

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE
SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:)	
)	Chapter 13 Case
KENNETH EUGENE PRICE, JR.)	Number <u>92-10834</u>
SS# 256-15-1941)	
PATRICIA ELIZABETH PRICE)	
SS# 252-04-5501)	
4366 Old Waynesboro Road)	
Hephzibah, Georgia 30815)	
Debtors)	
<hr style="width: 50%; margin-left: 0;"/>		
FEDERAL NATIONAL MORTGAGE ASSOCIATION)	
Movant)	
vs.)	
KENNETH EUGENE PRICE, JR.)	
PATRICIA ELIZABETH PRICE)	
Respondents)	

ORDER

The movant, Federal National Mortgage Association ("FNMA"), seeks dismissal of this Chapter 13 case or, alternatively, relief from the automatic stay of 11 U.S.C. §362(a) to record a property deed to property formerly owned by the debtors and foreclosed upon and sold by FNMA. Debtors oppose the motion. Based on the evidence presented at hearing and relevant legal authorities, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

On December 10, 1987 the debtors, Kenneth Eugene Price, Jr. and Patricia Elizabeth Price, filed a joint Chapter 13 petition in this court, Chapter 13 case No. 87-11337. That case was dismissed May 17, 1989 based on the debtors' failure to make the promised Chapter 13 payments. On June 5, 1989 the debtors filed a second Chapter 13 petition, case No. 89-10822. That case was dismissed on April 23, 1990 based on the debtors' failure to make the promised Chapter 13 payments. On June 28, 1990 the debtors filed a third Chapter 13 case, case No. 90-11076. On December 26, 1991 in case No. 90-11076, FNMA moved for relief from stay to foreclose its security interest in real property, debtors' residence at 4366 Old Waynesboro Road, Hephzibah, Georgia, which secures a note executed by debtors in favor of FNMA. I denied FNMA's motion conditioned on debtors' payment of the post petition arrearage on the mortgage debt. On March 5, 1992 FNMA again moved for relief from the stay and submitted an affidavit by its representative that debtors failed to comply with the order denying relief from stay. Accordingly, an order dated March 13, 1992 was entered in case No. 90-11076 granting FNMA relief from the automatic stay. On April 29, 1992, after the debtors had completed all payments required under the confirmed plan to be made to the trustee, but before a discharge was entered,¹ the debtors filed a fourth Chapter 13 petition, case

¹The trustee's final report was filed May 7, 1992 and the debtors were discharged on May 13, 1992.

No. 92-10834, which is their current case. The only secured debt appearing in debtors' current Chapter 13 petition is that of FNMA.² Total unsecured, non-priority debt scheduled in debtors' current Chapter 13 petition is Four Hundred Forty and No/100 (\$440.00) Dollars. There are no scheduled unsecured priority claims. Debtors' proposed Chapter 13 plan calls for bi-weekly payments to the Chapter 13 trustee of Sixty-Seven and No/100 (\$67.00) Dollars and direct installments to FNMA (through its servicing agent) according to the terms of the underlying debt instrument, commencing with the installment payment due May 1, 1992. Under the proposed plan, existing arrearage on the mortgage debt will be cured within the plan period by disbursements from the Chapter 13 trustee.

On May 5, 1992 FNMA sold the subject property for Eight Thousand Nine Hundred Six and (\$8,906.00) Dollars pursuant to the power of sale provisions in the security deed.³ As of the date of hearing on FNMA's motion, the debtors were current on their proposed Chapter 13 plan, including direct payments to FNMA; however, unrebutted evidence presented by FNMA at hearing indicates that as of June 19, 1992, a prepetition delinquency exists in the amount of One Thousand Four Hundred Seventy-Six and 80/100 (\$1,476.80) Dollars, which accrued during the pendency of case No. 90-11076 as

²The schedules indicate that the claim is held by VA Loan Service and Claims, which is servicing agent for FNMA. There is no dispute that FNMA is the holder of the claim.

³No violation of the automatic stay of 11 U.S.C. §362(a) is alleged.

a result of the debtors' failure to make the required direct payments to FNMA in that case.

