UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF OHIO

In Re:	)	
	)	**JUDGE RICHARD L. SPEER**
John/Mary Ann Kelly	)	
	)	Case No. 04-30818
Debtor(s)	)	
	)	

ORDER

This cause comes before the Court after a Hearing on the Motion of National Bank of Oak Harbor to Dismiss the Debtors' Chapter 13 case and to Apply a Time Bar to refiling. Although provided with notice of the Hearing on this matter, only Vaughn Hoblet, counsel for the Movant was present at the Hearing. After considering the matter, the Court, for the reasons set forth herein, finds both aspects of the Movant's Motion to be well-taken. Consistent with this finding, the Debtors' case will be dismissed subject to a 180-day refiling injunction.

Background

The circumstances underlying the relationship between the Movant and the Debtors are not in dispute. The Movant, National Bank of Oak Harbor (hereinafter "Movant"), holds a mortgage interest in certain real property owned by the Debtors. Underlying this mortgage interest is a loan made by the Movant to the Debtors in the amount of $224,000.00. Representing this loan is a promissory note dated June 3, 1999, together with certain modifications executed on June 30, 2000. The Debtors are currently in default under the terms of the note and extension.

Findings of Fact

From the evidence presented in this case, as well as the relevant judicial record, the Court makes the following findings of fact in accordance with Bankruptcy Rules 7052(a) and 9014(c):

On July 25, 2002, the Debtors filed a petition in this Court for relief under Chapter 7 of the United States Bankruptcy Code. (Case No. 02-34887). This event occurred one day prior to the time a Sheriff's sale, stemming from the Movant's foreclosure action, was to occur on the Debtors' property.

On October 30, 2002, the Debtors filed a Motion to convert their case to Chapter 11 of the Bankruptcy Code; through an order entered one day later, this Motion was Granted. On April 28, 2003, upon a Motion of the United States Trustee, the Court entered an order dismissing the Debtors' case for cause.

On June 19, 2003, the Debtors filed a petition in this Court for relief under Chapter 12 of the United States Bankruptcy Code. (Case No. 03-34831). Similar to the Debtors' previous filing, this event occurred one day prior to the time a Sheriff's sale, stemming from the Movant's foreclosure action, was to occur on the Debtors' property. On August 22, 2003, the Movant filed a Motion in this case for, among other things, relief from Stay. No hearing was held on this matter, as prior to the time of the scheduled hearing, the Court was informed that the Parties had reached an agreement. On November 26, 2003, this case, upon application by the Debtors, was dismissed.

On February 12, 2004, the Debtors filed the instant case seeking relief under Chapter 13 of the United States Bankruptcy Code. (Case No. 03-34831). Like the prior two filings, this case was filed one day prior to the time a Sheriff's sale, stemming from the Movant's foreclosure action, was to occur on the Debtors' property. On March 11, 2004, the Movant filed the instant Motion to Dismiss. Just under a month later, the Debtors filed a Notice of Dismissal. In this case, the Debtors filed three motions, two of which were granted, to extend the time to file a plan. No proposed plan of reorganization, however, was ever presented to the Court in this case.

DISCUSSION

Pursuant to the Movant's instant Motion, two related issues are before the Court: (1) the propriety of dismissing the Debtors' bankruptcy; and if a dismissal is proper, (2) whether a bar to refiling should be imposed upon the Debtors. Under 28 U.S.C. §§ 157(b) and 1334, a determination of these matters is a core proceeding over which this Court has the jurisdictional authority to enter final orders.

