

NOT FOR COMMERCIAL PUBLICATION

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:) Case No. 08-12357
)
GEORGE DEIMLING and) Chapter 13
DIANNE DEIMLING,)
Debtors.) Judge Pat E. Morgenstern-Clarren
) **MEMORANDUM OF OPINION**

The debtors George and Dianne Deimling move to extend the automatic stay under bankruptcy code § 362(c)(3)(B) and creditor Lake of the Falls Condominium Association (the “association”) opposes that request.¹ For the reasons stated below, the debtors’ motion is denied.²

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

The court held an evidentiary hearing on May 15, 2008. The debtors presented their case through their own testimony and exhibits. The association introduced the testimony of Erick

¹ Docket 10, 20, 28, 29, 31.

² This written opinion is entered only to decide the issues presented in this case and is not intended for commercial publication in an official reporter, whether print or electronic.

Algotson, its property manager, as well as exhibits. Based on the evidence presented, the court finds that:

George and Dianne Deimling have filed four cases in this court. Their first two cases were chapter 7 cases filed in 1993 and 2003. Their third case was a chapter 13 case which was filed on May 18, 2006 (the “previous case”).³ The previous case was dismissed for lack of funding, then reinstated when the debtors paid the amounts owed to the chapter 13 trustee. The debtors’ chapter 13 plan, confirmed on May 15, 2007, required the debtors to make weekly plan payments of \$239.54 to the chapter 13 trustee. The debtors acknowledge that they failed to maintain the payments. The case was ultimately dismissed by an order entered on April 3, 2008 based on the failure to fund their plan.⁴ The debtors’ current chapter 13 case was filed the same day.

The current dispute centers on a condominium unit at 26638 Lake of the Falls, Olmsted Falls, Ohio, that the debtors have owned since 1997; by virtue of that ownership, they are members of the association. Mr. Algotson testified that, during the debtors’ previous case, they did not pay the association’s monthly condominium maintenance assessments for the period September 2007 through April 2008, except for one partial payment in January.⁵ The association was granted relief from stay in the previous case to allow it to pursue its lien rights

³ *In re George and Dianne Deimling*, case no. 06-11949.

⁴ The trustee’s motion to dismiss asserted the plan payments were delinquent in the amount of \$7,519.68 through March 2008. *See* case no. 06-11949, docket 106. The debtors filed a number of responses to the motion; they did not dispute the amount owed, but instead said they would bring their plan payments current. *See* case no. 06-11949, docket 108, 110, 111. At the hearing, Dianne Deimling disputed the amount owed in the previous case, but did not provide details.

⁵ *See* Association exh. 5.

against the debtors' condominium unit, based on the failure to pay the assessments. After the stay was lifted, the association reactivated its state court foreclosure proceeding.

The debtors filed their current case to stop the foreclosure action. They have proposed a plan which will require them to make monthly plan payments of \$700.00 through payroll deductions from Dianne Deimling's wages. George Deimling has been with his current employer for two years, Dianne Deimling has been with her current employer for a year and a half, and their income has not changed during those time periods. Dianne Deimling testified that they made their first plan payment to the trustee and also paid their May 2008 post-petition condominium assessment.

The debtors attribute their lack of success in the previous case to a number of things. George Deimling injured his foot at work in February 2008 and could not work for approximately five weeks, during which time his pay was reduced by one-half. He also had oral surgery for an abscessed tooth, which caused him to miss a few days of work and to pay the dentist's bill out of pocket. The couple also repaired their furnace in the winter of 2007. The debtors did not provide any information about the costs associated with the dental work and furnace repair. Dianne Deimling also suggested that they fell behind in their plan payments when she changed jobs during the previous case, because the couple began making their plan payments directly to the trustee rather than through a payroll deduction.

DISCUSSION

Filing a bankruptcy petition generally operates to impose the automatic stay. *See* 11 U.S.C. § 362(a). And the automatic stay usually remains in effect until an order granting relief from stay is entered, *see* 11 U.S.C. § 362(d), or the stay terminates by operation of law, *see* 11

U.S.C. § 362(c)(1), (2). However, BAPCPA⁶ amended the automatic stay provisions to limit the automatic stay with respect to repeat filers. One of those limitations is § 362(c)(3), which provides that the automatic stay terminates in certain second bankruptcy filings. It is up to the debtor in such a case to request that the stay be continued. *See* 11 U.S.C. § 362(c)(3).

