



SO ORDERED,

**Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: March 28, 2014**

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

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

IN RE:

CECILLIA ROUNDTREE,

CASE NO. 14-00671-NPO

DEBTOR.

CHAPTER 13

**ORDER SUSTAINING THE OBJECTION
TO MOTION TO EXTEND THE AUTOMATIC STAY AND
DENYING THE MOTION TO EXTEND AUTOMATIC STAY**

This matter came before the Court for hearing on March 24, 2014 (the “Hearing”) on the Motion to Extend Automatic Stay (the “Motion to Extend”) (2014 Bankr. Dkt. 5)¹ filed by Cecillia Roundtree (the “Debtor”) and the Objection to Motion to Extend the Automatic Stay (the “Objection”) (2014 Bankr. Dkt. 11) filed by J. Mitchell Smith (“Smith”) in the 2014 Bankruptcy Case. At the Hearing, Jim Arnold (“Arnold”) appeared on behalf of the Debtor and Michael Williams appeared on behalf of Smith. The Court, being fully advised in the premises, finds that the Objection should be sustained and the Motion to Extend should be denied for the reasons that follow.

¹ Citations to the record are as follows: (1) citations to docket entries in the above-styled bankruptcy case, Case No. 14-00671 (the “2014 Bankruptcy Case”) are cited as “(2014 Bankr. Dkt. ___)”; and (2) citations to docket entries in Case No. 13-02030 (the “2013 Bankruptcy Case”) are cited as “(2013 Bankr. Dkt. ___)”.

Jurisdiction

The Court has jurisdiction over the parties to and the subject matter of this 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 to Extend was proper under the circumstances.

Facts

2013 Bankruptcy Case

1. On July 1, 2013, the Debtor filed a petition for relief pursuant to chapter 13 of the Bankruptcy Code (2013 Bankr. Dkt. 1).

2. On September 6, 2013, the Court entered the Agreed Order on Objection to Confirmation (DKT #25) and Objection to Secured Claim (DKT #19) (the “Smith Agreed Order”) (2013 Bankr. Dkt. 32). The Agreed Order provided for the treatment of the Debtor’s \$8,460.46 debt to Smith, which was secured by a 2002 Cappaert Platinum Manufactured Home (the “Manufactured Home”). The Agreed Order stated that the Manufactured Home would be abandoned automatically and the automatic stay would be terminated immediately if the Debtor became more than 60 days delinquent on the plan payments to James L. Henley, the chapter 13 trustee (the “Trustee”).

3. On August 14, 2013, the Trustee filed the Trustee’s Motion to Dismiss (the “Trustee’s Motion to Dismiss”) (2013 Bankr. Dkt. 22) requesting the Court to dismiss the 2013 Bankruptcy Case due to the Debtor’s failure to remit plan payments. On August 15, 2013, the Court entered the Agreed Order (2013 Bankr. Dkt. 23) resolving the Trustee’s Motion to Dismiss and providing that the 2013 Bankruptcy Case may be dismissed if the Debtor became more than 60 days delinquent on the plan payments.

4. On February 18, 2014, the Court entered the Order Dismissing Case (2013 Bankr. Dkt. 45) dismissing the 2013 Bankruptcy Case because the Debtor became more than 60 days delinquent in plan payments to the Trustee. On February 21, 2014, Smith filed the Notice of Termination of Automatic Stay (2013 Bankr. Dkt. 49) giving notice that the automatic stay had been terminated as to the Manufactured Home pursuant to the Smith Agreed Order.

2014 Bankruptcy Case

5. On February 27, 2014, the Debtor filed a petition for relief pursuant to chapter 13 of the Bankruptcy Code (2014 Bankr. Dkt. 1).

6. Also on February 27, 2014, the Debtor filed the Motion to Extend requesting that the Court extend the automatic stay as to all of the Debtor's creditors, including Smith, throughout the life of the 2014 Bankruptcy Case. Along with the Motion to Extend, the Debtor filed the Declaration in Support of Motion to Extend the Automatic Stay Pursuant to 11 U.S.C. §362(c)(3) (the "Declaration"), in which the Debtor stated that she could perform fully a bankruptcy plan because she had become employed since the dismissal of the 2013 Bankruptcy Case.

7. On March 17, 2014, Smith filed the Objection arguing that the automatic stay should remain terminated as to the Manufactured Home because the stay was terminated pursuant to the Smith Agreed Order in the 2013 Bankruptcy Case.

