant to § 554 of the Bankruptcy Code. See 11 U.S.C. § 554(a)-(c).

Parker v. Wendy's Intern., Inc., 365 F.3d 1268, 1272 (11th Cir. 2004).

Hence, the question remains whether the Chapter 7 trustee in Ms. Sheppard's case is in any way bound by the Superior Court's dismissal of Debtor's claims. Wells Fargo was apparently aware of the bankruptcy case but did not seek to join the trustee as a party in the Gwinnett action. It is clear that Wells Fargo's informal discussions with the trustee could not effect an abandonment of the estate's interest in the Gwinnett County action: there is a procedure for abandoning property, 11 U.S.C. § 554, that requires notice to creditors. But the Court need not resolve this question to rule on Ms. Sheppard's contention that the automatic stay barred Wells Fargo from moving to dismiss the Gwinnett action against it with respect to her interest in that litigation. This Court agrees with the 7th and 11th Circuits that the prosecution of a motion to dismiss an action brought by a debtor in which no counterclaim is filed does not violate the automatic stay, which applies only to actions against a debtor, not to actions filed by a debtor, and to acts to seeking possession of, or control over, property of the estate. The motion to dismiss did not take possession of the lawsuit, which would be impossible because it is intangible property, or exercise control over it in the sense intended in section 363(a)(3).

Accordingly, it is

ORDERED that Debtor's Emergency Motion To Stay State Court Action is DENIED.

Dated: June 12, 2006.



JAMES E. MASSEY
U.S. BANKRUPTCY JUDGE