

**United States Bankruptcy Court
Northern District of Illinois
Eastern Division**

Transmittal Sheet for Opinions for Posting Opinions

Will this Opinion be Published? Yes

Bankruptcy Caption: In re Robert M. Kowalski

Bankruptcy No. 18 BK 09130

Adversary Caption: Paloian v. Byline Bancorp, Inc. et al.

Adversary No. 19 AP 00626

Date of Issuance: October 13, 2021

Judge: Jacqueline P. Cox

Appearance of Counsel:

Attorney for Movant: M. Ryan Pinkston
Seyfarth Shaw, LLP

Attorney for Respondent: Richard B. Polony
Hinshaw & Culbertson LLP

Trustee or Other Attorneys: Gus A. Paloian
Seyfarth Shaw, LLP

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

In re:)	Chapter 7
)	
Robert M. Kowalski)	Case No. 18 BK 09130
)	
Debtor.)	
<hr style="width: 40%; margin-left: 0;"/>		
)	
Gus A. Paloian , not individually, but solely in his capacity as the duly appointed Trustee for the estate of Robert M. Kowalski,)	
)	
Plaintiff,)	
)	
v.)	Adv. No. 19 AP 00626
)	
Byline Bank ,)	
)	
Defendant.)	Honorable Jacqueline P. Cox

Amended Order Denying Motion to Set Trial for Adversary Proceeding (Adv. Dkt. 105)

Plaintiff, Gus A. Paloian (the “Plaintiff”), not individually, but solely in his capacity as the duly appointed Chapter 7 Trustee for the estate of Debtor Robert M. Kowalski (the “Bankruptcy Estate”) moved for an Order Setting a Trial Date. Before this adversary proceeding was filed, two witnesses, Robert Kowalski (the “Debtor”) and Jan Kowalski, were indicted on criminal charges, including bankruptcy fraud and concealment of assets. Thereafter, the court continued this matter for status to November 16, 2021 because Jan Kowalski refused to testify when deposed in this adversary proceeding, invoking her Fifth Amendment privilege against self-incrimination.

In support of his Motion, the Trustee argues the Defendant should not be granted a stay of the adversary proceeding because it has not filed a motion for a stay. The Trustee also argues it is unnecessary for Jan Kowalski to testify because the court’s prior findings and conclusions based on

her testimony in a prior adversary proceeding are binding in this proceeding under the law of the case doctrine. Alternatively, the Trustee argues that the factors courts use to determine if a stay is appropriate weigh against a stay. In its response, the Defendant argues applying the law of the case doctrine here would be unjust because (1) it would prevent it from eliciting testimony from two key witnesses, the Debtor and Jan Kowalski, and (2) the Defendant was not a party to the prior adversary proceeding. *Trustee v. Byline Bancorp., Inc. (In re Kowalski)*, Ch. 7 Case No. 18-09130, Adv. No. 19-00626, Dkt. No. 107, pp. 1-2 (Bankr. N.D. Ill. Sept. 17, 2021) (“Adv. 19-626”).

The Defendant also argues that here, the aforementioned factors weigh in favor of postponing the trial until the criminal proceedings conclude. Due to the posture of the criminal matter and the fact that the defendants in the criminal case are witnesses in the civil matter, the court orders that the Plaintiff’s Motion for an Order Setting a Trial Date will be denied, and that the trial in this adversary proceeding will be stayed until the end of the criminal case.

Background

This Adversary Proceeding concerns Cashier’s Checks, most of which were purchased pre-petition by the Debtor from the Defendant. During Robert M. Kowalski’s Chapter 7 case, these checks were deposited into and funds were later withdrawn from an Interest on Lawyer Trust Account (“IOLTA Account”) belonging to Jan Kowalski, the Debtor’s sister and former attorney. Adv. 19-626, Byline’s Statement of Contested Facts ¶¶ 1-3, 9-11, 14-25, Dkt. No. 63-1.

