

SO ORDERED.

SIGNED this 2nd day of March, 2015.



*Catharine R Aron*

UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT  
MIDDLE DISTRICT OF NORTH CAROLINA  
WINSTON-SALEM DIVISION

In re:

WILLIAM SYLVESTER SCIPIO

Debtor.

Case No. 15-50110

**ORDER**

THIS MATTER came on for hearing on February 23, 2015, in Winston-Salem, North Carolina upon a motion by William Scipio (the “Debtor”) to impose the stay pursuant to 11 U.S.C. § 362(c)(4)(B). Donald Buie appeared on behalf of the Debtor, Craig Haskell appeared on behalf of State Employees’ Credit Union (the “Creditor”), Kathryn Bringle appeared on behalf of the Chapter 13 Trustee’s Office (the “Trustee”), and Robert Price appeared on behalf of the Office of the Bankruptcy Administrator. After considering the documents on the record, the testimony presented, and the arguments of counsel, the Court concludes that the Debtor’s motion should be denied.

**Background**

The Debtor filed three petitions under Chapter 13 in the past year. The Debtor first filed for bankruptcy on June 9, 2014, and was dismissed on July 25, 2014, pursuant to 11 U.S.C. §

521(i) for failure to file all of the required information under § 521(a)(1). The Debtor retained counsel after he filed his petition but before his case was dismissed. The second case was filed on August 19, 2014, and was voluntarily dismissed by the Debtor on November 25, 2014. The first two petitions were nearly identical. In his schedules, the Debtor listed that he owned real property worth \$37,400.00 and personal property worth \$3,200.00. The Debtor only listed one liability: a debt owed to the Creditor secured by his real property. His schedules listed two sources of income, Social Security disability income and contributions from his brother, for a total of \$1,449.00. The Debtor's expenses were listed at \$855.00, leaving a monthly net income of \$594.00. Despite having available net income, the Debtor made only one payment to the Trustee in each of his first two cases.

The present case was filed on February 10, 2015. The figures listed in the Debtor's schedules for the third case were mostly the same from his previous cases with the exception of his income and expenses. For his income, the Debtor listed his Social Security disability income, an increase in contributions from his brother, and rent from a boarder for a total of \$1,740.00. Even though his expenses were higher, listed at \$991.50, the Debtor's monthly net income increased to \$748.50. As in the previous two cases, the Debtor listed only one liability: the debt owed to the Creditor secured by his real property. As of the hearing date, the Debtor made no payments to the Trustee.

The most significant asset listed by the Debtor in all three cases is a piece of real estate. The Debtor and his brother each inherited a one-half interest in a house located at 2120 Kentucky Circle, Lumberton, North Carolina ("the Property") from their mother after she passed away in 2009. Since his mother passed away, the Debtor has not resided at the Property. Instead, the Debtor's brother uses the Property as his home. The Creditor holds a deed of trust on the

Property that secures an equity line of credit issued to the deceased mother. Although some payments were sent to the Creditor after her passing, no payments have been received by the Creditor for the Property since December 2010. The Debtor listed the Creditor as a secured in his schedules in all three cases, but the Debtor has not assumed his mother's obligations.

### **Discussion**

Generally, the filing of a petition imposes a stay on “any act to obtain possession of property of the estate.” 11 U.S.C. § 362(a)(3). However, when a party files more than two cases within a single year, “the stay under subsection (a) shall not go into effect upon the filing of the later case.” 11 U.S.C. § 362(c)(4)(A)(i). A court may impose the stay in the later case but “only if the party in interest demonstrates that the filing of the later case is in good faith as the creditors to be stayed.” 11 U.S.C. § 362(c)(4)(B). A repeat filer seeking to impose the stay must overcome a presumption that the later petition was not filed in good faith by clear and convincing evidence. 11 U.S.C. § 362(c)(4)(D)(i)(I). The standard of clear and convincing evidence is an intermediate standard of proof that has been defined as “highly probable.” *Direx Israel, Ltd. v. Breakthrough Medical Corp.*, 952 F.2d 802, 819 n. 7 (4th Cir. 1991) (quoting 9 J. Wigmore Evidence § 2498 (3d ed. 1940)).

