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11/02/2007

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

IN RE:	§	
	§	
THOMAS MICHAEL TOBAR and	§	Case No. 07-42320
TAMI MARIE TOBAR,	§	(Chapter 13)
	§	
Debtors.	§	

ORDER DENYING MOTION TO CONTINUE THE STAY

Thomas Michael Tobar and Tami Marie Tobar (collectively, the “Debtors”) initiated this case on October 5, 2007, by jointly filing a petition for relief under Chapter 13 of Title 11 of the United States Code (the “Bankruptcy Code”). Their original petition states that the Debtors had one bankruptcy case pending in the previous year. More than twenty-seven days after initiating their present bankruptcy case, after the close of business on Thursday, November 1, 2007, the Debtors filed a MOTION FOR CONTINUATION OF AUTOMATIC STAY AFTER PRIOR DISMISSAL WITHIN YEAR OF FILING [Dkt. #6] (the “Continuation Motion”) and a MOTION FOR SETTING AND REQUEST FOR EXPEDITED HEARING [Dkt. #7] (the “Request for Expedited Hearing”).¹ The Debtors state in their Continuation Motion that their prior bankruptcy case was dismissed on August 20, 2007, for failure to make scheduled plan payments. In their Request for Expedited Hearing, the Debtors request a hearing “not later than on or before November 9, 2007” and

¹ The Court’s records reflect that the Continuation Motion was filed at 5:59 p.m. and the Request for Expedited Hearing was filed at 11:58 p.m. on November 1, 2007.

state, as grounds for an expedited hearing, that “[a] hearing was not requested earlier because the motion was just filed.”

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 significantly changed the application of the automatic stay to debtors who have more than one bankruptcy case pending within a one-year period. Under §362(c)(3)(A), if a debtor has had a bankruptcy case pending and dismissed within one year of filing the present case, “the stay ... shall terminate with respect to the debtor on the 30th day after the filing of the case.” The Court may continue the stay upon a motion of the debtor and “after notice and hearing completed before the expiration of the 30-day period.” 11 U.S.C. §362(c)(3)(B). The Court does not have authority under §362(c)(3)(B) to continue the automatic stay if a hearing on a motion for continuance is not completed before the thirtieth day after the filing of the case. *See id.*

To effectuate §362(c)(3)(A), the Local Rules for the United States Bankruptcy Court for the Eastern District of Texas (the “Local Bankruptcy Rules”) provide that motions to continue the automatic stay “shall be scheduled for an accelerated hearing upon filing” LBR 4001(a)(1). The moving party must contact the applicable courtroom deputy by telephone or electronic mail upon filing a stay continuation motion. LBR 4001(a)(2). Stay continuation motions must be served on all creditors, and “no hearing shall be conducted on less than two business days notice.” LBR 4001(a)(2)-(3). The Local Bankruptcy Rules “have the same force and effect as law, and are binding upon the parties and

the court until changed in the appropriate manner.” *See Matter of Adams*, 734 F.2d 1094, 1098-99 (5th Cir. 1984).

Here, the Debtors failed to provide this Court with any grounds for expediting an already expedited procedure in their Request for Expedited Hearing.² The Debtors also failed to comply with this Court’s Local Bankruptcy Rules by failing to contact the applicable courtroom deputy upon filing their Continuation Motion – the Court discovered the Continuation Motion and the Request for Expedited Hearing upon its own *sua sponte* review of the docket of this case. Finally, the thirty-day period prescribed in §362(c)(3)(B) will expire on Monday, November 5, 2007, *see* FED. R. BANKR. P. 9006(a), and the Debtors failed to file their Continuation Motion and Request for Expedited Hearing in time for the Court to conduct a hearing with two business days notice to creditors as required by the Local Bankruptcy Rules.

In support of their request for a continuation of the stay, the Debtors invoke this Court’s equitable powers under §105(a) of the Bankruptcy Code. This Court’s powers under §105(a) are not unlimited as that section only “authorizes bankruptcy courts to fashion such orders as are necessary to further the substantive provisions of the Code,” and does not permit bankruptcy courts to “act as roving commission[s] to do equity.” *In re Southmark Corp.*, 49 F.3d 1111, 1116 (5th Cir.1995) (citations and internal quotations omitted). Courts disagree as to

² In their Request for Expedited Hearing, the Debtors request a hearing more than 30 days after their petition date. In light of the clear requirement in §362(c)(3)(A) that a hearing must be completed within 30 days of the petition date, the Court assumes the requested hearing date to be a typographical error.

whether §105(a) permits bankruptcy courts to extend an automatic stay for single-repeat filers outside of the thirty-day period explicitly prescribed by Congress in §362(c)(3)(B). Compare, e.g., *In re Jumpp*, 344 B.R. 21, 27 (Bankr. D. Mass. 2006) (“[T]he Court cannot use its general equitable powers under §105(a) to impose a stay Congress has declared must terminate if the requirements of §362(c)(3) are not met.”), and *In re Berry*, 340 B.R. 636, 637 (Bankr. M.D. Ala. 2006) (“There is nothing in the language of §362(c) which suggests that the Court may impose a stay once the thirty-day period has expired.... If the Court were to consider motions such as the Debtor's instant motion [to extend the stay, filed sixty-four days after the filing of the later petition], the elaborate scheme provided by Congress in [the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005] would be undermined.”), with *In re Whitaker*, 341 B.R. 336, 346 (Bankr. S.D. Ga. 2006) (“My only authority for reinstating the stay [once it has lapsed under §362(c)(3)(A)] is to use the equitable powers conferred by §105(a).”). However, even those courts that have concluded that a bankruptcy court may use its §105(a) powers to extend the stay outside the thirty-day period in the context of §362(c)(3) “appli[ed] the traditional test for injunctive relief.” *In re Whitaker*, 341 B.R. at 348. See also *Capital One Auto Finance v. Cowley*, 374 B.R. 601, 606 (W.D. Tex., 2006) (“Assuming without deciding that a bankruptcy court may extend or reinstate the stay pursuant to its §105 powers despite the lack of a hearing completed within the thirty-day period prescribed by Congress, the Court

further finds that the Bankruptcy Court did not make the proper findings necessary for the issuance of an injunction in the instant case.”).

The Debtors in this case have not initiated an adversary proceeding for injunctive relief as required by Federal Rule of Bankruptcy Procedure 7001(7), nor have they established (or even addressed) the elements for obtaining injunctive relief. The Court, therefore, need not decide whether it may in an appropriate case use §105(a) to extend the thirty-day period prescribed in §362(c)(3)(B). Accordingly,

IT IS ORDERED that the MOTION FOR SETTING AND REQUEST FOR EXPEDITED HEARING [Dkt. #7] shall be, and it is hereby, **DENIED**.

IT IS FURTHER ORDERED that the MOTION FOR CONTINUATION OF AUTOMATIC STAY AFTER PRIOR DISMISSAL WITHIN YEAR OF FILING [Dkt. #6] shall be, and it is hereby, **DENIED**.

Signed on 11/2/2007

Brenda T. Rhoades SD

HONORABLE BRENDA T. RHOADES,
UNITED STATES BANKRUPTCY JUDGE