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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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9 Charles M. Brewer Limited Restated)  
Pension Plan, et al.,

No. CV-11-02363-PHX-FJM

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Plaintiffs,

**ORDER**

11

vs.

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13 Reish Luftman McDaniel & Reicher PC, et)  
al.,

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Defendants.

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18 The court has before it plaintiff Charles M. Brewer’s motion for relief from judgment  
19 (doc. 17), defendants’ response (doc. 20), and Brewer’s reply (doc. 28).

20 This case involves a dispute between plaintiffs and a California law firm plaintiffs  
21 hired to defend them against pension benefit claims. Plaintiffs originally filed this action in  
22 state court, asserting claims of professional negligence and fraud. Defendants removed the  
23 action and filed a motion to dismiss without prejudice and to compel arbitration. Plaintiffs  
24 did not respond to the motion. On January 17, 2012, we entered an order granting the motion  
25 to dismiss and compelling arbitration (doc. 14) (“Order”).

26 Plaintiff Brewer now seeks relief from the Order pursuant to Rule 60(b)(4), Fed. R.  
27 Civ. P., which provides that a party may seek relief from judgment if “the judgment is void.”  
28 Brewer argues that the judgment entered in this case is void because it violated the automatic

1 stay provisions of 11 U.S.C. § 362(a)(1) and (3).<sup>1</sup>

2 Brewer waited over a year and a half to file his request for relief from judgment.  
3 Although the Federal Rules of Civil Procedure do not prescribe a specific time limit for filing  
4 a motion under Rule 60(b)(4), the motion must be made “within a reasonable time.” Fed. R.  
5 Civ. P. 60(c)(1). Brewer was, or should have been, fully aware of the possible effect of his  
6 bankruptcy filing at the time defendants filed their motion to dismiss, but he failed to raise  
7 it as a defense to the motion. In fact, he did not respond to the motion at all. If Brewer  
8 thought the stay applied, he could have filed a notice of filing bankruptcy and suggestion of  
9 stay before we acted. But no notice was given. Instead, he waited over a year and a half  
10 after final judgment was entered to assert his argument that defendants’ motion to dismiss  
11 and the January 17, 2012 Order violated the automatic stay. Brewer gives no explanation for  
12 the delay. We conclude that the motion for relief from judgment was not made within a  
13 reasonable time as required by Rule 60(c)(1), and the motion is denied on this basis. We also  
14 deny the motion on its merits.

15 11 U.S.C. § 362(a)(1) provides that upon the filing of a petition for bankruptcy, an  
16 automatic stay applies to “the commencement or continuation . . . of a judicial,  
17 administrative, or other action or proceeding against the debtor.” Plaintiff argues that  
18 notwithstanding that he initiated this action against the defendants, the motion to dismiss was  
19 an “action against the debtor” under 11 U.S.C. § 362(a)(1), and was an act to “exercise  
20 control over property of the estate” under § 362(a)(3). We disagree on both counts.

21 This legal malpractice action initiated by Brewer against the defendants is clearly not  
22 an “action or proceeding against the debtor.” *Id.* § 362(a)(1). “[W]hether a case is subject  
23 to the automatic stay must be determined at its inception. That determination should not  
24 change depending on the particular stage of the litigation at which the filing of the petitioner  
25 in bankruptcy occurs.” *Ingersoll-Rand Fin. Corp. v. Miller Mining Co.*, 817 F.2d 1424, 1426

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27 <sup>1</sup>Charles Brewer filed this motion individually because only he has filed for  
28 bankruptcy. Therefore, our Order dismissing the case and compelling arbitration is final with  
respect to the other plaintiffs.

