

THIS OPINION IS NOT INTENDED  
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UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

FILED  
MAR 13 11 2:00  
CLERK OF COURT  
NORTHERN DISTRICT OF OHIO  
CLEVELAND

In re: ) Case No. 01-18739  
)  
KENNETH R. WATSON, ) Chapter 13  
)  
Debtor. ) Judge Pat E. Morgenstern-Clarren  
)  
) **MEMORANDUM OF OPINION**

This is the Debtor Kenneth Watson's fifth bankruptcy filing. On motion of BA Mortgage LLC, the Court dismissed the case for good cause shown with a bar against refiling for 180 days. (the "Dismissal Order"). (Docket 9). The Debtor requests relief from the Dismissal Order and reconsideration of the decision to dismiss his case (the "Motion"). (Docket 12, 15). BA Mortgage opposes this request.<sup>1</sup> (Docket 14). The Court held a hearing on February 27, 2002.

**JURISDICTION**

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered on July 16, 1984 by the United States District Court for the Northern District of Ohio. This is a core proceeding under 28 U.S.C. § 157(b)(2).

**FACTS AND DISCUSSION**

BA Mortgage LLC (the "Lender")<sup>2</sup> moved to dismiss this Chapter 13 case with a bar against refiling based on the Debtor's lack of good faith. The Lender cited the Debtor's serial

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<sup>1</sup> Although the Chapter 13 Trustee also objected to reinstatement of the case, he later withdrew the objection. See docket entry for February 12, 2002.

<sup>2</sup> BA Mortgage LLC is the successor by merger with Nationsbanc Mortgage Corp. which is the successor by merger with Nationsbanc Mortgage Corp. of New York (formerly known as Keycorp Mortgage Inc.), the assignee of the Resolution Trust Corp. as receiver for Broadview Savings Bank. For ease of the reader, no distinction is drawn between these entities in this Opinion.

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bankruptcy filings and argued that the present case was filed for the sole purpose of delaying attempts to foreclose on the Debtor's residence. The motion was heard on November 13, 2001. Neither Debtor's counsel nor the Debtor appeared to oppose it. The motion stated at least a prima facie case for dismissal with sanctions, and in the absence of opposition it was granted. The Dismissal Order was entered on December 1, 2001. (Docket 9).

On December 26, 2001, the Debtor filed an untimely motion to reconsider the Dismissal Order followed on February 4, 2002 by an amended motion which also included a request for relief under Federal Rule of Civil Procedure 60(b). (Docket 12, 15). Looking at these motions collectively, the Debtor requests two things: (1) relief from the Dismissal Order under Rule 60(b); and (2) reconsideration of the decision to dismiss the case with sanctions.

**I. Relief from Judgment**

The Debtor requests relief under Rule 60(b), citing excusable neglect and other grounds. See FED. R. BANKR. P. 9024 (incorporating FED. R. CIV. P. 60(b)(1)). Determinations regarding "excusable neglect" are guided by the Supreme Court's analysis of that term in *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380 (1993). The determination as to what "sorts of neglect will be 'excusable' . . . is at bottom an equitable one, taking into account all relevant circumstances surrounding the party's omission." *Pioneer Inv. Servs.* at 395. Factors to consider include "(1) the danger of prejudice to the other party, (2) the length of delay; (3) its potential impact on judicial proceedings; (4) the reason for the delay, and (5) whether the movant acted in good faith." *Jinks v. AlliedSignal, Inc.*, 250 F.3d 381, 386 (6th Cir. 2001) (citing *Pioneer Inv. Servs.*, 507 U.S. at 395). It is appropriate to consider these factors "in cases where procedural default has prevented the court from considering the true merits of a party's claim." *Id.*

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Debtor's counsel did not attend the November 13, 2001 hearing on the motion to dismiss because she mistakenly believed that the matter was going to be resolved with the Lender through an agreed entry. As a result, the Debtor did not have an opportunity to be heard in opposition to the dismissal request and the Dismissal Order is in this respect analogous to a default judgment. There is no indication of bad faith. Given that the Debtor moved quickly to request relief from the Dismissal Order, the delay is negligible. While the Lender's efforts to foreclose on the property have been delayed, it will not be greatly prejudiced if relief is granted. This is because the Lender's counsel stated that an order of sale has been submitted in the foreclosure proceeding, which means that once this matter is resolved the sale will occur promptly. Also, the parties have already presented their evidence on the dismissal issue (see discussion below) and so this Court can promptly address the merits of the Lender's dismissal request. Based on these rather unusual circumstances, the Debtor's failure to appear in opposition to the motion to dismiss was excusable neglect. The Debtor's request for relief from the Dismissal Order is, therefore, granted.

**II. Reconsideration**

With the Dismissal Order set aside, the Debtor requests reconsideration of the decision to dismiss his case. The parties presented their evidence on the merits of the Lender's motion at the February 27, 2002 hearing.<sup>3</sup> It is now appropriate, therefore, to address the merits of that motion.

