IT IS ORDERED as set forth below:

Date: September 9, 2016

Lisa Ritchey Craig
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN THE MATTER OF:	:	**CASE NUMBERS**
MAURICE EARKET,	:	BANKRUPTCY CASE
	:	16-56132-LRC
Debtor.	:	
_____	:	
	:	
MAURICE EARKET	:	ADVERSARY PROCEEDING
TATUM FAMILY TRUST,	:	NO. 16-05102-LRC
	:	
Plaintiffs,	:	
	:	
v.	:	
	:	
SPECIALIZED LOAN SERVICING,	:	
FIRST STAGE, LLC,	:	
HOUSE ON THE RUN.COM, LLC,	:	IN PROCEEDINGS UNDER
	:	CHAPTER 13 OF THE
Defendants.	:	BANKRUPTCY CODE

ORDER

Before the Court is the *Motion to Dismiss Plaintiff's Complaint* (the "Motion"),

filed by Specialized Loan Servicing, LLC ("Defendant"), *Plaintiffs' Motion to Reopen Scheduling* (Dkt. 8), and *Plaintiffs' Emergency Motion to Turn Over Property* (Dkt. 9) (the "Turnover Motion"). The motions arise in connection with a complaint (hereinafter the "Complaint") filed by Maurice Earket ("Earket") and Tatum Family Trust (collectively "Plaintiffs") asserting violations of 11 U.S.C. § 362, provisions of the Fair Debt Collections Practices Act ("FDCPA"), and "State Title Trespass Law." The Complaint also seeks emergency injunctive relief or a restraining order and a declaration that the automatic stay is "in immediate effect" and that a particular foreclosure sale was "wrongful."

PROCEDURAL HISTORY

Earket filed a voluntary petition for relief under Chapter 13 of the Bankruptcy Code on April 4, 2016 (the "Petition Date").[1] *See* Case No. 16-56132-LRC (Bankr. N.D. Ga.), Dkt. No. 1 (the "2016 Bankruptcy Case"). Previously, Earket had filed two bankruptcy petitions initiating cases that were both dismissed within one year of the filing of the 2016 Bankruptcy Case, to wit: (1) Case No. 15-58379-MHM (Bankr. N.D. Ga.), filed May 4, 2015, and dismissed May 21, 2015; and (2) Case No. 15-64793-LRC (Bankr.

[1] The Court takes "judicial notice of the dockets and the content of the documents filed in the case[s] for the purpose of ascertaining the timing and status of events in the case[s] and facts not reasonably in dispute" and may do so without converting this motion to dismiss into a motion for summary judgment. *In re Ferguson*, 376 B.R. 109, 113 n.4 (Bankr. E.D. Pa. 2007), as amended (Oct. 25, 2007) (citing Fed. R. Evid. 201); *In re Hart*, No. 13-20039-TLM, 2013 WL 693013, at *1 n.2 (Bankr. D. Idaho Feb. 26, 2013) ("Pursuant to Fed.R.Evid. 201, the Court takes judicial notice of its own dockets");*Thomas v. Alcon Labs*., 116 F. Supp.3d 1361 (N.D. Ga. 2013) (citing *Serpentfoot v. Rome City Comm'n*, 322 F. App'x 801, 807 (11th Cir. 2009)).

N.D. Ga.), filed August 3, 2015, and dismissed September 17, 2015.

On the Petition Date, Earket filed an *Emergency Motion to Confirm Automatic Stay for April 4, 2016*, in which he sought confirmation that an automatic stay had arisen in the 2016 Bankruptcy Case. *Id*., Dkt. No. 20. Earket did not contact the Court's Chambers or request a hearing on the motion. Consequently, the Court took no action on the motion prior to the dismissal of the 2016 Bankruptcy Case on May 20, 2016, for failure to correct filing deficiencies. *Id*., Dkt. No. 43.

