SO ORDERED.

SIGNED this 9th day of December, 2016.

LENA MANSORI JAMES
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF NORTH CAROLINA
DURHAM DIVISION

In re:	)	
	)	
Larry Darnel Daniel,	)	Case No. 16-80216
	)	Chapter 13
Debtor.	)	
	)	

ORDER DISMISSING CASE

THIS MATTER came before the court for hearing on December 1, 2016, after due and proper notice, upon a Motion by Standing Trustee to Dismiss Case (the "Motion") pursuant to 11 U.S.C. § 1307(c)(5) filed October 17, 2016 (Docket No. 74). Benjamin Busch appeared on behalf of the Debtor, Benjamin Lovell appeared on behalf of the Chapter 13 Trustee, and William Miller, Bankruptcy Administrator, appeared. After careful review of the entire record and the arguments of counsel, the court finds and concludes as follows:

FACTS

Prior to filing for bankruptcy, Mr. Daniel owned and resided with his 16-year-old daughter at real property located at 6 Bonham Court, Durham, North Carolina, 27703 (the "Property"), subject to a mortgage with State Employees Credit Union. The

Property is within a subdivision managed by the Ashley Forest Association of Durham, Inc. (the "Association"), with assessments of $31.50 due monthly to pay for the subdivision's common expenses. On November 19, 2013, the Association filed a claim of lien on the Property for ongoing nonpayment of the monthly assessment pursuant to North Carolina law. On March 24, 2014 the Association authorized foreclosure of the Property, and a substitute trustee was appointed to conduct the sale. On April 2, 2014 the substitute trustee sent Mr. Daniel a demand letter for the past-due balance, $980.72, and the sum was tendered via direct money order that posted on May 19, 2014. However, on May 19, 2014, $612.66 was assessed in attorney fees, such that a balance of $574.16 remained unpaid once Mr. Daniel's $980.72 money order posted. As there were additional fees and fines accrued beyond the demand letter's date of issuance that remained unpaid, the substitute trustee "proceeded to foreclose on the claim for attorney fees due and Association fines." (AP No. 16-9014, Docket No. 17, ¶ 17). Mr. Daniel then continued to not pay the Association's fees and fines through at least October 1, 2014, for a balance of $806.66 when the substitute trustee was granted an order of foreclosure.[1]

[1] It appears to the court that Mr. Daniel had the ability to pay this ongoing obligation of $31.50 per month to the Association, as evidenced by his steady income, his lack of any other substantial debt, his current mortgage payments, and his ability to afford vehicle payments on his 2015 Kia. Why Mr. Daniel chose to halt payments on his monthly Association dues is a question that was never answered during the pendency of this case, and frankly it baffles the court given the havoc Mr. Daniel's nonpayment has wrought upon his life and finances.

A hearing was held before the Clerk of Court on October 16, 2014, where the substitute trustee appeared, and acted as affiant for the Association, alleging personal knowledge of Mr. Daniel's default. The Clerk of Court for the Superior Court of Durham County, NC entered an order of foreclosure finding that notice of the hearing was duly served on Mr. Daniel, that no valid defense was presented as to why the foreclosure should not be held, and that the Association had the right to foreclose under the terms of the power of sale provided in both the Association's Declarations and N.C. GEN. STAT. § 47F-3-116.

The Property was sold just over one year later on December 18, 2015. Jones Family Holdings, LLC ("JFH") made the highest bid of $4,308.00, and the upset-bid period closed December 28, 2015. On February 5, 2016 the substitute trustee delivered a foreclosure deed to JFH. JFH then obtained a writ of possession. Forced Sheriff's eviction was scheduled for March 11, 2016, and the instant case was filed one-day prior on March 10.

On the morning of March 10, 2016, Mr. Daniel went to CarMax in Raleigh, NC and, entirely on credit with CarMax, purchased a 2015 Kia Cadenza for a total sales price of $33,258.24, with $25,565.91 financed at 8.95% requiring 72 monthly payments of $461.92. That same day, at 1:59 pm, Mr. Daniel filed his emergency Chapter 13 petition. Two weeks later, on March 24, 2016, Mr. Daniel filed his schedules, showing ownership in the Property and the 2015 Kia, as well as a 2005 Toyota Sienna with 254,000 miles,

and a 1989 Toyota Celica with 200,000 miles. On Schedule D, Mr. Daniel listed two secured creditors, State Employees Credit Union for his mortgage and CarMax for the Kia, and on Schedule E/F Mr. Daniel listed only a $3,000.00 priority tax claim and $2,659.00 in unsecured debts. On his Schedule I, Mr. Daniel reported $4,021.29 in income from a pension, with expenses on Schedule J of $4,168.64 including his mortgage and vehicle payments. On May 20, 2016, Schedule I was amended to reflect $4,621.29 in income based on a new part-time job, and Schedule J was adjusted to show $4,375.64. Mr. Daniel was current on his mortgage, could afford his new vehicle payments, and had almost no debt. His statement of financial affairs reflects steady pension income of over $50,000.00 for the two years preceding the filing. His bankruptcy was filed to forestall his eviction by JFH.

