SO ORDERED,

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: August 3, 2015

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:

SHARRON L. COLEY, **CASE NO. 15-01684-NPO**

DEBTOR. **CHAPTER 13**

ORDER: (1) DENYING MOTION TO EXTEND AUTOMATIC STAY; (2) GRANTING, IN PART, MOTION TO VALIDATE FORECLOSURE SALE, OR IN THE ALTERNATIVE, MOTION FOR IN REM RELIEF FROM STAY PURSUANT TO 11 U.S.C. § 362(d)(4) FOR RELIEF FROM CO-DEBTOR STAY PURSUANT TO 11 U.S.C. § 1301 AND FOR ABANDONMENT OF THE PROPERTY FROM THE ESTATE; AND (3) DISMISSING THE DEBTOR'S CURRENT CASE

This matter came before the Court for hearing on June 22, 2015 (the "Hearing") on the Motion to Extend Automatic Stay (the "Motion to Extend Stay") (Dkt. 9)[1] filed by the debtor, Sharron L. Coley[2] (the "Debtor"); the Response in Opposition to Debtor's Motion to Extend Automatic Stay (the "Response") (Dkt. 11) filed by Cenlar FSB as Loan Subservicer for MGC Mortgage, Inc., as servicer for LPP Mortgage, LTD. ("Cenlar"); the Motion to Validate

[1] Citations to the record are as follows: (1) citations to docket entries in the above-referenced bankruptcy case (the "Debtor's Current Case") are cited as (Dkt. ____); (2) citations to docket entries in Case No. 14-03202 (the "Husband's 2014 Case") are cited as "(Husband's 2014 Case Dkt. ___)"; and (3) citations to docket entries in other bankruptcy cases are cited by the case number followed by the docket number.

[2] The Court spells the Debtor's name, "Sharron L. Coley," as it appears in the petition for relief (the "Petition") (Dkt. 1) filed in the Debtor's Current Case although it is spelled "Sharon L. Coley" in other filings by the Debtor.

Foreclosure Sale, or in the Alternative, Motion for In Rem Relief from Stay Pursuant to 11 U.S.C. § 362(d)(4) for Relief from Co-Debtor Stay Pursuant to 11 U.S.C. § 1301 and for Abandonment of the Property from the Estate (the "Motion to Validate Sale" and the "Motion for *In Rem* Relief *Nunc Pro Tunc*") (Dkt. 12) filed by Cenlar; and the Answer (Dkt. 19) filed by the Debtor in the Debtor's Current Case. At the Hearing, Robert Rex McRaney, Jr. represented the Debtor, and Karen A. Maxcy represented Cenlar.

Jurisdiction

This Court has jurisdiction over the subject matter of and the parties to this proceeding pursuant to 28 U.S.C. § 1334. These matters are core proceedings under 28 U.S.C. § 157(b)(2)(A) & (G). Notice of the Motion to Extend Stay, Motion to Validate Sale, and Motion for *In Rem* Relief *Nunc Pro Tunc* was proper under the circumstances.

Facts

The Debtor and her non-debtor husband, Mitchell Coley (the "Husband"), reside at 124 Autumn Street, Hazlehurst, Mississippi (the "Subject Property"). They purchased the Subject Property on October 8, 2008. To finance the purchase, they obtained a loan from Cenlar[3] secured by a deed of trust on the Subject Property (the "Deed of Trust"). The first payment on the loan became due on November 14, 2008. From that date until May 27, 2015, a span of more than six (6) years, Cenlar initiated six (6) foreclosure sales to enforce its rights under the Deed of Trust after the Debtor and her Husband became delinquent in their loan payments. During that same time span, the Debtor and her Husband, either jointly or individually, commenced six (6) bankruptcy cases. Five (5) of them were commenced to stay foreclosure sales. Of the six (6)

[3] Cenlar is the loan subservicer for MGC Mortgage, Inc. who acquired the loan and Deed of Trust through a series of assignments. (Cenlar's Exs. 1-11). For clarity and brevity and because the distinction makes no difference, the Court refers only to Cenlar.

bankruptcy cases, four (4) of them have been dismissed involuntarily for nonpayment. Two (2) of the six (6) cases remain pending: the Debtor's Current Case and the Husband's 2014 Case.

Debtor and Husband's 2009 Case

On October 1, 2009, the Debtor and her Husband filed a joint petition for relief under chapter 13 of the Bankruptcy Code in case number 09-03447-NPO (the "Debtor and Husband's 2009 Case"). Their schedules of income and expenses indicated a total monthly income of $1,526.00, consisting entirely of the Husband's "Social Security," and average monthly expenses of $840.00. (Case No. 09-03447-NPO, Dkt. 4 at 14-15). The confirmed plan provided payment of $852.00 per month for five (5) years. Their joint bankruptcy case was dismissed on December 20, 2010 when they failed to make plan payments. (Case No. 09-03447-NPO, Dkt. 83).

Husband's March 2012 Case

On March 23, 2012, the Husband filed an individual petition for relief under chapter 13 of the Bankruptcy Code in case number 12-01036-NPO. His schedules of income and expenses indicated a total monthly income of $1,627.00, consisting of $1,525.00 in "social security" and $102.00 in other support, and average monthly expenses of $815.00. (Case No. 12-01036-NPO, Dkt. 4 at 13-14). The confirmed plan provided for payments of $820.00 per month for five (5) years and payment of a claim secured by a 1999 Mercury Grand Marquis in the amount of $2,587.94.[4] (Case No. 12-01036-NPO, Dkt. 28). His case was dismissed on June 21, 2012 because of his failure to make plan payments. (Case No. 12-01036-NPO, Dkt. 30).

[4] Because the Debtor and her Husband acquired the 1999 Mercury Grand Marquis within 910 days before the commencement of the Husband's March 2012 Case, the Husband's treatment of the claim was governed by 11 U.S.C. § 1325(a). The claim is mentioned in the facts because the Debtor asserts a positive change in financial circumstances in the Debtor's Current Case based on the abandonment of the 1999 Mercury Grand Marquis in a subsequent bankruptcy filing.

Husband's December 2012 Case

On December 18, 2012, the Husband filed an individual petition for relief under chapter 13 of the Bankruptcy Code in case number 12-03964-NPO. His schedules of income and expenses indicated a total monthly income of $1,700.00, consisting entirely of "Social Security," and average monthly expenses of $896.00. (Case No. 12-03964-NPO, Dkt. 4 at 13-14). The confirmed plan provided for payments of $964.50 per month for five (5) years and a claim secured by a 1999 Mercury Grand Marquis valued at $1,500.00. (Case No. 12-03964-NPO, Dkt. 23). The case was dismissed on July 2, 2013 because of his failure to make plan payments. (Case No. 12-03964, Dkt. 34).