On May 9, 2016, Earket filed the Complaint, which, liberally construed, asserts that: (1) Plaintiffs hold an interest in real property known as 2131 Rockhaven Circle, Decatur, Georgia 30032 (the "Property"); (2) Defendant advertised a foreclosure sale of the Property to be held on April 5, 2016; and (3) following the filing by Earket of the 2016 Bankruptcy Case, Defendant continued to pursue the foreclosure sale of the Property and engage in additional collection acts, such as calls and "harassments." With regard to defendant First Stage, LLC ("First Stage"), the Complaint appears to allege that First Stage was the third-party buyer of the Property at the foreclosure sale and that First Stage has initiated dispossessory proceedings in the Magistrate Court of DeKalb County, Georgia. It is not clear from the Complaint what part in all of this Plaintiffs allege defendant House On the Run.com, LLC has played.

On June 8, 2016, Defendant filed the Motion seeking dismissal under Rule 7012 of

the Federal Rules of Bankruptcy Procedure and Rule 12(b)(6) of the Federal Rules of Civil Procedure. Plaintiffs oppose the dismissal of the Complaint and have also filed the Turnover Motion, requesting that this Court order the turnover of the Property to Plaintiffs and the destruction of the deed under power (presumably executed by Defendant to First Stage, LLC) for having been issued in "direct violation of the automatic stay."

CONCLUSIONS OF LAW

A. *Whether the Court Should Retain Jurisdiction*

Defendant urges the Court to decline to exercise subject matter jurisdiction over the Complaint because the 2016 Bankruptcy Case has been dismissed. As Defendant notes, adversary proceedings are generally dismissed upon the dismissal of the main bankruptcy proceeding, but not necessarily because the bankruptcy court lacks subject matter jurisdiction, as "jurisdiction over an adversary proceeding is determined at the time the Complaint is filed, not some later time such as after the underlying bankruptcy has been dismissed." *In re Oxley Dev. Co., LLC*, 493 B.R. 275, 287 (Bankr. N.D. Ga. 2013) (Sacca, J.); *see also Fidelity & Deposit Co. of Md. V. Morris (In re Morris)*, 950 F.2d 1531, 1535 (11th Cir. 1992) ("[T]he dismissal of an underlying bankruptcy case does not automatically strip a federal court of jurisdiction over an adversary proceeding which was related to the bankruptcy case at the time of its commencement."); *In re Rolsafe Int'l,*

LLC, 477 B.R. 884, 895 (Bankr. M.D. Fla. 2012) ("Jurisdiction, however, is not determined with the benefit of hindsight or through a retroactive lens.").

Even if subject matter jurisdiction remains following the dismissal of the bankruptcy case, however, the Court has the discretion to determine "whether to retain jurisdiction over the adversary proceeding." *Morris*, 950 F.2d at 1534. "[R]etaining jurisdiction over an adversary complaint when the underlying bankruptcy case has been dismissed is the exception not the rule." *In re Gustafson*, 316 B.R. 753, 758 (Bankr. S.D. Ga. 2004); *see also In re Ocon*, 2007 WL 1087223, at *3 (Bankr. S.D. Fla. Mar. 29, 2007). The Court should retain jurisdiction "only if cause is shown." *Gustafson*, 316 B.R. at 756.

When deciding whether to retain jurisdiction over an adversary proceeding following the dismissal of the underlying bankruptcy case, the Court should consider: "(1) judicial economy; (2) fairness and convenience to the litigants; and (3) the degree of difficulty of the related legal issues involved." *Morris*, 950 F.2d at 1535 (citing *In re Smith*, 866 F.2d 576, 580 (3d Cir. 1989)); *see also In re Oxley Dev. Co., LLC*, 493 B.R. 275, 287 (Bankr. N.D. Ga. 2013) (Sacca, J.) (retaining jurisdiction over an adversary proceeding because it would be more efficient than having the parties "start from scratch," would avoid wasting significant judicial resources already invested, and would be fairer, more convenient, and cheaper to the litigants); *In re Cottonwood Corners Phase*

V, LLC, 2012 WL 5906883, at *3 (Bankr. D.N.M. Nov. 26, 2012) (stating that, "when the Court considers permissive abstention after dismissal of the related bankruptcy case, the permissive abstention analysis shifts" and the "factors governing abstention are (1) enforcement of bankruptcy policies, (2) judicial economy, (3) convenience to the parties, (4) fairness, and (5) comity").

