

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
(WEST PALM BEACH DIVISION)

CASE NO. 10-81612-CIV-HURLEY/HOPKINS

JONATHAN E. PERLMAN, Esq., as court
appointed Receiver of Creative Capital
Consortium, LLC, et al.,

Plaintiff,

v.

WELLS FARGO BANK, N.A, as
successor-in-interest to Wachovia Bank, N.A.,

Defendant.

**RECEIVER'S REPLY TO WELLS FARGO BANK, N.A.'S
RESPONSE IN OPPOSITION TO MOTION TO LIFT OR VACATE STAY OF
DISCOVERY AND INCORPORATED MEMORANDUM OF LAW**

Plaintiff Jonathan E. Perlman, Esq., the court-appointed Receiver (the "Receiver") of Creative Capital Consortium, LLC, A Creative Capital Concept\$, LLC, United Investment Club, LLC, Reverse Auto Loan, LLC, Wealth Builders Circle, LLC, The Dream Makers Capital Investment, LLC, G\$ Trade Financial, Inc. and Unity Entertainment Group, Inc., (collectively, the "Receivership Entities"), hereby files this Reply to Wells Fargo Bank, N.A.'s ("Wachovia") Response In Opposition To Motion To Lift Or Vacate Stay Of Discovery (the "Response") [D.E. #47] and states as follows:

PRELIMINARY STATEMENT

Wachovia's Response raises certain procedural arguments, which merit the filing of this Reply by the Receiver. However, as a preliminary matter, and to emphasize the Receiver's

purpose for filing the Motion to Lift or Vacate Stay of Discovery (the “Motion to Vacate”)[D.E. #46], it is important to note that this Court has a strong policy of resolving issues on their *merits*, and not on procedural technicalities.

The Order Granting Defendant’s Motion to Stay Discovery (the “Stay Order”) [D.E. #45] was entered by this Court without legal opposition by the Receiver. Consequently, the Court’s ruling may have been spurred by the Receiver’s default.¹ By virtue of the Motion to Vacate, this Court now has the benefit of Receiver’s opposing legal arguments regarding the stay of discovery, and may consider them to the extent not otherwise fully considered in executing the Stay Order. Therefore, although the Receiver disagrees with (and herein addresses) the *procedural* arguments² raised by Wachovia in its Response, he nonetheless respectfully urges this Court to strongly consider the *substantive* legal arguments raised in the Motion to Vacate, and to effectively reassess its ruling concerning a stay of discovery.

MEMORANDUM OF LAW

I. The Receiver Has Not Run Afoul of Fed. R. Civ. P. 6(b)(1)(B.)

Wachovia argues that this Court should not consider the Motion to Vacate because the Receiver has failed to first file a request for extension of time to respond to the Motion to Stay Discovery in accordance with Fed. R. Civ. P. 6(b)(1)(B.) However, the Court had already ruled upon the Motion to Stay Discovery and entered the Stay Order when the Receiver first became

¹ In the Stay Order, the Court notes that its ruling is entered “without the benefit of a response from Plaintiff”, and that “the failure to submit a response to a motion may be deemed sufficient cause for granting the motion by default.”

² In addition to presenting certain procedural arguments in its Response, Wachovia “re-argues” many of the substantive issues initially presented in its Motion to Stay. The Receiver has addressed all of these issues in the Motion to Vacate, and given that this pleading takes the form of a “reply”, confines its arguments herein to the “new” procedural arguments,

aware of his inadvertent failure to respond to that Motion. Thus the Receiver considered it more prudent to proceed with a “new” motion to lift the pending stay.³

Notwithstanding which approach is more appropriate, this Court has broad discretion in ruling upon matters of pretrial procedure, and the Eleventh Circuit has a “strong policy of resolving issues on the merits, rather than on procedural technicalities.” Whitehead By and Through Whitehead v. School Bd. for Hillsborough County, State of Fla., 932 F.Supp.1396, 1399 (M.D.Fla.1996); See also, Morrone v. Gunderson, 169 F.R.D. 168, 171 (M.D.Fla.1996); U.S. ex rel. Butler v. Magellan Health Services, Inc., 74 F.Supp.2d 1201, (M.D.Fla.1999.) The Receiver urges this Court to consider the substantive merits of his arguments concerning Wachovia’s lack of entitlement to a discovery stay, as opposed to focusing upon the questionable technical procedural issues raised by Wachovia.

Nonetheless in the event this Court requires that the Receiver seek an extension of time in order to properly present his arguments regarding the discovery stay issue, the Receiver hereby requests that such an extension be granted. Fed. R. Civ. P. 6(b)(1)(B) provides that an extension of time to file a response may be granted, for good cause, “on motion made after the time has expired if the party failed to act because of excusable neglect.” The Receiver has demonstrated excusable neglect in the Motion to Vacate, through which he informed this Court that a response to Wachovia’s Motion to Stay Discovery was timely prepared and ready to file but for an unfortunate lack of communication among the Receiver’s counsel and legal staff. (See Motion to Vacate, D.E. #46, p. 3,4.) This Court may, if necessary, enter an order, *nunc pro tunc*, extending the time for the Receiver to reply to Wachovia’s Motion to Stay.

³ The Receiver’s decision was in no way meant to subvert the Federal Rules of Civil Procedure.

II. The Receiver Has Complied With S.D. Local Rule 7.1(a)(3).

The Local Rules of this District require moving counsel to confer with opposing counsel “in a good faith effort to resolve by agreement *the issues to be raised in the motion.*” S.D. Local Rule 7.1(a)(3), (emphasis added.) The Receiver fully complied with this obligation. As admitted by Wachovia in its Response, the parties conducted a discovery conference in this case on April 11, 2011, wherein a “good faith discussion on discovery matters” ensued. The discussion specifically included a discourse of the issues regarding Wachovia’s proposed Motion to Stay. (Response, D.E. # 47, p. 4, 5.) The issues concerning the Wachovia’s Motion to Stay are the very same issues addressed in the Receiver’s Motion to Vacate, and the very same issues upon which the parties continue to be diametrically opposed. A second conference by the parties was not warranted, and Wachovia’s arguments in this regard are truly form over substance.

CONCLUSION

For the reasons set forth above, and more specifically for the reasons set forth in the Motion to Vacate, the Receiver respectfully requests that the Stay Order be vacated and that the parties be allowed to proceed immediately with pretrial discovery.

Dated: August 18, 2011
Miami, Florida

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 18, 2011, the foregoing document was electronically filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the below Service List, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By: s/David P. Lemoie
Attorney

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