Debtor's 2014 Case

On March 17, 2014, the Debtor filed an individual petition for relief under chapter 13 of the Bankruptcy Code in case number 14-00922-NPO (the "Debtor's 2014 Case"). Her schedules of income and expenses indicated that she was unemployed and her Husband received a total monthly income of $3,357.00, consisting of $1,607.00 in "social security," $1,648.00 in "VRAP,"[5] and $102.00 in support, and average monthly expenses of $1,166.00. (Case No. 14-00922-NPO, Dkt. 4 at 13-16). The amended confirmed plan provided for plan payments of $965.00 per month and the abandonment of the "1997 Mercury."[6] (Case No. 14-00922-NPO, Dkt. 29). The Debtor's 2014 Case was dismissed on August 8, 2014, because of the Debtor's failure to make plan payments. (Case No. 14-00922-NPO, Dkt. 33).

[5] "VRAP" is undefined in the schedules but is believed to refer to the Veterans Retraining & Assistance Program.

[6] The reference to a 1997 Mercury is an obvious error and should be to the 1999 Mercury Grand Marquis.

Husband's 2014 Case

On October 6, 2014, the Husband filed an individual petition for relief under chapter 13 of the Bankruptcy Code in case number 14-03202-NPO. His schedules of income and expenses indicated a monthly income of $1,830.00, consisting of $1,632.00 in "social security," $96.00 in "SNAP,"[7] and $102.00 in other support, and average monthly expenses of $865.00. (Husband's 2014 Case, Dkt. 4 at 13-16). The confirmed plan provided for plan payments of $1,490.50 per month and the abandonment of the 1999 Mercury Grand Marquis. (Husband's 2014 Case, Dkt. 42).

On January 22, 2015, Cenlar filed a Motion for *In Rem* Relief from Stay Pursuant to 11 U.S.C. § 362(d)(4) and for Relief from Co-Debtor Stay Pursuant to 11 U.S.C. § 1301 (the "Motion for *In Rem* Relief") (Husband's 2014 Case, Dkt. 26). The Debtor was served a copy of the Motion for *In Rem* Relief. The Court issued an Order Granting *In Rem* Relief from Stay Pursuant to 11 U.S.C. § 362(d)(4) and for Relief from Co-Debtor Stay and for Abandonment (the "*In Rem* Order") (Husband's 2014 Case, Dkt. 40) on March 19, 2015. Because Cenlar obtained stay relief under § 362(d), it could enforce its rights under the Deed of Trust against the Subject Property for the duration of the Husband's 2014 Case. 11 U.S.C. § 362(b)(20).[8] There is no evidence that Cenlar recorded the *In Rem* Order under Mississippi laws governing notices of interests or liens in real property pursuant to 11 U.S.C. § 362(d)(4)(*) (hanging paragraph). Later, on May 1, 2015, an order was entered converting the Husband's 2014 Case from chapter 13 to chapter 7. (Husband's 2014 Case, Dkt. 47).

[7] "SNAP" is undefined in the schedules but is believed to refer to benefits from the Supplemental Nutrition Assistance Program.

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

Debtor's Current Case

With the *In Rem* Order in hand, Cenlar conducted a non-judicial foreclosure sale of the Subject Property at 2:30 p.m. on May 27, 2015, under its Deed of Trust. Cenlar entered a credit bid and purchased the Subject Property. Hours before the foreclosure sale and without the knowledge of Cenlar, the Debtor filed the Petition under chapter 13 of the Bankruptcy Code, commencing the Debtor's Current Case at 11:47 a.m. on the same day.

In the Debtor's Current Case, the schedules of income and expenses indicated a total monthly income of $3,630.00, consisting of income of the Debtor of $1,700.00 and income of the Husband of $1,930.00, and average monthly expenses of $800.00. The Debtor's total monthly income of $1,700.00 consists of $1,400.00 in "VA Aid and attendance and food stamps" and $300.00 in "Family Asst." The Husband's total monthly income of $1,930.00 consists of $1,700.00 in "unemployment compensation,"[9] $130.00 in "VA Aid and attendance and food stamps," and $100.00 in pension or retirement income. (Dkt. 20 at 13-16).

The Debtor filed her Motion to Extend Stay on June 1, 2015, requesting that the Court extend the automatic stay as to all her creditors, including Cenlar, pursuant to 11 U.S.C. § 362(c)(3)(B). (Dkt. 9). The Debtor also filed her Declaration in Support of Motion to Extend the Automatic Stay Prusuant [*sic*] to 11 U.S.C. § 362(C)(3) [*sic*] (the "Declaration"). (*Id.*). Cenlar filed its Response opposing the Motion to Extend Stay on June 2, 2015. Contemporaneously with its Response, Cenlar filed the Motion to Validate Sale and Motion for *In Rem* Relief. In the Motion to Validate Sale, Cenlar seeks an order declaring that the *In Rem* Order prevented the automatic stay in the Debtor's Current Case from affecting the foreclosure

[9] The reference to "unemployment compensation" appears to be a scrivener's error. The Debtor's testimony at the Hearing referred to this income as social security, not unemployment compensation.

sale on May 27, 2015 and that the stay in the Debtor's Current Case did not extend to the Subject Property. In the Motion for *In Rem* Relief *Nunc Pro Tunc*, Cenlar asks the Court, in the alternative, to enter a new *in rem* order "such that any subsequent Bankruptcy filing by any party will not impose an automatic stay as to the [Subject] Property securing the claim of [Cenlar]." (Dkt. 12). On June 21, 2015, the day before the Hearing, the Debtor filed her proposed chapter 13 plan, which lists Cenlar's mortgage on the Subject Property as the only debt to be paid by the Debtor. (Dkt. 22). The proposed plan provides for plan payments of $1,158.00 per month for five (5) years.

The Hearing was held within the thirty (30)-day time period provided in § 362(c)(3)(B). On the same day as the Hearing, the Court issued the Order Extending Automatic Stay Until the Court Issues an Order Resolving the Motion to Extend Automatic Stay (Dkt. 25). With respect to the Motion to Validate Sale and the Motion for *In Rem* Relief *Nunc Pro Tunc*, the Court issued the Order Extending Stay (Dkt. 24) under § 362(e) ordering that the stay continue pending the conclusion of a final hearing and determination under § 362(d).

Discussion

The filing of a petition for relief under the Bankruptcy Code creates an automatic stay. 11 U.S.C. § 362. Unless an exception applies, the stay bars creditors from engaging in certain specified types of actions against a debtor, the debtor's property, or property of the bankruptcy estate. 11 U.S.C. § 362(a)(1)-(8) (listing acts that are stayed); 11 U.S.C. § 362(b)(1)-(28) (listing exceptions to stay); 3 COLLIER ON BANKRUPTCY ¶ 362.01 (16th ed. 2015). A creditor may ask the Court to terminate, annual, or modify a stay under § 362(d) in certain situations. This matter concerns amendments to § 362 included in the section of the Bankruptcy Abuse Prevention and

Consumer Protection Act of 2005, Pub. L. No. 109-8 ("BAPCPA") entitled "Discouraging Bad Faith Repeat Filings." *See In re Lundquist*, 371 B.R. 183, 186 (Bankr. N.D. Tex. 2007).

