

IT IS ORDERED as set forth below:

Date: April 28, 2014



Wendy L. Hagenau

Wendy L. Hagenau
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:)	CASE NO. 14-50559-WLH
)	
NICHOLAS JOSEPH BURROUGHS,)	CHAPTER 13
)	
Debtor.)	JUDGE WENDY L. HAGENAU
)	

ORDER DISMISSING CASE WITH 180-DAY BAR TO REFILING

This matter came before the Court on the Motion of The Bank of New York/Mellon (“Movant”) to Dismiss or, in the Alternative, to Strike Redundant, Impertinent, and Scandalous Matters and to Shorten Time for Hearing [Docket No. 45]. The hearing was held on April 23, 2014. Danielle Hudson appeared on behalf of the Movant, and Mr. Burroughs appeared individually. After hearing from both parties, and a review of the docket in this and the Debtor’s four prior cases, the Court rules as follows.

The Debtor has a history of filing bankruptcy cases. He filed this, his fifth, bankruptcy case on January 7, 2014. The purpose of the Debtor’s bankruptcy case, by his own description, is to continue a dispute with The Bank of New York/Mellon over the foreclosure of his home.

The Debtor's first bankruptcy case was filed on May 29, 2009 as a Chapter 7. The Debtor was represented by counsel in that case and received a discharge. The Debtor's next case was filed on December 6, 2011 as a *pro se* Chapter 13. The Debtor never paid a filing fee, never filed a plan, and never filed any schedules. This case was dismissed on February 1, 2012. Within the following year, the Debtor filed his third case on January 2, 2013, also as a *pro se* Chapter 13 case. This time the Debtor paid the filing fee, but again no plan was filed, and no payments were ever made to the Chapter 13 Trustee. The Court temporarily extended the automatic stay pursuant to 11 U.S.C. § 362(c)(3) to allow for further hearing, but the Debtor's motion to permanently extend the stay was denied. The case was dismissed on April 4, 2013 when confirmation was denied.

Only three months later, the Debtor filed his fourth Chapter 13 case on July 2, 2013, also *pro se*. The Court granted the Debtor's request for an extension of time to file his plan and schedules, but they were still not filed timely. Ultimately, the Debtor filed a plan in September 2013, but the plan proposed to pay \$0 and identified no creditors to be paid. The Court dismissed the Debtor's motion to impose the stay under 11 U.S.C. § 362(c)(4) for lack of prosecution of the motion. The Court then denied the Debtor's motion to vacate the dismissal of the motion to impose the stay. The Court found there was no likelihood the Debtor could succeed on the motion to impose the stay because (i) there was a presumption the case was filed in bad faith, (ii) there was no substantial change in the financial or personal affairs of the Debtor since the dismissal of the prior case, and (iii) there was no reason to conclude that the later case would be successful, particularly since the plan proposed to pay \$0 and did not treat Movant at all. This case was dismissed on October 10, 2013.

Finally, the Debtor filed the present case on January 7, 2014, also *pro se*. Because this was the Debtor's third case pending within the year, the automatic stay did not go into effect

under 11 U.S.C. § 362(c)(4). Consequently, Movant conducted the foreclosure sale of the Debtor's home on January 7, 2014. The Debtor filed a motion to impose the automatic stay in this case on the filing date, but no hearing was conducted or order entered prior to the foreclosure. After a hearing on February 5, 2014, the Court denied the motion because, again, there was no change in the personal or financial circumstances of the Debtor and no reason to conclude this case would be successful. The foreclosure had already occurred and the home the Debtor hoped to save was not property of the estate. The Debtor filed a plan in this case, proposing to pay \$100 a month to the Trustee, but the Debtor proposed to pay unsecured creditors only 0.01% (of which Movant is one). The Debtor proposed to pay SunTrust, which apparently holds a line of credit, \$50.00 a month. The Debtor filed a 120-page complaint against Movant and others on April 17, 2014, alleging fraud and seeking to set aside the foreclosure. The Debtor informed the Court he had filed the same complaint in the U.S. District Court (Case No. 1:14-cv-1129-JEC-GGB) and in the superior court.

The Trustee reported that the Debtor appeared at the originally scheduled 341 meeting, but no plan or schedules had been filed so the meeting was continued. The Debtor did not attend the rescheduled 341 meeting. The Trustee stated the plan is not confirmable and not administrable by the Chapter 13 Trustee. Movant seeks to dismiss the case and asks the Court to prohibit the Debtor from re-filing a bankruptcy case for a period of 180 days. The Trustee has pending a separate motion to dismiss with prejudice, which has not yet been heard.

