

SO ORDERED.

SIGNED this 19th day of June, 2014.




LENA MANSORI JAMES
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

In Re:)	
)	
LaKesha Renarda O'Neal)	Case No.: 14-10603 C-13G
)	
Debtor.)	
_____)	

ORDER DENYING MOTION FOR AUTOMATIC STAY

THIS MATTER came before the Court on June 11, 2014, upon the Debtor's Motion to Impose Automatic Stay pursuant to 11 U.S.C. § 362(c)(4). At the hearing, Jason L. Jelinek appeared on behalf of LaKesha Renarda O'Neal (the "Debtor") along with the Debtor, and Kathryn L. Bringle appeared on behalf of Anita Jo Kinlaw Troxler, the Chapter 13 Trustee. The Chapter 13 Trustee filed a Response to the Motion requesting the Court enter an order denying the Motion; no other responses were filed. All parties received due and proper notice. Having considered the Motion, the Response filed by the Trustee, the testimony of the Debtor, and other matters of record in this case, the Court concludes that the Motion must be denied.

The Debtor filed a petition for relief under Chapter 13 of the Bankruptcy Code on May 30, 2014. The present case is the Debtor's fifth Chapter 13 bankruptcy filing since October, 2009. The Debtor's first bankruptcy case (Case No. 09-12056) was filed on October 28, 2009 and dismissed on December 29, 2009, prior to confirmation. Her second case (Case No. 10-10055) was filed on January 14, 2010, confirmed on April 21, 2010 with a plan payment of \$345.00 per month, and dismissed on January 31, 2012.

The Debtor filed her third bankruptcy case (Case No. 13-10447) on April 2, 2013 and her plan was confirmed on July 17, 2013 with a monthly payment amount of \$275.00. In this case, the Debtor's Schedule I showed income of \$1,907.00, including \$707.00 in Social Security Benefits and \$1,200.00 from self-employment. Her Schedule J listed expenses in the amount of \$1,571.00, leaving net income in the amount of \$336.00 available for a plan payment. The case was dismissed on January 17, 2014, six months after plan confirmation. The Debtor had paid \$1,375.00 into the plan.

The Debtor's fourth Chapter 13 bankruptcy case (Case No. 14-10107) was filed February 4, 2014 and was dismissed April 3, 2014, prior to confirmation. In this case, the Debtor's Schedule I showed income of \$1,920.00, including \$720.00 in Social Security Benefits and \$1,200.00 from self-employment. Her Schedule J listed expenses in the amount of \$1,571.00, leaving net income in the amount of \$349.00 available for a plan payment. The Debtor paid no payments in the case prior to its dismissal.

Therefore, this fifth case (and third within a twelve-month period) brings the Debtor under the provision of 11 U.S.C. §362(c)(4) for filing a case when two or more cases have been pending within the previous year but were dismissed. On Schedule A of her petition, the Debtor did not list any real property. On Schedule B of her petition, the

Debtor listed two vehicles, a 1993 Lexus and a 2000 Ford Expedition. Federal Financial Services is listed as the secured creditor for both vehicles on the Debtor's Schedule D with claims totaling \$12,650.00. Schedule I reflects income of \$1,870.00, including \$720.00 in Social Security Benefits and \$1,150.00 from self-employment. Her Schedule J reflects expenses in the amount of \$1,576.00, leaving net income in the amount of \$294.00 available for a plan payment.

In her Motion to Impose Automatic Stay, the Debtor is seeking the protection of the automatic stay in order to retain possession of her vehicles. The Debtor is unaware of any collection efforts or pending legal actions by any creditor in the case. The Debtor asserts that she has experienced a substantial change in circumstances in that she is in the process of receiving a kidney transplant which would allow her to resume a more regular work schedule and allow the Debtor to meet the financial obligations of a Chapter 13 plan.

