

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

IN RE:	§	
	§	
PETER J. SPECKMAN, JR.,	§	Case No. 04-42172
	§	(Chapter 13)
Debtor.	§	
_____	§	
	§	
PETER J. SPECKMAN, JR.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Adv. No. 05-4086
	§	
FLAGSTAR BANK, F.S.B. and	§	
NORTEX MORTGAGE,	§	
	§	
Defendants.	§	

**ORDER REGARDING PLAINTIFF’S EMERGENCY MOTION FOR
APPLICATION FOR WRIT OF MANDAMUS**

This matter is before the Court on the “Emergency Motion for Application for Writ of Mandamus” (the “Motion”) filed by Peter J. Speckman (the “Debtor”) on October 18, 2007. In the Motion, which the Debtor filed pro se, the Debtor seeks an order from this Court compelling his counsel to take certain actions in connection with this adversary proceeding. Flagstar Bank, F.S.B. (“Flagstar”) opposes the Motion, which Flagstar describes as “a thinly disguised attempt to manufacture grounds for further continuance of the trial settling.”¹

¹ In its response to the Debtor’s Motion, Flagstar also requests that the Court consider sanctions against the Debtor under Bankruptcy Rule 9011. However, Flagstar failed to follow the procedure for initiating a sanctions proceeding set forth in Bankruptcy Rule 9011(c). Bankruptcy Rule 9011(c) requires, among other things, that a motion for sanctions be made separately from other motions.

BACKGROUND

The Debtor filed a pro se petition for relief under Chapter 13 of the Bankruptcy Code on May 4, 2004. The case was converted to Chapter 7 on March 9, 2005. The Debtor received a discharge on June 17, 2005, and his case was administratively closed.

The only real property listed in the Debtor's "Schedule A – Real Property" was a residence located at 3329 Singletree Trail in Plano, Texas. The Debtor claimed this property as his exempt homestead under Texas law in his "Schedule C- Property Claimed as Exempt." The Debtor listed a market value of \$184,000 for his home, and he listed Flagstar as holding a purchase money lien on his home in the amount of \$131,500.

After filing for bankruptcy, the Debtor defaulted on his mortgage payments. Flagstar filed motions seeking relief from the automatic stay and the co-debtor stay based on the payment defaults. Flagstar, the Debtor, and the Debtor's spouse subsequently reached an agreement providing for a cure of the payment arrears, among other things. The Court entered an "Agreed Order Conditioning the Automatic Stay Pursuant to 11 U.S.C. §362" and an "Agreed Order Conditioning the Co-Debtor Stay Pursuant to 11 U.S.C. §1301" (collectively, the "Agreed Orders") on February 10, 2005.

Less than three months after the Court approved the Agreed Orders, the Debtor initiated this adversary proceeding against Flagstar. In his complaint, which was filed on May 2, 2005, the Debtor alleges that there were a number of errors on his credit report when he was negotiating the purchase of his home in or around 1998. He alleges that Flagstar's agent, Nortex Mortgage ("Nortex"), agreed (1) that Flagstar would loan him the funds necessary to purchase his home at an initial interest rate of 11.5% and (2) that Flagstar would re-negotiate the interest rate to then-current market terms if the Debtor

made timely payments for twelve months and corrected the errors on his credit report with Experian. The Debtor further alleges that Flagstar and Nortex failed to honor the latter portion of this agreement by renegotiating the interest rate on his home mortgage. Thus, the Debtor claims that he was fraudulently induced to enter into the loan and that Flagstar has been unjustly enriched. He seeks the return of all “excess interest” paid to Flagstar, to strip Flagstar’s lien from his home, and to recover damages from Flagstar for alleged violations of the Texas Deceptive Trade Practices Act.

This adversary proceeding was originally set for trial on May 10, 2006. The parties have requested and received numerous continuances of the trial date. On April 28, 2006, Flagstar filed an unopposed request for continuance in order to allow the parties to complete discovery, which was granted, and the trial was rescheduled for October 10, 2006. On September 27, 2006, the parties jointly filed another motion requesting continuance of the trial date in order to complete discovery, which was granted, and the trial was rescheduled for January 11, 2007. On January 5, 2007, the parties jointly filed a motion requesting a continuance of the trial date in order to accommodate settlement discussions, which was granted, and the trial was rescheduled for May 2, 2007. On May 1, 2007, the Debtor filed a request for continuance based on his counsel’s recent heart surgery, which was granted, and the trial was rescheduled for September 4, 2007.

The Debtor filed another request for continuance on August 22, 2007, alleging that both he and his counsel were suffering from assorted health problems. The Court scheduled the Debtor’s request for hearing on August 28, 2007. At the conclusion of the hearing, the Court granted the Debtor’s request to continue the trial date but warned the

parties that no further continuances of the trial date would be granted. The trial is currently scheduled for November 19, 2007.

