

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK**

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In re: Gregory Wire

**Chapter 7
Case No: 12-73922**

MOTION

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**MOTION TO COMPEL TRUSTEE TO ABANDON HIS INTEREST IN DEBTOR'S
RESIDENCE AND CONCLUDE THE MEETING OF CREDITORS**

**THIS PLEADING REQUESTS RELIEF THAT MAY BE ADVERSE TO YOUR INTERESTS. IF NO
TIMELY RESPONSE IS FILED WITHIN TWENTY (20) DAYS FROM THE DATE OF SERVICE,
THE RELIEF REQUESTED HEREIN MAY BE GRANTED WITHOUT A HEARING BEING HELD.
A TIMELY FILED RESPONSE IS NECESSARY FOR A HEARING TO BE HELD.**

**TO: THE HONORABLE DOROTHY EISENBERG
UNITED STATES BANKRUPTCY JUDGE**

Gregory Wire ("Movant"), the Debtor and party in interest in the above referenced bankruptcy proceeding, by his attorney of record, Brian McCaffrey, hereby files this Motion to Compel Abandonment pursuant to 11 U.S.C. § 554 and 6007 of the Federal Rules of Bankruptcy Procedures and further Compel the Trustee to Conclude the Meeting of Creditors Pursuant to 4003(b)(1) of the Federal Rules of Bankruptcy Procedures (the "Motion") and at the directive of this Court for an order:

- (a) Compelling the Chapter 7 Trustee ("Trustee") to abandon his interest in the Debtor's residence, and;
- (b) Compelling the Trustee to conclude the meeting of creditors, and;
- (c) Granting such other relief as this court deems just and proper.

And in support thereof respectfully submits as follows:

JURISDICTION

1. The Court has jurisdiction over the Motion pursuant to 28 U.S.C. §§ 157 and 1334(b). Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)

BACKGROUND

2. At all times relevant, the Debtor is the owner and resident of a single family home located at [REDACTED] (hereinafter the "Residence") which the Debtor intends to retain through loss mitigation efforts being supervised by this Court.
3. The Debtor's Attorney commenced a case on behalf of the Debtor with this Court pursuant to chapter 7 of the Bankruptcy Code on June 23, 2012 and was assigned case number 12-73922.
4. On August 9, 2012 this Court held the 341(a) Meeting of Creditors. Debtor was present and answered questions posed to him by the Trustee, Marc A. Pergament, Esq.
5. On August 13, 2012 the Trustee filed a Discovery of Assets with regards to rental income being collected from roommates who share the residence with the Debtor.
6. Prior to submitting this motion Debtors counsel has communicated by telephone, email, and in writing regarding the undue burden created by the demands of the Trustee that the Debtor turn over rents received.
7. The Trustee has insisted that the Debtor turn over the rents and therefore this motion is necessary to obtain relief.

AUTHORITY FOR THE RELIEF REQUESTED

I. COMPELLING THE TRUSTEE TO ABANDON HIS INTEREST IN THE RESIDENCE

8. 11 USC §§ 554(b) and (c) provide in pertinent part that:

- b. On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.
- c. Unless the court orders otherwise, any property scheduled under section 521 (a)(1) of this title not otherwise administered at the time of the closing of a case is abandoned to the debtor and administered for purposes of section 350 of this title.

9. In Wissman v. Pittsburgh Nat. Bank, 942 F. 2d 867, 873 (4th Cir. 1991): the Court held “[The debtor] may . . . move the bankruptcy court to compel the trustee to abandon the estate’s interest in any [asset] pursuant to Bankruptcy rule 6007(b). If, after a hearing, the trustee refuses to abandon or join the action, the bankruptcy court should compel abandonment . . .” and the debtor must “. . . establish by a preponderance of the evidence that the Property [i]s burdensome or of inconsequential value and benefit to the estate . . .”

10. Additionally, §554 of the Bankruptcy Code gives bankruptcy trustees the power to abandon estate property that would not sell for a sufficient price to justify the cost of the property’s liquidation. In re Laredo, 334 B.R. 401, 414 (Bankr. N.D. Ill. 2005). Section 554 provides in part:

11 USC § 554. Abandonment of property of the estate

- (a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.
- (b) On request of a party in interest and after notice and a hearing, the court may order the trustee to abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.

11 U.S.C. § 554(a), (b)(Emphasis supplied). The section permits the abandonment of property that would otherwise consume the estate’s resources. In re Pilz Compact Disc, Inc., 229 B.R. 630, 635 (Bankr. E.D. Pa. 1999).

