UNITED STATES BANKRUPTCY COURT

NORTHERN DISTRICT OF CALIFORNIA

In re DERALD KENOYER, Debtor.	Case No. 11-53472-ASW Chapter 7
DERALD KENOYER, Plaintiff, vs. NOREEN CARDINALE, MARTHA L. CARON, AND MARY MARGARET BUSH, Defendants.	Adv. Proc. No. 11-05130

DECISION GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants Noreen Cardinale, Martha Caron, and Margaret Bush (collectively referred to as "Defendants") have moved for summary judgment, or in the alternative summary adjudication, on Plaintiff Derald Kenoyer's claims against Defendants relating to Defendants' alleged violation of the automatic stay. Attorney Stephen Finestone represents Defendants, and attorneys Kathryn Diemer and

Judith Whitman[1] represent Mr. Kenoyer. Mr. Kenoyer filed a late Opposition, which Mr. Kenoyer wrote himself. After a telephonic conference with Mr. Finestone and Ms. Diemer, the Court extended the briefing schedule, and Ms. Diemer filed an Opposition on behalf of Mr. Kenoyer. Defendants replied to the second Opposition. Having considered the parties' written arguments, evidence, and statements made at the hearing on December 13, 2012, and for the reasons explained below, the Defendants' Motion for Summary Judgment is granted.

I. Standard of Review

A court shall grant summary judgment if the pleadings and any filed affidavits, discovery responses and deposition testimony show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Bankr. P. 7065 (incorporating Fed. R. Civ. P. 56); Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 584-85 (1986). Material facts are those that may affect the outcome of the case. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable factfinder to return a verdict for the non-moving party. Id. at 248.

When determining whether such a factual dispute exists, the Court may not weigh the evidence or make credibility determinations. Id. at 255; see also Bravo v. City of Santa Maria,

[1] Ms. Whitman remains Mr. Kenoyer's counsel of record, although a declaration executed by Ms. Whitman on January 22, 2013, states that Ms. Whitman has retired.

665 F.3d 1076, 1083 (9th Cir. 2011). Instead, "the evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [the non-movant's] favor." Anderson, 477 U.S. at 255 (citing to Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-159 (1970)). If a genuine dispute as to a material fact exists, then summary judgment must be denied. Id. at 249-50. However, if the non-moving party carries the burden of proof and fails to make a sufficient showing to establish an element which is essential to that party's case, then summary judgment must be entered. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

II. Issues Presented

In this proceeding, Mr. Kenoyer contends that Defendants violated the automatic stay, 11 U.S.C. §§ 362(a)(1) and (6), which went into effect on April 13, 2011, when Mr. Kenoyer filed for bankruptcy. Within the two main issues -- whether §§ 362(a)(1) or (6) have been violated -- the Court has identified the following specific issues:

(1) Did it violate the automatic stay for Ms. Cardinale, as the state court plaintiff, and for Ms. Cardinale's attorneys to make a post-petition attempt to enforce a pre-petition trial subpoena that was served on Mr. Kenoyer, the bankruptcy debtor?

(2) Does it make any difference that Mr. Kenoyer was severed from the state court litigation shortly after the filing of Mr. Kenoyer's bankruptcy petition?

(3) Does it make any difference that Mr. Kenoyer never testified or produced documents in response to the

subpoena?

(4) Does the breadth of the subpoena matter? In other words, does it make a difference whether the subpoena was narrowly directed to the claims against non-debtor co-defendants, or whether the subpoena was more broadly directed at claims against Mr. Kenoyer?

(5) Was it Defendants' obligation to seek relief from the automatic stay before seeking to enforce the subpoena, or was it instead incumbent on Mr. Kenoyer to seek injunctive relief under 11 U.S.C. § 105(a) to prevent enforcement of the subpoena?

(6) Did it violate the automatic stay, 11 U.S.C. 362(a)(6), when Mr. Kenoyer's alleged involvement in the tortious conduct was discussed at the state court trial of the claims asserted against the non-debtor co-defendants?