Previously, the Trustee filed a Motion for Turnover of Estate Funds (the “Turnover Motion”) against the Debtor and Jan Kowalski, alleging the cash withdrawals were property of the estate that had been converted by them. *In re Kowalski*, Ch. 7 Case No. 18-09130, Dkt. No. 315, pp. 1, 3-11 (Bankr. N.D. Ill. Dec. 26, 2018) (“BK Case”). At the trial on the Turnover Motion, Jan

Kowalski testified that the Debtor used the Cashier's Checks to pay her legal fees earned from Debtor and from entities the Debtor owned or controlled. Adv. 19-626, Byline's Statement of Contested Facts ¶ 5, Dkt. No. 63-1. On February 21, 2019, the court granted the Turnover Motion, finding that Jan Kowalski's testimony was not credible and that the disputed funds withdrawn from her IOLTA Account were property of the Debtor's bankruptcy case. BK Case, Case No. 18-09130, Dkt. No. 436 at p. 1.

The Trustee also filed an adversary proceeding against Jan Kowalski for turnover of the Cashier's Checks proceeds. *Trustee v. Kowalski (In re Kowalski)*, Ch. 7 Case No. 18-09130, Adv. No. 19-00066, Dkt. No. 1, ¶¶ 10-104 (Bankr. N.D. Ill. Feb. 4, 2019) ("Adv. 19-066"). On February 15, 2019, the court granted a Temporary Restraining Order and an Injunction to prevent Jan Kowalski from disposing of the disputed funds. Adv. 19-066, Dkt. No. 8 at pp. 1-5.

On March 10, 2019, the U.S. Attorney filed a criminal complaint against the Debtor, Jan Kowalski, and others, alleging that they concealed the property of the Bankruptcy Estate, obstructed the Trustee's and creditors' efforts to obtain records or locate property of the estate, and filed false and fraudulent documents. Complaint ¶¶ 2-5, 18, 27, 35, 39, 41, *United States v. Kowalski*, No. 19 CR 00226 (ND. Ill. Mar. 10, 2019), ECF No. 1. On April 25, 2019, the Trustee filed this adversary proceeding against Defendant Byline alleging three counts: violation of the automatic stay, conversion, and turnover of property of the Estate. Adv. 19-626, Dkt. No. 1 ¶¶ 45-75.

The criminal case is ongoing. See *United States v. Kowalski*, No. 19 CR 00226-1, 2021 WL 4318074, at*2-4 (ND. Ill. Sept. 23, 2021) (denying Robert's motions to dismiss the indictment). The government's position is that during the bankruptcy case, Robert and Jan Kowalski concealed property of the Bankruptcy Estate from Robert's creditors and the Trustee, including approximately

\$360,000 in assets, filed documents containing false representations, and made false representations to the U.S. Bankruptcy Court. Complaint ¶¶ 4, 18 *Kowalski*, No. 19 CR 00226, ECF No. 1. Based on their handling of the Cashier's Checks at issue in this adversary proceeding, Robert and Jan Kowalski are also charged with conspiracy to embezzle bank funds and to falsify bank records as well as aiding and abetting the embezzlement of bank funds. *See United States v. Kowalski*, 2021 WL 4318074, at *2 (N.D. Ill. Sept. 23, 2021).

The court continued this matter for status to November 16, 2021 to discern the status of the criminal case.