8. On March 21, 2014, the Debtor filed statements and schedules regarding her current income, expenses, and creditors (2014 Bankr. Dkt. 13), including the Schedule I: Your Income (the "Schedule I") (*Id.* at 17-18).

9. The Debtor was unable to appear at the Hearing due to being hospitalized. Arnold, counsel for the Debtor, provided evidence to the Court in the form of a physician's note verifying the reason for the Debtor's absence. (Debtor Ex. 1).

Discussion

Section 362(c)(3)² limits the duration of the automatic stay to thirty (30) days in a case filed by a debtor who has had a prior case dismissed within the year preceding the filing of the second case. 11 U.S.C. § 362(c)(3). Section 362(c)(3)(B) provides that upon a motion,³ and after notice and a hearing completed within the 30-day period, the Court may extend the automatic stay if the debtor demonstrates the filing of the later case was in good faith. 11 U.S.C. § 362(c)(3)(B). A presumption of bad faith exists as to the later bankruptcy case if the initial bankruptcy case was dismissed because of the debtor's failure to perform the terms of a confirmed plan. 11 U.S.C. § 362(c)(3)(C)(i)(II)(cc).

In the case at hand, the Debtor seeks to extend the 30-day automatic as to all of her creditors, including Smith, pursuant to § 362(c)(3)(B). Because the 2013 Bankruptcy Case was dismissed due to the Debtor's failure to make plan payments, a presumption of bad faith arises as to the filing of the 2014 Bankruptcy Case. *See* 11 U.S.C. § 362(c)(3)(C)(i)(II)(cc). Consequently, the Debtor must rebut this presumption of bad faith for the Court to extend the stay as to all of her creditors. Before addressing whether the Debtor has successfully rebutted this presumption, the Court will address the Objection to the Motion to Extend as to the Manufactured Home.

² Hereinafter, all code sections refer to the United States Bankruptcy Code found at Title 11 of the United States Code, unless otherwise noted.

³ *See* MISS. BANKR. L.R. 4001-1(e) (providing the procedural requirements for motions to extend the automatic stay pursuant to § 362(c)(3)(B)).

A. The Objection to the Motion to Extend is sustained.

In the Objection, Smith argues that because the automatic stay was terminated in the 2013 Bankruptcy Case as to the Manufactured Home, the automatic stay should remain terminated despite the filing of the 2014 Bankruptcy Case. The Court agrees with Smith. The facts of this case are similar to the facts of *In re Grinstead*, No. 09-50810-NPO, 2009 WL 2499610 (Bankr. S.D. Miss. Aug. 14, 2009), a previous case before the Court. In *Grinstead*, an agreed order between the debtor and a secured creditor provided that the automatic stay would terminate in respect to the secured creditor if the debtor did not pay a specific amount of money to the creditor by a certain date. 2009 WL 2499610, at *1. The debtor ultimately failed to make the requisite payment, and the stay terminated as to the secured creditor. *Id.* at *2. The bankruptcy case was eventually closed. *Id.* The debtor filed another bankruptcy petition a few months later, one day before the secured creditor's foreclosure sale was scheduled to occur. *Id.* Relying on the previous stay termination, the secured creditor proceeded with the scheduled foreclosure sale. *Id.* In holding that the foreclosure sale did not violate § 1322, the Court found that debtor's subsequent filing of the bankruptcy petition did not affect the secured creditor or reinstate the automatic stay as to the foreclosed property. *Id.* at *4. In reaching this conclusion, the Court relied on *Jefferson v. Mississippi Gulf Coast YMCA, Inc.*, 73 B.R. 179, 182 (S.D. Miss. 1986),⁴ a case in which the District Court for the Southern District of Mississippi decided that an

⁴ In accordance with the doctrine of *stare decisis*, the Court is bound by the decisions of the District Courts for the Southern District of Mississippi. See *Lentz v. Myers (In re Myers)*, Adv. Proc. 10-05014-EE, 2011 WL 3880968, at *9 (Bankr. S.D. Miss. Sept. 1, 2011); see also *In re Jobs.com, Inc.*, 283 B.R. 209 (Bankr. N.D. Tex. 2002), *aff'd on other grounds*, 301 B.R. 187 (N.D. Tex. 2003), *aff'd*, 393 F.3d 508, 516 (5th Cir. 2004).

in rem order lifting the automatic stay entered under the pre-BAPCPA⁵ version of § 362(d) remained in effect despite a subsequent bankruptcy filing, provided that the previous bankruptcy case involved the same debtors, creditors, and property.⁶ *Grinstead*, 2009 WL 2499610, at *3.

