

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re:

Chapter 11

TAYLOR, BEAN & WHITAKER
MORTGAGE CORP.,

Case No. 3:09-bk-07047-JAF

Debtor.

**DEBTOR'S RESPONSE AND OBJECTION TO THE
MOTION OF FIRST AMERICAN TITLE INSURANCE
COMPANY FOR RELIEF FROM THE AUTOMATIC STAY**

Taylor, Bean & Whitaker Mortgage Corp. (the “**Debtor**”), by and through its undersigned counsel, hereby files this Response and Objection to the Motion of First American Title Insurance Company for Relief from the Automatic Stay (the “**Response**”) and requests that the Court deny the Motion of First American Title Insurance Company for Relief from the Automatic Stay (the “**Motion**”) (Doc. No. 502) on the following grounds:

Preliminary Statement

First American Title Insurance Company (“**First American**” or “**Movant**”) requests that the Court enter an order granting relief from the automatic stay to allow it to proceed with certain litigation currently pending in the Circuit Court of Mobile County, Alabama (the “**Action**”). The Action was filed on August 13, 2009, and seeks the establishment of an equitable mortgage in favor of First American, as well as claims for unjust enrichment, constructive trust, equitable subrogation, and liability on a dishonored check. The Action seeks both equitable relief and monetary damages in excess of

\$390,000. The check at issue was dishonored after Colonial Bank placed a freeze on the Debtor's bank accounts. As further discussed below, the balancing of the relevant factors militates against lifting the automatic stay at this time.

Legal Argument

The Movant bears the burden of establishing a *prima facie* case that it is entitled to relief from the automatic stay for cause. *In re Paxson Elec. Co.*, 242 B.R. 67 (Bankr. M.D. Fla. 1999). As set forth below, the Movant cannot meet this burden.

Although the term "for cause" is not defined in the Bankruptcy Code, courts have adopted twelve factors to consider when deciding whether or not to lift the stay so that litigation may continue to completion in another tribunal. The factors that courts consider in this analysis are as follows:

(1) Whether relief would result in a partial or complete resolution of the issues; (2) lack of any connection with or interference with the bankruptcy case; (3) whether the other proceeding involves the debtor as fiduciary; (4) whether a specialized tribunal with the necessary expertise has been established to hear the cause of action; (5) whether the debtor's insurer has assumed full responsibility for the defense; (6) whether the action primarily involves third parties; (7) whether litigation in another forum would prejudice the interest of other creditors; (8) whether the judgment claim arising from the other action is subject to equitable subordination; (9) whether the movant's success in the other proceeding would result in a judicial lien avoidable by the debtor; (10) the interest of judicial economy and the expeditious and economical resolution of litigation; (11) whether the parties are ready for trial in the other proceeding; and (12) the impact of the stay on the parties and the balance of harms. *See, e.g., In re Sommax Industries*, 907 F.2d 1280, 1285-86 (2d Cir. 1990); *In re Beane*, 404 B.R. 942 (M.D. Fla. 2008).

Not every one of these factors will be relevant in every case. *See, In re Bogdanovich*, 292 F. 3d 104, 110 (2d Cir. 2002). An analysis of the relevant factors below leads to the conclusion that the automatic stay should not be lifted to allow the Action to go forward.

1. Lack of any connection with or interference with the bankruptcy case.

As the Court is aware, the Debtor is in the process of effectuating a global resolution with the major constituencies in this case and is liquidating its assets for the benefit of its creditors. Allowing the Action to go forward will interfere with the Debtor's efforts to maximize the value of its estate for the benefit of creditors. Accordingly, this factor militates against lifting the automatic stay.

2. Whether the other proceeding involves the debtor as a fiduciary.

The Action does not involve the Debtor as a fiduciary. This factor militates against lifting the automatic stay.

3. Whether a specialized tribunal with the necessary expertise has been established to hear the cause of action.

As a specialized tribunal has not been established, this factor militates against lifting the automatic stay.

4. Whether the debtor's insurer has assumed full responsibility for defense.

Upon information and belief, no insurer has assumed full responsibility for defending the Action and, if the automatic stay is lifted, the Debtor will be required to

pay the costs of defending the Action. Accordingly, this factor militates against lifting the automatic stay.

5. Whether the action primarily involves third parties.

Although the Debtor is a defendant in the Action, the primary defendant in the Action is HMC-Home Mortgage Company (“**HMC**”), the holder of the mortgage at issue. The Movant’s claims for equitable relief are directed at the mortgage obtained by HMC under the circumstances alleged in the Action. It is the Debtor’s position that any claim for monetary damages against the Debtor should be resolved through the claims process in this Court. The claims for equitable relief only require the participation of HMC. Accordingly, this factor militates against lifting the automatic stay.

6. Whether litigation in another forum would prejudice the interest of other creditors.

As discussed above, the Debtor is in the process of effectuating a global resolution with the major constituencies in this case and in liquidating its assets for the benefit of its creditors. Requiring the Debtor to litigate in another forum would greatly prejudice the interests of other creditors. This factor also mitigates against lifting the automatic stay.

7. Whether the judgment claim arising from the other action is subject to equitable subordination.

This factor does not appear to be applicable.

8. Whether the movant's success in the other proceeding would result in a judicial lien avoidable by the debtor.

This factor does not appear to be applicable.

9. The interest of judicial economy and the expeditious and economical resolution of litigation.

The Debtor submits that the interest of judicial economy would be best served by not lifting the automatic stay. Discovery has not commenced and the Action is not even close to being ready for trial. Indeed, the Action was filed on August 13, 2009, just days before the bankruptcy filing. Accordingly, this factor militates against lifting the automatic stay.

10. Whether the parties are ready for trial in other proceeding.

As discussed above, the Action is not ready for trial. Therefore, this factor militates against lifting the automatic stay. Indeed, the Action was filed on August 13, 2009, just days before the Petition Date.

11. The impact of the stay on the parties and the balance of harms.

The balance of the harms favors maintaining the automatic stay. The Debtor is in the process of liquidating its assets for the benefit of its creditors. Lifting the automatic stay would require the Debtor to pay the costs of defending the Action and will distract the Debtor's Chief Restructuring Officer and its financial advisors at this critical stage in the case. In addition, the Action is not ready for trial. The Movant has the ability to resolve its claims in this Court. Requiring the Movant to proceed in this Court

will not prejudice the Movant. The balance of harms favors the Debtor and, therefore, the automatic stay should remain in place.

WHEREFORE, the Debtor respectfully requests that the Court enter an order denying the Motion and providing such other and further relief as is just and proper.

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