

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ENTERED ON DOCKET
FEB 15 2011

IN RE: : CASE NO. 10-86690-JB
: :
WILLIAM KEITH DAVIDSON, :
: : CHAPTER 13
Debtor. : :

ORDER

This Chapter 13 case came before the Court on January 31, 2011 on a motion for relief from stay and a motion to dismiss the case with prejudice filed by CitiMortgage, Inc. ("CitiMortgage") on December 2, 2010 (Docket Nos. 38 and 40).¹ Debtor filed a *pro se* motion to dismiss the case without prejudice, one business day before the scheduled hearing (Docket No. 49). Ashby L. Kent appeared on behalf of CitiMortgage, the debtor appeared *pro se*, and Sonya Buckley appeared on behalf of the Chapter 13 Trustee. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). After hearing arguments by counsel for CitiMortgage and the debtor and reviewing the record in this case, the Court concludes that the case should be dismissed with prejudice, such that debtor is ineligible for and prohibited from filing another bankruptcy case for 180 days from the entry of this Order.

This is debtor's third bankruptcy case filed under Chapter 13. Debtor filed his first Chapter 13 case *pro se*, Case No. 05-92270-JEM. He never filed a Chapter 13

¹ CitiMortgage scheduled the hearing on its motion for relief and motion to dismiss with prejudice for January 11, 2011, but the matters were rescheduled due to inclement weather.

plan or the required Schedules and failed to make any payments to the Chapter 13 Trustee. Debtor filed a second Chapter 13 case, Case No. 09-62833-JB, this time through counsel Wynn Pelham. Again, he failed to file a Chapter 13 plan or the required Schedules and failed to make any payments to the Chapter 13 Trustee. Both cases were dismissed.

Debtor filed the instant Chapter 13 case *pro se* on September 7, 2010. The case came before the Court on for a plan confirmation hearing on November 9, 2010, during which the Court heard objections to confirmation from both the Chapter 13 Trustee and CitiMortgage. The Chapter 13 Trustee asked for a dismissal of the case and stated that debtor failed to make any plan payments to the Chapter 13 Trustee. CitiMortgage objected that the plan failed to address its arrearage claim which was substantial. The Court entered an Order on November 15, 2010, granting debtor through and including November 23, 2010 both to file a confirmable plan providing for the treatment and funding of CitiMortgage and to bring all Chapter 13 plan payments current or dismiss the case.

The Chapter 13 Trustee filed a Status Report on December 8, 2010 stating that debtor failed to comply with the Court's November 15, 2010 Order, as debtor failed to file a confirmable plan and debtor failed to bring his plan payments current. The Report showed that, as of December 8, 2010, debtor remained delinquent in payments due to the Chapter 13 Trustee in the amount of \$2,220.00. Debtor did not dismiss this case on November 23, 2010, but waited to file a motion to dismiss the case without prejudice

until one business day before the January 31, 2011 hearing on CitiMortgage's motion to dismiss the case with prejudice. There is no dispute that this case is ready to be dismissed under 11 U.S.C. § 1307(c)(1), (4), and (5); the only question is whether it should be dismissed with a finding that debtor may not file another bankruptcy proceeding for 180 days.

CitiMortgage argues that debtor's case should be dismissed pursuant to 11 U.S.C. § 109(g)(1) because debtor did not file a confirmable plan or make the payments to the Chapter 13 Trustee as required by the Court's November 15, 2010 Order. CitiMortgage also maintains that debtor is thirty (30) months in arrears with an arrearage in excess of \$48,000.00. CitiMortgage contends that debtor filed this case in bad faith which is evidenced by debtor's multiple bankruptcy filings and state court litigation. Debtor filed an adversary proceeding in Bankruptcy Court styled William Keith Davidson v. CitiMortgage, Inc. s/b/m ABN Amro Mortgage Group, Inc. and Federal Home Loan Mortgage Corporation, A.P. No. 10-6569-JB, which raises claims identical to the claims asserted by the debtor against CitiMortgage in a case pending in the Superior Court of Fulton County, William K. Davidson v. CitiMortgage, Inc., Civil Action No. 2010CV182707 ("Superior Court Action").² Significantly, the Superior Court entered an order on October 14, 2010 dismissing debtor's claims in the Superior Court Action with prejudice.

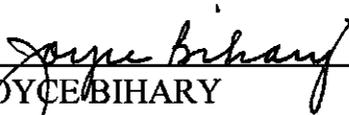
² Debtor initially filed the state court action in the Superior Court of Gwinnett County on January 29, 2009. William K. Davidson v. CitiMortgage, Inc., sbm ABN Amro Mortgage Group, Inc., McCurdy & Candler, LLC, & John Doe(s), Civil Action No. 09-A00884-8. The case was transferred to the Superior Court of DeKalb County and then to the Superior Court of Fulton County.

Under the facts and circumstances of this case, the Court finds that good cause exists for a dismissal of this case under 11 U.S.C. §§ 109(g)(1) and 349(a). Section 109(g)(1) makes an individual ineligible for filing a bankruptcy case if the debtor had a pending bankruptcy case within the preceding 180 days and the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case. Debtor failed to file a proper plan or make payments to the Chapter 13 Trustee and he has not properly prosecuted this third Chapter 13 case. Section 349(a) gives a bankruptcy court discretion to enter an order of dismissal with prejudice or one that prohibits a subsequent refiling. 3 COLLIER ON BANKRUPTCY ¶ 349.02[2] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2010). Dismissal for cause pursuant to § 349(a) may apply in conjunction with § 109(g)(1) and is warranted where a debtor fails to properly prosecute multiple Chapter 13 bankruptcy cases, by failing to make plan payments or otherwise failing to conform to the requirements of Chapter 13 in a manner that is prejudicial to creditors. *See In re Duruji*, 287 B.R. 710, 713-14 (Bankr. S.D. Ohio 2003); *In re Palmer*, 2006 WL 6591599, at *3 (Bankr. N.D. Ga. May 15, 2006). In addition to three Chapter 13 filings with no payments to the Chapter 13 Trustee, this case and debtor's most immediate prior case were filed on the day of scheduled hearings in the Superior Court Action. The debtor has not shown any intent to pay creditors in his Chapter 13 cases, and CitiMortgage has demonstrated cause to dismiss this case with a prohibition against refiling for 180 days.

In accordance with the above reasoning, CitiMortgage's motion to dismiss

this case with prejudice is GRANTED, and debtor is not eligible to file another bankruptcy case for 180 days from the entry of this Order.

IT IS SO ORDERED, this 14th day of February, 2011.



JOYCE BIARY
UNITED STATES BANKRUPTCY JUDGE

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