

Dismissed and Opinion Filed July 29, 2016



In The  
**Court of Appeals**  
**Fifth District of Texas at Dallas**

---

No. 05-16-00374-CV

---

**MELISSA GARCIA BREWER, Appellant**  
**V.**  
**TEXANS CREDIT UNION, Appellee**

---

**On Appeal from the 199th Judicial District Court**  
**Collin County, Texas**  
**Trial Court Cause No. 199-00377-2014**

---

**MEMORANDUM OPINION**

Before Chief Justice Wright, Justice Lang-Miers, and Justice Stoddart  
Opinion by Chief Justice Wright

Before the Court is appellee Texans Credit Union's (Texans CU) motion to dismiss this appeal. Texans CU contends the appeal should be dismissed for want of jurisdiction because appellant Melissa Garcia Brewer failed to timely file her notice of appeal.

**Background**

Brewer filed the underlying state district court suit against Texans CU seeking damages, a declaratory judgment, an accounting, and a temporary restraining order and injunction to stop a foreclosure sale of real property following Brewer's alleged default on a Home Equity Loan Promissory Note and under a Texas Home Equity Security Document (the state court litigation). In the state court litigation, Texans CU filed a counterclaim against Brewer seeking an order that

it be permitted to proceed with foreclosure of the lien against the real property created by the Home Equity Security Document.

Texans CU moved for summary judgment on Brewer's claims against it and on its counterclaim against Brewer. On April 1, 2015, the trial court signed a summary judgment in favor of Texans CU on its counterclaim, a no-evidence summary judgment in favor of Texans CU on Brewer's claims, and a final judgment in favor of Texans CU on Brewer's claims and Texans CU's counterclaim. Brewer filed a timely motion for new trial. Accordingly, Brewer's deadline for filing her notice of appeal was ninety days after the final judgment—June 30, 2015. *See* TEX. R. APP. P. 26.1(a).

On May 5, 2015, prior to the deadline for filing her notice of appeal, Brewer filed a voluntary bankruptcy proceeding in Case No. 15-40841-R-13, United States Bankruptcy Court for the Eastern District of Texas, Sherman Division. On December 9, 2015, the bankruptcy court entered an agreed order in Case No. 15-40481-R-13, terminating the automatic bankruptcy stay with respect to all claims, counterclaims, causes of action, proceedings, and defenses pertaining to the state court litigation and providing the state court litigation “may continue to completion and finality, including any and all appeals or other proceedings or remedies.”

Brewer filed her notice of appeal on March 31, 2016. On April 12, 2016, Texans CU filed a motion to dismiss the appeal for lack of jurisdiction, asserting Brewer's notice of appeal was untimely under rule of appellate procedure 42.3(a) because the notice of appeal was filed more than ninety days after the final judgment. *See* TEX. R. APP. P. 42.3(a). On May 2, 2016, Brewer filed a motion requesting an extension of time to file a response to Texans CU's motion to dismiss. On May 3, 2016, we granted Brewer an extension to June 2, 2016, for filing any response to Texans CU's motion to dismiss. On May 4, 2016, we received notification of Brewer's May 3, 2016 voluntary bankruptcy proceeding in Case No. 16-40841-R-13, United

States District Court for the Eastern District of Texas, Sherman Division. Pursuant to the automatic stay created by Brewer's bankruptcy case, we abated the appeal by order entered May 23, 2016. *See* TEX. R. APP. P. 8.2; *see also* 11 U.S.C.A. § 362 (West 2015).

On June 13, 2016, Texans CU filed a motion to reinstate the appeal. *See* TEX. R. APP. P. 8.3(a). Pursuant to rule of appellate procedure 8.3, Texans CU attached a certified copy of the bankruptcy court's June 2, 2016 "Order Extending the Automatic Stay as to All Creditors and Conditionally Extending the Automatic Stay as to Texans Credit Union," wherein the bankruptcy court ordered that the automatic stay "is not in effect and is terminated with respect to all claims, counterclaims, causes of action, proceedings, and defenses" pertaining to the appeal and the appeal "may continue to completion and finality, including any and all appeals or other proceedings or remedies." *See id.* Brewer did not file a response to Texans CU's motion to reinstate the appeal. On July 15, 2016, we reinstated the appeal, and ordered that any response to Texans CU's motion to dismiss was to be filed within ten days of that order. Brewer did not file a response to the motion to dismiss.

