



**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION**

IN RE:

**Don A. Pelletier,

Debtor.**

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Case No. 00-81949 C-13

ORDER

THIS MATTER came on for hearing before the undersigned bankruptcy judge on August 31, 2000, in Durham, North Carolina upon the Motion by Ocwen Federal Bank, FSB to Annul the Automatic Stay. Michael J. McCrann appeared on behalf of the Debtor, Terri Fisher appeared on behalf of Ocwen Federal Bank, FSB (the "Creditor"), and Ben Lovell appeared on behalf of the Chapter 13 Trustee. After hearing the arguments of counsel and reviewing the file, the court makes the following:

FINDINGS OF FACT

1. On or about January 18, 2000, the Debtor filed a Chapter 13 petition in the District of Rhode Island, case number 00-10144. The bankruptcy was dismissed pursuant to 11 U.S.C. § 109(g)(1) for failure to file missing documents on March 22, 2000 with a 180-day bar to refiling.
2. On August 3, 2000, the Debtor filed a Chapter 13 petition in this district. This filing occurred before the expiration of the 180-day bar.
3. On August 21, 2000, the Creditor filed a Motion to Annul the Automatic Stay so that the Creditor could complete a foreclosure proceeding it had initiated in Rhode Island since the dismissal of the Debtor's prior case.

DISCUSSION

Pursuant to § 301, a voluntary case is commenced by the filing of a petition with the bankruptcy court by an entity that may be a debtor under each chapter. See 11 U.S.C. § 301. Section 109(g) of the Bankruptcy Code governs who may be a debtor.

Notwithstanding any other provision of this section, no individual or family farmer 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 --

(1) 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 . . .

11 U.S.C. § 109(g). Section 362(a) provides that the filing of a petition under §§ 301, 302, or 303 initiates the operation of the automatic stay. See 11 U.S.C. § 362(a). However, a debtor must be eligible for the chapter under which the case is filed and an individual who is barred from refiling under § 109(g) is not an eligible debtor under §301. Therefore, the petition filed by the Debtor before the expiration of the 180-day bar period did not create a bankruptcy case and the automatic stay was not triggered.

To allow a debtor to file a petition in bad faith, when he is clearly not eligible, and still enjoy the benefits of the Chapter 13 automatic stay would encourage illicit filings and run counter to the provisions of the code designed to deter improper conduct. "Where § 109(g) has been involved, courts have protected the integrity of their rulings. In such circumstances, courts have found that the filing of the second alleged bankruptcy case did not create an automatic stay." In re Ioane, 2000 WL 146088, *1 (Bankr. N.D. Cal. 2000); see also In re Hollberg, 208 B.R. 755 (Bankr. D.D.C. 1997); FDIC v. Cortez (In re Cortez), 96 F.3d 50 (2nd Cir. 1996) (Debtor dismissed with prejudice in Florida proceeding; refiling in California violated Florida court's 12-month prohibition against further bankruptcy filings by Debtor, hence ineffective to trigger automatic stay provisions.) To order otherwise would effectively allow debtors to evade court orders. The order of dismissal with a 180-day bar became a final order making the individual ineligible to be a debtor under the Bankruptcy Code until the expiration of the bar period. Here, the Debtor did not appeal the order dismissing his previous case with prejudice and, thus, he cannot now assert that he is eligible to be a debtor before the 180-day bar period expires.

The court finds that annulment of the stay is not the appropriate remedy here. Annulment is appropriate where the party taking the action in violation of the stay is unaware of the bankruptcy filing. Annulment implies that there is a proper stay in place. Since the Debtor is not an eligible debtor under the Bankruptcy Code, the filing of his petition did not initiate the operation of the stay, and the foreclosure proceeding initiated by the creditor is valid and may proceed.

CONCLUSION

The court finds that the Debtor's previous dismissal with a 180-day bar from refiling prevents the commencement of a case regarding the Debtor during the 180-day period and so any document purporting to be a petition filed during the bar period is not a petition as defined under 11 U.S.C. § 101(42) and does not give rise to the automatic stay under § 362.

Therefore, IT IS ORDERED, ADJUDGED AND DECREED that the Debtor and his property are not protected by the automatic stay under the Bankruptcy Code and, therefore, the foreclosure proceeding initiated by the Creditor is valid and the Creditor may proceed with the sale of the property.

This the 7 day of September, 2000.

CATHARINE R. CARRUTHERS

Catharine R. Carruthers
United States Bankruptcy Judge