ORDERED.

Dated: March 14, 2017

Cynthia C. Jackson
Cynthia C. Jackson
United States Bankruptcy Judge

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

In re:

Kyle R. Melton,

Debtor.
_____/

Case No. 6:16-bk-07134-CCJ
Chapter 13

ORDER IMPOSING AUTOMATIC STAY

This case came before the Court for trial to consider the Motion by Debtor to Extend Automatic Stay (Doc. No. 7; the "Motion to Extend Stay") and the Objection to the Motion to Extend Stay (Doc. No. 17), filed by Federal National Mortgage Association c/o Seterus Inc., as the Authorized Subservicer ("Fannie Mae"). Upon consideration of the evidence presented at trial, including the testimony of the Debtor, the Court makes the following findings of fact and conclusions of law.

Findings of Fact

The Debtor, Kyle R. Melton (the "Debtor") filed for relief under Chapter 13 of the Bankruptcy Code on October 31, 2016 (the "Current Case"). This is the Debtor's third Chapter

13 bankruptcy case in approximately two and a half years. The Debtor testified that he filed all three bankruptcy cases to save his home of over 20 years, which is located in Ocoee, Florida (the "Property"). The Property is the subject of a foreclosure action (the "Foreclosure Action") brought by Fannie Mae in 2012.[1] Fannie Mae holds the only mortgage on the Property. In each of the three bankruptcy cases, Mr. Christopher P. Hancock of Hancock & Associates, P.A. represented the Debtor.

The Debtor filed his first bankruptcy case on May 18, 2014 (the "First Case").[2] The Debtor's bankruptcy schedules listed the Property subject to the mortgage as having a value of approximately $163,000, with Fannie Mae having a mortgage of $244,728. The Debtor filed a Chapter 13 plan in the First Case which provided for payment of Fannie Mae's claim over a period of three years. The Court entered an order on December 11, 2014, confirming the Debtor's Chapter 13 plan (Doc No. 19, the "Confirmation Order"). The Debtor made approximately 25 of the 36 required plan payments. Fannie Mae received over $23,000 during the pendency of the First Case. Two years after filing the First Case however, the Debtor suffered a stroke that required hospitalization. The Debtor makes a living as a professional painter and wallpaper hanger, and as a result of the stroke, was unable to work until he became rehabilitated. The Debtor testified that his medical condition prevented him from fully complying with the Confirmation Order. On June 28, 2016, the Court entered an order dismissing the First Case because the Debtor failed to a provide a copy of his 2015 federal income tax return to the Chapter 13 Trustee, as required by the Confirmation Order.

[1] *Federal National Mortgage Assoc., v. Melton, et al.* Case No. 2012-CA-018160-O filed in the Circuit Court for Orange County, Florida.
[2] Case No. 6:14-bk-05759-CCJ.

The Debtor filed his second bankruptcy case on July 29, 2016 (the "Second Case").[3] The Debtor testified that he had little recollection of the Second Case because of his continued recovery from the stroke. In the Second Case, the Debtor failed to timely file a Chapter 13 plan or seek an extension of time to do so. As a result, approximately two weeks after the filing, the Court entered an order dismissing the Second Case. Mr. Hancock informed the Court that the Debtor's failure to file a Chapter 13 plan in the Second Case was caused by his own negligence and not by any action (or inaction) by the Debtor.

After the Court dismissed the Second Case, the Circuit Court entered an order in the Foreclosure Action scheduling a sale of the Property for October 31, 2016. Although the Debtor met with Mr. Hancock weeks before the foreclosure sale to discuss his need to file another bankruptcy case, Mr. Hancock filed the Current Case approximately one hour prior to sale. Mr. Hancock filed a "Suggestion of Bankruptcy and Notice of Automatic Stay" in the Foreclosure Action, but the clerk proceeded with the foreclosure sale and issued a certificate of sale to Fannie Mae on November 2, 2016. Within days of the sale, the Debtor filed a motion in the Foreclosure Action asking the Circuit Court to vacate the issuance of the certificate of sale. Fannie Mae acknowledged that it received notice of the Current Case in the Foreclosure Action.