Law of the Case Doctrine

The law of the case doctrine is a rule of practice under which after an issue has been litigated and decided once, that should be the end of the matter. *See Analytical Eng'g, Inc. v. Baldwin Filters, Inc.*, 425 F.3d 443, 454 (7th Cir. 2005) (quoting *Creek v. Vill. of Westhaven*, 144 F.3d 441, 445 (7th Cir. 1998)). Under this rule, when the court decides an issue of law, the ruling will govern the same issues in subsequent stages of the case. *See Redfield v. Cont'l Casualty Corp.*, 818 F.2d 596, 605 (7th Cir. 1987). A court has discretion to apply the doctrine. *See id.*

A bankruptcy court may apply the doctrine across adversary proceedings within the same bankruptcy case. *See In re Motors Liquidation Co.*, 590 B.R. 39, 62 (S.D.N.Y. 2018), *aff'd*, 943 F.3d 125, 133 (2d Cir. 2019). However, some courts have decided not to apply the doctrine to a different adversary proceeding in the same bankruptcy case that involves different parties. *See United States ex rel. Kemper Sec. Grp. v. Clark (In re Kazi)*, 165 B.R. 246, 248 (Bankr. S.D. Ill. 1994) (“[t]he doctrine is not applicable where either different parties or issues are involved.”) (citations omitted).

The Trustee argues it is not necessary for Jan Kowalski to testify, since the court's findings from her testimony in a prior adversary proceeding are binding in this proceeding. He argues the court should hold that under the law of the case doctrine, the Defendant is bound by the court's prior rulings that the Cashier's Checks were not from attorney's fees earned from the debtor, the Cashier's Checks were Property of the Bankruptcy Estate, and that Jan Kowalski was not a credible witness. Adv. 19-066, Dkt. No. 8 at pp. 2-5; Adv. 19-626, Dkt. No. 105, ¶¶ 28, 34-36.

The Defense argues applying the doctrine in this manner would be unjust, since it would prevent it from eliciting testimony from two key witnesses about the Cashier's Checks and because the Defendant was not a party to the prior proceeding. Adv. 19-626, Dkt. No. 107 at pp. 1-2.

Notably, Robert and Jan Kowalski are the principal witnesses to the transactions at issue. Adv. 19-626, Dkt. No. 107 at p. 9. Moreover, although a Byline Bank representative testified at the prior proceeding, the Defendant did not have the opportunity to question the Debtor or Jan Kowalski. Given the importance of these witnesses to their case, the Defendant should have the opportunity to elicit testimony from them. Since applying the law of the case doctrine would effectively deny the Defendants that opportunity, the court, in its discretion, declines to apply the doctrine herein.

Stay of the Adversary Proceeding

Courts have the inherent power to control their dockets while taking into account the "economy of time and effort" for the court, counsel, and litigants. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). This includes a court's discretionary power to stay civil proceedings, postpone civil discovery, or impose protective orders and conditions when the "interests of justice" so require. *See United States v. Kordel*, 397 U.S. 1, 12, n. 27 (1970). Courts may stay a civil case

to preserve a witness's Fifth Amendment privilege rights. *See Eastwood v. United States*, 2008 WL 5412857, at *1 (E.D. Tenn. Nov. 14, 2008) (citations omitted); *Cf. Andover Data Servs. v. Statistical Tabulating Corp.*, 876 F.2d 1080, 1080-82 (2d Cir. 1989) (stating that a witness may invoke their Fifth Amendment privilege whenever they reasonably believe their testimony could be used in a criminal proceeding).

Entering a stay in light of a parallel criminal proceeding is not constitutionally required; courts have discretion to issue stays. *See United States v. All Meat & Poultry Prods.*, 2006 WL 27119, at *1 (N.D. Ill. Jan. 4, 2006) (citations omitted). Courts look to six factors in determining whether the stay of an adversary proceeding is appropriate: (1) whether the two cases involve the same subject matter; (2) whether both actions were brought by the government; (3) the posture of the criminal proceeding; (4) the effect on the public interest if a stay were to be issued; (5) the plaintiff's interests in proceeding expeditiously with the litigation and the potential prejudice to the plaintiff of a delay; and (6) the burden that any particular aspect of the proceedings may impose on the defendant. *See Layng v. Garcia (In re Garcia)*, 569 B.R. 480, 487 (Bankr. N.D. Ill. 2017) (citing *Cruz v. Cnty. of DuPage*, 1997 WL 370194, at *2 (N.D. Ill. June 27, 1997)).

