

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Master-In-Equity

The Honorable Marvin H. Dukes, III

RECEIVED
JUL 22 2013
SC Court of Appeals

Court of Appeals Tracking No. 2012-210910

CitiMortgage, Inc., Respondent,

v.

Daniel Junk a/k/a Daniel L. Junk and Christine H. Junk
and Oldfield Community Association, Defendants,

Of Whom Daniel L. Junk and Christine H. Junk are Appellants,

_____ Daniel L. Junk and Christine H. Junk, Counterclaim
Appellants,

v.

_____ CitiMortgage, Inc. Counterclaim
Respondent.

_____ Daniel L. Junk and Christine H. Junk, Third-party
Appellants,

v.

Riley Pope & Laney, LLC, Heidi Carey, Esq., Roy
Laney, Esq., T. Lowndes Pope, Esq., Bayview Loan
Servicing, LLC, MERSCORP, Inc., Mortgage
Electronic Registration Systems, Inc., Citi Master
Servicing, Citigroup Global Markets Realty Corp.,
Citigroup Mortgage Loan Trust, Inc., John Does 1-
5,000, Jennifer Oakes, Robert G. Hall, Security
Connections, Inc., Krystal Hall, Danielle Sterling, ABC
Appraisal Group, Inc., Mark A. Ruplinger, Linda
Heller, Harry Jones, Colonial Coast Title Agency, Inc.,
Lawyers Title Insurance Corporation, Corelogic, Inc.
and American Home Mortgage Holdings, Inc. Third-Party
Respondents.

Response regarding effect of Appellants' bankruptcy filing on pending appeal

In response to this Court's letter of July 11, 2013, Respondent/Counterclaim Respondent CitiMortgage, Inc., and Third-Party Respondents Bayview Loan Servicing, LLC, Merscorp, Inc., Mortgage Electronic Registration Systems, Inc., CitiMaster Servicing, Citigroup Global Markets Realty Corp., Citigroup Mortgage Loan Trust, Inc., Jennifer Oakes, Robert G. Hall; Third-Party Respondents Riley Pope & Laney, LLC, Heidi Carey, Esq., Roy Laney, Esq., and T. Lowndes Pope, Esq.; Third-Party Respondents Security Connections, Inc., Krystal Hall; Third-Party Respondents ABC Appraisal Group, Inc., Mark A. Ruplinger, Linda Heller, Harry Jones; Third-Party Respondents Corelogic, Inc.; Third-Party Respondents Lawyer Title Insurance Corporation; and Third-Party Respondents Colonial Coast Title Agency, Inc. submit this response to Appellants' Notification of Filing Under Bankruptcy Code and Suggestion of Stay. As explained more fully below, this matter is *not* subject to the automatic stay set forth in Chapter 11, Section 362 of the United States Bankruptcy Code, though there are restraints on the Appellants' ability to pursue the appeal.

Appellants contend 11 U.S.C. § 362 stays this appeal. *See* Suggestion of Stay p. 1. This is incorrect. That section provides, in relevant part, that the filing of a bankruptcy petition "operates as a stay" of:

[T]he commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding *against the debtor* that was or could have been commenced before the commencement of the case under this title, or to recover a

claim against the debtor that arose before the commencement of the case under this title . . .

11 U.S.C. 362(a)(1) (emphasis added). This consolidated appeal is not such a proceeding. By the clear terms of the statute, the automatic stay applies only to actions against the debtor and “not to claims the debtor himself seeks to enforce.” *See, e.g., DiMaggio v. Blache*, 466 So.2d 489, 491 (5th Cir. 1985) (holding that “Section 362 by its very language is applicable only to claims against the debtor, not to claims the debtor himself seeks to enforce. Accordingly the automatic stay provision had no effect . . .”). This analysis also applies to counterclaims, third-party claims, and other process brought by the debtor. *See, e.g., Thomas v. Blue Cross & Blue Shield Ass’n*, 333 Fed. Appx. 414, 420 (11th Cir. 2009) (“Under the plain language of the statute, [debtor’s] counterclaims against Blue Cross are not ‘against the debtor,’ and thus were not subject to the automatic stay”); *U.S. Abatement Corp. v. Mobil Exploration & Producing U.S., Inc.*, 39 F.3d 563, 568 (5th Cir. 1994) (holding “counterclaims asserted by a debtor are not actions ‘against the debtor’ which are subject to the automatic stay”); *Seiko Epson Corp. v. Nu-Kote International, Inc.*, 190 F.3d 1360, 1364 (Fed. Cir. 1999) (“The rule . . . permits claims by the debtor and counterclaims to proceed”); *In re Porter*, 371 B.R. 739, 747 (E.D. Pa. 2007) (holding that section 362 did not preclude an adjudication of debtor’s appeal from the adverse judgment on her claims against another party, although it did stay appeal from judgment on the other party’s claims against the debtor); *Jefferson Ward Stores, Inc. v. The Doody Co.*, 48 B.R. 276, 278 (E.D. Pa. 1985) (declining to impose automatic stay on debtor’s third-party complaint because “a third-party complaint is a separate, though related, claim brought within the context of ongoing litigation . . .” and “was, at its inception, a claim

