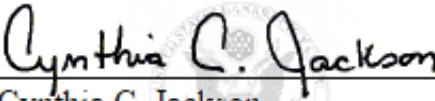


ORDERED.

Dated: September 30, 2016


Cynthia C. Jackson
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION
www.flmb.uscourts.gov

In re:

Robert B. Worobec,

Debtor.

Case No. 6:16-bk-02222-CCJ
Chapter 13

ORDER

This case came before the Court for trial to consider the (i) Motion by County of Volusia (“Volusia County”) for Determination as to Whether Property is Property of the Estate, and if so, for Annulment of the Automatic Stay, or Alternatively, in Rem Relief from Automatic Stay (Doc. No. 10; the “Motion for Stay Relief”), and the Joinder by Shores Investments, LLC (“Shores Investments”) to the Motion for Stay Relief (Doc. No. 22), (ii) Motion by Shores Investment for Judicial Notice (Doc. No. 23), and (iii) Motion by Shores Investments for Entry of Order Dismissing Debtor's Chapter 13 Case as a Bad Faith Filing and Enjoining Debtor from Filing Subsequent Bankruptcy Petitions (Doc. No. 21; the “Motion to Dismiss”). For the reasons stated in open court, the Court granted the motion by Shores Investment for judicial notice of the

public real estate records (Doc. No. 23), and took the remaining matters under advisement. Upon consideration of the evidence presented at the hearing, including the testimony of the Debtor, of Ms. Rhonda Orr for Volusia County and of Mr. Mark McDonald for Shores Investments, the Court makes the following findings of fact and conclusions of law.

Findings of Fact

The Debtor, Robert B. Worobec (the “Debtor”) filed for relief under Chapter 13 of the Bankruptcy Code on April 4, 2016 (the “Petition Date”). This is the Debtor’s fifth Chapter 13 bankruptcy case in the last thirteen years. The Debtor’s first two bankruptcy cases were dismissed over ten years ago.¹ The Debtor’s third and fourth bankruptcy cases concluded with entry of a discharge after completion of a Chapter 13 plan.²

The Debtor filed the current case without counsel and has represented himself *pro-se*. On Bankruptcy Schedule A/B, the Debtor lists an interest in commercial real property located at 1002 Main Street, Daytona Beach, FL 32118 (the “Property”) with a value of \$495,000³ (Doc. No. 16). The Property is subject to tax liens for unpaid real estate taxes, which the Debtor disputes. Volusia County testified that the past due real estate taxes for the Property totaled approximately \$171,463.00 on the Petition Date. The Debtor’s Chapter 13 Plan provides for payment of the allowed claim of Volusia County once the amount of the claim is adjudicated.⁴

¹ *In re Worobec*, Case Number 03-00634, Chapter 13 case filed in the United States Bankruptcy Court for the Northern District of Florida on September 19, 2003. This case was dismissed on July 7, 2004 after confirmation of a plan. *In re Worobec*, Case Number 06-00049, Chapter 13 case filed in the United States Bankruptcy Court for the Middle District of Florida on January 9, 2006. This case was dismissed on April 6, 2006 prior to confirmation of a plan.

² *In re Worobec*, Case Number 06-10085, Chapter 13 case filed in the United States Bankruptcy Court for the Northern District of Florida on June 1, 2006. The Debtor received a discharge on October 3, 2011 pursuant to Section 1328(a). *In re Worobec*, Case Number 11-10435, Chapter 13 case filed in the United States Bankruptcy Court for the Northern District of Florida on September 14, 2011. The Debtor received a discharge on August 19, 2014 pursuant to Section 1328(a).

³ Bankruptcy Schedule A/B lists the Property with a value of \$4,950,000 which is apparently a typographical error. The Summary of Schedules, Question 2 of Bankruptcy Schedule A/B and Bankruptcy Schedule D indicate the Property value is \$495,000.

⁴ Doc. No. 17, par. 9 (10).

