UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

IN RE:

JEREMIAH JOHN McAULIFFE — CASE NO. 94-63227

Debtor — Chapter 13

IN RE:

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Hon. Stephen D. Gerling, Chief U.S. Bankruptcy Judge

MEMORANDUM-DECISION, FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

At its motion term in Syracuse, New York, on February 21, 1995, the Court heard the motion of Key Corp Mortgage, Inc. ("KMI") filed pursuant to §362(d)(1) of the Bankruptcy Code (11 U.S.C. §§101-1330) ("Code"), seeking to vacate the automatic stay imposed pursuant to Code §362(a) and permit KMI to conclude a pending mortgage foreclosure action in a New York state court, or in the alternative, dismiss the case because Debtor was not eligible for Chapter 13 relief pursuant to Code §109(g)(1). Debtor filed opposing papers and appeared at oral argument.

JURISDICTIONAL STATEMENT

The Court has core jurisdiction of this contested matter pursuant to 11 U.S.C. §§1334(b), 157(a)(b)(1) and (2)(G).

FACTS

Debtor filed a voluntary petition pursuant to Chapter 13 of the Code on November 23, 1994. Debtor thereafter filed a Chapter l3 plan ("Plan") January 17, 1995. As of the date hereof, the Plan has not been confirmed.

The instant case is the third Chapter 13 the Debtor has filed since November 1993. On November 3, 1993, one day prior to the scheduled foreclosure sale of KMI's mortgage on Debtor's property at 38 East Street, Skaneateles, New York, Debtor filed his first Chapter 13 case ("Case #1"). On April 8, 1994, this Court denied confirmation of Debtor's proposed plan which had been objected to by KMI and dismissed Case #1 pursuant to Code §1307(c)(1). On June 29, 1994, again on the eve of KMI's rescheduled foreclosure sale, Debtor filed his second Chapter 13 case ("Case #2"). On September 8, 1994, the Court again denied confirmation of Debtor's proposed Chapter 13 plan, but provided the Debtor with an opportunity to file an amended plan within thirty (30) days of the date of the Order. When Debtor failed to file an amended plan, the Court, by Order dated October 17, 1994, dismissed Case #2. As indicated above, on November 23, 1994, six days prior to KMI's second rescheduled foreclosure sale, Debtor filed the

instant Chapter 13 ("Case #3").

It appears from the moving papers that the balance due on KMI's mortgage debt is approximately $64,000 while Debtor's property is allegedly valued at approximately $136,000.

ARGUMENTS

KMI argues initially that the filing of Debtor's Case #3 on November 23, 1994 violated Code §109(g)(1) since the dismissal of Debtor's Case #2 resulted from his "intentional failure to obey an order of the Court," (see Affidavit of David C. Fielding, Esq. sworn to January 16, 1995, ¶20). Additionally, KMI argues that the three separate Chapter 13 filings by Debtor evidence a lack of good faith and, thus, there is cause to lift the automatic stay pursuant to Code §362(d)(1). KMI asserts that these same grounds provide a basis, alternatively, to dismiss the Chapter 13. Finally, KMI argues that whichever relief the Court grants, it should further pronounce that in any subsequent filing by Debtor, within 180 days, the stay imposed pursuant to Code §362(a) shall not apply to its foreclosure proceedings.

Debtor argues that Code §109(g)(1) is not implicated because neither of the Court's prior Orders dismissing Case #1 or Case #2 were with prejudice and neither dismissal resulted from Debtor's willful failure to abide by any Court order. Debtor contends that in both of his prior cases, he was inadequately represented by counsel who failed to inform him of the status of his cases or the need to file amended Chapter 13 plans. He asserts

that the Order dismissing Case #2, while giving him the opportunity to file an amended plan, did not mandate that he do so.

DISCUSSION

Considering the first ground asserted by KMI, that Case #3 was filed in violation of Code §109(g), the Court must examine the language of the statute. Code §109(g)(1) provides that a debtor is prohibited from refiling a petition for a period of l80 days if the prior case "was dismissed by the court for a willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of the case;".

KMI asserts, herein, that the Debtor's current Chapter 13 case was filed on November 23, 1994, while his prior Chapter 13 case was dismissed by Order dated October 17, 1994, thus falling within the l80 day filing prohibition of the statute. KMI next asserts that Case #2 was dismissed due to a failure of the Debtor "to obey a court order to file an amended plan on October l7, 1994". (See Affidavit of David C. Fielding, Esq., sworn to January l6, 1995 at ¶20.)

Debtor argues that his failure to file an amended plan by October 17, 1994 was not a willful failure to abide by the Court's prior Order of September 8, 1994, since that Order simply gave Debtor 30 days from the date of that Order to file and notice an amended plan. Debtor argues that the filing of an amended plan was optional and not mandated by the September 8, 1994 Order. (See September 8, 1994 Order attached to Affirmation of James F.

Selbach, Esq., dated February 1, 1995, at Exhibit "E.")

