

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE: : CASE NO. 10-62834-JB
: :
COURTNEY S. BAILEY and :
DOUGLAS D. BAILEY, :
: CHAPTER 7
Debtors. : :

ORDER

This no asset Chapter 7 case is before the Court on debtors' *pro se* "Motion to Delay Entry of Discharge" (Docket No. 58). Debtors seek to delay the entry of discharge pursuant to Rule 4004(c)(2) of the Federal Rules of Bankruptcy Procedure until a final judgment is rendered in an adversary proceeding debtors filed *pro se* against U.S. Bank National Association as trustee on behalf of the Holders of the CitiGroup Mortgage Loan Trust Inc. Asset-Backed Pass-Through Certificates, Series 2006-FX1, its successors and/or assigns ("U.S. Bank") on July 8, 2010 (Adversary Proceeding No. 10-9056, *Courtney S. Bailey and Douglas D. Bailey v. U.S. Bank*).

The Clerk is ready to issue a Chapter 7 discharge to the debtors in this case. The deadline for filing objections to discharge was August 27, 2010, and no objections to discharge were filed. Debtors have met the requirements for granting of a discharge under 11 U.S.C. § 727. This is a core proceeding under 28 U.S.C. § 157(b). After carefully considering debtors' motion and the applicable law, the Court concludes that the motion should be DENIED.

Debtors filed this case *pro se* as a Chapter 13 case on February 1, 2010. A section 341(a) meeting of creditors in the Chapter 13 case was held and concluded on March 25, 2010. Debtors made no payments to the Chapter 13 Trustee and voluntarily converted their case to a Chapter 7 case on May 24, 2010. Martha Miller was appointed as the Chapter 7 trustee. The section 341(a) meeting of creditors in the Chapter 7 case was held on June 28, 2010 and concluded on July 21, 2010. On July 24, 2010, Ms. Miller submitted a report that there are no assets available for distribution to creditors, that the estate has been fully administered, and she requested that she be discharged from any further duties as trustee.

Before debtors converted their case to a Chapter 7 case, U.S. Bank filed a motion for relief from the automatic stay in order to foreclose on debtors' residence located at 5257 Chamblee Dunwoody Road, Dunwoody, Georgia 30338 (the "Property"). Debtors opposed the motion for relief and the matter came on for hearing. The Court entered an order on August 23, 2010, granting the motion for relief from stay to allow the parties to litigate their disputes in state court. Debtors have now filed a motion for reconsideration of the order lifting the stay.

The day after the hearing on U.S. Bank's motion for relief from the automatic stay, debtors filed an adversary proceeding against U.S. Bank to object to U.S. Bank's proof of claim and to request leave to file an action against U.S. Bank in the state courts for alleged fraud, breach of contract, RESPA and TILA violations. U.S. Bank has

filed a motion to dismiss this adversary proceeding.

U.S. Bank filed a proof of claim early in this bankruptcy case while debtors were proceeding under Chapter 13. The claim lists Midland Mortgage Co. as the servicer for U.S. Bank.¹ The claim was filed on February 16, 2010 in the amount of \$641,518.69, secured by a first mortgage on the Property. The mortgage arrearage is listed as \$122,470.46, which represents twenty (20) missed payments of \$5,864.26 per month from July 1, 2008 through February 1, 2010, plus late charges and other charges. At the July 7, 2010 hearing on U.S. Bank's motion for relief from the automatic stay, counsel for U.S. Bank stated that the arrearage was approximately \$143,000.94 through July of 2010 and debtors had missed twenty-four (24) payments. Counsel for U.S. Bank also represented that U.S. Bank had attempted foreclosure on the Property several times prior to the debtors' bankruptcy.

In their Schedules filed on March 18, 2010, debtors listed the current value of the Property on Schedule A as \$809,000.00 and the amount of the secured claim on the Property as \$904,000.00. On Schedule D, debtors listed Midland Mortgage as the creditor holding a first mortgage on the Property in the amount of \$711,000.00 and a creditor identified as "SLS" as the creditor holding a second mortgage on the Property in the amount of \$211,000.00. Debtors listed both secured claims as disputed. On April 27, 2010, debtors filed amended schedules. On Schedule A, debtors changed the value of the

¹ Specifically, U.S. Bank is listed as the trustee on behalf of the holders of the Citigroup Mortgage Loan Trust Inc. Asset-Backed Pass-Through Certificates, Series 2006-FX1.

Property to \$937,000.00 and the amount of the secured claims to \$956,443.70, and on Schedule D, debtors changed the creditor on the first mortgage from “Midland Mortgage” to read “US Bank National Association/Midland Mortgage Co.” and they increased the amount of that claim to \$745,443.70. Debtors’ Chapter 13 plan did not provide for any payment on these claims.