Under § 1307(c), a creditor seeking to have a debtor's case dismissed must establish the existence of "cause." In very general terms, "cause" under § 1307(c) means that the reorganization process is not proceeding in a manner envisioned by the Bankruptcy Code. In this matter, however, the Debtors have tacitly agreed to the Movant's Motion to Dismiss by subsequently filing their own notice of dismissal in accordance with paragraph (b) of § 1307. Important here is that unlike a creditor's motion to dismiss brought under paragraph (c) of § 1307(b), a dismissal brought under paragraph (b), (which can only be brought by a debtor,) is mandatory. In the relevant language of the statute: "[o]n request of the debtor at any time, . . . the court shall dismiss a case under this chapter." Thus, with the filing of the Debtors' notice of dismissal, the existence of "cause" has, for all practicable purposes, become a moot point as a dismissal in inevitable. Nevertheless, an issue is raised by what are in essence competing Motions to Dismiss: whether the Debtors' Notice of Dismissal prevents this Court from considering the injunctive relief the Movant seeks in its Motion to Dismiss?

Given that a debtor has a right to dismiss their bankruptcy case, the ability of this Court to consider imposing the injunctive relief sought by the Movant hinges on the time at which a debtor's notice of dismissal becomes effective. If it becomes effective immediately, then this Court lacks jurisdiction to entertain any additional matters in the Debtors' case. Rationally, the converse is also true: to the extent a notice of dismissal does not immediately effectuate a dismissal, then this Court retains jurisdiction to hear and decide additional matters related to the Debtors' case.

Section 1307(b), by its use of the mandatory language "shall," makes it clear that when a debtor seeks a dismissal, it must be entered. All the same, the statute specifically requires that the "court," and as opposed to the "clerk," enter the dismissal. Thus, as opposed to being simply an administrative function – for example, by directing that the "clerk" immediately dismiss the case upon a notice received by the debtor – the statute contemplates that the bankruptcy court continue to play a role in the case. In conformance with this principle, it has always been the practice of this Court to enter a subsequent order of dismissal, even if the action to dismiss is brought by way of a notice of dismissal under § 1307(b). Such a position, besides being practical, is necessary to fulfill the requirements of the Bankruptcy Code.

First, continued court oversight subsequent to the filing of a notice of dismissal under § 1307(b) is necessary because a debtor's absolute right to dismiss under this section is not applicable if the case had previously been converted from another Chapter. Thus, a review to ensure compliance is necessary. More important, § 349, which governs the effect of a dismissal, allows a court, for "cause," to set forth certain conditions at dismissal.[1] The interplay between this section and § 1307(b) was pointed out in *In re Dilley*, where the court, contrary to the assertions made by the debtor, dismissed the case with prejudice:

> In his Response Debtor asserts that the Court may not order dismissal with prejudice in response to the Debtor's motion to dismiss under section 1307(b) of the Bankruptcy Code. But the language and apparent purpose of the applicable Code sections support the contrary conclusion as does the case law. Section 1307(b) provides only that the Court shall dismiss the case. It does not state the implications of that dismissal[.]

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[1] Section 349(a) provides, "[u]nless the court, for cause, orders otherwise, the dismissal of a case under this title does not bar the discharge, in a later case under this title, of debts that were dischargeable in the case dismissed; nor does the dismissal of a case under this title prejudice the debtor with regard to the filing of a subsequent petition under this title, except as provided in section 109(g) of this title."

125 B.R. 189, 195 (Bankr. N.D.Ohio 1991).

These provisions, therefore, show that while a court's role in a debtor's bankruptcy may be limited once a notice of dismissal under § 1307(b) is filed, the court's role will still extend to matters related to both the debtor's eligibility for the dismissal and the implications attached to the dismissal. In turn, this makes it impracticable to effectuate an immediate dismissal of a debtor's case. Accordingly, even when a debtor files a notice of dismissal under § 1307(b), the bankruptcy court, albeit to a limited extent, retains jurisdiction over a debtor's bankruptcy case.

In this case, the Movant's position focuses on the implications of dismissal, arguing that the Debtors should be enjoined for a period of time from seeking the relief afforded by the Bankruptcy Code. In support of imposing such an injunction, the Movant cites two statutory authorities: 11 U.S.C. § 109(g)(2); and § 105(a). As detailed below, the Court finds both sections are applicable in this case.