11. Here, the Residence is encumbered by a first mortgage in the amount of approximately

\$ [REDACTED] and a second mortgage in the amount of approximately \$ [REDACTED] while the value

of the property is approximately \$ [REDACTED] Thus there is no equity and the Residence is of inconsequential value to the estate.

12. Here, the residence is shared with roommates who pay rents to the Debtor in the amount of \$ [REDACTED] after expenses the net rental income is \$ [REDACTED] Thus, the rental income is of inconsequential value to the estate.

13. The Debtor is engaged in loss mitigation efforts with the Creditor / Mortgagee to keep his home.

14. The Creditor / Mortgagee has not made a claim to obtain the rents, however that Creditor / Mortgagee continues to accrue back payments.

15. The Trustee's insistence on collecting the rents places the Debtor squarely outside the requirements of the United States Treasury Department's ("Treasury") Requirements for the Home Affordable Modification Program ("HAMP"). When presented with this conundrum the Trustee's response was less than civil, and clearly indicative of his lack of concern for the Debtors ability to keep his home.

16. Central to the issuance of a modification under the HAMP program is the ability of the lender to verify the borrower's income by reviewing bank deposits.

17. If the Trustee is successful in compelling the debtor to turn over the rents the Debtor will be irreparably prejudiced in his ability to keep his home due to a lack of ability to comply with Treasury requirements.

18. Unless the Trustee is willing to park the rents in a dedicated Special Purpose Account bearing the name of the Debtor and is further willing to participate in each and every phase of the loss mitigation process, his request to collect the rents is overly burdensome, and causes an undue hardship by disqualifying the Debtor from the very program that will enable him to keep his home.

19. Furthermore, the Trustee's piling on of fees for administering the estate and Employing Weinberg, Gross & Pergament LLP as Attorneys for the Trustee (the Trustees Firm) has the effect of adding to the expenses of a debtor who can ill afford it, and if these fees are taken into consideration by the Creditor / Mortgagee during the loss mitigation process could affect the debt to income ratios used to determine qualification and prejudice the Debtor's ability to qualify for the HAMP program and keep his home.
20. The rents that the Trustee is seeking to collect do not belong to the Estate; they belong to the secured Creditor.
21. Moreover, the rents that the Trustee seeks to confiscate are meant to make the mortgage payments for the residence.
22. The Creditor / Mortgagee is charging the Debtor interest and accruing each and every payment that is not being made against the account of the Debtor. Thus, the Trustee, in seeking to confiscate the rents is actually borrowing money in the name of the Debtor, with no rational justification for doing so.
23. In a HAMP loan modification the back payments will be capitalized by adding them to the principal balance of the mortgage. Meaning, that even though the debtor is not currently able to make the mortgage payments he will still be made to repay those missed payments in the long run. Moreover, he will be made to pay interest on the back payments which become a part of his new principal balance.
24. The Trustee has not proposed any type of distribution of the rents to the creditor. Rather, this appears to be a bold attempt to scrape a few dollars out of the Debtor for the sole purpose of collecting the Trustee's fees and those awarded to his firm for acting as the attorney for the Trustee.

II. COMPELLING THE TRUSTEE TO CONCLUDE THE MEETING OF CREDITORS

25. Bankruptcy rule 4003(b)(1) provides in pertinent part that: “Except as provided in paragraphs (2) and (3), a party in interest may file an objection to the list of property claimed as exempt within 30 days after the meeting of creditors held under § 341(a) is concluded or within 30 days after any amendment to the list or supplemental schedules is filed, whichever is later.”
26. Here, if the Trustee is permitted to continue the hearing indefinitely, the debtor remains in a state of limbo regarding his limited exempted assets.
27. The intent of BAPCA was to allow debtors an opportunity to go on with their lives with a fresh start. *In re NATHANIEL and REGINA AJUNWA*, Bankr. S.D.N.Y., Case No. 11-11363, the Court wrote: “Congress has established Chapter 7 as a means for a debtor to obtain a fresh start”. Thus, the Debtor needs the meeting of creditors concluded to enjoy his fresh start without fearing a never ending challenge to his exemptions. But for the rents the Trustee would have already issued a report of no assets in this case.
28. Here, there is no reasonable possibility that the Trustee could liquidate the Residence for the benefit of creditors. Moreover, the Trustee has not asserted that he could liquidate the Residence for the benefit of creditors. Therefore, there is no reasonable excuse for continuing the meeting of creditors, and the Court should compel the Trustee to conclude the meeting of creditors.
29. Bankruptcy rule 4003(b)(1) provides the basis for concluding the meeting of creditors.
30. Once the Trustee has been compelled to abandon his interest in the Residence, conclude the meeting of creditors and the discharge is issued the Residence will become abandoned to the debtor pursuant to § 554(c) of the Bankruptcy code