A. Motion to Extend Stay

BAPCPA added § 362(c)(3) to the Bankruptcy Code limiting the extent and duration of the automatic stay if a debtor had a case pending within the preceding year that was dismissed. Under § 362(c)(3)(A), if a debtor files a single or joint chapter 7, 11, or 13 case within one (1) year of having a prior case dismissed, the automatic stay in the second case terminates on the thirtieth day in the absence of a court order to the contrary.[10] 11 U.S.C. § 362(c)(3)(A). Because the Debtor's Current Case was filed on May 27, 2015, which was within one (1) year of the dismissal of the Debtor's 2014 Case, the automatic stay in the Debtor's Current Case would have terminated thirty (30) days after May 27, 2015, or on June 26, 2015, except for the Court's entry of the interim Order Extending Automatic Stay Until the Court Issues an Order Resolving the Motion to Extend Automatic Stay (Dkt. 25). The Debtor now asks the Court to extend the stay as to all creditors for the duration of the Debtor's Current Case. She asserts that she filed the Debtor's Current Case in good faith to stay the foreclosure sale of the Subject Property.

Section 362(c)(3)(B) provides for the continuation of the stay beyond the thirty (30)-day period if a debtor demonstrates that its most recent case was filed "in good faith as to the creditors to be stayed." 11 U.S.C. § 362(c)(3)(B). Before addressing the issue of good faith, the Court considers whether a rebuttable presumption of bad faith arises under § 362(c)(3)(C) against the Debtor in the Debtor's Current Case. If the Court finds that the Debtor's Current Case is presumptively filed in bad faith, the Debtor's burden of proof increases from a mere

[10] There is an exception for "a case refiled under a chapter other than chapter 7 after dismissal under section 707(b)." *See* 11 U.S.C. § 362(c)(3)(A). None of the cases commenced by the Debtor involved a motion to dismiss filed under § 707(b).

"preponderance of the evidence" to "clear and convincing evidence" and, therefore, becomes more rigorous. *In re Collins*, 335 B.R. 646, 651 (Bankr. S.D. Tex. 2005).

1. Does the presumption of bad faith arise?

A bad faith presumption arises against a debtor as to all creditors if any one of three (3) following events has occurred: (1) the debtor has had more than one (1) previous case under chapters 7, 11, or 13 pending within the previous year; (2) the debtor, in a previous case that was dismissed within one (1) year of the current case, failed to perform certain tasks; or (3) there has been no substantial positive change in the financial or personal affairs of the debtor.[11] 11 U.S.C. § 362(c)(3)(C)(i). The Court finds that the second condition has been shown to exist by a preponderance of the evidence, which is enough for the bad faith presumption to arise. 11 U.S.C. § 362(c)(3)(C)(i)(II); KEITH M. LUNDIN & WILLIAM H. BROWN, CHAPTER 13 BANKRUPTCY 4th ed. § 432.4, ¶ 6, www.chapter 13online.com [hereinafter LUNDIN].

Section 362(c)(3)(C)(i)(II) provides that the presumption arises if the debtor fails to:

> (aa) file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be a substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney);
>
> (bb) provide adequate protection as ordered by the court; or
>
> (cc) perform the terms of a plan confirmed by the court.

11 U.S.C. § 362(c)(3)(C)(i)(II). The Debtor satisfies the criteria in subsection (cc). The Debtor's 2014 Case was filed by the Debtor on March 17, 2014 and was dismissed by the Court on August 8, 2014 because of the Debtor's failure to make payments pursuant to the terms of a

[11] For debtors subject to § 362(c)(3), there is an exception to the presumption of bad faith if the prior case was dismissed "due to the creation of a debt repayment plan." 11 U.S.C. § 362(i). Thus, if a debtor voluntarily dismissed her case after making a plan that does not work, no presumption of bad faith arises. That exception does not apply here.

confirmed plan. The dismissal of the Debtor's 2014 Case took place within one (1) year of the filing of the Debtor's Current Case on May 27, 2015. A failure to make plan payments falls within the scope of a failure "to . . . perform the terms of a plan" pursuant to § 362(c)(3)(C)(i)(II)(cc). *See In re Elliott-Cook*, 357 B.R. 811, 813-15 (Bankr. N.D. Cal. 2006) (finding that the bad faith presumption arose because the debtor's prior case was dismissed after she failed to make plan payments); *In re Montoya*, 333 B.R. 449, 452 (Bankr. D. Utah 2005) (same). Accordingly, the presumption of bad faith arises under that subsection.[12]

2. Has the Debtor rebutted the bad faith presumption by clear and convincing evidence?

Because the bad faith presumption arises under § 362(c)(3)(C)(i)(cc), the Debtor must show by clear and convincing evidence that the Debtor's Current Case "is fil[ed] in good faith as to the creditors to be stayed." 11 U.S.C. § 362(c)(3)(C). Unlike the preponderance of the evidence standard (which only would require the Debtor to present evidence of greater weight than what is offered in opposition to it), the clear and convincing standard of proof requires the Debtor to present evidence that supports her allegations with a high degree of certainty. The Fifth Circuit Court of Appeals has defined the clear and convincing standard of proof as "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).

[12] Additionally, for reasons discussed later in this Order, the presumption of bad faith arises under § 362(c)(3)(C)(i)(III)(bb) due to the lack of proof that either a substantial positive change in the Debtor's circumstances has occurred or any other reason exists to conclude that the Debtor's Current Case will be successful.

The Bankruptcy Code does not expressly define the term "good faith" as used in § 362(c)(3). *See* 11 U.S.C. § 362(c)(3)(B); LUNDIN, § 432.5, ¶ 3. Bankruptcy courts have used different approaches in analyzing whether a debtor has shown that a case was filed in good faith within the meaning of § 362(c)(3)(B). *See In re Ferguson*, 376 B.R. 109, 122 (Bankr. E.D. Pa. 2007) (listing fourteen (14) factors identified by different courts as relevant in considering good faith under § 362(c)(3) and § 362(c)(4)). But the concept of good faith is not new to the Bankruptcy Code. In deciding whether a chapter 13 plan has been proposed in good faith and may be confirmed under § 1325(a)(3), the Fifth Circuit long ago established a "totality of the circumstances" test. *Pub. Fin. Corp. v. Freeman*, 712 F.2d 219, 221 (5th Cir. 1983); *In re Chaffin*, 816 F.2d 1070, 1073 (5th Cir. 1987). This test "exacts an examination of all the facts in order to determine the bona fides of the debtor" and, thus, allows for flexibility in analyzing the particular facts and circumstances of the case at hand. *In re Chaffin*, 816 F.2d at 1073. The Court finds that many of the relevant circumstances for determining good faith under § 1325(a)(3), such as whether a chapter 13 plan is likely to succeed and whether its proposal constitutes an abuse of the Bankruptcy Code, coincide with the factors for determining good faith under § 362(c). For this reason and because other courts within the Fifth Circuit continue to rely on the good faith analysis in *Chaffin* when determining whether to confirm a plan, the Court finds it appropriate to apply the "totality of the circumstances" test in this matter. *See, e.g.*, *Ramirez v. Bracher (In re Ramirez)*, 204 F.3d 595, 601 (5th Cir. 2000). In doing so, the Court notes that there are both objective and subjective factors. *See In re Charles*, 334 B.R. 207 (Bankr. S.D. Tex. 2005) (determining good faith on an objective basis and a subjective basis).