The Debtor receives \$2,500.00 a month from social security and an annuity and expects to increase his income by renting properties.⁵

Volusia County has tried to sell the Property to satisfy the tax liens on three separate occasions over the last five years. Volusia County cancelled two scheduled sales of the Property due to the filing and reinstatement of the Debtor's fourth bankruptcy case. A third tax deed sale of the Property was scheduled for and held on April 5, 2016--the day *after* the Debtor filed this case.

The Debtor testified that the day before the sale, (the "Petition Date") he called Volusia County and informed a representative that he had filed a bankruptcy petition. Ms. Orr testified that on the morning of the scheduled sale of the Property, Volusia County staff performed a search of PACER for any bankruptcy filings as a part of its practice prior to any tax deed sale. She further testified that the Volusia County staff did not find any bankruptcy filings relating to the Property and informed the clerk to proceed with the tax deed sale.

Shores Investments purchased the Property for \$495,700.00 at the tax deed sale.⁶ A tax deed transferring the Property to Shores Investments was recorded in the public records of Volusia County, Florida on April 5, 2016. Mr. McDonald testified that Shores Investments had no knowledge of the Debtor's current bankruptcy filing when the tax deed sale occurred and relied upon Volusia County to conduct any searches for bankruptcy filings. He testified that after the tax deed sale, Shores Investments obtained insurance on the Property for the approximate amount of \$2,500.00 because they were not sure whether the Property was insured. Counsel for Shores Investments stated that Shores Investments has incurred approximately

⁵ Doc. No. 16, pg. 29.

⁶ Shores Investments is in the business of buying properties in and around the Daytona Beach area because a related entity already owned property in the area.

\$8,000 in attorneys' fees in connection with this matter. On April 6, 2016, the Debtor delivered to Volusia County a bankruptcy filing receipt for the current case.

Conclusions of Law

By their pleadings, both Volusia County and Shores Investment rely heavily on an argument that the debtor does not own the Property in order to show bad faith and that stay relief is not even necessary. At trial however, both parties conceded that for trial purposes, the Debtor *does* own the Property. Accordingly, for the purposes of resolving these matters the Court assumes that the Property is owned by the Debtor.

The Motion to Dismiss

By the Motion to Dismiss (as amended by argument at trial), Shores Investments contends that the case should be dismissed because it was not filed in good faith. Section 1307(c) of the Bankruptcy Code provides that upon the request of a party in interest, the bankruptcy court may dismiss a Chapter 13 case for "cause" and lists eleven bases for dismissal, all of which are non-exclusive.⁷ Although not listed as a basis in Section 1307(c), under binding case law, debtor's bad faith (or lack of good faith), in filing a bankruptcy case does constitute such "cause" for dismissal.⁸ A dismissal for bad faith is, however, limited to extraordinary circumstances⁹ and the moving party bears the burden of proof.¹⁰

In evaluating a debtor's good faith under Section 1307, the Court must focus its inquiry on whether the debtor seeks to abuse the Chapter 13 process by using it for a purpose for which

⁷ *In re Fretwell*, 281 B.R. 745,749 (Bankr. M.D. Fla. 2002).

⁸ *Marrama v. Citizens Bank of Massachusetts*, 549 U.S. 365, 373 (2007), *In re Bucco*, 205 B.R. 323, 324 (Bankr. M.D. Fla.1996).

⁹ *In re Haning*, 252 B.R. 799, 807 (Bankr. M.D. Fla. 2000).

