

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

In re:

Case No. 6:06-bk-02178-ABB
Chapter 13

JAMES GREEN, II,

Debtor.

ORDER

This matter came before the Court on the Motion for Relief from Stay or Alternatively to Confirm the Stay is No Longer Applicable (“Motion”)¹ filed by Paul G. Brown, the Movant herein (“Movant”), against James Green, II, the Debtor herein (“Debtor”). The Movant seeks relief from the automatic stay for cause, or, in the alternative, to confirm the automatic stay no longer applies. An evidentiary hearing on the Motion was held on November 14, 2006 at which the Debtor, the Debtor’s counsel, and the Movant’s counsel appeared. The Court makes the following Findings of Fact and Conclusions of Law after reviewing the pleadings and evidence, hearing live argument, and being otherwise fully advised in the premises.

FINDINGS OF FACT

The Debtor instituted an individual Chapter 13 case on June 17, 2005 captioned In re James Green, II, Case No. 6:05-bk-06833-ABB (“Case I”). The Chapter 13 Trustee filed Trustee’s Motion to Dismiss Case for Failure to File an Amended Chapter 13 Plan.² An Order Dismissing Case (“Order”)³ was entered on January 18, 2006 dismissing the case, terminating the automatic stay, and holding “[p]ursuant to the provisions of 11 U.S.C. Sections 105(a) and 109(g), the debtor is not enjoined from filing for relief under Chapter 13 of Title 11 of the United States Code.” The effective date of the Order was delayed fourteen days to allow the Debtor an opportunity to convert the case.⁴

The Debtor filed a Notice of Conversion within the fourteen-day period on January 31, 2005.⁵ The Order Converting Case from Chapter 13 to Chapter 7 was entered

on February 3, 2006.⁶ Case I was not dismissed because the Debtor timely filed a conversion notice in accordance with the Order.

The Movant is the holder of a note and second priority mortgage encumbering the Debtor’s home located in Polk County, Florida. The Movant, pre-conversion, filed a Motion for Relief from Automatic Stay seeking stay relief.⁷ The Movant was granted stay relief post-conversion on April 21, 2006 “for the sole purpose of allowing movant to obtain an in rem judgment against the property and that movant shall not obtain an in personam relief against the debtor.”⁸ The Movant proceeded with a foreclosure action and obtained an Amended Final Judgment of Foreclosure (“Judgment”) on July 27, 2006.⁹ The Debtor received a discharge on July 13, 2006 and Case I was closed on August 21, 2006.¹⁰

A foreclosure sale was scheduled for August 30, 2006. The Debtor instituted his present Chapter 13 case on August 29, 2006 (“Case II”). Case II is governed by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”). Case I was pending within one year of the petition date of Case II, but Case II was not dismissed. The automatic stay arose upon the filing of Case II. The Debtor has not filed a motion seeking to extend the stay.

The Movant desires to complete the foreclosure action and seeks relief from the automatic stay, or, alternatively, confirmation no automatic stay is in effect, as the Debtor did not file a motion seeking to extend the stay. The Movant contends cause exists to grant relief from stay because: (i) the Debtor’s proposed plan is not feasible; (ii) the plan does not propose monthly payments in conformity with the Chapter 13 statutory requirement; (iii) the property appears to have no equity and the proposed plan payments do not preserve the Movant’s secured position; (iv) Case I as a Chapter 13 failed; and (v) the Movant obtained stay relief in Case I. The Movant presented no evidence in support of its Motion at the evidentiary hearing.

A determination of Plan feasibility is premature at this point. The Debtor is making adequate protection payments to his secured creditors through his proposed plan. The change in the Debtor’s circumstances has increased the Debtor’s ability to pay his plan payments. The lack of equity may constitute cause for granting stay relief, but the Movant has presented no evidence establishing such contentions. The conversion of Case I

¹ Doc. No. 26.

² Case I Doc. No. 31.

³ Case I Doc. No. 42.

⁴ Case I Doc. No. 42 at ¶ 5.

