



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

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: October 24, 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:

**DANNY L. BEW,

DEBTOR.**

**CASE NO. 16-13325-NPO

CHAPTER 13**

**ORDER (1) DENYING MOTION TO EXTEND AUTOMATIC STAY;
(2) DISMISSING BANKRUPTCY CASE; AND (3) IMPOSING FILING BAR**

This matter came before the Court for hearing on October 20, 2016 (the “Hearing”), on the Motion to Extend Automatic Stay (the “Motion”) (Dkt. 5) filed by the debtor, Danny L. Bew (the “Debtor”) and the Response in Opposition to Motion to Extend Automatic Stay (the “Response”) (Dkt. 10) filed by Delta Foundation, Inc. and Sun-Delta Capital Access Center, Inc. (collectively, “Delta”), a creditor in the above-styled chapter 13 bankruptcy case (the “Bankruptcy Case”). At the Hearing, W. Heath Franklin (“Franklin”) represented the Debtor, Sandra Jaribu Hill (“Hill”) represented Delta, and Adam Sanford (“Sanford”) appeared on behalf of Locke D. Barkley, the standing chapter 13 panel trustee (the “Trustee”). After fully considering the matter and being fully advised in the premises, the Court denied the Motion and dismissed the Bankruptcy Case 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 September 24, 2016 (the “Petition”) (Dkt. 1). The Petition constituted the Debtor’s fifth chapter 13 bankruptcy petition since April, 2013. The Debtor previously filed the following bankruptcy cases: (1) Chapter 13 Case No. 13-11494-NPO on April 12, 2013, which was dismissed on May 30, 2013, for failure to timely file documents or to pay the required fees (Case No. 13-11494-NPO, Dkt. 12); (2) Chapter 13 Case No. 13-12276-NPO on June 3, 2013, which was dismissed on June 19, 2013, for failure to timely file documents or to pay required fees (Case No. 13-12276-NPO, Dkt. 10); (3) Chapter 13 Case No. 15-10936-NPO on March 13, 2015, which was dismissed on May 28, 2015, for failure to timely file documents or to pay required fees (Case No. 15-10936-NPO, Dkt. 29); and (4) Chapter 13 Case No. 15-12447-NPO (the “Fourth Bankruptcy Case”) on July 13, 2015, upon the agreement of the Debtor (Case No. 15-12447-NPO, Dkt. 43).

2. The Debtor filed the Motion on September 28, 2016. In the Motion, the Debtor requested that the Court extend the automatic stay pursuant to § 362(a)¹ “as to all creditors.” (Mot. at 1). The Debtor attached the Declaration in Support of Motion to the [*sic*] Extend Automatic Stay Pursuant to 11 U.S.C. § 362(c)(3) (the “Declaration”) (Mot. at 2). In the Declaration, the Debtor provided that he has “had a substantial change in financial or personal

¹ Hereinafter, all code sections refer to the Bankruptcy Code found in title 11 of the U.S. Code unless indicated otherwise.

affairs since the dismissal of the last case, and believe[s] that this case will result in a confirmed plan that will be fully performed.” (Decl. at 1). The Debtor indicated that he now has “[m]ore consistent income from rental properties” and a “roommate” who contributes approximately \$800.00 per month “toward living expenses.” (*Id.*).

3. In the Response, Delta argued that the Motion should be denied. (Resp. at 2). According to the Response, the Debtor filed the Bankruptcy Case “without providing sufficient evidence he has the financial resources to maintain a Chapter 13 Plan or comply with required schedules or deadlines.” (*Id.* at 1). Delta noted that the “alleged additional income” the Debtor alleged in the Declaration “is not sufficient to support the Debtor’s claim that a Chapter 13 Plan will be successfully performed.” (*Id.* at 2). Delta also contended in the Response that the Debtor “has continuously used the Bankruptcy System to avoid foreclosure of a property, known as ‘Southern Whisper’, which is identified as collateral to secure outstanding debts owed to Creditors.” (*Id.* at 2). According to Delta, the Debtor filed the Petition in bad faith, as evidenced by his “excessive bankruptcy filings” that have caused “undue delays and slowed the process allowing others to legitimately file their Chapter 13 Bankruptcy cases.” (*Id.*). In the event that the Court were to grant the Motion, Delta requested that the Court “enter a 60-Day Drop Dead Order Dismissing Debtor’s Chapter 13 bankruptcy case should he fail to timely make Plan payments” as well as impose a 180-day bar on filing a bankruptcy petition. (*Id.* at 2-3).

