



SO ORDERED.

SIGNED this 27 day of June, 2006.

Janice Miller Karlin

JANICE MILLER KARLIN
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS**

In re:)
)
KELLY ANN MONTHEY,) **Case No. 06-40288**
) **Chapter 13**
)
 Debtor.)
_____)

**MEMORANDUM DECISION AND ORDER DENYING DEBTOR'S
MOTION FOR RECONSIDERATION**

This matter is before the Court on the timely Motion for Reconsideration¹ filed by Debtor, Kelly Ann Monthey, of the Court's order² denying, in part, her motion to extend the automatic stay. The Court's order held that the automatic stay expired as to Commerce Bank & Trust ("Commerce") pursuant to 11 U.S.C. § 362(c)(3),³ but remained in effect as to all other creditors, as Commerce was

¹Doc. 26.

²Doc. 24.

³This case was filed after October 17, 2005, when most provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), Public Law 109-8, 119 Stat. 23, become effective. All future statutory references are thus to BAPCPA, 11 U.S.C. §§ 101 - 1532 (2005), unless other specifically noted.

the only creditor to oppose Debtor's motion to extend the stay. Debtor seeks reconsideration of the Court's order as it pertains to Commerce.

I. FINDINGS OF FACT

Within the 30-day period after Debtor filed her petition, the Court conducted a hearing on her motion to extend the automatic stay pursuant to § 362(c)(3)(B). At that hearing, after Debtor finished the presentation of her evidence, counsel for Commerce questioned whether there was any dispute on the issue of whether Commerce had commenced some kind of collection action between the dismissal of the prior case, and the commencement of the instant case. He noted that he had a bank witness available to testify on this issue, if deemed necessary. In response, counsel for Debtor stated that although he was unaware of any requirement that "action" have been taken, he would nevertheless stipulate to what Commerce's witness intended to testify.⁴

Based upon that stipulation, Commerce did not call its witness. As a result of that stipulation, and the evidence presented at the hearing, the Court held that the automatic stay would terminate as to Commerce on the 30th day after the filing of the petition.

At no time in Debtor's pleadings filed prior to the hearing, nor at any time during the hearing, did Debtor's counsel argue that § 362(c)(3)(B) was not implicated because Commerce had not taken sufficient action. The Court gave counsel an opportunity to make opening statements, and Debtor's counsel waived making the statement. In closing argument, Debtor's counsel again made no argument that Commerce had not taken "action," as contemplated by § 362(c)(3)(A). In fact,

⁴As will be discussed in more detail below, there appears to be some confusion between the parties as to precisely what the stipulation made by Debtor included. Commerce contends that Debtor stipulated to the fact that it had commenced sufficient action to satisfy § 362(c)(3)(A), while Debtor claims that the stipulation only related to the fact that Commerce had commenced some self-help repossession actions, not that it had met the requirements of § 362(c)(3)(A).

Debtor's counsel specifically stated that he was not even aware of any such statutory requirement, and thus effectively stopped the introduction or admission of any further evidence or argument on the issue by offering to stipulate to the facts after Commerce first raised the issue.

II. STANDARDS FOR A MOTION TO RECONSIDER

The legal standard for granting a motion for reconsideration is narrow. "A motion for reconsideration should be granted only to correct manifest errors of law or to present newly discovered evidence."⁵ "Such motions are not appropriate if the movant only wants the Court to revisit issues already addressed or to hear new arguments or supporting facts that could have been presented originally."⁶

III. CONCLUSIONS OF LAW

Section 363(c)(3) was added to the Bankruptcy Code by the BAPCPA to alter the application of the automatic stay in cases involving certain repeat filers who had been in a single or joint case, whether filed or pending, within one year of the filing of the current case. Section 363(c)(3)(A) states that "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." (Emphasis added) Commerce was the only objecting creditor, and appeared at the hearing to contest the extension of the stay.

Following the close of Debtor's evidence, and prior to calling its first witness, Commerce noted that some courts have interpreted § 362(c)(3)(A) in a manner that requires a creditor to have taken certain "action" before the creditor can be the beneficiary of the automatic termination of the

⁵*Adams v. Reliance Standard Life Ins. Co.*, 225 F.3d 1179, n.5 (10th Cir. 2000) (internal quotations omitted).