As to these issues, both sides have produced substantially the same evidence, and neither party has raised a factual dispute. Instead, the dispute between the parties is whether the Defendants are entitled to judgment as a matter of law under this set of undisputed material facts, which are detailed below.

The issues before the Court are purely legal. See Eskanos & Adler, P.C. v. Leetien, 309 F.3d 1210, 1213 (9th Cir. 2002) ("Whether the automatic stay provisions of 11 U.S.C. § 362(a) have been violated is a question of law."). Significantly, the issues are also novel. Although several courts, including the Ninth Circuit Bankruptcy Appellate Panel, have addressed similar issues within the context of discovery, this Court has found no binding or persuasive legal precedent which squarely addresses the issues,

particularly with respect to a trial subpoena.

III. Statement of Undisputed Material Facts

In support of the motion and the contention that there was no violation of the automatic stay nor any resulting damages, Defendants have offered the declaration of Ms. Caron with supporting attachments. In opposition to the motion, Mr. Kenoyer has offered the declaration of Ms. Diemer with supporting attachments. These declarations, their attachments, and the Court's own docket together demonstrate the following material facts, which neither side has disputed. The exhibits attached to Ms. Diemer's declaration were lettered and will be referred to herein as Ex. A, Ex. B, etc. The exhibits attached to Ms. Caron's declaration were numbered and will be referred to herein as Ex. 1, Ex. 2, etc.

Ms. Caron and Ms. Bush were Ms. Cardinale's attorneys in a state court case pending against Mr. Kenoyer and several others in Contra Costa County in which Ms. Cardinale alleged a conspiracy to commit fraudulent transfers. Caron Decl. at ¶¶ 1, 12, 22. The other state court defendants were Daniel R. Miller, Sr., Keith Charles Knapp, Home Loan Services Corporation dba California Home Loans, Daniel R. Miller, Jr., and Patrice Miller. The state court case was set for trial to commence on April 18, 2011. Caron Decl. at ¶ 4; Diemer Decl. at ¶ 6.

Before trial in the state court, and approximately three weeks before Mr. Kenoyer filed for bankruptcy, Ms. Cardinale's attorneys issued a subpoena (hereafter, "the Subpoena") on March 23, 2011, which was served on Mr. Kenoyer on March 30, 2011. Caron Decl. at

¶¶ 4-5; Diemer Decl. at ¶ 2. The Subpoena required Mr. Kenoyer to appear at trial on April 18, 2011, and to produce records. Caron Decl. at ¶ 4; Ex. A & Ex. 2 "Civil Subpoena"; Ex. 3 "Proof of Service." According to the Subpoena, "The witness has exclusive custody of the original of documents which will be offered as evidence in the trial of this matter, **and is a party defendant** who acted as loan agent for many of the loans which are the subject of this action." (Emphasis added).

The Subpoena sought numerous records. The Subpoena was aimed, specifically, at all writings concerning Mr. Kenoyer's affiliation with co-defendants in the state court action, as well as writings pertaining to numerous entities, such as Napa Valley, Inc., Pashlin, Inc., PFG, Inc. and others. The Subpoena also sought records pertaining to 23 separate pieces of real property. The Subpoena sought information relating to Daniel R. Miller, Jr.,[2] to Patrice Miller,[3] and to Daniel R. Miller, Sr.[4] However, the Subpoena also sought information concerning Mr. Kenoyer: Mr. Kenoyer's agreements and investments with Daniel R. Miller, Jr., and other non-defendants; Mr. Kenoyer's commissions and fees; Mr. Kenoyer's affiliation and agreements with California Home Loans or Keith Charles Knapp; the recordation of two deeds of trust in Mr. Kenoyer's favor; money loaned or advanced by Mr. Kenoyer to the co-defendants; written communications between Mr. Kenoyer and Daniel

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[2] Subpoena Attachment at ¶¶ 1, 4, 5, 6, 10, 12, 13, 14, 15, 19, 20, 21, 22, 25, 26, 27, 28, 29, 30, 31, and 33.

[3] Subpoena Attachment at ¶¶ 1, 8, 10, 12, 14, 19, 20, 25, 26, and 31.

