

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

IN RE:

WILEY DEBTOR,

DEBTOR

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§

CASE NO. 11-12345
(Chapter 11)

**OBJECTION OF GOOD HEDGE, INC. TO
DEBTOR'S MOTION TO EXTEND STAY
AND REQUEST FOR HEARING**

**TO THE HONORABLE BARRY GOOD-JUDGE,
UNITED STATES BANKRUPTCY JUDGE:**

Good Hedge, Inc. ("GHI") – both a lessee of, and a creditor holding a secured claim against, Wiley Debtor ("Debtor") in the above-captioned Chapter 11 case – objects to the Debtor's motion to extend the stay and requests a hearing on the motion.

INTRODUCTION

1. Debtor's motion addresses the "exploding automatic stay" issue under 11 U.S.C. 362(c)(3) resulting from the repetitive filing of bankruptcy cases. Inasmuch as this case is a "chapter 24" case (a chapter 11 case following a prior chapter 13 case filed and dismissed within the prior year), the automatic stay in this case expires on January 4, 2012 as to all creditors unless Debtor obtains an order of this Court under section 362(c)(3)(B) extending the stay.

2. Not only does Debtor's dovetail motion to extend the stay fail to disclose to this Court important information that bears on the exploding stay issue, the motion does not set forth any factual basis for extending the stay in this case.

LEGAL STANDARD

3. Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, the automatic stay no longer applies uniformly to all debtors. Section 362(c)(3) sets forth limitations of the stay for debtors who have had a case pending and dismissed within the year prior to filing:

- (3) if a single or joint case is filed by or against a 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 refiled 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).

4. Section 362(c)(3)(B) provides that a continuation of the stay beyond the 30-day limitation set forth above may be granted only if four requirements are met:

- (1) a motion is filed;
- (2) there is notice and a hearing;
- (3) the notice and hearing are completed before the expiration of the original 30-day stay; and

- (4) the debtor proves that the filing of the new case “is in good faith as to the creditors to be stayed.”

11 U.S.C. § 362(c)(3)(B); *In re Collins*, 335 B.R. 646, 650 (Bankr. S.D. Tex. 2005) *In re Paul*, 2010 Bankr. LEXIS 3324 (Bankr. N.D. Tex. 2010). If those four requirements are fulfilled, then a court may extend the stay “subject to such conditions or limitations as the court may then impose.” 11 U.S.C. § 362(c)(3)(B).

5. The first three requirements of section 363(c)(3)(B) set forth above are easy to fulfill, so most previous decisions on the exploding stay issue deal with the fourth requirement – *i.e.*, that the new case must be filed in good faith. Under section 362(c)(3)(C)(i), a presumption of the absence of good faith arises as to all creditors of a debtor in three circumstances:

- (1) If the debtor was a debtor in more than one case pending in the preceding one-year period; 11 U.S.C. § 362(c)(3)(C)(i)(I);
- (2) If the prior case was dismissed as a result of the debtor’s failure to file or amend the petition or other required documents without substantial excuse, to provide adequate protection ordered by the court, or perform the terms of a confirmed plan; 11 U.S.C. § 362(c)(3)(C)(i)(II); or
- (3) If “there has not been a substantial change in the financial or personal affairs of the debtor” since the prior case was dismissed, or if a fully-performed, confirmed plan in the current case is not likely. 11 U.S.C. § 362(c)(3)(C)(i)(III).

The debtor may rebut the presumption of the absence of good faith “by clear and convincing evidence to the contrary.” 11 U.S.C. § 362(c)(3)(C). “Clear and convincing evidence is that weight of proof which produces in the mind of the trier of fact a firm

belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts of the case.” *Shafer v. Army & Air Force Exch. Serv.*, 376 F.3d 386, 396 (5th Cir. 2004).

