UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF MICHIGAN

In re:

RYAN MICHAEL HARMON,	Case No. DG 18-04298
	Chapter 13
Debtors.	Hon. Scott W. Dales

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MEMORANDUM OF DECISION AND ORDER

PRESENT: HONORABLE SCOTT W. DALES
Chief United States Bankruptcy Judge

On March 6, 2019 in Grand Rapids, Michigan, the court held hearings on confirmation of the Debtor's proposed chapter 13 plan, the chapter 13 trustee's motion to dismiss case, the Debtor's objection to the proof of claim of Mancinelli Law Group d/b/a Mancinelli Goeman Law Group PC ("MLG"), as well as MLG's motions for relief from the automatic stay and to dismiss the Debtor's chapter 13 case. This opinion addresses only MLG's stay relief motion.

The decision to lift the automatic stay for cause, or to keep the stay in place, is within the bankruptcy court's discretion. *See Laguna Assocs. Ltd. P'ship v. Aetna Cas. & Sur. Co. (In re Laguna Assocs., Ltd. P'ship)*, 30 F.3d 734, 737 (6th Cir. 1994). Here, MLG is urging the court to find "cause" to grant relief from the automatic stay under § 362(d)(1) given the pendency of the state court proceeding that the creditor commenced against the Debtor and his mother, Mari Harmon, to enforce its supposed charging lien against the Debtor's homestead.[1] *See* Creditor Mancinelli Law Group, PC's Motion For Relief From Stay (ECF No. 35, the "Motion") at ¶¶ 13-14.

[1] Although a final hearing on a motion for relief from stay is expressly identified as an evidentiary hearing under LBR 4001-1(c)(2), MLG offered no evidence, and did not ask the Debtor (who was in court) to testify. In view of the absence of evidence touching on the Debtor's good faith, the court denies the Motion to the extent premised on that aspect of "cause."

In cases involving a creditor's request to return to state court proceedings suspended by the automatic stay, the Sixth Circuit has identified the following factors for bankruptcy courts to consider when exercising their discretion regarding whether to grant or withhold relief from the automatic stay:

> 1) judicial economy; 2) trial readiness; 3) the resolution of preliminary bankruptcy issues; 4) the creditor's chance of success on the merits; and 5) the cost of defense or other potential burden to the bankruptcy estate and the impact of the litigation on other creditors.

See In re United Imports, Inc., 203 B.R. 162, 167 (Bankr. D.Neb. 1996) (cited approvingly in *In re Garzoni*, 35 Fed. Appx. 179, 181 (6th Cir. 2002) (unpublished)); *see also In re Martin*, 542 B.R. 199 (6th Cir. B.A.P. 2015) (citing *United Imports* factors); *Junk v. CitiMortgage, Inc. (In re Junk)*, 512 B.R. 584, 607 (Bankr. S.D. Ohio 2014) (applying *United Imports* factors); *McSwain v. Williams (In re Williams)*, No. 11-00536, 2012 WL 2974914 (Bankr. W.D. Tenn. July 20, 2012) (Sixth Circuit has not adopted a single test to determine whether cause exists under § 362(d)(1) to modify the automatic stay to allow pending litigation to continue but has considered a variety of factors). On balance, in this case, the *United Imports* factors favor denying MLG's motion.

First, during the hearing MLG argued for returning the dispute to the Ottawa County Circuit Court because the creditor's suit in that court named the Debtor's mother, Mari Harmon, in addition to the Debtor. MLG therefore contends that resolving the claim objection in bankruptcy court while litigating the related guaranty claim against the Debtor's mother in the Ottawa County Circuit Court would be inefficient. MLG argued, plausibly at the time, that the bankruptcy court could not exercise its limited jurisdiction over the non-debtor mother but the state court, with its general jurisdiction, could resolve MLG's claims against both the Debtor and

his mother. Continuing the argument, entertaining the claim objection in federal court and the guaranty claims against Ms. Harmon in state court would duplicate judicial efforts and present the risk of inconsistent judgments.

In response, the Debtor argued that his mother was on the verge of filing her own bankruptcy petition (under chapter 7) which, of course, would stay the state court's hands, undermining the argument for judicial efficiency. In fact, the court takes judicial notice that Ms. Harmon filed a chapter 7 petition with this court on March 12, 2019. *See In re Mari Harmon*, Case No. 19-00939-JWB (Bankr. W.D. Mich.). It seems that the claims against both Mr. Harmon and his mother are now before the federal court, undercutting MLG's reliance on the state court's jurisdiction over Ms. Harmon.

Also touching on judicial efficiency, as well as the last *United Imports* factor, the chapter 13 trustee urged the court not to permit the Ottawa County Circuit Court to resolve the questions about the validity of MLG's supposed lien, given the potential impact of that decision on other creditors. Obviously, a decision by the state court upholding MLG's lien would allocate approximately $29,099.23 in value of the Debtor's home to MLG alone, thereby affecting the chapter 7 liquidation calculation under § 1325(a)(4) and, correspondingly, reducing the payments to creditors either in chapter 13 (as presently postured) or a chapter 7 if the Debtor's case later converts. If the state court were simply determining the amount of a creditor's claim, the impact on other creditors would be modest, especially in cases like the present which will likely yield a modest dividend to unsecured creditors regardless of the outcome. Resolving a dispute about a property interest such as a lien, however, could have a much bigger impact on the estate, and therefore creditors. The court finds the chapter 13 trustee's arguments persuasive.