brought *by* the debtor. Its character is not changed by the fact that it was brought in the context of a suit against the debtor rather than as an independent action”); *In re Regal Constr. Co.*, 28 B.R. 413 (D. Md. 1983) (holding that stay does not apply to counterclaim because 11 U.S.C. § 362 does not address actions brought by the debtor); *First Wisc. Nat’l Bank v. Grandlich Dev. Corp.*, 565 F.2d 879, 880 (5th Cir. 1978) (holding the automatic stay did not bar continued adjudication of debtor’s counterclaim in action originally brought against debtors “because the counterclaim was not a proceeding *against* the debtor”) (emphasis in original).

The orders before this Court relate to claims brought *by* the debtors, namely the counterclaims, third-party complaint, and a motion to hold certain parties in default. Because neither those claims nor this appeal were brought against the debtor, this appeal is not subject to the automatic stay of 11 U.S.C. § 362.¹

There are, however, restraints on the Appellants’ ability to proceed. Appellants, as Chapter 11 bankruptcy debtors, no longer control their claims in this appeal because the claims vested in their bankruptcy estate upon filing of the bankruptcy petition. The act of filing a petition creates a bankruptcy estate that comprises “all legal or equitable interests of the debtor in property as of” the date of filing. 11 U.S.C.A. §§ 301-303, 541(a)(1); *see also* 11 U.S.C.A. § 541(c)(1) (stating that “an interest of the debtor in property becomes property of the estate . . .” upon filing of a petition under Chapter 11). A cause of action is an interest of the debtor in property within the meaning of 11 U.S.C.A. § 541. *U.S. v. Whiting Pools, Inc.*, 462 U.S. 198, 205 (1983) (recognizing that the debtor’s causes of action constitute estate

¹ The only action *against* the Appellants is CitiMortgage’s foreclosure action. The foreclosure action remains pending in the lower court and would be stayed by section 362.

property); *Wooley v. Haynes & Boone, LLP*, 714 F.3d 860, 864 (5th Cir. 2013) (same).

After the filing of the Chapter 11 petition, only the trustee or debtor in possession can prosecute pre-petition claims. *National Am. Ins. Co. v. Ruppert Landscaping Co.*, 187 F.3d 439, 441 (4th Cir. 1999) (holding that only the trustee has standing to bring claims that are part of the bankruptcy estate); 11 U.S.C.A. § 1107(a) (noting the Chapter 11 debtor-in-possession has all the rights and powers of a trustee). Notably, the debtor-in-possession is legally distinct from the Appellant. *Penick Pharm., Inc. v. McManigle*, 227 B.R. 229 (S.D.N.Y. 1998) (stating that upon filing of a Chapter 11 petition, the debtor becomes the debtor-in-possession and, as such, occupies the same role as the bankruptcy trustee for the estate); *In re CRS Architectural Metals Corp.*, 1 B.R. 729 (D.N.Y. 1979) (holding that a debtor in possession and the bankrupt are different legal entities); *see also In re Obie Elie Wrecking Co.*, 35 B.R. 114 (N.D. Ohio 1983) (holding the trustee is not an agent of the debtor, but rather acts as a representative of the estate to manage the estate's funds for the benefit of the estate's creditors); *Allegaert v. Perot*, 548 F.2d 432, 435-36 (2d. Cir. 1977) (holding the estate business is subject to the supervision and approval of the Bankruptcy Court); 2 *Collier on Bankruptcy* § 323.02 ("The trustee does not represent the debtor and does not owe the debtor any fiduciary duty"). The debtor in possession has a fiduciary duty *to the estate* but not to the debtor. *Wolf v. Weinstein*, 3723 U.S. 633, 649-50 (1963) (observing that the debtor in possession has a fiduciary duty to the estate).

