

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

IN RE:)
)
MARVIN LEE WILCOX and)
PAMELA JEAN WILCOX,) Case No. 07-10610-BH
) Chapter 7
Debtors,)
)

MOTION FOR RELIEF FROM AUTOMATIC STAY

The Oklahoma Department of Securities (Department), a creditor in this Chapter 7 Bankruptcy Case, hereby moves this Court pursuant to 11 U.S.C. §362(d) to lift the automatic stay to allow the Department to pursue collection of its non-dischargeable judgment against Debtors Marvin and Pamela Wilcox (Debtors).

IN SUPPORT THEREOF, the Department states the following:

1. The Department obtained a state court judgment in the matter of *Oklahoma Department of Securities ex rel. Irving L. Faught, Administrator et al. v. Robert Mathews, et al.*, Case No. CJ-2005-3796, in the District Court of Oklahoma County, State of Oklahoma, against Debtors on January 31, 2007 (State Court Judgment). Debtors appealed the State Court Judgment and it remains on appeal at the Oklahoma Supreme Court in consolidated case, SD-104262. The Oklahoma Supreme Court has not issued any stay of execution of the judgment.

2. On March 2, 2007, Debtors filed for bankruptcy protection seeking relief under Chapter 7.

3. Subsequently, the Department brought an adversary proceeding against Debtors seeking denial of the discharge of the State Court Judgment under 11 U.S.C. § 523(a)(2) and (19).

4. On December 12, 2008, this Court entered an order holding that the State Court Judgment was non-dischargeable pursuant to 11 U.S.C. § 523(a)(19).

5. On December 22, 2008, Debtors appealed that order.

6. On January 30, 2009, Debtors filed a *Motion for Stay of Order* pending the appeal.

7. On March 2, 2009, this Court denied a stay of the order pending appeal.

8. On January 21, 2009, the Chapter 7 Trustee filed an *Individual Estate Property Record and Report*, stating that no assets have been recovered for the bankruptcy estate and indicating that the Chapter 7 Trustee is waiting for Debtors to file their 2007 tax return to determine whether there will be a refund that would be property of the bankruptcy estate.

ARGUMENTS AND AUTHORITIES

Pursuant to 11 U.S.C. § 362(c), the automatic stay continues in effect until the bankruptcy case is dismissed or closed or until the debtor is granted or denied a discharge, unless the bankruptcy court terminates the stay with respect to a specific creditor on one of the grounds set forth in 11 U.S.C. § 362(d). Although some courts have held that it is not necessary for a creditor holding a non-dischargeable debt to seek relief from the automatic stay before pursuing collection of that debt, at least one court has found to the contrary. *In re Watson*, 78 B.R. 232 (B.A.P. 9th Cir. 1987) (automatic stay did not preclude creditor with non-dischargeable debt from executing judgment

against post-petition funds); *In re Embry*, 10 F.3d 401 (6th Cir. 1993) (creditor with debt determined to be non-dischargeable did not violate automatic stay by garnishing debtor's bank account); *but see In re Cardillo*, 172 B.R. 146 (N.D. GA 1994) (automatic stay must be lifted before creditor executes on non-dischargeable debt).

Debtors' bankruptcy case has not been closed or dismissed, nor has it yet been determined whether Debtors will be granted or denied a discharge as to his other debts. Therefore, in light of the conflicting caselaw cited above and the lack of caselaw in this jurisdiction, the Department has chosen to err on the side of caution and seek relief from the automatic stay.

Pursuant to 11 U.S.C. § 362(d)(1), a party in interest may request relief from the stay for "cause." Courts have discretion to determine whether a creditor should be granted relief from the stay on a case by case basis. *In re Busch*, 294 B.R. 137, 140 (B.A.P. 10th Cir. 2003). Once the party requesting relief shows there is cause to lift the stay, the burden shifts to the debtor to show why the stay should continue in effect. *Id.* at 140-141. Although "cause" is not defined in the Bankruptcy Code, courts have considered various factors to determine whether the automatic stay should be modified, including whether relief would interfere with the bankruptcy case and whether relief would prejudice other creditors. *Id.* Ultimately, courts consider the impact of the stay on the parties and weigh the harm to the debtor in granting relief against the harm to the creditor in continuing the stay. *Id.*

The facts of this case establish "cause" to grant the Department relief from the stay. As discussed above, the State Court Judgment is non-dischargeable, thus, Debtors will not be relieved of the judgment in this bankruptcy proceeding and the Department is

entitled to recover on the judgment through the state court process. The Chapter 7 Trustee has not yet declared this a "no-asset" case, but has not collected any assets after two years and has indicated that the only potential asset for distribution is a 2007 tax refund that may not even result once Debtors' 2007 tax return is filed. Debtors have reaffirmed their debts to all of their secured creditors. Finally, Debtors have now had the benefit of the automatic stay for over two years. It appears that the only significant outstanding issue, other than the possible 2007 tax refund, responsible for keeping this bankruptcy case open is the pending appeal of this Court's order determining the State Court Judgment to be non-dischargeable.

Because no recoverable assets have been found after two years of bankruptcy protection and Debtors have reaffirmed their debts to their secured creditors, recovery on the State Court Judgment will undoubtedly come from Debtors' post-petition assets and income. Thus, granting relief from the stay will cause no prejudice to the bankruptcy estate or any other creditor. On the other hand, requiring the Department to wait until the bankruptcy case is closed will cause a significant and unjustified delay in the Department's ability to collect on the State Court Judgment.

The Department believes that Debtors will soon have assets by which the State Court Judgment can be satisfied. For instance, Debtor Marvin Wilcox will be a beneficiary of significant trust assets that are post-petition assets. Because of the anticipated distribution from the trust to Debtor, there is now some chance of recovery by the Department. That chance of recovery may be greatly diminished if the automatic stay prevents execution on the non-dischargeable State Court Judgment at the time of that distribution.

The Department obtained the State Court Judgment in January 2007. The State Court Judgment represents money by which Debtors were unjustly enriched in a massive “Ponzi” scheme. Unlike Debtors, other participants in the “Ponzi” scheme lost significant amounts of money, and in some cases, their life savings and retirement funds. Those individuals have been waiting since October of 2004 to recover funds lost to them – funds by which Debtors have benefitted over the past several years. Any money recovered on the State Court Judgment will be placed in a receivership for the benefit of those participants who lost money in the “Ponzi” scheme.

WHEREFORE, the Department moves the Court to enter an order lifting the automatic stay as to the State Court Judgment and granting such other relief as appropriate.

Submitted by:

s/ Gerri Stuckey

Gerri Stuckey, OBA #16732

Amanda Cornmesser, OBA # 20044

Oklahoma Department of Securities

First National Center, Suite 860

120 N. Robinson

Oklahoma City, Oklahoma 73102

(405)280-7700

(405)280-7742 facsimile

*Counsel for Plaintiff, Oklahoma Department
of Securities*

CERTIFICATE OF SERVICE

I hereby certify that on the 9th of April, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

Robert N. Sheets
Robert J. Haupt
Phillips Murrah P.C.
Corporate Tower
101 N. Robinson, Thirteenth Floor
Oklahoma City, OK 73102
Attorneys for Debtors

Jeffrey C. Trent
P.O. Box 851530
915 W. Main
Yukon, OK 73099
Attorney for Debtors

Susan J. Manchester, Chapter 7 Trustee
1412 N. Dewey
Oklahoma City, OK 73103

Matthew R. Oppel
117 N. Main Street
P.O. Box 555
Kingfisher, OK 73750
Attorney for Wilcox Creditor, NBanC

s/ Gerri Stuckey