

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

~~MAR 23 2010~~

IN RE:	:	CASE NO. 09-93431-JB
	:	
DIEGO M. RODRIQUEZ,	:	
	:	
Debtor.	:	
_____	:	CHAPTER 7
	:	
DIEGO M. RODRIQUEZ,	:	
	:	
Plaintiff,	:	ADVERSARY PROCEEDING
	:	NO. 10-9007-JB
v.	:	
	:	
UNITED STATES OF AMERICA,	:	
	:	
Defendant.	:	

ORDER

Debtor filed a complaint *pro se* alleging that the United States of America violated the automatic stay under 11 U.S.C. § 362. This adversary proceeding is before the Court on a motion for summary judgment filed by defendant United States of America, on behalf of the U.S. Department of Health and Human Services, Social Security Administration (the "SSA") (Docket No. 6). The debtor has filed a response, and this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A). After carefully reviewing the pleadings and the record in this case, the Court concludes that defendant's motion for summary judgment should be granted.

Debtor filed this Chapter 7 case on December 21, 2009. It appears from the papers that plaintiff alleges defendant should be held in contempt for violating the automatic stay for withholding overpayments from the monthly benefits payable to the

debtor. The undisputed facts show the SSA has paid debtor the full monthly benefit of \$1,665.00 for the months following the filing of this case. Defendant also argues that the automatic stay did not go into effect upon the filing of this case, because debtor is an individual who had two or more cases pending in the year preceding the filing of this case. See 11 U.S.C. § 362(c)(4)(A)(i).

A court will enter summary judgment only upon showing that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The undisputed facts are as follows. Since the filing of this bankruptcy on December 21, 2009, the SSA has paid debtor the full amount of disability payments. The full monthly disability payment is \$1,665.00. On January 2, 2010, SSA paid debtor a disability payment of \$1,500.00 and withheld \$165.00 to recover an overpayment. When the Atlanta office of the SSA received notice of the bankruptcy case on January 11, 2010, the SSA stopped any withholding for overpayments and notified debtor that he would receive the full \$1,665.00 for February, 2010 and each month thereafter. On February 3, 2010, SSA issued a check to debtor for the \$165.00 withheld from the January, 2010 payment. At a hearing in the bankruptcy court on February 22, 2010, debtor acknowledged that he had received his full disability payments for January and February of 2010.

Defendant's argument that the automatic stay did not go into effect upon the filing of the instant case is correct. Section 362(c)(4)(A) of the Bankruptcy Code provides that the automatic stay will not go into effect if an individual debtor has had two or more

bankruptcy cases pending within the previous year that were dismissed. Debtor filed two cases in the United States Bankruptcy Court for the Western District of Washington, both of which were pending and dismissed within the one year period prior to filing the instant case in the Northern District of Georgia. Debtor filed a Chapter 13 case, Case No. 08-46604 on December 15, 2008; the court in Washington entered an order dismissing that case on July 14, 2009 for failure to appear at the meeting of creditors. Debtor then filed a Chapter 7 case, Case No. 09-46095 on August 20, 2009, and the court in Washington entered an order dismissing that case on October 28, 2009 for failure to file required schedules and statement of financial affairs. Debtor moved from Washington to Georgia and filed the instant Chapter 7 case, Case No. 09-93431, on December 21, 2009. Since debtor is an individual and had two bankruptcy cases pending and dismissed within the preceding year, pursuant to § 362(c)(4)(A)(i), an automatic stay did not go into effect when this Chapter 7 case was filed.

In his response to the motion for summary judgment, debtor argues that one of his bankruptcy cases in the Western District of Washington was improperly dismissed. Debtor contends that at the time Case No. 09-46095 was dismissed for failure to file the required schedules, he had a pending motion to extend the time to file schedules which he believed was set for hearing after the court dismissed the case. Debtor argues that § 362(c)(4) is not applicable here, because he contends that his bankruptcy cases in

Washington were dismissed “without cause”. This argument has no merit. Section 362(c)(4) provides, in pertinent part, as follows:

(4)(A)(i) if a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed, other than a case refiled under section 707(b), the stay under subsection (a) shall not go into effect upon the filing of the later case; and

(ii) on request of a party in interest, the court shall promptly enter an order confirming that no stay is in effect;

(B) if, within 30 days after the filing of the later case, a party in interest requests the court may order the stay to take effect in the case as to any or all creditors (subject to such conditions or limitations as the court may impose), after notice and a hearing, only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed;

(C) a stay imposed under subparagraph (B) shall be effective on the date of the entry of the order allowing the stay to go into effect; and

(D) for purposes of subparagraph (B), a case is presumptively filed not in good faith (but such presumption may be rebutted by clear and convincing evidence to the contrary)--

(i) as to all creditors if--

(I) 2 or more previous cases under this title in which the individual was a debtor were pending within the 1-year period;

11 U.S.C. § 362(c)(4). (emphasis added)


The language in § 362(c)(4)(A) is clear. If an individual debtor files a third case and had two previous cases pending and dismissed within a year before filing the third case, an automatic stay does not go into effect in the third case. The only exception to this is a case filed under a chapter other than Chapter 7 following a dismissal of a prior Chapter 7 case under section 707(b). 3 COLLIER ON BANKRUPTCY ¶ 362.06[4] (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev.). This exception has no applicability here.

The statute allows a party in interest to request the Court to order the stay to take effect in the third case, after notice and hearing, if the party demonstrates that the third case was filed in good faith as to the creditors to be stayed. 11 U.S.C. § 362(c)(4)(B). The analysis of whether a debtor filed the third case in good faith only applies when the Court is considering whether to impose the stay under § 362(c)(4)(B), not whether the stay automatically goes into effect upon the filing of a third case. Here, the debtor did not file a motion as such under § 362(c)(4)(B), but the Court construed debtor's pleading (Docket No. 44) as a request for an order to have the automatic stay take effect, and the Court scheduled a hearing on that matter for February 22, 2010. See Order and Notice of Hearings entered on January 28, 2010 (Docket No. 45). Following the hearing on February 22, 2010, the Court entered an order imposing the automatic stay. Under § 362(c)(4)(C), the stay in this case was effective on February 22, 2010, the date the order was entered.

Debtor's complaints about the docketing and handling of his cases in the Western District of Washington should be brought before that court. This bankruptcy court is not an appellate court, nor can it modify orders of another bankruptcy court.

In accordance with the above reasoning, the Court concludes plaintiff does not have a cause of action for a stay violation by the SSA during the pendency of this bankruptcy case, and defendant's motion for summary judgment must be and is granted.

It is so ORDERED, this 22nd day of March, 2010.


JOYCE BIHARY
UNITED STATES BANKRUPTCY JUDGE

CERTIFICATE OF MAILING


A copy of the foregoing Order was mailed to the following:

Diego M. Rodriquez
6295 Jimmy Carter Blvd
Norcross, GA 30071

Daniel A. Caldwell
U. S. Attorney Office
600 U.S. Courthouse
75 Spring St., SW
Atlanta, GA 30303

Jordan E. Lubin
Building 2
8325 Dunwoody Place
Atlanta, GA 30350-3307

David Weidenbaum
362 Richard Russell Building
75 Spring Street, SW
Atlanta, GA 30303


Stephanie A. Mayberry
Judicial Assistant for
Chief Judge Bihary

Mailed: 03/22/2010