While the case law does not provide a "bright line" on the issue of willful failure, its been generally held that as used in Code §109(g) "willful connotes an act done intentionally, deliberately, knowingly and purposely, without justification or excuse". In re Morris, 49 B.R. 123, 124 (Bankr. W.D.Ky. 1985); see also In re Limpert, 155 B.R. 793, 794 (Bankr. M.D.Fla. 1993); In re Nelkovski, 46 B.R. 542, 544 (Bankr. N.D.Ill. 1985).[1]

Focusing solely on the language of the September 8, 1994 Order conditionally dismissing Debtor's Case #2, one cannot reach the conclusion that the Debtor's failure to satisfy the condition of that Order by filing and noticing for confirmation an amended plan within thirty days thereafter, constituted a willful failure to comply with that Order, thus, invoking the l80 day sanction of Code §109(g) when Case #2 was finally dismissed by virtue of the October l7, 1994 Order of the Court.

KMI alleges alternatively, however, that the stay imposed pursuant to Code §362(a) should be vacated for cause pursuant to "Code §362(d)(6)" (sic) because Debtor's "three separate filings under Chapter 13, each on the eve of a scheduled foreclosure sale, without confirmable plans as to any of said filings, is evidence of lack of good faith". (See Affidavit of David C. Fielding, Esq., sworn to the January 16, 1995 at ¶21.)

The law is fairly well settled that "cause" for relief from the stay pursuant to Code §362(d)(1) is established where it

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[1] Code §109(f) was redesignated as subsection (g) by the 1986 amendments to Title ll.

can be shown that a Chapter 13 debtor has acted in "bad faith". See In re Maurice, 167 B.R. 114, 124 (Bankr. N.D.Ill. 1994); In re Hundley, 103 B.R. 768, 770 (Bankr. E.D.Va. 1989); In re Ashton, 63 B.R. 244, 246 (Bankr. D.N.D. 1986). While so-called "serial" filings in Chapter 13 are not prima facie evidence of bad faith, a majority of courts that have examined such conduct have concluded that absent a change in circumstances between filings, bad faith is an inescapable conclusion. See In re Earl, 140 B.R. 728-737 (Bankr. N.D.Ind. 1992). (citations omitted)

The Second Circuit Court of Appeals in Johnson v. Vanguard Holding Corp. (In re Johnson), 708 F.2d 865 (2d. Cir. 1983), considering an appeal from a dismissal of a Chapter 13 case based upon a debtor's bad faith filing, observed that "'Good faith,' while not defined by statute or legislative history, see 5 Collier on ¶1325.01 [2][C] (15th ed. 1982) certainly does, however, require 'honesty of intention,' Barnes v. Whelan 689 F.2d at 200, in the sense of focusing on the debtor's conduct in the submission, approval, and implementation of a Chapter 13 bankruptcy plan." Id. at 868 (citations omitted). The Second Circuit further directed that "The Bankruptcy Judge should determine whether Johnson had a bona fide change in circumstances that justified her default on her first plan and her second filing." Id.

While in the instant case KMI seeks to vacate the stay rather than dismiss the case based on the Debtor's serial filings, the pronouncements of the Second Circuit in Johnson, supra, 708 F.2d at 868 are equally applicable here. Debtor apparently argues that, in essence, a change of circumstances does exist in that he

now has an attorney who will keep him informed as to the status of the Chapter 13 case and presumably will comply with the Court's orders. (See Affidavit of Debtor sworn to January 30, 1995).[2]

From a review of the moving papers and the exhibits attached thereto, it appears that Debtor's Case #1 was dismissed when both KMI and the Chapter 13 Trustee objected to the alleged amount of arrearages on the KMI mortgage which Debtor proposed to cure through that plan. KMI also objected to confirmation of Debtor's Plan in Case #2 on basically the same grounds, namely that Debtor's second plan understated KMI's mortgage arrears. Debtor contends that his then attorney, Edward Fintel, Esq., advised him that he was having trouble obtaining the actual amount of the arrears, but that Debtor relied on Fintel "to obtain the correct numbers" from KMI. Finally, Debtor alleges that while he is now aware that he was given 30 days to file a new plan which would correctly state the arrears due on the KMI mortgage, he does not know what Mr. Fintel did to comply with the Conditional Order of September 8, 1994. (Id. at ¶6 and 7).

The Court notes that the motion filed by KMI herein appears to allege that as of January 16, 1995, Debtor's arrearage on his mortgage was $33,732.59, yet the Plan currently filed by the Debtor in connection with Case #3 fixes the arrears at $28,400. (See Debtor's Plan filed January 17, 1995). Additionally, at oral argument Debtor's counsel asserted that KMI's attorney refused to provide him with a current arrearage figure. It would thus appear

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[2] The Court notes that while Case #3 was filed on November 23, 1994, Debtor did not file a Chapter 13 plan until January 17, 1995.

that a dispute over arrears will again be an impediment to the confirmation of Debtor's proposed Chapter 13 Plan. Thus, while Debtor may have changed attorneys, it is not clear that that alone is a change in circumstances which will bring about a confirmable Chapter 13 plan in Case #3.

Nevertheless, the Court concludes that it will give Debtor the benefit of the doubt regarding the alleged actions (or inaction of his prior attorneys) and permit Case #3 to proceed to a confirmation hearing on Debtor's current Plan dated January 13, 1995 and filed on January 17, 1995. In the event that Debtor is unable to confirm said Plan on or before April 26, 1995, without good cause, the Court will dismiss Case #3 and will prohibit Debtor from refiling a Chapter 13 case within 180 days of the order of dismissal all in accordance with Code §109(g)(1).

IT IS SO ORDERED.

Dated at Utica, New York
this day of

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge