



SO ORDERED.

SIGNED this 4th day of April, 2019.

Catharine R Aron

UNITED STATES BANKRUPTCY JUDGE

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

In re:

LYNTON YATES BALLENTINE, JR.,

Debtor.

Case No. 18-50581

ORDER DISMISSING CASE WITH 180-DAY BAR

THIS CASE came before the Court on March 27, 2019, on the Motion Requesting that Case be Dismissed with Prejudice and for Finding of Bad Faith [Case No. 18-50581, Doc. #62] (the “Motion to Dismiss”), filed by Nationstar Mortgage LLC, d/b/a Champion Mortgage Company (“Champion Mortgage”) on March 6, 2019. At the hearing, Kristen Redman and Jennifer Himes appeared on behalf of Champion Mortgage, Sarah Bruce appeared on behalf of the United States Bankruptcy Administrator, Vernon Cahoon appeared as the attorney for the Chapter 13 Trustee, and Pearlis Timmerman-Ballentine appeared on behalf Lynton Yates Ballentine, Jr. (the “Debtor”), who was also present.¹ After considering the Motion to Dismiss; the Response to the Motion to Dismiss [Case No. 18-50581, Doc. #69]; the arguments of the parties, including the Bankruptcy Administrator and the attorney for the Chapter 13 Trustee’s statements at the hearing in support of the Motion to Dismiss; the record in this case; and the

¹ Mrs. Timmerman-Ballentine holds power of attorney for Mr. Ballentine.

record in (1) related adversary proceeding number 18-6030, (2) United States District Court for the Middle District of North Carolina case number 1:16-cv-01403-CCE-JEP, and (3) United States District Court for the Middle District of North Carolina case number 1:17-cv-00509-CCE-JEP,² the Court concludes that this case should be dismissed with prejudice with a 180-day bar for the reasons which follow.

BACKGROUND

The Debtor and his wife, Pearlis Timmerman-Ballentine, reside at 665 Irving Street, Winston-Salem, North Carolina (the “Property”). The Debtor listed the Property on Schedule A of his petition and noted his sole ownership interest in it. [Case No. 18-50581, Doc. #15]. As he has since conceded,³ however, he in fact transferred the Property to the LB International Express Trust (the “Trust”) in 2013. According to the Debtor, the Trust has multiple trustees and beneficiaries.⁴

Prior to filing for bankruptcy and transferring the Property to the Trust, the Debtor executed an Adjustable Rate Note – Home Equity Conversion (the “Reverse Mortgage Note”) and an Adjustable Rate Home Equity Conversion Deed of Trust (the “Deed of Trust”) with Wells Fargo Bank, N.A. (“Wells Fargo”), encumbering the Property. Under the Reverse Mortgage Note and Deed of Trust, the Debtor received an initial sum of \$200,160.00. Wells Fargo committed to future advances of up to \$300,240.00. The Reverse Mortgage Note and Deed of Trust did not require the Debtor to make monthly repayments for sums advanced, but they did require him to maintain all taxes and insurance on the Property.

² The Court may take judicial notice of other pleadings and proceedings which directly relate to this matter. *NC & VA Warranty Co. v. The Fidelity Bank (In re NC & VA Warranty Co., Inc.)*, 554 B.R. 110, 120-21 (Bankr. M.D.N.C. 2016) (citing *Colonial Penn Ins. Co. v. Coil*, 887 F.2d 1236, 1239 (4th Cir. 1989)).

³ The Debtor first noted the existence of the trust at an October 5, 2018 hearing. [Case No. 18-50581, Doc. #33].

⁴ The Court requested a copy of the Trust in adversary proceeding number 18-6030 but never received it. *See* [Adv. No. 18-6030, Doc #62].

According to Wells Fargo, the Debtor defaulted under the terms of the Reverse Mortgage Note and Deed of Trust; the bank accelerated the maturity of the debt and instituted foreclosure proceedings with respect to the Property in 2016 and 2017. During the 2016 proceeding, the Debtor attempted to remove the matter from state court to the United States District Court for the Middle District of North Carolina (the “Middle District”). The Middle District dismissed the case, as the Clerk of Court for Forsyth County had, in the interim, dismissed Wells Fargo’s petition for foreclosure without prejudice.⁵ See 1:16- cv-01403-CCE-JEP, Order and Judgment, Doc. #8.