Section 362(c) does not define good faith, leaving courts to develop various definitions and factors to effectuate its meaning. The Fourth Circuit, in defining good faith under § 1325(a)(3), developed a totality of the circumstances test to consider whether there has been “an abuse of the provisions, purpose, or spirit of [the Chapter].” *Neufeld v. Freeman*, 794 F.2d 149, 152 (4th Cir. 1986) (quoting *Deans v. O'Donnell*, 692 F.2d 968, 972 (4th Cir. 1982)). In order to apply *Neufeld* to § 362(c), this Court has utilized the seven-factor test from *In re Galanis*, 334 B.R. 685, 693 (Bankr. D. Utah 2005). *In re Havner*, 336 B.R. 98, 103 (Bankr. M.D.N.C. 2006).

*Cf. In re Mullins*, 2006 WL 2571027, at \*2 (Bankr. M.D.N.C. September 1, 2006) (applying the seven-factor *Galanis* test to § 362(c)(4)). The seven factors are as follows:

1) the timing of the petition; 2) how the debt(s) arose; 3) the debtor's motive in filing the petition; 4) how the debtor's actions affected creditors; 5) why the debtor's prior case was dismissed; 6) the likelihood that the debtor will have a steady income throughout the bankruptcy case, and will be able to properly fund a plan; and 7) whether the Trustee or creditors object to the debtor's motion.

*Galanis*, 334 B.R. at 693. No one factor is dispositive; instead, each factor should be considered together. *Havner*, 336 B.R. at 105.

The first factor considers the timing of the Debtor's petition. Bad faith can be demonstrated by a debtor who allows his debt to accumulate because "creditors often incur substantial costs in trying to enforce their rights and collect the debts owed to them." *Havner*, 336 B.R. at 104. The Debtor testified that he filed his three petitions to forestall the Creditor's foreclosure proceedings. While the Creditor was incurring substantial costs in pursuing foreclosure, the Debtor caused the debt to increase by not make any of the monthly payments on the debt. The timing of the Debtor's petition signals bad faith.

The second factor considers how the debt first arose. Debts that arose from luxury spending are viewed differently than debts from medical emergencies. *Galanis*, 334 B.R. at 695. The debt in the present case arose due to the Debtor's mother taking out an equity line of credit on the Property. Because the origin of the present debt is not attributable to the Debtor, this factor does not impact this Court's analysis.

The third factor considers the Debtor's motivation in filing his present case. The Debtor testified that he filed the third petition to save the Property from foreclosure. Despite the Debtor's questionable ability to actually repay debts through a Chapter 13 plan, this Court concludes that the Debtor's motivation in saving the Property from entering foreclosure was

sincere and genuine. *See In re Snipes*, 314 B.R. 898, 902 (Bankr. S.D. Ga. 2004) (“Utilization of Chapter 13 relief to save one’s home is clearly a common and valid reason for filing and not the type of action that, standing alone, evidences bad faith.”) Accordingly, this factor weighs for the Debtor.

The fourth factor considers how creditors are affected by the Debtor’s actions. There is one significant creditor in this case.<sup>1</sup> The Creditor is owed approximately \$11,832.00 and has not received payment since December 2012. The Creditor accumulated attorney fees and other costs associated with initiating two foreclosure proceedings, both of which were stopped by the Debtor’s repeated bankruptcy filings. The practical effect of the Debtor’s actions is that his brother has received the benefit of living in the Property without having to pay anything to the Creditor. This factor weighs against the Debtor.