[4] Subpoena Attachment at ¶¶ 1, 7, 10, 12, 14, 19, 20, 25. 26, 28, and 31.

Miller, Jr.; and Mr. Kenoyer's net worth. Subpoena Attachment at ¶¶ 13-24 and 35.

On April 11, 2011, Ms. Caron received a telephone call from Mr. Kenoyer's attorney, Ms. Whitman, advising of Mr. Kenoyer's intention to file a bankruptcy petition. Caron Decl. at ¶ 6. According to Ms. Caron, Ms. Whitman at that time demanded that the state court claims against Mr. Kenoyer be dismissed, with prejudice. Id. Ms. Caron agreed to sever the claims against Mr. Kenoyer, but not to dismiss the claims. Id. Ms. Caron also stated that Ms. Whitman acknowledged that Mr. Kenoyer would still be required to testify, but that Ms. Caron agreed to relieve Mr. Kenoyer to "standby status on Monday, April 18[.]" Id.

On April 12, 2011, Ms. Caron flew to California for purposes of trying the state court case. Id. at ¶ 7. The very next day, April 13, 2011, at 3:16 p.m., Mr. Kenoyer filed a petition with the bankruptcy court under chapter 7, initiating this bankruptcy case. On April 14, 2011, the Notice of Stay of Proceedings, dated April 13, 2011, was served on Ms. Caron and Ms. Bush. Diemer Decl.; Ex. B & Ex. 5 "Notice of Stay of Proceedings" and "Certificate of Service"; Caron Decl. at ¶ 8.

On April 15, 2011, Ms. Caron received a letter (hereafter, "the April 15 Letter") from Mr. Kenoyer's attorney, Ms. Diemer, stating that Ms. Cardinale should cease requesting Mr. Kenoyer's testimony because of the pending bankruptcy case. Diemer Decl., Ex. C "April 15 Letter"; Caron Decl. at ¶ 9. The April 15 Letter explained that any attempt to enforce the Subpoena would, in Ms. Diemer's opinion, violate the automatic stay under 11 U.S.C. § 362(a)(1), which prohibits the continuation of the state court

action against Mr. Kenoyer. The April 15 Letter further sought confirmation that Ms. Cardinale did not "intend to make any efforts to seek damages from Mr. Kenoyer, or Mr. Kenoyer's attendance," at the state court trial. In closing, the April 15 Letter stated that if Mr. Kenoyer's counsel was required to appear at the state court trial, then Mr. Kenoyer would seek all available remedies under the law for costs or harm to Mr. Kenoyer.

On April 16, 2011, and in response to the April 15 Letter, Ms. Caron sent a letter (hereafter, "the April 16 Letter") to Ms. Diemer stating that Ms. Cardinale was no longer proceeding against Mr. Kenoyer, and that a motion to sever Mr. Kenoyer was "now pending."[5] The April 16 Letter memorialized a conversation between Ms. Caron and Ms. Whitman in which Ms. Whitman allegedly acknowledged that Mr. Kenoyer was still obligated to appear as a witness, and in which Ms. Whitman and Ms. Caron agreed that Mr. Kenoyer could be on standby status on April 18. The April 16 Letter then stated that, based upon the threatening tone of the April 15 Letter, "our gracious agreement to allow Mr. Kenoyer to avoid appearing on April 18 is hereby revoked."

The April 16 Letter then analyzed the impact of the filing of Mr. Kenoyer's bankruptcy petition on the enforceability of the Subpoena. First, the April 16 Letter discussed the general prohibition in 11 U.S.C. § 362 against the continuation of an action against a debtor. The April 16 Letter then discussed the Ninth Circuit Bankruptcy Appellate Panel's decision in Groner v.

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[5] The assertion that the motion was "now pending" on April 16, 2011, appears to have been incorrect. The motion to sever filed in the state court case was signed by counsel on April 18, 2011. Ex. 6 "Motion to Sever."