The Movant asked the Court to dismiss the case with prejudice, prohibiting the Debtor from being a debtor under the Bankruptcy Code for 180 days under 11 U.S.C. § 109(g). This section provides that "... no individual ... may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if – ... 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”.

Additional grounds for dismissal “with prejudice” exist under 11 U.S.C. § 349(a) and § 105. Section 349(a) provides as follows:

Unless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed; nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(g) of this title.

This Section permits the Court “for cause” to dismiss a case with prejudice. “With prejudice” in this context means either barring the discharge of certain debts or limiting the debtor’s authority to file a bankruptcy petition for a certain time period or both. “[A] number of cases support the authority of the bankruptcy court to dismiss a debtor’s case with prejudice to future filings that extends beyond 180 days, among other remedies.” Dietrich v. Knob-Hill Stadium Properties, 2007 WL 579547 (6th Cir. Feb. 15, 2007) (cites omitted). Additionally, Section 105(a) of the Bankruptcy Code provides, “The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.”

Courts have found cause to prohibit future bankruptcy filings by a debtor where the debtor filed or pursued a bankruptcy case in bad faith. In re Leavitt, 171 F.3d 1219 (9th Cir. 1999); In re Tornheim, 239 B.R. 677 (Bankr. E.D. N.Y. 1999). “A lack of good faith exists when a debtor files a petition without intending to perform the statutory obligations required by the Bankruptcy Code or when a debtor’s conduct constitutes an abuse of the bankruptcy process.” In re Brown, 319 B.R. 691, 693 (Bankr. M.D. Ala. 2005) (cites omitted). Grounds for relief also exist if the debtor has violated a court order. Dietrich, 2007 WL 579547. Under any construction, the courts assess the totality of the circumstances in deciding whether cause exists to bar the refiling of a bankruptcy case. Courts consider such factors as whether the debtor

misrepresented facts, the debtor's history of filings and dismissals, whether the debtor only intended to defeat outside litigation, and whether the debtor's behavior is egregious. In re Leavitt, 171 F.3d at 1224.

The Court finds that, based upon the record as a whole, cause exists to dismiss this case and bar the Debtor's refiling of a Chapter 13 petition for 180 days. The Debtor has failed to properly prosecute this case and the three prior Chapter 13 cases. Specifically, the Debtor has failed to attend his 341 hearing and has failed to file a plan which can be properly administered by the Chapter 13 Trustee. Moreover, the Debtor has filed this case for no bankruptcy reason. The Debtor made clear that his purpose in filing this bankruptcy case was to facilitate the filing of an adversary proceeding against Bank of America and The Bank of New York/Mellon and others which is now pending before the Court in Adversary No. 14-5117. The Debtor reports he has filed a similar cause of action with the U.S. District Court and with the Georgia Superior Court. It is the Debtor's desire to have the foreclosure set aside. It is clear to the Court that the Debtor has no intent of prosecuting a Chapter 13 bankruptcy case or reorganizing any debts until there is a resolution of his complaint regarding the foreclosure of his home. As the Court explained to the Debtor, if the Debtor is successful in having the foreclosure set aside, bankruptcy may provide a proper alternative for repayment of the debt due and owing to the holder of the security interest in the home. Until that time, though, there is no debt to reorganize and there is no property of the estate to be protected. The bankruptcy court is not the proper place for the litigation of these issues as their outcome will have no effect on property of the estate or the Debtor's ability to reorganize. Moreover, the Debtor has filed these cases in other proper venues where the issues may be resolved.

While the Court believes the Debtor is earnest in his belief in his allegations, and the Debtor is entitled to his day in court to have those allegations resolved, the bankruptcy court is

not the proper forum for the litigation of those issues, and continual filing of skeletal plans and petitions with no intention of actually completing a Chapter 13 plan is simply an abuse of the process. As a result, it is hereby

ORDERED that this bankruptcy case is DISMISSED and the Debtor is prohibited from filing a Chapter 13 case for 180 days unless such case is filed with counsel.

Movant's Motion also requested that the Court strike certain "redundant, impertinent, and scandalous matters". The Court declines to do so. The fact that Movant disagrees with the allegations made by the Debtor does not make them "redundant, impertinent, or scandalous".

END OF ORDER

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