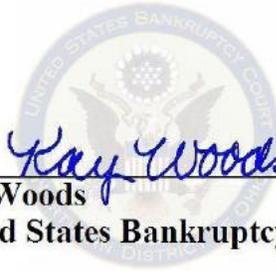


IT IS SO ORDERED.

Dated: April 18, 2016
01:12:20 PM



Kay Woods

 Kay Woods
 United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

STANLEY E. ELKINS and
DENISE H. ELKINS,

Debtors.

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CASE NUMBER 16-40041

CHAPTER 7

HONORABLE KAY WOODS

MEMORANDUM OPINION REGARDING MOTION
OF THE UNITED STATES TRUSTEE TO DISMISS
PURSUANT TO 11 U.S.C. SECTIONS 707(a) AND 109(g)

Daniel M. McDermott, the United States Trustee for Region 9 ("UST"), filed Motion of the United States Trustee to Dismiss Pursuant to 11 U.S.C. Sections 707(a) and 109(g) ("Motion to Dismiss") (Doc. 18) on February 9, 2016. On February 23, 2016, Debtors Stanley E. Elkins and Denise H. Elkins ("Debtors") filed Chapter 7 Debtors' Response and Request for Hearing on U.S. Trustee's Motion to Dismiss ("Debtors' Response") (Doc. 20). The Debtors filed Chapter 7 Debtors' Supplemental Response to U.S.

Trustee's Motion to Dismiss (Doc. 27) on April 6, 2016. The Court held a hearing on the Motion to Dismiss on April 7, 2016, at which appeared (i) Wayne W. Sarna, Esq. on behalf of the Debtors; and (ii) Linda M. Battisti, Esq.¹ on behalf of the UST. The Court took the matter under advisement and now issues this Memorandum Opinion regarding the Motion to Dismiss; for the reasons set forth below, the Court will deny the Motion to Dismiss.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and General Order No. 2012-7 entered in this district pursuant to 28 U.S.C. § 157(a). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408, and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). The following constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

I. BACKGROUND

The Debtors filed a voluntary chapter 7 petition on January 12, 2016 ("Current Case"). This is the third bankruptcy case filed by the Debtors. The Debtors filed their first case – a chapter 7 voluntary petition – on June 30, 2004, which case was denominated Case No. 04-43218 ("2004 Case"). The Debtors received a discharge in the 2004 Case on December 1, 2004. The Debtors filed a second bankruptcy case on August 17, 2011, which was a

¹ Pursuant to an agreement between this Court and the Office of the United States Trustee for Region 9, Ms. Battisti was permitted to appear telephonically.

voluntary chapter 13 petition denominated Case No. 11-42436 ("Prior Case").

On August 18, 2014, Bank of America, N.A. ("Bank") filed Motion of Bank of America, N.A. for Relief from Stay ("Motion for Relief") in the Prior Case (Prior Case, Doc. 45) in connection with real estate located at 1756 Elm Rd. N.E., Warren, Ohio (the "Debtors' Residence").² The Debtors did not oppose the Bank's Motion for Relief, and the Court entered Order Granting Motion of Bank of America N.A. for Relief from Stay (Prior Case, Doc. 47) on October 3, 2014.

More than a year later, on December 9, 2015, the Debtors filed a notice of voluntary dismissal in the Prior Case (Prior Case, Doc. 49). On that same day, the Court entered Chapter 13 Order of Dismissal (Prior Case, Doc. 50).

As set forth above, less than two months after obtaining voluntary dismissal of the Prior Case, the Debtors filed the Current Case. On February 2, 2016, Federal National Mortgage Association ("Fannie Mae") moved for relief from stay regarding the Debtors' Residence (Doc. 16). A week later, the UST filed the pending Motion to Dismiss. The Debtors took the same position regarding relief from stay in the Current Case that they did in

² The Motion for Relief was actually the second time the Bank moved for relief from stay regarding the Debtors' Residence in the Prior Case. The Bank filed a motion for relief from stay (Prior Case, Doc. 32) on August 5, 2013, which was withdrawn by the Bank a week later on August 13, 2013 (Prior Case, Doc. 34).

the Prior Case – they did not oppose Fannie Mae’s motion for relief from stay. On April 8, 2016, the Court entered an order (Doc. 29), which granted Fannie Mae’s unopposed motion for relief from stay regarding the Debtors’ Residence.