FACTUAL BACKGROUND

6. The facts relating to Debtor’s bankruptcies reflect that the presumption of absence of good faith applies in regard to his motion to extend and that the motion provides no basis upon which Debtor could rebut the presumption by clear and convincing evidence.

7. Debtor is no stranger to the Bankruptcy Courts for the Southern District of Texas. In August, 2009, Debtor filed two chapter 11 cases on behalf of companies that he owned, W.D. Industries, Inc and W.D. Enterprises, Ltd. (administratively consolidated chapter 11 case no. 10-54321– Judge Loophole). After floundering around aimlessly in chapter 11 for ten months, both cases were converted to chapter 7. Creditors holding unsecured claims in both cases have received nothing.

8. GHI is the lessee of a building that Debtor owns at 98761 Fielding Park Dr, Houston, Texas 77058 on the far southeast side of the Houston metropolitan area (“the Fielding Park property”). GHI operates a growing manufacturing business out of the Fielding Park property in which it has made a substantial investment of machinery, equipment and time in the leased premises.

9. Debtor pledged the Fielding Park property as collateral for two loans. First, Debtor borrowed approximately \$700,000 in September, 2007 from Clueless Bank (“the Clueless Bank loan”), which Debtor secured with a first lien on the property. Moreover, Debtor also borrowed approximately \$500,000 from the Small Business Authority Bank (“the SBA” and “the SBA loan”), which he secured with a second lien on the Fielding Park property.

10. Debtor defaulted on the Clueless Bank loan in April, 2009 and has made no payments on the loan in the two-and-a-half years since then. Debtor also has been in default of the SBA loan for a long time. Accordingly, the current balance of the Clueless Bank loan is approximately \$775,000 and the most recent information from the SBA is that the current balance of the SBA loan is approximately \$520,000. Thus, the total amount of indebtedness secured by the property is over \$1,295,000. Inasmuch as two recent expert opinions regarding the value of the Fielding Park property have ranged between \$1,100,000 – \$1,135,000, Debtor has no – or nominal – equity in the property.

11. Given Debtor’s lack of equity in the Fielding Park property and the risk that Clueless Bank would exercise its contractual rights in regard to the property to GHI’s detriment, GHI bought the Clueless Bank loan in August, 2011 as a hedge to protect its substantial investment in the leased premises. GHI attempted to reach an accommodation with Debtor, but such attempts were unsuccessful and Debtor continued not to make any payment on the Clueless Bank loan.

12. As a result, in early September, 2011, GHI posted the Fielding Park property for a foreclosure sale to be conducted on October 4, 2011. On the eve of the scheduled foreclosure sale (October 3rd), Debtor filed his chapter 13 case (case no. 11-65769) in order to stay the sale.

13. Having used the automatic stay to delay the foreclosure sale, Debtor proceeded to be a quintessential bad faith debtor in his chapter 13 case. He did not file any schedules, statement of affairs or any financial information whatsoever with the Court, prompting the Court to issue its order that the case would be dismissed absent Debtor's compliance with his duties (docket #6 in case no. 11-65769). Debtor also did not file a proposed chapter 13 plan, nor did he even show up for his meeting of creditors (docket #16 in case no. 11-65769).

14. Rather than comply with his duties as a debtor, Debtor filed a disingenuous motion to dismiss his chapter 13 case just two weeks after commencing the case (docket #13 in case no. 11-65769). In the motion, Debtor asserted that the total amount of unsecured claims against him made him ineligible for chapter 13 and that – if he were to remain in bankruptcy – he would have to convert to a chapter 11 case. However, Debtor stated on page two of his motion that he did not want to do that:

6. The Debtor has experience in Chapter 11 filings and does not want to convert to a Chapter 11 personally. Not only are the Chapter 11 fees higher than a Chapter 13, *the Debtor does not believe that he can propose a confirmable plan under Chapter 11.* (emphasis supplied)

7. The Debtor respectfully requests that this Court dismiss his Chapter 13 filing without prejudice so that he can attempt to work out his financial problems outside of the Federal Bankruptcy Court protection. . . .