On November 2, 2016, the Debtor filed in this Court the Motion to Extend Stay, requesting that the Court extend the automatic stay pursuant to Section 362(c)(3)(B) of the Bankruptcy Code. The Motion to Extend Stay asserts that one year prior to the Current Case, the Debtor *filed* one prior bankruptcy case, referencing the Second Case. The Motion to Extend Stay makes no reference to the First Case. Based on the representations made in the Motion to Extend Stay, the Court, without a hearing, entered an order on November 8, 2016, extending the automatic stay

[3] Case No. 6:16-bk-05026-CCJ.

until a hearing could be held (Doc. No. 10; the "Stay Order").[4] By the Stay Order, the Court scheduled a preliminary hearing on the Motion to Extend Stay for January 10, 2017.

On December 1, 2016, the Circuit Court heard the Debtor's motion to vacate the certificate of sale in the Foreclosure Action. Fannie Mae and the Debtor were both represented by counsel at the hearing. After hearing argument from counsel, the Circuit Court made an oral ruling vacating the certificate of sale. No transcript of the hearing is before this Court. The parties dispute what occurred at the Circuit Court hearing. Fannie Mae asserts that the Circuit Court vacated the certificate of sale based upon this Court's entry of the Stay Order. The Debtor asserts that the Circuit Court vacated the certificate of sale because Fannie Mae did not oppose it.

Three weeks after the Circuit Court hearing, and over a month after the Court entered the Stay Order in the Current Case, Fannie Mae filed an objection to the Motion to Extend Stay (Doc. No. 17 the "Objection"). At the preliminary hearing on the Motion to Extend Stay, the Court imposed the automatic stay until a trial could be held on the Motion to Extend Stay. Fannie Mae has not appealed from the Circuit Court's order vacating the certificate of sale, nor has it moved to reconsider or appealed from the Stay Order.

The Debtor was the only witness called at trial. Neither Fannie Mae nor the Debtor offered any exhibits at trial to support their respective positions. The Debtor testified that his medical condition has improved and he is now working. The docket indicates that the Debtor has (i) filed the required schedules and Chapter 13 plan, (ii) appeared at the meeting of creditors, and (iii) requested mortgage modification mediation with Fannie Mae. The Chapter 13 Trustee represented to the Court that the Debtor has made all required plan payments in the Current Case.

[4] Often, the bankruptcy court dockets in this division cannot accommodate a hearing within the time required by Section 362(c)(3)(B) of the Bankruptcy Code. It is therefore common for the bankruptcy courts to enter an order, without a hearing, that extends the automatic stay until a hearing date is available.

Conclusions of Law

By the Objection, Fannie Mae asserts that the automatic stay did not go into effect immediately upon filing the Current Case because one year prior to the Current Case, the Debtor had *two pending* bankruptcy cases that were dismissed--the First and Second Cases. Fannie Mae argues that the Circuit Court vacated the certificate of sale in error because no stay existed. Fannie Mae requests an order from this Court confirming that no stay existed when the foreclosure sale occurred, so it may proceed to have the certificate of sale reissued in the Foreclosure Action.

Section 362(c)(4)(A)(i) of the Bankruptcy Code is clear. The automatic stay does not go into effect in a bankruptcy case if the Debtor had two or more *pending* cases that have been dismissed within one year preceding the current filing.[5] The operative term is *pending* cases within the preceding one year, and not cases *filed*.[6] In this case, the Debtor had two *pending* Chapter 13 cases that were dismissed within one year preceding the Current Case, so the automatic stay did not go into effect upon filing the Current Case. As such, the Court entered the Stay Order in error. Fannie Mae is correct that no stay existed when the Circuit Court clerk proceeded with the foreclosure sale and issued the certificate of sale. It is also true however, that the automatic stay was not in effect when the Circuit Court *vacated* the certificate of sale.