4. The Debtor filed the Chapter 13 Plan (the “Plan”) (Dkt. 14) on October 11, 2016. The Plan indicates that the Debtor will make sixty (60) monthly payments of \$5,523.00. (Plan at 1).

5. At the Hearing, the Debtor testified that he owns approximately nine (9) rental properties and approximately ten (10) vacant lots. He filed the Petition to halt foreclosure on one

of the rental properties. According to the Debtor, the Fourth Bankruptcy Case was dismissed because he had a heart attack after making a few payments and was unable to continue making payments. The Debtor testified that he can afford to make the \$5,523.00 monthly payments because he now has a roommate contributing \$800.00 per month to the household, he has more steady income from his rental properties, and he recently completed a renovation of another rental property that will increase his income by \$600.00 per month. The Debtor stated that he sent a payment of \$3,000.00 to the Trustee on October 18, 2016.² Upon cross examination by Sanford, the Debtor admitted to having four (4) previous chapter 13 bankruptcy cases, the most recent being the Fourth Bankruptcy Case. The Debtor testified that he and Delta attempted to negotiate a settlement, but they were unable to reach an agreement and he has made no direct payments to Delta since then.

7. Hill argued at the Hearing that the Debtor's financial situation has not changed so as to indicate that he will be able to make his Plan payments. According to Hill, the Debtor has continuously used bankruptcy to avoid foreclosure on one of his rental properties. Delta has scheduled a foreclosure sale on the property several times, but each time the Debtor has filed a petition, halting its efforts. Hill contended that these repeated filings and dismissals indicate a lack of good faith. Additionally, Hill stated that the Debtor owed \$295,809.76 as of the Petition date, and has made no payments to Delta since August 29, 2011.

Discussion

I. Denial of Motion

Generally, § 362 provides for a stay that automatically takes effect upon the filing of a bankruptcy petition. 3 COLLIER ON BANKRUPTCY ¶ 362.01 (16 ed. 2016). "Section 362 provides

² The Debtor's payments are \$5,523.00 per month, meaning the payment he sent to the Trustee was only a partial payment.

for a broad stay of litigation, lien enforcement and other actions, judicial or otherwise, that are attempts to enforce or collect prepetition claims.” *Id.* Section 362(c)(3) 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 one (1) 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 if “there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case . . . or for any other reason to conclude that the later case will not be concluded” 11 U.S.C. § 362(c)(3)(C)(i)(III). The presumption of bad faith arises under the facts of the Bankruptcy Case because there has not been a substantial change in the financial affairs of the Debtor since the Fourth Bankruptcy Case. There is no guarantee that the Debtor will receive \$800.00 per month from his “roommate” because, as he stated at the Hearing, there is no written agreement or contract. Additionally, the Debtor provided no evidence that his rental properties are garnering a more steady monthly income. The Debtor testified that he recently completed renovations on one of his rental properties that will increase his monthly income by \$600.00, but provided no evidence. Accordingly, the presumption of bad faith arises.

In determining whether a debtor has rebutted the presumption of bad faith, courts utilize a totality of the circumstances test. 3 COLLIER ON BANKRUPTCY ¶ 362.01[3][b]. “A debtor who can sufficiently demonstrate changed circumstances or other reasons for success in the present case will likely rebut any bad faith presumption.” *Id.* When the presumption of bad faith arises,

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

the debtor must show by clear and convincing evidence that the current bankruptcy case “is fil[ed] in good faith as to the creditors to be stayed.” 11 U.S.C. § 362(c)(3)(C). This standard requires the Debtor “to present evidence that supports her allegations with a high degree of certainty.” *In re Coley*, Case No. 15-01684-NPO, slip op. at *10 (Bankr. S.D. Miss. Aug. 3, 2015). 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 286, 396 (5th Cir. 2004) (internal quotation marks omitted).