II. ARGUMENTS OF THE PARTIES

A. The UST’s Argument

The UST argues that the Debtors’ Current Case must be dismissed based on 11 U.S.C. §§ 707(a) and 109(g). Section 707(a) provides that a court may dismiss a chapter 7 case only after notice and hearing and only for cause. Section 707 is titled “Dismissal of a case or conversion to a case under chapter 11 or 13” and subsection (a) sets forth a non-exclusive list of three examples of “cause” for dismissal: (i) unreasonable delay by the debtor that is prejudicial to creditors; (ii) nonpayment of fees and charges; and (iii) failure to timely file schedules and other documents. None of these examples of cause are applicable to the Debtors’ Current Case. Section 109, which is titled “Who may be a debtor,” provides:

(g) Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if –

* * *

(2) 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.

11 U.S.C. § 109 (2016). Despite citing to both statutes, the UST's argument centers entirely on § 109(g)(2). In other words, except for the eligibility issue in § 109(g)(2), the UST does not contend that there is any other "cause" to dismiss the Debtors' Current Case.

Although recognizing that there have been different interpretations of § 109(g), the UST cites to *In re Andersson*, 209 B.R. 76 (6th Cir. B.A.P. 1997) for the proposition that § 109(g)(2) is not ambiguous and must be read in accordance with its plain meaning – *i.e.*, an individual is not eligible to be a debtor under the Code for 180 days following voluntary dismissal of a case in which a creditor filed a motion for relief from stay. The UST states,

As a result of the Debtors requesting and obtaining a voluntary dismissal of their chapter 13 case following the filing of a motion for relief from stay in such case, they were not eligible to be debtors for 180 days. Therefore, the Debtors are not eligible to be debtors until approximately June 9, 2016. Since they filed their current chapter 7 case on January 25, 2016, they are not eligible to be debtors at this time and their case should be dismissed.

Mot. to Dismiss ¶ 5.³

³ June 6, 2016 (not June 9, 2016) is the 180th day following the December 9, 2015 dismissal of the Prior Case. The Current Case was filed on January 12, 2016 (not January 25, 2016).

B. The Debtors' Argument

The Debtors counter that they were not eligible to convert the Prior Case from chapter 13 to chapter 7 because the Prior Case was commenced within eight years of their 2004 Case. Thus, 11 U.S.C. § 727(a)(8) would have prohibited the Debtors from receiving a discharge if they had converted the Prior Case to chapter 7. The Debtors state that, as a result of permitting the Bank relief from stay regarding their Residence in the Prior Case, they faced a huge unsecured deficiency claim based on foreclosure of the mortgage on their Residence. Because they could not fund the mortgage deficiency claim in the chapter 13 plan and conversion of the Prior Case to chapter 7 was not an option, the Debtors voluntarily dismissed the Prior Case and filed the Current Case.

The Debtors rely on *In re Durham*, 462 B.R. 139 (Bankr. D. Mass. 2011) and *In re Payton*, 481 B.R. 460 (Bankr. N.D. Ill. 2012) for the proposition that § 109(g) requires a causal connection between the motion for relief and the voluntary dismissal in order for the 180-day bar to apply. Here, the Debtors argue, there was no causal connection between the Bank's Motion for Relief, which was granted in October 2014, and their voluntary dismissal of the Prior Case in December 2015.

The Debtors differentiate their circumstances from the facts in *In Re Andersson*, which involved two chapter 13 cases, each filed to stop foreclosure on the debtors' residence. The Debtors argue

that the Current Case does not constitute abuse of the bankruptcy process (a statement with which the UST agrees).⁴ The Debtors further argue that cases interpreting § 109(g)(2) deal exclusively with the filing of second chapter 13 cases after voluntary dismissal of a prior chapter 13 case; the Debtors note that their Current Case is a chapter 7.