Debtors request a delay or deferral of the entry of an order granting them a discharge pursuant to Rule 4004(c)(2) until a final judgment is entered in the adversary proceeding debtors filed *pro se* against U.S. Bank challenging U.S. Bank’s proof of claim. Debtors misunderstand the purpose of Rule 4004(c)(2), and the law and the facts do not support delaying the entry of a discharge in this case. The cases cited by debtors in their motion do not involve Rule 4004(c)(2) and do not support the relief requested by debtors.

Rule 4004(c)(2) provides that “[n]otwithstanding Rule 4004(c)(1), on motion of the debtor, the court may defer the entry of an order granting a discharge for 30 days and, on motion within that period, the court may defer entry of the order to a date certain.” The primary purpose of this Rule is to give a debtor additional time to decide whether to reaffirm all or part of a debt because a reaffirmation agreement is enforceable only if it was made prior to the granting of the discharge. 9 COLLIER ON BANKRUPTCY ¶ 4004.04[11] (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2010) (citing FED. R. BANKR. P. 4004(c) 1983 advisory committee’s note (“The last sentence of subdivision (c)

takes cognizance of § 524(c) of the Code which authorizes a debtor to enter into enforceable reaffirmation agreements only prior to entry of the order of discharge.”)). Other reasons for seeking a short delay of the discharge may include settling dischargeability litigation. *Id.* But there is no Rule or case law that would allow a deferral of the discharge to litigate an adversary proceeding challenging a creditor’s secured claim, and the law does not allow a deferral of the discharge so as to extend the automatic stay.

Debtors’ apparent reason for seeking a delay of their Chapter 7 discharge is that the granting of the discharge will terminate the automatic stay. As the Court explained in its August 23, 2010 Order lifting the automatic stay, under 11 U.S.C. § 362(c), the automatic stay of an act against property only continues until the property is no longer property of the estate, and the stay of other acts under § 362(a) only continues until the earliest of the time a case is closed, dismissed or a discharge is granted. *See* 11 U.S.C. § 362(c)(1) and (2). Rule 4004(c)(2) cannot be used to extend the automatic stay as to U.S. Bank or to continue litigation that will result in no benefit to the estate. *VonGrabe v. Mecs (In re VonGrabe)*, 332 B.R. 40, 44-45 (Bankr. M.D. Fla. 2005); *In re Moore*, No. 09-00274, 2009 WL 1490863, at *1 (Bankr. N.D. Iowa 2009).

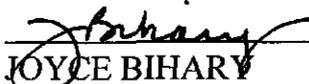
Debtors argue that a discharge should be delayed so they can challenge U.S. Bank’s proof of claim in the adversary proceeding they recently filed in the bankruptcy court. They argue that if they cannot litigate U.S. Bank’s claim in the bankruptcy court,

they will be precluded from challenging U.S. Bank's right to foreclose in any other forum. These arguments are without merit. U.S. Bank does not have an allowed claim in this bankruptcy case. Debtors did not provide for any payment to U.S. Bank in their Chapter 13 plan, debtors made it clear in every pleading that they intend to challenge a foreclosure by U.S. Bank in the state courts, and debtors listed U.S. Bank's claim as disputed in their Schedules. Second, the Court lifted the automatic stay specifically so that this two-party dispute could be addressed in the state courts. Third, bankruptcy courts do not typically rule on objections to proofs of claim filed in no asset Chapter 7 cases, since the point of filing a proof of claim is to obtain a distributive share in the assets of the proceeding. *See Ziino v. Baker (In re Ziino)*, – F.3d –, 2010 WL 3155512, at *2 (11th Cir. 2010) (“An allowed claim...permits the claimant to participate in the distribution of the bankruptcy estate.”); 4 COLLIER ON BANKRUPTCY ¶ 501.01[3][b] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2010) (“In no-asset chapter 7 liquidation cases, the filing of a proof of claim serves no practical purpose since there will be no distribution from the estate in which to participate.”). In this no asset Chapter 7 case, there will be no distribution and thus there is no bankruptcy purpose to be served by considering debtors' objections to U.S. Bank's proof of claim.²

² In fact, in no asset Chapter 7 cases, creditors receive a form notice, as did the creditors in this case, advising them in bold letters not to file a proof of claim unless they receive a subsequent notice to do so. The notice provides that, “There does not appear to be any property available to the Trustee to pay creditors. You therefore should not file a proof of claim at this time. If it later appears that assets are available to pay creditors, you will be sent another notice telling you that you may file a proof of claim, and telling you the deadline for filing your proof of claim”. In this case, there are no assets available to the

For all the above reasons, debtors' motion to delay the entry of the Chapter 7 discharge is DENIED.

IT IS SO ORDERED, this 17th day of September, 2010.



JOYCE BIARY
UNITED STATES BANKRUPTCY JUDGE

Trustee to pay creditors, and creditors have not been advised to file a proof of claim.

DISTRIBUTION LIST

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