No evidence is before this Court as to why the Circuit Court vacated the certificate of sale. The Debtor's motion to vacate the certificate of sale filed in the Foreclosure Action makes no reference to the Stay Order.[7] In Florida, foreclosure actions are brought in courts of equity which have broad discretion to set aside judicial sales.[8] Both Fannie Mae and the Debtor were

[5] *In re Jean*, 508 Fed. Appx. 939 (11th Cir. 2013); *See also In re Bates*, 446 B.R. 301 (8th Cir. 2011).
[6] 508 Fed. Appx. at 940.
[7] The Objection attached a copy of the Debtor's motion to vacate the certificate of sale as Exhibit A.
[8] *See Arsali v. Chase Home Finance LLC*, 121 So.3d 511, 517-19 (Fla. 2013).

represented and presented argument to the Circuit Court, and that Court decided to vacate the certificate of sale.

At all relevant times, Fannie Mae knew that the Debtor filed the Current Case. Creditors have an affirmative duty to monitor a bankruptcy court's docket upon notice of a bankruptcy filing to protect its rights.[9] Fannie Mae could have filed a motion to reconsider the Stay Order prior to the Circuit Court vacating the certificate of sale. In that event, the Court would have vacated the Stay Order and avoided any confusion with the Circuit Court. Fannie Mae could also have requested an order from this Court confirming that no stay was in effect in the Current Case pursuant to Section 362(c)(4)(A)(ii) of the Code. Instead, the parties proceeded before the Circuit Court with the bankruptcy record as it existed, and the Circuit Court may or may not have relied on it.

This Court is not able to and will not review the actions of state courts.[10] The Circuit Court vacated the certificate of sale in the Foreclosure Action while no stay existed and prior to this Court temporarily invoking the automatic stay. With the certificate of sale of the Property being vacated by the Circuit Court, the Debtor now has an interest in the Property subject to the jurisdiction of this Court.[11]

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[9] *See In re Tucker*, 263 B.R. 632, 636 (Bankr. M.D. Fla. 2001)(creditor had burden to protect his rights by timely filing an adversary complaint even though the creditor did not receive the deadline order because the bankruptcy court docket clearly reflected the entry of the deadline order); *In re Marchessault,* 416 B.R. 896 (Bankr. M.D. Fla. 2009)(litigant has affirmative duty to monitor the court's docket); *In re Lickman,* 297 B.R. 162, 192-193 (Bankr. M.D. Fla.) (upon notice of bankruptcy filing, party had an affirmative duty to request clarification from the bankruptcy court as to the scope of the automatic stay)

[10] *Casale v. Tillman*, 558 F.3d 1258 (11th Cir. 2009)("The *Rooker–Feldman* doctrine makes clear that federal district courts cannot review state court final judgments because that task is reserved for state appellate courts or, as a last resort, the United States Supreme Court.")

[11] *In re Jaar*, 186 B.R. 148, 153-54 (Bankr. M.D. Fla. 1995)(A certificate of sale must be set aside for the mortgagor to have any right to acquire the property); *In re Catalano*, 510 B.R. 654, 659 (Bankr. M.D. Fla. 2014) (Debtor lost interest in real property upon issuance of certificate of sale, but may renew the relief requested if the certificate of sale is vacated)

The Court now considers whether the automatic stay should be imposed in the Current Case. Under Section 362(c)(4)(B) of the Bankruptcy Code, within 30 days of the petition date, a debtor may request that the Court enter an order imposing the automatic stay, if the debtor demonstrates that the current filing is in good faith.[12] A presumption exists that the current case is not filed in good faith as to all creditors if:

