

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ENTERED ON DOCKET
MAY 23 2008

IN RE:) CHAPTER 13
)
MARK EVANS PULLEN and)
MARY KAY PULLEN,) CASE NO. 07-65415-MHM
)
Debtors.)

MEMORANDUM OF OPINION REGARDING GOOD FAITH

This case is before the court on remand from the U.S. District Court following the appeal of this court's order entered July 9, 2007. The U.S. District Court remand requires the undersigned to set forth the factual basis for her conclusion that this case was filed in good faith. A brief recapitulation of the procedural path of this case would be helpful.

This case commenced Monday April 2, 2007. A foreclosure sale of Debtors' residence (the "Residence") by Cain Harris ("Harris")¹ was scheduled for Tuesday, April 3, 2007. On April 3, 2007, Harris filed a motion seeking emergency relief from the automatic stay to allow Harris to cry out the foreclosure sale,² and an order was entered that same day, without hearing, that allowed the sale to go forward but prohibiting the creditor from recording the deed or otherwise perfecting the sale without further court order. Such

¹ Harris is represented in this proceeding by his father, Gary Harris, who purchased the judgment and *fi. fa.* against Debtor Mark Pullen ("Pullen") from his former client. On August 1, 2006, Pullen's interest in the Residence was levied upon by the Fulton County Marshal. Pullen's undivided one-half interest in the Residence was sold at auction for \$50,000 to a third party, but, postpetition, Harris has acquired that interest.

² Harris is assignee of a first mortgage against the Residence. Harris purchased the note and security deed and then subordinated his interest in the Residence to the judgment lien held by his father.

modification of the stay was based upon a presumption that because this case was filed within 180 days of the dismissal of a prior case, this case was filed in bad faith. As is evident from the limited relief granted, however, the presumption of bad faith was rebuttable.

Based upon the relief granted in the April 3, 2007 order, the conditional foreclosure sale took place as scheduled. Harris purchased the Residence with a bid of \$56,100. The Residence is valued in the Schedules at \$219,000. A second mortgage exists (subordinate to the judgment and the first mortgage) in the amount of approximately \$90,000.

A motion to annul the stay and to validate the foreclosure sale was filed by Harris April 5, 2007. On April 10, 2007, Debtors filed a motion under §362(c)(3) to continue the automatic stay. Hearings on those motions were held May 1, 2007, May 22, 2007 and June 22, 2007. As a result of those hearings, an order was entered July 9, 2007 (the "Order"), vacating the April 3, 2007 order modifying the stay to allow the foreclosure sale and granting Debtors' motion under §362(c)(3) to extend the automatic stay. The conclusions in the Order were based upon the conclusion that Debtors filed this bankruptcy case in good faith in a legitimate attempt to protect their property and to reorganize. The Order was appealed by Harris, resulting in a remand for the limited purpose of allowing the undersigned to set forth the factual basis for the finding that this case was filed in good faith. The purpose of this memorandum is to set forth that factual basis.

As set forth above, the order on Harris' emergency motion was based, on the limited facts then presented, upon a rebuttable presumption³ that Debtor's case was not filed in good faith. Similarly, under §362(c)(3), when a prior dismissed case was pending during the twelve months immediately preceding the instant case, the termination of automatic stay may be avoided if the debtor can show by clear and convincing evidence that the case was filed in good faith. A determination of good faith is based upon consideration of the totality of the circumstances. *In re Montoya*, 333 B.R. 449 (Bankr. D. Utah 2005); *In re Charles*, 334 B.R. 207 (Bankr. S.D. Tex. 2005); *In re Sarafoglou*, 345 B.R. 19 (Bankr. D. Mass. 2006); *In re Ball*, 336 B.R. 268 (Bankr. M.D. N.C. 2006); *In re Ferguson*, 376 B.R. 109 (Bankr. E.D. Penn. 2007); *In re Thornes*, 2007 WL 5171032 (Bankr. S.D. Ga. 2007) (J. Davis). *But see In re Whitaker*, 342 B.R. 336 (Bankr. S.D. Ga. 2006) (J. Dalis).