During the 2017 foreclosure proceeding, Wells Fargo assigned the Deed of Trust to Champion Mortgage. The Debtor also attempted to remove the 2017 proceeding from state court to the Middle District. This time, the Middle District remanded the proceeding to state court for lack of subject matter jurisdiction. 1:17-cv-00509-CCE-JEP, Order of Remand, Doc. #26. The Debtor appealed this ruling to the Fourth Circuit, which dismissed the appeal. 1:17-cv-00509-CCE-JEP, USCA Opinion, Doc. #29; USCA Judgment, Doc. #'s 29 and 30. The Debtor requested a rehearing or rehearing en banc, which the Fourth Circuit denied on May 1, 2018. 1:17-cv-00509-CCE-JEP, Order, Doc. #32.

The Debtor filed this Chapter 13 case *pro se* on June 4, 2018, to stop the 2017 foreclosure proceeding and reap the benefits of the automatic stay. As the Debtor indicated at the March 27, 2019 hearing and in his amended complaint in adversary proceeding number 18-6030, his ultimate objective in this case is to receive a determination from this Court that the Reverse Mortgage Note and Deed of Trust are, in effect, void, or that they must be cancelled due to what

⁵ Wells Fargo stated that the Substitute Trustee had been unprepared to prosecute the foreclosure proceeding at that time, as he had not yet received the necessary documentation to do so. 1:16- cv-01403-CCE-JEP, Motion to Dismiss, Doc. #6.

the Debtor believes were improper assignments and fraudulent conduct by Wells Fargo, Champion Mortgage, and the Government National Mortgage Association.

During the pendency of this case, the Debtor has filed three proposed Chapter 13 plans. In his first plan [Case No. 18-50581, Doc. #15] (the “First Plan”), the Debtor failed to provide for any plan payments at all. Before the Chapter 13 Trustee noticed the First Plan for objections, the Debtor filed an amended plan [Case No. 18-50581, Doc. #19] (the “Amended Plan”). In his Amended Plan, the Debtor proposed payments of \$200 per month for thirty-six months. The Court denied confirmation of the Amended Plan, which did not provide for the payment of any pre or post-petition taxes on the Property.⁶ [Case No. 18-50581, Doc. #49].

Several months after filing his Amended Plan, in October of 2018, the Debtor indicated to the Court, for the first time, that the Property was not, in fact, his. *See* [Case No. 18-50581, Doc. #'s 30, 31, and 33].⁷ The Court has since learned that the Debtor effectuated the transfer of the Property to the Trust via: (1) a General Warranty Deed and (2) a “Trustee’s Satisfaction of Deed of Trust.”⁸ Both documents are dated May 30, 2013 and were recorded with the Forsyth County Register of Deeds on June 3, 2013.

Following entry of the Court’s order denying confirmation of his Amended Plan, on February 13, 2019, the Debtor filed his third proposed plan (the “Third Plan”). [Case No. 18-50581, Doc. #55]. In his Third Plan, the Debtor proposes payments of \$300 per month for thirty-six months. *Id.* Those payments are to be directed to the Forsyth County Tax Collector for post-petition taxes on the Property. *See id.* § 9(b); [Case No. 18-50581, Doc. #54]. The Debtor does

⁶ Champion Mortgage filed a proof of claim in this case, stating that taxes were not maintained on the Property from 2008-2017.

⁷ The Court’s docket also reflects that a commercial Affidavit of Truth, filed on August 7, 2018, indicated that the Property was held in trust, but the Court has no record as to the source of that document. *See* [Case No. 18-50581, Doc. #18].

⁸ These documents constitute matters of public record of which the Court takes judicial notice. *See generally* Fed. R. Bankr. P. 9017 (explaining that the Federal Rules of Evidence apply in bankruptcy cases); Fed. R. Evid. 201 (noting that the Court may take judicial notice of adjudicative facts).

not propose to distribute any funds towards the repayment of pre-petition debts; nor would such a proposal appear to be feasible. On his petition, the Debtor disclosed household income in the amount of \$1,532 per month. [Case No. 18-50581, Doc. #15]. Neither the Debtor nor his wife is employed; their income derives mainly from social security. *Id.* Household expenses, including \$260 in property taxes, total \$1,654 per month, leaving the Debtor and his wife with negative net income in the amount of \$122 per month. *Id.* At the March 27, 2019 hearing, the attorney for the Chapter 13 Trustee also reported that the Debtor was delinquent in proposed plan payments in the amount of \$800. The Third Plan has not been confirmed.