> -two or more previous bankruptcy cases in which the individual was a debtor were pending within the one year period
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> -a previous bankruptcy case was dismissed within the one year period because the debtor failed to file or amend without substantial excuse the petition or any other required documents, failed to provide adequate protection as ordered, or failed to perform the terms of a confirmed plan, or
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> -no substantial change in the financial or personal affairs of the debtor occurred since the dismissal of the prior case or as to Chapter 13 cases, any other reason to conclude that the current case will not be concluded with a confirmed plan that will be fully performed.[13]

A debtor may rebut the foregoing presumption by clear and convincing evidence to the contrary.[14]

By the Objection, Fannie Mae contends that the automatic stay should not be imposed in this case because the Debtor did not file it in good faith. In support, Fannie Mae asserts that the Debtor's filing of the Suggestion of Bankruptcy and Notice of Automatic Stay in the Foreclosure Action and the Motion to Extend Stay in the Current Case, when no automatic stay existed, demonstrates a lack of good faith. In addition, at trial, Fannie Mae argued that the Debtor's failure to attend the mortgage modification mediation in the First Bankruptcy Case, failure to file a Chapter 13 plan in the Second Bankruptcy Case and his filing of the Current Case on the eve of foreclosure also demonstrate a lack of good faith.

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[12] 11 U.S.C. §362(c)(4)(B).
[13] 11 U.S.C. §362(c)(4)(D).
[14] *Id.*

The Court finds that the Debtor filed the Current Case in good faith. The Debtor timely filed the Motion to Extend Stay (which the Court now considers as a motion to impose the automatic stay). At trial, the Debtor provided a substantial excuse--hospitalization with a serious medical condition requiring rehabilitation--for failing to comply with the Confirmation Order, which caused the Court to dismiss the First Case. Although the Debtor had little recollection of the Second Case, Debtor's counsel provided a substantial excuse--his own negligence in failing to file a plan or to seek an extension--which caused the Court to dismiss the Second Case. The Debtor is no longer hospitalized and is now working, which demonstrates a substantial change in the financial and personal affairs of the Debtor. With the Debtor returning to work and given that the Debtor successfully completed two-thirds of the plan payments in the First Case, there is no reason to conclude that the Debtor will not be successful in the Current Case. The Debtor's testimony at the trial was credible. The Debtor appears to be sincere and highly motivated. The Debtor has filed the required schedules and Chapter 13 plan in the Current Case, appeared at the meeting of creditors, and requested mortgage modification mediation with Fannie Mae. The Debtor has made all required plan payments so far. Although the Debtor filed the Current Case on the eve of foreclosure, that alone does not demonstrate lack of good faith. The Debtor rebutted by clear and convincing evidence any presumption that the Current Case was not filed in good faith.

At trial Fannie Mae also requested that the Court impose Rule 9011 sanctions against Debtor's counsel for filing the Suggestion of Bankruptcy and Notice of Automatic Stay in the Foreclosure Action and the Motion to Extend Stay in the Current Case. Under the due process requirements of Rule 9011, a court may issue sanctions only upon motion of a party after compliance with the rule's "safe harbor" provision or upon its own initiative after entry of an order to show cause. Here, Fannie Mae failed to comply with the Rule 9011 requirements and this Court

declines to enter an order to show cause, finding that an order would be inappropriate in this case. Accordingly, no sanctions will be imposed.[15]

Conclusion

Based on the foregoing, it is ordered that (i) the Motion to Extend Stay (Doc. No. 7) is granted, (ii) the automatic stay is imposed in this case, effective immediately; (iii) the Stay Order entered in error (Doc. No. 10) is vacated, and (iv) Fannie Mae's request for sanctions against Debtor's counsel is denied.

Attorney Christopher P. Hancock 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.

[15] In support of its request, Fannie Mae cites to *In re Hackney*, Case No. 6:03-bk-02488-ABB (Bankr. M.D. Fla. 2007). In that case, Judge Briskman first issued an order to show cause as Rule 9011 requires. Here, no such order has been entered in this case.