STATEMENT OF FACTS

31. On or about June 1, 2012 the Debtor retained counsel to assist in his efforts to obtain assistance with protecting his rights in a foreclosure action titled OneWest Bank, FSB vs. Gregory Wire under Index No: [REDACTED] NY and working to resolve the default that had occurred on his mortgage with respect to his Residence.
32. While reviewing the Debtors legal options and financial situation it became evident that the Debtor did not have a bank account.
33. Counsel inquired about the reason Debtor did not have a bank account and it was discovered that the Debtor had a number of money judgments which were preventing him from maintaining a bank account for fear of the account being seized.
34. Under HAMP Guidelines as well as OneWest in house policies servicers are required to verify employment income of borrowers through pay stubs, tax returns and **bank statements** [emphasis added]. In a case where there is rental income the servicer is required to verify that income through tax returns, and **bank statements** [emphasis added].
35. After a review of the Debtors overall financial condition the decision was made that he would seek protection from the Bankruptcy Court to address the judgments, and loss mitigation while utilizing the automatic stay to hold the foreclosure action in abeyance while loss mitigation efforts progressed under the supervision of this Court.
36. Moreover, the automatic stay made it possible for the Debtor to open a bank account to comply with the requirements for income verification without fear of said bank account being seized by judgment creditors.
37. As outlined *supra* Debtor's counsel filed a Chapter 7 bankruptcy petition on June 23, 2012 with this Court under case number 12-73922.
38. On July 25, 2012 the Debtor filed a loss mitigation request with this Court and on August 23, 2012 the Court issued a loss mitigation order.

39. On August 9, 2012 the Trustee conducted the 341(a) Meeting of Creditors and inquired about the rents that were disclosed on the Debtors Schedule J as other income.
40. Prior to the filing of the instant case the mortgagee, OneWest Bank, was refusing payments from the Debtor due to the foreclosure action.
41. The Trustee has taken the position that since the mortgage payments are not being made he can collect the rents and administer the upkeep, maintenance and expenses of the property.
42. The Trustee, in a letter dated August 10, 2012 identified the rents as a “major issue” and demanded that the rents be turned over to him. (Exhibit A)
43. On August 22, 2012 in an effort to assuage the Trustees thirst for the rents and the fees associated with administering the miniscule estate, a proposal to proceed with turning over the net rents after expenses was made. (Exhibit B)
44. On August 23, 2012 the Trustee responded in writing that the proposal was unacceptable and took the position that certain expenses to maintain this single family Residence were not associated with the rented portion of the home. Indeed, the Trustee has determined that allowing the swimming pool to fall into dis-repair would be acceptable because it is for “personal use” of the debtor. The Trustee has also asserted that there is no need for “general maintenance” and repairs to certain portions of the single family Residence are for the “personal use” of the Debtor. This position misses the point that any degradation of any portion of the Residence would allow the property to fall into dis-repair, destroy the value of the property and therefore the assets of the estate to diminish solely at the discretion of the Trustee who would presumably benefit from any funds not used to maintain the property.
45. Here, the Trustee’s actions to date are of great concern and are detrimental to the relief that the Debtor sought when asking for the protections afforded under the bankruptcy code.
46. The “rents” being collected are the product of a Debtor in financial trouble taking the extraordinary step of renting out portions of his home to help make ends meet.

47. The Trustee's actions have seriously jeopardized the Debtor's ability to keep his home and have prejudiced the Debtor's ability to have a successful outcome in the loss mitigation ordered by this Court. Thus, the Trustee's position is in contravention of the bankruptcy code, the interest of the Estate and the Debtor.

48. In light of the foregoing, the Debtor has been forced to defend his right to keep his home by making this motion to compel the Trustee to abandon his interest in the Residence and conclude the meeting of creditors.

RELIEF REQUESTED

49. The Debtor and the Trustee agree that the Residence is property of the bankruptcy estate.

50. The parties also agree that the Residence is fully encumbered by a contractual mortgage that was recorded prepetition.

51. The Debtor by filing this motion, requests that the Court find that the Trustee must either administer or abandon the Property in a timely manner, and conclude the meeting of creditors.

52. Under §704(a)(1) of the Bankruptcy Code, a trustee must "collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest." 11 U.S.C. §704(a)(1)[Emphasis added].

