



A handwritten signature in blue ink that reads "Neil P. Olack".

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: December 16, 2016

The Order of the Court is set forth below. The docket reflects the date entered.

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF MISSISSIPPI**

IN RE:

MICHELLE MATHENEY,

CASE NO. 16-13998-NPO

DEBTOR.

CHAPTER 13

ORDER REIMPOSING AUTOMATIC STAY

This matter came before the Court for hearing on December 15, 2016 (the “Hearing”), on the Motion to Extend Automatic Stay (the “Motion”) (Dkt. 5) filed by the debtor, Michelle Matheny (the “Debtor”), and the Response to Debtors’ [*sic*] Motion to Extend Automatic Stay (the “Response”) (Dkt. 29) filed by American Credit Corporation of Mississippi, LLC (“American Credit”) in the above-styled chapter 13 bankruptcy case (the “Bankruptcy Case”). At the Hearing, Chris F. Powell (“Powell”) represented the Debtor, Stacey Moore Buchanan (“Buchanan”) represented American Credit, and W. Jeffrey Collier (“Collier”) appeared on behalf of Locke D. Barkley, the standing chapter 13 panel trustee. After fully considering the matter and being fully advised in the premises, the Court reimposed the automatic stay from the bench. This Order memorializes and supplements the Court’s bench ruling.

Jurisdiction

The Court has jurisdiction over the parties to and the subject matter of the Bankruptcy Case

pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(G). Notice of the Motion was proper under the circumstances.

Facts

1. The Debtor filed a voluntary petition for relief pursuant to chapter 13 of the Bankruptcy Code on November 11, 2016 (the “Petition”) (Dkt. 1).

2. Prior to filing the Petition, the Debtor’s previous bankruptcy case, Case No. 14-14454-NPO (the “Prior Bankruptcy Case”) was dismissed on October 14, 2016, for failure to make plan payments (Prior Bankruptcy Case Dkt. 74). On October 21, 2014, the Debtor also had another previous bankruptcy case, Case No. 13-14160-NPO (the “2013 Bankruptcy Case”), dismissed more than one (1) year prior to the filing of the Petition. (2013 Bankruptcy Case Dkt. 46).

3. The Debtor filed the Chapter 13 Plan (the “Plan”) (Dkt. 6) on November 15, 2016. In the Plan, the Debtor proposed to make bi-weekly payments of \$200.00 for sixty (60) months. (Plan at 1). She listed her secured creditors as American Credit and Robinson Furniture. (*Id.* at 2).

Pleadings

4. The Debtor filed the Motion on November 15, 2016, four (4) days after the Petition was filed. The Motion provided that the Prior Bankruptcy Case was dismissed “because, through no fault of her own,¹ Debtor was reduced to less than forty (40) hours/week of work and could not maintain her *Plan* payments.” (Mot. at 1). According to the Debtor, she is now working two (2) jobs and “has increased her hours at McDonalds to thirty-five (35) hours/week.” (*Id.*). The

¹ At the Hearing, the Debtor contradicted this statement, testifying that she lost her job because of her own actions. The Court finds this difference to be immaterial.

Motion further provided that the Debtor “reasonably believes” that the Plan will be confirmed and “she will be able to fully perform the terms of-and complete-her *Plan*.” (*Id.*). Attached to the Motion was the Declaration in Support of Motion to Extend the Automatic Stay Pursuant to 11 U.S.C. § 362(c)(3) (the “Declaration”) (Mot. at 4-5). In the Declaration, the Debtor provided that she had a substantial change in financial or personal affairs since the dismissal of the Prior Bankruptcy Case because she is “now working 35hrs/week at McDonalds.” (Declaration at 2).

5. In the Response, American Credit opposed the Motion because the Debtor could not make the required plan payments in the 2013 Bankruptcy Case or the Prior Bankruptcy Case. (Resp. at 1). According to American Credit, “Debtor is approximately \$20,259.87 delinquent in payments to American Credit Corporation and there is an eviction suit pending in the Justice Court of Bolivar County, Mississippi.” (*Id.*). American Credit argued that the Motion should be denied because the “automatic stay in Debtor’s case should not be extended as it is not feasible.” (*Id.*).

Hearing

6. The Hearing was held on December 15, 2016, thirty-four (34) days after the Petition was filed.

7. At the Hearing, the Debtor testified that the 2013 Bankruptcy Case and the Prior Bankruptcy Case were both dismissed because she lost her job and fell behind in making her plan payments. The Debtor now has two (2) jobs. She works at McDonald’s approximately thirty-five (35) hours per week and earns \$7.25 per hour and at Holiday Inn approximately twenty (20) hours per week and earns \$7.50 per hour. According to the Debtor, she filed the Petition to save her mobile home, where she lives with her three (3) sons, boyfriend, and her boyfriend’s son. One of the Debtor’s adult sons recently obtained employment and will soon begin contributing to

household payments, but no other residents of the mobile home are currently employed or contributing to household expenses.