¹⁰ *In re Fretwell*, 281 B.R. at FN3 (citing *In re Love*, 957 F.2d 1350, 1355 (7th Cir. 1992)).

it is not intended.¹¹ Chapter 13 is intended to allow an honest and conscientious debtor to deal with his financial difficulties by paying off his debts over time.¹²

The Eleventh Circuit has established a variety of factors bankruptcy courts must consider in determining the debtor's good faith including:

- (1) the amount of the debtor's income from all sources;
- (2) the living expenses of the debtor and his dependents;
- (3) the amount of attorney's fees;
- (4) the probable or expected duration of the debtor's Chapter 13 plan;
- (5) the motivations of the debtor and his sincerity in seeking relief under the provisions of Chapter 13;
- (6) the debtor's degree of effort;
- (7) the debtor's ability to earn and the likelihood of fluctuation in his earnings;
- (8) special circumstances such as inordinate medical expense;
- (9) the frequency with which the debtor has sought relief under the Bankruptcy Reform Act and its predecessors;
- (10) the circumstances under which the debtor has contracted his debts and his demonstrated bona fides, or lack of same, in dealings with his creditors;
- (11) the burden which the plan's administration would place on the trustee.¹³

As with any totality of the circumstances test, no one factor will determine the issue. "Rather, the Court must consider all of the circumstances surrounding the Debtor's prepetition activity and the filing of the Case."¹⁴

¹¹ *In re Haning*, 252 B.R. at 807.

¹² *In re Saylor*, 869 F.2d 1434 (11th Cir. 1989).

¹³ *In re Kitchens*, 702 F.2d 885 (11th Cir. 1983).

¹⁴ *In re Haning*, 252 B.R. at 808.

Pointing to a number of *Kitchens* factors, Shores Investments contends that the case was filed in bad faith because the debtor “is not sincere” in his efforts to reorganize and is “motivated solely by his own self-interest.” Shores Investments alleges that this lack of sincerity is demonstrated by the fact that the case was filed on the “eve of the tax deed sale of the Property and solely for the purpose of permitting the Debtor to continue to frustrate the efforts of his legitimate creditors from collecting their debts by selling the Property.” Shores Investments further argues that bad faith is shown because there are alleged inaccuracies in the Debtor’s schedules and that the Debtor is a “serial filer.”

The Debtor’s prior cases were filed over a period of thirteen years, with the most recent filings resulting in a discharge. The Debtor’s success in obtaining a discharge in two of the most recent bankruptcy filings by completing all plan payments weighs in the Debtor’s favor, despite the number of filings. The Debtor’s testimony at the hearing was credible. The Debtor appears to be sincere and highly motivated. The Debtor seeks to retain the Property which has substantial equity and to pay his creditors. The Debtor has filed a plan which proposes to pay the allowed claims of Volusia County. The Debtor disclosed income that is stable. The Debtor timely filed his Bankruptcy Schedules and Statements and a Chapter 13 Plan. The Debtor has commenced plan payments. The Debtor’s degree of effort in this case to date, especially considering his *pro-se* status, demonstrates his sincerity in seeking bankruptcy relief. And, although the Motion to Dismiss asserts that the Debtor’s Bankruptcy Schedules and Statements contained omissions or errors, no such errors were proven by Shores Investments. For all of these reasons, the Court finds that the Debtor has filed this case in good faith and denies the Motion to Dismiss.

The Motion for Stay Relief

The second issue before this Court is whether the automatic stay should be annulled as of the Petition Date. Generally, acts taken in violation of the automatic stay are void.¹⁵ The Eleventh Circuit has however, recognized that bankruptcy courts may annul the automatic stay in appropriate *limited* circumstances, in order to grant retroactive relief from the automatic stay.¹⁶

In determining whether the circumstances merit annulment of the automatic stay, bankruptcy courts must consider the following factors: (i) whether the creditor had actual or constructive knowledge of the bankruptcy filing, (ii) whether the debtor acted in bad faith, (iii) whether grounds would have existed for modification of the stay if a motion had been filed before the violation, (iv) whether the denial of retroactive relief would result in unnecessary expense to the creditor, and (v) whether the creditor has detrimentally changed its position on the basis of the action taken.¹⁷ The party seeking annulment of the stay bears the initial burden of showing the presence of circumstances warranting the annulment, and if met, the debtor then bears the burden of proving that the request for retroactive relief from the stay should be denied.¹⁸

The Court finds that neither Volusia County nor Shores Investments met their initial burden of proof on the Motion for Stay Relief. First, the Court has already found that the Debtor filed this case in good faith. Second, the Debtor testified that he called Volusia County on the Petition Date and informed them of the bankruptcy filing. This testimony was uncontroverted. Ms. Orr's testimony that PACER failed to disclose the Debtor's current bankruptcy case to

¹⁵ *In re Albany Partners, Ltd.*, 749 F.2d 670, 675 (11th Cir. 1984).