FNMA argues that the debtors' current Chapter 13 plan should be dismissed ab initio because, according to FNMA, a debtor may not maintain two Chapter 13 cases concurrently. FNMA also maintains that the relief from stay obtained in debtors' prior case, case No. 90-11076, is res judicata and that the automatic stay is not effective or invoked in the current case. In its motion, FNMA contends debtors' current Chapter 13 case was filed in bad faith. In response, debtors argue that there is no per se bar to filing a Chapter 13 case while another Chapter 13 case is pending. Debtors' further contend that the automatic stay is separate and distinct for each bankruptcy case and therefore was invoked upon the filing of their current petition. On the issue of the debtors' good faith, debtors argue that repeat filings are not necessarily indicative of bad faith. Debtors also argue that neither is the fact that they filed their current Chapter 13 case before a discharge was entered in their prior case indicative of bad faith because their prior case was "paid out" and they were merely waiting for the entry of discharge in that case. Debtors argue that under the totality of the circumstances test for determining whether a petition is filed in good faith, I must find their current Chapter 13 case was filed in good faith.

CONCLUSIONS OF LAW

Although some courts have held that a debtor may not

"properly" be in two voluntary bankruptcy cases at once, see, e.g., In re: Befort, 137 B.R. 56 (Bankr. D. Kans. 1992), Matter of Lunsford, 39 B.R. 490 (Bankr. N.D. Ga. 1984), In re: Martin, 97 B.R. 1013 (Bankr. N.D. Ga. 1989), In re: Valparaiso Motel Corp., 125 B.R. 228 (Bankr. N.D. Ind. 1990), there is no express procedural bar in the Bankruptcy Code or Rules to filing a Chapter 13 petition before a discharge is entered in a pending Chapter 13 case. Moreover, the Eleventh Circuit Court of Appeals has held that a debtor is not prohibited from filing a Chapter 13 petition during the period between the entry of discharge in a pending Chapter 7 case and the Chapter 7 trustee's filing of a final report and closing of the case. In re: Saylors, 869 F.2d 1434, 1437 (11th Cir. 1989). In Saylors, the court's concern was to avoid preventing deserving debtors from taking advantage of Chapter 13 during a period of time between discharge in a pending bankruptcy case and the formal closing of the case, which requires a final report by the trustee. Id. at 1438. Although in debtors' case No. 90-11076 discharge was not entered prior to the current Chapter 13 petition, the required plan payments to the Chapter 13 trustee had been made.⁴ The debtors were merely waiting for the Chapter 13 trustee to file a final report and for the entry of discharge by the court. There is no per se rule that prohibited debtors from filing a Chapter 13

⁴Debtors did not complete the scheduled direct payments to FNMA pursuant to the terms of the underlying contractual agreement and the confirmed plan; however, no objection to the entry of discharge was filed.

petition during this period of time. Saylors, supra. Contra Lunsford, supra. Therefore, the debtors' current Chapter 13 case will not be dismissed as void ab initio.

FNMA is also incorrect in arguing that the automatic stay of 11 U.S.C. §362(a) was not effective or invoked upon the filing of this Chapter 13 case because, according to FNMA, relief from the automatic stay in the prior case was res judicata. "[A] petition filed under §301, 302 or 303 of this title . . . operates as a stay, applicable to all entities" 11 U.S.C. §362(a). There is no provision in §362 or elsewhere in the Bankruptcy Code for an exception to §362(a) that prevents invocation of the stay by the filing of a Chapter 13 petition where stay relief was granted in a prior Chapter 13 case. The relief from the automatic stay obtained by FNMA in case No. 90-11076 does not affect invocation of the stay by the debtors' subsequent Chapter 13 petition. "The . . . order of [March 13, 1992 granting relief from stay] merely lifted the automatic stay in the [prior Chapter 13] case. In no way did the order purport to be a permanent adjudication of [FNMA's] right to foreclose." Saylors, supra, at 1438. The stay relief obtained in case No. 90-11076 did not as a matter of law carry over to the debtors' current Chapter 13 case as the stay invoked by each Chapter 13 petition is separate and distinct.⁵ Id.