⁶*Zhou v. Pittsburg State Univ.*, 252 F. Supp. 2d 1194, 1199 (D. Kan. 2003) (citing *Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir. 1991)).

stay under that section.⁷ Commerce indicated that it was prepared to call a witness from the bank's collections department to testify what actions it had taken in respect to repossessing the collateral, if the Court found such testimony necessary. Counsel for the Debtor responded "I'm not aware of any such requirement, but certainly I can stipulate to that." As a result of that statement, Commerce did not call its witness.

Thereafter, no other mention was made of the action taken by Commerce, other than the question put to counsel for Commerce by the Court: "Mr. Fricke, other than the stipulation that Commerce took some action in an attempt to collect the debt between the date of the dismissal of case 03-42366 and the filing of the current case, and my understanding is there is a stipulation on that, do you have any other evidence to present to the Court?" The response to the Court's question was in the negative. Commerce thus presented no evidence on this issue. At no time did Debtor's counsel attempt to correct the Court's stated understanding—that the parties had stipulated to Commerce taking action.

Debtor has now filed a motion for reconsideration raising, for the first time, the argument that the stay did not terminate as to Commerce on the basis that the steps it took toward self-help repossession were insufficient to qualify as an "action" under § 362(c)(3)(A). The Court finds that this argument is improperly raised in this motion for reconsideration, as it clearly could have been raised and argued at the hearing on this matter. This is especially true given the fact that Commerce specifically raised the issue, and Debtor's counsel clearly indicated that Commerce need not call its witness to specify what action was taken, as Debtor was in essence waiving this issue. Had Debtor raised this defense, both Commerce and the Court would have had the opportunity to examine what

⁷Although this issue will certainly appear before this Court at a later date, for purposes of this motion, the Court need not, and specifically does not, address what constitutes sufficient "action" for purposes of § 362(c)(3)(A).

exact action had been taken by Commerce, and whether those actions met the requirements of § 362(c)(3)(A). Instead, the Court is left with what, at the time, seemed to be a clear stipulation by the parties, and lingering factual issues that could all have been elucidated at the hearing.

Congress required that the Court “complete” the hearing on any motion to extend the stay within 30 days of the filing.⁸ The Court endeavored to timely receive all evidence either party believed was relevant, and Debtor elected to stipulate that the evidence Commerce was prepared to offer was unnecessary for the Court’s decision. Debtor will not be allowed to now change her trial strategy, in the form of this motion for reconsideration, as a result of apparently learning after the hearing that other debtors have successfully raised this issue in other jurisdictions.

As noted above, motions for reconsideration “are not appropriate if the movant only wants the Court to . . . hear new arguments or supporting facts that could have been presented originally.”⁹ There is no doubt that the arguments and supporting facts that Debtor now raises in her motion for reconsideration could have been, and should have been, raised at the initial hearing in this case. The need for such a rule is clearly evident here as Commerce was induced into not presenting any evidence or argument on this matter during the hearing. The time allowed by Congress for conducting the hearing has passed. Debtor’s failure to raise these arguments in a timely manner, so that appropriate evidence could have been timely received, prevents her from now arguing a request for reconsideration on those very bases.

⁸Section 362(c)(3)(B).

⁹*Zhou v. Pittsburg State Univ.*, 252 F. Supp. 2d at 1199.

IV. CONCLUSION

The Court finds that Debtor's Motion for Reconsideration must be denied.¹⁰ Debtor failed to raise before or during the hearing in this case the issues contained in the motion, and in fact waived the arguments, despite ample opportunity, if not a direct invitation from Commerce, to do so.

IT IS, THEREFORE, BY THE COURT ORDERED that Debtor's Motion for Reconsideration is denied.

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¹⁰Commerce had requested, in its Supplemental Objection, that this Court delay ruling on this Motion until after July 5, 2006, as it has apparently requested Debtor's counsel withdraw the Motion for Reconsideration in lieu of Commerce seeking sanctions under Fed. R. Bankr. P. 9011. At a hearing conducted on confirmation this date, the Court specifically asked Debtor's counsel if he yet knew whether he would be withdrawing his Motion for Reconsideration, so the Court could determine whether to hold its decision. He indicated he had made his decision, and had no intent to withdraw the Motion. The Court indicated that in light of that final decision, the Court would announce this decision from the bench, which it did, and that it would also issue this decision forthwith.