DISCUSSION

“Mandamus” derives from Latin and means “we command.” 52 AM. JUR. 2D *Mandamus* § 1 (1970). The “remedy of mandamus is a drastic one, to be invoked only in extraordinary circumstances.” *Power v. Barnhart*, 292 F.3d 781, 784 (D.C. Cir. 2002). Mandamus is available only if: “(1) the plaintiff has a clear right to relief; (2) the defendant has a clear duty to act; and (3) there is no other adequate remedy available to plaintiff.” *Id.* The party seeking mandamus “has the burden of showing that ‘its right to issuance of the writ is clear and indisputable.’” *Id.* (citations omitted). *See also Heckler v. Ringer*, 466 U.S. 602, 616 (1984) (clear nondiscretionary duty required).

Although the general power of federal courts to issue writs of mandamus has been abolished by Federal Rule of Civil Procedure 81(b), the All Writs Statute, 18 U.S.C. §1651(a), allows “all courts established by Act of Congress” to “issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.” Similarly, 11 U.S.C. §105(a) allows a bankruptcy court to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions” of the Bankruptcy Code. As noted in the legislative history to §105(a):

Section 105 is similar in effect to the All Writs Statute, 28 U.S.C. 1651 The section is repeated here for the sake of continuity from current law and ease of reference, and to cover any powers traditionally exercised by a bankruptcy court that are not encompassed by the All Writs Statute.

H.R. Rep. 95-595, 95th Cong., 1st Sess., at 316-17 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6273-74.

Here, the Debtor's Motion appears to be in the nature of a request that this Court compel his attorney to take certain actions. The Debtor states in his response to Flagstar's opposition that he is not seeking a continuance of the trial date, but "the issuance of a writ to cause the Attorney for Debtor ... to act within the guidelines for attorney's [sic] representing the client's interests."² To the extent the Debtor seeks to compel performance of an alleged duty, the relief the Debtor seeks is in the nature of mandamus. See *Georges v. Quinn*, 853 F.2d 994, 995 (1st Cir. 1988); *United States v. Brock (In re Wingreen Co.)*, 412 F.2d 1048, 1051 (5th Cir. 1969). The writ of mandamus is one of the writs available under the All Writs Statute and may, under appropriate circumstances, be granted under 11 U.S.C. §105(a) as well. See *Moye v. Clerk, DeKalb County Superior Court*, 474 F.2d 1275 (5th Cir. 1973) (per curiam); *In re 1900 M Restaurant Associates, Inc.*, 319 B.R. 302 (Bankr. D. D.C. 2005). However, the duty the Debtor seeks to compel must be "so plainly prescribed as to be free from doubt and equivalent to a positive command.... [W]here the duty is not thus plainly prescribed, but depends on a statute or statutes the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus." *Wilbur v. United States*, 281 U.S. 206, 218-19 (1930).

The Court, having reviewed the Motion as well as the opposition by Flagstar and the Debtor's response to Flagstar's opposition, finds that the Debtor has failed to establish any right to the issuance of a writ of mandamus. The Debtor has not, for example, established any "plainly prescribed" duty that his counsel has failed to perform,

² In his response to Flagstar's opposition, the Debtor requests that the Court sanction Flagstar in connection with a motion to dismiss filed by Flagstar in the Debtor's underlying bankruptcy case. The Debtor, however, failed to follow the procedure for initiating a sanctions proceeding set forth in Bankruptcy Rule 9011(c).

such as a duty imposed by the Bankruptcy Code, the Bankruptcy Rules or this Court's prior orders. A perception of inadequate representation or a dispute regarding trial tactics is not grounds for the drastic relief the Debtor requests in the Motion. Moreover, the record reflects that the Debtor's counsel is suffering from serious health problems, and the Court granted the most recent continuance of the trial date in part to allow the Debtor time to retain new counsel.

CONCLUSION AND ORDERS

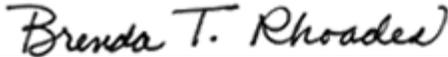
For the foregoing reasons,

IT IS ORDERED that the Debtor's Motion shall be, and it is hereby, **DENIED**.

IT IS FURTHER ORDERED that Flagstar's request for sanctions against the Debtor shall be, and is hereby, **DENIED** without prejudice to re-filing in compliance with the requirements of Bankruptcy Rule 9011(c).

IT IS FURTHER ORDERED that the Debtor's request for sanctions against Flagstar shall be, and is hereby, **DENIED** without prejudice to re-filing in compliance with the requirements of Bankruptcy Rule 9011(c).

Signed on 11/14/2007

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HONORABLE BRENDA T. RHOADES,
UNITED STATES BANKRUPTCY JUDGE