A debtor in possession has only three options with regard to pending prepetition litigation commenced by the debtor: (1) to continue and assume the prosecution of the

pending action, (2) to consent to the debtor's continued prosecution of the action for the estate's benefit, or (3) to decline to prosecute the pending action if it appears the prosecution will be fruitless. *See 2 Collier on Bankruptcy* § 323.02(b) (15th ed. 1981). If this appeal is to continue, then the debtor must receive additional authorization from the Bankruptcy Court to do so. The court must approve (1) the use cash collateral, *see* 11 U.S.C. § 363 and Federal Rule of Bankruptcy Procedure 4001, and (2) the Junks' ability to employ or compensate an attorney, whether retained prior to or after the filing of the petition, *see* 11 U.S.C. §§ 327, 330 and Federal Rule of Bankruptcy Procedure. Both are applicable to this appeal. While this matter is not subject to the automatic stay and should proceed, Appellants must first receive approval from the Bankruptcy Court to allow them to incur the costs related to this appeal (i.e., printing, filing, and serving the record on appeal and drafting, filing, and serving their final briefing) and to compensate A. Parker Barnes, Jr., counsel for Appellant Christine H. Junk. The Junks have failed to receive this authorization.

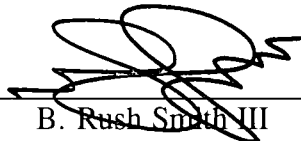
In addition to their bankruptcy counsel, the Junks have applied to the Bankruptcy Court for the retention of *other* counsel. However, the counsel named in the application are not South Carolina attorneys. It is, therefore, unclear what the Junks intend or seek to accomplish with this filing. Regardless, the Junks would still need approval from the Bankruptcy Court to commit estate assets or funds to pursue this appeal.

In this case, the question of whether the debtor in possession intends to pursue the debtor's claims and this appeal remains unresolved at this time. Appellants cannot claim to this Court that it would be in the estate's best interest to stay this matter. Any

such determination must be made and approved by the Bankruptcy Court alone. *See* 11 U.S.C. §§ 1106 and 1107 (noting that under the Bankruptcy Code Appellants have a fiduciary and statutory duty to preserve and maintain the estate and to operate estate business in an efficient manner in order to allow maximum ultimate payments on pre-petition debts). Moreover, as set forth *supra*, none of the options available to the debtor-in-possession allow for a stay when the stay imposed by 11 U.S.C. § 362 does not apply.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____



B. Rush Smith III
SC Bar No. 012941

Brian P. Crotty
SC Bar No. 16983

—Michael J. Anzelmo
SC Bar No. 72933

1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, South Carolina 29201
803.799.2000

Attorneys for Respondent/Counterclaim
Respondent CitiMortgage, Inc., and Third-Party
Respondents Bayview Loan Servicing, LLC,
Merscorp, Inc., Mortgage Electronic Registration
Systems, Inc., CitiMaster Servicing, Citigroup
Global Markets Realty Corp., Citigroup Mortgage
Loan Trust, Inc., Jennifer Oakes, and Robert G.
Hall

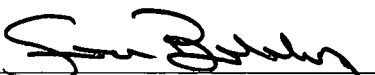
{Additional Signature Pages Follow}

And with permission to sign on behalf of:

By:  _____

John T. Lay
Childs C. Thrasher
Gallivan, White & Boyd, PA.
P.O. Box 7368
Columbia, SC 29202
803-779-1833

Attorneys for Third-Party Respondents Riley Pope
& Laney, LLC, Heidi Carey, Esq., Roy Laney,
Esq., and T. Lowndes Pope, Esq.

By:  _____


Sean Michael Bolchoz
Bolchoz Law Firm, PA
PO Box 828
Bluffton, SC 29910

Attorneys for Third-Party Respondents Security
Connections, Inc., and Krystal Hall


By:  _____

Susan Taylor Wall
Amanda C. Williams
McNair Law Firm
P.O. Box 1431
Charleston, SC 29402

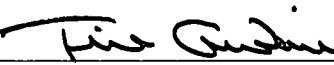
Attorneys for Third-Party Respondents ABC
Appraisal Group, Inc., Mark A. Ruplinger, Linda
Heller, and Harry Jones

By: 
James Y. Becker
Hamilton Osborne, Jr.,
Haynsworth Sinkler Boyd, P.A.
P.O. Box 11889
Columbia, SC 29211-1889

Attorneys for Third-Party Respondents Corelogic,
Inc.

By: 
Demetri "Jim" Koutrakos
Callison Tighe & Robinson
P.O. Box 1390
Columbia, SC 29202

Attorneys for Third-Party Respondents Lawyer
Title Insurance Corporation

By: 
Elizabeth Van Doren Gray
Tina Cundari
Sowell Gray Stepp & Laffitte, LLC
P.O. Box 11449
Columbia, SC 29211

Attorneys for Third-Party Respondents Colonial
Coast Title Agency, Inc.