The Debtor testified at the hearing with regard to changes in her financial situation and health issues. During her third and fourth cases, she was responsible for payments related to her mother's funeral expenses, which were incurred in 2012. The automatic withdrawal from her monthly Social Security payment for these expenses has now terminated. As a result of this change, the Debtor has approximately \$20.00 more available to her each month. She also stated that her daughter had graduated from high school and that would help with expenses. In her previous cases, the Debtor was unable to continue to make her plan payments due to an interruption in her ability to work as a result of her kidney disease. She is now on a transplant list and feels that, subsequent to a kidney transplant, she will be able to earn more money as an income tax preparer.

Specifically, the Debtor expects to earn a “couple of dollars more” per month after her transplant. Although the Debtor is on the kidney transplant list, she has no timeline for when the procedure will take place. Overall, the Debtor’s testimony was vague with regard to her financial situation and prospects.

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 ... the stay under subsection (a) shall not go into effect upon the filing of the later case;

The Debtor had two prior bankruptcy cases dismissed within the preceding year of the current bankruptcy case; therefore, the automatic stay did not arise in the present case pursuant to §362(c)(4). However, §362(c)(4)(B) provides as follows:

(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;

The Debtor filed the Motion requesting that the Court impose the automatic stay as to all creditors. In order to prevail on this Motion, the Debtor must rebut the presumption with clear and convincing evidence that the case was filed in good faith. Section 362(c)(4)(D)(i) provides a presumption that the case was filed “not in good faith” as to all creditors if:

- (I) 2 or more 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.

Section 362(c)(4)(D)(ii) provides a presumption that a case was also filed “not in good faith” as to any creditor that has filed a motion for relief from stay in a previous case in certain circumstances. This provision is inapplicable to the Debtor's present case as no motions for relief from stay have been filed by her creditors in previous cases.

Section 362(c)(4)(D)(i)(III) presents difficulty for the Debtor in her latest filed case. In light of her history of Chapter 13 petition filings, the Court must look at whether the Debtor has provided clear and convincing evidence of a substantial change in the financial or personal affairs of the Debtor since the dismissal of the next most previous case or any other reason such that a confirmed Chapter 13 plan can be fully performed. *See In re Maggio*, No. 12-03581-8-JRL, 2012 WL 1947208 at *2 (Bankr. E.D.N.C. May 30, 2012). The Trustee points out in her Response that the Debtor has been unable to pay the plan payments in prior cases and has failed to show a source of income sufficient to maintain the plan payments on a regular basis.

The Debtor asserts that her possible health improvement with a kidney transplant, her daughter's graduation from high school, and the termination of payments for her mother's funeral expenses constitute reasons why her circumstances have changed in a way that will enable her to make regular plan payments in the future. In considering “good faith” filings pursuant to a determination in connection with §§362 (c)(3) and (4),

the Court may analyze the likelihood that the debtor will have a steady income throughout the bankruptcy case, and will be able to properly fund a plan, and also whether the trustee has objected to the debtor's motion. *See In re Winters*, No. 06-70447, 2006 WL 3392890 at *4, FN 8 (Bankr. W.D. Va. Nov. 22, 2006).

In the five petitions filed by the Debtor, her schedules have shown essentially the same income and expenses over the almost five-year period. She has not demonstrated any material increase in income or decrease in expenses with her schedules in this case or with her testimony. If anything, the schedules filed in the present case reflect a slight decrease in income and disposable income. It is doubtful to the Court that the Debtor can properly fund a plan and maintain payments for the three-year period required to complete such plan. As a result, the Court determines that the Debtor failed to provide clear and convincing evidence to rebut the statutory presumption that her current petition was filed not in good faith.

Based upon the foregoing, the Debtor's Motion to Impose the Automatic Stay pursuant to 11 U.S.C. §362(c)(4) is denied.

END OF DOCUMENT

PARTIES TO BE SERVED
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14-10603 C-13

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All parties in Interest in the Case