Miller (In re Miller), 262 B.R. 499 (B.A.P. 9th Cir. 2001). The April 16 Letter opined that based upon Miller, § 362 did not prohibit Mr. Kenoyer from testifying at the state court trial against the co-defendants once the claims against Mr. Kenoyer were severed. The April 16 Letter continued: "[t]he [Miller] court noted that if the discovery had any utility other than to facilitate recovery against the debtor, it was permitted, even where that information could eventually adversely affect the debtor." Caron Decl. at ¶ 10, Ex. 4 "April 16 Letter." The April 16 Letter then stated: "Plaintiff is clearly not proceeding against Mr. Kenoyer any longer. However, he is an indispensable witness as to the remaining three defendants and I expect to see him Monday."

On April 18, 2011, the state court trial proceedings commenced, although jury selection did not begin until April 26, 2011, and the first witness was not called until April 27, 2011. Diemer Decl. at ¶ 6; Caron Decl. at ¶¶ 11 and 25. On April 18, 2011, Ms. Cardinale immediately moved to sever Mr. Kenoyer from the state court trial.[6] Caron Decl. at ¶ 12, Ex. 6 "Motion to Sever"; Diemer Decl. at ¶ 5. Also on April 18th, Ms. Caron argued to the state court judge that under Miller, Mr. Kenoyer could be compelled to testify once he was severed from the litigation and no longer a party. Diemer Decl.; Ex. D "Reporter's Transcript, Cardinale v. Miller, et al., April 18, 2011." Ms. Caron stated: "We are not proceeding against Mr. Kenoyer in any way. We are actually asking that he be severed from this. However, it is a conspiracy case. He is an important witness. He has been served with a subpoena to

[6] Ms. Cardinale also moved to sever another defendant, Patrice Miller, who had also filed for bankruptcy. Caron Decl. at ¶ 12.

testify." Id. By contrast, Ms. Diemer argued that compelling Mr. Kenoyer to testify would be a violation of the stay, because Ms. Diemer believed that Ms. Caron would attempt to elicit testimony from Mr. Kenoyer about the claims against Mr. Kenoyer which could later be used against Mr. Kenoyer. Id. Another attorney at the hearing, Charles Bronitsky -- who represented Keith Charles Knapp and Home Loan Services Corporation -- suggested that the parties go to the bankruptcy court to ask for clarification as to the scope of the stay. Id.[7]

On April 19, 2011, the state court entered an order granting the motion to sever. Ex. 8 "Order Granting Motion to Sever and Enforcing Subpoena." The state court ordered "Mr. Kenoyer who is under trial subpoena to appear and testify as a witness . . . to comply with that subpoena absent further notice from the bankruptcy court." Id.; Caron Decl. at ¶ 13; Diemer Decl. at ¶ 9. Also on April 19, 2011, Mr. Kenoyer filed an ex parte motion to show cause in Mr. Kenoyer's bankruptcy case for the purpose of determining whether Mr. Kenoyer could be compelled to testify in the state court case. See Case No. 11-53472, Docket #7.

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[7] From the record, it is not clear whether the parties discussed who would seek relief from the bankruptcy court, or what type of relief would be sought. The opposition brief filed by Ms. Diemer on behalf of Mr. Kenoyer states that it was the state court judge, Judge Judith Craddick, who "required direction from the bankruptcy court," and that "Ms. Caron refused to file a motion for relief from stay[.]" The opposition brief then states that it was Judge Craddick who "put the obligation on the debtor to confirm that the motion to stay still included Mr. Kenoyer as a witness." This reference to a "motion to stay" is unclear. No such motion was filed in the main bankruptcy case or in this adversary proceeding. As discussed infra, Mr. Kenoyer did file other motions with this Court after Judge Craddick purportedly placed the burden of taking action on Mr. Kenoyer.

