

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE: _____ || CASE NO. 06-62439
Roy Lee Palmer,
CHAPTER 13
Debtor. JUDGE MASSEY
_____ ||

ORDER GRANTING MOTION OF SELECT PORTFOLIO SERVICING, INC. TO DISMISS

This is Roy Palmer's fourth bankruptcy case since March 2000. The Court takes judicial notice of the record in each of these cases. During the pendency of these cases, Mr. Palmer has essentially sought to avoid a foreclosure on his residence located at 3522 Stanford Cir., Decatur, Georgia (the "Property") by Select Portfolio Servicing, Inc., which until recently was known as Fairbanks Capital Corporation.

In the first case, filed under case no. 00-64007, Mr. Palmer was represented by an attorney. During that case, Fairbanks and Debtor engaged in extensive (as compared to the average Chapter 13 case) litigation over its effort to obtain relief from the automatic stay. On December 2, 2004, Mr. Palmer received a discharge in that case, and it was closed in early 2005.

Mr. Palmer filed the second case, which was assigned case no. 05-68108, on May 2, 2005 and was represented by counsel. In Schedule D filed in that case, Mr. Palmer swore that he was indebted to Fairbanks Capital Corporation in the amount of \$125,000 and that there was an unsecured portion of the claim in the amount of \$15,000 as unsecured, based on his valuation of the Property in the amount of \$110,000. The Chapter 13 Trustee objected to confirmation of his proposed plan on several grounds, and that case was dismissed on July 7, 2005. Select Portfolio filed a proof of claim in that case, to which Debtor interposed no objection, asserting that the

prepetition arrearage was over \$30,000. The Trustee's final report in that case shows that Mr. Palmer paid the Trustee only \$234, which was refunded to him when the case was dismissed.

Mr. Palmer represented himself in his third case, case no. 05-98154, filed under Chapter 7 on October 13, 2005. In that case, he valued the Property at \$98,000 and indicated that there was a secured claim in the amount \$135,000. Select Portfolio Servicing Inc. filed a motion for relief from stay in November 2005. Judge Bonapfel, to whom that case had been assigned, held a hearing on the lender's motion on December 6, 2005. The Court granted the motion in an order on December 16, 2005, in which the Court indicated that Mr. Palmer had been heard.

The Chapter 7 case was then reassigned to me. Mr. Palmer received a discharge in that case in an order entered on March 6, 2006. On March 3, 2006, Mr. Palmer filed a motion seeking a temporary restraining order in an effort to prevent Select Portfolio Servicing, Inc. from foreclosing on the Property. The Court denied that motion in an Order entered on March 7, 2006, on the ground that the prior decision of the court lifting the automatic stay finally decided the dispute between the parties as to the stay and could not be relitigated.

The Court did not realize at the time it considered the motion for a temporary restraining order that Mr. Palmer had filed this current case under Chapter 13 on March 3, 2006. Both the Chapter 13 Trustee and Select Portfolio Servicing, Inc. moved to dismiss this case, and the Court held a hearing on the motions on May 10, 2006. At that hearing, Mr. Palmer raised the issue that the lender had not given him proper credit for payments made on the loan secured by the Property. Select Portfolio's motion to dismiss seeks dismissal with prejudice so as to prevent Mr. Palmer from being eligible to file still another case on the ground that the filing of this case was in bad faith. This Court agrees.

In the Order entered in case no. 05-98154 on March 7, 2006, denying Mr. Palmer's motion for a temporary restraining order, the Court stated:

As a general rule, courts will not permit parties to relitigate issues that have previously been litigated or could have been litigated on the same cause of action. This is a rule of judicial economy. If every litigant dissatisfied with an order or judgment could avoid its effect simply by starting the litigation over, there would never be an end to litigation, and courts could not function. The legal doctrine that prevents relitigation of claims is called "res judicata."

Res judicata is frequently used to refer generically to the law of former adjudication. A former judgment can create two different types of bars to subsequent litigation, depending on whether the subsequent litigation arises from the same or a different cause of action. If the later litigation arises from the same cause of action, then the judgment bars litigation not only of "every matter which was actually offered and received to sustain the demand, but also [of] every [claim] which might have been presented." *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 319, 47 S.Ct. 600, 602, 71 L.Ed. 1069 (1927).

In re Justice Oaks II, Ltd., 898 F.2d 1544, 1550 (Fn.3) (11th Cir. 1990). The December 16, 2005 Order lifting the stay to permit Respondent to foreclose involved the issue of whether there was cause for stay relief. See 11 U.S.C. § 362(d)(1), which provides:

On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

Respondent's motion alleged that Debtors were in arrears on their obligations in an amount exceeding \$34,000. Debtors do not contend in their motion that the payments made during their prior Chapter 13 case brought the arrearage current. But even if they now made such a contention, they had to have raised it at the December 6, 2005 hearing. They cannot raise it now. Similarly, the fact that the Court recognized a dispute between Debtors and their mortgagee in a prior case does not change the fact that Debtors had to raise any issue concerning Respondent's contentions that they were in arrears at the December 6 hearing.

Order entered March 7, 2006 in case no. 05-98154, p. 2. That reasoning applies here as well.

Even though Select Portfolio has chosen to move for dismissal as opposed to relief from stay, the

issue of whether there is cause for stay relief has been litigated and binds Debtor. In moving to dismiss, Select Portfolio is in effect asking for stay relief because this case is nothing more than a one-on-one contest between it and Mr. Palmer.

The Trustee seeks dismissal because Mr. Palmer failed to attend the meeting of creditors and has not paid any amount to the Trustee with respect to the plan. The first plan payment was due 30 days after this case was filed. 11 U.S.C. § 1326(a)(1) Mr. Palmer did not contest that he has made no plan payments but contends that he did not receive the notice of the meeting of creditors. The Court does not believe Mr. Palmer. He has been a debtor in three earlier cases and had ample time to determine when the meeting of creditors would be held.

The Court concludes that by filing this case while his prior case was still pending, by attempting to raise an issue in this case that was effectively adjudicated in the prior case, by failing to make plan payments when due, and by failing to attend the meeting of creditors, Mr. Palmer has failed to come before the Court in proper prosecution of this case within the meaning of section 109(g)(1) of the Bankruptcy Code. In addition, the Court holds that Mr. Palmer did not file this case in good faith, permitting the Court to dismiss with prejudice pursuant to section 349(a) of the Bankruptcy Code. The lack of good faith is demonstrated by Mr. Palmer's failure to comply with his duties as a debtor in a Chapter 13 case as outlined above and by the fact that Mr. Palmer has been a debtor almost continuously for the past five years without his curing the default on this loan. *See In re Kitchens*, 702 F.2d 885, 889 (11th Cir. 1983).

For these reasons, it is

ORDERED that the motions of the Trustee to dismiss the case and the motion of Select Portfolio Services, Inc. to dismiss this case with prejudice are granted. Debtor is ineligible to be a debtor in a case under title 11 of the United States Code until 180 days after the entry of this Order.

Dated: May 12, 2006.


JAMES E. MASSEY
U.S. BANKRUPTCY JUDGE