Section § 109(g)(2) proscribes an individual or family farmer, who is otherwise eligible, from availing themselves to the protections of the Bankruptcy Code if "at any time in the preceding 180 days . . . 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." It is set forth in § 349(a) that a dismissal is subject to this 180-day injunction. In applying § 109(g), the Bankruptcy Appellate Panel for the Sixth Circuit has held that, contrary to the holdings rendered in some other jurisdictions, no correlation needs to be shown between the dismissal and the relief from stay; § 109(g) is simply to be applied according to its plain meaning. *In re Andersson*, 209 B.R. 76 (B.A.P. 6th Cir. 1997) (109(g)(2) applicable when motion to dismiss filed 1 ½ years after motion for relief from stay filed). Consequently, once a motion for relief from stay is filed, the 180-day bar against refiling applies if, at any time thereafter, a debtor voluntarily seeks to dismiss their case; extraneous factors, such as occurred in this case where the Parties ostensibly reached

an agreement with respect to the Movant's Motion for Relief from Stay, will not affect the applicability of § 109(g)(2).

Based therefore upon the holding of *In re Andersson*, the applicability of § 109(g)(2) in this case cannot be questioned: in their second bankruptcy filing, the Movant filed a motion for relief from stay, and then approximately three months subsequent to this event, the Debtors requested and then received a voluntary dismissal of their case. Also, considering that the Debtors have on three separate occasions sought to dismiss their case on the eve of the Movant foreclosing against its collateral, this case represents a perfect alignment with the purpose § 109(g)(2), which was described in the case of *In re Holder* as follows:

> Section 109(g)(2) deals with voluntary dismissals and subsequent refilings which effectively act to prevent creditors from acquiring relief from the automatic stay and pursuing foreclosure remedies in state court proceedings. Customarily in such cases, a debtor's bankruptcy petition is filed to forestall a threatened foreclosure. Once the foreclosure process is stopped, debtors either do not, or cannot, properly prosecute the case, or they move to dismiss the case after a motion for relief from stay has been filed. The purpose of the 180 day period in Section 109(g) is to allow creditors holding secured claims, . . . a window of opportunity to exercise their rights under state law free of the constraints of the bankruptcy law. Otherwise, debtors could file and dismiss cases at will, free to interdict all foreclosure efforts, and having succeeded, thereafter to cease to prosecute their cases or to dismiss them and refile when foreclosure again threatens.

151 B.R. 725, 727 (Bankr. Md.1993). Although such an alignment is not absolutely required under the holding rendered by the Bankruptcy Appellate Panel's holding in *In re Andersson*, as will be explained, the Debtors' conduct of repeatedly filing bankruptcy on the eve of foreclosure, along with other considerations, overcomes a significant weakness with applying § 109(g)(2) in this case.

By its plain terms, the 180-day bar to refiling under § 109(g)(2) does not begin when the action to enforce the injunction is brought. Rather, the injunction of § 109(g)(2) starts to run when the case, in which the motion for relief was brought, is voluntarily dismissed. The potential difficulty this creates in this case is that the Movant's Motion for relief from stay occurred in the Debtors' second bankruptcy case, not in this case which was commenced about three months after the second case was dismissed. Thus, the 180-day period of § 109(g)(2) started to run when this Court's order was entered dismissing the Debtors' prior bankruptcy case, an event which occurred on November 26, 2003. As a result, the 180-day bar to refiling set forth in § 109(g)(2), while still in effect, is fast approaching its termination.