15. As a result of the foregoing representations, this Court dismissed the chapter 13 case on November 9, 2011.

16. After dismissal of the chapter 13 case, GHI again attempted to reach an accommodation with Debtor. Reflecting the falsity of the above-stated representations in his motion to dismiss that he had filed only days earlier, Debtor advised GHI that he would simply file another bankruptcy case if GHI attempted to exercise its contractual right to conduct a non-judicial foreclosure sale of the property. Debtor continued not to make any payments on the Clueless Bank loan.

17. Accordingly, GHI again posted the Fielding Park property for a foreclosure sale on December 6, 2011. Once again, on the eve of the scheduled foreclosure sale, Debtor commenced this chapter 11 case on December 5, 2011. Debtor filed his motion to extend the automatic stay on December 8, 2011.

LEGAL ANALYSIS

18. Debtor's motion to extend provides no meaningful basis upon which to base an extension of the automatic stay. Although his prior chapter 13 case was dismissed technically pursuant to his own motion, Debtor had failed to file virtually all of the required documents of a debtor in such a bankruptcy case without a meaningful excuse. 11 U.S.C. § 362(c)(3)(C)(i)(II). But for the false representations made in his motion to dismiss, this Court would have undoubtedly dismissed the case because of Debtor's failure to file the required documents.

19. Similarly, given the short time between this case and Debtor's prior chapter 13 case, it is clear that "there has not been a substantial change in the financial or personal affairs of the debtor" since dismissal of the prior case. 11 U.S.C. § 362(c)(3)(C)(i)(III). Indeed, Debtor's motion to extend provides no information to contradict Debtor's own statement in his motion to dismiss the prior chapter 13 case that he could not propose a confirmable chapter 11 plan. Consequently, Debtor faces a presumption of the absence of good faith in regard to his request to extend the automatic stay.

20. In view of the foregoing, Debtor's motion to extend provides no information upon which to base a rebuttal of the presumption of the absence of good faith by clear and convincing evidence. 11 U.S.C. § 362(c)(3)(C). Debtor's statement in his prior chapter 13 case that he could not propose a confirmable chapter 11 plan means

that this case has a very low likelihood of success. Moreover, the fact that Debtor still has not provided any financial information to this Court or creditors despite having filed two bankruptcy cases since October 3, 2011 indicates that the low probability that he could propose a feasible plan. Consequently, it is virtually impossible that Debtor could fulfill his heavy burden of rebutting by clear and convincing evidence the presumption that his case was not filed in good faith.

21. Inasmuch as Debtor's motion does not even attempt to suggest clear and convincing evidence to prove feasibility, the motion fails to meet the objective good faith requirement. Debtor's alleged subjective good faith is irrelevant. Debtor's motion to extend provides no information upon which to overcome the presumption that his case was not filed in good faith, so the Court need not evaluate whether to exercise its discretion to extend the automatic stay. The motion should simply be denied.

SPECIFIC RESPONSES TO MOTION TO EXTEND

22. GHI responds to the specific allegations in the motion to extend by the following parallel-numbered paragraphs:

1. Admitted
2. The first sentence is admitted. The second sentence is denied.
3. Denied.
4. Denied.

REQUEST FOR HEARING.

23. GHI requests a hearing on Debtor's motion to extend. However, GHI submits that it is Debtor's obligation to obtain such a hearing before the expiration of the automatic stay.

Accordingly, GHI requests that the Court deny Debtor's motion to extend the automatic stay, and for such other and further relief as is just.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument, was served via electronic transmission to counsel for the debtor, creditors and parties-in-interest via the Court's ECF system and via first class mail to the parties set forth on the attached creditor matrix on the 9th day of December, 2011.

A handwritten signature in black ink that reads "Tom Kirkendall". The signature is written in a cursive, slightly slanted style.

Tom Kirkendall