### **Analysis**

Pursuant to section 362(a)(1) of the bankruptcy code, Brewer's May 5, 2015 bankruptcy case operated to stay the commencement or continuation of any action or proceeding that was or could have been commenced against Brewer, the debtor. *See* 11 U.S.C.A. § 362(a)(1); *Three Legged Monkey, L.P. v. Cook*, 417 S.W.3d 541, 543 (Tex. App.—El Paso 2013, pet. denied); *see also Brashear v. Victoria Gardens of McKinney, L.L.C.*, 302 S.W.3d 542, 546 (Tex. App.—Dallas 2009, no pet.) (section 362 bars the filing of a notice of appeal in an action against a debtor in bankruptcy because that would constitute a continuation of the action); *Bunch v. Hoffinger Indus., Inc. (In re Hoffinger Indus., Inc.)*, 329 F.3d 948, 953 (8th Cir. 2003) ("[T]he filing of the notice of appeal in state court is one aspect of a continuation of a judicial

‘proceeding against a debtor,’ and thus stayed by § 362(a)(1)[.]’). The May 5, 2015 bankruptcy stay operated to stay only proceedings against Brewer, the debtor. *See Three Legged Monkey*, 417 S.W.3d at 543 (petition filed under bankruptcy code operates as automatic stay of judicial proceedings against debtor; “against the debtor” indicates Congress intended only to stay suits filed against bankrupt debtors, not suits filed by bankrupt debtors). Thus, Brewer’s June 30, 2015 deadline for filing her notice of appeal was not extended by the May 5, 2015 bankruptcy stay.

However, in the state court litigation, creditor Texans CU filed a counterclaim against debtor Brewer, and Brewer’s notice of appeal encompasses an appeal of the counterclaim in favor of Texans CU. *See Koolik v. Markowitz*, 40 F.3d 567, 568 (2nd Cir. 1994) (bankruptcy petition automatically stayed continuation of debtor’s appeal, even though debtor had initiated the proceedings, where judgment against debtor on counterclaims had been entered prior to bankruptcy petition). Section 108(c) of the bankruptcy code affords an extension of state-court deadlines under some circumstances with regard to a state court civil action on a claim against a debtor. That section provides, in pertinent part:

[I]f applicable bankruptcy law . . . fixes a period for commencing or continuing a civil action in a court other than a bankruptcy court on a claim against the debtor . . . and such period has not expired before the date of the filing of the [bankruptcy] petition, then such period does not expire until the later of—

(1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or

(2) 30 days after notice of the termination or expiration of the stay under section 362.922, 1201, or 1301 of this title, as the case may be, with respect to such claim.

11 U.S.C.A. § 108(c) (West 2015); *see also Brashear*, 302 S.W.3d at 547 (when applicable, section 108(c) extends certain deadlines for thirty days after notice of the termination of a bankruptcy stay); *Gantt v. Gantt*, 208 S.W.3d 27, 30–31 (Tex. App.—Houston [14th Dist.] 2006,

pet. denied) (section 108(c) provides for extension of thirty days after notice of termination of bankruptcy stay but does not toll appellate timetables).

While the initial appellate timetable for Brewer’s appeal of Texans CU’s claim against her was not extended pursuant to her May 5, 2015 bankruptcy filing, *see Raley v. Lile*, 861 S.W.2d 102, 105 (Tex. App.—Waco 1993, writ denied), section 108(c) provided for a thirty-day extension of the June 30, 2015 appellate deadline that expired during the pendency of the stay, *see Burrhus v. M&S Mach. Supply Co., Inc.*, 897 S.W.2d 871 (Tex. App.—San Antonio 1995, no writ). After the stay was terminated with regard to the state court litigation on December 9, 2015, the thirty-day extension of Brewer’s deadline to file her notice of appeal pursuant to section 108(c)(2) expired on January 8, 2016.<sup>1</sup> Brewer’s March 31, 2016 notice of appeal was untimely. Accordingly, we grant Texans CU’s motion and dismiss the appeal for want of jurisdiction. *See* TEX. R. APP. P. 42.3(a).

/Carolyn Wright/  
CAROLYN WRIGHT  
CHIEF JUSTICE

160374F.P05

---

<sup>1</sup> “[A] motion for extension of time is necessarily implied when an appellant, acting in good faith, files a notice of appeal beyond the time allowed by rule 26.1, but within the fifteen-day grace period provided by rule of appellate procedure 26.3 for filing a motion for extension of time.” *Hykonnen v. Baker Hughes Bus. Support Servs.*, 93 S.W.3d 562, 563 (Tex. App.—Houston [14th Dist.] 2002, no pet.). Here, even implying a fifteen-day extension of time under rule of appellate procedure 26.1, would not result in Brewer’s notice of appeal being timely filed.



**Court of Appeals  
Fifth District of Texas at Dallas**

**JUDGMENT**

MELISSA GARCIA BREWER, Appellant

No. 05-16-00374-CV      V.

TEXANS CREDIT UNION, Appellee

On Appeal from the 199th Judicial District  
Court, Collin County, Texas,  
Trial Court Cause No. 199-00377-2014.  
Opinion delivered by Chief Justice Wright,  
Justices Lang-Miers and Stoddart  
participating.

In accordance with this Court's opinion of this date, the appeal is **DISMISSED** for want of jurisdiction.

It is **ORDERED** that appellee Texans Credit Union recover its costs of this appeal from appellant Melissa Garcia Brewer.

Judgment entered July 29, 2016.