

Dismissal Order was vacated based under fundamental fairness after the Debtors failed to receive timely notice of the possible dismissal of their case if they fail to timely make their plan payments as contained in a provision included in a Court Order continuing the automatic stay after their filing previous failed cases.

18-60345. William and Meredith Stone

Hearing Date: 8/30/18 Tyler Docket; Debtors' Motion to Vacate Order Dismissing Case where the case was dismissed after the Debtors' failed to timely make their initial monthly plan payment in violation of the Court Order granting the Debtors' Motion to Extend the Automatic Stay.

Issue: Should the Dismissal Order be vacated where the Debtors did not have actual knowledge of the Court provision requiring the Debtors' timely making their plan payments until after the initial plan payment due date had passed?

Background:

If the debtor was in a previous dismissed bankruptcy within the preceding 1 year period prior to the filing of current case, the automatic stay in the current bankruptcy filing shall terminate on the 30th day after the filing of this latter case. 11 U.S.C. 363(c)(3)(A).

If the debtor files a motion for continuation of the automatic stay, the Court may extend the stay in the subsequent case as to any or all creditors "*subject to such conditions or limitations as the Court may then impose.*" 11 U.S.C. 363(c)(3)(B).

During the last couple of years involving debtors that are in their third bankruptcy with little or no gap between filing these consecutive cases, the Court has been including in its Orders Extending the Automatic Stay an additional condition requiring the debtors to timely make their plan payments with no grace period for a certain period of time as set forth therein or their case would be summarily dismissed without further notice or motion (this provision herein referred to as the "timely plan payment provision").

Facts: At the hearing, one of the Debtors testified as follows:

--This is the Debtors' **third** bankruptcy filing (the Debtor testified concerning the history of the two prior cases and the reasons why these two prior cases failed).

--The Debtors filed the current case on **6/4/18**, thereby causing their first plan payment to be due 30 days thereafter (7/4/18).

--The Debtors filed their Motion to Continuation of Stay in Consecutive Cases on **6/4/18**.

--The Court entered its Order Establishing Deadline for Objection to Motion for Continuation of Automatic Stay and Setting Possible Hearing Date on such Motion on **6/4/18**.

--The Court entered its Order Extending the Automatic Stay containing the timely plan payment provision on **6/27/18**.

--The Debtors' initial plan payment came due on **7/4/18**. The Debtors failed to timely make this payment in violation of the timely plan payment provision as contained in the Order Extending the Automatic Stay.

--The Trustee filed his Notice of Plan Payment Delinquency on **7/9/18** upon the failure of the Trustee to receive the Debtors' initial plan payment that came due on 7/4/18.

--The Court entered its Dismissal Order on **7/9/18**.

--The Debtor testified that the Debtors were out-of-town and did not return until **7/9/18** (four days after the due date of their initial plan payment on 7/4/18). Accordingly, the Debtors did not have actual knowledge of their obligations under the timely plan payment provision as contained in the Order Extending the Automatic Stay. The Debtors attempted (but failed) to make their initial plan payment through TFS/MoneyGram on that date.

--On **7/9/18**, the Debtors' filed their Motion to Vacate the Dismissal Order based upon their lack of actual knowledge of their obligations to timely make their plan payments (and the possible dismissal of their case) as set forth in the timely plan payment provision contained in the Order Extending the Automatic Stay.

Ruling: The Court vacated the Dismissal Order with the following observations:

--Fundamental fairness of notice to the Debtors required the dismissal order to be vacated in this case. However, the Judge noted that, of all probability, the Order Establishing Deadline for Objection to Motion for Continuation of the Automatic Stay and Setting Possible Hearing Date on such Motion (that is entered shortly after the debtors' filing their Motion for Continuation of Stay) will be modified to include a notice of the possibility of the inclusion of a timely plan payment provision with the possible dismissal of the case with prejudice in the event the debtors fail to comply.

--**In other words, the "I didn't know" excuse will not work in future cases.** In a recent Order Establishing Deadline for Objection to Motion for Continuation of Automatic Stay and Setting Possible Hearing on such Motion, the Court included the following notice language in its Order:

IT IS FURTHER ORDERED that, if no objection to the Motion is timely filed by the stated deadline, then the Court shall deem the Motion to be unopposed and shall continue the automatic stay as requested by the Debtor, provided; however, ***that in the event this case constitutes the third (or more) consecutive case that has been filed by the Debtor, the Court reserves the right to impose strict conditions upon the continuation or imposition of the automatic stay, notwithstanding the lack of objection, that may require the Debtor to tender plan payments in strict compliance with the payment due date without a grace period and any failure by the Debtor to comply with that strict compliance policy shall result in the immediate termination of the automatic stay and the dismissal of the case with prejudice. The Debtor is, therefore, instructed to review carefully the terms of any stay continuation/imposition order entered by the Court.*** [emphasis added]

--During the course of the hearing, the Judge pointed out to the Debtors' counsel that the Court has been imposing this timely plan payment provision on the debtors for the last couple of years and that notice to the debtors' counsel on the implementation of this provision is instantaneously transmitted electronically to the debtors' counsel (while acknowledging that notice by paper to the Debtors takes longer). The Court further noted that the debtors' bar should communicate to their clients of the possibility of the inclusion of this timely plan payment provision (with the resulting dismissal of the case upon the debtors' failure to do so) when the current case is the debtors' third bankruptcy filing with little or no gap between the filings of the consecutive cases.