53. "The duty to close the estate expeditiously is the Trustee's main duty and overriding responsibility." *In re Hutchinson*, 5 F.3d 750, 753 (4th Cir. 1993)(quoted in *In re Wait*, 2010 WL 2667413, at 2 (Bankr. N.D. Iowa)). In discharging his duty, it is the Chapter 7 trustee's function to liquidate the estate's assets expeditiously, not to operate or manage the property for the estate. [Emphasis added] *In re PermaLife Products, LLC*, 432 B.R. 503, 513-14 (Bankr. D.N.J. 2010). Even in those unusual circumstances where a Chapter 7 trustee is authorized to

operate the debtor's business, §721 permits the operation to continue only "for a limited period." 11 U.S.C. §721.

54. Therefore, in the instant case the Trustee is required to administer the estate expeditiously. The period of time for him to evaluate an asset's value is not open-ended or indefinite.

55. *In re Wait*, The Court first recognized that the determination required the trustee to balance his duty to administer the case expeditiously with his duty to consider the "best interests" of creditors **and the debtor**. [Emphasis added] *In re Wait*, 2010 WL 2667413, at 2. The Court then addressed the timing issue.

In balancing these duties, the trustee is generally permitted, within a reasonable time, to consider the question of abandonment. 5 Collier on Bankruptcy ¶ 554.02(2) (Alan N. Resnick & Henry J. Sommer eds., 16th ed.). Collier describes the proper balancing as follows:

The term "reasonable" implies that the period of deliberation is adaptable to the circumstances. The trustee may wait until he or she is able to ascertain whether there is any profit to be expected for the estate. In fact, it may be the trustee's duty to wait.

...

While the trustee may be accorded a reasonable time period for investigation, when other parties seek a decision about abandonment, there comes a time, as one court put it, "to fish or cut bait." The trustee must close a bankruptcy estate as expeditiously as is compatible with the best interests of the parties. The term expeditiously should be deemed to put a reasonable time limitation on the trustee. Extraordinary delay in closing a bankruptcy estate should generally not be tolerated. Unreasonably holding property that should be abandoned should likewise not be tolerated.

In re Wait, 2010 WL 2667413, at 3 (quoting 5 Collier on Bankruptcy ¶ 554-5). In other words, a Chapter 7 trustee should determine whether an asset is of inconsequential value or benefit to the estate within a reasonable time, and the reasonableness of the period depends on the circumstances of the case.

56. Here, the Court should grant the Debtors motion because (1) the Property is fully encumbered, and (2) the Chapter 7 case has been pending for more than sixty (60) days, (3) the Debtor has filed a Motion to compel the Trustee to abandon the Property and conclude the meeting of creditors and (4) The Trustee's demand for rents severely inhibits the Debtor's ability to successfully obtain a loan modification through loss mitigation efforts.

57. First, it is an undisputed fact that the Property is fully-encumbered. The Debtor listed the Property on the schedules that were originally filed with his bankruptcy petition, and valued the Property at \$ [REDACTED]. The parties agree that the Residence has no equity. Therefore the Estate has no equity in the Residence.

58. Second, the bankruptcy case has been pending for more than two (2) months. The Chapter 7 petition was filed on June 23, 2012. The Property was listed on the schedules originally filed with the petition in June of 2012, and is not a newly-discovered asset. The Debtor claimed the Property as exempt, and the Trustee examined the Debtor regarding the Property at the §341 meeting of creditors on August 9, 2012.

59. The Debtor disputes the Trustees classification of the rents collected as a newly discovered asset.

60. The Property is a residence. It is not commercial or other "special use" property that may require particular marketing expertise to sell. Even though the Property has remained in the estate for more than 2 months, however, the Trustee has not made any claim that he could sell the property for the benefit of the Estate, indeed, he can not.

61. Under these circumstances, the Trustee should be compelled to abandon his interest in the Residence pursuant to §554(b) of the Bankruptcy Code.

62. Other than the rents that are being collected from the roommates in the Residence there are no other assets to be distributed, therefore the Trustee should be compelled to conclude the meeting of creditors.

WHEREFORE, Debtors respectfully request the entry of an order substantially similar to the proposed order attached hereto:

- (a) Compelling the Chapter 7 Trustee (“Trustee”) to abandon his interest in the Debtor’s residence, and;
- (b) Compelling the Trustee to conclude the meeting of creditors, and;
- (c) Granting such other relief as this court deems just and proper.

Dated this the 10th day of August, 2012.

/s/ Brian McCaffrey

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