

---

In the United States Bankruptcy Court  
for the  
Southern District of Georgia  
Savannah Division

In the matter of: )  
 )  
FRANKIE THOMPSON ) Chapter 13 Case  
 )  
 ) Number 97-41245  
 )  
Debtor )

**MEMORANDUM AND ORDER**

The above case came on to be heard in response to Notice of Show Cause Hearing issued to determine whether additional relief in the form of a retroactive dismissal of the above-captioned case should be granted SunTrust Bank, Savannah, N.A. ("SunTrust"). Having considered the evidence I enter the following Findings of Fact and Conclusions of Law.

**FINDINGS OF FACT**

This is Debtor's seventh bankruptcy case filed since 1990. The most recent three filings are those relevant to the Court's decision herein.

On December 1, 1995, Debtor filed a Chapter 13 case number 95-42584. On August 8, 1996, following confirmation of Debtor's plan, SunTrust filed a Motion for Relief from Stay which was scheduled for a hearing on September 12, 1996. On September

17, 1996, an Order was entered denying the Motion subject to certain conditions which included cure of all post-petition payments on or before November 11, 1996. On November 8, 1996, Debtor *pro se* filed a Motion to Dismiss and, because of that request, an Order dismissing the case was entered on November 11, 1996.

On January 31, 1997, Chapter 7 case number 97-40284, was filed by the Debtor acting *pro se*. On February 6, 1997, the United States Trustee filed a Motion to Dismiss Debtor's case pursuant to 11 U.S.C. Section 707(a). At the hearing to consider that motion on March 14, 1997, counsel for SunTrust pointed out to the Court that because of the dismissal of the previous Chapter 13 case following the filing of SunTrust's motion for relief from stay Debtor should be deemed ineligible for relief under any chapter of the Bankruptcy Code for 180 days pursuant to 11 U.S.C. Section 109(g)(2). In the meantime on March 6, 1997, Debtor filed a motion to voluntarily dismiss his case, but no hearing on his motion had been scheduled as of March 14. After consideration of the evidence on March 14 the Court directed dismissal of the case which order held in part as follows: "It is hereby ordered that the petition of the Debtor and the within case is hereby dismissed with prejudice barring refiling within 180 days." See Order Dismissing Case With Prejudice, Mar. 14, 1997, Ch. 7 Case No. 97-40284, Doc. 16.

Thereafter on May 2, 1997, Debtor *pro se* filed this Chapter 13 case. Because of the terms of the prior dismissal order, the file was referred to the undersigned

and I directed that an order dismissing the case be entered, which order was entered on May 6, 1997, due to Debtor's ineligibility. SunTrust subsequently requested, by letter dated June 3, 1997, with a copy to Debtor, that the May 6 Order dismissing be made retroactive to the date of filing. At the hearing held to consider that relief on June 12, 1997, Debtor appeared individually and with counsel who had recently been retained. In essence, Debtor's argument was that he believed he had the wherewithal to refinance his home and payoff the SunTrust claim and that an ambiguity in the Order of March 14, 1997, made it appear to him that while he could not refile a Chapter 7 case, he was nevertheless free to file a new Chapter 13.

After considering the evidence and the contentions of counsel I rule that SunTrust's motion should be granted. As to the Debtor's ability at this point to refinance and payoff SunTrust's claim, the evidence is clear that SunTrust sold the property on the first Tuesday in May 1997, without notice of these proceedings, to a third party purchaser and was thereby divested of title to the property. As a result, even if the Court were inclined to order SunTrust to afford the Debtor an opportunity for a reasonable period of time to borrow money in order to pay off this indebtedness, I find that the transfer of title which occurred as a result of the foreclosure precludes that relief in this case.

Ordinarily the filing of a new case under Title 11 would, pursuant to 11 U.S.C. Section 362, result in an automatic stay of all proceedings including the foreclosure sale. From the receipt issued by the Clerk's Office on May 2, 1997, it appears that

Debtor's case was filed at 10:54 a.m., which the Court, taking judicial notice thereof, concludes is within the legal hours of sale, but by local custom actually pre-dates the time when foreclosures generally commence in Chatham County, to wit: 11:00 a.m. However, since the issue is whether Debtor was ineligible, I conclude that the efficacy of the foreclosure sale is governed by whether the Debtor was eligible to file on May 2, 1997, and that the otherwise automatic imposition of the stay of Section 362 is subject to this Court's ruling on eligibility. In that regard it is clear that the Order entered March 14, 1997, in case number 97-40284, specifically barred Debtor against refiling for a period of 180 days. The Order is argued to be ambiguous in not stating that he is barred from refiling any case under Title 11 but because it is not necessary to reach that issue I decline to deal further with efficacy of the March 14 Order.

Instead, it is clear that Debtor was ineligible under Section 109 to file either the Chapter 7 case on January 31, 1997, or the Chapter 13 case on May 2, 1997, in that the dismissal of his earlier Chapter 13 on November 8, 1996, occurred within 180 days of the filing of both subsequently-filed cases and that voluntary dismissal occurred following the filing of a request for relief from stay by Movant, SunTrust, as alluded to above.

Accordingly, Debtor is, by the plain meaning of 11 U.S.C. Section 109, ineligible to have refiled any case under Title 11 until after May 8, 1997, at the earliest. He was ineligible to file this case on May 2, and that filing is therefore a nullity. It is

therefore appropriate to make the May 6 dismissal order retroactive to the date of filing, and to annul the stay which otherwise would have arisen on that date, so as to validate the creditor's actions which were taken without actual knowledge of the filing.

O R D E R

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the request of SunTrust Bank, Savannah, N.A., to make the Order Dismissing Case, entered May 6, 1997, retroactive to May 2, 1997, the date of filing, is granted and the automatic stay is annulled.

---

Lamar W. Davis, Jr.  
United States Bankruptcy Judge

Dated at Savannah, Georgia

This \_\_\_\_ day of June, 1997.