The Debtor lives at 3249 West 46th Street, Cleveland, Ohio with his 16-year-old son. The Lender loaned money to the Debtor which is secured by a mortgage on this property. The

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<sup>3</sup> The Debtor and his father, James Watson, testified and the Lender introduced the dockets from the Debtor's five bankruptcy cases into evidence.

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Debtor acknowledged that the property has been scheduled for sheriff's sale four times and that his bankruptcy filings stayed the Lender's efforts to have the property sold.

These are the Debtor's five bankruptcy cases:

The Debtor's first case, a Chapter 13, was filed in November 1995. The Debtor worked for American National Can at the time and earned \$15.00 an hour. He was in the midst of a divorce and did not live at the property. The Chapter 13 plan was confirmed in January 1996, with the Lender getting relief from stay in July 1996. The Debtor voluntarily dismissed the case in February 1998.

The Debtor filed his second Chapter 13 case in February 1998. At that time, he still worked at American National Can. The Debtor testified that he was a single father with five children, but he did not elaborate on what that meant financially. The Debtor tried to get medical leave because he was allergic to the chemicals he came in contact with at work. He lost his job while this Chapter 13 case was pending. The Debtor later participated in a work program to be retrained for other work and also received ADC. His plan was confirmed in March 1998. In June 1998, the Debtor moved to suspend his plan payments, which motion was granted in August 1998. The Lender got relief from stay in April 1999 and the case was dismissed for lack of funding in June 1999.

The Debtor filed his third case, a Chapter 7, in July 1999. He was not working when this case was filed. The Lender was granted relief from stay in November 1999. The Debtor received a discharge.

The Debtor filed his fourth case, another Chapter 13, in March 2000. He was employed by Magnesium Aluminum Corp., having recently left a position where he was making \$9.00 an

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hour because this job offered more money. The Debtor's plan was confirmed in May 2000. His request to suspend plan payments was granted in August 2000. The Lender requested relief from the automatic stay in January 2001, but later withdrew that request. The case was dismissed for lack of funding in March 2001.

The Debtor filed this Chapter 13 case, his fifth bankruptcy case, in September 2001. The Debtor is unemployed and his monthly income consists of \$243.00 in food stamps and a \$305.00 welfare payment. He testified that his friends pay him approximately \$200.00 a month for car rides, but this income is not reflected on his Schedule I of current income. (Docket 1). The Debtor also testified that he has monthly expenses of \$800.00 including his plan payment. The Debtor's Schedule J, however, lists current monthly expenses of \$914.00 excluding the plan payment. (Docket 1).

The Debtor suffers from severe allergies which have resulted in four operations. He also has high blood pressure and takes medication for depression. He applied for social security disability over a year and a half ago. His attorney recently requested an expedited hearing on that matter and expects one will be scheduled in the next few months.

The Debtor's family is committed to helping him meet his financial obligations in this case. The Debtor's Schedule I indicates an \$800.00 family contribution. (Docket 1). The Debtor's father testified that he, his wife, and the Debtor's brothers will help the Debtor make his Chapter 13 plan payments and he believes each can contribute \$75.00 to \$100.00 a month. The Debtor has five brothers, but it was not clear how many of them intend to contribute because the Debtor's father testified that only three of the brothers were "doing well." The Debtor's counsel

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stated that the family members signed an affidavit stating their intention in this regard; however, the affidavit was not presented at the hearing and it is not part of the case file.

The Debtor proposes paying the Lender's entire debt through the Chapter 13 plan. This debt was scheduled by the Debtor as \$22,732.00 with a proposed monthly plan payment of \$425.00. The Chapter 13 Trustee recommended that the payment be increased to \$481.71 to allow the plan to be completed in a 60-month period. The Lender subsequently filed a proof of claim for \$30,312.00 and the Debtor has not objected to it.

This motion to dismiss is governed by Bankruptcy Code §1307(c) which provides for dismissal (or conversion) of a Chapter 13 case "for cause." 11 U.S.C. § 1307(c). A debtor's failure to file a Chapter 13 case in good faith is cause for conversion under this section. *Society Nat'l Bank v. Barrett (In re Barrett)*, 964 F.2d 588 (6th Cir. 1992) (citations omitted). "Our circuit's good faith test requires consideration of the totality of circumstances." *Id.* at 591. There are at least twelve factors to be considered in determining a debtor's good faith: (1) the debtor's income; (2) the debtor's expenses; (3) the debtor's attorney fees; (4) the anticipated duration of the plan; (5) the debtor's sincerity; (6) the debtor's earning potential; (7) special circumstances which the debtor may be subject to; (8) the frequency with which the debtor has sought bankruptcy relief; (9) the circumstances under which the debt was incurred; (10) the amount of payment offered by the debtor; (11) the administrative burden on the Chapter 13 trustee; and (12) the statutory policy in favor of granting relief to debtors. *Id.* at 592.

The totality of the circumstances indicate that the Debtor did not file his present case in good faith. This is the Debtor's fifth filing in six years and two of the three previous Chapter 13 cases were dismissed for failure to fund. The Lender has been repeatedly thwarted in its efforts

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to sell the Debtor's real property and apply the proceeds to the debt. The Debtor's health was a factor in his failure to fund the previous cases and his health has not improved. The Debtor is currently unemployed and appears to have little prospect of obtaining employment. The possibility of funding his case through a disability award is uncertain because there is insufficient information about the probability and the timing of an award. The Debtor's failure to schedule the income which he receives from friends indicates a lack of sincerity in this case.