For purposes of objective good faith, the good faith analysis primarily relies on "the likely reasons why the debtor's previous plan failed" and "what has changed in the debtor's

circumstances so that the present plan is likely to be successful." 3 COLLIER ON BANKRUPTCY ¶ 362.06[b] (16th ed. 2015) (citing *In re Elliott-Cook*, 357 B.R. at 815); *see also* LUNDIN, § 432.5, ¶ 14 (stating "nearly all courts offer special weight to evidence of changed circumstances that materially impacts some important aspect of the refiling—that explains why the prior case failed; or that portends in favor of success in the current case"). In fact, "[w]hen there is insufficient evidence of change in the personal or financial circumstances of the debtor since the dismissal of the prior case," courts have consistently found a lack of good faith under § 362(c)(3) and refused to extend the stay. LUNDIN, § 432.5, ¶ 14. For the purposes of subjective good faith, the focus of the good faith inquiry under § 362(c)(3)(B) hinges upon "whether the debtor is attempting to thwart his creditors or whether he is making an honest effort to repay them to the best of his ability." *In re Baldassaro*, 338 B.R. 178, 188 (Bankr. D.N.H. 2006) (citing *Sullivan v. Solimini (In re Sullivan)*, 326 B.R. 204, 212 (B.A.P. 1st Cir. 2005)). With these principles in mind, the Court begins its objective inquiry by determining whether there is a positive change in circumstances that supports the Debtor's allegations of good faith.

a. Did the Debtor prove a positive change in circumstances?

The overarching reason for dismissal of the Debtor's 2014 Case was her failure to make plan payments, or, in the precise words of § 362(c)(3), "fail[ure] to . . . perform the terms of a plan confirmed by the court." *See* 11 U.S.C. § 362(c)(3)(C)(i)(II)(cc). The Court considers whether the Debtor can explain why the circumstances that led to the failure of the Debtor's 2014 Case do not exist in the Debtor's Current Case and can show a likelihood that the Debtor's Current Case will result in a chapter 13 discharge. As previously mentioned, a positive change in circumstances for determining good faith under § 362(c)(3) can be either of a personal or financial nature.

(1.) Personal Circumstances of the Debtor

In her Motion to Extend Stay, the Debtor simply stated that Debtor's 2014 Case "was dismissed for [f]ailure to make plan payments" with no reason given why she failed to make the payments. (Dkt. No. 9). At the Hearing, the Debtor likewise did not offer any explanation why she failed to make plan payments in the Debtor's 2014 Case. Almost all of the Debtor's testimony at the Hearing focused on why she wants to save the Subject Property from foreclosure in the Debtor's Current Case. The Debtor testified that her Husband suffers from narcolepsy, seizures, and "COPD"[13] and "is on oxygen [and] insulin."[14] She further testified that she fully intends to make the payments *under her current plan* for these reasons. She did not testify, however, that her Husband's health problems were the reason for the failure of Debtor's 2014 Case.

The Debtor, moreover, testified that "[a]ll this just started raining down on us at one time, so we need somewhere to stay"[15] and "Mr. Coley needs help now, and so I am going to be over the finance."[16] Evidence that dismissal of a prior case was "related to circumstances beyond [a debtor's] control and were not due to his failure to cooperate with the trustee or abide by the orders of this Court" has been found to weigh in favor of the debtor. *In re Baldassaro,* 338 B.R. at 190 (weighing why the previous case was dismissed, the court found that this factor cut in favor of the debtor because his inability to make plan payments was due to his illness that

[13] According to the U.S. Centers for Disease Control and Prevention, "COPD" or chronic obstructive pulmonary disease refers to a group of diseases that cause breathing-related problems. *See* www.cdc.gov/copd/ (last visited Aug. 3, 2015).

[14] Test. of Debtor at 11:35:30-11:38:30. The Hearing was not transcribed. References to the testimony presented at the Hearing are cited by the timestamp of the audio recording.

[15] Test. of Debtor at 11:35:31.

[16] Test. of Debtor at 11:35:58.

prevented him from working and diminished his sales commissions to zero). The Debtor's testimony, however, indicates that her Husband's health problems became an issue *after* the dismissal of the Debtor's 2014 Case. The only mention of the Debtor's 2014 Case during her testimony was her affirmative nod to her counsel's question asking her whether she "fell short, for one reason or another."[17] The Debtor has the burden of proving a positive change in circumstances that would make success in the Debtor's Current Case reasonably probable, but her failure to present evidence explaining why the Debtor's 2014 Case failed in the first place hinders her ability to show such a change.

To the contrary, the evidence presented with respect to her personal circumstances establishes that they have changed for the worse, not for the better. The point of proving adverse, personal circumstances is so that a debtor can show how those circumstances affected a previous case, but do not now. *Compare In re Elliott-Cook*, 357 B.R. at 815 ("[U]nexpected and unavoidable medical expenses and car repair bills led to the dismissal of the debtor's prior case. . . . With the return of good health, she has been able to return to her job . . . . Additionally, the unexpected cost of repairing the debtor's vehicle is now behind her.") *with In re Kurtzahn*, 337 B.R. 356, 366 (Bankr. D. Minn. 2006) ("[T]he Kurtzahns' ages [71 and 72] and shaky health status are enough to cast a general doubt on their ability" to make plan payments). The worsening health of the Husband, unfortunately, will likely create a number of additional hardships and obstacles to the Debtor's ability to make plan payments in the Debtor's Current Case. She testified that her Husband "needs help now" due to being "totally disabled" and requires constant care. The Debtor further testified that she intends to be his primary caretaker. She explained that the U.S. Department of Veteran Affairs (the "VA") "will pay me to help assist

[17] Test. of Debtor at 11:36:54.

[my Husband] with his healthcare."[18] She further testified that "someone has to be with him twenty-four hours, and so they are going to give me aid and attendance" ("VA Benefits").[19] From this testimony, it is clear that the Debtor intends to stay home to care for her Husband. A review of the schedules filed in the Debtor's Current Case confirms that this is her intent. The Debtor marked the box, "Employed," for herself, listed her occupation as "Care-giver," and identified her employer as "Through VA Benefits." (Dkt. 20). Unless her application for VA Benefits is approved, however, a full-time commitment to care for her Husband will prevent her from being able to pursue outside employment in order to fund her own plan. Thus, the Court concludes that her personal situation weighs against extending the stay.