Although the Bankruptcy Code does not define what “good faith” means, the Fifth Circuit Court of Appeals has established a “totality of the circumstances” test for determining good faith in the context of chapter 13 plan proposals. *In re Coley*, Case No. 15-01684-NPO, slip op. at *11. The Fifth Circuit test “exacts an examination of all the facts in order to determine the bona fides of the debtor” and allows for flexibility in analyzing the particular facts and circumstances of the case at bar. *In re Chaffin*, 816 F.2d 1070, 1073 (5th Cir. 1987). There are both objective and subjective facts the Court will consider in applying to totality of the circumstances test. *See In re Charles*, 334 B.R. 207 (Bankr S.D. Tex. 2005). Objective good faith will be determined by examining 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.” *In re Coley*, Case No. 15-01684-NPO, slip op. at *11-12 (citations omitted). “When 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

and have refused to extend the automatic stay. *In re Coley*, Case No. 15-01684-NPO, slip op. at *12 (citing KEITH M. LUNDIN & WILLIAM H. BROWN, CHAPTER 13 BANKRUPTCY 4th ed. § 432.5, ¶ 14 (www.chapter 13online.com)). Subjective good faith, on the other hand, focuses on “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 Coley*, Case No. 15-01684-NPO, slip op. at *12 (citing *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))).

In consideration of both the objective and subjective evidence in the Bankruptcy Case, the Court finds that the totality of the circumstances test indicates the Debtor’s lack of good faith in filing the Bankruptcy Case. As previously mentioned, the Debtor has provided no guarantee that he will receive \$800.00 per month from his roommate, or that he is guaranteed to receive \$600.00 per month in additional income from a recently renovated rental property. Additionally, the Debtor has not demonstrated that he has a more steady income from his rental properties now than he did when his previous four (4) bankruptcy cases failed. The Debtor’s first three (3) chapter 13 bankruptcy cases were dismissed for not filing the required documents or paying his fees. This shows the Debtor’s inability, or unwillingness, to comply with the most basic requirements of the Bankruptcy Code. The Debtor has not put forth any evidence that demonstrates that his situation has improved so that the Plan will be successful, or that he intends to comply with the basic requirements of the Bankruptcy Code. In fact, even though the Debtor testified that he mailed a payment to the Trustee, the payment was not a full payment, evidencing the fact that the Debtor again cannot make his Plan payments. These facts indicate an objective lack of good faith.

The subjective evidence also indicates that the Debtor lacked good faith when he filed the Petition. At the Hearing, Hill stated that Delta has scheduled several foreclosure proceedings in the past and, each time, the Debtor has filed for bankruptcy to avoid the foreclosure. Each of those cases has been dismissed. “Repeated attempts to stall foreclosure disguised as chapter 13 filings weighs against extending the stay.” *In re Coley*, 16-01684-NPO, slip op. at *18-19 (citation omitted). “[N]umerous 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.” *Id.* at *19 (citations omitted). As the Debtor stated at the Hearing, he filed the Petition to avoid the foreclosure on one of his rental properties. The Court finds that this is the Debtor’s fourth attempt to file a bankruptcy petition in order to halt a foreclosure, and that he had no intention of repaying his creditors in any of his previous chapter 13 bankruptcy cases. Again, this is evidenced by the Debtor’s non-compliance with the Bankruptcy Code’s basic requirements.

Further, the Debtor has also made zero payments to Delta since August, 2011. For over five (5) years, the Debtor has avoided foreclosure by filing for bankruptcy and has avoided making any payments to Delta. The Court finds that this subjective evidence indicates that the Debtor has filed at least five (5) bankruptcy cases in order to thwart his creditors’ collection efforts. The Debtor made no progress in his previous four (4) chapter 13 bankruptcy cases, and three (3) of those cases were dismissed for not filing necessary documents or paying the filing fee. This indicates that the Debtor filed those petitions to thwart his creditors and had no intention of making an honest effort to pay his creditors. Had he intended to successfully complete a chapter 13 plan in any of his previous chapter 13 bankruptcy cases, he would have

attempted to comply with the Bankruptcy Code's requirements of filing necessary documents and paying filing fees.

Under the totality of the circumstances test, examining both the objective and subjective evidence, the Court finds that the Debtor did not file the Petition in good faith. He filed the Petition to thwart Delta's efforts to collect and had no intention of repaying his almost \$300,000.00 debt. The Debtor has demonstrated no change in circumstances, or that he intends to successfully complete the Plan in the Bankruptcy Case. Accordingly, the Court finds that the Motion should be denied.