The fifth factor considers the reasons for dismissal of the previous cases. The Debtor’s first case was dismissed pursuant to § 521(i) for failing to file all of the required documents. While the Debtor filed the case without the benefit of an attorney, he retained counsel with enough time to file the required documents. The Debtor testified that he was not aware of what documents were missing and that he was unfamiliar with bankruptcy before his first case. In light of the Debtor’s testimony, this Court is disinclined to consider the circumstances of the first case against the Debtor. *See Galanis*, 334 B.R. at 696 (finding that the circumstances of the debtors’ previous case indicate good faith where it was dismissed because the debtors’ attorney failed to file a response to a motion to dismiss despite the debtors’ repeated requests). Unlike the first case, the circumstances leading to the dismissal of the second case were within the Debtor’s

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<sup>1</sup> While not included in his schedules, two other creditors filed proofs of claim in the Debtor’s three cases. The Robeson County Tax Collector filed a proof of claim for property taxes stemming from the Property in the amount of \$4,669.90. Atlas Acquisitions LLC filed a proof of claim for telecommunication services in the amount of \$107.48. No testimony was presented at the hearing regarding these two claims, and so these claims will not be addressed here.

control. The second case was voluntarily dismissed by the Debtor. The Debtor testified that he panicked after he fell behind in his payments to the Trustee, leading him to voluntarily dismiss his case so that he could file a third time. Although the circumstances of his previous cases are mixed, because he is attempting to get a third bite at the apple this factor weighs against the Debtor.

The sixth factor considers whether the Debtor could fund a Chapter 13 plan through steady income. The Debtor consistently receives \$1,090.00 every month in Social Security disability benefits, but his other two sources of income are speculative and uncertain. The Debtor claims to receive \$400.00 a month from his brother. However, the Debtor testified that he and his brother tried to come up with some amount of money to make a payment to the Trustee in the present case but that they could not find any money to do so. The present case does not appear to be any different than the previous two cases in which the Debtor made a total of only two payments to the Trustee spread out over roughly five months. Ordinarily, when a debtor's income is significantly dependent on the goodwill of outside individuals, the stability of the income is questionable. In this case, the Debtor's inability to make payments to the Trustee sows considerable doubt on the steadiness of his income. Furthermore, the recent addition of rental income in the amount of \$250.00 is problematic. No evidence has been submitted regarding the length of the boarder's stay or the consistency of the boarder's payments. Without any additional information about the rental income and in light of the Debtor's difficulty in paying the Trustee, this Court cannot accept that the Debtor will reliably receive \$250.00 every month in rental income. Therefore, due to the unsteadiness of the Debtor's income and his past difficulties in making payments to the Trustee, the sixth factor weighs heavily against the Debtor.

The seventh factor considers whether the Trustee or any creditor objected to imposing the stay. The Trustee, the Creditor, and the Bankruptcy Administrator all objected to the Debtor's motion. The seventh factor weighs against the Debtor.

In addition to the seven factors listed above, the Debtor's unique situation warrants consideration into the nature of his supposed debt. In interpreting the provisions, purpose, and spirit of Chapter 13 the Fourth Circuit has stated that it provides "the ability to reorganize one's financial life and pay off debts." *Branigan v. Bateman (In re Bateman)*, 515 F.3d 272, 283 (4th Cir. 2008). The Debtor listed the Creditor as secured for \$37,400.00, but this debt does not belong to the Debtor. The debt was incurred by his deceased mother who took out an equity line of credit. There has been no evidence or testimony presented that the Debtor is personally liable for this debt. While it is true that the Debtor owns a one-half interest in the Property and therefore has an interest in salvaging what equity exists in it, the Debtor has no need of financial reorganization. To impose the stay in this case would run afoul of the purpose and spirit of Chapter 13.

### **Conclusion**

Therefore, based on the totality of the circumstances, this Court finds that the debtor did not present sufficient evidence to rebut the presumption that he filed his petition in bad faith pursuant to § 362(c)(4).

Based on the foregoing, the Debtor's motion to impose the stay is denied.

END OF DOCUMENT

## **SERVICE LIST**

ALL PARTIES OF RECORD AS OF THE DATE OF THE ORDER SHALL BE SERVED BY  
THE BANKRUPTCY NOTICING CENTER