ANALYSIS

Champion Mortgage has requested that the Court dismiss this case with prejudice, arguing that it was not filed in good faith. Under 11 U.S.C. § 1307(c), the Court may dismiss or convert a Chapter 13 case, “whichever is in the best interests of creditors and the estate, for cause.” *Id.* A debtor’s bad faith in filing the petition constitutes “cause” to dismiss or convert under §1307. *In re Page*, 519 B.R. 908, 912-13(Bankr. M.D.N.C. 2014) (citing *Marrama v. Citizens Bank of Mass.*, 549 U.S. 365, 373-75 (2007); *In re Kestell*, 99 F.3d 146, 148 (4th Cir. 1996)). In determining whether a petition was filed in bad faith, the ultimate inquiry for the Court is “ ‘whether or not under the circumstances of the case there has been an abuse of the provisions, purpose, or spirit of [Chapter 13].’ ” *Branigan v. Bateman (In re Bateman)*, 515 F.3d 272, 283 (4th Cir. 2008) (quoting *Deans v. O'Donnell*, 692 F.2d 968, 972 (4th Cir.1982)).

Factors that the Court may consider include:

the percentage of repayment proposed to unsecured creditors, the debtor’s financial situation, the period of time payment will be made, the debtor’s employment history and future prospects, the nature and amount of unsecured debt, the debtor’s prior bankruptcy filings, the debtor’s honesty in representing the facts, . . . any unusual or exceptional problems facing a particular debtor[,]. . . the debtor’s prepetition conduct[,]. . . the timing of the petition, how the debt

arose[,] . . . the debtor's motive for filing, whether the debtor intended to defeat state court litigation, whether the debt could be discharged in a Chapter 7[, and] . . . whether the debtor . . . was eligible to file for Chapter 13 under § 109(e).

Page, 519 B.R. at 913. The party requesting dismissal for cause carries the burden of proof. *In re Brogdon*, No. 01-80488, 2001 WL 1699687, at *2 (Bankr. M.D.N.C. Sept. 7, 2001).

If the Court finds that a case has been filed in bad faith and believes that the debtor has engaged in egregious behavior, it may also dismiss the case with prejudice. *Id.*, at *3 (noting that a finding of egregious behavior depends upon the “totality of the circumstances of the case”); *In re Carter*, 570 B.R. 500, 521 (Bankr. M.D.N.C. 2017) (dismissing a case with prejudice with a one year bar from refiling).

The totality of the circumstances in this case lead inescapably to the conclusion that it was filed in bad faith. The Debtor admits that he filed this case to seek a determination from the Court as to the validity of a lien against property which is held in Trust. The Debtor asserted at the March 27, 2019 hearing that he is neither the sole beneficiary nor the sole trustee of the Trust; it further appears that the Debtor may exert little to no control over the actions of the Trust.⁹ The Debtor has also failed to provide the Court with any Trust documentation. The Court can only conclude that the Property does not constitute property of the estate. *See, e.g., In re Broughton*, No. 5:16-cv-00302-RE, 2018 WL 4760489, at *2-3 (E.D.N.C. Oct. 2, 2018) (explaining that, under North Carolina law, where a debtor is both sole trustee and sole beneficiary of a trust, all legal and equitable title merge with the debtor); *see generally Rodriguez v. Fed. Deposit Ins. Corp. (In re United W. Bancorp., Inc.)*, 558 B.R. 409, 421 (Bankr. D. Colo. 2016) (noting

⁹ When the Court requested copies of the Trust in adversary proceeding 18-6030, a Mr. Ronald Peggs indicated that he was one of the trustees of the Trust and would need to discuss the document's disclosure with a panel of trustees. [Adv. No. 18-6030, Doc #62]. While Mr. Peggs was not under oath, the Debtor made no comment. *Id.*

that when a debtor's ownership of property is in question, the debtor bears the initial burden to prove he or she holds legal title to the property), *rev'd on other grounds and remanded*, 574 B.R. 876 (D. Colo. 2017). As a result, it is clear that the Debtor initiated this proceeding without any hope of obtaining the relief he would like from this Court, which lacks jurisdiction to assess claims against the Property. *See generally Rutherford Hosp. Inc. v. RNH P'ship*, 168 F.3d 693, 699 (4th Cir. 1999) (explaining that "a bankruptcy court's jurisdiction does not extend to property not part of a debtor's estate").