(2.) Financial Circumstances of the Debtor

Although the Debtor did not allege a change of circumstances in her Motion to Extend Stay, whether personal or financial, and did not present any evidence at the Hearing about any change for the better in her personal circumstances, she claimed that three (3) positive changes have occurred in her financial circumstances since the dismissal of the Debtor's 2014 Case. They are that: (1) she will receive VA Benefits due to her Husband's disability; (2) she will receive $150.00 per month from her brother-in-law and daughter for sixty (60) months; and (3) she is no longer liable for a car loan.[20]

With respect to the VA Benefits, the Debtor did not testify at the Hearing as to the precise amount, but in her schedules, she lists that amount as $1,400.00 per month. No evidence

[18] Test. of Debtor at 11:35:30.

[19] Test. of Debtor at 11:35:30.

[20] The plan proposed by the Debtor has not been confirmed, and the Court makes no determination in this Order as to its feasibility.

corroborating the VA Benefits, either as to the amount or the Debtor's eligibility, was offered at the Hearing. On cross-examination, the Debtor admitted that she only had applied for the VA Benefits but insisted that the VA "was working speedily on the application."[21] Therefore, the Court finds that the Debtor has not proved that she is receiving VA Benefits of $1,400.00 per month.

Without the VA Benefits, the Debtor's monthly net income decreases from $2,830.00 to $1,430.00.[22] The monthly net income in the Debtor's 2014 Case was $2,191.00. This means that the amount with which the Debtor can make plan payments in the Debtor's Current Case would be $761.00 *less* than the amount available in the Debtor's 2014 Case.[23] Further, that decrease does not take into account that her proposed plan payments in the Debtor's Current Case are $193.00 *more* than they were in the Debtor's 2014 Case.[24] Clearly, without the $1,400.00 in VA Benefits, the Debtor is in worse financial position now then she was before.

With respect to the family contributions, the Debtor testified at the Hearing that she will receive a total of $300.00 per month for five (5) years (the life of the plan) from her brother-in-law and daughter. She included these family contributions in her total monthly income of $3,630.00. No evidence, however, was presented by the Debtor to confirm that these family members have the commitment and ability to provide $300.00 per month for five (5) years. Regardless, neither the brother-in-law nor the daughter appeared to testify at the Hearing.

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[21] Test. of Debtor at 11:38:31-11:40:00.

[22] $1,430.00 = $3,630.00 (monthly income) □ $1,400.00 (monthly VA Benefits) □ $800.00 (average monthly expenses).

[23] $761.00 = $2,191.00 (the Debtor's disposable monthly income in the Debtor's 2014 Case) □ $1,430.00 (the Debtor's disposable monthly income in the Debtor's Current Case).

[24] $193.00 = $1,158.00 (the Debtor's proposed plan payments in the Debtor's Current Case) □ $965.00 (the Debtor's proposed plan payments in the Debtor's 2014 Case).

Although the Debtor's counsel stated at the Hearing that the brother-in-law had signed an affidavit agreeing to contribute $150.00 per month for the life of the plan, the Debtor never offered this affidavit into evidence. Moreover, the Debtor's counsel did not state that the daughter had signed such an affidavit. Neither the daughter nor the brother-in-law has any legal obligation to provide financial support to the Debtor. Moreover, there is no evidence that they made financial contributions to the Debtor in the past, which would have at least raised an expectation that the payments would continue. The Court, therefore, finds that the Debtor has failed her burden of proving that she receives this additional income.

Without these family contributions, the Debtor's net, disposable income decreases from $1,430.00 per month to $1,130.00 per month, representing a difference of $1,061.00 per month in net, disposable income from the Debtor's 2014 Case.[25] Yet the plan payments in the Debtor's 2014 Case ($965.00) were less than they are in the Debtor's Current Case ($1,158.00).[26]

As to the final alleged positive change in her financial circumstances, the Debtor testified that she no longer has a car note to pay. A review of the Debtor's 2014 Case, however, shows that the Debtor abandoned the "1997 Mercury" before confirmation of the amended plan. (Case No. 14-00922-NPO, Dkt. 29). The elimination of a debt typically serves as evidence that a debtor's circumstances have improved, but the Debtor's testimony here shows that the purported change occurred before dismissal of the Debtor's 2014 Case. In other words, the Debtor's 2014 Case failed despite the absence of a car note. Accordingly, her testimony regarding the car note does not necessarily support a positive change in her financial situation.

[25] $1,061.00 = $2,191.00 (the Debtor's monthly net income in the Debtor's 2014 Case) - $1,130.00 (the Debtor's monthly net income in the Debtor's Current Case).

[26] *See supra* note 24.

As previously explained, it is the Debtor's burden to prove by clear and convincing evidence that her financial circumstances have changed for the better so that the Debtor's Current Case is likely to succeed despite the failure of the Debtor's 2014 Case. Given the lack of clear and convincing evidence supporting her claim to either the VA Benefits or the family contributions, her financial position is worse in the Debtor's Current Case than in the Debtor's 2014 Case. Without the $1,400.00 per month in VA Benefits or the $300.00 per month in family contributions, her total, household income is only $1,930.00. Once her average monthly expenses of $800.00 are subtracted, her net, disposable monthly income with which she could make her plan payments is only $1,130.00. This amount is less than the proposed monthly plan payment.

Further, the plan payments in the Debtor's Current Case are higher than in the Debtor's 2014 Case. Despite higher income and lower payments in the Debtor's 2014 Case, she failed to make plan payments. Just as with her personal circumstances, the weight of the evidence indicates that her financial circumstances unfortunately have *worsened* since the dismissal of the Debtor's 2014 Case. Accordingly, the Court concludes that her financial condition also weighs against extending the stay. Although the Court finds that the Debtor has not met her burden of proving that the Debtor's Current Case has a reasonable probability of success, the Court continues its analysis and next considers the totality of the circumstances in determining whether subjective good faith exists under § 362(c)(3).

b. Was the Filing of the Debtor's Current Case an Abuse of the Bankruptcy Code?

If the Debtor's history of serial filing evinces an underlying scheme with the intent not to pay Cenlar, then the Debtor's motive in filing the Debtor's Current Case was in bad faith. *See In re Galanis*, 334 B.R. 685, 695 (Bankr. D. Utah 2005). Repeated attempts to stall foreclosure

disguised as chapter 13 filings weigh against extending the stay. *See In re Chaney*, 362 B.R. at 694 ("The court needs to determine that the repetitive filing does not violate the spirit of the Bankruptcy Code. The new case must not be a ploy to frustrate creditors. It must represent a sincere effort on the part of the debtor to advance the goals and purposes of chapter 13."). In drafting BAPCPA, Congress intended, *inter alia*, "to stop the 'revolving door' of bankruptcy that permitted repeat and serial filings by consumer debtors." LUNDIN, § 431.4, ¶ 1; *see also* Laura B. Bartell, *Staying the Serial Filer—Interpreting the New Exploding Stay Provisions of § 362(c)(3) of the Bankruptcy Code*, 82 AM. BANKR. L.J. 201, 226 (2008) ("Congress intended a severe punishment for serial filers."). Moreover, a debtor's filing of one or more additional prior cases, above and beyond the single, prior case needed to fall under the auspices of § 362(c)(3), indicates an intent to abuse or manipulate the bankruptcy process. "[A] case involving serial filings always involves weighing the possibility of abuse of the bankruptcy process." *In re Worthy*, No. 10-10027, 2010 Bankr. LEXIS 1592, at *9 (Bankr. E.D. La. May 18, 2010).

