

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE**

In re:

Bk. No. 00-10031-JMD
Chapter 7Caroline G. Douglas,
DebtorCharles G. Douglas, III,
Movant

v.

CM No. 00-13

Caroline G. Douglas,
Respondent

MEMORANDUM OPINION

I. INTRODUCTION

The Court has before it the motion of Charles G. Douglas, III (the “Movant”), seeking relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(1), and the objection thereto of Edmond J. Ford, Chapter 7 Trustee (the “Trustee”). Caroline G. Douglas (the “Debtor”) did not file a written objection to the motion. For the reasons outlined below, the Court grants the motion in part and denies the motion in part.

This Court has jurisdiction of the subject matter and the parties pursuant to 28 U.S.C. §§ 1334 and 157(a) and the “Standing Order of Referral of Title 11 Proceedings to the United States Bankruptcy Court for the District of New Hampshire,” dated January 18, 1994 (DiClerico, C.J.). This is a core proceeding in accordance with 28 U.S.C. § 157(b).

II. BACKGROUND

The Movant and the Debtor have been engaged in divorce proceedings in New Hampshire state court since 1996. On December 7, 1999, the Rockingham County Superior Court (the “Divorce Court”) entered a final order on the issue of the value and distribution of the parties’ marital assets (the “Divorce

Court Order”). Pursuant to the Divorce Court Order, the Debtor was ordered to execute a quitclaim deed¹ and to vacate the marital home by January 6, 2000. The Divorce Court Order specifically provides:

The marital homestead is awarded to Charles Douglas and Caroline Douglas is awarded \$7,500, one half the equity in the house, to be paid simultaneously upon her executing and delivering a quitclaim deed to Charles Douglas conveying to him all her right, title, and interest in the residence. This shall be accomplished within 30 days, at which time Caroline Douglas is ordered to move out of the house. To the extent this order is appealed, this part of the order regarding Caroline Douglas vacating the marital homestead shall take place as a routine real estate closing and shall not be stayed pending appeal.

In the event Caroline Douglas does not timely vacate the property, the Merrimack County Sheriff’s Office is directed to remove her from the property and to place her personalty in storage at her own expense.

Divorce Court Order ¶ 10. In a separate paragraph of the Divorce Court Order, the Divorce Court set the \$7,500.00 award to the Debtor against payments that were made to her during the course of the divorce.

See Divorce Court Order ¶ 16. As a result of the setoffs, the Debtor was ultimately ordered to pay the Movant \$166.33. See id.

On or about December 29, 1999, the Debtor filed an emergency ex parte motion with the New Hampshire Supreme Court (the “Supreme Court”) seeking to stay the Divorce Court Order to the extent that it requires the Debtor to execute a deed and transfer possession of the marital home to the Movant. On January 3, 2000, the Supreme Court denied the Debtor’s motion (the “Supreme Court Order”). On January 6, 2000, the Debtor filed Chapter 7 bankruptcy. On January 7, 2000, the Movant filed the instant motion seeking relief from the automatic stay so that he could take whatever steps are necessary to effectuate the transfer of possession of the marital residence. The Movant also filed an ex parte request for an emergency hearing on the motion which was granted by the Court on January 10, 2000. The Court held a hearing on January 13, 2000 at which the Movant, the Debtor, and the Trustee appeared. After hearing extensive argument by the parties, the Court took the matter under advisement.

¹ Although the Debtor and the Movant were married in 1991, the marital home was purchased in 1994 solely in the Movant’s name and the Movant was the only person who executed the mortgage note. Subsequent to the purchase, the Movant executed, but did not record, a deed transferring the property to himself and the Debtor as joint tenants. Subsequent to commencement of the divorce proceedings, the Debtor recorded the deed. As of the petition date, the record title reflects that the Debtor and the Movant own the marital home jointly.

III. DISCUSSION

Section 362(a) of the Bankruptcy Code operates to stay certain actions against debtors and their property. See Grella v. Salem Five Cent Savs. Bank, 42 F.3d 26, 31 (1st Cir. 1994) (“As soon as a petition in bankruptcy is filed, the automatic stay provisions of § 362 take effect, preventing all pre-petition creditors from taking action to collect their debts.”); Nelson v. Taglienti (In re Nelson), 994 F.2d 42, 44 (1st Cir. 1993) (“As a general rule, the filing of a bankruptcy petition operates as a stay against actions affecting the property of the estate.”). “Ordinarily, a party in interest must ask the bankruptcy court for, and receive, relief from the stay before proceeding against the debtor’s estate.” Nelson, 994 F.2d at 44.