II. ANALYSIS

In the *Andersson* case, the Sixth Circuit BAP held that the text of § 109(g)(2) was "unambiguous" and adopted the bankruptcy court's conclusion that:

[T]he literal application of the statute comports with the drafter's express intention to prevent repeated invocation of the automatic stay. The mandatory interpretation also gives debtors clear direction as to their eligibility, which is consistent with the Sixth Circuit's instruction that eligibility issues should be determined in an "efficient and inexpensive" manner. See *In re Pearson* [773 F.2d 751, 756 (6th Cir. 1985)] (interpreting eligibility issues under 11 U.S.C. § 109(e)). Based on these considerations, under the plain language of § 109(g)(2) an individual is not eligible to be a debtor under the Code for 180 days following voluntary dismissal of a case in which a creditor filed a motion for relief from stay.

In re Andersson, 209 B.R. at 78, citing *In re Andersson*, No. 96-11001, 1996 WL 417233, at *3 (Bankr. N.D. Ohio May 24, 1996).

At the Hearing, Ms. Battisti acknowledged that the Sixth Circuit BAP's interpretation of § 109(g)(2) was "harsh," but she

⁴ At the hearing, Ms. Battisti, on behalf of the UST, admitted that there was no abuse by the Debtors in filing the Current Case.

postulated that *Andersson* was the "controlling case" in the Sixth Circuit.

This Court takes issue with *Andersson* being a "controlling case" in this Circuit. Unlike decisions from the Sixth Circuit Court of Appeals, which are controlling, decisions from a Bankruptcy Appellate Panel in the Sixth Circuit have no such precedential effect. Bankruptcy courts within the Sixth Circuit have taken varying positions on this subject.

The Sixth Circuit has not yet published any ruling concerning the binding effect of bankruptcy appellate panel decisions. *Signal v. Livingston (In re Livingston)*, 379 B.R. 711, 726 (Bankr. W.D. Mich. 2007). Bankruptcy courts in this circuit have reached conflicting conclusions regarding the precedential effects of bankruptcy appellate panel decisions. *Compare id.* (holding that such decisions are not binding because, *inter alia*, the doctrine of *stare decisis* arises from the inevitability of reversal on appeal, and bankruptcy appellate panels can only hear appeals from bankruptcy courts if all parties to the appeal consent) *with Rhiel v. OhioHealth Corp. On [sic] re Hunter*, 380 B.R. 753 (Bankr. S.D. Ohio 2008) (holding that, in the interest of uniform case law throughout a district and predictability of results, bankruptcy courts should treat bankruptcy appellate panel decisions as binding).

In re Terrell, No. 08-60172, 2009 WL 1586753, at *6 (Bankr. N.D. Ohio Jan. 15, 2009).

The bankruptcy court in *In re Boyd*, 414 B.R. 223 (Bankr. N.D. Ohio 2009), agreed with the conclusion that BAP decisions do not constitute binding precedent.

This Court agrees with those courts holding that BAP decisions should be considered persuasive authority, but do not have binding precedential effect like decisions

from the U.S. Supreme Court or from the court of appeals in which the bankruptcy court is located. See *In re Terrell*, 2009 WL 1586753, at *6 (finding BAP decisions to be persuasive authority); *In re Livingston*, 379 B.R. at 727 (same); *In re Cormier*, 382 B.R. 377, 409 (Bankr. W.D. Mich. 2008) (same). In short, while there may be good policy reasons for BAP decisions to be binding precedent on all bankruptcy courts within the circuit, the dual appellate tracks set forth by Congress under 28 U.S.C. § 158 simply cannot mandate such a result because litigants will always have the option of appealing to the district court, which is unconstrained by prior BAP precedent.

In re Boyd, 414 B.R. at 232.

In *Andersson*, the BAP noted that the purpose of § 109(g)(2) was to prevent the debtor from controlling the automatic stay.

To the extent that a review of the legislative history would serve as a check that this determination does not produce a result at odds with the purpose of the statute, an examination of the legislative intent behind § 109(g)(2) further supports the Panel's reading of the statute and would yield the same result in this case. Section 109(g)(2) is intended to prevent the debtor from controlling the automatic stay without restriction by voluntarily invoking the stay (filing) and voluntarily terminating the stay (dismissing). The section restricts the debtor's invocation of the automatic stay (filing), if, following the filing of a request for relief from the automatic stay, the debtor voluntarily requests and obtains a dismissal of the bankruptcy.