Factors to be considered in determining good faith were set forth in *Kitchens v. Georgia Railroad Bank and Trust Co.*, 702 F. 2d 885 (11th Cir. 1983). *See Johnson v. Home State Bank*, 501 U.S. 78 (1991); *Jim Walter Homes, Inc. V. Saylor*, 869 F. 2d 1434 (11th Cir. 1994). Those factors include but are not limited to the following:

- (1) the amount of the debtor's income from all sources;
- (2) the living expenses of the debtor and his dependents;
- (3) the amount of attorney's fees;
- (4) the probable or expected duration of the debtor's Chapter 13 plan;

³ A rebuttable presumption means that the presumption is not conclusive. *John R. Sand & Gravel Company v. U.S.*, 128 S. Ct. 750 (2008).

- (5) the motivations of the debtor and his sincerity in seeking relief under the provisions of Chapter 13;
- (6) the debtor's degree of effort;
- (7) the debtor's ability to earn and the likelihood of fluctuation in his earnings;
- (8) special circumstances such as inordinate medical expense;
- (9) the frequency with which the debtor has sought relief under the Bankruptcy Reform Act and its predecessors;
- (10) the circumstances under which the debtor has contracted his debts and his demonstrated bona fides, or lack of same, in dealings with his creditors;
- (11) the burden which the plan's administration would place on the trustee.

Kitchens, 702 F. 2d 888-9. The relevant timing for the purposes of the issues currently under consideration is the time of the filing of this case. *Ball*, 336 B.R. 268.

This case presents an unusual set of facts because of the occurrences regarding the title to Debtor's Residence. The judgment that apparently precipitated Debtors' flight to bankruptcy was a default judgment,⁴ which was purchased by Gary Harris (Cain Harris' father and lawyer) and executed upon prepetition. In order to execute on the judgment, Cain Harris purchased the first mortgage on the Residence and then subordinated his

⁴ The facts underlying that judgment appear to be concerned with Debtor's consignment sale of a violin valued at \$8,000. The default judgment included an additional \$10,000 in punitive damages and other costs and fees.

interest in the Residence to the judgment lien held by Gary Harris. After the execution on the judgment lien, the threatened foreclosure on the first mortgage precipitated the filing of the instant case. The aggressive pursuit by the Harrises of these Debtors is unusually rancorous.⁵ Debtors, on the other hand, appear passive and depressed and, as a result, even feckless.

Pullen is in the business of making and repairing violins. It does not appear to be a lucrative career. His wife and co-debtor, however, has regular employment as a registered nurse. Debtors' combined income appears to be sufficient to fund a plan. Shortly after filing this case, Debtors presented a plan that may be confirmable. The machinations by the Harris creditors have created some complex legal issues regarding the Residence and Debtors will benefit from the breathing spell afforded to every debtor who desires an opportunity to reorganize and pay debts in an orderly manner. Additionally, Debtors possess a contingent asset, a legal malpractice action against their former attorneys,⁶ which may provide additional assets to fund this case.

As set forth in the Order, Debtor's attorney allowed the immediately prior case to be dismissed in the perhaps erroneous belief that Debtors had no defense to the failure to file pay advices within 45 days of the petition date. Based upon that conclusion, Debtors' attorney undertook no effort to address the other objections to confirmation that were

⁵ The state of title is subject to two adversary proceedings, No. 08-6010, and No. 07-6620.

⁶ Adversary proceeding No. 07-6220.

pending and resulted in the dismissal of the case.⁷ Thus, the dismissal of the prior case occurred as a result of a legal judgment by Debtors' attorney, not as a result of any bad faith conduct by Debtors. Debtors are motivated by a sincere desire to remain in the Residence and reorganize. Debtors may have engaged in bad judgment, but that is true of many debtors in bankruptcy. Debtors have been relentlessly pursued over what was originally a debt of less than \$10,000, but little evidence has been presented that bad faith motivated the filing of this bankruptcy case or any prior case. Debtors deserve an opportunity to propose a confirmable plan.

This the 23rd day of May, 2008.



MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE

⁷ Prior to enactment of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), it was common practice among consumer debtors' attorneys, when problems in a case were encountered, to simply allow the case to be dismissed and then refile. Unfortunately, post-BAPCPA, that behavior has not been entirely eliminated, even though debtors are now confronted with the necessity of overcoming termination of the automatic stay under §362(c)(3) or (4).