Columbia, South Carolina

July 22, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Master-in-Equity

The Honorable Marvin H. Dukes, III

Court of Appeals Tracking Nos. 2012-210910, 2012-212115, and 2012-212148

CitiMortgage, Inc., Respondent,

v.

Daniel Junk a/k/a Daniel L. Junk and
Christine H. Junk, and Oldfield Community
Association,

Appellants,

Of Whom Daniel L. Junk and Christine H.
Junk are.....

_____ Daniel L. Junk and Christine H. Junk, Counterclaim Appellants

v.

CitiMortgage Inc., Counterclaim Respondent,

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Riley Pope & Laney, LLC, Heidi Carey,
Esq., Roy Laney, Esq., T. Lowndes Pope,
Esq., Bayview Loan Servicing, LLC,
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Servicing, Citigroup Global Markets Realty
Corp., Citigroup Mortgage Loan Trust, Inc.,
John Does 1-5,000, Jennifer Oakes, Robert
G. Hall, Security Connections, Inc., Krystal
Hall, Danielle Sterling, ABC Appraisal
Group, Inc., Mark A. Ruplinger, Linda
Heller, Harry Jones, Colonial Coast Title
Agency, Inc., Lawyer Title Insurance
Corporation, Corelogic, Inc., and American
Home Mortgage Holdings, Inc., Third-Party Respondents.

Sean Michael Bolchoz
Bolchoz Law Firm, PA
PO Box 828
Bluffton, SC 29910

Demetri "Jim" K. Koutrakos
Callison Tighe & Robinson, LLC
P.O. Box 1390
Columbia, SC 29202

Elizabeth Van Doren Gray
Sowell Gray Stepp & Laffitte, LLC
P.O. Box 11449
Columbia, SC 29211

Susan Taylor Wall
McNair Law Finn. P.A.
Post Office Box 1431
Charleston. South Carolina 29402

A handwritten signature in black ink, appearing to read "J. Lee", written over a horizontal line.

Jennifer B. Lee
Administrative Assistant

July 22, 2013

Nelson Mullins

Nelson Mullins Riley & Scarborough LLP

Attorneys and Counselors at Law
1320 Main Street / 17th Floor / Columbia, SC 29201
Tel: 803.799.2000 Fax: 803.255.9024
www.nelsonmullins.com

Michael J. Anzelmo
Tel: 803.255.9312
Fax: 803.255.9024
michael.anzelmo@nelsonmullins.com

July 22, 2013

Hand Delivered

The Honorable Jenny Abbott Kitchings
Clerk of Court
SC Court of Appeals
1015 Sumter Street - 5th Floor
Columbia, SC 29201

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JUL 22 2013

SC Court of Appeals

RE: CitiMortgage, Inc. v. Daniel L. Junk, et al.
Civil Action No. 2009-CP-07-05088
Order on Appeal: February 22, 2012 (“Order Granting Motion to Dismiss
Third-Party Complaint”)
Court of Appeals Tracking No. 2012-210910

and

CitiMortgage, Inc. v. Daniel Junk a/k/a Daniel L. Junk, Christina H. Junk and
Oldfield Community Association
Civil Action No. 2009-CP-07-5088
Order on Appeal: April 23, 2012 (“Order Granting CitiMortgage’s Motion to
Dismiss Counterclaims”)

and

CitiMortgage, Inc. v. Daniel Junk a/k/a Daniel L. Junk, Christina H. Junk and
Oldfield Community Association
Civil Action No. 2009-CP-07-05088
Order on Appeal: May 3, 2012 (“Form 4 Order Denying Junk’s Motion for
Default Judgment”)

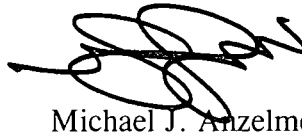
The Honorable Jenny Abbott Kitchings
July 22, 2013
Page 2

Dear Ms. Kitchings:

Enclosed please find an original seven copies of a Response Regarding Effect of Appellants' Bankruptcy Filing on Pending Appeal in the above-referenced matter. Please file the original and return a clocked-in copy to me via our courier. Should you have any questions, please do not hesitate to contact me.

By copy of this letter, I am hereby serving all parties.

Very truly yours,

A handwritten signature in black ink, appearing to read "Michael J. Anzelmo", written over a horizontal line.

Michael J. Anzelmo

MJA:jlee
Enclosures

cc: A. Parker Barnes, Jr.
James Y. Becker
Andrew E. Colvin
John T. Lay
Childs Cantey Thrasher
Sean Michael Bolchoz
Demetri "Jim" K. Koutrakos
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