11 U.S.C. § 362(c)(3)

Section 362(c)(3) limits the availability of the automatic stay by providing that –

(3) if a single or joint case is filed by or against debtor who is an individual in a case under chapter 7, 11, or 13, and if a single or joint case of the debtor was pending within the preceding 1-year period but was dismissed, other than a case refiled under a chapter other than chapter 7 after dismissal under section 707(b) –

(A) the stay under subsection (a) with respect to any action taken with respect to a debt or property securing such debt or with respect to any lease shall terminate with respect to the debtor on the 30th day after the filing of the later case

11 U.S.C. § 362(c)(3)(A). Under this provision, the automatic stay in a chapter 13 case terminates 30 days after the bankruptcy filing, if the debtor filed a previous case that was pending in the year prior to the filing that was dismissed other than under § 707(b).⁷ The debtors acknowledge that the automatic stay in their case will terminate based on the dismissal of the previous case and they ask that the stay be continued beyond the initial 30 days as to all of their creditors.

Debtors who move to continue the automatic stay must demonstrate that the current filing is a good faith filing as to the creditors to be stayed. 11 U.S.C. § 362(c)(3)(B). Certain cases are

⁶ Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23.

⁷ Opinions vary regarding the meaning and effect of § 362(c)(3)(A). The court decides this matter without addressing that issue as the parties have not requested clarification on that issue and the debtors acknowledge that they must request a continuation of the stay.

presumed not to have been filed in good faith, either as to all creditors or as to specific creditors. 11 U.S.C. § 362(c)(3)(C). In such cases, the party requesting the stay continuation is required to rebut the presumption that the filing is not made in good faith “by clear and convincing evidence to the contrary[.]” *Id.* The “clear and convincing” standard is an intermediate standard of proof that falls between the “preponderance of the evidence” and the “beyond a reasonable doubt” standards. *Addington v. Texas*, 441 U.S. 418, 423-24 (1979). Clear and convincing evidence in this context is proof which produces in the trier of fact a firm belief or conviction as to the allegations sought to be established. *In re Wilson*, 336 B.R. 338, 347 (Bankr. E.D. Tenn. 2005).

Section 362(c)(3) does not define good faith. Before BAPCPA, courts generally looked at the totality of the circumstances to determine good faith in this context, and this test has continued to be applied post-BAPCPA. *See for example, In re Elliott-Cook*, 357 B.R. 811, 814-15 (Bankr. N.D. Cal. 2006); *In re Baldassaro*, 338 B.R. 178, 187 (Bankr. D.N.H. 2006); *In re Havner*, 336 B.R. 98, 103-4 (Bankr. M.D.N.C. 2006); *In re Galanis*, 334 B.R. 685, 692-93 (Bankr. D. Utah 2005); *In re Montoya*, 333 B.R. 449, 457-58 (Bankr. D. Utah 2005); *see also In re Ferguson*, 376 B.R. 109, 120 (Bankr. E.D. Pa. 2007) (adopting the “totality of the circumstances” test to determine a debtor’s good faith under § 362(c)(4)(B); *but see In re Whitaker*, 341 B.R. 336, 346 (Bankr. S.D. Ga. 2006). As the Sixth Circuit’s general approach to good faith issues is that all of the circumstances should be considered, *see Alt v. United States (In re Alt)*, 305 F.3d 413, 419-20 (6th Cir. 2002), the court adopts that test here.

The question then becomes what factors should be considered in determining good faith. In *Alt*, decided pre-BAPCPA, the Sixth Circuit accepted the proposition that a debtor’s lack of good faith was cause to dismiss a chapter 13 case. *Id.* at 418-19. In that context, the circuit cited these factors as being relevant to good faith: the nature of the debt; how the debt arose; the