Same Subject

Where issues overlap significantly in the civil and criminal cases, this factor weighs in favor of a stay. *See In re Garcia*, 569 B.R. at 487-88 (citations omitted). This is because the civil case may undermine the defendant's Fifth Amendment privilege against self-incrimination by expanding rights of criminal discovery, disclosing the basis of the defense to the prosecution before trial.

The Trustee acknowledges that there is some overlap between this adversary proceeding and the criminal matter. However, he argues that the Defendant's acts in providing the Cashier's Checks

to Jan Kowalski pre-petition for earned fees is not alleged in the criminal complaint. The Trustee also points out that Jan Kowalski is a witness, not the Defendant, in this proceeding, and thus is entitled to less protection. However, it is important to note that a non-party witness, like anyone else, is entitled to the protection of the Fifth Amendment. *See Sec. & Exch. Comm'n v. United Brands Co.*, 1975 WL 432, at * 1 (D. Mass. Nov. 10, 1975) (citing *Guy v. Abdulla*, 58 F.R.D. 1, 1 (N.D. Ohio 1973)).

Likewise, as the Defense argued in its response, since the criminal matter and this adversary proceeding both center around the transactions involving the Cashier's Checks, there is substantial overlap between the civil and criminal matters. Adv. 19-626, Dkt. No. 107 at pp. 6-7. This factor weighs in favor of a stay.

Actions Brought by the Government

Where both actions are brought by the government, a stay should be imposed. *See In re Garcia*, 569 B.R. at 488 (citations omitted). The Trustee persuasively argues that the civil proceeding is not brought by the government. The Trustee is not an officer, agent, or instrumentality of the United States. *In re Hughes Drilling Co.*, 75 B.R. 196, 197 (Bankr. W.D. Okla. 1987). This factor weighs against a stay herein.

Posture of the Criminal Matter

Where a parallel criminal case is pending at the same time a civil matter is proceeding, a stay should be entered. *See In re Garcia*, 569 B.R. at 469 (citing *Cruz*, 1997 WL 370194, at *3). Even where a witness in the civil proceeding is a defendant in the parallel criminal case, courts have reasoned that staying the civil case until the criminal proceeding concludes may be appropriate where any delay in the civil proceeding would be minimal and the resolution of the criminal matter

may affect the inquiry into issues in the civil case. *See Tostado v. Jackson*, 2011 WL 2116396, at*5 (E.D. Wis. May 25, 2011) (staying vicarious liability suit against employer and former employee where employer intended to call employee as witness while employee was a defendant in a related criminal case).

The Trustee argues that although the criminal case is currently pending, the civil discovery rules will not be used to improperly benefit the criminal case. Adv. 19-626, Dkt. No. 105 ¶ 43. Hence, he argues no further discovery from Jan Kowalski is likely necessary because she has already testified about her allegedly “earned fees” from the Debtor and provided her alleged “documentation” of said fees. Adv. 19-626, Dkt. No. 105 ¶ 44. However, since the criminal proceeding is ongoing, it is speculative to argue that no further discovery will be needed from Jan Kowalski; this factor weighs in favor of a stay.

Effect on the Public Interest

The court must also consider the potential effect of a stay on the public interest. *See In re Garcia*, 569 B.R. at 490. Where a stay would “enable the defendants to engage in some continuing wrong,” this factor weighs against a stay. *See Cruz*, 1977 WL 370194, at *3.

In considering the effect of staying an adversary proceeding on the public, bankruptcy courts have weighed the following competing interests of the public: (1) prompt disposition of litigation, (2) safeguarding constitutional protections, and (3) ensuring the bankruptcy process is used only to protect honest but unfortunate debtors. *See In re Garcia*, 569 B.R. at 490. There are countervailing concerns: while delay of the civil case impairs the public interest in swift disposition of civil matters, the public also has an interest in ensuring that civil matters do not taint or interfere with the criminal process. *See id.* at 489-91.