A second consideration, related to the first, involves the status of the Ottawa County Circuit Court action -- implicating the second *United Imports* factor. Although the state court action is closer to the finish line than any proceeding in the bankruptcy court, it cannot fairly be described as "trial ready" because the state court is poised to enter judgment by default, according to MLG's counsel. If so, the Debtor will be bound by the preclusive effect of the state court's judgment in proposing his plan, to the detriment of his other creditors, without a meaningful evaluation of MLG's contentions on the merits. If, on the other hand, the state court is inclined to set aside the entry of default, the state court case and the federal claim objection proceeding will both be in their infancy, with less reason to favor the state proceeding over the federal. And, given the collective nature of a bankruptcy proceeding, there are good reasons to favor the federal.

Similarly, with respect to MLG's disputed lien, the issue of whether the lien is a "judicial lien" that impairs the Debtor's exemptions is probably the sort of "preliminary bankruptcy issue" that this court, rather than the Ottawa County Circuit Court, should resolve. It is true, however, that the reference to the lien in a retainer agreement certainly favors MLG on this point by suggesting the consensual origin of the interest.

To the extent that the *United Imports* factors encourage the court to consider the likelihood of MLG's success on the merits, the unpublished opinion *In re Walker*, Case No. 15-42265 (Bankr. E.D. Mich. Feb. 17, 2017), which relies on the *dicta* in *George v. Sandor M. Gelman, P.C.*, 506 N.W.2d 583, 585 (Mich. App. 1993), suggests a likelihood of success on the validity of MLG's lien, as MLG argues. Neither case, however, addressed the impact, if any, of MRPC 1.8 (Conflict of Interest, Prohibited Transactions) on MLG's lien. For example, it is at least arguable that the retainer agreement purported to give MLG a lien on the subject matter of

the representation (the Debtor's share of marital assets), as Judge Tucker suggested (and refused to approve) in the admittedly different context of *In re Blume*, 591 B.R. 675, 678 (Bankr. E.D. Mich. 2018). It also remains to be seen the extent to which MLG complied with MRPC 1.8(a) in acquiring the lien, even assuming the lien's creation does not violate MRPC 1.8(j). Similarly, the amount of the debt allegedly secured by the lien more than doubled since December 2017 when the Debtor signed the "Acknowledgement of Unpaid Attorney Fees/Costs" indicating that he owed $13,638.48, or when that same month MLG recorded with the register of deeds its Notice of Attorney's Lien claiming an estimated $15,000.00 in fees and expenses. *See* Proof of Claim No. 4-1 at Exh. A. It appears that approximately half of the debt allegedly secured by the lien is for the firm's own collection costs (or at least, costs that the firm's attorneys incurred in representing the firm), which it will have to defend as reasonable under applicable non-bankruptcy law in the claim objection proceeding. *Souden v. Souden*, 844 N.W.2d 151, 158 (Mich. App. 2013). Suffice it to say that the court has serious doubts about MLG's likelihood of success on its claim and its lien.

As for the final *United Imports* factor, the court has already considered the impact on other creditors of granting the Motion, concluding that unsecured creditors and the trustee would be better served by retaining within the bankruptcy court the dispute regarding MLG's claim and lien.

Finally, as this court noted many years ago in the chapter 11 context, courts are less inclined to grant stay relief early in a bankruptcy case, to give the debtor the breathing spell that Congress envisioned as the parties consider their reorganization options. *Cf. In re Holly's, Inc.*, 140 B.R. 643, 699-700 (Bankr. W.D. Mich. 1992) (describing debtor's burden of justifying the automatic stay under § 362(d)(2)(B) as a "sliding scale," with burden on debtor increasing as the

case progresses); *see also* H.R.Rep. No. 95-595 (1977), reprinted in 1978 U.S.C.C.A.N. 5787, 6296-97; S.Rep. No. 95-989 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5835-36 (automatic stay provides "breathing spell"). Here, the Debtor's case is in its infancy.

For the foregoing reasons, the court will deny the Motion.

NOW, THEREFORE, IT IS HEREBY ORDERED that the Motion (ECF No. 35) is DENIED.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Memorandum of Decision and Order pursuant to Fed. R. Bankr. P. 9022 and LBR 5005-4 upon Ryan Michael Harmon, Ralph M. Reisinger, Esq., Brett N. Rodgers, Esq., Scott Mancinelli, Esq., and the United States Trustee (by First Class U.S. Mail).

END OF ORDER

IT IS SO ORDERED.

Dated March 25, 2019

Scott W. Dales
United States Bankruptcy Judge