On April 20, 2011, Mr. Kenoyer commenced the instant adversary proceeding against the Defendants and filed an ex parte motion for a temporary restraining order. Also on April 20, 2011, a hearing was held on the ex parte motion. At the hearing, this Court explained that "Ms. Diemer first filed a motion claiming that the stay was violated and wanted an emergency hearing on a motion, and the Court, meaning I, declined to set a hearing on the motion on shortened time like this and so the instruction went back that if Ms. Diemer wanted a hearing, she better file an adversary [proceeding], which she has done. So this is an adversary proceeding requesting injunctive relief." Diemer Decl. at ¶ 10, Ex. E "Transcript of Proceedings, Hearing Re: Complaint for TRO, April 20, 2011." The Court also expressed concerns about the applicability of the stay to the pre-petition Subpoena. The Court explained that the Court had not had an opportunity to research the issue fully, and the Court was uncertain about the effect of the Miller decision relied upon by Ms. Cardinale, partly because the Miller case involved a discovery subpoena. Diemer Decl. at ¶ 11, Ex. E "Transcript of Proceedings, Hearing Re: Complaint for TRO, April 20, 2011."[8]

At the April 20, 2011 hearing, it became unnecessary for this Court to rule on the application for a temporary restraining order, because Ms. Cardinale stipulated, through Ms. Caron, not to call Mr. Kenoyer to testify until further order of this Court. Caron

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[8] At the subsequent December 13, 2012 hearing, the Court asked if there was a practical difference between a deposition subpoena and a trial subpoena, and Ms. Diemer conceded that she did not know if there was a practical difference between the two, but that Miller could be distinguished on the risk to the debtor. Audio Recording of December 13, 2012 hearing at 4:57 p.m.

Decl. at ¶ 14. Ms. Cardinale, through her attorney Ms. Caron, also agreed to provide Mr. Kenoyer with "use immunity for any subsequent adverse proceedings as to any testimony at the state court trial he might provide."[9] Ex. E "Transcript of Proceedings, Hearing Re: Complaint for TRO, April 20, 2011"; Caron Decl. at 14. The Court continued the hearing on Mr. Kenoyer's motion for a restraining order to April 29, 2011. At the April 29, 2011 hearing, the Court again continued the hearing to May 6, 2011. Before the hearing could be held, the state court trial concluded on May 4, 2011, and the case was submitted to the jury. Caron Decl. at ¶ 19. The jury returned a verdict on May 6, 2011, and the hearing scheduled to take place in this Court on May 6 was never held. Thus, this Court entered no order on the motion for a temporary restraining order.

Ms. Cardinale elected to proceed in the state court trial without Mr. Kenoyer's testimony. Caron Decl. at ¶ 15. In addition, Ms. Cardinale did not present Mr. Kenoyer's pre-petition deposition testimony at trial. Caron Decl. at ¶ 16. Instead, at trial, Ms. Caron sought and received documents from one of the co-defendants, California Home Loans ("CHL"). Diemer Decl. at ¶¶ 14-

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[9] Strictly speaking, "use immunity" pertains to criminal prosecutions and is defined as "[i]mmunity from the use of the compelled testimony (or any information derived from that testimony) in a future prosecution against the witness. After granting use immunity, the government can still prosecute if it shows that its evidence comes from a legitimate independent source." Black's Law Dictionary (9th ed. 2009). Although Ms. Caron did not explain what she meant by "use immunity," the transcript from the state court hearing shows that Ms. Caron agreed that Ms. Cardinale was "willing that if [Mr. Kenoyer] testifies, not to use anything [Mr. Kenoyer] says against [Mr. Kenoyer or Mr. Kenoyer's estate] in any forum[.]" Because Mr. Kenoyer did not testify, there is no testimony which would fall under any grant of "use immunity."

15, Ex. F "Reporter's Transcript, Cardinale v. Miller, et al.: April 19, 2011, April 28, 2011." These documents related to a trust account that CHL maintained but which contained Mr. Kenoyer's funds, which Mr. Kenoyer allegedly used to make advances to cover defaults by Mr. Miller. Id. Ms. Caron also asked one of the state court defendants, Mr. Knapp, about this account and about Mr. Knapp's knowledge that Mr. Kenoyer was using the funds to cover missed payments on loans made by Mr. Knapp to Mr. Miller. Id. The Court cannot divine what Ms. Caron's intent or strategy was in inquiring into these subject areas.[10]

The state court trial concluded with a judgment on May 10, 2011 in favor of Ms. Cardinale against Daniel R. Miller, Sr., Keith Charles Knapp, and Home Loan Services Corporation dba California Home Loans, in the amount of $2,170,593, as well as punitive damages totaling $900,000. Caron Decl. ¶ 21-22, Ex. 11 "Jury Verdict Form," Ex. 1 "Judgment on Special Verdict by Jury." The state court did not determine Mr. Kenoyer's liability, and the judgment does not impact his liability. Id.

