

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION



In re:) Case No. 10-21391
)
THOMAS R. SPINKS,) Chapter 13
)
Debtor.) Judge Pat E. Morgenstern-Clarren
)
) **MEMORANDUM OF OPINION¹ AND**
) **ORDER**

The debtor Thomas Spinks moves the court to order the automatic stay into effect against all creditors under 11 U.S.C. § 362(c)(4)(B) in this, his third chapter 13 case filed since 2005.² Creditor CitiMortgage Inc. opposes the motion on the ground that the case was not filed in good faith.³ For the reasons stated below, the court finds that the debtor met his burden of proof and the motion is granted.

JURISDICTION

Jurisdiction exists under 28 U.S.C. § 1334 and General Order No. 84 entered 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)(G).

THE EVIDENTIARY HEARING

The court held an expedited evidentiary hearing on February 23, 2011 because the debtor's residence at 1268 Irene Road, Lyndhurst, Ohio is scheduled to be sold at sheriff's sale on March 14, 2011.

¹ 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.

² Docket 20, 25.

³ Docket 22.

The debtor presented his case through his testimony and exhibits. CitiMortgage presented its case through cross-examination.

The following findings of fact are based on that evidence and reflect the court's weighing of the evidence presented, including determining the credibility of the witnesses. "In doing so, the Court considered the witness's demeanor, the substance of the testimony, and the context in which the statements were made, recognizing that a transcript does not convey tone, attitude, body language or nuance of expression." *In re The V Companies*, 274 B.R. 721, 726 (Bankr. N.D. Ohio 2002). See FED. R. BANKR. P. 7052 (incorporating FED. R. CIV. P. 52). When the court finds that a witness's explanation was satisfactory or unsatisfactory, it is using this definition:

The word satisfactory 'may mean reasonable, or it may mean that the Court, after having heard the excuse, the explanation, has that mental attitude which finds contentment in saying that he believes the explanation—he believes what the [witness] says with reference to the [issue at hand]. He is satisfied. He no longer wonders. He is contented.'

United States v. Trogon (In re Trogon), 111 B.R. 655, 659 (Bankr. N.D. Ohio 1990) (discussing the issue in context of bankruptcy code § 727) (quoting *First Texas Savings Assoc., Inc. v. Reed*, 700 F.2d 986, 993 (5th Cir. 1983)).

In this case, the court finds the debtor's testimony to be completely credible.

FACTS

I.

In 2002, the debtor borrowed \$96,000 from ABN AMRO Mortgage Group, Inc. to purchase a home. The loan was secured by a mortgage on the Lyndhurst, Ohio residence.

CitiMortgage is the successor by merger to ABN AMRO and the debtor does not dispute that CitiMortgage owns and holds the note secured by the mortgage.⁴

II.

The debtor, now age 51, is educated and trained as a graphic artist. He filed a chapter 7 case in November 2004. The case proceeded uneventfully and the debtor received a discharge.

The debtor followed that with a chapter 13 case filed on March 14, 2005. This filing was intended to save his house by paying his CitiMortgage arrearage through a plan and making his postpetition payments to CitiMortgage as due. Although the case had some ups and downs in the funding, the debtor made plan payments to both the chapter 13 trustee and postpetition payments to CitiMortgage for almost five years. As a result, he paid the \$19,263.33 CitiMortgage arrearage claim in full. He had only a few months to go in 2010 before he would have received his chapter 13 discharge, but his self-employment as a graphic artist failed and he had insufficient income to make the final payments.

Before reaching that point, the debtor made extensive efforts to find employment. His 2010 tax returns showed that he found work through five different temporary agencies who placed him in more than 20 positions. Through these agencies, he worked in day labor, shipping, receiving, and packaging. None of those, however, turned out to be permanent or lucrative. And so, the case was dismissed for lack of funding by order dated June 17, 2010.

The debtor once again found temporary work, which he left to begin what he was told would be a permanent job. With that job, he filed his third chapter 13 case on June 12, 2010. The job did not, however, work out. The debtor did not attend his meeting of creditors because

⁴ For unexplained reasons, the state court foreclosure proceedings relating to this note and mortgage continue to be prosecuted in the name of ABN AMRO.

he did not have employment and did not have the money for gas and parking to come downtown. The case was dismissed on August 18, 2010.

The current case was filed on November 19, 2010. Again, the debtor hopes to save his house. This time, however, his financial fortunes have improved. He started a new job as a graphic data specialist for VE Global Vending, Inc. He is earning \$11.00 an hour and has already received overtime pay. His work includes graphic design, technical art, and photo editing in connection with work that the company performs upgrading vending machines with nutritional and other information. He has received positive feedback regarding his skills and performance; he is highly optimistic that this is a growth field and that his job will continue. If his income stays on course, it will be about \$23,000.00, far exceeding his income in 2009 and 2010. His budget in this, as well as in the previous cases, is modest.

III.

In 2004, after the debtor fell behind in his note payments, CitiMortgage obtained a state court judgment and a foreclosure decree against him, and set a sheriff's sale for March 28, 2005. The debtor's 2004 chapter 7 filing stayed that sale. Similarly, the debtor's chapter 13 case filings stayed reactivated sheriff's sales set for June 14, 2010 and then November 22, 2010.