“[T]he hearing on a motion for relief from stay is meant to be a summary proceeding, and the statute requires the bankruptcy court’s action to be quick.” Grella, 42 F.3d at 31. “The limited grounds set forth in the statutory language, read in the context of the overall scheme of § 362, and combined with the preliminary, summary nature of the relief from stay proceedings, have led most courts to find that such hearings do not involve a full adjudication on the merits of claims, defenses, or counterclaims, but simply a determination as to whether a creditor has a colorable claim to property of the estate.” Id. at 32. See also Bombardier Capital, Inc. v. Ken Carpenter RV, Inc. (In re Ken Carpenter RV, Inc.), 177 B.R. 754, 754 (Bankr. D.N.H. 1995) (citing Grella). “To allow a relief from stay hearing to become anymore extensive than a quick determination of whether a creditor has a colorable claim would turn the hearing into a fullscale adversary lawsuit . . . and would be inconsistent with this procedural scheme.” Grella, 42 F.3d at 33. “The statutory and procedural schemes, the legislative history, and the case law all direct that the hearing on a motion to lift the stay is not a proceeding for determining the merits of the underlying substantive claims, defenses, or counterclaims. Rather, it is analogous to a preliminary injunction hearing, requiring a speedy and necessarily cursory determination of the reasonable likelihood that a creditor has a legitimate claim or lien as to a debtor’s property.” Id.

In this case, the Movant seeks relief from the automatic stay for “cause” pursuant to 11 U.S.C. § 362(d)(1). The statute provides:

On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying , or conditioning such stay–

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest.

11 U.S.C. § 362(d)(1). Pursuant to the Bankruptcy Code, the party seeking relief from the stay has the burden of proof on the issue of the debtor’s equity in the property and the party opposing such relief has the burden of proof on all other issues. See 11 U.S.C. § 362(g). However, the movant bears the burden of going forward with evidence sufficient to establish a prima facie case that he has a factual and legal right to relief from the automatic stay. See In re Sonnax Indus., Inc., 907 F.2d 1280, 1285 (2^d Cir. 1990).

According to the Movant, there are two bases for finding “cause” under section 362(d)(1). First, the Divorce Court Order and the Supreme Court Order are final orders, with respect to paragraph 10 of the Divorce Court Order which requires the Debtor to execute and deliver a quitclaim deed and vacate the marital home. The Movant argues that, without relief from the automatic stay, the state courts’ orders are being frustrated. Second, the Movant argues that he lacks adequate protection. Because the Debtor is not required to make payment on the notes secured by the marital home, the Debtor continues to be harmed by the Debtor’s rent-free occupation of the home.

In defense, the Debtor argues that the Divorce Court Order is not final as the appeal period has not expired.² She argues further that the Movant has no immediate right to possession of the marital home because paragraph 10 of the Divorce Court Order contains a condition precedent to transfer of the property (i.e., the Debtor is not required to transfer possession until she executes and delivers a quitclaim deed to the property “as a routine real estate closing”) and that condition has not yet occurred. Lastly, the Debtor argues that she cannot afford to make adequate protection payments due to the disruption of her

² In its January 3, 2000 order, the Supreme Court granted the Debtor’s motion for an extension of time for filing a notice of appeal. The Debtor has until March 3, 2000 to appeal the Divorce Court Order.

professional practice as a result of the litigation associated with the divorce. However, she asks that she be given ninety days in order to attempt to secure some resources with which she can offer the Movant adequate protection. The Debtor admits that there is no guarantee that she will be able to provide adequate protection in the form of a bond or other funds.

A. Frustration of State Court Orders

As argued by the Movant, cause exists under section 362(d)(1) for lifting the automatic stay as a final state court order has been entered which requires the Debtor to turn over possession of the marital home. The Debtor takes the position that there is a condition precedent to transfer and that the order is not yet final. Although the Movant's argument that he is entitled to possession of the property is one possible interpretation of paragraph 10 of the Divorce Court Order, the Court finds that the Debtor's argument, that the right to possession is not triggered until transfer of the deed, is not without some merit. Regardless of the interpretation of the Divorce Court Order, the intervention of this bankruptcy proceeding currently prevents any transfer of the Debtor's interest in the marital home. See section III.C of this opinion. While the Divorce Court clearly anticipated that the Debtor would file an appeal, the Divorce Court may not have anticipated that the Debtor would file bankruptcy.

In any event, this Court believes that paragraph 10 of the Divorce Court Order should be interpreted and/or clarified by the state courts as it is not clear whether the Divorce Court intended the transfer of title to be a condition precedent to the transfer of possession or whether each transfer was an independent event. Accordingly, the automatic stay is lifted to permit the parties to seek clarification and/or an interpretation of the Divorce Court Order in the state court having appropriate jurisdiction over the matter.