The Court finds the legal analysis in *Grinstead* to be applicable to the case at bar. In the current case, the automatic stay was lifted as to the Manufactured Home in the 2013 Bankruptcy Case, which involved the same debtor, the same creditor, and the same property. Therefore, the automatic stay remains lifted on the Manufactured Home.⁷ *See Jefferson*, 73 B.R. at 182.

B. The Motion to Extend as to all other creditors is denied.

Having determined that the automatic stay under § 362 remains lifted as to Smith, regarding his security interest in the Manufactured Home, the Court will now address the Motion to Extend as it pertains to all other creditors. As previously mentioned, the Debtor must rebut the presumption of bad faith in order to succeed on the Motion to Extend. *See* 11 U.S.C. § 362(c)(3)(C)(i)(II)(cc). The presumption must be rebutted by clear and convincing evidence. 11 U.S.C. § 362(c)(3)(C). In determining whether the presumption has been rebutted, courts consider the totality of the circumstances. *In re Norris*, No. 3-36681-H3-13, 2013 WL 6909894, at *3 (Bankr. S.D. Tex. Dec. 31, 2013) (citations omitted).

⁵ Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23.

⁶ The Fifth Circuit Court of Appeals was asked to determine if BAPCPA overturned *Jefferson* in *Barner v. Saxon Mortg. Servs., Inc.*, 597 F.3d 651 (5th Cir. 2010), but the Fifth Circuit did not reach that issue. *Id.* at 654. Therefore, *Jefferson* is still controlling law in the Southern District of Mississippi.

⁷ The Court, however, does not reach the issues of whether a stay may be reimposed by a court or whether debtors are entitled to seek other forms of injunctive relief in situations where a stay has been terminated.

To rebut the presumption of bad faith, the Debtor provided the Declaration stating that she became employed after the dismissal of the 2013 Bankruptcy Case and that future plan payments will be made through a wage withholding order. *See* MISS. BANKR. L.R. 4001-1(e). Yet the documents filed by the Debtor are inconsistent. For example, in the Declaration, the Debtor stated that she had no prior bankruptcy cases dismissed in the past year for failure to perform the terms of a plan confirmed by the Court. As previously discussed, the 2013 Bankruptcy Case was dismissed for the Debtor's failure to make payments in accordance with a confirmed plan. Also, the Debtor stated in the Declaration that she became "gainfully employed" since the dismissal of the 2013 Bankruptcy Case. In Schedule I, filed on March 21, 2014, the Debtor stated that she had been employed as a clerk for Comcast Cable Communication for two and a half months. Thus, her employment predates the dismissal of the 2013 Bankruptcy Case, which occurred on February 18, 2014.

The Debtor has the burden to rebut the presumption of bad faith by clear and convincing evidence. The documents submitted to the Court by the Debtor, though, are neither clear nor convincing. The Fifth Circuit Court of Appeals has stated that clear and convincing evidence is "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) (citations omitted). Due to the inconsistent information between the Declaration and Schedule I, the Court cannot, without hesitancy, come to a clear conviction of the truth of the Debtor's allegations. Though it is unfortunate that the Debtor was unable to appear personally at the Hearing, she was represented by counsel. Arnold did not submit any evidence at the Hearing

verifying the Debtor's "newfound" employment or any other substantial change in circumstance that would suggest the 2014 Bankruptcy Case has a meaningful chance of success, much less constitute clear and convincing evidence rebutting the presumption of bad faith. Thus, the Court finds that the Debtor did not rebut the presumption of bad faith created by § 362(c)(3)(C). Accordingly, the Court finds that the Motion to Extend should be denied.

Conclusion

For the foregoing reasons, the Court finds that the Objection to the Motion to Extend should be sustained and the Motion to Extend should be denied.

IT IS, THEREFORE, ORDERED that the Objection to the Motion to Extend is hereby sustained and the automatic stay remains lifted as to the Manufactured Home.

IT IS FURTHER ORDERED that the Motion to Extend is hereby denied and the automatic stay terminates under § 362(c)(3)(A) as to all creditors of the Debtor "on the 30th day after the filing" of the 2014 Bankruptcy Case.

##END OF ORDER##