On March 24, 2016, Mr. Daniel filed his first proposed plan, seeking to pay $282.88 per month to the Trustee for 36 months and to pay the mortgage claim directly. On May 5, 2016, the Trustee filed a Notice of Proposed Plan, including Mr. Daniel's proposed terms, and further setting forth that Mr. Daniel would pay CarMax directly. The plan proposed a 0% dividend to unsecured creditors. JFH objected to the proposed plan, asserting its ownership interest over the Property and arguing that Mr. Daniel's legal claim to the Property was extinguished upon completion of the foreclosure sale. In response Mr. Daniel filed a late objection to his own proposed plan, seeking to pay the Association's monthly dues and cure any arrearage, as well as provide adequate

protection payments to JFH during the pendency of an adversary proceeding (the "Adversary Proceeding") filed May 10, 2016.

Mr. Daniel initiated the Adversary Proceeding against JFH and Frank Todd Whitlow by filing a complaint seeking to avoid the transfer of his residence to JFH as constructively fraudulent pursuant to 11 U.S.C. § 548. The complaint alleged that the foreclosure sale to JFH could be avoided pursuant to § 548(a)(1)(B) because the transfer occurred within two years prior to the petition date, Mr. Daniel was made insolvent by the transfer, and Mr. Daniel received less than "reasonably equivalent value" in exchange for the transfer. (Am. Compl. ¶¶ 33-41). Mr. Daniel sought recovery under § 550(a) to recover his residence, and against the substitute trustee on a breach of fiduciary duty claim arising from his conduct in the process of selling the Property. On June 28, 2016, Mr. Daniel filed an amended complaint to include the Trustee as a co-plaintiff as a necessary party, and to add Sheila Daniel, Mr. Daniel's ex-wife, as a defendant. Mr. Whitlow was eventually voluntarily dismissed as a co-defendant.

On May 11, 2016, JFH filed a motion in the main case seeking relief from the automatic stay as to the Property so that it could proceed with eviction and assume possession of the Property. On June 16, 2016, hearings were held on plan confirmation and the motion for relief. The court sustained JFH's objection to plan confirmation. Mr. Daniel was given 30 days to propose a new plan.

Additionally, on June 16, the court took the motion for relief under advisement. Mr. Daniel argued that the pending Adversary Proceeding precluded granting relief from the stay, and contended that relief from the stay could not be granted, as the Adversary Proceeding went to the heart of whether JFH is the true owner of the Property. Mr. Daniel further argued that in circumstances where a motion for relief is filed with a pending § 548 action, a preliminary injunction analysis could be used. The court rejected that assertion, noting that no motion for preliminary injunction had been filed, and that if Mr. Daniel sought to enjoin JFH, then a motion seeking an injunction must be filed. On July 11, 2016, the court entered an order granting JFH's motion for relief from stay. The court found that once the 10-day upset bid period had passed, the rights of the parties to a foreclosure sale become fixed, and in the instant case Mr. Daniel failed to act during the upset bid period.[2] As lifting the stay did not preclude or impact any of Mr. Daniel's claims or attempts at recovery, the stay was lifted.

On June 22, 2016, Mr. Daniel filed a motion for preliminary injunction in the Adversary Proceeding, seeking to restrain JFH from seeking possession of the Property, or transferring or disposing of title, during the pendency of the proceeding. On July 13, 2016, a hearing was held on Mr. Daniel's motion for preliminary injunction. Mr. Daniel testified that, in his opinion, the value of the Property was approximately $200,000.00

[2] "Here, it is clear that the Debtor sat on his rights and failed to take any action prior to the completion of the foreclosure sale. North Carolina law directs, and bankruptcy courts have upheld, that the running of the upset bid period fixes property rights in favor of the purchaser. JFH is now the owner of the Property, and cause therefore exists to modify the automatic stay." (Docket No. 47, page 6).

and that it was in need of approximately $30,000.00 in outstanding repairs and maintenance. Mr. Daniel further testified that he had lived in the Property for 22 years, that he was raising his family there and still had one minor child at home and a grandchild who visited frequently, that he had extensive personal property located on the Property, and that moving would be an extreme hardship. He testified that he had no alternative housing, that he had not investigated his options for moving into a rental property, and that he had not saved any funds if needed for a deposit on rental housing. Mr. Daniel appeared distraught at the prospect of moving out of his home. He did not disclose that he had purchased a vehicle on the petition date, increasing his monthly expenses by over $450.00 a month. No other evidence was presented.

