


Dated: May 14, 2018
The following is ORDERED:




Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

In re
NEAL H. LABOVITZ,
Debtor.

Case No. 18-20429-L
Chapter 13

Neal H. Labovitz,
Plaintiff,
vs.
Internal Revenue Service,
Defendant.

Adv. Proc. No. 18-00010

ORDER GRANTING MOTION TO DISMISS

BEFORE THE COURT is the motion of Defendant, the Internal Revenue Service, to dismiss the Complaint for failure to state a claim for which relief may be granted. Dkt. No. 11. The Debtor/Plaintiff, Neal H. Labovitz, timely filed a Response. Dkt. No. 14. Neither party has requested oral argument on the motion.

The Complaint alleges that the Defendant is attempting to attach or freeze assets belonging to the Debtor's non-filing wife to satisfy its tax lien which would prohibit the co-

debtor from managing her assets, paying her debts, and obtaining income for the Debtor and Debtor's wife to live on. According to the Complaint, the Debtor's wife is also liable for the tax debt, but the debt is a result of the Debtor's income alone and the Debtor's proposed plan will fully protect the Defendant as a secured creditor and pay the debt in full with the requisite interest. Thus, the Debtor asks the court to extend the co-debtor stay of Bankruptcy Code section 1301 or issue an injunction preventing the Defendant from attempting to collect this debt from his wife, the co-debtor, while the case is pending, absent which, irreparable harm will come to the co-debtor and Debtor. In the Motion to Dismiss, the Defendant asserts that the court is without authority to grant the relief sought by the Debtor. In his Response, the Debtor contends that without a stay on the Defendant's collection efforts against the co-debtor, there cannot be an effective reorganization.

JURISDICTION AND AUTHORITY

Jurisdiction over a complaint arising under the Bankruptcy Code lies with the district court. 28 U.S.C. § 1334(b). Pursuant to authority granted to the district courts at 28 U.S.C. § 157(a), the district court for the Western District of Tennessee has referred to the bankruptcy judges of this district all cases arising under title 11 and all proceedings arising under title 11 or arising in or related to a case under title 11. *In re Jurisdiction and Proceedings Under the Bankruptcy Amendments Act of 1984*, Misc. No. 81-30 (W.D. Tenn. July 10, 1984). Matters concerning administration of the estate and the determination of what actions are permitted or prohibited by the automatic stay are core proceedings arising under the Bankruptcy Code. *See* 11 U.S.C. § 157(b)(2)(A) and (O). The court has authority to hear and determine this adversary proceeding subject to appellate review under section 158 of title 11. 28 U.S.C. § 157(b)(1).

MOTION TO DISMISS

Federal Rule of Civil Procedure 8(a), made applicable in bankruptcy proceedings by Federal Rule of Bankruptcy Procedure 7008(a), directs that a pleading provide “a short and plain statement of the claim showing that the pleader is entitled to relief.” Pursuant to Bankruptcy Rule 7012(b)(6), a complaint may be dismissed if it fails to state a claim upon which relief can be granted. In reviewing a motion to dismiss a complaint for failure to state a claim upon which relief can be granted the trial court must “(1) view the complaint in the light most favorable to the plaintiff and (2) take all well-pleaded factual allegations as true.” *Tackett v. M&G Polymers, USA, LLC*, 561 F.3d 478, 488 (6th Cir. 2009). A motion to dismiss pursuant to Rule 12(b)(6) “should only be granted when the court, upon review of the complaint, is convinced that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.” *Garzoni v. K-Mart Corp. (In re Garzoni)*, 35 Fed. Appx. 182 (6th Cir. 2002); *see Ashcroft v. Iqbal*, 556 U.S. 662, 678-79, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009) (“[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss.”).

DISCUSSION

The filing of a bankruptcy petition operates as a stay applicable to all entities of actions against the debtor or property of the debtor or bankruptcy estate. *See* 11 U.S.C. §362(a)(1) and (3); *In re Elrod*, 523 B.R. 790 (Bankr. W.D. Tenn. 2015). The automatic stay of acts against a debtor does not automatically give rise to a stay of acts against non-filing co-debtors. *In re Johnson*, 548 B.R. 770, 787 (Bankr. S.D. Ohio 2016). In a case filed under Chapter 13 of the Bankruptcy Code, however, the protections of the automatic stay are extended beyond the debtor and estate to include protection of “any individual that is liable on [a consumer] debt with the

debtor” from collection of that consumer debt. 11 U.S.C. § 1301. *I.R.S. v. Westberry (In re Westberry)* 215 F.3d 589 (6th Cir. 2000). In this proceeding, the Debtor asks that the court extend the co-debtor stay of section 1301 to prevent collection of joint tax debt from the Debtor’s wife. In a precedential opinion, the Court of Appeals for the Sixth Circuit has ruled that income tax debt is not consumer debt for purposes of the co-debtor stay and thus, section 1301 does not apply to prevent the IRS from collecting tax debt from a co-debtor. *Westberry* at 591, 593. For this reason, the relief requested by the Debtor, extension of the co-debtor stay to tax debt, is not a plausible claim for relief that can survive the Defendant’s Motion to Dismiss.

The Complaint includes a request that the court issue an injunction preventing the Defendant from attempting to collect this debt from his wife while his Chapter 13 case is pending. The Debtor sought the same relief in his Motion for Ex Parte and Expedited Extension of Co-Debtor Stay or Imposition of Stay to Internal Revenue Service (Bankr. Dkt. No. 5), which was heard by the court on March 1, 2018, and denied. The Order denying the motion for injunctive relief was entered on March 6, 2018 (Bankr. Dkt. No. 41), and is now final. The court could not find: (1) that the property subject to the levy was property of the debtor or the estate; or (2) that this case presents the type of “unusual circumstances” necessary to support an injunction for a non-filing co-debtor. *See Amer. Imaging Serv., Inc. v Eagle-Picher Ind., Inc. (In re Eagle-Picher Ind., Inc.)*, 963 F.2d 855 (6th Cir. 1992); *In re Johnson*, 548 B.R. at 788; *Saleh v. Bank of Am., N.A. (In re Saleh)*, 427 B.R. 415, 420 (Bankr. S. D. Ohio 2010). Additionally, when the creditor is the Internal Revenue Service and the debtor does not dispute the validity of the claim, the court is prohibited by the Anti-Injunction Act from issuing an injunction to restrain the IRS from collecting against a non-filing co-debtor. *See* 26 U.S.C. §

7421(a); *Pressimone v. I.R.S. (In re Pressimone)*, 39 B.R. 240, 244 (Bankr. N.D. N.Y. 1984); *Hall v. I.R.S. (In re Hall)*, 123 B.R. 441, 443 (Bankr. N.D. Ga. 1991). Thus, even if the Debtor had filed a motion to alter or amend the judgment or a motion for relief from the judgment, or if the Complaint could be construed as such a motion, there is no law to support the request for injunctive relief in this Complaint. *Hall* at 444.

CONCLUSION

From the foregoing, the court concludes that the Complaint fails to state a claim upon which relief may be granted. Accordingly, Defendant's Motion to Dismiss the Complaint is **GRANTED**.

cc: Debtor/Plaintiff
Attorney for Debtor/Plaintiff
Defendant
Attorneys for Defendant
Chapter 13 Trustee