Serial filing behavior by a debtor wishing to extend the stay is especially pertinent where that debtor's petitions are all inextricably tied to the obstruction of foreclosure sales. Specifically, "[t]he essential purpose of the new case cannot be to impose the automatic stay in order to delay a foreclosure . . . or other collection activity." *In re Charles*, 334 B.R. at 222. In line with this logic, numerous courts have found bad faith when a serial debtor's history of filings shows that she has time and again filed bankruptcy solely as an effort to obstruct a creditor's ability to foreclose on its secured property. *See, e.g.*, *In re Boates*, No. 05-4353, 2006 U.S. Dist. LEXIS 2256, at *15 (E.D. Pa. Jan. 23, 2006) (affirming a bankruptcy court's decision to annul the stay under § 362(d) due to a based on a finding that the debtor's sole intent in filing was to defeat a foreclosure sale); *GRP Fin. Servs. Corp. v. Olsen (In re Olsen)*, No. 06-66198,

2007 Bankr. LEXIS 614, at *32 (Bankr. N.D. Ga. Jan. 8, 2007) ("Debtor acknowledges that she filed for bankruptcy for the purpose of preventing the foreclosure sale of her home. While this alone does not establish Debtor's bad faith, the absence of any significant effort to effectively reorganize by proposing a confirmable Chapter 13 plan, making regular payments to the Chapter 13 Trustee, or making post-petition mortgage payments to Movant demonstrates Debtor's lack of good faith.").

Cenlar alleges that the Debtor's motive in filing the Debtor's Current Case was solely to stop the scheduled foreclosure sale of the Subject Property, an allegation that the Debtor did not sufficiently dispute at the Hearing. Her testimony that she filed the Debtor's Current Case in good faith is insufficient to prove her motive, especially when the totality of the circumstances contradicts her testimony. The Debtor has been a debtor in three (3) bankruptcy cases involving the Subject Property; all were commenced in close proximity to the date of a foreclosure sale by Cenlar. Indeed, the Debtor's Current Case was filed at 11:47 a.m. on May 27, 2015, less than three (3) hours before the sixth scheduled foreclosure sale of the Subject Property.[27] (Dkt. 11 at ¶ 3, 12).

The Debtor, however, did not act alone in forestalling the foreclosures sales. Rather, she acted in concert with her Husband to stage a series of bankruptcy petitions so that they could each benefit from the operation of the automatic stay in the other's bankruptcy case. This activity has been aptly described by other courts as "tag-teaming." *E.g., In re Selinsky*, 365 B.R. 260, 264 (Bankr. S.D. Fla. 2007). The Debtor and her Husband filed a joint petition for relief on October 1, 2009. The serial filings to stay foreclosure sales began after the Debtor and Husband's 2009 Case was dismissed for nonpayment on December 20, 2010, when the Husband

[27] Alone, the filing of a petition for relief on the eve of a foreclosure sale of property of the debtor does not establish a lack of good faith.

filed a new individual petition on March 23, 2012 to stay a foreclosure sale. The Debtor waited just outside the bankruptcy court until the Husband "tagged" her to replace him in the bankruptcy court after the March 23, 2012 case was dismissed on July 2, 2013. Next, the Debtor "tagged" her Husband to replace her after the dismissal of the Debtor's 2014 Case. The Husband then "tagged" the Debtor again after the *In Rem* Order was entered in the Husband's 2014 Case on March 19, 2015. The "tag-teaming" of the Debtor and her Husband are demonstrated in the chart below:

Petitioner	**Case No.**	**Petition Date**	**Scheduled Date of Foreclosure**	**Resolution**
Debtor and Husband	09-03447-NPO	Oct. 1, 2009	N/A	Dismissed Dec. 20, 2010
Husband	12-01036-NPO	Mar. 23, 2012	unknown	Dismissed June 21, 2012
Husband	12-03964-NPO	Dec. 18, 2012	Dec. 19, 2012	Dismissed July 2, 2013
Debtor	14-00922-NPO	Mar. 17, 2014	Mar. 19, 2014	Dismissed Aug. 8, 2014
Husband	14-03202-NPO	Oct. 6, 2014	Oct. 8, 2014	Pending & Converted to Chapter 7
Debtor	15-01684-NPO	May 27, 2015	May 27, 2015	Pending

A court's analysis of whether to extend a stay under § 362(c)(3) "in a case involving serial filings always involves weighing the possibility of abuse of the bankruptcy process." *In re Worthy*, 2010 Bankr. LEXIS 1592, at *9. The important question under this analysis is whether the Debtor filed the Debtor's Current Case with a genuine intent to repay her debt to Cenlar or, instead, filed it as a means to manipulate the Bankruptcy Code and avoid Cenlar's enforcement of its rights under the Deed of Trust. *See In re Baldassaro*, 338 B.R. at 188-89; *see also In re Kurtzahn*, 337 B.R. at 364; *In re Charles*, 334 B.R. at 217 ("Factors to be considered include whether the debtor truly intends to effectuate rehabilitation and whether the plan evidences an

attempt to abuse the spirit of the Bankruptcy Code.") (citing *In re Ramirez*, 204 F.3d at 600-01; *In re Chaffin*, 816 F.2d at 1073)).

At the Hearing, the Debtor testified that her intent in filing the Debtor's Current Case was to save the Subject Property. As previously stated, the *In Rem* Order had been entered in the Husband's 2014 Case about two (2) months earlier. The Court finds that staying the foreclosure was the sole reason for the filing, and there was no intent by the Debtor to repay Cenlar. As such, the Court finds that the filing of the Debtor's Current Case represents an abuse of the Bankruptcy Code. In considering the totality of the circumstances, additional facts that support this finding are three (3) material inaccuracies in the documents filed in the Debtor's Current Case. Material inaccuracies have been relied upon by numerous courts as indicative of a bad faith filing under § 362(c)(3)(B). *E.g.*, *In re Erevia*, No. 15-80008, 2015 Bankr. LEXIS 496, at *10 (Bankr. S.D. Tex. Feb. 17, 2015) (concluding that the bad faith presumption was not rebutted by relying, in part, on the existence of inaccuracies in the debtor's schedules and financial statements); *In re Landaverde*, No. 06-33438, 2006 Bankr. LEXIS 2071, at *5 (Bankr. S.D. Tex. Aug. 25, 2006) (same); *In re Taylor*, No. 07-31055, 2007 Bankr. LEXIS 1505, at *11-13 (Bankr. E.D. Va. Apr. 26, 2007) (relying in part on inaccuracies in the debtor's schedules, plan and affidavit to reject the debtor's request for a stay extension); *see also In re Carr*, 344 B.R. 776, 781 (Bankr. N.D.W. Va. 2006) (listing whether "the debtor concealed or misrepresented assets and/or sources of income" as an example of behavior that would indicate bad faith under § 362(c)(3)(B)).