Trustee's Comments: Approximately two years ago, the Trustee sent out a Memo to the bar concerning a case that was dismissed pursuant to the debtor's failure to comply with one of these timely plan payment provisions (the *Prewitt* case).¹ In that Memo, the Trustee made the following recommendations to the debtors' bar that the Trustee believes are still valid:

--If the debtor cannot, for whatever reason, make the payment by the due date as set under the Bankruptcy Code, the debtor should consider filing his Motion to Move the Due Date at the same time the debtor files the Motion to Continue the Automatic Stay. Such a Motion should be very specific on why the due date needs to be moved in that the Trustee will be reviewing such carefully. If, for example, the Debtor simply does not want to make the first plan payment, the Trustee will probably object to such.

Note: In that *Prewitt* case, the debtor received his social security check the day before the due date of the plan payment and, accordingly, it was impossible for the debtor to timely forward the plan payment to the Trustee without violating the timely plan payment provision as contained in the Order Extending the Automatic Stay. Had the debtor requested the Court to change the due date for his plan payment to one week later, the debtor would have then been able to timely make his plan payments to the Trustee's office as required under the timely plan payment provision and the case would not have been dismissed.

--The debtor should consider making a full plan payment to the Trustee at the time of or shortly after the filing of the bankruptcy case. In that way, the debtor shall remain one payment ahead in the payments no matter which manner the Debtor commence making subsequent plan payments... [the Memo continues, thereby listing in the Memo the various ways to make plan payments to the Trustee's office].

Note: Had the Debtors in this case made a full plan payment shortly after the filing of this case, the Debtors would have been current on the day their initial plan payment came due and their case would not have been dismissed (even though they did not have knowledge of the timely plan payment provision as contained in the Order Extending the Automatic Stay thereby requiring them to timely make that payment).

--If the Trustee correctly filed a Notice of Plan Payment Delinquency (meaning that the Trustee has not received the plan payment by the due date), do not call the Trustee's Office requesting

¹ See Trustee's Memo on his website under the tab "East Texas Cases" entitled "Condition Requiring Debtor to Stay Current on Plan Payments to Trustee as contained in Order Extending Automatic Stay as Against all Creditors is absolute with no grace period" [*In re Prewitt*, Case No. 16-60303].

that such be withdrawn for any other reason other than such was filed in error. The Trustee will **not** withdraw it unless the Notice of Plan Payment Delinquency was filed in error. ... The ultimate decision on whether the case will be dismissed or not after a delinquency will be made by the Court, not the Trustee.

Note: In their Motion to Vacate Dismissal Order, the Debtors in this case alleged that the Certificate of Non-payment as filed by the Trustee was “not accurate.” That allegation was not true thereby prompting the Trustee to file his Objection to the Motion to Vacate Dismissal Order.

--The Debtors’ plan payments, pursuant to the terms of the Debtors’ Chapter 13 Plan, provided for the Debtors to make their plan payments beginning “on the 30th day after the Petition Date” [Section 2.2 of Plan]. The Debtors filed their petition on 6/4/18, thereby making the due date of the Debtors’ initial plan payment being on **7/4/18**.

--The Debtors’ first plan payment posted with the Trustee’s office on **7/12/18**.

--The Trustee’s Certification of Non-payment was accurate when such was filed on **7/9/18** in that the Trustee had not received such and the Debtors were in violation of the timely plan payment provision as contained in the Order Extending Automatic Stay.

The final observation that the Trustee would make concerning this case, as noted above, is that the “I didn’t know” excuse will not work in future cases with the Court now including the additional notice as noted above in the Order Establishing Deadline for Objection to Motion for Continuation of Automatic Stay and Setting Possible Hearing on such Motion. The debtor’s attorneys should discuss the possible inclusion of the timely plan payment provision long before the Order Extending the Automatic Stay is entered so that the debtors are not surprised when the timely plan payment provision is added to the Order Extending the Automatic Stay.

Had the additional notice provision (as noted above) been included in the Order Establishing Deadline for Objection to Motion for Continuation of Automatic Stay and Setting Possible Hearing in this case, the Trustee is of the opinion that the Court would not have vacated the Dismissal Order.