Nevertheless, § 109(g) does not constitute the only basis upon which a debtor may be barred from seeking relief in the Bankruptcy Court. Section 105(a) of the Bankruptcy Code sets forth that "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." This power, in conjuncture with § 349 – which governs the effect of a dismissal – has been held to confer upon a bankruptcy court the authority to bar a debtor from seeking relief beyond the 180-day period set forth in § 109(g). *In re Casse*, 198 F.3d 327, 336 (2nd Cir.1999); *In re Tomlin*, 105 F.3d 933 (4th Cir.1997); *In re Price*, 304 B.R. 769, 771 (Bankr. N.D.Ohio 2004). *But see In re Frieouf*, 938 F.2d 1099 (10th Cir.1991) (the minority position in the Tenth Circuit is that § 349 prohibits a court from exceeding the scope of the 180-day time limit of § 109(g)). Although § 105(a) is and should be used sparingly to extend the 109(g) bar to refiling, its application is appropriate (and likely mandated) where there exists a plain abuse of the bankruptcy process. As explained below, such an abuse exists here.

The protections afforded by the automatic stay of § 362 are not a final goal of the Bankruptcy Code, but rather a means by which the goals of the Code may be achieved. As a result, while seeking to invoke the automatic stay of the Bankruptcy Code does not necessarily constitute an abuse of the

bankruptcy process, a debtor who files for bankruptcy for the *sole* purposes of gaining the protections of the automatic stay, is engaging in conduct abusive of the bankruptcy process.

Looking now at this case, the Debtors filed their petition on the eve of a foreclosure sale initiated by the Movant. Although not dispositive, the timing of this event does raise an inference that the Debtors only filed the instant bankruptcy case to gain the protections of the § 362(a). However, what heavily tips the scale against the Debtors are these additional negative considerations:

> As previously discussed, not only this bankruptcy, but the Debtors' prior two bankruptcies were filed on the eve of a foreclosure sale.
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> The Debtors' first case was dismissed for "cause."
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> The Debtors voluntarily dismissed their prior bankruptcy, thus ostensibly demonstrating their lack of need for the bankruptcy process. However, less than three months later, and again on the eve of a foreclosure sale, the Debtors filed this bankruptcy case.
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> The Debtors' second bankruptcy was dismissed under conditions which satisfied § 109(g)(2).
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> In this case, despite being well beyond the 15-day deadline imposed by Bankruptcy Rule 3015(b), and despite being afforded ample time, the Debtors have not put forth any plan of reorganization.
>
> Finally, the Debtors have again sought the voluntary dismissal of this case.

The cumulative weight of these facts, together with the timing of the instant bankruptcy, leads to the overwhelming conclusion that the Debtors never intended to put forth a viable plan of reorganization. As such, the only rational basis for the Debtors filing this case was to invoke the protections of the automatic stay. Accordingly, given this conclusion, the Court finds that the Debtors have engaged in a

blatant abuse of the bankruptcy process, thereby making it appropriate to apply § 105(a) so as to temporarily enjoin the Debtors from seeking the protections afforded by the Bankruptcy Code.

As for the time duration, the Court, based upon the concerns of the Movant to finalize its foreclosure action, finds that the injunction against the Debtors refiling should be for 180 days, commencing from the entry of this Order. **In coming to this decision, it has not gone unnoticed to the Court that the Debtors have utilized every Chapter of the Bankruptcy Code available to them: Chapter 7; Chapter 11; Chapter 12; and Chapter 13.** (emphasis added). Thus, the Debtors have been afforded the full extent of what bankruptcy law has to offer.

In reaching the conclusions found herein, the Court has considered all of the evidence, exhibits and arguments of counsel, regardless of whether or not they are specifically referred to in this Decision.

Accordingly, it is

ORDERED that this case be, and is hereby, DISMISSED.

It is ***FURTHER ORDERED*** that the Debtors, John F. Kelly, and Mary Ann Kelly, are hereby enjoined, pursuant to 11 U.S.C. §§ 105(a), 109(g)(2) and 349, from filing a petition in this Court, or any bankruptcy court in the United States, under any Chapter of the United States Bankruptcy Code, for a period of 180 days, commencing from the entry of this Order.

Dated:

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Richard L. Speer
United States
Bankruptcy Judge