8. According to the Debtor's uncontroverted testimony, she entered into a lease-purchase agreement with American Credit for the purchase of the mobile home in March of 2012, and made a \$10,000.00 down payment, but the mobile home was not delivered until six (6) months later. Even though she did not have possession of the mobile home, American Credit began collection efforts for what it considered to be delinquent payments under the lease-purchase agreement. The Debtor explained that she had not made any of the \$550.00 monthly payments at that point because the mobile home had yet to be delivered. The Debtor attempted to contact the seller every month during the six (6) months she waited for delivery of the mobile home.

9. Collier stated at the Hearing that he does not anticipate a feasibility issue with the Plan considering the Debtor's income and expenses. His only concerns are that the Debtor has filed three (3) bankruptcy petitions since 2013, and continuing employment has proven to be a struggle for the Debtor.

10. Powell argued that the Plan proposes to satisfy the debt with American Credit so that at the end of the Plan, the Debtor will own the mobile home. According to Powell, this was also the case with the Debtor's plans in the 2013 Bankruptcy Case and the Prior Bankruptcy Case.² Buchanan agreed that if the Debtor makes 170 payments to American Credit, she will become the owner of the mobile home.

² The Court was unable to verify the accuracy of this statement. In the Plan, the Debtor proposed to pay American Credit the value of the mobile home, \$18,000.00, at a 5.00% rate of interest. Additionally, in the 2012 Bankruptcy Case and the Prior Bankruptcy Case, the Debtor proposed to pay American Credit value. (2013 Bankruptcy Case Dkt. 5 at 2; Prior Bankruptcy Case Dkt. 45 at 2). This fact was immaterial to the Court's decision to reimpose the automatic stay.

Discussion

Upon the filing of a bankruptcy petition, the automatic stay takes effect, providing for a broad stay of litigation, lien enforcement and other actions that are attempts to enforce or collect prepetition claims. 11 U.S.C. § 362. Under § 362(c)(3),³ however, the automatic stay will terminate with respect to the debtor on the thirtieth (30th) day after the filing of a bankruptcy petition when the debtor has had a prior case dismissed within the past year. 11 U.S.C. § 362(c)(3)(A). Section 362(c)(3)(B) provides that “on the motion of a party in interest for continuation of the automatic stay and upon notice and a hearing, the court may extend the stay in particular cases as to any or all creditors . . . after notice and a hearing completed before the expiration of the 30-day period only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed” 11 U.S.C. § 362(c)(3)(B). Because the Hearing was held thirty-four (34) days after the Petition was filed, the Court will first discuss its authorization to grant the Motion after “the expiration of the thirty (30)-day period” (the “Thirty (30)-Day Window”) before discussing the Debtor’s satisfaction of her burden under § 362(c)(3)(C).

I. Authority to Reimpose Stay Under § 105

Under the plain language of the statute, “[a] hearing on the motion for stay extension, if held by the court, must be completed within the 30-day period following the filing of the petition. Parties seeking to extend the stay should thus file the motion with the petition or immediately thereafter to allow time for the court to conclude any hearing.” 3 COLLIER ON BANKRUPTCY ¶ 362.06[3][b] (16th ed. 2016). In *Capital One Auto Finance v. Cowley*, 374 B.R. 601, 605 (W.D.

³ Hereinafter, all code sections refer to the Bankruptcy Code in title 11 of the U.S. Code unless indicated otherwise.

Tex. 2006), the district court noted “a split among bankruptcy courts as to whether § 105⁴ permits bankruptcy courts to extend an automatic stay for single-repeat filers outside of the thirty-day period prescribed by Congress in 11 U.S.C. § 362(c)(3)(B).”

In *Cowley*, the debtor filed a bankruptcy petition within one (1) year of a previous dismissal. *Id.* at 603. She timely filed a motion to extend the stay and requested an expedited hearing. *Id.* The bankruptcy court did not hold a hearing within the Thirty (30)-Day Window, but it did enter an “Interim Order Extending Automatic Stay and Setting Final Hearing,” in which it granted an extension of the automatic stay pending a final hearing. *Id.* After the hearing, which was held eight (8) days after the expiration of the Thirty (30)-Day Window, the bankruptcy court granted the motion to extend. *Id.* In vacating the bankruptcy court’s order extending the stay, the district court noted that § 362(c)(3)(B) *requires* bankruptcy courts to hold a hearing within the Thirty (30)-Day Window, but that a split of authority existed as to whether § 105 permits bankruptcy courts to extend the stay outside of this period. *Id.* at 605-06. The district court in *Cowley* stated that it was not required to decide whether § 105 authorizes bankruptcy courts to extend the automatic stay outside of the Thirty (30)-Day Window because, even assuming that it does, the bankruptcy court in *Cowley* made no “findings during the hearing or in its final order as to why the injunctive powers of § 105 should be invoked to extend the stay.” *Id.* Accordingly, the district court declined “to determine the general question of whether a bankruptcy court may use its § 105 power to extend the automatic stay once it has terminated pursuant to § 362(c)(3)(B), due to the paucity of the record. The issue was not argued by the parties before the Bankruptcy Court, nor did the Bankruptcy Court explicitly rely on § 105.” *Id.*