After the jury rendered its verdict in the state court action, Defendants filed a motion in this adversary proceeding seeking dismissal of Mr. Kenoyer's Complaint. At a hearing held July 14,

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[10] Ms. Caron may have inquired into Mr. Kenoyer's knowledge of the conspiracy in order to build the case against his former co-defendants, or perhaps to set the stage for future litigation against Mr. Kenoyer, or for both purposes; however, Ms. Diemer's Declaration only has one, out of context, page of a transcript of Ms. Caron discussing Mr. Kenoyer's knowledge of the conspiracy. Diemer Decl. at ¶ 17, Ex. G "Reporter's Transcript, Cardinale v. Miller, et al.: May 2, 2011." This limited information is insufficient to show anything other than the fact that Mr. Kenoyer was mentioned during the trial.

2011, the Court dismissed the Complaint with leave to amend.[11] Mr. Kenoyer filed an Amended Complaint on October 14, 2011.

According to the Amended Complaint, Mr. Kenoyer commenced the adversary proceeding out of a concern that admissions, other unfavorable evidence, or determinations in the state court case would be used against Mr. Kenoyer in a non-dischargeability action. The first cause of action in the Amended Complaint seeks declaratory relief as to whether the automatic stay prevents Ms. Cardinale from calling Mr. Kenoyer to testify at the state trial, from requesting documents from Mr. Kenoyer, or from litigating Mr. Kenoyer's liability. The second cause of action seeks an injunction preventing Ms. Cardinale from engaging in the conduct described in the first cause of action. The third and final cause of action seeks damages for "costs, attorneys' fees, other expenses, and emotional distress, all according to proof."

IV. Discussion

The filing of a bankruptcy petition operates as a stay of "the 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 bankruptcy case. 11 U.S.C. § 362(a)(1). Similarly, the filing of a bankruptcy petition stays "any act to collect, assess, or recover a claim against the debtor that arose before the commencement" of the bankruptcy case. 11 U.S.C. § 362(a)(6). Mr. Kenoyer alleges that Defendants violated both of

[11] The Complaint was dismissed because the parties agreed that the Complaint was improperly pled.

these statutory provisions.

The automatic stay is one of the most fundamental aspects of the Bankruptcy Code and serves several purposes. A primary purpose of the automatic stay is to relieve a debtor of financial pressures such as those which drove the debtor into bankruptcy. See Schwartz v. United States (In re Schwartz), 954 F.2d 569, 571 (9th Cir. 1992). Another purpose of the stay is to ensure "that all claims against the debtor will be brought in a single forum, the bankruptcy court." Hillis Motors, Inc. v. Hawaii Auto Dealers Ass'n, 997 F.2d 581, 585 (9th Cir. 1993). The stay is intended to give a debtor the opportunity to reorganize or repay debts, if at all possible. Boucher v. Shaw, 572 F.3d 1087, 1092 (9th Cir. 2009). Thus, when the automatic stay applies, the burden is on a creditor to request relief from the stay, typically under 11 U.S.C. § 362(d).[12]

The failure to request and obtain such relief, when required, can result in a willful violation of the stay. For a creditor's violation to be willful, the creditor must know of the automatic stay and intentionally act in a way which violates the stay. Morris v. Peralta (In re Peralta), 317 B.R. 381, 389 (B.A.P. 9th Cir. 2004). A creditor is not required to have specific intent to violate the stay in order for the creditor's actions to amount to a willful violation. Id. In addition, the creditor's good faith belief that the creditor's conduct did not violate the stay is not

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[12] The burden to make a request is not identical to the burden of proof once a request is made. See 11 U.S.C. § 362(g) (discussing the creditor's initial burden of proof on the issue of equity in the property, and the debtor's burden of proof on all other issues).