B. Adequate Protection

Although the Debtor intends to dispute the Divorce Court's findings and rulings on appeal, including the Divorce Court's rulings regarding transfer of the marital home, it is clear to this Court that the Divorce Court Order establishes the rights and obligations between the Debtor and the Movant with respect to alimony, support, and property division as of December 7, 1999. While the Debtor may be successful in whole or in part in her appeal of the Divorce Court Order, this Court cannot permit the Debtor to use the Bankruptcy Code to effectively modify that order on a temporary or permanent basis. See Bruggen v. Bruggen (In re Bruggen), 82 B.R. 515, 517 (Bankr. W.D. Mo. 1987) (stating that "state court award as it exists as of the date of its making is one which may not be modified by the bankruptcy courts") (quoting Endicott v. LaSalle, 79 B.R. 439 (Bankr. W.D. Mo. 1987)); Moore v. Moore (In re Moore), 22 B.R. 200, 201 (Bankr. M.D. Fla. 1982) (stating that the bankruptcy courts "were not intended by Congress to serve as appellate courts to pass upon final divorce decrees rendered by State Courts with the power to modify or alter the support provisions of divorce decrees"). Although the Divorce Court Order is not yet final, because the appeal period has not yet run, the Supreme Court has refused to stay the provisions of the Divorce Court Order regarding the sale of the marital home pending appeal. If the Debtor were permitted to utilize the automatic stay to prohibit transfer of possession of the marital home to the Movant, while the Movant pays the associated debt service and real estate taxes, she would, in effect, be impermissibly modifying the terms of the Divorce Court Order regarding property division and/or support. The Movant has a current right to adequate protection of his interests in the support and property division provisions of the Divorce Court Order.

The Debtor has alleged that if she is required to vacate the marital home on short notice, she will suffer severe economic and emotional harm. According to the Debtor, she will have no place to live and no place to conduct her business. This will impair her ability to continue representing herself in the divorce action and will prevent her from re-establishing her law practice. The Debtor argues that she is entitled to the benefits of bankruptcy including a fresh start.

Therefore, in order to allow the Debtor to make a smoother transition, given her recent bankruptcy filing, and to maintain the status quo while the parties seek clarification of the Divorce Court Order, the automatic stay shall remain in effect, with respect to the Movant's actions to obtain possession of the property, until April 6, 2000, subject however to the Debtor making adequate protection payments to the Movant as follows. On or before January 25, 2000, the Debtor must pay to the Movant through Movant's counsel \$3,064.92 to cover her living in the marital home from January 6, 2000 to February 5, 2000. On or before February 11, 2000, the Debtor must pay \$3,064.92 to cover the period from February 6, 2000 to March 5, 2000. On or before March 6, 2000, the Debtor must pay \$3,064.92 to cover the period from March 6, 2000 to April 5, 2000. If the Debtor fails to make any one of these payments to Movant's counsel by the date specified, the Movant shall be entitled to automatic relief from the stay in accordance with the local bankruptcy rules. See LBR 9071-1 ("The moving party must submit an affidavit stating that the conditions have or have not been met and a proposed order granting the appropriate relief to be entered by the Court two (2) business days after filing and mailing a copy of the same to all opposing parties."). The amount of the adequate protection payments is based upon the Movant's monthly expenses for principal, interest, and taxes on the marital home.

C. Execution and Transfer of Deed

The Trustee objected to the motion for relief to the extent that it requested the Court to order the Debtor to execute and deliver a quitclaim deed to the marital home. To the extent that the motion for relief makes such a request, the motion is denied. The Debtor's interest in the marital home and its equity is property of the Debtor's bankruptcy estate. See 11 U.S.C. § 541(a)(1) (stating that property of the estate is comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case"). The Debtor has not as yet filed her bankruptcy schedules, including any exemption claims under Schedule C, and the Trustee has not as yet conducted the first meeting of creditors. Unless and until the Trustee abandons the bankruptcy estate's interest in the property pursuant to 11 U.S.C. § 554, any deed

transferring the property must be executed by the Trustee and any sale of estate property must be approved by the Court pursuant to 11 U.S.C. § 363.

IV. CONCLUSION

For the reasons outlined above, the motion for relief is granted to the extent that the Movant may seek clarification and/or an interpretation of paragraph 10 from the state courts. With respect to the Movant's request that he be entitled to take steps to obtain possession of the marital home, the request is granted effective April 6, 2000. The Debtor is entitled to retain possession of the marital home until April 6, 2000 subject to her making monthly adequate protection payments of \$3,064.92. As for the Movant's request that the Debtor be ordered to execute and deliver a quitclaim deed, the request is denied.

This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. The Court will issue a separate order consistent with this opinion. Pursuant to the Federal Rules of Bankruptcy Procedure, the court order granting in part and denying in part the motion is stayed for ten days. Fed. R. Bankr. P. 4001(a)(3) (eff. December 1, 1999) ("An order granting a motion for relief from an automatic stay in accordance with Rule 4001(a)(1) is stayed until the expiration of 10 days after the entry of the order, unless the court orders otherwise.").

DONE and ORDERED this 14th day of January, 2000, at Manchester, New Hampshire.

J. Michael Deasy
Bankruptcy Judge