Having considered the facts of this case and the arguments of the parties, the Court concludes that it has cause to retain jurisdiction over Plaintiffs' request for a declaration regarding whether the automatic stay arose in the 2016 Bankruptcy Case and the related requests for damages for violating the automatic stay and for turnover of the Property (as requested in the Turnover Motion).[2] As the bankruptcy court assigned the 2016 Bankruptcy Case, this Court is in the best position to render a ruling regarding the impact of the filing of the 2016 Bankruptcy Case. *Accord In re Skaggs*, 183 B.R. 129, 131 (Bankr. E.D. Ky. 1995) ("These authorities lead the Court to conclude that it has discretion to dismiss or not to dismiss [an] action based upon an alleged violation of the automatic stay when the action was properly and timely brought during the pendency of the bankruptcy proceeding, the parties are properly before the Court, the Court has a particular interest in enforcement of the provisions of the Bankruptcy Code and the matter

[2] To the extent Plaintiffs seek damages under and enforcement of the automatic stay, this is a core proceeding under 28 U.S.C. § 157(b)(2), over which this Court has subject matter jurisdiction and the authority to enter a final order of judgment. *See* 28 U.S.C. § 1334; *In re Waugh*, 2014 WL 5473819, at *1 (Bankr. M.D. Ala. Oct. 28, 2014).

can be quickly tried. It seems fundamental that any court must retain jurisdiction to vindicate its own authority and enforce its own properly issued orders."); *In re Johnson*, 575 F.3d 1079, 1084 (10th Cir. 2009) ("The great weight of case authority supports our conclusion that a § 362(k)(1) proceeding remains viable after termination of the underlying bankruptcy case."). This matter can be quickly dealt with in the context of the current motion to dismiss for failure to state a claim. It would, therefore, be more convenient for the parties and fairer to Plaintiffs if this Court makes a determination regarding the existence of the automatic stay. It also serves the goal of judicial economy to have the matter resolved here and now.

The *Morris* factors, however, support the Court's decision to abstain from hearing the remaining requests for relief in the Complaint. These claims arise under non-bankruptcy law, including the FDCPA and state foreclosure law, and could more appropriately be litigated in another forum. Following the dismissal of the 2016 Bankruptcy Case, any question of whether the foreclosure and sale to a third party were valid under state law cannot impact any bankruptcy estate. Further, because the remaining requests for relief were pending before this Court for only eleven days when the Court dismissed the 2016 Bankruptcy Case and the Court disposed of no matters in this adversary proceeding, this Court is not yet familiar with the claims. Requiring the parties to litigate these issues in another forum would, therefore, not result in wasted

judicial resources and would not require the parties to "start over" or incur unnecessary or duplicative expenses.

B. *Whether Plaintiffs' Request for Declaratory Relief, Sanctions/Damages, and Turnover Should be Dismissed*

Plaintiffs' request for a declaration regarding the existence of the automatic stay in the 2016 Bankruptcy Case, the request for damages/sanctions arising from Defendant's alleged violation of the automatic stay, and the request for turnover of the Property fail to state a claim upon which relief may be granted and will be dismissed under Rule 12(b)(6). Rule 8 of the Federal Rules of Civil Procedure, requires that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2) (made applicable to this proceeding by FED. R. BANKR. P. 7008). Under Rule 12(b)(6), the Court may dismiss a complaint if it fails "to state a claim upon which relief can be granted." *See* FED. R. CIV. P. 12(b)(6) (made applicable to this proceeding by FED. R. BANKR. P. 7012(b)). When considering whether to dismiss a complaint for failure to state a claim upon which relief can be granted, the Court must accept as true all factual allegations set forth in the complaint and, on the basis of those facts, determine whether the plaintiff is entitled to the relief requested. The Court must also draw all reasonable inferences in the light most favorable to the non-moving party. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 554-56 (2007); *Daewoo Motor America, Inc. v. General*

Motors Corp., 459 F.3d 1249, 1271 (11th Cir. 2007); *Hill v. White* 321 F.3d 1334, 1335 (11th Cir. 2003); *Grossman v. Nationsbank, Nat'l Ass'n*, 225 F.3d 1228, 1231 (11th Cir. 2000); *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1273 n.1 (11th Cir. 1999). Legal conclusions, labels, and unsupportable assertions, however, are not entitled to a presumption of truth. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Consequently, "conclusory allegations, unwarranted factual deductions or legal conclusions masquerading as facts will not prevent dismissal." *Davila v. Delta Air Lines, Inc*., 326 F.3d 1183, 1185 (11th Cir. 2003).