The first material inaccuracies are found in the Petition and the Declaration filed in support of the Motion to Extend Stay and relate to the prior bankruptcy filings of the Debtor and her Husband. When asked in the Petition to list all prior bankruptcy cases filed within the last

eight (8) years, the Debtor disclosed the Debtor's 2014 Case but not the Debtor and Husband's 2009 Case. (Dkt. 1). Moreover, when asked in the Petition to list any pending bankruptcy case filed by her spouse, she did not disclose the Husband's 2014 Case. (*Id.*). In the Declaration, the Debtor declares under penalty of perjury that she did not have "any prior cases dismissed in the past year for . . . [f]ailure to perform the terms of a plan confirmed by the Court." (Dkt. 9). As Cenlar points out in its Response, this statement is untrue. The Debtor's 2014 Case was dismissed for failure to make plan payments, a fact the Debtor acknowledged in her Motion to Extend Stay. (Dkt. 9). These inconsistencies are indicative of bad faith.

The second material inaccuracy is the Debtor's indication in her schedules that she was employed on June 21, 2015. However, this assertion is untrue. Assuming that her role as a full-time caregiver of her Husband constitutes employment because of the payment of VA Benefits, she had not received any of those benefits as of the Hearing. Given the significance of a showing of a positive change in circumstances in the analysis of good faith under § 362(c)(3)(B), the Debtor's incorrect assertion that she was, in fact, newly employed is indicative of bad faith.

The third and final material inaccuracy is the Debtor's indication in her schedules that she was receiving VA Benefits of $1,400.00. As of the Hearing, the Debtor's application for those benefits had not been approved. Because she included income she had not been approved to receive, she listed her total monthly income as $3,630.00 when it should have been no more than $2,230.00. By listing $3,630.00, the Debtor increased her current monthly income by roughly 63%. Such a substantial inaccuracy is indicative of bad faith.

c. Summary of the Court's Good Faith Analysis

The Debtor faced an elevated burden to rebut the presumption of bad faith by proving by clear and convincing evidence that she filed the Debtor's Current Case in good faith. The

Debtor's 2014 Case failed due to her inability to make plan payments, but she provided no reason why it failed. Further, she did not show that she had experienced a positive change in either her financial or personal circumstances that would increase the likelihood of her making payments in the Debtor's Current Case. Indeed, it appears that her circumstances, both financial and personal, have substantially worsened, not improved. Yet the plan payments she proposes to make under the Debtor's Current Case ($1,158.00) are more than those under the Debtor's 2014 Case ($965.00). The Court is not unsympathetic to the circumstances of the Debtor and her Husband, but the issue of good faith must be decided on legal principles and the evidence presented at the Hearing.

The Court further finds that the Debtor failed to present clear and convincing evidence that her motive in filing the Debtor's Current Case was one of good faith with respect to all of her creditors, including Cenlar. The evidence indicates that the Debtor commenced the Debtor's Current Case with an intent to frustrate Cenlar by delaying foreclosure, instead of with a desire to "mak[e] an honest effort to repay them to the best of [her] ability." *In re Baldassaro*, 338 B.R. at 188 (citing *In re Sullivan*, 326 B.R. at 212). Ultimately, "where a debtor files a bankruptcy case to prevent a foreclosure after previous chapter 13 cases were unsuccessful, the most significant considerations in evaluating good faith" overlap with those objective considerations already discussed. *See In re Scarborough*, No. 07-15269, 2007 Bankr. LEXIS 3690, at *13 (Bankr. E.D. Pa. Oct. 25, 2007). Accordingly, the Debtor's inability to show any substantial positive change in circumstances further confirms that the Debtor likely intended to use her filing of the Debtor's Current Case as a tool to delay Cenlar's foreclosure right, as opposed to filing with the intent to repay Cenlar. Therefore, the Court finds that her Motion to Extend Stay should be denied and that the automatic stay should terminate upon entry of this Order.

B. Motion to Validate Sale

Section § 362(b)(20) and § 362(d)(4) were added to the Bankruptcy Code by BAPCPA, *inter alia*, to reduce abusive filings.[28] Section 362(b)(20) provides an exception to the operation of the stay as to "any act to enforce any lien against or security interest in real property following entry of the order under [§ 362](d)(4) as to such real property in any prior case under this title for a period of 2 years after the date of the entry of such an order." 11 U.S.C. § 362(b)(20). An order under § 362(d)(4) "grant[s] relief from the stay . . . of an act against real property" of a secured creditor with an interest in that real property if the court determines, *inter alia*, that the filing of the petition was part of a scheme to delay, hinder, or defraud creditors that involved multiple bankruptcy filings affecting such real property. 11 U.S.C. § 362(d)(4). "If recorded in compliance with applicable State laws governing notices of interests or lien in real property," an *in rem* order is "binding in any other case under this title purporting to affect such real property." 11 U.S.C. § 362(d)(4)(*) (hanging paragraph).[29] A debtor may move for relief from an *in rem* order based on changed circumstances in a subsequent bankruptcy case. *Id*.

On March 19, 2015, this Court issued the *In Rem* Order under § 362(d)(4) in the Husband's 2014 Case, lifting the stay with respect to the Subject Property. (Husband's 2014

[28] Section 362(d)(4) was amended by the Bankruptcy Technical Corrections Act of 2010, Pub. L. 111-327, 124 Stat. 3557, to change "and" to "or" in order to establish that only one of the conditions (delay, hinder, or defraud) must exist for the subsection to apply.

[29] The unnumbered paragraph that appears at the end of § 362(d)(4)(B) (known as the "hanging paragraph") provides, in pertinent part:

> If recorded in compliance with applicable State laws governing notices of interests or liens in real property, an order entered under paragraph (4) shall be binding in any other case under this title purporting to affect such real property filed not later than 2 years after the date of the entry of such order by the court.

Id.

Case, Dkt. 40). On May 27, 2015, about two (2) months after the *In Rem* Order was issued, the Debtor filed the Debtor's Current Case. (Dkt. 1). Later that same day, the Subject Property was sold at a foreclosure sale while the initial thirty (30)-day stay in the Debtor's Current Case was still in effect. (Dkt. 26). Cenlar now asks this Court to declare that the *In Rem* Order issued with respect to the Subject Property in the Husband's 2014 Case is valid against the Debtor. Notably, in the Debtor's Current Case, the Debtor did not move for relief from the *In Rem* Order based upon changed circumstances or other grounds.

Section 362(b)(20) prevents the operation of a stay of actions commenced with the purpose of enforcing "any . . . security interest in real property . . . as to such real property." 11 U.S.C. § 362(b)(20). It also prevents the stay of actions with respect to that property "in any prior case under this title." *Id*. Section 362(d)(4) provides that an *in rem* order "with respect to a stay of an act against property" is "binding in any other case under this title purporting to affect such real property." 11 U.S.C. § 362(d)(4). Unlike § 362(b)(20), however, § 362(d)(4) contains a recordation requirement. Neither § 362(b)(20) nor § 362(d)(4) expressly excepts the stay of actions that arises in a subsequent case filed by a different debtor.