In re Andersson, 209 B.R. at 79.

The *Andersson* case was decided almost twenty years ago, in 1997, well before the Bankruptcy Code was amended by the Bankruptcy Abuse Prevention and Consumer Protection Act ("BAPCPA") in 2005. In BAPCPA, Congress took some of the control over the automatic stay away from a debtor by including new subsections in § 362(c).

For example, the automatic stay is limited to 30 days (unless extended by order of the court before the expiration of the 30-day period) if a debtor had a case pending within the one-year period preceding the debtor filing the petition. See 11 U.S.C. § 362(c)(3)(A). The automatic stay does not go into effect at all if a debtor had two pending cases in the preceding one-year period. See 11 U.S.C. § 361(c)(4)(A). However, this Court notes that despite additions to § 363(c), which provide limits on a debtor's ability to control the automatic stay, Congress left § 109(g) intact.

In *In re Payton*, the bankruptcy court found that § 109(g) was ambiguous because "following" has several meanings: (i) time sequence; (ii) compliance; and (iii) causation. The Court held:

Section 109(g)(2) uses "following" to establish a relationship between two discrete events: the debtor's voluntary dismissal of a bankruptcy case and a request for relief from the automatic stay; it provides for ineligibility where there is "voluntary dismissal of [a prior] case following the filing of a request for relief from the automatic stay." In this context, causation is the focus of the relationship, not simply chronology.

* * *

The text of § 109(g)(2) clearly shows its purpose. By making a debtor ineligible for later bankruptcy relief if a request for relief from the automatic stay was filed in an earlier case, § 109(g)(2) provides protection for creditors who have sought stay relief. Without the limitation of § 109(g)(2), a debtor could – by voluntarily dismissing one case in which stay relief was sought and then filing another case – obtain repetitive automatic stays to prevent a creditor from taking action against the debtor's property.

In re Payton, 481 at 466. The Court went on to explain:

The overbreadth that results from the chronological definition of "following" – and the need for judicial discretion to cure it – is eliminated if the causal definition is used. With this definition, a debtor is only ineligible for a later bankruptcy filing if the debtor voluntarily dismissed the original case as a result of the filing of a motion for relief from the automatic stay. This is precisely the abuse that the statute was intended to address, and so, in addition to being the most reasonable choice based on the statutory context, the causal definition of "following" precisely matches the statutory purpose. "Following" meaning "as a result of" is the best way to read § 109(g)(2).

Id. at 467.

Like other courts, this Court differs from the *Andersson* court's conclusion that § 109(g)(2) is unambiguous; to the contrary, although various judicial interpretations of a statute do not necessarily mean that a statute is ambiguous, in this case, this Court finds that the multiple common dictionary meanings for the word "following" does render § 109(g)(2) ambiguous. "Since § 109(g)(2) has generated three different lines of authority for the meaning of the word 'following,' this Court cannot agree with the *Andersson* court that the text of the statute is so plain that it can be applied without further analysis." *In re Richardson*, 217 B.R. 479, 484 (Bankr. M.D. La. 1998). "This Court agrees with the court in *In re Payton* that the word 'following' finds itself amenable to several definitions and that § 109(g)(2), as it is

read, is ambiguous as to the meaning of 'following.'" *In re Guerrero*, 540 B.R. 270, 278 (Bankr. S.D. Tex. 2015).