1 (9th Cir. 1987) (quoting Ass'n of St. Croix Condo. Owners v. St. Croix Hotel Corp., 682  
2 F.2d 446, 449 (3d Cir. 1982)). Where a single case includes several “actions or  
3 proceedings,” “*who* filed the complaint is not dispositive of whether the case involves an  
4 action or proceeding against the debtor.” Parker v. Bain, 68 F.3d 1131, 1137 (9th Cir. 1995)  
5 (emphasis in original). Instead, multiple claim or multiple party “litigation must be  
6 disaggregated so that particular claims, counterclaims, crossclaims and third-party claims are  
7 treated independently when determining which of their respective proceedings are subject  
8 to the bankruptcy stay.” Maritime Elec. Co. v. United Jersey Bank, 959 F.2d 1194, 1204-05  
9 (3rd Cir. 1991). For example, where a counterclaim “at its inception” is a claim against a  
10 debtor, it is stayed. Parker, 68 F.3d at 1137. But we have no counterclaim, cross-claim or  
11 third party claim in this case. Therefore, this case “at its inception” is an action by the  
12 debtor.

13 Defendants’ motion to dismiss and to compel arbitration is conduct in defense of the  
14 litigation initiated by Brewer. While the debtor’s cause of action may be an asset of the  
15 estate, the defendant is not, by opposing the action, seeking to take possession of estate  
16 assets. Instead, it is “a continuation of the pre-petition judicial proceeding by the debtor and  
17 was not itself an “action against the debtor.” Martin-Trigona v. Champion Fed. Sav. & Loan  
18 Ass’n, 892 F.2d 575, 577 (7th Cir. 1989) (holding that a defendant’s motion to dismiss a  
19 claim brought by a debtor is not subject to the automatic stay).

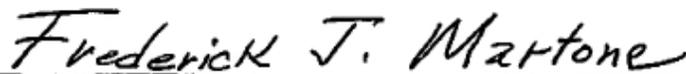
20 Brewer has cited to no case, nor have we found one, where a motion to dismiss or to  
21 compel arbitration filed in defense of a pre-petition action by the debtor constitutes an act to  
22 obtain possession or control over bankruptcy estate property. The only case cited by Brewer  
23 in support of his claim is In re General Assoc. Investors Ltd., 159 B.R. 551 (Bankr. D. Ariz.  
24 1993), where the bankruptcy court held that the Taxing Authorities’ motion to dismiss  
25 debtor’s appeal of a tax assessment was subject to the automatic stay under 11 U.S.C. §  
26 362(a)(1). The Taxing Authorities had “commenced the original proceeding” by virtue of  
27 the tax assessment against the debtor. The debtor’s appeal was in response to that  
28 assessment. Therefore, the Taxing Authorities’ motion to dismiss debtor’s appeal was a

1 continuation of an “action against the debtor.” In contrast to General Assoc., it is undisputed  
2 that Brewer commenced this action.

3 We reject Brewer’s attempt to characterize defendants’ motion to dismiss as “an overt  
4 attempt to ‘exercise control over property of the [bankruptcy] estate.’” Reply at 2 (citing 11  
5 U.S.C. § 362(a)(3)). “While it is true that a successful defense to a lawsuit eliminates its  
6 alleged value, this results in no loss to the estate . . . . There can be no loss of what does not  
7 exist.” In re Merrick, 175 B.R. 333, 338 (BAP 9th Cir. 1994). Here, defendants’ efforts to  
8 enforce the parties’ arbitration agreement was a defensive strategy filed in response to  
9 plaintiffs’ lawsuit. It was not an action or proceeding against a debtor, or an act to obtain  
10 possession of or control over property of the estate. It would defy equitable principles to  
11 allow the plaintiff/debtor to prosecute his action against defendants and at the same time  
12 deny defendants the opportunity to assert defensive motions. Brewer’s petition for  
13 bankruptcy did not afford him the unfettered right to choose the forum in which to litigate  
14 his claim or to avoid an otherwise valid arbitration agreement. We conclude that neither the  
15 motion to dismiss nor the Order granting the motion was a violation of the automatic stay.

16 **IT IS ORDERED DENYING** Brewer’s motion for relief from judgment (doc. 17).

17 DATED this 3<sup>rd</sup> day of October, 2013.

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19 **Frederick J. Martone**  
20 **Senior United States District Judge**