¹⁶ *Id.*

¹⁷ *Id.*, *In re Rivera*, 2016 WL 513900 (Bankr. M.D. Fla. 2016).

¹⁸ *In re Barr*, 318 B.R. at 599.

Volusia County staff prior to the tax deed sale is unfortunate, but no fault of the Debtor. Third, the Debtor has provided for payment of the taxes in his plan and there is significant equity in the Property that would render stay relief unlikely as of the Petition Date. These factors weigh heavily in the Debtor's favor.

Although Shores Investments did not have notice of the Debtor's current bankruptcy case and paid for the Property. Volusia County is holding the payment amount which it represented to the Court it will return to Shores Investments if the Motion for Stay Relief is denied. Shores Investments has incurred expenses in the form of monies for an insurance premium (which ultimately proved unnecessary) and its attorneys' fees but those expenses were incurred voluntarily and that fact alone is insufficient to annul the stay.

Finally, the facts of this case are clearly distinguishable from cases where the automatic stay has been annulled.¹⁹ The Debtor filed this case in good faith and informed Volusia County of the bankruptcy filing in a timely manner. Volusia County had *over a year and a half* from the discharge of the Debtor's fourth bankruptcy case until the filing of the current case to sell the Property at a tax deed sale, but failed to do so. For all of these reasons, the Court finds that the appropriate circumstances do not exist to annul the automatic stay as of the Petition Date.

The final issue before this Court is whether the automatic stay should be lifted as to the Property under Section 362(d)(4)(B) of the Code. Under Section 362(d)(4), in order to obtain stay relief, movant must establish that: (i) "the debtor engaged in a scheme", (ii) the purpose of the scheme was to "delay, hinder *and* defraud the creditor," and (iii) the scheme "involved

¹⁹ See *In re Albany Partners, Ltd.*, 749 F.2d at 675 (bankruptcy court did not abuse its discretion by annulling the automatic stay when the bankruptcy case was filed in bad faith and debtor's asserted interest in subject property had been previously litigated and rejected by the state court); *In re Barr*, 318 B.R. 592, (automatic stay annulled as to creditor in debtor's three bankruptcy cases when debtor failed to notify creditor of the bankruptcy cases, debtor acted in bad faith by continuing litigation with creditor for two years despite the bankruptcy filings, and creditor incurred approximately \$40,000.00 in litigation costs).

multiple filings.”²⁰ If successful, the movant obtains relief from the automatic stay for two years.²¹ “Due to the extraordinary impact of this remedy, a creditor requesting such relief has a substantial burden of proof.”²²

Volusia County failed to present *any* evidence that the Debtor engaged in a scheme to “delay, hinder *and* defraud” Volusia County. The existence of multiple bankruptcy filings, without more, such as making false representations to a creditor, will not result in a finding that the debtor acted with the intent to hinder, delay *and* defraud, as required by Section 362(d)(4).²³ For these reasons, the Motion for Stay Relief is denied.

Conclusion

Based on all the facts and circumstances described above, it is ordered that (i) the Motion for Stay Relief is denied without prejudice and (ii) the Motion to Dismiss is denied without prejudice.

Attorney Andrew V. Layden is directed to serve a copy of this order on interested parties and file a proof of service within 3 days of entry of the order.

²⁰ *In re Poissant*, 405 B.R. 267 (Bankr. N.D. Ohio 2009); *In re Darlington*, 2009 WL 6498171 (Bankr. N.D. Ga. 2009).

²¹ *Id.*

²² *Id.* at 273.

²³ *In re Darlington*, at *5.