Plaintiffs request a declaration that the automatic stay applied in the 2016 Bankruptcy Case. The automatic stay ordinarily arises upon the filing of a bankruptcy petition. 11 U.S.C. § 362(a). When, however, "a single or joint case is filed by or against a debtor who is an individual . . . , 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 a chapter other than chapter 7 after dismissal under section 707(b), the stay under subsection (a) shall not go into effect upon the filing of the later case." 11 U.S.C.A. § 362(c)(4).

Here, even assuming the facts of the Complaint to be true and drawing all inferences in favor of Plaintiffs, it is clear that Earket filed two prior Chapter 13 bankruptcy cases that were dismissed within one year before he filed the 2016

Bankruptcy Case. Accordingly, no automatic stay arose upon the filing of the 2016 Bankruptcy Case.

As to the request for damages for violating the automatic stay and for turnover of the Property, Plaintiffs have "the burden to demonstrate, by a preponderance of the evidence, that a violation of the automatic stay has occurred, that the violation was willfully committed by the respondent, and that the debtor suffered damage as a result of the violation." *In re Witkowski*, 523 B.R. 291, 297–98 (B.A.P. 1st Cir. 2014). This necessarily requires Plaintiffs to establish the existence of the automatic stay. "Because no automatic stay existed, the Complaint cannot state a claim against Defendants and must be dismissed." *Villareal v. Seneca Mortgage Servicing, LLC*, 2016 WL 866282, at *6 (E.D. Cal. Mar. 7, 2016). As "[n]o amendment could alter this fact . . . . [l]eave to amend is . . . inappropriate in this instance." *Id*.

CONCLUSION

For the reasons stated above, it is hereby

ORDERED that Defendant's Motion to Dismiss is **GRANTED**.

IT IS FURTHER ORDERED that Plaintiffs' request for declaratory relief regarding the existence of the automatic stay in the 2016 Bankruptcy Case is **DISMISSED** pursuant to Rule 12(b)(6);[3]

[3] The Court recognizes that only the Defendant moved for dismissal of the Complaint, while the Plaintiffs have

IT IS FURTHER ORDERED that Plaintiffs' requests for damages and/or sanctions arising from an alleged violation of the automatic stay are **DISMISSED** pursuant to Rule 12(b)(6);

IT IS FURTHER ORDERED that Plaintiffs' Emergency Motion to Turn Over Property (Doc. 9) is **DENIED**;

IT IS FURTHER ORDERED that this Court exercises its discretion to abstain, pursuant to 28 U.S.C. § 1334(c)(1), from hearing all other counts of the Complaint, and, therefore, such counts are hereby **DISMISSED without prejudice**.

IT IS FURTHER ORDERED that Plaintiffs' Motion to Reopen Scheduling (Doc. 8) is **DENIED** as moot.

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asserted claims against First Stage and House On The Run.Com, LLC. Notwithstanding the failure of these other defendants to seek dismissal, the Court finds that dismissal of all of the Plaintiffs' claims is appropriate. As to the claims at issue, these defendants are similarly situated to Defendant. "'A District Court may properly on its own motion dismiss an action as to defendants who have not moved to dismiss where such defendants are in a position similar to that of moving defendants or where claims against such defendants are integrally related.'" *Gardner v. TBO Capital LLC*, 986 F. Supp. 2d 1324, 1333 n.5 (N.D. Ga. 2013) (quoting *Loman Dev. Co. v. Daytona Hotel & Motel Suppliers, Inc.*, 817 F.2d 1533, 1537 (11th Cir. 1987)). The Plaintiffs have had adequate notice and opportunity to respond to the request for dismissal made by Defendant and would not, therefore, be prejudiced by the Court's *sua sponte* dismissal of the claims against First Stage and House On the Run.Com, LLC. *Id*. ("It is clear that Plaintiffs have not, and cannot, state a claim . . . against the non-moving Defendants and notice is not required.").