⁵ Case I Doc. No. 44.

⁶ Case I Doc. No. 46.

⁷ Case I Doc. No. 26.

⁸ Case I Doc. No. 53.

⁹ Doc. No. 26, Exh. 2.

¹⁰ Case I Doc. No. 55.

and the Movant's attainment of stay relief in the previous case do not constitute cause for granting relief from stay in this case. The Movant has failed to establish cause exists for granting relief from the automatic stay.

The Movant argues, in the alternative, the automatic stay expired thirty days after the petition date of Case II. The Debtor would have been required to seek an extension of the automatic stay in Case II within thirty days of the petition date had Case I been dismissed. The Debtor did not need to seek an extension of the stay because Case I was not dismissed. The automatic stay remains in full force and effect. The Movant's Motion is due to be denied.

CONCLUSIONS OF LAW

The automatic stay of 11 U.S.C. § 362(a)(1) arose upon the Debtor's filing of Case II. The Movant seeks relief from the automatic stay pursuant to § 362(d)(1) to complete the foreclosure action. A court shall grant relief from the stay, such as by terminating, annulling, modifying, or conditioning such stay, on request of a party in interest and after notice and a hearing, "for cause, including the lack of adequate protection of an interest in property of such party in interest." 11 U.S.C. § 365(d)(1) (2005). The "decision to lift the stay is discretionary with the bankruptcy judge, and may be reversed only upon a showing of abuse of discretion." *In re Dixie Broad., Inc.*, 871 F.2d 1023, 1026 (11th Cir. 1989).

The Movant sets forth five reasons why cause exists to lift the stay. The arguments relating to the feasibility of the Debtor's plan and whether it meets the statutory requirements of § 1325(a)(5)(b) cannot yet be determined. The events of Case I recited by the Movant do not constitute cause in Case II for stay relief. The only assertions made by Movant for "cause" are the assertions the property lacks equity and the Movant's secured position is eroding. The Movant presented no evidence establishing either the property does not have equity or the Movant is not adequately protected. A change in circumstances has occurred increasing the Debtor's ability to maintain payments in compliance with his Plan. The Movant failed to establish cause exists for granting relief from the stay.

The Movant contends, in the alternative, the automatic stay has expired because the Debtor did not seek an extension of the stay pursuant to the new BAPCPA¹¹ provision:

(3) if a single or joint case is filed by or against debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period *but was dismissed*, other than a case refilled under a chapter other than chapter 7 after dismissal under section 707(b)—
(A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case.

11 U.S.C. § 362(c)(3)(A) (2005) (*emphasis added*). An extension of the stay may be sought upon motion filed and heard prior to the expiration of the thirty-day post-petition period. 11 U.S.C. § 362(c)(3)(B).

The touchstone of § 362(c)(3) is dismissal. Section 362(c)(3) is only applicable if the previous case was dismissed. Section 362(c)(3) is not applicable to the Debtor's Case II because Case I was not dismissed. The Debtor timely exercised his statutory right to convert Case I (pursuant to 11 U.S.C. § 1307(a)) within the fourteen-day period set forth in the Order. The dismissal provision of the Order never took effect.

The automatic stay automatically arose when the Debtor filed Case II pursuant to § 362(a) and remains in full force and effect. No basis exists for granting the relief sought in the Motion.

Accordingly, it is

ORDERED, ADJUDGED and DECREED that Movant's Motion is hereby **DENIED** without prejudice.

Dated this 21st day of November, 2006.

/s/ Arthur B. Briskman
ARTHUR B. BRISKMAN
United States Bankruptcy Judge

¹¹ Pub. L. No. 109-8, 119 Stat. 23 (2005). The Bankruptcy Abuse Prevention and Consumer Protection Act was enacted on April 20, 2005. The new law became generally effective on

October 17, 2005, but certain provisions became effective upon enactment. Section 362(c)(3)(B), which is relevant to this proceeding, became effective on October 17, 2005.