The Debtor has also been less than candid with the Court about the Property, unnecessarily prolonging the duration of this case. On his petition, signed under penalty of perjury, the Debtor attested to his sole ownership of the property, [Case No. 18-50581, Doc. #15]; in adversary proceeding 18-6030, he similarly alleged that he owned the Property in fee simple and requested a declaratory judgment so stating, [Adv. No. 18-6030, Doc. #4 "The Parties" ¶ 7, "Prayer for Relief" ¶7(d)]. The Debtor only disclosed the existence of the Trust to the Court after his case had been pending for roughly four months. *See* [Case No. 18-50581, Doc. #48].¹⁰ The Debtor's lack of candor about the Property and the duration during which he misled the Court weigh heavily against a finding that this case was filed in good faith.¹¹

Finally, the Debtor appears to have no funds with which to make *any* repayments towards pre-petition debts. Even with a tight budget of \$1,654 in monthly expenses, the Debtor's household, which relies mainly on social security income, has negative net monthly income at the end of each month in the amount of \$122. [Case No. 18-50581,

¹⁰ It is also of note that the Debtor's amended complaint in adversary proceeding number 18-6030 was filed after the Debtor admitted that the Property was held in trust.

¹¹ If the Court has incorrectly assumed that the Commercial Affidavit of Truth, Doc. # 18 in this proceeding, was not filed by the Debtor, then the Debtor only technically withheld the existence of the Trust from the Court for roughly two months. Nevertheless, the Court also deems this an unacceptable length of time to withhold such significant information from the Court. The Debtor should have known who owned the Property before initiating this filing.

Doc. #15]. Unsurprisingly, at the March 27, 2019 hearing, the attorney for the Chapter 13 Trustee office informed the Court that the Debtor was \$800 delinquent in plan payments. This delinquency accounts only for payments towards post-petition taxes on the Property. “Chapter 13 is titled ‘Adjustment of Debts of an Individual with Regular Income.’ The purpose of Chapter 13 is to enable debtors to adjust their debts by creating a plan to pay their debts out of future income.” *In re Barnes*, No. 12-06613-8-RDD, 2013 WL 153848, at *10 (Bankr. E.D.N.C. Jan. 15, 2013). It is abundantly clear that the Debtor did not file this case to repay his debts over time.

In light of the totality of the circumstances, as stated above, the Court concludes that this case was filed in bad faith. The Court also finds that the Debtor’s conduct, in attempting to evade the 2017 foreclosure proceeding while misrepresenting material facts to the Court and requesting relief under Chapter 13 of the Bankruptcy Code, constitutes sufficiently egregious conduct to dismiss the case with a 180-day bar.¹² The Debtor has not only wasted judicial resources and inappropriately benefited from the automatic stay during the pendency of this case, but has also undoubtedly multiplied legal fees for Wells Fargo and Champion Mortgage, who are no closer to resolving their claims against the Property than they were at the beginning of this case and have invested much time and energy into the proceedings before this Court.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that this case is dismissed with a 180-day bar to re-filing a Chapter 13 proceeding in this district.

END OF DOCUMENT

¹² The Court further finds dismissal, rather than conversion, to be in the best interest of creditors and the estate. The Debtor has exempted all available equity in his personal property. *See* [Case No. 18-50581, Doc. #15].

PARTIES TO BE SERVED

LYNTON YATES BALLENTINE, JR.
665 IRVING STREET
WINSTON-SALEM, NC 27103

PEARLIS TIMMERMAN-BALLENTINE
665 IRVING STREET
WINSTON-SALEM, NC 27103

KRISTEN M. REDMAN
COUNSEL FOR CHAMPION MORTGAGE CO
TUGGLE DUGGINS P.A.
PO BOX 2888
GREENSBORO, NC 27402

KATHRYN L BRINGLE
CHAPTER 13 TRUSTEE
P. O. BOX 2115
WINSTON-SALEM, NC 27102-2115

WILLIAM P. MILLER
BANKRUPTCY ADMINISTRATOR
101 SOUTH EDGEWORTH STREET
GREENSBORO, NC 27401