

SO ORDERED.

SIGNED this 15th day of August, 2013.



Catharine R. Aron

UNITED STATES BANKRUPTCY JUDGE

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

In re:

Lewis Walter Whittington and
Cathy Rooks Whittington

Debtors.

Case No. 13-50859

ORDER GRANTING DEBTORS' MOTION
TO EXTEND THE AUTOMATIC STAY

THIS MATTER came before the Court on July 31, 2013, in Winston-Salem, North Carolina upon Motion by Debtors to Extend the Automatic Stay. Kristen Nardone appeared on behalf of the Debtors, the male Debtor, Lewis Walter Whittington, appeared, Kathryn L. Bringle appeared as the Chapter 13 Trustee, and Robert E. Price, Jr., appeared as staff attorney for the Office of the Bankruptcy Administrator. After considering the motion, arguments of counsel, testimony of Lewis Walter Whittington, and evidence on

record, this Court makes the following findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure:

JURISDICTION

This Court has jurisdiction over the subject matter of this proceeding pursuant to 28 U.S.C. §§ 151, 157, and 1334 and Local Rule 83.11 entered by the United States District Court for the Middle District of North Carolina. This is a core proceeding under 28 U.S.C. § 157 which this Court may hear and determine.

PROCUDURAL HISTORY AND FACTS

On July 10, 2013, Lewis Walter Whittington and Cathy Rooks Whittington (“Debtors”) filed their second chapter 13 petition (“Second Case”). Since the Debtors had a joint chapter 13 case pending within the preceding 1-year period prior to filing the Second Case, the Debtors filed a Motion to Extend the Automatic Stay. At the hearing on the Motion to Extend the Automatic Stay (“Motion”), the standing trustee raised the issue of eligibility under 11 U.S.C. § 109(g).

A. Bankruptcy Filing History

The Debtors’ previous chapter 13 petition (“First Case”) was filed on April 29, 2010. In the First Case, the Debtors listed two real properties on Schedule A, the Debtors’ primary residence (“Residential Property”) and a residence occupied by the Debtors’ daughter (“Non-residential Property”).¹ The Debtors’ chapter 13 plan was confirmed on July 26, 2010 (“Plan”). In the Plan, the Debtors treated the first and second deed of trust liens on the Residential Property as continuing long-term debts to be paid by the Trustee. The first and second deed of trust liens on the Non-residential Property were

¹ The Residential Property is located at 8044 Eagle Street, Mount Pleasant, NC. The Non-residential Property is located at 8082 Eagle Street, Mount Pleasant, NC.

to be paid directly by the Debtors' daughter. The Debtors' daughter defaulted on payments, and subsequently, on September 14, 2011, the first deed of trust holder, IBM Lender Business Process Services, Inc. ("IBM") filed a motion for relief from stay regarding the Non-residential Property ("Relief Motion"). The Court granted the Relief Motion on November 10, 2011, and the stay was lifted as to IBM and the second deed of trust holder, Citimortgage, Inc., providing a period until May 7, 2012 to file deficiency claims. On March 25, 2013, almost eighteen months after the stay was lifted on the Non-residential Property, the Debtors filed a request for voluntary dismissal of the First Case due to an increase in Plan payments ("Dismissal"). As such, the Court dismissed the First Case on March 26, 2013.

The Debtors filed the Second Case to save their Residential Property as the mortgage holder filed a foreclosure proceeding in June 2013. In the Second Case, the Debtors have surrendered any interest in the Non-residential Property. The Debtors filed the Motion pursuant to 11 U.S.C. § 362(c)(3)(B). As such, the Court must determine whether the Second Case was filed in good faith as to the creditors to be stayed.

ANALYSIS

A. Debtors' Eligibility

As a preliminary issue, the Court must first address whether the Debtors are eligible to be Debtors in the Second Case pursuant to 11 U.S.C. § 109(g)(2) due to the Debtors' Dismissal after IBM filed the Relief Motion in the First Case. 11 U.S.C. § 109(g)(2) provides:

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; or
- (2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title.