II. Dismissal of Bankruptcy Case

Although § 1307(c) provides that the Court is permitted to dismiss or convert a chapter 13 case for cause "on request of a party in interest or the United States Trustee," § 105(a) gives the Court the power to "issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). "No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process." *Id.*

This Court recently held in *In re Campbell*, Case No. 15-03134-NPO (Dkt. 26), slip op. at *4 (Bankr. S.D. Miss. Nov. 12, 2015), an analogous chapter 7 case, that "overwhelming evidence exist[ed] to dismiss the Bankruptcy Case for cause." The debtor in *In re Campbell* had five (5) bankruptcy cases dismissed for failure to file necessary documents, failure to pay the filing fee, and failure to obtain prepetition credit counseling. *Id.* The Court held that this demonstrated the debtor's status as a serial filer and that her "failure to comply with the basic requirements of the Bankruptcy Code indicate an abuse of the bankruptcy process." *Id.*

In order to prevent an abuse of the bankruptcy process by a debtor who repeatedly files chapter 13 bankruptcy to avail himself of the protections afforded by the Bankruptcy Code while neglecting his duty to comply with bankruptcy law, the Court considers whether to dismiss the Bankruptcy Case *sua sponte*. As the Court held in Section I above, the Debtor did not file the Petition in good faith. He has repeatedly filed for bankruptcy in order to avoid foreclosure based on a debt he has made no payments on for five (5) years. The Debtor has also repeatedly failed to file required documents or pay the necessary filing fee. As this Court has previously held, when a debtor's serial filings evidence "an underlying scheme with the intent not to pay [a creditor]," the Debtor's motive in filing the Bankruptcy Case was in bad faith. *In re Coley*, 15-01684-NPO, slip op. at *18. Based on the Debtor's bad faith filing of the Bankruptcy Case, the Court finds that the Bankruptcy Case should be dismissed.

III. Imposition of Filing Bar

Dismissals are generally without prejudice under § 349(a), but the Court has discretion "to deny the debtor the benefits of the general rule, i.e., to dismiss the case with prejudice. . . ." when there is cause to do so. 3 COLLIER ON BANKRUPTCY ¶ 340.01[1]. Under § 349(a), the Court may dismiss a case and "enter an order prohibiting a debtor from filing a bankruptcy case for some period of time in the future." *In re Weaver*, 307 B.R. 834, 840 (Bankr. S.D. Miss. 2002) (citation omitted); see also *In re Hughes*, 360 B.R. at 208 (imposing a two-year filing bar on a debtor who filed six bankruptcy cases in three years). In addition to § 349(a), § 105(a) provides that the Court may issue any order necessary or appropriate to carry out the provisions of the Bankruptcy Code. The Court may, therefore, fashion a dismissal order with a filing bar.

In *In re Campbell*, the Court imposed a two (2) year filing bar because it found that the debtor's "serial filing and abuse of the bankruptcy system" warranted a dismissal with prejudice.

In re Campbell, Case No. 15-03134-NPO (Dkt. 26), slip op. at *5. The Court held that “[a] simple dismissal has not been sufficient to deter the Debtor from abusing the bankruptcy system.” *Id.* Likewise, the Court finds that a simple dismissal has not been sufficient to deter the Debtor from filing chapter 13 bankruptcy cases to halt foreclosure sales in the past. Dismissals have also not been sufficient to deter the Debtor from filing chapter 13 cases with no intention of filing necessary documents or paying the filing fee. The Debtor has now filed a fifth chapter 13 bankruptcy case, and has shown no indication of improved financial conditions that demonstrate the Bankruptcy Case will be successful, or that he intends to comply with the Bankruptcy Code. The Court has concluded that the Debtor filed the Petition to halt foreclosure and that the Debtor has no intention of repaying his creditors through the Plan. Accordingly, the Court finds that the Bankruptcy Case should be dismissed with prejudice and the Debtor should be barred from filing a bankruptcy petition in any jurisdiction for 180 days from the date of this Order.

IT IS, THEREFORE, ORDERED that the Motion is hereby denied.

IT IS FURTHER ORDERED that the Bankruptcy Case is hereby dismissed.

IT IS FURTHER ORDERED that the Debtor is barred from filing a bankruptcy petition in any jurisdiction for 180 days from the date of this Order.

##END OF ORDER##