Only recently has case law developed adjudicating which debtors are affected by an *in rem* order. *Cf. In re Spencer*, No. 15-11204-13, 2015 Bankr. LEXIS 1668, at *19 (Bankr. W.D. Wis. May 15, 2015) (citing 11 U.S.C. § 362(b)(20)). The Court has not found any reported case issued by a court within the Fifth Circuit that has considered whether an *in rem* order is effective in a subsequent case against a different debtor. Some courts in other jurisdictions have held that an *in rem* order that complies with the recordation requirement under § 362(d)(4) protects specific property from future stays, regardless of who the debtor is in any particular case. *See Alakozai v. Citizens Equity First Credit Union (In re Alakozai)*, 499 B.R. 698, 704 (B.A.P. 9th

Cir. 2013); *Rodriguez v. Murphy*, No. 13-23363-CIV, 2014 WL 1414424, at *4 (S.D. Fla. Apr. 11, 2014). A preliminary question that arises here is whether the *In Rem* Order is binding in the Debtor's Current Case in the absence of evidence that it was recorded by Cenlar. On the recordation issue the following question has been posed by a leading treatise on chapter 13: "Does the reference in § 362(b)(20) to 'entry of the order under subsection (d)(4)' incorporate the condition in the hanging paragraph at the end of § 362(d)(4) that the order must be recorded before it has extended binding effect?" LUNDIN, § 431.1, ¶ 11.

Whether an *in rem* order is effective against a different debtor in a subsequent case and whether the recordation of an *in rem* order under § 362(d)(4) is a requirement under § 362(b)(20) are issues arising out of the ambiguity of the statutes and the confusing interplay between them. Resolution of these issues would require the Court to take the road "less traveled by" when there is an easier path within view. For the reasons stated later in this Order, the Court finds that Cenlar is entitled to a new *in rem* order *nunc pro tunc* with respect to the Subject Property and, thus, is entitled to the alternative relief it requested in the Motion to Validate Sale. The Court does not rule on the effect of the *In Rem* Order entered in the Husband's 2014 Case but ratifies the foreclosure sale for an alternative reason, as discussed below.

C. Motion for *In Rem* Relief *Nunc Pro Tunc*

Section 362(d) authorizes courts to grant relief from the automatic stay "by terminating, annulling, modifying or conditioning" the stay. 11 U.S.C. § 362(d). The Fifth Circuit has held that pursuant to § 362(d), bankruptcy courts have the power to annul the automatic stay "retroactively to the date of the filing of the petition which gave rise to the stay, and thus validate actions taken by the party at a time when he may have been unaware of the existence of the stay." *Sikes v. Global Marine, Inc.*, 881 F.2d 176, 179 (5th Cir. 1989) (quoting another source).

In *Rodriguez*, an analogous case, the court annulled the stay *nunc pro tunc* relief where the effectiveness of an *in rem* order was disputed because of a lack of evidence that the *in rem* order had been properly recorded. *See Rodriguez*, 2014 WL 1414424, at *4 ("[E]ven if the original § 362(d)(4) Order [entered in a previous case not filed by the current debtor] were never recorded, [the bankruptcy court's *nunc pro tunc*] Order [entered in the current debtor's case] newly granted stay relief under § 362(d)(4) and is therefore directly binding on [the current debtor]'s second bankruptcy petition.").

For the reasons previously set forth regarding the denial of the Motion to Extend Stay, the Court finds that the Motion for *In Rem* Relief *Nunc Pro Tunc* should be granted and the stay should be annulled under § 362(d)(4) with respect to the Subject Property retroactively to the date of the filing of the Debtor's Current Case. *See Rushmore Loan Mgmt. Servs., LLC v. Kohar (In re Kohar)*, 525 B.R. 248, 257 (W.D. Penn. 2015) (lifting the stay retroactively and validating a sheriff's sale that occurred post-petition because of the debtor's serial filings and abusive use of the bankruptcy process). The Court further finds that the stay with respect to the co-debtor Husband also should be granted *nunc pro tunc* under § 1301(c)(3). The annulment of the stay validates the foreclosure sale conducted by Cenlar.

Cenlar did not have prior knowledge of the commencement of the Debtor's Current Case, and the frequency and proximity of the previous bankruptcy petitions filed by both the Debtor and her Husband show, *inter alia*, that the Debtor's motivations were improper. The absence of any positive change in her circumstances, her unsubstantiated claims of support in VA Benefits and family contributions, and the inaccuracies outlined above, justify entry of a new *in rem* order in the Debtor's Current Case.

D. Dismissal of the Debtor's Current Case

The Court finds that the Debtor's Current Case should be dismissed for cause. Such cause exists when a bankruptcy petition is filed in bad faith. *In re Beauty*, 42 B.R. 655 (Bankr. E.D. La. 1984). Based upon the totality of the circumstances of the Debtor's Current Case as outlined in the above discussion, including the frequency with which the Debtor has sought bankruptcy relief and her motivations in doing so, the Court concludes that the Debtor's Current Case was filed in bad faith and should be dismissed. *See In re Chaffin*, 836 F.2d at 218; *see also In re Hammers*, 988 F.2d 32 (5th Cir. 1993) ("While the Code does not expressly prescribe for *sua sponte* dismissal or conversion, . . . section 105(a) accommodates such a result."). Moreover, the list of grounds for the dismissal of a chapter 13 case under § 1307(c) includes "unreasonable delay by the debtor that is prejudicial to creditors." Here, Cenlar has been unable to enforce its rights under its Deed of Trust since early 2012 because of the "tag-team" serial filings.

Conclusion

The Court finds that the Debtor has not satisfied her burden of proving by clear and convincing evidence that she filed the Debtor's Current Case in good faith and, accordingly, the Motion to Extend Stay should be denied. Although the Court declines to determine whether the *In Rem* Order filed in the Husband's 2014 Case prevented the operation of the automatic stay in the Debtor's Current Case with respect to the Subject Property, the Court finds that the foreclosure sale should be validated, the Motion for *In Rem* Relief *Nunc Pro Tunc* should be granted, and the Subject Property should be abandoned from the estate. Finally, the Court finds that the Debtor's Current Case should be dismissed.

IT IS, THEREFORE, ORDERED that the Motion to Extend Stay is hereby denied and the automatic stay hereby terminates as to all creditors upon the entry of this Order.

IT IS FURTHER ORDERED that the Motion for *In Rem* Relief *Nunc Pro Tunc* is hereby granted. The automatic stay of § 362 is hereby annulled with respect to the Subject Property, retroactive to the filing of the Debtor's Current Case, and the Subject Property is hereby abandoned from the estate.

IT IS FURTHER ORDERED that the foreclosure sale conducted by Cenlar on the Subject Property is hereby validated.

IT IS FURTHER ORDERED that the Debtor's Current Case is hereby dismissed.

##END OF ORDER##