Despite their different conclusions, this Court finds both the *Andersson* and the *Payton* decisions to be instructive. Each of those cases reached results that were equitable in the circumstances of those cases. In *Andersson*, the debtors filed their first chapter 13 case on the eve of foreclosure. After the creditor filed a motion for relief from stay, the debtors voluntarily dismissed the case. One hundred days later, the debtors filed their second chapter 13 case, again for the purpose of stopping foreclosure proceedings. In contrast, the *Payton* case involved a motion for relief from stay regarding a car. The car was repossessed and sold three years before the debtors voluntarily dismissed their case. The instant case is more like the *Payton* case than the *Andersson* case because no creditor has been or is prejudiced by the Debtors' filing of their Current Case. Instead, granting the UST's Motion to Dismiss could result in prejudice to Fannie Mae. As set forth above, Fannie Mae has already obtained relief from stay regarding the Debtors' Residence in the Current Case. If the Court were to grant the UST's Motion to Dismiss and the Debtors filed a new bankruptcy case after expiration of the 180-day period, but prior to December 9, 2016, Fannie Mae might feel compelled to file a motion to obtain a comfort order that the

automatic stay would not apply in the newly filed case.⁵ If the Debtors were to refile after December 9, 2016, Fannie Mae would incur yet another filing fee and related attorney's fees if it sought relief from the automatic stay. It would indeed be an anomaly if dismissal – based on one reading of the ambiguous wording in § 109(g)(2) – would harm both the Debtors⁶ and a creditor.

If the Debtors had been able to convert their case from chapter 13 to chapter 7 instead of having to dismiss the chapter 13 case and file a new chapter 7 case, the posture of this case would be nearly the same except the Debtors would not be facing the UST's Motion to Dismiss. It is troubling to the Court that the UST, rather than a creditor, has filed this Motion to Dismiss. The UST admits there is no "abuse" to be rectified by dismissal of this case. Indeed, although the list of "cause" in § 707 is not exhaustive, one of the circumstances listed is delay that is prejudicial, which is not applicable here. To the contrary, as set forth above, prejudice is likely to result if the Motion to Dismiss is granted.

⁵ If the Debtors file a case prior to December 9, 2016, they would have two pending cases in the one-year period prior to filing such case. Thus, pursuant to 11 U.S.C. § 362(c)(4)(A), the automatic stay would not be applicable.

⁶ At minimum, the Debtors would incur an additional filing fee.

As previously stated, this Court finds § 109(g)(2) to be ambiguous. If the meaning of the word "following" requires a causal connection between the motion for relief and voluntary dismissal in the Prior Case, then the 180-day bar is not applicable to the Debtors' Current Case. If the word "following" is merely chronological, then the Debtors are not eligible to be debtors in the Current Case and must be dismissed. At most the Debtors' filing of their Current Case – a chapter 7 case – involves merely technical non-conformance with the statutory language. Because bankruptcy courts are courts of equity and this Court can find no just cause to dismiss the Debtors' Current Case, the Court will deny the UST's Motion to Dismiss.

An appropriate order will follow.

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IT IS SO ORDERED.

Dated: April 18, 2016
01:12:20 PM


Kay Woods

Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

STANLEY E. ELKINS and
DENISE H. ELKINS,

Debtors.

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CASE NUMBER 16-40041

CHAPTER 7

HONORABLE KAY WOODS

ORDER DENYING MOTION OF THE UNITED STATES TRUSTEE TO DISMISS
PURSUANT TO 11 U.S.C. SECTIONS 707(a) AND 109(g)

Daniel M. McDermott, the United States Trustee for Region 9 ("UST"), filed Motion of the United States Trustee to Dismiss Pursuant to 11 U.S.C. Sections 707(a) and 109(g) ("Motion to Dismiss") (Doc. 18) on February 9, 2016. On February 23, 2016, Debtors Stanley E. Elkins and Denise H. Elkins ("Debtors") filed Chapter 7 Debtors' Response and Request for Hearing on U.S. Trustee's Motion to Dismiss (Doc. 20). The Debtors filed Chapter

7 Debtors' Supplemental Response to U.S. Trustee's Motion to Dismiss (Doc. 27) on April 6, 2016.

The Court held a hearing on the Motion to Dismiss on April 7, 2016, at which appeared (i) Wayne W. Sarna, Esq. on behalf of the Debtors; and (ii) Linda M. Battisti, Esq. on behalf of the UST. At the conclusion of the hearing, the Court took the matter under advisement.

For the reasons set forth in the Court's Memorandum Opinion Regarding Motion of the United States Trustee to Dismiss Pursuant to 11 U.S.C. Sections 707(a) and 109(g) entered on this date, the Court hereby **DENIES** the Motion to Dismiss.

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