⁴ Section 105(a) grants bankruptcy courts the authority to “issue any order, process, or judgment that is necessary or appropriate to carry out the provisions” of the Bankruptcy Code. 11 U.S.C. § 105(a).

at 606-07.

The district court in *Cowley* cited *Whitaker v. Baxter (In re Whitaker)*, 341 B.R. 336, 346 (Bankr. S.D. Ga. 2006), as an example of a case where a bankruptcy court had used its equitable powers under § 105 to extend the stay outside of the Thirty (30)-Day Window. In *In re Whitaker*, the debtors filed a petition less than one (1) year after their previous bankruptcy case was dismissed. *In re Whitaker*, 341 B.R. at 340. The bankruptcy court held a hearing on the motion to extend the automatic stay outside the Thirty (30)-Day Window. *Id.* The bankruptcy court first determined that the second petition was filed in good faith under § 362(c)(3)(B). *Id.* at 345-46. According to the bankruptcy court, the debtors rebutted the presumption that they filed the petition in bad faith by showing a substantial change in financial or personal affairs. *Id.* at 345. Based on the evidence presented at the hearing, the bankruptcy court found “that there has ‘been a substantial change in the financial or personal affairs of the debtor[s] since the dismissal of the next most previous case’ sufficient ‘to conclude that the later case [under chapter 13] will be concluded . . . with a confirmed plan that will be fully performed.’” *Id.* at 346 (quotations omitted).

After determining that the debtors met their burden of showing the second bankruptcy case was filed in good faith, the bankruptcy court in *Whitaker* noted that the debtors’ “opportunity to use the § 362(c)(3)(B) safe harbor has passed,” and the court’s only authority to reimpose the stay was to use “the equitable powers conferred by § 105(a)” to extend the automatic stay outside of the Thirty (30)-Day Window. *Id.* “Under the circumstances and the facts of this case, I find that reimposition of the automatic stay is appropriate, and necessary to ensure an orderly payment to creditors under the Debtor’s chapter 13 plan.” *Id.* at 347. The bankruptcy court considered the following factors in reimposing the automatic stay: 1) it was “reluctant to deprive [the debtors] of

a decision on the merits, since they can clearly and convincingly carry their statutory burden under § 362(c)(3)(B) & (C);” 2) notice of the motion was served and no objections or responses were filed; and 3) the Court was “concerned that parties not suffer merely because of the inadvertence of their counsel.” *Id.* According to the bankruptcy court, it exercised its discretion under § 105 to reimpose the stay because “[i]f the stay is not imposed, both [the debtors] and the bankruptcy estate would be susceptible to irreparable injury.” *Id.* at 348.

The Court finds that it is authorized by § 105(a) to reimpose the automatic stay even when the hearing is held outside the Thirty (30)-Day Window if the facts and circumstances warrant such a decision, and if a debtor otherwise meets his or her burden to show good faith under § 362(c)(3)(B).⁵ Like the bankruptcy court in *In re Whitaker*, this Court’s decision is influenced by several factors. First, the Debtor’s misfortune was due, in part, to the seller’s failure to deliver the mobile home until almost six (6) months after the Debtor signed the lease purchase agreement. Despite the seller’s failure to deliver the mobile home, American Credit claimed that the Debtor owed it \$550.00 per month for the six (6) months the Debtor did not have possession of the mobile home. Additionally, the Debtor filed the Motion just four (4) days after the Petition was filed, well within the Thirty (30)-Day Window. Due to an error in the Clerk’s office and through no fault of the Debtor or her counsel, the Hearing was not scheduled until after the Thirty (30)-Day Window expired. Finally, as will be discussed fully herein, the Debtor has satisfied her burden under § 362(c)(3)(B) to show a substantial change in circumstances. For the foregoing reasons, the Court exercises its § 105(a) authority to consider the Motion.

⁵ The scope of the termination of the automatic stay under § 362(c)(3)(A) is not at issue here because the Court is reimposing the automatic stay.