The hearing was continued to July 14, 2016, where the court issued an oral ruling, declining to enjoin JFH. Oral Ruling July 14, 2016, AP No. 16-9014. In its oral ruling, the court found that the amended complaint did not seek equitable relief, and therefore a preliminary injunction could not be issued. Further, the court found that even were the requested relief available to Mr. Daniel, he still failed to satisfy the necessary elements of a preliminary injunction analysis as set forth in *Real Truth About Obama*, 575 F.3d 342 at 346 (4th Cir. 2009). Finally, the court noted that the Fourth Circuit had denied a preliminary injunction on appeal in a case with a nearly identical fact pattern.

On July 15, 2016, Mr. Daniel filed an amended proposed plan, proposing to pay $192.40 per month for 36 months, and to pay CarMax directly. The proposed plan also included a provision stating that the Property was not legal property of the estate, and thus State Employees Credit Union had no secured claim against the estate; should the § 548 action be successful in bringing the Property back into the estate, Mr. Daniel would modify the plan to cure arrears and pay the monthly mortgage. The plan proposed a 0% dividend to unsecured creditors. The Trustee filed a Notice of Proposed Plan on August 3, 2016 for Mr. Daniel's amended plan, and a hearing was set for September 8, 2016.

On August 1, 2016, JFH filed a motion to dismiss the Adversary Proceeding pursuant to Rule 12(b)(6), alleging that JFH is the current title owner of the Property, that Mr. Daniel had failed to adequately state a claim, that JFH is a good faith, third party purchaser protected by state law, and that the Rooker-Feldman doctrine, *res judicata*, and collateral estoppel prevent Mr. Daniel from bringing a claim. JFH did not file a supporting memorandum or brief. On August 22, 2016, Mr. Daniel and the Trustee filed a response and a joint memorandum opposing dismissal of the Adversary Proceeding. After a hearing on the motion the court entered an order denying JFH's motion to dismiss.

At the plan confirmation hearing on September 8, 2016, the court inquired as to the circumstances surrounding Mr. Daniel's purchase of a new vehicle mere hours

before filing for Chapter 13 protection. This fact had not come to light in any previous hearing, but came to the court's attention upon reviewing the claims register in preparation for the hearing. In response, the Trustee echoed the court's concerns, and as Mr. Daniel was not present, requested that the hearing be continued to October 6, 2016. On September 11, 2016, Mr. Daniel filed another amended plan, identical to the plan heard on September 8 but for a proposed 100% dividend to unsecured creditors $282.93 per month plan payments. On September 12, 2016, the BA filed an objection to confirmation on alternate theories that the proposed payment stream was inadequate and that the case or proposed plan was not filed in good faith.

At the October 6, 2016 hearing, Mr. Daniel gave testimony that he purchased the Kia prior to filing for bankruptcy to take advantage of the lower interest rate available to him prior to filing, that he was still driving the 2005 Toyota he drove prior to filing for bankruptcy, and that the new Kia was purchased for his teenage daughter to use to travel to afterschool activities. The court made extensive findings on the record, and denied confirmation relying on 11 U.S.C. § 1325(a)(3), which requires that a plan be proposed in good faith. The court specifically found that, based on his prepetition conduct, the timing of his petition, how his debt arose and his motive for filing, Mr. Daniel had not met his burden to show that his chapter 13 plan was proposed in good faith and not an abuse of the provisions, purpose, or spirit of the Bankruptcy Code.

On October 17, 2016, the Trustee filed the instant Motion to dismiss the case pursuant to 11 U.S.C. § 1307(c)(5), inability to propose a confirmable plan. On October 30, 2016, Mr. Daniel filed a final amended plan, this time proposing to pay $301.93 per month with a 100% dividend to unsecured creditors plus interest, showing the ability to fully pay his creditors without any recovery in the Adversary Proceeding.[3] The Trustee filed a Notice of Proposed Plan on November 1, 2016, and a hearing was set for December 1. On November 30, 2016, Mr. Daniel filed a Notice of No Opposition to Dismissal.

