

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

<b>In re:</b>	)	
	)	
	)	
<b>James Marvin Jones and</b>	)	<b>Case No. 06-51316-13</b>
<b>Tammy Skipper Jones,</b>	)	
	)	
<b>Debtors.</b>	)	
	)	

**ORDER DENYING MOTION FOR AUTOMATIC STAY**

This matter came before the Court for hearing on October 25, 2006 upon the Debtors' Motion to Impose the Automatic Stay. At the hearing, William V. Bost appeared on behalf of the Debtors, Matthew T. McKee appeared on behalf of GMAC Mortgage Corporation ("GMAC"), and Kathryn Bringle appeared in her capacity as the Chapter 13 Trustee. Based upon a review of the Motion, the evidence presented at the hearing, and the entire official file, this Court hereby makes the following findings of fact and conclusions of law:

**FACTS**

The Debtors filed a petition for relief under Chapter 13 of the Bankruptcy Code on September 29, 2006. On Schedule A of their petition, the Debtors listed real property consisting of a doublewide manufactured home and six-acre lot located in Lexington, North Carolina with an approximate value of \$82,000.00. GMAC holds a first mortgage on the property in the amount of \$89,318.00. Pursuant to the terms of the mortgage, the Debtors are required to make payments of approximately \$840.00 per month. In addition to these regular monthly payments, GMAC has filed a claim for a mortgage arrearage in the amount of \$30,533.74.

This case is the Debtors' fifth bankruptcy filing. The Debtors' first bankruptcy case (98-50894) was filed May 15, 1998 and dismissed on January 13, 2000. Their second case (03-

50191) was filed on January 22, 2003 and dismissed on April 12, 2004. Their third case (05-50329) was filed on February 7, 2005. GMAC filed a motion for relief from stay in the third case on January 10, 2006. GMAC's motion for relief was pending when the third case was dismissed on February 6, 2006 with a 180-day bar for refiling. Mr. Jones testified that he was not able to make payments in his third case because he was terminated by his employer. In February 2006, one month after the Debtors' third case was dismissed, Mr. Jones obtained employment with Thomas Built Buses, where he is currently employed. Mr. Jones testified that after the Debtors' third case was dismissed, he tried to make arrangements with GMAC to bring the account current; however, he did not attempt to remit any payments to GMAC.

The Debtors filed their fourth case (06-50509) on April 24, 2006. GMAC filed a motion for relief from stay in the fourth case on May 23, 2006. The Debtors' fourth case was dismissed on June 5, 2006 because it was filed within 180 days of the third case, in violation of the 180-day bar. Again, after their fourth case was dismissed, the Debtors did not attempt to remit any payments to GMAC. Most recently, the Debtors filed their fifth and present case, and on October 3, 2006, the Debtors filed a Motion to Impose the Automatic Stay (the "Motion").

At the hearing on the Motion, Mr. Jones testified that he could not recall the last time the Debtors had made a payment directly to GMAC, but that GMAC did receive some payments through the Debtors' Chapter 13 plan in their third bankruptcy case. Despite not having made a payment in at least six months and having been steadily employed, Mr. Jones testified that he had only been able to set aside a total of \$1,000.00 to remit to GMAC. Nevertheless, he testified that he expected his wife to start new employment in the near future at a higher salary than her current employment. The Debtors are proposing to make monthly plan payments of \$1,350.00,

from which the Chapter 13 Trustee would pay both ongoing payments and the mortgage arrearage. The Debtors acknowledge that there is no equity in the property. GMAC objects to the Debtors' Motion.

### ANALYSIS

Section 362(c)(4)(A) of the Bankruptcy Code provides:

(4)(A)(i) if a single or joint case is filed by or against a debtor who is an individual under this title, and if 2 or more single or joint cases of the debtor were pending within the previous year but were dismissed, other than a case refiled under section 707(b), the stay under subsection (a) shall not go into effect upon the filing of the later case;

Because the Debtors had two prior bankruptcy cases dismissed within the preceding year of the fifth and current bankruptcy case, the automatic stay did not arise in the present case pursuant to § 362(c)(4). Nevertheless, § 362(c)(4)(B) provides that

(B) if, within 30 days after the filing of the later case, a party in interest requests the court may order the stay to take effect in the case as to any or all creditors (subject to such conditions or limitations as the court may impose), after notice and a hearing, only if the party in interest demonstrates that the filing of the later case is in good faith as to the creditors to be stayed;

Thus, pursuant to § 362(c)(4)(B), the Debtors have filed the present Motion requesting that the Court impose the automatic stay as to all creditors.

In order to prevail on this Motion, the Debtors must demonstrate they filed the current case in good faith as to all creditors. Section 362(c)(4)(D) provides that a case is presumptively filed not in good faith as to all creditors if:

- (I) 2 or more previous cases under this title in which the individual was a debtor were pending within the 1-year period;
- (II) a previous case under this title in which the individual was a debtor was dismissed within the time period stated in this paragraph after the debtor failed to file or amend the petition or other documents as required by this title or the court without substantial excuse (but mere inadvertence or negligence shall not be

substantial excuse unless the dismissal was caused by the negligence of the debtor's attorney), failed to provide adequate protection as ordered by the court, or failed to perform the terms of a plan confirmed by the court; or (III) there has not been a substantial change in the financial or personal affairs of the debtor since the dismissal of the next most previous case under this title, or any other reason to conclude that the later case will not be concluded, if a case under chapter 7, with a discharge, and if a case under chapter 11 or 13, with a confirmed plan that will be fully performed;

In addition, § 362(c)(4)(D) provides that there is a presumption that a case was not filed in good faith as to any creditor that has filed a motion for relief from stay in “a previous case in which the individual was a debtor if, as of the date of dismissal of such case, such action was still pending or had been resolved by terminating, conditioning, or limiting the stay as to such action of such creditor.” However, this presumption may be rebutted by clear and convincing evidence to the contrary. 11 U.S.C. § 362(c)(4)(D).

In this case, there is a presumption that the Debtors did not file in good faith as to GMAC since GMAC had filed a motion for relief from stay that was pending as of the date of dismissal in the two cases that were pending within the previous year. Given the facts of this case, the court finds that the Debtors have not successfully rebutted by clear and convincing evidence the presumption that this case was not filed in good faith as to GMAC.

First, the Debtors behavior prior to filing the present case does not support a finding of good faith. Since their last case, the Debtors have neither attempted to remit mortgage payments to GMAC nor set such mortgage payments aside in anticipation of attempting to cure the arrearage through a Chapter 13 plan. In addition, the Debtors’ amended schedules do not support a finding that the proposed plan is feasible. The Debtors listed income of \$2,230.26, and expenses, not including their mortgage payment, of \$1,137.00, leaving only \$1,093.26 with which to pay monthly plan payments of \$1,350.00. It is questionable whether a plan payment of

\$1,350.00 will even be sufficient to pay the ongoing mortgage payment of \$840.00, the arrearage claim of over \$30,000.00, and administrative expenses. Also, the Debtors filed their fourth case within 180 days of their third case, in direct violation of the dismissal order. Although the fourth case was dismissed less than two months after it was filed, its pendency prejudiced GMAC's ability to complete its foreclosure proceedings during the 180-day bar period. Therefore, there is sufficient evidence to support the presumption that the Debtors did not file in good faith, and there is not clear and convincing evidence to rebut the presumption.

Because there are numerous grounds for this court to find that the Debtors did not file their petition in good faith as to GMAC, the Court find that the Debtors' Motion must be DENIED, and it is so ORDERED.

**SERVICE LIST**

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