

ORDERED.

Dated: February 10, 2020



Catherine Peek McEwen  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY  
COURT MIDDLE DISTRICT OF  
FLORIDA TAMPA DIVISION  
www.flmb.uscourts.gov

In re:

Trail Management, LLC,

Case No. 8:20-bk-00963-CPM  
Chapter 11

Debtor. \_\_\_\_\_ /

**AMENDED\* ORDER MODIFYING THE AUTOMATIC STAY TO PERMIT  
CIVIL TRIAL TO GO FORWARD IN PENDING FORECLOSURE ACTION**

THIS CASE came on for consideration on the Court's own motion pursuant to 11 U.S.C. § 105 to consider entry of an appropriate order. The Court has reviewed the docket in this case, including the *Emergency Motion to Dismiss Case as Bad Faith Filing or, in the Alternative, for Relief from the Automatic Stay* (the "Emergency Motion") (Doc. No. 6) filed by Westwater Construction, Inc. ("Westwater"). The Emergency Motion describes, among other things, a state court action pending in the Twelfth Judicial Circuit Court in and for Sarasota County, Case No. 2013-CA-002930NC (the "State Court Action"), in which Westwater and the Debtor are both parties and which involves a determination as to the validity of Westwater's lien on property titled in the Debtor's name and located at 5351 Saddle Oak Trail, Sarasota, Florida (the "Subject Property"). Attached as "Exhibit AA" to the Emergency Motion is a copy of an order by Circuit Judge Hunter W. Carroll, in which Judge Carroll seeks clarification from the Bankruptcy Court as to his ability to conduct a trial in the State Court Action on February 13 -14, 2020.

\*Amended to correct scrivener's errors and clarify the scope of the relief granted.

In his order, Judge Carroll points out that this is the third bankruptcy case filed by the Debtor on the eve of trial in the State Court Action. This Court notes that this is, indeed, the Debtor's third bankruptcy filing within a span of less than five months.<sup>1</sup> The Bankruptcy Code does provide that certain serial filers are not entitled to the automatic stay. Individuals may lose at least a sliver or all of the automatic stay pursuant to 11 U.S.C. § 362(c)(3) or (4).<sup>2</sup> The Debtor, however, is not an "individual" as that term is used in the Bankruptcy Code.<sup>3</sup> And although an exception to the automatic stay also exists for serial small business cases under 11 U.S.C. § 362(n), this case does not appear to be a "small business case" as that term is defined in the Code.<sup>4</sup> Thus, it appears that both the Debtor and property of the estate are currently protected by the automatic stay.

The Court also notes that in the current case, the Debtor has filed Adversary Proceeding No. 8:20-ap-00080-CPM against Westwater seeking a determination of the extent and validity of the same lien at issue in the State Court Action, evidencing the Debtor's desire to obtain a judicial resolution of this dispute. Such desire is also reflected in the Debtor's Schedule D, wherein the

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<sup>1</sup> The Court takes judicial notice that the first case was filed on September 20, 2019, in this Court, Case No. 8:19-bk-8931-CPM, and the second was filed on January 2, 2020, in the U.S. Bankruptcy Court for the District of Delaware, Case No. 20-bk-10005-KBO.

<sup>2</sup> With respect to 11 U.S.C. § 362(c)(3), a circuit split exists regarding the extent of the expiration of the automatic stay for a debtor who had one prior case pending within one year of the current case filing, whether that be a sliver of the stay—as to property of debtor only—or all of the stay. *Compare Rose v. Select Portfolio Serv.*, 945 F.3d 226, 230 (5th Cir. 2019) (after reviewing the plain language and the context of § 362(c)(3)(A), court adopts "the majority position" and concludes that this provision "terminates the stay only with respect to the debtor," i.e., only a sliver expires) and *Holcomb v. Hardeman (In re Holcomb)*, 380 B.R. 813, 816 (10th Cir. BAP 2008) (relying on the plain meaning of the phrase "with respect to the debtor" and the policies behind the Bankruptcy Code, court concludes § 362(c)(3)(A) does not impact property of the estate, noting that "if Congress meant to terminate the stay in its entirety, it would have done so in plain language as it did in § 362(c)(4)(A)(i)") (citation omitted) with *Smith v. State of Maine Bureau of Revenue Services (In re Smith)*, 910 F.3d 576, 590 (1st Cir. 2018) (after analyzing the statute's text, statutory context, and legislative intent, court concludes that § 362(c)(3)(A) "terminates the entire automatic stay . . . after thirty days for second time filers"). I have consistently held that only a sliver expires, primarily based on the grammatical construction of the text and application of statutory construction canons, namely the series-qualifier canon and the surplusage canon, the former of which was not discussed by the First Circuit. *See* A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* pp. 147-51 and 174-79 (2012).

<sup>3</sup> *See* 11 U.S.C. § 101(41) (distinguishing "individual" from "corporation" in the definition of a "person").

<sup>4</sup> *See* 11 U.S.C § 101(51C). *See infra* note 5.