⁵Although stay relief obtained in one case does not as a matter of law carryover to a subsequent filing, 11 U.S.C. §105(a) authorizes the court to issue any order or to take any necessary action, sua sponte if necessary, to carry out the provisions of the Bankruptcy Code or to prevent an abuse of process. In appropriate

FNMA argues that cause exists to grant relief from the automatic stay in debtors' current Chapter 13 case because it purportedly was filed in bad faith. The Bankruptcy Code provides that, "[o]n request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section [362] . . . for cause. . . . 11 U.S.C. §362(d)(1). Relief from the automatic stay may be granted on a "for cause" basis under §362(d)(1) if a petition was filed in bad faith. In re: Phoenix Picadilly, Ltd., 849 F.2d 1393, 1394 (11th Cir. 1988). "Good faith," a requirement for confirmation of a Chapter 13 plan, 11 U.S.C. §1325(a)(3), is not defined in the Bankruptcy Code. In determining whether a petition was filed in good faith, the court "may consider any factors which evidence 'an intent to abuse the judicial process and the purposes of the reorganization provisions,' or, in particular, factors which evidence that the petition was filed 'to delay or frustrate the legitimate efforts of secured creditors to enforce their rights.'" In re: Phoenix Picadilly, Ltd., supra, at 1394 [quoting In re: Albany Partnerships, Ltd., 749 F.2d 670, 674 (11th Cir. 1984)].

Such a determination of bad faith, however, is best made at the time of the hearing on confirmation of the debtor's chapter 13 plan. See, 11 U.S.C. §1324. See, also In re: Robinson, 18 B.R. 891 (Bankr. D. Conn. 1982); In re: Kosenka, 104 B.R. 40 (Bankr. N.D. Ind. 1989). The "good faith" criteria set out in Kitchens v. Georgia Railroad Bank & Trust

circumstances I have ordered that the relief granted apply in any subsequent bankruptcy proceeding.

Company (In re: Kitchens) 702 F.2d 885 (11th Cir. 1983), can then be considered in conjunction with the confirmation criteria of 11 U.S.C. §1325. . . 'The causes for dismissal pursuant to §1307, however, are inclusive not exclusive. . . Clearly, if the filing of a petition involves a blatant abuse of judicial process the court need not wait until the confirmation hearing to provide a remedy.' In re: Robinson, supra at 893. However, the court in Robinson went on to note that "dismissal of a petition for lack of good faith prior to consideration of the plan should be ordered only under extraordinary circumstances." In re: Robinson, supra at 893.

CTE Investments, Inc. v. Brown (In re: Brown) Chapter 13 case No. 90-10450 slip op. p. 9 (Bankr. S.D. Ga. July 26, 1990) quoting General Motors Acceptance Corporation v. Bullock (In re: Bullock) Chapter 13 case No. 89-11583 slip op. pp. 3-4 (Bankr. S.D. Ga. April 18, 1989).

From the evidence presented at hearing FNMA has demonstrated such exceptional circumstances to warrant not only a determination of whether this Chapter 13 proceeding was brought in good faith but also has established this case as a bad faith filing. The Eleventh Circuit Court of Appeals has set forth a non-exhaustive list of factors relevant to the good faith determination:

1. The amount of the debtor's income from all sources;
2. The living expenses of the debtor and his dependents;
3. The amount of attorney's fees;
4. The probable or expected duration of the debtor's Chapter 13 plan;
5. The motivations of the debtor and his sincerity in seeking relief under the provisions of Chapter 13;
6. The debtor's degree of effort;
7. The debtor's ability to earn and the likelihood of fluctuation in his earnings;
8. Special circumstances such as inordinate medical expenses;

9. The frequency with which the debtor has sought relief under the Bankruptcy Reform Act and its predecessors;
10. The circumstances under which the debtor has contracted his debts and his demonstrated bona fides, or lack of same, in dealings with his creditors;
11. The burden which the plan's administration would place upon the trustee;
12. The substantiality of repayments; and
13. The potential nondischargeability of debt in a Chapter 7 proceeding.

Kitchens v. Georgia Railroad Bank & Trust Co., supra, 888-89.

In addition, in Phoenix Picadilly, Ltd., supra, the Eleventh Circuit Court of Appeals found the following factors, among others, relevant in dismissing a Chapter 11 plan of reorganization on the basis of bad faith:

1. The debtors have few unsecured creditors, and their claims are small in relation to the claims of the secured creditor;
2. The property in question is the subject of a foreclosure action as the result of arrearages on the debt;
3. The timing of the debtors' filing evidences an intent to delay or frustrate the legitimate efforts of the debtors' secured creditors to enforce their rights.

Id. at 1394.

Applying Kitchens, supra, and Phoenix Picadilly, Ltd. supra criteria to the facts of this case I find the debtors' current Chapter 13 petition was filed in bad faith. This is the debtors' fourth Chapter 13 case since 1987. Their first two cases were dismissed for nonpayment. In the third case, the debtors defaulted on promised direct payments to FNMA resulting in a substantial delinquency which entitled FNMA to relief from the automatic stay to foreclose its security interest in the debtors' home. Relief from stay having been obtained by FNMA, debtors filed their current

Chapter 13 petition which, according to the testimony of Mr. Price, was done solely to stop the foreclosure and save their house. The only secured debt in this case is that owed FNMA. Unsecured debt is minimal. The debtors did not file this case with the intention to reorganize under Chapter 13; they filed it only to stave off FNMA from foreclosing. This is not the purpose of Chapter 13. "Filing [a bankruptcy petition] solely for the purpose of stopping or delaying a foreclosure, without the ability or intention to reorganize, is an abuse and therefore is not the proper basis for the filing of a bankruptcy proceeding, i.e., the filing lacks good faith." In re: Huerta, 137 B.R. 356, 369-70 (Bankr. C.D. Cal. 1992) (emphasis added). Assuming the debtors are capable in this case of meeting the proposed plan payments and direct payments to FNMA, which assumption is tenuous at best in light of the debtors' prior failures in Chapter 13, "the prospects of a successful reorganization do not override, as a matter of law, the finding of bad faith" In re: Phoenix Picadilly, Ltd., supra at 1394.

Based on the totality of the circumstances surrounding this filing, the debtors have abused the provisions, purpose, and spirit of Chapter 13 with their current petition, and show a lack of commitment to the rehabilitative intent of Chapter 13. "[A]n abuse of §362 occurs when the debtor has no intention of effectuating a realistic plan of reorganization and the bankruptcy court's self-executing injunction results in unnecessary and costly delays." Weiszhaar Farms, Inc. v. Livestock State Bank, 113 B.R. 1017, 1020

(D. S.D. 1990). In addition to supporting relief from stay under §362(d)(1), bad faith is grounds for dismissal of the case, In re: Waldron, 785 F.2d 936 (11th Cir. 1986), cert. dismissed, 478 U.S. 4028, 106 S.Ct. 3343, 92 L.E.2d 763 (1986), and pursuant to 11 U.S.C. §105(a) the court is authorized to take "any action or make any determination necessary or appropriate . . . to prevent an abuse of process."

It is therefore ORDERED that the motion of Federal National Mortgage Association for relief from the automatic stay of 11 U.S.C. §362(a) in this Chapter 13 case No. 92-10834 is granted which relief from stay applies in this or any subsequent bankruptcy proceeding brought by these debtors;

further ORDERED that the foreclosure sale conducted by Federal National Mortgage Association in accordance with its loan and security documents and applicable State law is confirmed and validated;

further ORDERED that Federal National Mortgage Association its successors, assigns, or purchasers at foreclosure sale are authorized to proceed with all available State remedies as to the property which is the subject of this order; and

further ORDERED that this Chapter 13 proceeding case No. 92-10834 is dismissed with prejudice barring the debtor from seeking relief under any provision of the Bankruptcy Code for a period of 180 days from the date of this order.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia

this _____ day of September, 1992.