DISCUSSION

The Trustee has moved for dismissal pursuant to 11 U.S.C. § 1307(a)(5) which directs in part that, on request of the Trustee and after notice and hearing, "the court . . . may dismiss a case under this chapter . . . for cause, including-- . . . (5) denial of confirmation of a plan under section 1325 of this title and denial of a request made for additional time for filing another plan or a modification of a plan . . . ." The Trustee argues that as the court will not confirm a plan proposing a 100% dividend, as was the case on October 6, 2016 when the court denied confirmation for lack of good faith, then it is unaware of any confirmable plan, and since confirmation has been denied, the case must be dismissed. Section 1325(a) instructs: "Except as provided in subsection (b), the

[3] The purpose of § 548 is to preserve the debtor's estate for the benefit if its unsecured creditors. *See, e.g., In re Jeffrey Bigelow Design Grp., Inc.*, 956 F.2d 479, 484 (4th Cir. 1992) (quoting Jack F. Williams, *Revisiting the Proper Limits of Fraudulent Transfer Law*, 8 BANKR. DEV. J. 55, 80 (1991)); *Ivey v. First Citizens Bank & Trust Co.*, 539 B.R. 77, 83 (M.D.N.C. 2015) (quoting *In re Pearlman*, 472 B.R. 115, 125–26 (Bankr.M.D.Fl.2012)); *cf. Butler v. David Shaw, Inc.*, 72 F.3d 437, 441 n. 6 (4th Cir. 1996).

court shall confirm a plan if-- . . . (3) the plan has been proposed in good faith and not by any means forbidden by law . . . (7) the action of the debtor in filing the petition was in good faith . . . ." Section 1325(a) "requires bankruptcy courts to address and correct a defect in a debtor's proposed plan even if no creditor raises the issue." *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 277 n. 14 (2010); *see, e.g., In re Martin*, 444 B.R. 538, 542 (Bankr. M.D.N.C. 2011) ("[Section 1325(a)] bestows bankruptcy courts with the responsibility of ensuring that all confirmed plans adhere to the requirements of the Bankruptcy Code.").

Regardless of the legal sufficiency of the scheme by which a plan proposes to repay creditors, it may nonetheless violate the purpose and spirit of the Bankruptcy Code if the case was filed for an improper purpose and is thus lacking in good faith. *Matter of Metz*, 820 F.2d 1495, 1498 (9th Cir. 1987). Whether a case is filed in good faith is evaluated by considering the "totality of the circumstances." *Id*. The same factors aid in determining good faith in § 1325(a)(3) and (a)(7). *In re Dugan*, 549 B.R. 790, 795 (Bankr. D. Kan. 2016). At the October 6, 2016 hearing, this court enumerated several of those factors, including:

- the debtor's financial situation and employment history and prospects,
- the nature and amount of unsecured claims,
- past bankruptcy filings,
- the debtor's honesty in representing facts,
- any unusual or exceptional problems facing the particular debtor.
- the debtor's prepetition conduct
- timing of the petition
- how the debt arose and the motive for filing

- whether the debtor intended to defeat state court litigation

Courts have ruled that filing for bankruptcy to attempt to circumvent unfavorable state court litigation outcomes where the debtor was party to the litigation constitutes an improper purpose and the resultant cases are not filed in good faith. *See, e.g.*, *In re Lundahl*, 307 B.R. 233, 246–47 (Bankr. D. Utah 2003) (determining that the debtor primarily filed for bankruptcy to file adversary proceedings regarding issues that were previously resolved by other courts where the debtor was a party); *In re McGovern*, 297 B.R. 650, 659 (S.D. Fla. 2003) (finding that the lower court's determination of good faith was clearly erroneous as the debtor had only one substantial creditor, the victor in a state court defamation lawsuit, the debtor never made any payments toward satisfaction of the judgment, and the debtor filed for bankruptcy one day before his compelled appearance at a deposition in aid of execution of the judgment); *In re Reese*, 281 B.R. 735, 741 (Bankr. M.D. Fla. 2002) (deciding that the debtor, who had no arrearage on a secured asset and no personal property at risk of repossession, filed for bankruptcy primarily to diminish recovery on a state court judgment after multiple years of litigation).

In this case, at the October 6, 2016 hearing, the court determined that Mr. Daniel had abused the provisions, purpose, and spirit of the Bankruptcy Code. In considering the Trustee's instant Motion, the court is of the same mind as at the October 6, 2016 hearing, and incorporates and reiterates its findings and admonitions. The court is

troubled by Mr. Daniel's apparent lack of comprehension as to the consequences of his deliberate actions and inactions, as subsequent to the October 6 hearing, he filed yet another proposed plan. Due to Mr. Daniel's prepetition conduct, the timing of his petition, his motive for filing, the lack of candor in his testimony, and the lack of unusual or exceptional circumstances, and as a result of the findings already made by this court on October 6, 2016, § 1325(a)(7) remains an impediment to Mr. Daniel's ability to propose a confirmable plan. While most courts would delight at a proposed plan of reorganization paying a 100% dividend with interest to unsecured creditors, the peculiar circumstances of this case render this proposal a red herring in the determination of eligibility for confirmation.

Accordingly, the Trustee's Motion to Dismiss pursuant to 11 U.S.C. § 1307(a)(5) is GRANTED and it is hereby ORDERED that this case is dismissed.

END OF DOCUMENT

PARTIES TO BE SERVED

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Case No. 16-80216 C-13

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