11 U.S.C. § 109(g)(2). There are three distinct views regarding how to interpret 11 U.S.C. § 109(g)(2) – the mandatory or strict approach, the discretionary or equitable approach, and the casual connection approach.² *Rivera v. Matos*, ___B.R.____, 2013 WL 3199300 (1st Cir. BAP 2013); *In re Sole*, 233 B.R. 347, 348-50 (E.D. Va. Bankr. 1998). The mandatory or strict approach requires a strict application of 11 U.S.C. § 109(g)(2) and the statute is interpreted as plain and unambiguous. *Id.* See *In re Anderson*, 209 B.R. 76 (6th Cir. 1997); *In re Bigalk*, 813 F.2d 189 (8th Cir. 1987) (noting that in this case the different approaches had not yet been developed and were not discussed); *In re Redwood*, 2011 WL 2456785 (Bankr. D. R.I., June 16, 2011); *In re Farnsworth*, slip op., Case No. 04-01870 (Bankr. E.D.N.C. Aug. 5, 2004). As such, 11 U.S.C. § 109(g)(2) is applied any time a motion for relief from stay is filed earlier in time than the granting of a voluntary dismissal.³ *In re Sole*, 233 B.R. at 349. The discretionary or equitable approach balances the equities of the situation, which includes determining whether creditors would be unfairly prejudiced. *In re Rivera*, ___B.R.____, 2013 WL 3199300, at *3; *In re Luna*, 122 B.R. 575, 577 (9th Cir. BAP 1997); *In re Sole*, 233 B.R. at 348. The casual connection approach requires a relationship between the debtor’s request for voluntary

² Several courts chose not to select a particular view point due to the circumstances of the case. *In re Rivera*, 2013 WL 3199300 (1st Cir. BAP 2013); *In re Brown*, 2013 WL 2318414 (Bankr. E.D. Va. May 28, 2013); *In re Tune*, 361 B.R. 466 (Bankr. E.D.N.C. 2007); *In re Kelly*, 2001 WL 1806044 (Bankr. D.S.C. Sept. 20, 2001).

³ The mandatory or strict approach would seem to require dismissal even under circumstances in which the motion for relief from stay had been denied. *But see Hamilton v. Lanning*, 130 S.Ct. 2464 (2010) (showing an example of the Supreme Court rejecting an approach that would produce “senseless results that [the Court] did not think Congress intended.”)

dismissal and the motion for relief from stay. *In re Rivera*, ___B.R. ___, 2013 WL 3199300, at *3; *In re Sole*, 233 B.R. at 348; *In re Duncan*, 182 B.R. 156 (Bankr. W.D. Va. 1995). Courts must look at the circumstances surrounding the creditor's motion for relief from stay and the debtor's subsequent dismissal. *In re Sole*, 233 B.R. at 358. The rationale for the casual approach is that 11 U.S.C. § 109(g)(2) "was enacted for the sole purpose of curbing abusive repetitive bankruptcy filings by debtors seeking to overcome the grant of relief to a creditor from a stay in a prior case." *Rivera*, 2013 WL 3199300, at *3 (citing *In re Beal*, 347 B.R. 87, 92 (Bankr. E.D. Wis. 2006)).

This Court adopts the causal connection approach. The Debtors' Dismissal was due to an increase in Plan payments not the Relief Motion. The Debtors' Dismissal was approximately eighteen months after IBM filed the Relief Motion. For reasons unknown to the Court, IBM failed to complete the foreclosure during that time. The Debtors' wish to save their Residential Property in the Second Case not the Non-residential Property. The Debtors have released any interest in the Non-residential Property in the Second Case and will not hinder any actions by IBM or Citimortgage to foreclose on the Non-residential Property. The Court concludes that there is no relationship between the Dismissal and the Relief Motion. As such, the Court finds that the Debtors are eligible to be Debtors.

B. Extension of the Automatic Stay

Next, the Court must determine if the Debtors filed the Second Case in good faith. If a debtor had another bankruptcy case pending within one year of the current bankruptcy case, then 11 U.S.C. § 362(c)(3)(A) provides that the automatic stay terminates with respect to the debtor thirty days after filing the current case. *In re Folger*,

2007 WL 3046208 (Bankr. M.D.N.C., Oct. 16, 2007). 11 U.S.C. § 362(c)(3)(B) provides for the continuation of the automatic stay beyond the initial 30-day period if the debtor files a motion, after notice and a hearing completed before the expiration of the 30 day period, demonstrating that the current case is filed in good faith. *Id.* No party objected to the Motion, thus, the Court finds that the Second Case was filed in good faith. Therefore, the Court will extend the automatic stay.

CONCLUSION

Based upon the foregoing, it is therefore ORDERED that the Debtors' Motion to Extend the Automatic Stay is GRANTED.

END OF DOCUMENT

SERVICE LIST

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