timing of the petition; whether the debt would be dischargeable in chapter 7; the debtor's motive in filing; how the debtor's actions affected creditors; the debtor's treatment of creditors before and after the filing; and whether the debtor had been forthcoming with the court and creditors; as well as any of the factors used to determine good faith in the plan confirmation context. *Id.* at 419-20. This check list does not translate smoothly into the § 362(c)(3)(B) context, however, because the relevant time frame is the filing date. Additionally, some courts have suggested that other changes made by BAPCPA make the old list less significant. *See, for example, In re Baldassaro*, 338 B.R. at 187-88 (noting that consideration of the nature of the debts and whether they are dischargeable is less significant after BAPCPA because of the means test restrictions for chapter 7 qualification and changes to the chapter 13 discharge). Consequently, courts have concluded that the relevant factors from pre-BAPCPA cases should be modified. *Id.* (concluding that "the determination of good faith for purposes of § 362(c)(3) is similar but not congruent with, the determination of good faith in connection with § 707(b)(3) or § 1307"); *In re Galanis*, 334 B.R. at 693 (noting that the factors considered under Tenth Circuit precedent with respect to a § 1307(b) good faith analysis are to be considered under § 362(c)(3)(B) "with some reservations"); *In re Montoya*, 333 B.R. at 458 (stating that factors which the Tenth Circuit deemed to be relevant to a § 1307 good faith analysis continue to apply under § 362(c)(3)(B) but that "BAPCPA has changed the applicability of some of the factors").

This court finds that a totality of the circumstances test which acknowledges the Circuit's guidance on the good faith analysis, and which includes modifications recognizing the different focus of § 362(c)(3), should be used to determine whether debtors filed their case in good faith. The relevant factors to be considered include: (1) the timing of the petition; (2) how the debts arose; (3) the debtors' motives in filing the petition; (4) how the debtors' actions have affected

their creditors; (5) the reason for the dismissal of the debtors' previous case; (6) the likelihood that the debtors will have a steady income throughout the case and will be able to fund their plan; and (7) whether the trustee or creditors object to the debtors' request for continuation of the stay. *In re Baldassaro*, 338 B.R. at 188; *In re Havner*, 336 B.R. at 103; *In re Galanis*, 334 B.R. at 693. This analysis "is a fact-specific and flexible determination." *In re Alt*, 305 F.3d at 419.

The Debtors' Motion

The debtors acknowledge that, because their previous case was dismissed for failure to fund, there is a presumption as to all creditors that the current case was not a good faith filing. *See* 11 U.S.C. § 362(c)(3)(C)(i)(II)(cc). They also acknowledge that the presumption applies specifically as to the association because an order granted the association relief from stay in the previous case. *See* 11 U.S.C. § 362(c)(3)(C)(ii). The issue, therefore, is whether the debtors have rebutted the presumption, such that they should be granted a continuance of the stay.


The evidence shows that the debtors' previous case was dismissed based on a substantial default in plan payments. Although the debtors suggest that their failure to make plan payments resulted from an unexpected loss of income due to George Deimling's medical and dental issues and unexpected dental and home repair expenses, they failed to supply any specific information to tie their failure to fund their chapter 13 plan to those issues. There was, for example, no evidence that the debtors' failure to fund their plan coincided with the period of reduced income. And there was no evidence regarding the amount of the dental expenses and furnace repair costs, or even whether they were actually paid. The debtors' financial circumstances have not changed since their previous filing and there is little reason to conclude based on the evidence that they have a good faith basis for believing that they will be able to complete their plan in the current case.

The debtors filed their current case the same day that their previous case was dismissed and they filed it to prevent the association from proceeding with its foreclosure action. The association is apt to be prejudiced if the request is granted because the debtors did not maintain their ongoing payments to the association in their previous case and they did not provide an explanation for that failure. Moreover, they did not show how they would be able to maintain the payments in the current case. In the absence of such details, the timing and motivation behind the current filing remain suspect and do not suggest good faith.

This evidence, or lack thereof, leads the court to conclude that the debtors did not rebut the presumption that their current chapter 13 case was not filed in good faith as to the association or as to their other creditors. As a result, the debtors' request to continue the automatic stay must be denied.

CONCLUSION

For the reasons stated, the debtors' motion to continue the automatic stay is denied. A separate order reflecting this decision will be entered.



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge

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DIANNE DEIMLING,)
Debtors.) Judge Pat E. Morgenstern-Clarren
)
) **ORDER**

For the reasons stated in the memorandum of opinion entered this same date, the debtors' motion to continue the automatic stay under 11 U.S.C. § 362(c)(3)(B) is denied. (Docket 10).

IT IS SO ORDERED.



Pat E. Morgenstern-Clarren
United States Bankruptcy Judge