Debtor lists Westwater as a secured creditor by virtue of a “Disputed” “Fraudulent Mechanics Lien,” and in the Debtor’s plan of reorganization, which may treat Westwater’s claim as unsecured.<sup>5</sup>

Based on the foregoing, the Court finds that modifying the automatic stay to permit the state court to conduct a trial on February 13-14, 2020 (or sooner if possible), will materially and substantially advance the progress of this case and resolve the parties’ dispute in the most timely and efficient manner.<sup>6</sup> Consequently, the Court finds that it is also appropriate to bar removal of the State Court Action to the bankruptcy court. In addition, the Court finds that no bankruptcy filing by anyone anywhere in the world, including but not limited to a subsequent transferee, should cause the stay to go into effect as to the Subject Property. And because the dispute involving Westwater’s lien is already teed up and ready for trial next week in the State Court Action, and this order modifies the automatic stay to permit that trial to go forward, the Court will enter a separate order in the referenced adversary proceeding abating that proceeding pending the outcome of the State Court Action.

Accordingly, it is

**ORDERED:**

1. The automatic stay is modified, *nunc pro tunc* to the time of the petition, for the limited purpose of permitting the Twelfth Judicial Circuit Court to conduct, at the earliest possible date(s), a

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<sup>5</sup> The Court questions the chapter 11 experience of Debtor’s counsel’s because the Debtor filed a “Plan of Reorganization for Small Business Under Chapter 11,” yet the Petition does not include a “small business debtor” designation and the Debtor would not qualify as “small business debtor” as defined in the Bankruptcy Code if the Debtor’s “primary activity is the business of owning or operating real property or activities incidental thereto.” *See* 11 U.S.C. § 101(51D). Because the Debtor has not yet filed the required Case Management Summary in this case (and failed to file one in the Debtor’s prior chapter 11 case filed in this Court), the Court cannot determine the Debtor’s primary activity. The Emergency Motion asserts that the Debtor was created to receive the Subject Property via quitclaim deed from the Debtor’s sole manager, Michael Kim, suggesting that the Subject Property is the Debtor’s sole asset, which would disqualify the Debtor from being a small business debtor.

<sup>6</sup> This result is compelled by F.R.B.P. 1001 and Fla. R. Civ. P. 1.010 (both of which call for “the just, speedy, and inexpensive determination” of disputes).

trial in the State Court Action, which trial is currently scheduled for February 13-14, 2020, and to enter judgment following such trial.

2. Any action taken in aid of execution of a judgment against the Subject Property, to transfer title to the Subject Property, or to otherwise take possession of or encumber the Subject Property remains subject to the automatic stay. Therefore, any such action taken in the absence of a separate order of this Court permitting the same shall be without legal force and effect.<sup>7</sup>

3. No person may file a notice of removal of the State Court Action to this Court. If an attorney (an officer of the court) attempts to do so in violation of this order, the Court may consider such act as constituting criminal contempt.<sup>8</sup> If a non-attorney attempts to do so, such act will have no legal effect.

4. A bankruptcy filing by anyone anywhere in the world will not cause the automatic stay to go into effect with respect to the Subject Property.<sup>9</sup> A copy of this order may be recorded in the public records of Sarasota County.

5. To be clear, it is this Court's intent that the trial in the State Court Action go forward as scheduled before the Twelfth Judicial Circuit Court and nowhere else.

6. The Court will enter a separate order abating Adversary Proceeding No. 8:20-ap-0080-CPM.

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<sup>7</sup> See, e.g., *Albany Partners, Ltd. v. W.P. Westbrook (In re Albany Partners, Ltd)*, 749 F.2d 670, 675 (11th Cir. 1984) (acts taken in violation of the automatic stay are generally deemed void and without effect) (citing *Kalb v. Feuerstein*, 308 U.S. 433, 443 (1940)).

<sup>8</sup> See *Malaute v. Suzuki Motor Co., Ltd.*, 987 F.2d 1536, 1546 (11th Cir. 1993) *cert. denied*, 510 U.S. 863 (1993) (“All attorneys, as ‘officers of the court,’ owe duties of complete candor and primary loyalty to the court before which they practice. An attorney’s duty to a client can never outweigh his or her responsibility to see that our system of justice functions smoothly.”). See also *In re Douglas W. McDonald*, 819 F.2d 1020, 1024 (11th Cir. 1987) (“The essential elements of criminal contempt are that the court entered a lawful order of reasonable specificity, it was violated, and the violation was willful.”) (citing *United States v. Turner*, 812 F.2d 1552, 1563 (11th Cir. 1987)).

<sup>9</sup> See, e.g., 11 U.S.C. § 362(b)(21)(B).

The Clerk is directed to serve a copy of this order on the Debtor, any interested non-CM/ECF filers, and the Honorable Hunter W. Carroll, Circuit Judge, Twelfth Judicial Circuit Court of Florida, 2002 Ringling Blvd., Sarasota, FL 34237.