Starting in about 2009, the debtor made numerous attempts to obtain a loan modification from CitiMortgage. He worked with Cleveland Housing Network, Inc., which told him that CitiMortgage would not consider a special forbearance because the debtor had an active bankruptcy. Since then, he has applied to HAMP and was turned down. He has also applied directly to CitiMortgage, which has not responded substantively to his application. He has tried to get an answer through hundreds of phone calls and emails, but to no avail to date. He is going

to file a new application with HAMP based on his new job and is also continuing his efforts to start a discussion with CitiMortgage that he hopes will result in an agreement.

The court finds the debtor to be honest, forthright, and sincere in his efforts to deal with his creditors through this chapter 13 case.

THE POSITIONS OF THE PARTIES

The debtor argues that he filed this case in good faith and that his new job is a significant change in circumstances that will allow him to propose and complete a chapter 13 plan. He also argues that CitiMortgage's failure to respond to him while it actively pursues a foreclosure sale violates federal regulations.

CitiMortgage questions whether even the new income level will be sufficient to propose a plan that will be confirmed. Additionally, it denies that the debtor met his burden of proving his case by clear and convincing evidence.

DISCUSSION

I.

Ordinarily, the filing of a bankruptcy case imposes an automatic stay that prevents creditors from taking certain actions against the debtor. *See* 11 U.S.C. § 362(a). The law is different, however, when a debtor has had two or more cases pending within the previous year that were dismissed (with an exception not applicable here). In that case, an automatic stay is not imposed upon the filing of the debtor's current case. 11 U.S.C. § 362(c)(4)(A). The debtor may, however, have a stay imposed as to any and all creditors by proving that he filed the current case in good faith as to the creditors to be stayed. 11 U.S.C. § 362(c)(4)(B). A rebuttable presumption arises that the debtor's current case was not filed in good faith as to all creditors under certain specified circumstances. 11 U.S.C. § 362(c)(4)(D)(i). Additionally, a rebuttable

presumption arises that the current case was not filed in good faith with respect to any individual creditor that was granted relief from stay in a previous case. 11 U.S.C. § 362(c)(4)(D)(ii). The presumption against good faith may be rebutted by “clear and convincing evidence to the contrary[.]” 11 U.S.C. § 362(c)(4)(D).

Although the term “good faith” is used in § 362(c)(4) and in a number of other Bankruptcy Code provisions, it is not defined. The Sixth Circuit considers the totality of the circumstances in making a determination regarding good faith. *See for example Alt v. United States (In re Alt)*, 305 F.3d 413, 419 (6th Cir. 2002) (looking at the totality of the circumstances to determine a debtor’s good faith under § 1307(c)); *Society Nat’l Bank v. Barrett (In re Barrett)*, 964 F.2d 588, 591 (6th Cir. 1992) (noting that a determination under § 1325(a)(3) as to a debtor’s good faith in proposing a plan must be made after considering the totality of the circumstances).

The factors generally considered on this issue include:

- (1) the amount of the proposed payments and the amount of the debtor's surplus;
- (2) the debtor's employment history, ability to earn and likelihood of future increase in income;
- (3) the probable or expected duration of the plan;
- (4) the accuracy of the plan's statements of the debts, expenses and percentage repayment of unsecured debt and whether any inaccuracies are an attempt to mislead the court;
- (5) the extent of preferential treatment between classes of creditors;
- (6) the extent to which secured claims are modified;
- (7) the type of debt sought to be discharged and whether any such debt is nondischargeable in Chapter 7;

- (8) the existence of special circumstances such as inordinate medical expenses;
- (9) the frequency with which the debtor has sought relief under the Bankruptcy Reform Act;
- (10) the motivation and sincerity of the debtor in seeking Chapter 13 relief;
- (11) the burden which the plan's administration would place upon the trustee; and
- (12) whether the debtor is attempting to abuse the spirit of the Bankruptcy Code.

Hardin v. Caldwell (In re Caldwell), 851 F.2d 852, 859 (6th Cir. 1988). These factors may also be applied to determine a repeat filer's good faith for purposes of § 362(c)(4). *See In re Dowden*, 429 B.R. 894 (Bankr. S.D. Ohio 2010) (applying these factors on the issue of good faith under § 362(c)(3))._____

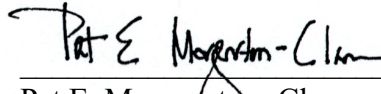
The parties agree that the rebuttable presumption that the debtor did not file in good faith applies in this case. The debtor, however, rebutted that presumption through this clear and convincing evidence: after repeated efforts, he has a new job which pays more money than he earned previously; he completed five years of one of his earlier chapter 13 cases, during which time he paid the CitiMortgage arrearages in full; he made numerous efforts over the last few years to find employment, accepting essentially any job offered to him even though they were all temporary and outside of his field of expertise; and he has shown that he is motivated to keep a job and to pay his debts. The court finds further that the debtor is not abusing the spirit of the Bankruptcy Code. He is instead trying very hard to find and keep employment, so that he can pay his creditors and keep his house. With his new job, that goal is within his reach.

_____CitiMortgage asks generally whether the debtor will be able to propose a confirmable plan even with his new job. That is a legitimate question, but one that should be addressed at the confirmation hearing based on specific calculations.

CONCLUSION

The debtor's motion under 11 U.S.C. § 362(c)(4)(B) is granted and the automatic stay of 11 U.S.C. § 362(a) is ordered into effect as to all of the debtor's creditors including CitiMortgage, Inc. A confirmation hearing will be held on **March 15, 2011 at 1:30 p.m.**

IT IS SO ORDERED.

A handwritten signature in black ink, appearing to read "Pat E. Morgenstern-Clarren", written over a horizontal line.

Pat E. Morgenstern-Clarren
United States Bankruptcy Judge