Here, the Trustee argues that the bankruptcy interest weighs against a stay. Adv. 19-626, Dkt. No. 105 ¶ 46. He argues that a stay would lead to further delay, and, in turn, to increased trustee and administrative fees. He also argues that because this case has been pending for two years, the interests of creditors harmed by Debtor's and Jan Kowalski's actions in receiving final payment of their claims weighs against staying the civil matter. Adv. 19-626, Dkt. No. 105, ¶¶ 46-47.

However, countervailing interests weigh in favor of a stay. These interests include safeguarding Jan Kowalski's constitutional rights and ensuring her criminal trial is not tainted by this proceeding. The public interest does not require proceeding to trial on the civil matter at this time.

Plaintiff's Interest

Plaintiffs have a strong interest in the expeditious resolution of litigation. The Trustee, as Plaintiff, argues that this adversary proceeding has been pending for two years and that a stay for an additional year to await resolution of the criminal matter would permit Jan Kowalski or the Debtor to manufacture more evidence, which could prejudice the Trustee.

The Defendant argues that the two-year period during which the matter has been pending does not make a stay inappropriate because during that time the parties conducted discovery and resolved the Trustee's summary judgment motion. The court finds that the Trustee's interest in prompt resolution of this adversary proceeding does not justify jeopardizing the Kowalskis' assertion of their rights in the criminal case.

Defendant's Interest

The final factor courts consider is the burden that denial of a stay would have on defendants.

See In re Garcia, 569 B.R. at 492. Courts in this district have reasoned that the burden on the defendants weighs in favor of granting a stay if denial of the stay would “confound” the defendants’ discovery efforts in defending their civil action. *See Fick v. Parker*, 2020 WL 4815904, at *6 (N.D. Ill. Aug. 18, 2020) (citations omitted). Once a defendant has been indicted, his or her privilege against self-incrimination is a factor favoring a stay. However, the privilege may not lie after a defendant has been convicted. *See All Meat & Poultry Prods.*, 2006 WL 27119, at *3 (N.D. Ill. Jan. 4, 2006) (“[t]he extent to which a convicted defendant is still entitled to assert the privilege is unclear.”).

Here, the Trustee argues that Jan Kowalski’s potential assertion of her Fifth Amendment privilege would not confound the Defendant’s discovery efforts because there are no undiscovered facts. The Trustee argues that all of the relevant documents and testimony were presented during the evidentiary hearings in the prior adversary proceeding. However, this argument is speculative at best, since it is difficult to know what evidence would be uncovered before the Debtor and Jan Kowalski have been questioned by the Defendant in this proceeding.

The Defendant argues that denial of the stay will impose a significant burden on the court and the Defendant. It argues if a stay is not imposed, it will subpoena Jan Kowalski and the Debtor as witnesses due to their personal knowledge regarding the Cashier’s Check transactions and that, in turn, they could refuse to testify, asserting their Fifth Amendment privilege. As a result, the court would have to determine whether the privilege applies with respect to each question asked in light of the criminal indictment. The Defendant also argues that there were no other witnesses to these transactions, and it does not have any other witnesses that can testify on the matter.

Denial of the stay would likely “confound” the Defendant’s discovery efforts, given the

importance of the Debtor's and Jan Kowalski's testimony to the Defendant's case and the difficulties that would likely arise were the Defendant to subpoena these witnesses to testify. This factor weighs in favor of a stay.

Adversary Proceeding No. 19-00626 is hereby stayed until the conclusion of the criminal case in which Jan Kowalski and the Debtor are charged with conspiracy to embezzle bank funds, bankruptcy fraud, and concealment of assets, among other charges.

The Trustee's Motion for an Order Setting a Trial Date is denied.

Dated: October 13, 2021

Entered:

Jacqueline P. Cox
United States Bankruptcy Judge