II. Determination of Good Faith Under § 362(c)(3)(B)

In determining whether a petition filed within one (1) year after the dismissal of a prior bankruptcy case was filed in good faith, “the court shall consider whether the presumption set out in section 362(c)(3)(C) that the case was not filed in good faith is applicable, and, if so, whether the moving party has rebutted the presumption with clear and convincing evidence to the contrary.” 3 COLLIER ON BANKRUPTCY ¶ 362.06[3][b]. If the presumption does not arise, the debtor is only required to show that the current case was filed in good faith under the preponderance of the evidence standard. *Id.* Under § 362(c)(3)(C)(i), the later filed case is presumed to be filed not in good faith as to all creditors if the previous case in which the individual was a debtor was dismissed within one (1) year for failure to perform the terms of a confirmed plan. 11 U.S.C. § 362(c)(3)(C)(i)(II). The Prior Bankruptcy Case was dismissed because the Debtor failed to make her plan payments for sixty (60) days or more. (Prior Bankruptcy Case Dkts. 46, 74). Accordingly, the presumption that the Bankruptcy Case was not filed in good faith arises pursuant to § 362(c)(3)(C)(i)(II).

In order to determine whether the Debtor has rebutted the presumption under § 362(c)(3)(C), the Court uses a totality of the circumstances test. *In re Bew*, Case No. 16-13325, slip op. at *5 (Bankr. N.D. Miss. Oct. 24, 2016). There are, however, “two primary areas of inquiry”: 1) “the reasons why the debtor’s previous plan failed,” also known as “objective good faith,” and 2) changes in the debtor’s circumstances “so that the present plan is likely to be successful,” also known as “subjective good faith.” 3 COLLIER ON BANKRUPTCY ¶ 362.06[3][b]; see *In re Coley*, Case No. 15-01684, slip op. at *10 (Bankr. S.D. Miss. Aug. 3, 2015). “A debtor who can sufficiently demonstrate changed circumstances or other reasons for success in the present case will likely rebut any bad faith presumption.” 3 COLLIER ON BANKRUPTCY

¶ 362.06[3][b]. To satisfy the requirement to demonstrate the aforementioned by clear and convincing evidence, the Debtor must “present evidence that supports her allegations with a high degree of certainty.” *In re Coley*, Case No. 15-01684-NPO, slip op. at *10. In other words, the clear and convincing standard of proof means “that weight of proof which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so clear, direct, and weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts of the case.” *Shafer v. Army & Air Force Exch. Serv.*, 376 F.3d 386, 396 (5th Cir. 2004) (internal quotation marks omitted).

The Court finds that under the totality of the circumstances test, the Debtor has shown that the Bankruptcy Case was filed in good faith by clear and convincing evidence. Although the filing of three (3) chapter 13 bankruptcy petitions since October 2013 would normally concern the Court, the Debtor’s situation is unique. Based upon the Debtor’s uncontroverted testimony at the Hearing, she found it necessary to commence three (3) bankruptcy cases due, in part, to American Credit’s actions. Although she entered into a lease-purchase agreement with American Credit for the purchase of the mobile home in March of 2012, and made a \$10,000.00 down payment, the mobile home was not delivered until six (6) months later. The Debtor did not make any payments to American Credit until the mobile home was delivered. Nonetheless, American Credit contended that the Debtor owed \$550.00 per month for the six months in which she was awaiting delivery. The Debtor subsequently filed bankruptcy three (3) times to save the mobile home. Considering objective good faith, the Court finds that the Debtor’s previous plans failed because she lost her job. In consideration of the Debtor’s subjective good faith, the Court finds that her circumstances have significantly changed because she is currently employed at two (2) different jobs working a total of fifty-five (55) hours per week. Accordingly, the Court finds that the

Debtor has shown by clear and convincing evidence that the Petition was filed in good faith and, therefore, the automatic stay should be reimposed and the Response should be overruled.

Conclusion

The Court finds that the automatic stay should be reimposed because the Debtor showed by clear and convincing evidence that the Petition was filed in good faith. Her previous plans failed because she lost her job, but she has demonstrated that she now works two (2) jobs for a total of fifty-five (55) hours per week. Because this is the Debtor's third bankruptcy case in three (3) years, however, the Court finds that if, after the Plan is confirmed, the Debtor becomes sixty (60) days or more delinquent, the Bankruptcy Case may be dismissed by subsequent order without further notice or hearing. If the Bankruptcy Case is dismissed because the Debtor becomes sixty (60) days or more delinquent, the Court will impose a bar preventing the Debtor from filing a bankruptcy petition in any jurisdiction for 180 days.

IT IS, THEREFORE, ORDERED that the Motion is hereby granted to the extent that the automatic stay is reimposed, retroactive to the date of the Petition, as to all creditors.

IT IS FURTHER ORDERED that the Response is hereby overruled.

##END OF ORDER##