The Debtor's monthly expenses exceed his scheduled monthly income. He is relying on family contributions to meet his living expenses and is relying entirely on family contributions to fund his Chapter 13 plan. The Debtor's Schedule I indicates he needs \$800.00 each month in family contributions to meet his monthly living expenses and to make his \$425.00 proposed monthly payment. While his family clearly wants to help, the amount they are proposing to contribute each month has not been specified. Also, it is clear that requisite plan payments will exceed the Debtor's \$425.00 proposal. The Trustee has requested an increased payment of \$481.71 to allow for a 60-month plan which is the maximum amount of time a plan may run. See 11 U.S.C. § 1322(d). Additionally, that plan payment is premised on the Lender's claim amount being \$22,732.00. According to the uncontested claim filed by the Lender for \$30,312.00, however, a larger monthly plan payment will be required. As the Debtor has no income of his own, this means that his family would have to contribute even more money each month than the amount contemplated.

Based on the above, the Court finds that the Debtor did not file this case in good faith. The Lender's motion to dismiss is, therefore, granted.

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The next issue is whether a 180-day bar against refiling should be imposed. Section 109(g)(1) provides for the dismissal with a 180-day bar to refiling if the “case was dismissed . . . for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case[.]” 11 U.S.C. § 109(g)(1). *See also Tolbert v. Fink (In re Tolbert)*, 255 B.R. 214 (B.A.P. 8th Cir. 2000). “Because the effect of § 109(g) is to deprive a debtor of the right to relief under the Code for 180 days, ‘the denial of eligibility should not be lightly or routinely imposed on the debtor without evidence that the debtor knowingly and intentionally failed to appear in prosecution of the case’.” *In re Pike*, 258 B.R. 876, 882-82 (Bankr. S.D. Ohio 2001) (quoting *In re Herrera*, 194 B.R. 178, 188 (Bankr. N.D. Ill. 1996)).

However, the court may:

construe repeated failure to appear or lack of due diligence as willful conduct. Repeated conduct strengthens the inference that the conduct was deliberate. Additionally, the court [may] infer from a pattern of dismissals and refilings in unchanged circumstances willful failure to abide by orders of the court and an abuse of the bankruptcy process[.]

*In re Nelkovski*, 46 B.R. 542, 544 (Bankr. N.D. Ill. 1985). *See also, Walker v. Stanley*, 231 B.R. 343, 348 (N.D. Calif. 1999) (finding that successive filings may be evidence of willful abuse of the bankruptcy process).

This is the Debtor’s fifth bankruptcy case in six years. Three of the previous cases were Chapter 13s and none of them was completed. The Debtor’s financial circumstances have gotten worse over that period even though he obtained a discharge of his unsecured debt in the Chapter 7 case. The Debtor has not met his duties as a Chapter 13 debtor in this case because the schedules he filed do not list income which he receives from his friends and do not accurately reflect his income based on this omission. Based on these facts, the Court finds that the Debtor

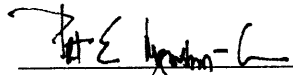


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has willfully failed to properly prosecute this case and the imposition of a 180-day bar against refiling is appropriate. The Lender's request for a bar against refiling under § 109(g)(1) is, therefore, granted and the Debtor is enjoined from filing for relief under the Bankruptcy Code for a period of 180 days from the entry of the order of dismissal.

A separate order will be entered reflecting this decision.

Date: 13 Mar 02

  
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Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

Served by mail on: Barbara Brown-Daniels, Esq.  
Amy Blythe Glaze, Esq.  
Myron Wasserman, Trustee

By: Joyce L. Gordon, Secretary  
Date: 3/13/02

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In re: ) Case No. 01-18739  
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KENNETH R. WATSON, ) Chapter 13  
)  
Debtor. ) Judge Pat E. Morgenstern-Clarren  
)  
) **ORDER**

For the reasons stated in the Memorandum of Opinion entered this same date,

IT IS, THEREFORE, ORDERED that the Debtor's Motion for Relief from Judgment and for Reconsideration of the decision granting the Motion of BA Mortgage LLC for dismissal of this case is granted. (Docket 12, 15). IT IS FURTHER ORDERED that, after reconsideration, the Motion of BA Mortgage LLC to dismiss this case is granted. (Docket 7). IT IS FURTHER ORDERED that BA Mortgage's request for the imposition of a 180-day bar against refiling under 11 U.S.C. § 109(g)(1) is also granted. The bar shall run from the date of this judgment.

Date: 13 Mar 2012

Pat E. Morgenstern-Clarren  
Pat E. Morgenstern-Clarren  
United States Bankruptcy Judge

Served by mail on: Barbara Brown-Daniels, Esq.  
Amy Blythe Glaze, Esq.  
Myron Wasserman, Trustee

By: Joyce L. Gordon, Secretary  
Date: 3/13/12